WHILE STUDENTS ARE SPEAKING, THE SUPREME COURT IS REMAINING SILENT: HOW TO ADDRESS STUDENT ONLINE SPEECH THROUGH THE SUPREME COURT AND LEGISLATIVE ACTION

“We’ve missed an opportunity to really clarify for school districts what their responsibility and authority is.”

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I. INTRODUCTION

Many Americans can relate to this routine: wake up; check email, Facebook, Twitter; reply to emails; update Facebook, Twitter; go to school or work and continue the same process throughout the day. For adults, it is clear that what is written on the Internet – except in limited circumstances – is afforded the full protection of the First Amendment. Now, imagine an American individual who instead of going to work in the morning, attends a public middle school or high school and something he or she posted on Facebook the previous night from his or her home has been brought to the attention of the school principal. The principal knows that if this speech occurred at school and during school hours, the student can be punished for it. However, the principal does not know if a punishment is appropriate in this situation because the offensive language was written on the Internet from a location outside of the school premises. In actuality, no one knows if the student can be punished for the speech, or what standard the speech must be held to when determining if the speech is punishable. In this instance, the school officials ultimately decide to punish the student and the student then sues the school district for violating his First Amendment rights. Neither party is sure of how the case will be decided because lower courts and appellate courts have failed to

1. Francisco Negron, general counsel of the National School Board Association, in response to the Supreme Court’s denial of certiorari for the cases involving student Internet speech. Hardy Lawrence, School Board News Today: High Court declines to hear two Internet cases, NSBA.ORG (Jan. 18, 2012), http://schoolboardnews.nsba.org/category/law/.
come to a consensus and are split on the issue.\textsuperscript{2} More importantly, while this has occurred, the Supreme Court has remained silent.

Arguably, no right is more frequently alleged to have been violated than a person's First Amendment right to freedom of speech and expression.\textsuperscript{3} In almost any aspect of the law, the Internet has created a need to clarify how the current jurisprudence should be applied; a need that has become ever more pressing as the Internet has led to the creation of new jurisprudence in many fields of law. Perhaps most affected is the nexus between the Internet and free speech. The creation of social media websites such as Facebook, Twitter, and MySpace has provided a new avenue for the Court to determine the extent by which speech is protected under the First Amendment. Juxtaposed with the protection of free speech is the authority of a school district to discipline students. The line of separation of schools' authority is blurred by the omnipresence of the Internet in almost every aspect of students's lives. In its existing decisions involving student speech, the Supreme Court has made it clear that if the speech occurred outside of school, the speech would most likely be protected.\textsuperscript{4} However, it is uncertain if the proliferation of the Internet in the life of a student, including in the classroom and the school environment, has an effect on whether a student can be disciplined for off-campus, after hours speech on the Internet.

During the spring and summer of 2011, federal appellate courts decided five cases involving student off-campus Internet speech.\textsuperscript{5} However, the United States Supreme Court has yet to hear a case involving student off-campus, after hours Internet speech. Without the guidance of the Supreme Court, the appellate courts turned to previous cases involving student speech. Currently, there is disunity among the circuits as to what


\textsuperscript{3} U.S. Const. amend I, see supra note 2.

\textsuperscript{4} See infra sec. II(c).

protections student speech is afforded when a student is off-campus. Further, the courts have wrestled with what disciplinary measures are permissible. This Comment proposes to resolve the circuit split by creating a new standard for evaluating Internet speech, which both expands and combines the standards set forth in prior cases involving more traditional forms of student speech. The standard would be used to evaluate both hateful speech, commonly referred to as cyberbullying, as well as lewd speech. This new standard would first require that there be a sufficient nexus between the speech and the school’s legitimate interest. Second, there would be a requirement of reasonable foreseeability that the speech would cause a substantial disruption to the school community. In the event that the Supreme Court continues to remain silent on the issue, a standard should be legislatively created with the guidance of the Department of Education and the policy considerations used in passing cyberbullying legislation.

This Comment will first focus on the background of the First Amendment in connection with the Internet in general and with student speech in general. Next, the five cases decided by the circuit courts spring and summer of 2011 will be discussed and the rationale of the courts’s holdings will be analyzed. The discussion will then turn to what the circuit split really means and the courts are not divulging. Finally, a proposal for a uniformed approach to determine whether off-campus student Internet speech is subject to punishment by school officials will be presented.

II. BACKGROUND

A. The Internet and the First Amendment

Since the beginning of the Internet, the issue of Internet speech and the First Amendment has been a hot topic. The format of the Internet is such that it does not have any geographical limitations. The First Amendment states that Congress “shall make no law . . . abridging the freedom of speech, or of the press.” The Court has applied the First Amendment directly to the type of communication at issue; for regulation of in-person speech, “any content–based restriction must satisfy

7. U.S. Const. amend. 1.
strict scrutiny.\textsuperscript{8} For broadcast medium, the Court requires that the government bear “a lower burden in justifying speech restrictions on the broadcast medium than in justifying speech restrictions on other communications media.”\textsuperscript{9} In restricting speech in broadcast mediums, the government is not subject to strict\textsuperscript{10} or intermediate scrutiny\textsuperscript{11} analysis.\textsuperscript{12} However, for print medium, the Court has afforded full First Amendment protection against restrictions on speech, requiring it to meet high scrutiny.\textsuperscript{13}

As every aspect of our lives seems to be shifting from more tangible communications to virtual and remote communications, the Court has had to keep up with these changes. Traditional laws and jurisprudence regarding speech must be interpreted to address the Internet. The proliferation of the Internet has added more difficulties to the debate over whether hate speech is protected by the First Amendment. The Court’s current status on hate speech protection is illustrated in the holdings of \textit{Beauharnais v. Illinois} and \textit{R.A.V. v. City of St. Paul} – where the Court states that “while offensive or injurious to the individuals it targets, it is nevertheless protected under the First Amendment.”\textsuperscript{14} When Congress “attempted to criminalize the transmission of obscene and indecent material over the Internet in a manner that was easily available to children,”\textsuperscript{15} the Court found “that [the] regulation of indecent speech on the Internet was an unconstitutional violation of the First Amendment.”\textsuperscript{16} However, Breckheimer notes that Internet speech loses its First

9. Id. at 271.
10. To withstand strict scrutiny analysis, the government has the burden of proving that its challenged action is necessary to achieve a compelling state interest and that it is narrowly tailored to achieve the intended result. Adam Winkler, \textit{Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts}, 59 VAND. L. REV. 793, 800 (2006).
11. To withstand intermediate scrutiny analysis, the action “must serve important governmental objectives and must be substantially related to the achievement of those objectives.” Craig v. Boren, 429 U.S. 190 (1976).
13. Id. at 273.
16. Id.
Amendment protections when “joined with conduct that threatens, harasses, or incites illegality.”

While the Internet has made communication much easier and efficient, it has not come without negative consequences. Students have used the Internet as a forum through which to bully classmates or to make lewd comments, including comments about school officials and other students. School officials can discipline bullying that occurs during regular school hours. However, it becomes difficult when the bullying takes place over the Internet away from school and not during school hours. This has come to be known as “cyberbullying”— “acts of children harassing and threatening each other online.” The prevalence of cyberbullying, combined with the occurrence of cyberbullying-victim suicides, has led many states to pass laws against cyberbullying. For example, in 2010, Louisiana passed a law defining cyberbullying as “the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen.” The punishment for cyberbullying in Louisiana is a fine of five hundred dollars, imprisonment for not more than six months, or both. Under cyberbullying laws, the courts, not the school district, punish the offender. An argument can be made that the legislative adoption of cyberbullying laws has created an avenue for the punishment of these offenses, and thus rendering school discipline unnecessary. However, in many cases, the offensive language does not meet the standard of statutory cyberbullying, either by not being mean enough or because the speech is just lewd, and perhaps the courts should not be the first venue to punish this speech. Therefore, the current cyberbullying laws are not a sufficient means to achieving an end to cyberbullying.

So what happens when the Internet speech does not rise to the level of cyberbullying? In the case of students, the Supreme Court has not addressed this issue. However, analyzing the lineage of cases involving traditional student speech and the way

17. Id. at 1508.
19. See infra notes 156-63.
20. LA. REV. STAT. ANN. § 14:40.7 (2012).
21. Id.
the Court has treated Internet speech, a new approach can be created so courts can uniformly determine whether a school district has violated the First Amendment rights of a student by punishing him for his online speech.

B. Supreme Court Decisions on Student Speech – The First Amendment in the Confines of Public Schools

While the Supreme Court has not specifically dealt with a case involving Internet student speech, the Court has decided cases involving more traditional forms of student speech. The law regarding the freedom of speech of students while in a public school is well settled.22

The seminal case involving student speech is Tinker v. Des Moines Independent Community School District.23 Tinker occurred at the height of the Vietnam conflict. Students in Des Moines decided that they would publicize their objection to the Vietnam conflict by wearing black armbands during the holiday season.24 The Des Moines school officials decided that “any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.”25 Three students, including Tinker, wore the armbands to school and were sent home until they returned without them.26

The Court famously held that the First Amendment rights exist for teachers and students and that they do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”27 However, the Court acknowledged that a “problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.”28 In Tinker, “school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.”29 The Court stated that in order for the school to

24. Id. at 504.
25. Id.
26. Id.
27. Id. at 506.
29. Id. at 508.
prohibit particular expression, “it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” The record of the case indicated that the only suggestions of disorder were that a former student of the high school was killed in the Vietnam conflict and some of his friends still attended the school, and that students from other schools planned on wearing the black armbands if these students were successful. The Court determined that the conduct the school sought to prohibit would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” The Court made it clear that “free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact.”

In his concurrence, Justice Stewart reestablished a prior court holding that “[a] State may permissibly determine that, at least in some precisely delineated areas, a child – like someone in a captive audience – is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.” For example, children are not afforded the right to marry or the right to vote – “deprivations that would be constitutionally intolerable for adults.”

In Bethel School District v. Fraser, Fraser gave a speech at a required school assembly that included “an elaborate, graphic, and explicit sexual metaphor.” Fraser was suspended for three days. The Court distinguished this case from Tinker. The Court held that the school district did not violate Fraser’s First Amendment right because, unlike Tinker, the punishment imposed was not related to any political opinion. Rather, this case involved lewd speech. The school had a rule that prohibited obscene language and gestures. In his short speech, Fraser said:

30. Id. at 509.
31. Id.
32. Id.
33. Id. at 513.
37. Id.
38. Id. at 685.
39. Id. at 678.
I know a man who is firm – he’s firm in his pants, he’s firm in his shirt, his character is firm – but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, . . . he drives hard, pushing and pushing until finally – he succeeds. Jeff is a man who will go to the very end – even the climax, for each and every one of you.\textsuperscript{40}

While the court of appeals in this case did not make the distinction between the armbands in \textit{Tinker} and the obscene speech given in front of 600 students, the Supreme Court made it clear that this distinction is essential to determining if the student’s First Amendment rights had been violated.\textsuperscript{41} The Court stated “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”\textsuperscript{42} Further, the Court has previously recognized “an interest in protecting minors from vulgar and offensive spoken language.”\textsuperscript{43} In its holding in \textit{Fraser}, the Court stated that the “undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”\textsuperscript{44} The Court further explained that the rights of students in public school are not always the same as adults in other settings.\textsuperscript{45} It held that the school was not violating the First Amendment rights of Fraser for disciplining him because of his lewd and indecent speech.\textsuperscript{46} The holding in \textit{Fraser} created an exception to \textit{Tinker} in which student in-school speech is not protected by the First Amendment when it is lewd or obscene – a substantial disruption does not have to be caused by the speech.

Most courts have applied \textit{Fraser} to extend beyond the facts of the case to “allow school officials to regulate any student speech that is vulgar, lewd, or plainly offensive.”\textsuperscript{47} These courts do not

\textsuperscript{40.} \textit{Id.} at 687.
\textsuperscript{41.} \textit{Id.} at 680-81.
\textsuperscript{42.} Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).
\textsuperscript{43.} \textit{Id.} at 684.
\textsuperscript{44.} \textit{Id.} at 681.
\textsuperscript{45.} \textit{Id.} at 682.
\textsuperscript{46.} \textit{Id.} at 685.
require that the speech be given in front of a student body or assembly. For example, in *Broussard v. School Board of Norfolk*, a student was punished for wearing a T-shirt to class that read “Drugs Suck” because the school determined that the language on the shirt was offensive. The court found in favor of the school board, ruling that the student’s First Amendment right was not violated when the school forced her to change her shirt.

The Court continued to create exceptions to the *Tinker* standard in *Hazelwood School District v. Kuhlmeier*. In *Kuhlmeier*, the school principal did not allow two articles to be published in the school newspaper – one article about the pregnancy experiences of three students and another article about the effect of divorce on high school students. It was the general practice for all of the potential articles to be submitted to the principal for review. The principal believed that the discussion of sexual activity and birth control was inappropriate for a school newspaper and that it would be unfair to the divorced parents not to be able to consent to the publication of the article. The Supreme Court reversed the appellate court’s holding that the school newspaper was a “public forum” and thus “precluded school officials from censoring its content except when necessary to avoid substantial interference with school work or discipline.” The Court stated that public schools do not possess all of the attributes of streets, parks, and other public forums. The Court distinguished this case from *Tinker*. In *Tinker* the school was attempting to silence student expression that was occurring on school property and this case required schools to tolerate certain student speech. The Court held that the school did not violate the First Amendment rights of the students 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

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49. *Id.* at 1537.
51. *Id.* at 263.
52. *Id.*
53. *Id.*
54. *Id.* at 265.
55. *Id.* at 267.
In a more recent case, *Morse v. Frederick*, the Court held that "schools may take steps to safeguard those entrusted to their care from speech." In *Morse*, students from Juneau-Douglas High School lined the street in anticipation of the Olympic Torch Relay passing through Juneau, Alaska. When the torchbearers and cameras passed the school, some students, including Frederick, lifted a banner that said, "BONG HITS 4 JESUS." Frederick did not comply with the principal's order to take down the banner and was suspended for ten days. The school district, in upholding the suspension, stated that the principal instructed the students to take down the banner because it "appeared to advocate the use of illegal drugs." The appellate court held that the school violated Frederick's First Amendment rights because his banner did not cause a substantial disruption. The Supreme Court reversed this holding. The Court held that Frederick's First Amendment right was not violated because the "particular concern to prevent student drug abuse at issue here, embodied in established school policy, extends well beyond an abstract desire to avoid controversy." The dissent pointed out that "the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students." Again, the Court created another exception to the substantial disruption test in *Tinker*, where a substantial disruption is not required when the speech would require schools to tolerate "student expression that contributes to those dangers."

From this line of cases, there are three limitations to school speech. It is clear that in-school speech can be regulated by school officials if it causes a substantial disruption to the activities of the school, or if the speech contains lewd or offensive language, or if it

57. Id. at 273.
59. Id.
60. Id.
61. Id. at 398.
62. Id.
63. Id. at 399.
64. Morse v. Frederick, 551 U.S. 393, 400 (2007).
65. Id. at 408-09.
66. Id. at 435.
67. Id. at 410.
occurs off-campus at a school sponsored activity. Further, school officials have the authority to regulate speech contained in school publications.

C. Non-Internet Off-Campus Speech

The *Tinker* lineage of cases involved speech that originated in school or at a school sponsored event. Therefore, it is unclear if they directly apply to cases in which the speech occurred outside of school or a school sponsored event. This area of traditional off-campus speech, which is still without a uniform standard, has been complicated by the addition of Internet speech cases. However, courts have attempted to apply the *Tinker* analysis in different ways.

One way that courts have upheld punishments of students for off-campus speech is when the student brings the off-campus speech to campus. In *LaVine v. Blaine School District*, a student was expelled for writing a poem in which he described a school shooting and plans to take his own life.68 The Ninth Circuit Court, using the *Tinker* analysis, upheld the expulsion because the school could reasonably predict a substantial disruption to the school environment.69

Another way courts have upheld punishments of students for off-campus speech is when the student has knowledge that the disruptive speech would be distributed at school. For example, in *Boucher v. School Board of Greenfield*, a punishment was upheld for an article written in an underground newspaper that was distributed at school about how to hack into the school’s computers.70 The Seventh Circuit Court upheld the punishment under the *Tinker* analysis because the school could reasonably believe that the article would cause a substantial disruption.

A third way that courts have upheld punishments for off-campus speech is when it is reasonably foreseeable that the speech would cause a disruption on-campus. This test has not been accepted by many courts. Under this test, a student could be punished even if the speech did not reach campus, but if reasonably foreseeable that if it did reach campus, it would cause a substantial disruption.

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69. *Id.* at 992.
III. THE CURRENT CONTROVERSY – OFF-CAMPUS INTERNET SPEECH

A. Recent Cases

1. Doninger v. Niehoff

Doninger v. Niehoff was decided by the Second Circuit in April, 2011. The controversy in the case arose over an event known as Jamfest at Lewis S. Mills High School. The event was scheduled to take place in the school auditorium, but shortly before the event, school administrators determined that the event could not take place in the auditorium because the teacher who was responsible for the school’s audio and lighting equipment in the auditorium would be unable to attend. The school concluded that the event could take place in the cafeteria on the same day or in the auditorium on another day. Avery Doninger, a junior and student council member, was upset by the announcement and in response used a school computer to send an email from one of the student’s father’s email accounts urging parents and students to “contact [the] central office and ask that we be let [sic] to use our auditorium.” Later, from her home, Doninger posted a message on her public blog stating, “jamfest is cancelled due to douchebags in the front office.” In response, the principal “refused to allow Doninger to run for a senior class officer position.”

In its holding, the circuit court focused on the “qualified immunity” of the school officials in punishing Doninger for her blog post. In order for the official to be protected by “qualified immunity,” the court asked, “whether ‘the facts, viewed in the light most favorable to the plaintiff, show that the official’s conduct violated a constitutional right.” A second inquiry is required to determine “whether the right at issue was clearly

72. Id. at 339.
73. Id.
74. Id. at 339-40.
75. Id. at 340.
76. Id. at 342.
77. Doninger v. Niehoff, 642 F.3d 334, 345 (2d Cir. 2011).
78. Id. (citing Gilles v. Repicky, 511 F.3d 239, 244 (2d Cir. 2007)).
To determine if the right was clearly established, the court "looks to whether (1) it was defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has confirmed the existence of the right, and (3) a reasonable defendant would have understood that his conduct was unlawful." The court concluded that the school officials should be awarded qualified immunity because the First Amendment right allegedly violated in this case was "not clearly established, such that it would have been clear to a reasonable school official that her conduct was unlawful in the situation she confronted."

The Second Circuit made clear that the "Supreme Court has yet to speak on the scope of a school's authority to regulate expression that, like [Doninger's] does not occur on school grounds or at a school-sponsored event." The court further stated that it is "incorrect to urge, as Doninger does, that the Supreme Court precedent necessarily insulates students from discipline for speech-related activity occurring away from school property, no matter its relation to school affairs or its likelihood of having effect – even substantial and disruptive effects – in school." Thus, due to the court affording the school officials qualified immunity, the Second Circuit did "not reach the question whether the school officials violated Doninger's First Amendment rights by preventing her from running for Senior Class Secretary." The court concluded that the law is not sufficiently clear on the question of whether off-campus speech can be subject to school punishment for the principal to know that punishing Doninger would violate her First Amendment rights.

Doninger unsuccessfully argued that a bright-line principle should apply which strictly limits the regulation of off-campus speech to circumstances that, under Tinker, will materially and substantially disrupt the work and discipline of the school. The court contended that Doninger did not supply them with a case that "enunciates her supposedly bright-line principle strictly
limiting the regulation of off-campus speech to *Tinker*-style circumstances or otherwise demonstrating a clearly established rule applicable to the specific circumstances of this case.”

The court further stated that they have previously “specifically noted that the applicability of *Fraser* to plainly offensive off-campus student speech is uncertain, reinforcing the absence of a clearly established right under the circumstances of this case.”

The Supreme Court has denied certiorari.

2. *J.S. v. Blue Mountain School District*

The Third Circuit decided *J.S. v. Blue Mountain School District* in June 2011. *J.S.*, an eighth grade student, created a fake MySpace profile for her principal on her home computer; the profile did not contain the principal’s name, but did have a photograph of the principal from the school website. The record shows that “the profile was so outrageous that no one took its content seriously.”

The profile was originally viewable by anyone; however, the next day, *J.S.* made the profile private. The profile described the principal as a sex addict and pedophile. *J.S.* was suspended for ten days and was prohibited from attending school dances.

A divided court determined that *Tinker* applied to the speech in *J.S.* In order for the school to prohibit a student’s expression, the school must show that “the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” Here, the court concluded that there was no substantial disruption in the school because of *J.S.*’s speech. The court further disagreed with the school district’s argument that because of the speech, a “forecast of substantial disruption was reasonable.” The record

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87. Id. at 347-48.
88. Id. at 348.
90. Id. at 920.
91. Id. at 921.
92. Id.
93. Id.
94. Id. at 922.
97. *J.S.*, 650 F.3d at 928.
98. Id. at 928.
of the case indicates that the speech caused only “general rumbles, a few minutes of talking in class, and some officials rearranging their schedules to assist [the principal] in dealing with the profile.”

The record also indicates that J.S. did not intend for the speech to be targeted at the school – the profile was private. The court held that under Tinker, the school violated the First Amendment when it suspended J.S. for the profile she created. Furthermore, the court refused to extend the Fraser standard to speech made off-campus, during non-school hours. In doing so, the court explained that expanding the Fraser standard to apply to this punishment “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.” The Supreme Court has denied certiorari.


The Third Circuit decided Layshock v. Hermitage School District in June 2011. Justin Layshock, a high school senior, used his grandmother’s home computer to create a fake MySpace profile of his principal. Layshock used a photograph of the principal from the school’s website for the profile and submitted false answers to survey questions located thereon. Layshock allowed other students to view the profile by adding them as friends. Many of the students accessed the profile from the school computers. When the principal became aware of the profile, he wanted to press charges because he found the profile “‘degrading,’ ‘demeaning,’ ‘demoralizing,’ and ‘shocking.’” After a hearing conducted by the school district, Layshock was suspended from school for ten days, placed in the school’s Alternative Education Program, and was banned from all

99. Id. at 929.
100. Id. at 930-31.
101. Id. at 931.
102. Id. at 932.
103. Id. at 933.
105. Id. at 207-08.
106. Id. at 208.
107. Id.
108. Id. at 209.
109. Id.
extracurricular activities, as well as his graduation ceremony.\textsuperscript{110}

In \textit{Layshock}, the court again determined that \textit{Tinker} is the standard by which this speech will be judged.\textsuperscript{111} The court rejected the school district’s argument that the speech could be considered on-campus speech because it “was aimed at the School District community and the Principal and was accessed on campus by [Layshock] and it was reasonably foreseeable that the profile would come to the attention of the School District and the Principal.”\textsuperscript{112} In his concurrence, Judge Jordan stated:

\begin{quote}
[f]or better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communication via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.\textsuperscript{113}
\end{quote}

The Supreme Court has denied certiorari.

4. \textit{Kowalski v. Berkeley County Schools}

The Fourth Circuit decided \textit{Kowalski v. Berkeley County Schools} in July 2011.\textsuperscript{114} Kara Kowalski, a high school senior, created a MySpace group with the name “S.A.S.H.”\textsuperscript{115} which she claimed stood for “Students Against Slut Herpes.”\textsuperscript{116} Another classmate stated that the group specifically targeted one classmate and the group name stood for “Students Against Shay’s Herpes.”\textsuperscript{117} Other students were able to post comments and photographs on the webpage.\textsuperscript{118} Because the school administrators concluded that Kowalski had created a “hate website,”\textsuperscript{119} they suspended her for ten days and issued her a ninety day social suspension.\textsuperscript{120}

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\textsuperscript{110} Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 209-10 (3d Cir. 2011).
\textsuperscript{111} Id. at 214.
\textsuperscript{112} Id. at 216.
\textsuperscript{113} Id. at 220-21.
\textsuperscript{114} Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011).
\textsuperscript{115} Id. at 567.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 568.
\textsuperscript{120} Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 569 (4th Cir. 2011).
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The Fourth Circuit focused on the question of “whether Kowalski’s activity fell within the outer boundaries of the high school’s legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students.” The court stated:

While Kowalski does not seriously dispute the harassing character of the speech on the “S.A.S.H.” webpage, she argues mainly that her conduct took place at home after school and that the forum she created was therefore subject to the full protection of the First Amendment. This argument, however, raises the metaphysical question of where her speech occurred when she used the Internet as a medium. Kowalski indeed pushed her computer’s keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment.

Had Kowalski created the group on a school computer during school hours, there would be no question as to the authority of school to discipline her. The court held that under Tinker the “School District was authorized . . . to discipline Kowalski, regardless of where her speech originated, because the speech was materially and substantially disruptive in that it interfered with the schools's work and collided with the rights of other students to be secure and to be let alone.” The court held that Kowalski’s First Amendment rights were not violated. The Supreme Court denied certiorari.

5. D.J.M. v. Hannibal Public School District #60

The Eighth Circuit decided D.J.M v. Hannibal Public School District #60 in August 2011. Using his home computer, D.J.M. sent instant messages to a classmate in which he stated his
intent to acquire a gun and shoot some students at school.\textsuperscript{127} In the instant messages, D.J.M. named specific people that he would “have to get rid of.”\textsuperscript{128} The principal and assistant principal suspended him for ten days, and shortly thereafter, the school district extended the suspension for the remainder of the school year.\textsuperscript{129}

Because this case involved threats of violence, the court used the “true threats” analysis to determine if the First Amendment protected this speech and whether the school district had the authority to discipline the student for his off-campus speech.\textsuperscript{130} A “true threat is a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another.”\textsuperscript{131} The First Amendment does not protect true threats.\textsuperscript{132}

The court also used the substantial disruption test from \textit{Tinker}.\textsuperscript{133} Under the substantial disruption test, the court held that the school did not violate D.J.M.’s First Amendment right by suspending him.\textsuperscript{134} The substantial disruption that occurred in this case, as argued by the school district, was parents and students notifying school authorities “expressing concerns about student safety and asking what measures the school was taking to protect them.”\textsuperscript{135} The court determined that “it was reasonably foreseeable that D.J.M.’s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment.”\textsuperscript{136} While this case is distinguished from the others because it involved actual threats of violence toward other students, the facts of the case are important in the analysis of the First Amendment issue. This case was not appealed to the Supreme Court.

\textbf{B. Circuit Split}

\begin{itemize}
\item \textsuperscript{127} \textit{Id.} at 758.
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.} at 759.
\item \textsuperscript{130} \textit{Id.} at 761-62.
\item \textsuperscript{131} Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002).
\item \textsuperscript{132} \textit{D.J.M.}, 647 F.3d at 764.
\item \textsuperscript{133} \textit{Id.} at 766.
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} \textit{Id.}
\end{itemize}
No circuit court has articulated a legal standard to use in judging discipline of off-campus Internet speech. Arguably, the Second Circuit provided the clearest rule by finding that school officials may be awarded qualified immunity because it is unclear whether the right to free speech has been clearly established. Following the Second Circuit’s ruling, it would seem imperative for the Supreme Court to grant certiorari to determine the status of this right in a social climate where the Internet is becoming the favored forum for communication among people, especially students. However, the Supreme Court did not take this opportunity to define the right.

The Third, Fourth, and Eighth Circuits that have decided the previously discussed cases have applied the Tinker standard and its progeny. However, these cases do not provide a clear rule for the fact patterns presented. Thus, the courts have not applied the standard uniformly. Furthermore, relying on a Tinker analysis as the Third, Fourth, and Eighth Circuits have done requires a determination of whether the standard for the behavior was “materially and substantially disruptive” to the school environment is the same for on-campus and off-campus speech. Again, the Supreme Court did not take the opportunity to clarify this standard. The Supreme Court may be satisfied with the application of the existing standards or the Court is waiting for the issue to be fully developed and disputed at the lower level.

C. Potential Solutions for Supreme Court

Looking at the history of the Court’s decisions regarding students’s freedom of speech, the Supreme Court has standards available for consideration.

1. Location Only Standard

The Court may apply a standard by which the location of the origin of the speech is the basis for whether the school can discipline the student. This location standard may be favored by people who argue that the school has no authority to discipline students for behavior that occurs at home or away from school. Based on the treatment of traditional speech, the Court will likely not use a location only standard for assessing student speech and it seems clear that the Court should refrain from a location only approach to determine if a student’s off-campus Internet speech is

137. Doninger v. Niehoff, 642 F.3d 334, 345 (2d Cir. 2011).
subject to punishment or is afforded the full protection of the First Amendment. Under a location only approach, school officials would not likely be able to discipline a student for Internet speech created off-campus. The technology and function of the Internet makes this approach difficult for school officials to ever be able to punish students in this context. Because students can create the speech anywhere and it can be accessed from nearly anywhere, with few geographical limitations, Internet off-campus speech would rarely be able to be disciplined by school officials. Proponents to utilizing a location only approach to discipline student speech argue that student off-campus speech, whether on the Internet or not, should not be subject to discipline by school officials because these officials should not have jurisdiction over a student’s off-campus conduct.138

2. Strict Tinker Analysis - Reasonably Foreseeable to Cause a Material and Substantial Disruption to the School

Strictly using Tinker as the standard would not completely resolve the issue of what off-campus Internet speech is protected by the First Amendment. Under Tinker, the only speech that would not be protected is speech that causes a material and substantial disruption to the school environment. What if the speech is offensive and makes its way to school officials without causing a material or substantial disruption? This student would likely not be able to be disciplined for this speech. What if the speech causes a material or substantial disruption, but is political in nature? The Smith concurrence in J.S. exposes a potential problem with strictly applying Tinker to Internet off-campus speech in regards to this question:

Suppose a high school student, while at home after school hours, were to write a blog entry defending gay marriage. Suppose further that several of the student’s classmates got wind of the entry, took issue with it, and caused a significant disturbance at school. While the school could clearly punish the students who acted disruptively, if Tinker were held to apply to off-campus speech, the school could also punish the student whose blog entry brought about the disruption. That cannot be, nor is it, the law.139

139. J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (Smith, J.,
First Amendment experts argue that the *Tinker* standard does not apply to off-campus speech because “*Tinker* is about speech to a captive audience of school listeners who cannot leave.” On the other hand, an audience to Internet speech is not compelled to remain subject to the speech.

Applying *Tinker* to online student speech does not seem to conform to the rationale of the *Tinker* court. The Court was concerned that censoring student speech in the classroom or school setting would prohibit the exchange of ideas in the school environment and would allow school officials to punish students for views that were unpopular or against the viewpoint of the school officials past the “schoolhouse gate.” In cases where the speech is not about the school community or a member of the school community, students should be free to express their ideas and viewpoints outside of school without interference from school officials.

### 3. Nexus Between the Speech and School Community Plus a Substantial Disruption

The standard the Court should adopt is a two-prong analysis. First, the Court should find that there is a sufficient nexus between the speech and the school community, i.e. the speech must be about a student or school official such that the school has a legitimate interest in the speech. The second prong is the *Tinker* standard that it must be reasonably foreseeable that the speech will cause a material and substantial disruption to the school environment. Requiring a nexus between the school and the speech will prohibit schools from disciplining speech that the school solely finds offensive. This will ensure that there is a line drawn at a point where school officials cannot discipline students for off-campus Internet speech that does not concern a student or the school community. However, under this analysis, the First Amendment would protect speech containing political views that school officials may not agree with or are unpopular.

#### a. First Prong: Nexus Between Speech and the

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School

A nexus between the speech and the school would not be an entirely new standard that the Court would adopt in the area of free speech. This nexus must not just be a connection between the speech and the school in which case the school may have overly broad power to discipline the student. Rather, the speech must have a connection to a legitimate school interest. In reviewing how the Court has treated the First Amendment rights of teachers outside the classroom, the Court may apply a similar standard to online student speech. In the landmark case of the First Amendment rights of teachers outside of school, *Pickering v. Board of Education*, the Court articulated a balancing test to apply to teacher speech. The Court stated, “[t]he problem in any case is to arrive at a balance between the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” In *Pickering*, a high school teacher was fired for sending a letter to the local newspaper criticizing the school board’s handling of bond issue proposals. Applying the balancing test, the Court found the school board violated the First Amendment rights of the teacher because the statements were not detrimental to the school’s interest just because they differed in opinion. The *Pickering* Court provided examples of types of speech that would create a legitimate concern for employers, which should be balanced against the First Amendment rights of the teacher, including:

- the need for discipline and harmony in the workplace,
- freedom to discharge an employee whose speech has disrupted the efficient operation of the employer and impeded the proper performance of the employee’s duties,
- freedom to discharge an employee whose speech is so lacking in foundation that it calls the speaker’s competence into question, and
- protection of close working relationships.

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143. See *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001); *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821 (7th Cir. 1998).
145. *Id.* at 568.
146. *Id.* at 566.
147. *Id.* at 569-70.
148. Donna Prokop, *Controversial Teacher Speech: Striking a Balance Between*
This balancing test for teacher speech is used when the speech is conducted outside of the classroom and fairs better under the scrutiny of Internet cases than the student speech standards because of what level the speech must reach in order to be punishable. Here, modifying this standard slightly for student speech, the Court will be able to articulate a standard not only for Internet speech, but also for traditional off-campus speech. On one side of the *Pickering* balancing test is the interest of the teacher as a citizen.149 This would be replaced with the interest of the student as a citizen. The interest of the student as a citizen would include the same First Amendment rights of adults. Whereas, on the other side of the balancing test, lies the interest of the State in promoting the efficiency of the public services it provides.150 Here, the State, through the school, has an interest in providing students with a safe and supportive environment to promote learning.

Prior cases have articulated schools’s interests to include safeguarding those entrusted to their care151 and “maintaining order in the school and protecting the well-being and educational rights of its students.”152 Therefore, it is against the State’s interest to have a student bully other students or defame or humiliate teachers and school officials, as a student would likely not have a legitimate interest in this type of speech. This balancing test does not take into account the location that the speech originated so that this test can be applied to speech that originated on the Internet. Nor does the balancing test consider if the speech made its way onto the school grounds. Therefore, the requirement by some courts that the speech physically make its way into the school is not taken into account in this prong. It may, however, be a useful element in determining whether a material or substantial disruption has occurred.

**b. Second Prong: *Tinker* Analysis**

After determining that the school’s interests are outweighed by the student’s interest, the speech should then be applied to the

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150. Id.


Tinker standard of being reasonably foreseeable to cause a substantial or material disruption to the school community. In light of the violence that has taken place in schools in the past decades, speech that promotes bullying or disrespect to teachers and officials can be reasonably foreseen to cause a substantial or material disruption to the school community. While every act of bullying, whether on the Internet or not, will not lead to a student seeking retaliation, it is the school’s responsibility to consider all possibilities that the speech may have on the school community. In many cases, a lewd comment that passes the balancing test will be reasonably foreseeable to cause a substantial disruption to the school.

Teachers and school officials should be given the authority to determine whether a material or substantial disruption is reasonably foreseeable. In Morse v. Frederick, Justice Thomas stated in his concurrence that courts have frequently deferred to teachers and school officials “to punish speech that the school or teacher thought was contrary to the interests of the school and its educational goals.”153 In deferring to school officials, a court must not make an assumption that school officials will overreact to speech and exaggerate the disruption it may cause.154 Due to training and experience in controlling the classroom setting, the expertise arguably lies with the teachers and school officials in determining what sort of disruption is severe enough to be material or substantial to the mission of the school. Some may argue that anything that distracts from educating the students is a material or substantial disruption.

The Court should adopt this standard because it provides a workable test to determine if school officials can discipline a student’s off-campus speech. This test is an extrapolation of what courts have articulated in response to student First Amendment violations.155 For example, the Second Circuit in Doninger upheld the punishment because it gave the school officials qualified immunity. Using the balancing test, the result would likely be the same, except that the Court would be able to analyze the speech.

153. Morse, 551 U.S. at 414 (Thomas, J., concurring).
D. Looking Beyond the Court - Potential Legislative Solutions

As the Supreme Court has not taken on this issue, it has left open the argument that perhaps the Court is not the best venue to determine a solution to student off-campus Internet speech. As discussed above, many states have already passed laws criminalizing cyberbullying. These cyberbullying laws do not include a remedy for school districts to handle the issue and many require that the cyberbullying occur on someone under the age of eighteen. Under many cyberbullying laws, students would not be punished for speech aimed at teachers and administrators.

Other states, including, Texas, Mississippi, Hawaii, New York, California, and Massachusetts have made it a criminal act to create a social media profile in someone else’s

156. TEX. PENAL CODE ANN. § 33.07(a) (West 2011) (“A person commits an offense if the person, without obtaining the other person's consent and with the intent to harm, defraud, intimidate, or threaten any person, uses the name or persona of another person to: (1) create a web page on a commercial social networking site or other Internet website; or (2) post or send one or more messages on or through a commercial social networking site or other Internet website, other than on or through an electronic mail program or message board program.”).

157. MISS. CODE ANN. § 97-45-33(1) (West 2011) (“Any person who knowingly and without consent impersonates another actual person through or on an Internet website or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person is guilty of a misdemeanor.”).

158. HAW. REV. STAT. § 711-1106.6(1) (West 2012) (“A person commits the offense of harassment by impersonation if that person poses as another person, without the express authorization of that person, and makes or causes to be made, either directly or indirectly, a transmission of any personal information of the person to another by any oral statement, or any statement conveyed by any electronic means, with the intent to harass, annoy, or alarm any person.”).

159. N.Y. PENAL LAW § 190.25 (McKinney 2008) (“A person is guilty of criminal impersonation in the second degree when he: . . . (4) impersonates another by communication by internet website or electronic means with the intent to obtain a benefit or injure or defraud another.”).

160. CAL. PENAL CODE § 528.5 (West 2011) (“(a) . . . any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for the purposes of harming, intimidating, threatening, or defrauding another person is guilty of a public offense punishable pursuant to subdivision (d). (c) For purposes of this section, ‘electronic means’ shall include opening an e-mail account or an account or profile on a social networking Internet Web site in another person’s name.”).

161. MASS. GEN. LAWS ANN ch. 92, § 71, § 370(a) (West 2010) (“Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person.”).
name. Under the Texas law, for example, J.S. and Layshock could be charged criminally with creating fake profiles of their principals even though it is unclear if their schools can punish them. In Texas, creating an online profile under someone else’s identity is a third degree felony. The punishment for a third degree felony in Texas is imprisonment of not more than ten years or less than two years and may be punishable by a fine not to exceed $10,000. However, the Third Circuit has held that these students could not be disciplined by the school district. The legislation allows students to be punished in a criminal court for the exact same out of school, after-hours speech at issue in the previously discussed cases. Likewise, the lower courts are protecting the victims of bullying by finding that schools and their administrators have not violated bullying students’s First Amendment rights. The better approach would be for states to transfer this issue to the schools.

Educators and parents would likely agree that there must be something between no punishment and labeling the student as a criminal. The United States Department of Education should propose model legislation that allows school districts to discipline students for off-campus Internet speech. This model should be adopted by the states to implement. The Anti-Defamation League has created model legislation in which it suggests that:

This policy will apply to an electronic communication whether or not this conduct originated on school property or with school equipment so long as: a reasonable person should know, under the circumstances, that the act will have the effect of harming a student or damaging the student’s property, or placing a student in reasonable fear of harm to his or her person or damage to his or her property; and has the effect of insulting or demeaning any student or group of students in such a way as to cause substantial disruption in, or substantial interference with, the orderly operation of the school.

162. TEX. PENAL CODE ANN. § 33.07(c) (West 2011).
163. TEX. PENAL CODE ANN. § 12.34 (West 2009).
166. Cyberbullying Prevention Law – An ADL Model Statute, ANTI-DEFAMATION
Legislation that clearly gives the power to the school districts to punish students for speech that occurs on the Internet will be more useful than a law that only allows the court to punish cyberbullying. Statistics from ABC News reports suggests that nearly 160,000 students stay home from school each day because of a fear of being bullied. It can be assumed that a large amount of this bullying is occurring on the Internet. Further, these students are not likely to report this activity to police officers because they possibly believe that it would only make the bullying worse. Teachers who see and interact with these students everyday are likely already aware of bullying that is taking place, even if it is occurring outside of school. Students are also more likely to confide in a teacher or school official, an adult they know and trust, to report the activities. Schools are better equipped than the courts to punish cyberbullies, attempt to change future behavior, and provide assistance to the victims. Furthermore, the legislative solution needs to include consequences for school districts that choose not to confront the cyberbullying or lewd Internet speech. If the legislature gives this authority to the school districts, it needs to be assured that the school districts will carry out this responsibility even in cases where the speech is within the views of the majority. A criminal legal remedy should remain in place for the minority of students who are not persuaded by school discipline, but it should not be the first avenue of punishment.

IV. CONCLUSION

The Supreme Court declined to articulate the legal standard by which off-campus Internet speech by students should be judged. Therefore, courts are left with little guidance in their determination of whether a student’s First Amendment rights have been violated. While all of Internet speech does not involve one student bullying another student, the detrimental effects of cyberbullying only add to the need to determine how school districts can discipline Internet speech before a tragedy happens. Although laws exist in some states making it a crime to bully someone through the Internet or to create a fake profile on a social media website, many would agree that labeling these 167. Bullying and Suicide, BULLYING STATISTICS, http://www.bullyingstatistics.org/content/bullying-and-suicide.html.
students as criminals is an extreme way to handle these situations. Arguably, the school has the responsibility and the means to punish and deter this behavior before a student is labeled a criminal. The Court must guide school districts in determining if a punishment is appropriate. The standard the Court should rely on is a two-prong analysis requiring, first, the interest of the school to outweigh the interest of the student and second, a reasonably foreseeable material or substantial disruption to the school environment. If the Court wishes to remain silent on this issue or even if it is decided in the future, legislative or policy considerations should be put in place to make it clear when the First Amendment does not protect off-campus Internet speech. Until the Supreme Court undertakes this issue, the detrimental effects of cyberbullying, and the confusion as to how to handle these issues will be present. In addition, until the Supreme Court decides on this issue, lower courts will continue to struggle to find a clear path in determining if a violation has occurred.