MOVING THE BULLY FROM THE SCHOOLYARD TO CYBERSPACE: HOW MUCH PROTECTION IS OFF-CAMPUS STUDENT SPEECH AWARDED UNDER THE FIRST AMENDMENT?

I. INTRODUCTION

The Supreme Court of the United States handed down its seminal decision of *Tinker v. Des Moines Independent Community School District* in 1969, determining that schools could regulate student speech if that speech would "substantially disrupt" the school environment.[1] In the forty-plus years since that decision, the way students communicate both inside and outside the school has changed dramatically. With the advent of the Internet and social media and its growth, schools and their students are gaining more of an online presence, and it is becoming increasingly difficult to draw the line between on-campus speech that falls within the

1. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

regulatory power of the school and off-campus speech that is beyond the school's reach.

Approximately 95% of children between the ages of twelve and seventeen have an online presence, and 80% of those users participate in social media sites such as Facebook, Twitter, and MySpace.[2] Eighty percent of teens use a cell phone regularly, making cell phones the most popular form of teen interaction.[3] Cell phones not only make telephone calls possible, they also foster instant interaction with texts and web access through the advent of smart phones. Students are no longer limited to seeing and talking to their classmates at school because they have the capability to text and chat, both with and without video streaming. This instant communication creates opportunities for additional threats to teens and adolescents in the form of cyberbullying, defined as using "the Internet, cell phones, or other devices to send or post text or images intended to hurt or embarrass another person."[4] It is estimated that over 50% of teens have experienced some form of cyberbullying with 20% experiencing it on a regular basis.[5] With the number of student suicides rising, due in part to increased cyberbullying, school administrators are increasingly facing a new disciplinary challenge as to how to regulate students' online conduct. The question of where the schoolhouse gate closes is almost impossible to answer now given the streamlined communication capabilities afforded by iPhones, iPads, laptop computers, and other devices. The threat of the school bully is no longer limited to recess and the playground.

Other articles have addressed the question of whether schools have proper jurisdictional authority over a student's speech that occurs off campus but is directed or later brought to campus.[6] The jurisdictional line between the public, outside world and the schoolhouse gate is becoming less relevant, however, and physical barriers may no longer solve the problem of whether or not students can be punished for their on-campus speech.[7] With advanced technology and instant communication, courts will

2. Amanda Lenhart, Mary Madden, Aaron Smith, Kristen Purcell, Kathryn Zickuhr & Lee Raine, *Teens, Kindness and Cruelty on Social Network Sites*, PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT (Nov. 9, 2011), http://pewinternet.org/Reports/2011/Teens-and-social-media.aspx.

3. *Cyber Bullying Statistics*, BULLYING STATISTICS, http://www.bullyingstatistics.org/content/cyber-bullying-statistics.html (last visited May 17, 2013) [hereinafter BULLYING STATISTICS].

4. *Cyberbullying*, NATIONAL CRIME PREVENTION COUNCIL, http://www.ncpc.org/cyberbullying (last visited May 17, 2013).

5. BULLYING STATISTICS, *supra* note 3.

6. *See* Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 FIRST AMEND. L. REV. 210, 213 (2009).

7. *See* Shannon M. Raley, *Tweaking* Tinker*: Redefining an Outdated Standard for the Internet Era*, 59 CLEV. ST. L. REV. 773, 775 (2011) ("Although courts routinely emphasize that student speech

continue to split hairs about jurisdictional limits, relying on "antiquated" physical barriers created by the Supreme Court more than forty years ago.[8] The four cases the Supreme Court has handed down in reference to student speech have all taken place on campus or at a school-sanctioned event.[9] Furthermore, with the exception of *Morse v. Frederick*, these landmark cases were decided not only before instant global communication such as Twitter, Facebook, and text messaging, but also before most homes and schools had computer and Internet capabilities. As the Supreme Court has already decided that speech on the Internet is entitled to the highest First Amendment protection,[10] it is imperative for the Supreme Court to determine how the Internet and public schools will intersect to protect online student speech while allowing schools to further their educational missions and duties. Therefore, a secondary question remains unanswered by our nation's highest court:[11] what standard should determine whether the First Amendment protects a student's off-campus Internet speech?

This Note seeks to explore this question in Part II by working through the United States Supreme Court's current jurisprudence on students' free speech rights while on campus. Part III addresses the current appellate court decisions regarding off-campus Internet speech. Although the Second, Third, Fourth, and Eighth Circuits have all dealt with this specific issue, each of these circuits has adopted a different standard to apply, leading to a great deal of inconsistency and confusion among the courts. Part IV provides the context for this controversial topic: the difficult balancing act between a student's First Amendment rights and a school's duty to further its educational mission and protect its students. This Part also scrutinizes these decisions by pointing to the flaws and strengths found in the courts' decisions and advocates for a new legal standard for off-campus Internet speech that could streamline the process, as the continued expansion of technology will only increase the difficulty in drawing the boundary between the schoolhouse gate and a student's home. Finally, this Part suggests adopting specific and separate standards for speech, such as

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can only be regulated if it occurs 'on-campus,' such a requirement has become virtually meaningless considering that the nature of the Internet makes it both 'nowhere and everywhere at the same time . . . .'" (quoting Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1090 (2008))).

8. *See id*.

9. *See* Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

10. Reno v. ACLU, 521 U.S. 844, 870 (1997).

11. *See* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008), *cert. denied*, 132 S. Ct. 499 (2011).

threats, which could help mitigate the ever-increasing problems of bullying and cyberbullying in schools.

II. THE HISTORY OF STUDENT FREE SPEECH JURISPRUDENCE

A. The Tinker *Standard*

Although courts had grappled with the issue before 1969, the United States Supreme Court handed down its landmark decision regarding students' free speech rights with *Tinker v. Des Moines Independent Community School District*.[12] With its decision, the Court ensured students would not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[13] The Court was faced with a group of students who violated a school regulation by wearing black armbands to school in protest of the Vietnam War.[14] The students were sent home and suspended for wearing the armbands, and they sued the school district and its officers, seeking to obtain an injunction against the school regulation prohibiting their expression.[15]

The Supreme Court ultimately held in favor of the students, finding that students cannot be punished for their expressive conduct when "there is no finding . . . that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . . .'"[16] The Court further found that schools do not "possess absolute authority over their students," as students continue to enjoy their Constitutional rights inside the school unless there exists a constitutionally valid reason to limit those rights.[17] Thus, a school cannot simply censor speech in an effort to avoid the "unpleasantness that always accompan[ies] an unpopular viewpoint."[18] Therefore, the standard established by the *Tinker* court allows schools to censor students' speech or expression only if it would "materially and substantially interfer[e]" or disrupt the operation of the school or the rights of other students.[19]

12. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
13. *Id*. at 506.
14. *Id*. at 504.
15. *Id*.
16. *Id*. at 509.
17. *Id*. at 511.
18. *Id*. at 509.
19. *Id*. at 513. *See also* DAVID L. HUDSON JR., FIRST AMEND. CTR, STUDENT ONLINE EXPRESSION: WHAT DO THE INTERNET AND MYSPACE MEAN FOR STUDENTS' FIRST AMENDMENT RIGHTS? (2006), *available at* http://archive.firstamendmentcenter.org/PDF/student.internet.speech.pdf.

B. Exceptions to Tinker

While the Supreme Court sought to protect students' rights to free expression in *Tinker*, the Court has since recognized several exceptions to the *Tinker* standard that reduce the protective nature of the Court's original standard.

1. The Fraser *Exception: Offensively Lewd and Indecent*

The first of these exceptions came in 1986 with the Court's decision in *Bethel School District No. 403 v. Fraser*.[20] The Supreme Court distinguished the case from *Tinker* and held that public schools could censor student expression that was "offensively lewd and indecent."[21] Matthew Fraser was suspended from school and prohibited from presenting his class graduation speech after he presented a sexually explicit and vulgar speech in violation of a school regulation at a mandatory student assembly.[22] Fraser alleged a violation of his constitutional rights, including his First Amendment right to freedom of speech.[23]

The Supreme Court determined there was a "marked distinction" between the political protest in *Tinker* and the sexually indecent speech given by Fraser that warranted a different standard by the Court.[24] Finding it part of the school's responsibility to "prohibit the use of vulgar and offensive terms in public discourse" in an effort to teach students the appropriate ways to express themselves in our democratic society,[25] the Court determined that the school district acted within its authority by imposing sanctions on Fraser for his offensive speech because vulgar and lewd expression is "wholly inconsistent with the 'fundamental values' of public school education."[26]

2. The Hazelwood *Exception: Pedagogical Concerns*

The Supreme Court carved out another exception in 1988 when it handed down its decision in *Hazelwood School District v. Kuhlmeier*.[27]

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20. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
21. *Id*. at 685.
22. *Id*. at 677–78.
23. *Id*. at 679.
24. *Id*. at 680.
25. *Id*. at 683.
26. *Id*. at 685–86. *See also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 213 (3d Cir. 2001) (interpreting *Fraser* as providing no constitutional protection "for 'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school").
27. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

Three students who wrote for their high school newspaper in the Hazelwood School District brought suit against the district for violations of their First Amendment rights after their principal refused to publish two student articles about teen pregnancy and divorce.[28] Although the Court of Appeals for the Eighth Circuit found the *Tinker* standard to preclude the censorship of the articles where no substantial disruption could have reasonably been predicted,[29] the Supreme Court reversed, articulating a new standard for speech that is school sponsored.

The Court found that schools and educators are entitled to exercise more control and authority over school-sponsored activities and, in this case, publications, so as to prevent the views of individuals from "erroneously" being attributed as the school's views as well.[30] The Court found that the *Tinker* standard is inapplicable to situations where the school limits student expression based on reasonable "pedagogical concerns."[31]

3. The Morse *Exception: Illegal Drug Use*

After *Hazelwood*, the United States Supreme Court did not address the parameters of student speech in public schools for almost twenty years.[32] In another effort to safeguard the children in the public school system, the Court decided *Morse v. Frederick*[33] and held that public schools are allowed to censor student speech and expression that can be seen as promoting illegal drug use.[34] Student Joseph Frederick attended the Olympic Torch Relay during school hours across the street from his school with other classmates while the principal and teachers monitored all students.[35] Frederick held up a banner with the slogan "BONG HiTS 4 JESUS," and the principal suspended him for ten days for this action.[36] Frederick then filed suit, alleging violation of his First Amendment rights.[37]

Although Frederick argued as to the uncertainty of whether or not he actually was in school for his case to be considered a school speech case, the United States Supreme Court quickly rejected any contention that standing across the street from the school at a school-sanctioned event during school hours does not qualify as being at school for school-speech

28. *Id*. at 262–64.
29. *Id*. at 265.
30. *Id*. at 271.
31. *Id*. at 273. *See also* HUDSON, *supra* note 19.
32. *See* Calvert, *supra* note 6, at 210.
33. Morse v. Frederick, 551 U.S. 393 (2007).
34. *Id*.
35. *Id*. at 397.
36. *Id*. at 397–98.
37. *Id*. at 399.

precedents to apply.[38] Citing *Fraser*, the court determined that students' constitutional rights are not "'automatically coextensive with the rights of adults'" in similar public settings.[39] Therefore, the school had the right to censor Frederick's speech in an effort to restrict the promotion of illegal drug use, "an 'important—indeed, perhaps compelling' interest."[40]

III. WHAT TESTS HAVE THE CIRCUITS APPLIED?

As the current line of school speech cases handle only speech occurring at school or at school-sanctioned events, courts have continually struggled with what standard to apply to speech that originates on the Internet off campus, such as in a student's home, but somehow affects the school or the student-body population. Some courts have chosen to apply the *Tinker* "substantial disruption" standard, although these courts have differed in the application of that standard.[41] Other courts have chosen to analyze a student's off-campus speech under a "true threat" standard, based on *Watts v. United States*.[42]

A. Tinkering with Tinker

1. The Second Circuit

The Second Circuit recently chose to apply the *Tinker* standard to determine that a school was entitled to censor student speech created on the Internet from the student's home computer in *Doninger v. Niehoff*.[43] The student, Avery Doninger, served on a Student Council committee that planned an annual music event at the school, but the group continued to disagree with the school about certain logistics regarding the event.[44] The students sent a mass e-mail to the community, encouraging everyone to call the school to request the event continue as originally planned, and the school received an influx of calls as a result.[45] Avery claimed the principal told her the event would be cancelled due to the e-mail, although the

38. *Id*. at 401.

39. *Id*. at 404–05 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

40. *Id*. at 407–08 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

41. *See* D.J.M. *ex rel*. D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754 (8th Cir. 2011); Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); Layshock *ex rel*. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc); Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008), *cert. denied*, 132 S. Ct. 499 (2011).

42. *See D.J.M.*, 647 F.3d at 761 (citing Watts v. United States, 394 U.S. 705 (1969)).

43. *Doninger*, 527 F.3d at 50–53.

44. *Id*. at 44.

45. *Id*.

principal ultimately disputed this testimony.[46] In response to the principal's decision, Avery posted a message to her online blog, continuing to encourage everyone to "call [the principal] to piss her off more" and calling the Central Office "douchebags."[47] After the principal and administration received more phone calls about the event and learned of Avery's blog post, Avery was prohibited from running for senior class secretary because her conduct showed a lack of "civility and good citizenship expected of class officers."[48] Her mother subsequently brought an action on her behalf, alleging violations of Avery's First Amendment rights.[49]

The Second Circuit ultimately found in favor of the school, holding that Avery's conduct created a "foreseeable risk of substantial disruption to the work and discipline of the school."[50] The court concluded, as a threshold jurisdictional matter, that it was reasonably foreseeable Avery's post would come to campus because it was designed to do so and explicitly pertained to events at the school.[51] The court determined that, if it is reasonably foreseeable a student's speech will reach campus or school authorities, a student can be punished for off-campus expression if there is a foreseeable risk that the expression will cause a disruption to the school environment.[52] Since it was reasonably foreseeable that Avery's speech would reach the school or school administrators, the court then found that her post also created a foreseeable and substantial disruption of the school because her language choice encouraged confrontation and her post contained incorrect information that had to be corrected by the administration, causing further disruption of the school environment.[53] The court grappled with whether or not the *Fraser* standard could be applied to off-campus speech but ultimately did not decide the issue, relying on *Tinker* and *Wisniewski* instead.[54]

2. The Third Circuit

The Third Circuit, sitting en banc, released two simultaneous opinions addressing the same issue of whether schools can regulate a student's

46. *Id*. at 44–45.
47. *Id*. at 45.
48. *Id*. at 46.
49. *Id*. at 46–47.
50. *Id*. at 53.
51. *Id*. at 50.
52. *Id*. at 48. *See also* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 39–40 (2d Cir. 2007) (holding the *Tinker* standard applied where it was reasonably foreseeable that a student's Internet icon depicting his teacher being shot would come to the attention of school authorities and cause a substantial disruption within the school).
53. *Doninger*, 527 F.3d at 51.
54. *See id*. at 49–50 ("It is not clear, however, that *Fraser* applies to off-campus speech.").

speech made and expected to be received off campus.[55] While the court's analysis of the two cases was slightly different due to the different arguments advanced by the parties to each case, the court ultimately held in favor of both students, finding that the school and school district had improperly censored student speech.[56]

In *Layshock ex. rel. Layshock v. Hermitage School District*, Layshock, a high school student, created a fake MySpace[57] profile under the guise of his principal by filling out incorrect and "bogus" information about his principal and using a picture of the principal found on the school's website.[58] Layshock limited access to the website to those people, including other students, who were MySpace "friends," but the principal soon found the profile mocking him.[59] Since the school had not blocked access to MySpace on the school's computers, students, including Layshock, were able to access the profile during school hours.[60] After the school discovered who authored the profile, Layshock was suspended, placed in an alternative school, and banned from extracurricular activities and his graduation ceremony.[61]

Because the school district did not challenge the district court's finding that there was insufficient proof of a "substantial disruption" of the school due to Layshock's conduct, the Third Circuit did not have to specifically address whether the *Tinker* standard allowed the school to punish his off-campus Internet speech.[62] Instead, the court emphasized that the school district's reliance on the *Fraser* lewdness standard was misplaced because

55. *See* J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc), *cert*. *denied*, 132 S. Ct. 1097 (2012); Layshock *ex rel*. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc). *See also* Eugene Volokh, *Third Circuit (En Banc) Opines on K-12 Students' Off-Campus Speech Rights*, THE VOLOKH CONSPIRACY (June 13, 2011, 3:38 PM), http://volokh.com/2011/06/13/third-circuit-en-banc-opines-on-k-12-students-off-campus-speech-rights.

56. *See Snyder*, 650 F.3d at 931–32 (holding that the *Tinker* standard, not *Fraser*, controls and finding no reasonable foreseeability of a "substantial disruption or material interference in school" as a result of the student's conduct); *Layshock*, 650 F.3d at 219 (holding that the school acted beyond its authority in censoring the student's speech).

57. MySpace is a social networking website that allows people to share information, music, and photographs with others through the Internet. The website can be found at http://www.myspace.com.

58. *Layshock*, 650 F.3d at 207–08.

59. *Id*. at 208–09.

60. *Id*. at 209.

61. *Id*. at 210. Although three other students created profiles portraying the principal that were "more vulgar" than Layshock's, Layshock was the only student to be reprimanded for his conduct. *See id*. at 208–09.

62. *Id*. at 214 (noting that "the School District is not arguing that it could properly punish [Layshock] under the *Tinker* exception for student speech that causes a material and substantial disruption of the school environment"). Although the Court never explicitly addressed *Tinker*'s applicability, it did allude to its possible application to certain off-campus conduct. *See id*. at 219 ("[W]e have found no authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school.").

Fraser is inapplicable outside of the school context.[63] This is in contrast with the Second Circuit's decision in *Doninger*, as that court explicitly chose not to answer whether *Fraser* applied in this context.[64] In response to the school district's argument that Layshock's speech should be considered on-campus, the Third Circuit found it would establish "unseemly and dangerous precedent" to allow Layshock to be punished for speech that he wrote on his grandmother's computer at her home in the same way he could be punished for uttering the same speech at his school or at a school-sanctioned event without a showing of a substantial disruption to the school environment.[65]

In a similar vein, in *J.S. ex rel. Snyder v. Blue Mountain School District*, an eighth grade student created a fake profile describing her principal on MySpace.[66] According to the court, the profile "contained crude content and vulgar language, ranging from nonsense . . . to profanity and shameful personal attacks aimed at the principal and his family."[67] Although humiliating for the principal and his family, the record contained no indication that anyone took the profile as a true description of the principal or his life.[68] J.S. made the profile accessible only to those people who were MySpace "friends" with the profile, and no one was able to access the profile at school due to the school's Internet firewall.[69] After another student informed the principal about the profile and showed the principal a printout of the profile upon request, the principal ultimately decided to suspend J.S. and threatened legal action.[70] J.S. and her parents filed suit against the school, alleging the school violated J.S.'s First Amendment rights.[71]

The majority chose to rely on the *Tinker* standard, finding no support for the conclusion that a "substantial disruption" of the school was reasonably foreseeable to school authorities.[72] The court distinguished the

63. *Id*. at 219 ("*Fraser* does not allow the School District to punish [Layshock] for expressive conduct which occurred outside of the school context.").

64. *See* Doninger v. Niehoff, 527 F.3d 41, 49 (2d Cir. 2008), *cert*. *denied*, 132 S. Ct. 499 (2011) ("It is not clear, however, that *Fraser* applies to off-campus speech.").

65. *Layshock*, 650 F.3d at 216. *See also* Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043 (2d Cir. 1979) (holding that a school could not censor a student publication that was written and distributed outside of school, even though it was secretly stored in a school closet).

66. J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc), *cert*. *denied*, 132 S. Ct. 1097 (2012).

67. *Id*. at 920.

68. *Id*. at 921.

69. *Id*.

70. *Id*. at 921–22.

71. *Id*. at 923.

72. *Id*. at 928. Although the dissent agreed with the adoption of the *Tinker* standard in this instance of off-campus speech, the dissenting judges disagreed about whether a substantial disruption of the school environment was or was not foreseeable. *See id*. at 941 (Fisher, J., dissenting). The dissent

Second Circuit's decision in *Doninger v. Niehoff*, finding that it was not reasonably foreseeable that the profile would cause a substantial disruption to the school environment because its content was so outrageous and unbelievable, and unlike the student in *Doninger*, J.S. had not intended for the profile to reach the school's campus and had taken steps to ensure it did not.[73] Although it is unclear whether the Second Circuit relied on intent as a necessary factor in determining whether it is reasonably foreseeable that speech will cause a substantial disruption,[74] the Third Circuit explicitly looked at the student's intent as a factor to be examined. The court further determined that because no student could access the profile at school, J.S. made the profile private, and no one took the outrageous profile seriously, no disruption of the school environment occurred, aside from some "general rumblings" within the school.[75] Furthermore, the court relied extensively on the facts of *Tinker*, reasoning that if a black armband to protest the Vietnam War could not have reasonably led authorities to forecast a substantial disruption of the school environment during the peak of controversy over the war, J.S.'s profile could not lead to such a forecast either.[76] Finally, the court silenced any possibility that the school was justified for censoring J.S. due to *Fraser*'s lewd and vulgar exception to *Tinker*, finding that the *Fraser* standard is inapplicable in public forums outside the school context.[77]

Those judges concurring in the *Snyder* opinion agreed with the outcome of the majority's decision but sharply disagreed with the majority's assumption that *Tinker* could apply to off-campus speech.[78] The concurrence recognized the sharp divide among courts regarding whether or not *Tinker* can apply outside of the school context but ultimately rejected *Tinker* as a viable standard for off-campus speech because it could "create a precedent with ominous implications."[79] Going back to the *Tinker* opinion, the concurrence pointed out that the Supreme Court has always

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focused mainly on the fear that the majority's holding would undermine "schools' authority to regulate students who 'materially and substantially disrupt the work and discipline of the school.'" *Id*. (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

73. *Id*. at 930.

74. *See* Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008), *cert*. *denied*, 132 S. Ct. 499 (2011) ("[A] student may be disciplined for expressive conduct . . . when it [is] . . . foreseeable that the off-campus expression might also reach campus.").

75. *Snyder*, 650 F.3d at 929.

76. *Id*. at 929–30.

77. *Id*. at 932. *See also* Morse v. Frederick, 551 U.S. 393, 405 (2007).

78. *Snyder*, 650 F.3d at 936 (Smith, J., concurring).

79. *Id*. at 939. The concurrence gave the example of a student who writes a blog entry on his home computer about his stance on gay marriage, which causes his classmates to create a disturbance at school in response. If *Tinker* applied to off-campus speech, not only could those students causing the disturbance be punished, but the author of the blog could be punished as well, which would be an incorrect application of the law. *See id*.

attempted to limit *Tinker*'s holding to the school setting due to "the special characteristics of the school environment."[80] The concurrence noted that allowing *Tinker* to apply to speech that occurs off campus would allow schools to regulate student expression, no matter the time, place, or manner, as long as it satisfied the "substantial disruption" test.[81] The concurrence recognized the increasing difficulty with drawing the line between on- and off-campus speech, but it concluded a foreseeable possibility that speech would reach a school's campus to be too risky of a standard to measure whether or not the speech occurred on campus.[82] Although J.S. humiliated the principal with harsh, vulgar words, the concurrence ultimately concluded that this type of speech must be tolerated outside of the school context to allow for more valuable speech that "enriches the marketplace of ideas, promotes self-government, and contributes to self-determination," regardless of whether or not a student is the author of that speech.[83]

3. The Fourth Circuit

The Fourth Circuit also addressed the issue of off-campus Internet speech recently when it decided *Kowalski v. Berkeley County Schools* in 2011.[84] Kowalski, a high school senior, created a sexually disparaging MySpace discussion group describing Shay, a classmate.[85] After Shay and her family complained to school authorities about Kowalski's page, the school concluded Kowalski had violated the school's policy against bullying.[86] As punishment, Kowalski was suspended and prohibited from crowning the next Queen of Charm and participating on the cheerleading squad.[87] Kowalski commenced suit against the school district, alleging violation of her free speech rights.[88]

Following in the footsteps of *Doninger*, the court applied *Tinker* and the foreseeability jurisdictional standard to conclude that the school district did not violate Kowalski's free speech rights when it punished her for the disparaging discussion group because it was reasonably foreseeable that her

80. *Id*. at 937 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

81. *Id*. at 939.

82. *Id*. at 940. However, the concurrence did state that any expression can be considered on campus if it is intentionally directed towards the school. *Id*.

83. *Id*. at 941.

84. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011), *cert*. *denied*, 132 S. Ct. 1095 (2012).

85. *Id*. at 567–68.

86. *Id*. at 568–69.

87. *Id*.

88. *Id*. at 570.

speech would reach the school and cause a substantial disruption.[89] The court had little trouble concluding that Kowalski's conduct satisfied *Tinker*'s "substantial disruption" test, relying on the fact that the website disrupted the school and infringed on other students' rights.[90] Although Kowalski created the website in her own home, the court found that she could have reasonably foreseen that the website would make it to the school because she invited other classmates to join the group who could bring the website to campus through the Internet on their smartphones or computers.[91]

B. Another Option: The True Threat Doctrine

After the horrific events at Columbine High School in 1999 and other school shootings in the early 2000s, schools and school districts around the country began to take student bullying and student threats more seriously.[92] Furthermore, with the advent of technology and instant communication, schools have been forced to deal with new issues of student speech and cyberbullying, determining when it is permissible to punish a student for online, off-campus speech that disparages another student or teacher.[93] Some courts have chosen to handle these issues under the *Tinker* standard as described above.[94] Others have chosen to examine these issues by examining the speech under the "true threat" doctrine established by *Watts v. United States*,[95] finding threatening student speech to be afforded no constitutional protection if it rises to the level of a true threat.[96]

The leading case in this area came in 2002 when the Court of Appeals for the Eighth Circuit decided *Doe v. Pulaski County Special School*

89. *See id*. at 574 (citing Doninger v. Niehoff, 527 F.3d 41, 48–49 (2d Cir. 2008)).

90. *Id*. at 573–74. The Court recognized that *Tinker*'s holding should be limited outside the school context but ultimately determined that the relationship between the Kowalski's speech and the interests of the school was sufficient to justify the school's censorship of her speech. *See id*. at 573.

91. *Id*. at 573–74.

92. *See* Karly Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying*, 13 BARRY L. REV. 103, 109 (2009) ("In the aftermath of the Columbine tragedy, the mindset of the public towards bullying changed from being begrudgingly tolerant to actively preventing bullying from occurring."); William Bird, Comment, *Constitutional Law—True Threat Doctrine and Public School Speech—An Expansive View of a School's Authority to Discipline Allegedly Threatening Student Speech Arising Off Campus*, 26 U. ARK. LITTLE ROCK L. REV. 111, 111 (2003) ("In light of several highly publicized school shootings in recent years, school officials across the country increasingly punish student expression and conduct perceived to be threatening.").

93. *See generally* Zande, *supra* note 92.

94. *See* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007) (rejecting true threat explicitly).

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

96. *See* D.J.M. *ex rel*. D.M. v. Hannibal Public Sch. Dist. No. 60, 647 F.3d 754, 761–65 (8th Cir. 2011); Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002).

District.[97] The lawsuit stemmed from a lovers' quarrel between two middle school students.[98] After K.G. dumped J.M. and refused to date him again, J.M. responded violently by composing two letters in his home describing how he wanted to rape and murder K.G.[99] After learning about the letters, K.G. and other students reported J.M.'s conduct to school authorities, and J.M. was expelled for the remainder of the year.[100] J.M.'s mother filed suit against the school, alleging violation of her son's free speech rights.[101]

Making no mention of *Tinker* or any student free speech cases, the Eighth Circuit concluded that J.M.'s First Amendment rights were not violated because his letters constituted a true threat.[102] The court first pointed to the Supreme Court's decision in *Watts*, finding threats of violence as a proscribable form of speech.[103] Although the Supreme Court never provided a test in *Watts* for determining what constitutes a proscribable threat, the Eighth Circuit determined that a statement constitutes a threat if a reasonable recipient "would interpret the purported threat as a serious expression of an intent to cause a present or future harm."[104] If J.M. intended to communicate the letter and a reasonable recipient would view the letter as a threat, the court reasoned that the letter should not be considered speech protected by the First Amendment.[105] Because J.M. had allowed a friend to read the letter and discussed the letter with K.G., the court had no trouble finding that J.M. intended to communicate the letter.[106] Furthermore, the court found that J.M.'s repeated use of profanity and explicit description of killing K.G. would have caused most reasonable people to fear for their safety, and therefore his letter could be properly construed as a true threat to K.G. that is not protected by the First Amendment.[107]

The majority's decision was met with some opposition, as four of the ten justices dissented from the majority ruling. Ultimately, the dissent believed J.M.'s speech did not constitute a true threat and was, thus, protected speech under the First Amendment. The dissent found that J.M. did not intend to communicate the threat to anyone because he had initially been unwilling to show the letter to anyone, and the letter was only shown

97. *Doe*, 306 F.3d 616.
98. *Id*. at 619.
99. *Id*.
100. *Id*. at 619–20.
101. *Id*.
102. *Id*. at 626–27.
103. *Id*. at 622.
104. *Id*. *See also* United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996), *cert. denied*, 519 U.S. 613 (1996).
105. *Doe*, 306 F.3d at 624–25.
106. *Id*.
107. *Id*. at 625–27.

to others after his friend snatched the letter from J.M.'s room.[108] Furthermore, the dissent did not believe that a reasonable recipient would have interpreted the letter as a threat given the entire context of the situation.[109] The dissent relied on several factors to reach this conclusion: (1) lack of actual intent to carry out the threat, (2) lack of a verbal threat to K.G., and (3) the fact that J.M. had no prior criminal history.[110]

The dissent also disagreed with the majority's disregard for the school context of the situation entirely.[111] The dissent discussed the *Tinker* standard in reference to J.M.'s conduct, since the dissent did not agree J.M.'s speech constituted a true threat.[112] However, the dissent did not discuss applying the *Tinker* standard to J.M.'s conduct at length, focusing instead on the "unnecessarily harsh" punishment the school board imposed on J.M. and characterizing it as an abuse of discretion.[113] Circuit Judge McMillan, one of the four dissenting judges, wrote a separate opinion addressing that specific issue by questioning the school's authority over J.M's speech, since it was composed in J.M.'s home outside of the school context.[114] Ultimately, however, the *Tinker* standard did not apply, and the Eighth Circuit established a precedent for applying a "true threat" analysis to student speech similar to J.M.'s speech.[115]

The Eighth Circuit was forced to address this issue again in 2011 when it decided *D.J.M. ex rel D.M. v. Hannibal Public School District*.[116] D.J.M., a high school student, sent instant messages to C.M. describing how D.J.M. wanted to bring a gun to school to shoot others and other comments of a threatening nature.[117] C.M. became increasingly worried about the conversations she had with D.J.M through instant messaging and eventually sent transcripts of their conversations to the principal.[118] The principal notified the police, who placed him in juvenile detention, and suspended him.[119] Although his suspension was originally for ten days, the principal subsequently extended it for the remainder of the year due to the "disruptive impact" D.J.M.'s comments had on the school environment.[120]

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108. *Id*. at 629 (Heaney, J., dissenting).
109. *Id*. at 631–32.
110. *Id*.
111. *Id*. at 627 (Heaney, J., dissenting).
112. *Id*. at 633 (Heaney, J., dissenting).
113. *Id*. at 633, 635 (Heaney, J., dissenting).
114. *Id*. at 636 (McMillan, J., dissenting).
115. *See* Zande, *supra* note 92, at 121.
116. D.J.M. *ex rel*. D.M. v. Hannibal Public Sch. Dist. No. 60, 647 F.3d 754 (8th Cir. 2011).
117. *Id*. at 756.
118. *Id*.
119. *Id*. at 756–57.
120. *Id*. at 757.

D.J.M.'s parents brought an action against the school board, alleging that their son's suspension violated his right to freedom of speech.[121]

Departing from its analysis in *Doe* slightly, the court chose to focus its discussion on both a "true threat" analysis and a *Tinker* analysis.[122] Relying on *Doe*, the court found that D.J.M.'s Internet conversations with C.M. constituted a true threat. Even though D.J.M. communicated the statements to a third party, C.M., instead of a victim of his threat, the court found that the element of intent was nevertheless satisfied because he reasonably should have known that C.M. could communicate those statements to the purported victims.[123] Furthermore, the court concluded that a reasonable recipient would perceive D.J.M.'s statements as a true threat based on numerous factors: his mention of suicide, his admission of depression, his purported access to weapons, a specific list of victims, and his admission that he wanted his school "to be known for something."[124] Although D.J.M. contended he was joking, the court determined that the school did not have to "wait and see" whether or not D.J.M. would carry out those threats because it was authorized under the First Amendment to intervene in the matter.[125]

After finding D.J.M.'s speech to constitute a true threat, the court also determined that the school was authorized under *Tinker* to punish D.J.M. for his disruptive expression. The court specifically relied on the Second Circuit decision of *Wisniewski*, since it also involved a student sending threatening instant messages.[126] The court in *Wisniewski* expressly rejected the application of the "true threat" doctrine to a student's off-campus threatening speech, reasoning that schools have more latitude to censor student speech under the *Tinker* standard than the true threat doctrine allows.[127] Although the Eighth Circuit did not similarly reject the "true threat" doctrine, it did find that the school had the authority to punish D.J.M. under the *Tinker* standard as well, since it was reasonably foreseeable that D.J.M.'s threats would be brought to the school's attention and create a risk of substantial disruption to the school environment.[128] The court found that the school was in fact substantially disrupted, as school

121. *Id*.
122. *Id*. at 760–62.
123. *Id*. at 764–65.
124. *Id*. at 762–64.
125. *Id*. at 764.
126. *Id*. at 765–66.
127. *See* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38 (2d Cir. 2007).
128. *D.J.M.*, 647 F.3d at 766.

authorities had to continually deal with concern from parents and students about D.J.M.'s threatening comments.[129]

IV. WHICH TEST SHOULD APPLY?

As the cases above show, courts are struggling to find a test to apply to online off-campus student speech that will preserve students' constitutional rights while giving schools the requisite authority to regulate their students' behavior to preserve the school environment. The Second, Third, and Fourth Circuits chose to rely on *Tinker* and the substantial disruption test to determine if the school properly censored a student's speech, with the Third Circuit departing slightly by focusing more on the student's intent to communicate the speech towards the school, rather than the foreseeability that the speech would reach the school or school administrators. The Eighth Circuit chose to analyze off-campus Internet speech under the true threat jurisprudence, as it was presented with student conduct of a more violent nature. With four circuits following different approaches, the question still remains: which test should apply to determine if a school can regulate a student's off-campus Internet speech?

A. Initial Concerns: The Balancing Act

The Supreme Court has consistently tried to strike a balance between the special characteristics of the school environment and the First Amendment rights of students. In *Tinker*, the Court recognized that school administrators should not have absolute control over students because students are still considered "'persons' under our Constitution."[130] Justice Brennan recognized that the school is the ideal "marketplace of ideas," exposing our youth to a multitude of different experiences and the "robust exchange of ideas."[131] Schools must tolerate students' unpopular religious and political opinions within the school and at school-sanctioned activities because tolerance is a fundamental value that is necessary to an effective democratic society.[132]

However, the Supreme Court has also consistently recognized that students' rights in the school context are not automatically "coextensive" with the rights of adults in a public setting.[133] A student's right to freely express his political and religious beliefs inside the school has to be

129. *Id*.
130. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).
131. *Id*. at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589 (1967)).
132. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).
133. *See Tinker*, 393 U.S. at 506.

weighed against the school's task of ensuring its students learn "socially appropriate behavior" in order to function in our society.[134] This is why the Supreme Court has crafted the exceptions to *Tinker* for lewd speech, speech that raises pedagogical concerns, and speech advocating illegal drug use—all three instances raising unique concerns in the school context. The Court agreed the school should have the authority to redress certain types of speech when the school has a "compelling interest"[135] in regulating that speech or, at the very least, when the school should not have to tolerate speech because it is inconsistent with "fundamental values" of public education.[136]

Therefore, the bigger question remains: do these concerns that allow for regulation of purely in-school speech extend beyond the schoolhouse gate and into a student's home or personal space? Because students are not physically inside the school while they are at home or elsewhere, it seems easy to conclude that schools should have no authority whatsoever to reach into that student's personal environment to regulate his speech or expression, just because that speech involves the school in some way. However, advanced communication technology in today's society makes that question harder to answer because there is no longer a distinct line between being at school and being at home.

Theoretically, the Court could continue to draw a literal line between the school and home, having no authority to regulate any speech or expression that does not occur on school grounds or at a school-sanctioned event.[137] Yet, speech uttered exclusively outside of the confines of the school could still disrupt the school in its task of educating children as much as speech spoken in a classroom. Furthermore, with the advent of instant messaging, Facebook, Twitter, and the many other social networking websites available on the Internet, it is much easier now for off-campus speech to reach campus instantaneously. Therefore, it is necessary to examine the approaches taken by the appellate courts above to find a standard that would allow schools to continue their educational missions without taking away students' First Amendment rights.

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134. *See Fraser*, 478 U.S. at 681.

135. *See* Morse v. Frederick, 551 U.S. 393, 407–08 (2007).

136. *See Fraser*, 478 U.S. at 685–86.

137. *See* Joseph A. Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 122 (2010) ("A common thread in all four of the [Supreme] Court's student-speech cases is that the school punished speech occurring either at school or a school-sponsored event.").

B. The True Threat Route

Although some courts find the true threat standard inapplicable to speech occurring solely on campus,[138] there is a better argument for applying the true threat standard as articulated in *Doe* and *D.J.M.* to offensive speech occurring off campus and relating to the school or someone associated with the school. The standard is workable in the off-campus speech context because true threats, no matter where they are uttered, can be proscribed without offending anyone's First Amendment rights.[139] If a student's speech rises to the level of a threat prohibited by the Supreme Court's decision in *Watts*, that student is not entitled to First Amendment protection regardless of his or her location because the school would have an interest in protecting its students "from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[140]

As discussed previously in Part III.B., the Eighth Circuit specifically addressed this issue in its decisions in *Doe* and *D.J.M*. In *Doe*, the court laid out the basic standard that a public school must establish in order to have a valid defense against a student's First Amendment claim regarding that student's alleged free speech. First, there must be speech or expression communicated by a school's student to another student, teacher, or other school employee that is threatening in nature.[141] The student must have intended to communicate the threatening speech to the other person,[142] and a reasonable recipient must have perceived the student's communication as a threat.[143] If the school can prove these elements, it should be allowed to punish a student's communication without violating that student's First Amendment rights because his speech is considered a true threat. Although this standard sets a high bar for schools to establish a valid defense, a court looking at a student's off-campus speech should begin its inquiry with the true threat doctrine. Schools arguably have a duty to protect their students and employees from real threats, especially from other students for which they are also responsible. Applying the true threat doctrine would ensure students' threatening speech could be proscribed so schools can maintain a safe environment for their students and employees.

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138. *See* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38 (2d Cir. 2007).

139. *See* D.J.M. *ex rel*. D.M. v. Hannibal Public Sch. Dist. No. 60, 647 F.3d 754 (8th Cir. 2011); Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002).

140. *Doe*, 306 F.3d at 622 (quoting R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377, 388 (1992)).

141. *See* Diane Heckman, *Just Kidding: K-12 Students, Threats and First Amendment Freedom of Speech Protection*, 259 EDUC. L. REP. 381, 403 (2010).

142. *Doe*, 306 F.3d at 624.

143. *Id*. at 625.

One issue the true threat standard presents is the lack of a solid definition of what constitutes threatening speech. It would seem natural that statements inciting physical violence or harm against another person would be considered a true threat, but what about speech that threatens to damage someone's reputation or that threatens to cause a disruption inside the school? The Supreme Court defined a true threat in *Virginia v. Black* as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[144] However, the definition of a true threat could be broadened in the school context to include threats of physical violence or harm as well as threats to harm a person's reputation or other threats that are equally damaging mentally and emotionally that could be properly characterized as cyberbullying.

Schools have a greater need for regulating students' speech with the recent cyberbullying outbreak. With the prevalent use of mobile devices and social media, cyberbullying has become a daily concern for school administrators. According to recent statistics, approximately one million students were subjected to some form of cyberbullying on Facebook alone in the year 2011.[145] Furthermore, about 20% of students claim they have been bullied through the Internet.[146] Some cyberbullying is considered more of a nuisance than a threat, but if a student bullies another student or teacher and that communication can be characterized as a threat, the school should be able to properly discipline that student without violating his or her free speech rights. For example, the students in *Layshock* and *Snyder* arguably engaged in cyberbullying by creating fake MySpace profiles about their principals containing extremely degrading, embarrassing, and false information that could have harmed both principals' reputations in the community. Furthermore, the student in *Kowalski* created a fake MySpace profile that was extremely degrading to a fellow student. If the definition of a true threat were broadened to include this type of damaging speech, students such as J.S., Layshock, and Kowalski would not be entitled to First Amendment protection and would be further deterred from taking their bullying from the schoolyard to cyberspace. Schools should not have to tolerate threatening speech made by their students towards other students or school employees, and the true threat doctrine could provide one alternative to handle this type of speech in the school context.

However, the true threat standard may not be an effective means of trying to regulate student speech that is purely off campus, including

144. Virginia v. Black, 538 U.S. 343, 359 (2003).

145. PURE SIGHT ONLINE CHILD SAFETY, http://puresight.com/Cyberbullying/cyber-bullying-statistics.html (last visited May 17, 2013).

146. *Id*.

cyberbullying, as most student speech will not involve a genuine threat of physical harm or violence, and it is unclear if the Supreme Court would be willing to broaden the definition of a true threat to include these other forms of mental and emotional harassment. Furthermore, it is unclear whether a student's speech such as that in *Doninger* would fall under any category of true threat analysis, although one could argue that Doninger did harass and threaten her principal by encouraging the community to berate the principal's office with phone calls and letters.

C. The Tinker *Route*

The *Tinker* standard's future in the off-campus Internet speech context is unclear because the Supreme Court has never addressed its applicability to such speech. The Second, Third, and Fourth Circuits all applied *Tinker* in cases where students were punished for off-campus Internet speech, barely pausing to consider whether the Supreme Court intended *Tinker* to be applicable to students when they left school grounds. Although the jurisdictional line between school and home has been blurred for students and their schools, students should be able to enjoy First Amendment protections outside of the school context without having to constantly be concerned that they will be reprimanded for their speech.

As the concurrence in *Snyder* pointed out, *Tinker*'s substantial disruption test was specifically crafted to deal with the special nature of schools, since school officials should be able "to prescribe and control conduct *in the schools*."[147] The last time the Supreme Court addressed the issue of student speech in 2007 in *Morse*, it went to great lengths to emphasize that the student's conduct did not occur off campus; Frederick unfurled his "BONG HiTS 4 JESUS" banner aimed toward the school at a school-sanctioned event during normal school hours as teachers and other school administrators supervised the students with the banner in plain view of most students.[148] Furthermore, because it was a school-sanctioned event, all students were subject to the district's rules for student conduct while attending the event.[149] Although the Court did not specifically address the issue of off-campus speech in *Morse*, in his concurrence, Justice Alito did make note of the fact that *Tinker* allows for state regulation of "in-school" student speech in ways that would not be constitutionally permissible in other public settings.[150] This could be an indication that, given the chance

147. J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 937 (3d Cir. 2011) (en banc), *cert*. *denied*, 132 S. Ct. 1097 (2012) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969)) (emphasis added).

148. *See* Morse v. Frederick, 551 U.S. 393, 397, 400–01 (2007).

149. *Id*. at 401.

150. *Id*. at 422 (Alito, J., concurring).

to decide the issue, the Supreme Court may not side with the view taken in cases like *Doninger*, holding instead that the school cannot reach beyond the school to regulate a student's Internet expression.

However, as noted previously, the concurring judges in *Snyder* did recognize that the on-campus and off-campus distinction is becoming increasingly difficult with the instantaneous nature of the Internet. While this is true, the Second Circuit arguably stretched the jurisdictional line too far when it relied on a foreseeability standard in its decisions in *Wisniewski* and *Doninger* to find that a school can regulate a student's conduct when it is foreseeable that a student's off-campus conduct will reach the school's campus, creating a substantial nexus between the student's off-campus speech and the school.[151] Almost all communication created through the Internet and other instant means can foreseeably make its way to a school campus and to the attention of school authorities due to the pervasive nature of electronic communication.[152] A bare foreseeability standard would encompass virtually all off-campus speech and would leave very little First Amendment protection for students.

Therefore, instead of solely relying on a jurisdictional test of whether speech could foreseeably come to the attention of school authorities or reach campus,[153] courts should perhaps look to the intent of the student speaker to initially determine if the school has a sufficient basis for jurisdiction over the student's speech. In *Snyder*, the court made note of the fact that J.S. did not intend for her MySpace page to reach campus because she took measures to ensure that the profile was private.[154] Therefore, the school did not have jurisdiction over J.S. to censor her speech without violating her First Amendment rights. A standard focusing more on the student's intent regarding the dissemination of his or her communication could protect more students from schools overstepping their jurisdictional bounds to punish off-campus communication. However, even if courts adopted an intent rather than foreseeability standard, other questions would surface as to that test's applicability: Will intent be satisfied if the student intends for it to reach campus? Should the intent requirement be satisfied if the student intends for other students to see it? What factors should measure intent? No matter the jurisdictional test, the Supreme Court will still have important questions to answer.

However, a jurisdictional test, regardless of whether it includes a rigid intent standard, may no longer be appropriate in this day in time. Since the

151. *See* Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008).

152. *See* Calvert, *supra* note 6, at 250.

153. *See id*. at 240.

154. J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 929–30 (3d Cir. 2011) (en banc), *cert*. *denied*, 132 S. Ct. 1097 (2012).

line between school and home is less pronounced due to Internet communication, schools should not be able to use this as an excuse to regulate everything a student says about other students or school employees. On the other hand, students should not be allowed to have free reign to cause significant disruptions at school from the privacy of their own home and never suffer any type of consequences. Some instances of student speech, though originating on the Internet and off-campus, have come to cause a greater disruption inside the schoolhouse gate and, arguably, should require the punishment of the student without offending his or her First Amendment rights. Therefore, while the *Tinker* standard alone may not be appropriate to measure this type of off-campus speech, the Supreme Court could use the "substantial disruption" standard as a springboard to find a new standard that would ensure students' First Amendment rights are being protected at the same time schools are able to maintain order and discipline inside their schools. To determine whether schools had authority to punish students for off-campus Internet speech, courts could look to factors such as (1) whether the speech was specifically directed at a fellow student or school employee, (2) the content of the expression (offensive, vulgar, political speech, etc.), (3) how many people had access to the expression, and (4) whether anyone accessed the speech inside the school and how many did so.

There is still the issue of what off-campus Internet expression would actually constitute a substantial disruption of the school, as the circuits deciding the issue do not interpret disruption consistently. The Second Circuit found a disruption when the school's principal received numerous phone calls in response to a student's blog,[155] but the Third Circuit found no disruption when students created degrading and offensive MySpace profiles of teachers because no one could have taken the profiles seriously.[156] There has been very little guidance from the Supreme Court since its decision in *Tinker* as to what constitutes a substantial disruption of the school environment, and the standard should arguably be heightened for speech on the Internet that does not originate inside the school because there would be less of a possibility for infringement of that student's First Amendment rights outside of the school.

D. The Other Tinker *Route*

Finally, there is another possible argument for using the second portion of the *Tinker* standard that has seldom been addressed after the Court's decision. The second prong to the *Tinker* standard states that a student may

155. *See Doninger*, 527 F.3d at 53.
156. *See Snyder*, 650 F.3d at 930.

express opinions on campus as long as he does so "without colliding with the rights of others."[157] While only a few courts have used this prong to determine a student's speech was not entitled to First Amendment protection,[158] this prong could be a workable alternative to the problems presented by the foreseeability and intent aspects of the material and substantial disruption prong. In interpreting the "rights of others" prong, other courts have determined that it means students cannot "interfere with the rights of other students to be secure and let alone."[159] The argument for utilizing the second prong is further strengthened by the Supreme Court's recognition in past decisions that schools can regulate student speech if it is in response to the school's "compelling interest," such as discouraging illegal drug use.[160] In *Morse*, the Court pointed to numerous statistics to indicate that illegal drug use among teenagers had been steadily increasing and was a "serious and palpable" danger for schools and their students.[161] The court relied on these factors in determining that a school can regulate a student's conduct that promote illegal drug use.[162]

As previously mentioned,[163] cyberbullying is plaguing school systems around the country as an ever-increasing problem that has led to tragic consequences. The news is filled with stories like that of 15-year-old Phoebe Prince, a young girl who was relentlessly mocked, teased, and even told to commit suicide via online messages and e-mails from fellow classmates.[164] Prince killed herself as a result of this cyberbullying,[165] and hers is not the only tragic story plaguing the country. Furthermore, cyberbullying can lead to consequences for the school environment. For example, a fight broke out in a Wisconsin middle school among a group of girls as a result of bullying comments made on Facebook.[166] Cyberbullying is continuing to wreak havoc on the school environment and students, but due to the lingering questions regarding off-campus speech protections, administrators are unsure about their role in disciplining cyberbullies.[167]

157. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

158. *See* Philip T.K. Daniel & Scott Greytak, *A Need to Sharpen the First Amendment Contours of Off-Campus Student Speech*, 273 EDUC. L. REP. 21, 44 (2011).

159. *See* West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000).

160. *See* Morse v. Frederick, 551 U.S. 393, 407 (2007).

161. *Id*. at 407–08.

162. *Id*. at 409–10.

163. *See supra* notes 2–5 and accompanying text.

164. Yunji De Nies, Susan Donaldson James & Sarah Netter, *Mean Girls: Cyberbullying Blamed for Teen Suicides*, ABC GOOD MORNING AMERICA (Jan. 28, 2010), http://abcnews.go.com/GMA/Parenting/girls-teen-suicide-calls-attention-cyberbullying/story?id=9685026#.TxDXOq-ZStw.email.

165. *Id*.

166. Jan Hoffman, *Online Bullies Pull Schools into the Fray*, N.Y. TIMES (June 27, 2010), http://www.nytimes.com/2010/06/28/style/28bully.html.

167. *Id*.

Much like the promotion of illegal drug use was a "serious and palpable" concern in *Morse*, cyberbullying is a prevalent danger in the public school setting today that has led to student deaths and other harassing and intimidating speech.

If the Supreme Court relied on *Tinker*'s "rights of others" prong, or even created an exception to *Tinker* using the reasoning from *Morse*, this could help schools and students begin to fight against cyberbullying and create a safer learning environment for students and teachers as well as address some of the jurisdictional and intent issues associated with *Tinker*'s disruption prong. Applying the rights-of-others standard to the facts of *Layshock*, *Snyder*, and *Kowalski* could have resulted in a different outcome for the students. Layshock's fake MySpace profile about his high school principal arguably interfered with the principal's rights, as Layshock characterized the principal as a drunk, a "big steroid freak," a drug user, and a "big whore."[168] J.S.'s fake MySpace profile about her middle school principal called into question the principal's sexual orientation and referred to him as a "sex addict," among other demeaning false characteristics.[169] These characterizations were untrue and could have affected both principals' reputations in the community as effective school leaders. Kowalski created a fake MySpace page that labeled a fellow student as a "whore" and accused the student of having herpes.[170] The Internet speech of these students collided with the rights of their principals and a fellow classmate. Although the profiles were not created inside the schoolhouse door, the effects of their speech were felt within the school community. All three of these situations could be fairly characterized as cyberbullying, and due to the increasing number of student suicides resulting from cyberbullying, schools have a growing need to address these problems by punishing and deterring students from further incidents.

Perhaps the best approach for the Supreme Court in looking at these purely off-campus speech cases would be to fully utilize the two *Tinker* prongs together to ensure the school is able to discipline its students without impinging on their rights. This would require the court to engage in a balancing test and examine (1) whether the student intended the speech to reach inside the schoolhouse gate, (2) the content of the expression, (3) how many people actually accessed the speech online, (4) how many people accessed the speech inside the school, and (5) if the speech collided with the rights of others. By combining the two *Tinker* prongs to create one

168. Layshock *ex rel*. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 208 (3d Cir. 2011) (en banc).

169. J.S. *ex rel*. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920–21 (3d Cir. 2011) (en banc), *cert*. *denied*, 132 S. Ct. 1097 (2012).

170. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 568 (4th Cir. 2011), *cert*. *denied*, 132 S. Ct. 1095 (2012).

balancing test with five factors (possibly more if the Supreme Court determined other factors were relevant), the school would have the authority to punish students for disruptive speech that actually impinged on others' rights, which could be an effective way to regulate the cyberbullying problem. This could potentially remove the temptation to punish students for any speech that happened to have a disruptive effect in the school because schools would also have to prove that the speech interfered with others' fundamental rights.

V. CONCLUSION

Although it is difficult to guess which approach the Supreme Court will take towards off-campus student speech, the three previously mentioned routes could all provide answers to the jurisdictional questions plaguing schools that discipline their students, even if each of the routes leaves some questions unanswered. However, utilizing both *Tinker* prongs to create a factor-based balancing test could be the Supreme Court's best approach. A balancing test that looks to the intent of the student, the effects of the student's speech at school, and the effects of the student's speech on the rights of others could effectively rid the schools of cyberbullying, while still maintaining students' First Amendment rights by requiring intent and interference with the rights of others. Although true threat analysis could have a similar impact on ridding the schoolyard of cyberbullies, there is no definition of a true threat that encompasses both mental or emotional harassment and violence, and it is unclear whether the Supreme Court would be willing to stretch this standard to include the type of conduct at issue in *Layshock*, *Snyder*, and *Kowalski*. Furthermore, due to the differing applications of *Tinker* by lower courts, it is clear that utilizing only the substantial disruption standard as it stands now is an ineffective way to manage students' off-campus Internet speech.

As this Note illustrates, there are numerous inconsistencies among lower courts as to what standard should apply to a student's off-campus Internet speech. Because the number of cases involving the same situations faced in *Doninger*, *Snyder*, *Layshock*, and *D.J.M.* show no sign of decreasing, the Supreme Court must speak on this issue to give courts a workable standard that will effectively balance students' First Amendment rights with schools' duty and mission to educate and protect their students. Other critics have argued that the widespread use of the Internet, social media, and smartphones should not interfere with the First Amendment rights of students just because it is easier for students to reach a wider

school audience from the comfort of their home.[171] However, there is no escaping the harm of student speech on the Internet, such as cyberbullying, and its impact on schools and their mission to educate and protect their students.

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171. *See* Calvert, *supra* note 6, at 252.

* J.D. 2013, University of Alabama School of Law. I would like to thank my family and friends for their unending love and support. Special thanks to my mom, my former teacher, for her educational insight and wisdom.