BLUE MOUNTAIN SCHOOL DISTRICT V. J.S. EX REL. SNYDER: WILL THE SUPREME COURT PROVIDE CLARIFICATION FOR PUBLIC SCHOOL OFFICIALS REGARDING OFF-CAMPUS INTERNET SPEECH?

I. INTRODUCTION

Public school students' right to free speech is a relatively new constitutional right but an increasingly ambiguous and important one. In fact, students asserting their right to free speech are the source of more litigated First Amendment claims than most other areas of free speech, including "obscenity, indecency, incitement to or advocacy of unlawful activity, defamation, commercial advertising, [and] campaign finance."[1] A new and confusing wrinkle on student free speech rights has come in the form of the Internet and social media. In June 2011, the Third Circuit Court of Appeals ruled in two separate and factually similar cases that students could not be punished for creating websites during non-school hours while the students were off campus.[2] In January 2012, the United States Supreme Court denied certiorari for *Blue Mountain School District v. J.S. ex rel. Snyder*, a petition based upon the decisions in these two cases.[3] This Note will analyze these two cases and will discuss how other circuits have approached similar fact patterns. This Note posits that the Supreme Court should clarify this confusing area of law by articulating a clear standard. Before *Tinker*'s material disruption standard applies, the Court should require purposeful direction and dissemination of speech. The Court should also rule that *Fraser* does not apply to off-campus speech.

II. SUPREME COURT PRECEDENT

Tinker v. Des Moines Independent Community School District is the seminal case for student free speech rights. In *Tinker*, five students were suspended for wearing black armbands to school in protest of the Vietnam War.[4] The school had learned ahead of time of several students' plan to wear armbands during the winter holiday season.[5] The Court ruled that school officials could not suppress expression "akin to 'pure speech'"[6] without a showing that "the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[7] Justice Fortas wrote for the majority, expressing his opinion that the students' protest would not have created a material and

1. Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 396 (2011) (quoting Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205, 208).

2. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207 (3d Cir. 2011) (en banc); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc).

3. Blue Mountain Sch. Dist. v. J.S. *ex rel*. Snyder, 132 S. Ct. 1097 (2012).

4. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

5. *Id*. at 504.

6. *Id*. at 508.

7. *Id*. at 509 (quoting Burnside v. Byers, 363 F.3d 744, 749 (1966)).

substantial disruption.[8] Rather, he concluded that the school officials had taken action based upon their wish to avoid controversy.[9] He found it significant that, in former instances, officials had allowed students to wear other symbols of political expression, including the Iron Cross, a traditional symbol of Nazism.[10]

In *Tinker*, Justice Fortas and the majority clearly established that students possess free speech rights during and outside of school hours.

> In our system, state-operated schools may not be enclaves of totalitarianism. . . . Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students . . . may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.[11]

Fortas's powerful rhetoric comparing the Des Moines school district to a totalitarian regime providing militant education like that in Sparta[12] paints a dire picture. He used ex post reasoning, finding that no substantial disruption resulted, but he did not give much consideration to whether it was reasonable for the school officials to anticipate a substantial disruption.[13]

Fortas also wrote that students' free speech is not limited to speech occurring in the classroom.

> A student's rights, therefore, 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, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the

8. *Id*. at 514.
9. *Id*. at 510.
10. *Id*.
11. *Id*. at 511.
12. *Id*. at 511–12 ("'In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.'" (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923))).
13. *Id*. at 508–09.

> requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.[14]

On the other hand, the purported guardian of the First Amendment,[15] Justice Hugo Black, wrote a vehement dissent in *Tinker*, asserting that "[i]t is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases."[16] Black argued that students' free speech rights are not equivalent to those of adults and that students are at school to learn, not to teach.[17] Black predicted that "after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders."[18]

Since *Tinker*, the Court has retreated from Fortas's strong protection of student speech, although the *Tinker* standard remains the starting point for speech analysis. In three major cases, the Court identified certain categories of student speech that are not protected.

First, in *Bethel School District No. 403 v. Fraser*, the Court ruled that school officials may proscribe lewd and indecent speech made by students.[19] *Fraser* concerned a high school student who gave a speech nominating his friend for a student government office.[20] The speech was laced with several sexual innuendos, describing his friend as a man "firm" in his pants, shirt, and his "belief in . . . students of Bethel."[21] Fraser completed his speech by telling the student body that the nominee would "go to the very end—even the climax, for each and every one of you."[22] When Fraser admitted that his use of sexual references was intentional, he was informed that he would be punished with a three-day suspension and removal from the list of student candidates to be selected to speak at graduation.[23] In actuality, he was only suspended for two days.[24]

With Justice Berger writing for the majority, the Court held that because school officials have an "interest in teaching students the boundaries of socially appropriate behavior,"[25] they can censor student

14. *Id*. at 512–13.

15. ANNE PROFFITT DUPRE, SPEAKING UP: THE UNINTENDED COSTS OF FREE SPEECH IN PUBLIC SCHOOLS 23 (2009); RONALD K.L. COLLINS & SAM CHALTAIN, WE MUST NOT BE AFRAID TO BE FREE: STORIES OF FREE EXPRESSION IN AMERICA 279 (2011).

16. *Tinker,* 393 U.S. at 522 (Black, J., dissenting).

17. *Id*.

18. *Id*. at 525.

19. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

20. *Id*. at 677.

21. *Id*. at 687 (Brennan, J., concurring).

22. COLLINS & CHALTAIN, *supra* note 15, at 285.

23. *Fraser*, 478 U.S. at 678.

24. *Id*. at 679.

25. *Id*. at 681.

speech that is "vulgar and lewd" and would "undermine the school's basic educational mission,"[26] even if it does not cause a material or substantial disruption. Berger noted that even the nation's legislative branch prohibits "impertinent" or "indecent" language, and the Court has repeatedly recognized a government interest in protecting the sensibilities of minors.[27] School officials have the right to censor sexually explicit language, even if not obscene, in order to demonstrate that such vulgarity is inconsistent with the school's fundamental values and educational mission.[28] The Court reiterated that while students have some free speech rights, they are not coextensive with their off-campus rights or the rights of adults: "[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."[29]

Quoting from Black's dissent in *Tinker*, the majority stated that the Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students."[30] The Court found that the school's policy, which prohibited "[c]onduct which materially and substantially interferes with the educational process . . . including the use of obscene, profane language or gestures,"[31] was constitutional and adequately provided due process notice to Fraser.[32]

A second exception to *Tinker* is found in *Hazelwood School District v. Kuhlmeier*, where the Court ruled that school officials could proscribe student speech in a school-sponsored newspaper.[33] The Court found that the school principal could constitutionally prevent the publication of student-written stories about pregnancy and divorce, reversing the court of appeals' finding that the newspaper was a public forum subject to full free speech protection.[34]

> [A] school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," but also from speech that is, for example, ungrammatical, poorly written, inadequately

26. *Id*. at 685.

27. *Id*. at 682, 684–85 (discussing Ginsberg v. New York, 390 U.S. 629 (1988); FCC v. Pacifica Found., 438 U.S. 726 (1978)).

28. *Id*. at 684.

29. *Id*. at 682 (quoting Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)).

30. *Id*. at 686 (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

31. *Id*. at 678.

32. *Id*. at 686.

33. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988).

34. *Id*.

> researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.[35]

The Court did not apply the *Tinker* material disruption test. Rather, it held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns,"[36] effectively carving out another exception to *Tinker* for school-sponsored speech and further limiting the free speech rights of students.

The most recent Supreme Court case concerning student free speech rights was *Morse v. Frederick*, in which the Court added another, very narrow, exception.[37] The Court held that school officials may take steps to proscribe "speech that can reasonably be regarded as encouraging illegal drug use."[38] Morse, the school principal, suspended Frederick, a high school student, for holding up a "BONG HiTS 4 JESUS" banner during a school-sponsored assembly, which was held across the street from the school but during school hours as the Olympic torch ceremony passed through Juneau, Alaska.[39] Although Frederick claimed that the banner was "'just nonsense meant to attract [the attention of the] television cameras,'"[40] Morse interpreted it as promoting the illegal use of marijuana.[41] The majority found that this was a reasonable interpretation, and as such, the student could be punished within the parameters of the First Amendment.[42]

The majority reiterated the principles from *Hazelwood* that schools may restrict certain speech "even though the government could not censor similar speech outside the school," and that *Tinker*'s material disruption test is not the only basis for restricting student speech.[43] The Court emphasized that discouraging drug use among students is an important and possibly even compelling interest[44] and held that Morse reasonably concluded it was necessary for her to punish the students in order to send a message of deterring illegal drug use.[45]

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35. *Id*. at 271 (internal citations omitted).
36. *Id*. at 273.
37. Jennifer Lynn More, *BONG HiTS 4 JESUS: The Lower Courts Struggle with the* Morse v. Frederick *Decision*, 47 CRIM. L. BULL. 741, 741–44 (2011).
38. Morse v. Frederick, 551 U.S. 393, 397 (2007).
39. *Id*. at 397–98.
40. *Id*. at 401.
41. *Id*. at 398.
42. *Id*. at 402.
43. *Id*. at 406.
44. *Id*. at 407.
45. *Id*. at 410.

Alito's concurrence stressed that the decision was limited to only "restrict speech that a reasonable observer would interpret as advocating illegal drug use" and that the Court's holding did not support restrictions of speech that could "plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"[46] Justice Stevens, joined by Justices Souter and Ginsburg, asserted that the banner was gibberish and could not reasonably be construed as promoting illegal drug use[47] and that the Court's ruling was problematic because it invited viewpoint discrimination.[48]

In summary, student speech is currently governed by four standards: *Fraser*'s standard for vulgar, indecent, or offensive speech; *Hazelwood*'s standard for school-sponsored speech; *Morse*'s standard for speech that can reasonably be interpreted as advocating illegal drug use; and the *Tinker* standard for all other school speech.

III. THE THIRD CIRCUIT OPINIONS

A. J.S. ex rel. Snyder v. Blue Mountain School District

J.S., an eighth grade honor roll student, and her friend, K.L., created a fictitious profile for their middle school principal, James McGonigle, on MySpace.[49] The profile was created using J.S.'s home computer and was made over the weekend.[50] The profile did not identify the principal by his name, school, or location, but it did contain a photo of him that was copied and pasted from the official school website. The profile purported to represent a "bisexual Alabama middle school principal named 'M-Hoe.'"[51] It contained crude and vulgar language, including calling him a "fag ass" and "dick head" and suggesting that he was a pedophile and "sex addict."[52] The website's URL was http://www.myspace.com/kidsrockmybed.[53] J.S. and K.L. originally created the profile as public, meaning it was accessible to anyone who searched for it.[54] Within a few days, though, they changed the profile to "private" and granted access to around twenty-two other

46. *Id*. at 422 (Alito, J., concurring).
47. *Id*. at 444 (Stevens, J., dissenting).
48. *Id*. at 437.
49. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc).
50. *Id*.
51. *Id*.
52. *Id*.
53. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 291 (3d Cir. 2010).
54. *Id*.

students.[55] However, no students were able to visit the page while at school because the school's computers blocked access to MySpace.[56]

Two days after the profile was made, a student approached McGonigle and told him about the page.[57] At McGonigle's request, that student brought a printout copy of the page to school (which was the only printout ever brought to the school).[58] McGonigle contacted MySpace, Inc. to have the page removed, and it complied.[59] McGonigle posited that the page caused a disruption at school: Two teachers reported minor disruptions in their classes based upon students talking among themselves about the profile, and the guidance counselor rescheduled a few meetings so that administrators could meet to discuss the profile.[60] McGonigle classified the students' behavior as a false accusation about a school faculty member and a "copyright" violation of the school system's computer use policy, and he suspended the students for ten days.[61] Upon J.S. and K.L's return from suspension, several students decorated J.S. and K.L.'s lockers to "congratulate" them.[62]

J.S. and her parents sued the school district, superintendent, and principal in a 42 U.S.C. § 1983 action claiming that the suspension violated J.S.'s free speech rights, due process rights, and rights under Pennsylvania state law, as well as her parents' substantive due process rights under the Fourteenth Amendment.[63] The Snyders stipulated to the dismissal of the superintendant and principal as defendants in the case.[64] The district court granted summary judgment for the school district but did not apply *Tinker*.[65] According to the court, because the speech did not send a political message, it did not merit the greater protection of the *Tinker* analysis.[66] Instead, the district court relied on the lewd and vulgar nature of the profile, its effect at the school, and the fact that criminal harassment charges could have been brought based on the conduct.[67] It reasoned that the speech could

55. *Id*.
56. *Snyder*, 650 F.3d at 921.
57. *Id*.
58. *Id*.
59. *Snyder*, 593 F.3d at 291.
60. *Id*. at 294.
61. *Snyder*, 650 F.3d at 921.
62. *Id*.
63. *Snyder*, 593 F.3d at 294–95.
64. *Id*. at 295.
65. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517, at *7–8 (M.D. Pa. Sept. 11, 2008).
66. *Id*. at *4.
67. *Id*. at *8.

be proscribed, as it was more akin to the lewd and indecent speech in *Fraser* as well as speech promoting illegal action like that in *Morse*.[68]

The three-judge panel for the Third Circuit Court of Appeals affirmed the order of the district court.[69] It determined that *Tinker*'s material disruption standard should apply: "[s]peech falling outside of [the narrow *Fraser* and [*Hazelwood*] exceptions] is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others."[70] Relying on *Tinker*'s statement that a student's conduct "in class or out of it" that causes a material disruption, "substantial disorder," or invades the rights of others may be proscribed,[71] the court of appeals found that *Tinker* could apply to off-campus speech.[72] However, the court recognized that the *Tinker* standard needed to be balanced with the "protected nature of off-campus student speech."[73] While it recognized that the MySpace profile did not cause an *actual* disruption, the court concluded that it reasonably could have created a material disruption had school officials not acted quickly to remove the page and punish its creators.[74] The court concluded by holding that speech need not satisfy any "geographic technicality" to be suppressed if it "reasonably threatens to cause a substantial disruption of or material interference" at school.[75]

When the Third Circuit Court of Appeals reheard the case en banc, it reversed the lower court's rulings and found in favor of J.S. on his First Amendment claim.[76] It assumed, without deciding, that the *Tinker* standard should apply.[77] Even though J.S.'s speech was not political in nature, the Third Circuit noted that the *Tinker* opinion has never been confined to such speech and emphasized the narrowness of the *Fraser*, *Hazelwood*, and *Morse* exceptions.[78] The court reasoned that neither the Supreme Court nor the Third Circuit has ever found punishment permissible when the speech was "not school-sponsored or at a school-sponsored event" and did not cause a substantial disruption at school.[79]

While the en banc panel found that an actual disruption is not necessary to satisfy the *Tinker* standard, it concluded that there was no reasonable

68. *Id*. at *6.
69. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 308 (3d Cir. 2010).
70. *Id*. at 298 (quoting Saxe v. State Coll. Area Sch. Dist, 240 F.3d 200, 214 (3d Cir. 2001)).
71. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).
72. *Snyder*, 593 F.3d at 307–08.
73. *Id*. at 299.
74. *Id*. at 299–300.
75. *Id*. at 301.
76. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (en banc).
77. *Id*. at 926.
78. *Id*. at 926–27.
79. *Id*. at 933.

basis to anticipate a material disruption,[80] finding that the facts indicating a disruption were even weaker than those in *Tinker*.[81] While J.S.'s speech was intended as a joke and was attempted to be made private, the student protesters in *Tinker* were clearly attempting to gain other students' attention with their armbands. The court added that the profile was so outrageous that no one would have taken it seriously and that the student had not intended for the speech to reach the school.[82]

The Third Circuit declined to apply *Fraser*'s lewdness standard to off-campus speech.[83] It noted that if *Fraser* were expanded to govern all speech that was made off campus and eventually made its way back to campus, free speech rights would be seriously undermined:

> Under these circumstances, to apply the *Fraser* standard to justify the School District's punishment of J.S.'s speech would be to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is *about* the school or a school official, is brought to the attention of a school official, and is deemed "offensive" by the prevailing authority.[84]

Judge Smith, joined by four other judges, wrote a concurring opinion in which he expressed his view that *Tinker* should not apply to off-campus speech and that off-campus speech should be governed by general First Amendment law.[85] He noted that extending *Tinker* to off-campus speech could logically be extended to censoring adults' off-campus speech, as discourse among adults also often causes substantial disruptions in the school setting.[86] Smith recognized that neither a geographic nor a foreseeability standard would be sufficient to determine whether speech occurred on campus or off campus.[87] He concluded by noting that under any standard, J.S.'s speech clearly occurred off campus because it was created off campus and J.S. took measures to ensure it did not reach campus.[88]

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80. *Id*. at 928 (referencing Lowery v. Euverard, 497 F.3d 584, 591–92 (6th Cir. 2007) ("*Tinker* does not require school officials to wait until the horse has left the barn before closing the door. . . . [It] does not require certainty, only that the forecast of substantial disruption be reasonable.")).

81. *Id*. at 928–29.

82. *Id*. at 929–30.

83. *Id*. at 932.

84. *Id*. at 933.

85. *Id*. at 936 (Smith, J., concurring).

86. *Id*. at 940 (giving the example of civil rights protests and desegregation efforts having a severe disruptive effect on public school systems in the 1950s and 1960s).

87. *Id*.

88. *Id*.

Judge Fisher wrote a dissenting opinion that was joined by five other judges, asserting that *Tinker* should apply to off-campus speech and that school officials had reasonably concluded that J.S.'s speech would cause a substantial disruption.[89] The dissent found J.S.'s speech more disruptive than the speech in *Tinker* because it was not political speech; it was directed at school officials; and it was vulgar, hurtful, and obscene.[90] The dissent focused on the relatively low value of J.S.'s speech compared to the political speech in *Tinker*[91] and the likelihood that allegations of sexual misconduct would disrupt the educational process by undermining McGonigle's authority.[92] Judge Fisher also expressed concern that the majority's ruling would prove "untenable" in an age "with near-constant student access to social networking sites on and off campus" and where "offensive and malicious speech is directed at school officials and disseminated online to the student body."[93]

B. Layshock ex rel. Layshock v. Hermitage School District

In a similar case, Justin Layshock, a seventeen-year-old high school senior, created a parody MySpace profile about his high school principal using his grandmother's computer during after-school hours.[94] Layshock's profile, one of four student-created MySpace profiles about the principal, included a photograph of the principal copied from the school's website.[95] It referred to the principal using a "big" theme (as the principal was apparently a large man): smoking a "big blunt," drinking from a keg in his office, having a "big hard-on," and being a "big whore" and "big steroid freak."[96] Layshock accessed the MySpace profile at least once while at school, and the profile was also viewed by other students at school.[97] Administrators were unable to block MySpace access from school computers because the technology director was on vacation, so they instead limited students' computer access for five days.[98] Several teachers also changed their lesson plans so that Internet use would not be necessary.[99] As

89. *Id*. at 941 (Fisher, J., dissenting).
90. *Id*. at 943.
91. *Id*.
92. *Id*. at 941.
93. *Id*. at 951–52.
94. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207–08 (3d Cir. 2011) (en banc).
95. *Id*. at 208.
96. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 591 (W.D. Pa. 2007).
97. *Layshock*, 650 F.3d at 209.
98. *Id*.
99. *Layshock*, 496 F. Supp. 2d at 593.

punishment for creating the profile, Layshock received a ten-day suspension, was enrolled in an alternative education program, and was banned from participating in extracurricular activities and graduation.[100]

Justin Layshock's parents, suing individually and on behalf of their son, brought a 42 U.S.C. § 1983 action against the school district and the superintendent and principals in their official and individual capacities.[101] The Layshocks' complaint alleged that the school district violated Justin's First Amendment rights, that the school district's policies were unconstitutionally vague and overbroad, and that the school district's punishment interfered with the Layshocks' due process right to raise and educate their child.[102] The district court entered summary judgment for the Layshocks on Justin's First Amendment claim.[103] The court classified the speech as off-campus speech and required the school district to show an appropriate nexus for the school's authority to punish speech under *Tinker*, whether that nexus be "based on timing, function, context or interference with its operations."[104] It stated that "[t]he mere fact that the internet may be accessed at school does not authorize school officials to become censors of the world-wide web."[105] The court concluded that the restriction failed under the *Tinker* analysis because the school had not demonstrated a causal nexus between Layshock's speech and a substantial disruption at the school.[106] It reasoned that the actual disruption was minimal[107] and that even if a substantial disruption had occurred, the school district had not shown that it was caused by Layshock's speech as opposed to the MySpace pages created by other students or even the administration's own reactions.[108] The district court also concluded that the school district did not have authority to punish Layshock under *Fraser* because *Fraser* does not apply to off-campus speech.[109]

On appeal to the Third Circuit Court of Appeals, the school district did not contest that there was no nexus between Layshock's speech and a substantial disruption of the school environment.[110] Instead, it argued that Layshock's speech started on campus because Layshock entered school "property" when he accessed the school website to copy and paste the

100. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 254 (3d Cir. 2010).
101. *Layshock*, 650 F.3d at 210.
102. *Id*.
103. *Id*. at 211.
104. *Layshock*, 496 F. Supp. 2d at 599.
105. *Id*. at 597.
106. *Id*. at 600.
107. *Id*. ("[N]o classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action.").
108. *Id*.
109. *Id*. at 599–600.
110. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 259 (3d Cir. 2010).

principal's picture onto the MySpace page, and the speech was "aimed" at the school community because it was accessed by Layshock on campus and would foreseeably come to the administrators' attention.[111] Chief Judge McKee rejected the trespass argument, finding the relationship between Justin's conduct and the school to be too attenuated.[112] The court decided that it "need not . . . define the precise parameters of when the arm of authority can reach beyond the schoolhouse gate" because the school district had not appealed the district court's finding that Justin's conduct did not cause a disruption at the school.[113] The court held only that the website did not enter the school and that the school district was not empowered to punish his "out of school expressive conduct under the circumstances."[114]

On a rehearing en banc, the Third Circuit Court of Appeals ruled in favor of Layshock, affirming the district court's judgment.[115] Writing for the majority, Chief Judge McKee again found the school district's "entering school property" argument to be too tenuous: "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities."[116] Because the school district did not dispute the district court's finding that punishment was inappropriate under *Tinker*, the court did not address the standard for when *Tinker* applies to speech originating off campus.[117] The court also rejected the argument that Layshock's speech could be proscribed as vulgar speech under *Fraser* merely because it reached campus.[118] The court rejected the Internet speech cases relied upon by the school district for this assertion, concluding that the off-campus student speech in those cases was proscribed because it caused a substantial disruption at school, not because it was vulgar speech that reached campus, and also noting that the court did not necessarily

111. *Id*.

112. *Id*. at 259–60 ("[W]e will not allow the School District to stretch its authority so far that it reaches Justin while he is sitting in his grandmother's home after school.").

113. *Id*. at 263.

114. *Id*.

115. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (en banc).

116. *Id*. at 216.

117. *Id*.

118. *Id*. at 219.

agree with the result in at least one of those cases.[119] Essentially, the court refused to extend *Fraser* to apply to speech that originated off campus.[120]

Judge Jordan, joined by Judge Vanaskie, wrote a concurring opinion, expressing the view that *Tinker* can be extended to reach off-campus speech.[121] Jordan wrote that the "'off-campus versus on-campus' distinction is artificial and untenable in the world we live in today."[122] Jordan criticized Smith's concurrence in *Snyder*, arguing that "[w]e cannot sidestep the central tension between good order and expressive rights by leaning on property lines."[123] In a tone reminiscent of Justice Black's dissent in *Tinker*, Jordan expressed fear that the two en banc decisions would send an "anything goes" message to students and administrators: "To the extent it appears we have undercut the reasoned discretion of administrators to exercise control over the school environment, we will not have served well those affected by the quality of public education, which is to say everyone."[124] Judge Jordan concluded that the majority en banc opinions do not foreclose the possibility of school officials' ability to censor off-campus speech that would create a substantial disruption.[125]

C. Petition for Certiorari

The two cases were consolidated into a single petition for certiorari with the Supreme Court. In it, the following questions were presented: (1) "Whether and how *Tinker* applies to online student speech that originates off campus and targets a member of the school community?" and (2) "Whether and how *Fraser* applies to lewd and vulgar online student speech that originates off campus and targets a member of the school community?"[126]

119. *Id*. at 217–18 (discussing J.S. *ex rel*. H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007); and Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008)).

120. *Layshock*, 650 F.3d at 219.

121. *Id*. at 219–22 (Jordan, J., concurring).

122. *Id*. at 220.

123. *Id*. at 221.

124. *Id*. at 222.

125. *Id*.

126. Petition for Writ of Certiorari at i, Blue Mountain Sch. Dist. v. J.S. *ex rel.* Snyder., 132 S. Ct. 1097 (2012) (No. 11-502), *available at* http://www.scotusblog.com/case-files/cases/blue-mountain-school-district-v-j-s/.

IV. TREATMENT OF THE ISSUES IN OTHER JURISDICTIONS

A. Application of Tinker *to Speech Originating Off Campus*

The major issues are whether speech created off campus can later become on-campus speech and if so, where one draws the line between off-campus and on-campus speech. Particularly with a "borderless medium" like the Internet, this becomes a difficult question. Scholars have suggested different approaches for if and when off-campus speech may be governed by *Tinker*.[127] Courts also vary in their tests for when off-campus speech will be subject to a *Tinker* analysis, although many agree that speech originating off campus can become subject to *Tinker* if it can be considered "on campus." The Supreme Court thus has the option of several existing standards to govern student speech that originates off campus.

1. The Geographic Standard

First, the Court could draw a bright-line rule along geographical lines, finding that speech originating off campus is not subject to *Tinker* and can thus only be regulated under traditional First Amendment doctrine. For example, in *Thomas v. Board of Education, Granville Central School District*, public high school students were suspended for publishing an underground newspaper with sexually explicit content.[128] Without applying a *Tinker* analysis, the Second Circuit found that the speech was not subject to punishment by school officials even though a few articles were prepared in the school building after school hours.[129] The court labeled the speech as off-campus speech since it was "deliberately designed to take place beyond the schoolhouse gate."[130] The court stated that "because school officials . . . ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith," their actions should be evaluated based on general First Amendment standards.[131] The court noted that the speech had not been proven obscene under the *Miller* standard and remanded to a lower court for determination of whether the speech was unprotected based on any unsuitability for distribution to children.[132] The court noted that its willingness to defer to school administrators' judgments in disciplining students depended on the

127. See Patrick, *infra* note 146, for an overview of some of the scholarly theories.

128. Thomas v. Bd. of Ed., Granville Cent. Sch. Dist., 607 F.2d 1043, 1046 (2d Cir. 1979). This case was decided after *Tinker* but before *Fraser*.

129. *Id*. at 1045, 1050.

130. *Id*. at 1050.

131. *Id*.

132. *Id*. at 1052, 1053 n.18.

fact that their authority was confined to the school environment.[133] A few federal district courts have followed the Second Circuit's reasoning in *Thomas*.[134]

2. The Foreseeability Standard

A second standard, which recognizes the borderless nature of the Internet but blurs the distinction between on-campus and off-campus speech, allows schools to regulate speech regardless of whether it originates on campus or off campus if the speech creates a "foreseeable risk of substantial disruption within a school."[135] In *Wisniewski v. Board of Education of Weedsport Central School District*, the Second Circuit found that the *Tinker* analysis was applicable to a student's off-campus Internet speech.[136] In that case, a student's instant message icon depicted a gun firing at a person's head with the message "Kill Mr. VanderMolen."[137] The icon was not disseminated to school officials or Mr. VanderMolen and was only seen by about fifteen of the student's instant messenger "buddies."[138] Even though the instant message icon did not rise to the level of a "true threat" and was not disseminated on campus, the court found that the student could be punished as it was "reasonably foreseeable . . . that the icon would come to the attention of school authorities," and it would "'materially and substantially disrupt the work and discipline of the school.'"[139] The Second Circuit applied the *Tinker* standard to punish off-campus speech again in *Doninger v. Niehoff*, although in that case the court applied the standard more narrowly, concluding that the student's blog entry encouraging readers to contact school administrators was "'purposely designed . . . to come onto the campus.'"[140]

133. *Id*. at 1052 ("When school officials are authorized only to punish speech on school property, the student is free to speak his mind when the school day ends. In this manner, the community is not deprived of the salutary effects of expression, and educational authorities are free to establish an academic environment in which the teaching and learning process can proceed free of disruption. Indeed, our willingness to grant school officials substantial autonomy within their academic domain rests in part on the confinement of that power within the metes and bounds of the school itself.").

134. *See* Mahaffey *ex rel*. Mahaffey v. Aldrich, 236 F. Supp. 2d 779 (E.D. Mich. 2002); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

135. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39 (2d Cir. 2007).

136. *Id*. at 38–39.

137. *Id*. at 36.

138. *Id*.

139. *Id*. at 38–39 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

140. Doninger v. Neihoff, 527 F.3d 41, 50 (2d Cir. 2008) (quoting Doninger v. Neihoff, 514 F. Supp. 2d 199, 216 (D. Conn. 2007) (internal quotation marks omitted)).

3. The "Sufficient Nexus" Standard

Another alternative is to recategorize Internet speech that originates off campus as on-campus speech if a "sufficient nexus" to the school environment is established. This is the approach used by the district court in *Layshock*.[141] In *Layshock*, the district court did not give specific criteria required to establish a nexus but found that the required nexus was not established because "[t]here [were] several gaps in the causation link" between the speech and a disruption.[142] Thus, the nexus required by the Western District of Pennsylvania seems to be a simple causation standard. The Pennsylvania Supreme Court used a different version of the "sufficient nexus" standard in *J.S. ex rel. H.S. v. Bethlehem Area School District*.[143] The court held that "where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech."[144] In that case, the court found that the speech could be considered on campus because the MySpace page was accessed at school by both students and administrators and was aimed at a specific audience of students.[145]

4. The Purposeful Direction and Dissemination Standard

A fourth alternative is to allow school regulation of Internet speech originally created off campus only if it is purposefully disseminated on campus. The Seventh Circuit applies what some have called a "place of reception" standard, focusing on where the speech is disseminated rather than where it originated.[146] For example, in *Boucher v. School Board of School District of Greenfield*, the Seventh Circuit allowed punishment of a student-run newspaper that was created off campus.[147] The court determined that *Tinker* applied since the newspaper had been disseminated on campus and advocated on-campus activity.[148]

One scholar, Alexander Tuneski, advocates a similar dissemination approach. Tuneski suggests that courts establish a clear line "based on

141. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 599–600 (W.D. Pa. 2007).

142. *Id*. at 600.

143. J.S. *ex rel*. H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002).

144. *Id*.

145. *Id*.

146. James M. Patrick, Comment, *The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. CIN. L. REV. 855, 865–66 (2010) (citing Erin Reeves, Note, *The "Scope of a Student": How to Analyze Student Speech in the Age of the Internet*, 42 GA. L. REV. 1127, 1148–49 (2008)).

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

148. *Id*. at 829.

where the expression originated and how it was disseminated."[149] Internet speech originating off campus could only be regulated under *Tinker* if the author took steps to bring the material on campus, such as "opening a web page at school, telling others to view the site from school, . . . and sending e-mail to school accounts."[150] Tuneski's approach differs from the Seventh Circuit's approach in that the speech will only be considered on campus if the *author* purposefully directs the speech on campus. The speech would not be considered off campus if brought to school by a third party. This approach is similar to the Third Circuit's analysis in *Snyder*, in which the majority distinguished the case from *Doninger* and others where the students intended for their speech to reach the school.[151] The Third Circuit noted that J.S. did not intend for the speech to reach the school based upon his steps to make the MySpace profile private and the fact that the only copy of the profile was brought to school at the principal's request.[152]

B. Application of Fraser *to Speech Originating Off Campus*

In contrast to the diverging opinions on whether and how to apply *Tinker* to off-campus speech, most appellate courts have been unwilling to use *Fraser* to regulate off-campus speech.[153] In *Snyder*, the Third Circuit interpreted *Fraser* to permit school officials to regulate only "'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech *in school*.'"[154] The Fourth Circuit suggested in *Kowalski* that a court could find that "speech originating outside of the schoolhouse gate but directed at persons in school and received by and acted on by them" could be considered in-school speech and regulated by *Fraser*.[155] However, the Fourth Circuit did not rest its holding on *Fraser*, instead finding that *Tinker* permitted school officials to punish a student for creating a lewd MySpace page to ridicule a fellow student.[156] The Pennsylvania Supreme Court also relied on *Tinker* to restrict a student's lewd Internet speech, expressing doubt as to whether *Fraser* could be applied to Internet speech originating off campus.[157]

149. Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 177 (2003).

150. *Id*. at 178.

151. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 930 (3d Cir. 2011) (en banc).

152. *Id*. at 930–33.

153. *See id*. at 937 (Smith, J., concurring).

154. *Id*. at 927 (majority opinion) (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 213 (3d Cir. 2001)); *see also* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 253 (3d Cir. 2002) (quoting *Saxe*'s narrow interpretation of the *Fraser* exception).

155. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 573 (4th Cir. 2011).

156. *Id*. ("We need not resolve, however, whether this was in-school speech and therefore whether *Fraser* could apply . . . .").

157. J.S. *ex rel*. H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865–67 (Pa. 2002).

Similarly, the Second Circuit rested its holding in *Doninger v. Neihoff* on *Tinker*, noting that *Fraser* might not apply to off-campus speech.[158] Thus, courts have either explicitly rejected the application of *Fraser* to off-campus Internet speech or expressed doubt as to its applicability.

V. PROPOSED STANDARD

It remains to be seen if or when the Supreme Court will clarify the parameters of student free speech. *Blue Mountain School District. v. J.S. ex rel. Snyder* is the third petition for certiorari concerning this subject matter that the Court has denied in the past few years.[159] One possible explanation for the denial of certiorari in this case is the Supreme Court's reluctance to take on cases that grapple with new technology.[160] However, given that the Court has recently decided issues such as GPS tracking devices in criminal investigations[161] as well as the First Amendment in the context of video games,[162] this is an unlikely explanation. The Court may also have found that this case was not the best vehicle to address the issue. Or it may have found there is not actually a circuit split—the circuit courts of appeal are not in disagreement over the rule of law to apply; rather, the diverging results and analyses in the different circuits are merely based on factual considerations.[163]

If another case arises on this issue, the Supreme Court should grant certiorari, and it should take care not to unnecessarily limit its holding. The Court has stated itself that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents."[164] Justice Thomas remarked more candidly on the state of uncertainty in this area in his concurring opinion in *Morse*: "I am afraid that our jurisprudence now says that students have a right to speak in schools except when they do not."[165] In order to provide greater clarity for school officials across the

158. Doninger v. Neihoff, 527 F.3d 41, 49–50 (2d Cir. 2008).

159. Doninger v. Neihoff, 642 F.3d 334 (2d Cir. 2011) (en banc), *cert. denied* 132 S. Ct. 499 (2011); Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 573 (4th Cir. 2011), *cert. denied* 132 S. Ct. 1095 (2012).

160. *See* Stephen Wermiel, *SCOTUS for Law Students: Student Speech and the Internet*, SCOTUSBLOG (Jan. 7, 2012, 4:01 P.M.), http://www.scotusblog.com/2012/01/scotus-for-law-students-student-speech-and-the-internet-sponsored-by-bloomberg-law/ (citing Scalia's reference to the "challenges of applying the Constitution to ever-advancing technology" in Brown v. Entertainment Merchants Ass'n, 131 S. Ct. 2729 (2011)).

161. U.S. v. Jones, 131 S. Ct. 3064 (2011).

162. *Brown*, 131 S. Ct. at 2733.

163. *See* Wermiel, *supra* note 160 (positing that the federal circuits may have differed on their conclusions of the factual question of the level of disruption in each case).

164. Morse v. Frederick, 551 U.S. 393, 401 (2007).

165. *Id*. at 418 (Thomas, J., concurring).

nation, the Court needs to articulate a clear standard for what qualifies as off-campus speech and when, if ever, it can be regulated.

A. Tinker *Should Apply to Off-Campus Internet Speech Only When a Student Purposefully Disseminates Speech On Campus*

The Court should clarify this law and find that Internet speech made and disseminated entirely off campus cannot be regulated by public school officials. The statement in *Tinker* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[166] suggests that students have full First Amendment rights in their non-student lives when they are not on school grounds. While an argument can be made that *Tinker* is ambiguous with regard to off-campus speech,[167] the more textually consistent interpretation as well as the better policy is that it was not meant to restrict off-campus speech. The Supreme Court stated in *Tinker*:

> conduct by the student, *in class or out of it*, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[168]

However, "in class or out of it," when read in context with the rest of the paragraph,[169] seems to embrace only speech made during extracurricular school activities—not speech that is made off campus and is not a part of a school-sponsored or school-related activity. The subsequent Supreme Court school speech cases have lent credence to this interpretation of *Tinker*. For example, the majority opinion in *Hazelwood* described *Tinker* as "address[ing] educators' ability to silence a student's personal expression that happens to occur *on the school premises*."[170]

Schools have little to no interest in regulating students' speech while they are off campus during non-school hours engaging in non-school-sponsored activities. Each of the seminal Supreme Court student speech

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

167. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 942 (3d Cir. 2011) (en banc) (Fisher, J., dissenting).

168. *Tinker*, 393 U.S. at 513 (emphasis added).

169. *Id.* at 512–13 ("A student's rights, therefore, 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, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." (internal citations omitted)).

170. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (emphasis added).

cases concerned speech uttered while at school or at least while at a school function.[171] *Morse* is the only case addressing speech that was arguably off campus, and in that case, the student was "'in the midst of his fellow students, during school hours, at a school-sanctioned activity.'"[172] In contrast, these Internet speech cases address an entirely different type of speech—speech that is not school-sanctioned in any way, occurs during after-school hours, and takes place in the privacy of the students' own homes. If the speech does not take place at school, school officials are not the appropriate party to discipline students. Rather, these students' behavior should be handled by their parents or, if the behavior rises to criminal activity, by law enforcement.

A standard requiring some purposeful direction and dissemination on campus would be best. By restricting the *Tinker* standard to only Internet speech which is purposefully disseminated or accessed on campus, students will be free to express themselves on the Internet so long as they do not intentionally use the speech to disrupt the school environment.

The purposeful direction and dissemination test has an advantage over the strict geographic test. Conferring full protection to speech originating off campus certainly protects more speech and promotes the free flow of ideas. However, the strict geographic approach is better suited for non-Internet student speech because the "'everywhere at once' nature of the internet"[173] makes geographic distinctions that are easily applied to tangible media dissatisfying. Under a geographic approach, a student could target speech at the school and intend to create a substantial disruption, yet remain safe from punishment by making the speech while off campus. Judge Jordan's concurring opinion in *Layshock* demonstrates this possibility well:

> With the tools of modern technology, a student could, with malice aforethought, engineer egregiously disruptive events and, if the trouble-maker were savvy enough to tweet the organizing communications from his or her cellphone while standing one foot outside school property, the school administrators might succeed in heading off the actual disruption in the building but would be left powerless to discipline the student.[174]

171. *Tinker*, 393 U.S. 503; *Hazelwood*, 484 U.S. 260; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Morse v. Frederick, 551 U.S. 393 (2007).

172. *Morse*, 551 U.S. at 398 (quoting language from the superintendent's memorandum).

173. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 940 (3d Cir. 2011) (en banc) (Smith, J., concurring).

174. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 221 (3d Cir. 2011) (en banc) (Jordan, J., concurring).

Even courts that have applied a geographic test have additionally considered whether there was purposeful direction at the school. For example, in *Porter v. Ascension Parish School Board*, the Fifth Circuit declined to apply *Tinker* to off-campus speech and instead applied general First Amendment principles to a violent picture that a high school student had drawn in the privacy of his own home.[175] In that case, two years after a student had drawn a picture depicting the school being attacked by missiles, helicopters, and armed assailants, the student's younger brother found it in a closet and inadvertently took the picture to campus.[176] The court reasoned that the picture could not be considered on-campus speech or even speech directed at campus because the student never intended for the picture to reach campus and took no action to "increase the chances that his drawing would find its way to school."[177] The court found that the student could not be punished by the school as it did not constitute a "true threat."[178] In a footnote, the Fifth Circuit noted that its holding was not in conflict with other cases analyzing off-campus speech brought onto campus, as the far-removed time element and unintentional travel to school put it "outside the scope" of precedent.[179]

The purposeful direction and dissemination test is also superior to the foreseeability standard. Although more narrowly applied in *Doninger*, the Second Circuit's foreseeability standard as used in *Wisniewksi* is far too broad.[180] The target of most student Internet speech will be the students' friends—those who are most likely to understand and appreciate the speech and who are likely to also be students at the school. Therefore, it will almost always be foreseeable that Internet speech regarding school issues will reach the school audience. The foreseeability approach prevents students from making any comments about their teachers or other students on the Internet since it would foreseeably involve the school audience. Such expansive restrictions on students' freedom of expression are not conducive to our democratic society. Under a purposeful direction and dissemination test, in contrast, students are free to express their opinions about school administrators so long as they confine this speech to off-campus areas.

Nor does the purposeful direction and dissemination test suffer from the vagueness problem presented by the "sufficient nexus" test. While there will still be some examination into the student's subjective intent, a

175. Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 615 (5th Cir. 2004).

176. *Id*.

177. *Id*.

178. *Id*. at 618.

179. *Id*. at 617, n.22.

180. Doninger v. Neihoff, 527 F.3d 41 (2d Cir. 2008); Wisniewksi v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007).

purposeful direction and dissemination test is far clearer than the "sufficient nexus" test. The courts have not given clear criteria for what would establish a sufficient nexus. Furthermore, this standard can be applied too broadly, especially if there is no requirement that the speech actually reach campus. If it is a mere causation standard, as applied by the district court in *Layshock*, it would seem to make little difference if the speech originated on campus or off campus, so long as the speech creates a substantial disruption.

A purposeful direction and dissemination test, requiring purposeful dissemination or access on campus, draws the appropriate balance of protecting speech made outside of the school environment, while still allowing educators to punish students who intentionally disrupt the educational environment. Although some have criticized the purposeful direction and dissemination test because it prevents school officials from regulating threats of violence if students do not bring the speech on campus,[181] school officials will still be able to regulate any threat of violence that rises to the level of a "true threat" under traditional First Amendment doctrine. Furthermore, a broader application of *Tinker* to off-campus speech is not necessary for teachers to maintain order and discipline in schools. A better remedy is to merely punish the students who have caused the disruption at school, rather than the student who made the off-campus speech.[182] Additionally, school officials can easily block access to the popular social networking sites students are likely to use for such speech, such as MySpace, Facebook, or Twitter, thus minimizing the risk of disruption.[183] In sum, a clear standard requiring purposeful direction and dissemination before off-campus speech may be punished would best balance students' free speech interests against school officials' interests in providing an educational environment free from distractions.

B. Fraser *Should Not Extend to Off-Campus Speech*

Fraser should not be extended beyond the scope of its facts and should not apply to speech that originates off campus. Direct statements from

181. Patrick, *supra* note 146, at 882.

182. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 939 (3d Cir. 2011) (en banc) (Smith, J., concurring) (Justice Smith gives the example of a student who created a blog post defending gay marriage. Restricting *Tinker* only to on-campus speech would not prevent the school from preventing or ending disruptions. While the school could certainly punish any students who acted disruptively at school, it would be unfair to punish the student who created the blog post merely for expressing his political views off-campus and during after-school hours.).

183. *See* U.S. DEP'T OF EDUC., EDUCATIONAL TECHNOLOGY IN U.S. PUBLIC SCHOOLS, FALL 2008, at 3 (2010), *available at* http://nces.ed.gov/surveys/frss/downloads.asp#FRSS17 (finding that 47% of secondary public schools reported having full-time employees whose sole responsibility was technology support).

Supreme Court justices lend support to this interpretation. Chief Justice Roberts, writing for the majority in *Morse*, stated, "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."[184] Roberts also relied on *Cohen*, a case in which the Supreme Court ruled that in a non-school setting the state cannot criminalize an adult's use of a four-letter expletive.[185] As noted in *Snyder*, "Chief Justice Roberts's reliance on the *Cohen* decision reaffirms that a student's free speech rights outside the school context are coextensive with the rights of an adult."[186] Justice Brennan's concurrence in *Fraser* also supports the assertion that the *Fraser* standard should not apply to off-campus Internet speech: "If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate . . . ."[187]

Furthermore, the rationale for *Fraser* was that lewd, vulgar, or offensive speech did not further a school's educational mission of teaching students to be good citizens.[188] It would stretch this reasoning too far to say that a school's authority to teach students to be good citizens extends as far as a student's home during non-school hours.[189]

VI. CONCLUSION

Because the Supreme Court has again denied certiorari on the parameters of student speech, educators and students are still left to guess at how a court would rule in any specific case. Courts are unsure whether they can use *Fraser* to allow school officials to restrict lewd and vulgar online speech and struggle with how to determine when speech becomes sufficiently on campus for purposes of the *Tinker* analysis. By articulating a clear purposeful direction and dissemination standard for when Internet speech may be regulated by *Tinker*, the Court would provide much-needed certainty in this area of law. Such an articulation would require all courts to use a single test, rather than the varying and sometimes overlapping standards currently in place. If a stronger standard for *Tinker* is articulated, lower courts may next turn to *Fraser* to regulate lewd off-campus Internet speech. To prevent this erroneous interpretation of its First Amendment

184. Morse v. Frederick, 551 U.S. 393, 405 (2007).

185. Cohen v. California, 403 U.S. 15 (1971).

186. *Snyder*, 650 F.3d at 932.

187. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring).

188. *Id*. at 681.

189. Carolyn Joyce Mattus, *Is It Really My Space?: Public Schools and Student Speech on the Internet After* Layshock v. Hermitage School District *and* Snyder v. Blue Mountain School District, 16 B.U. J. OF SCI. & TECH. L. 318, 334 (2010).

jurisprudence, the Court should also conclusively establish that *Fraser* cannot be used to regulate off-campus speech.

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