*TINKER*ING WITH THE PARAMETERS OF STUDENT FREE SPEECH RIGHTS FOR ONLINE EXPRESSION: WHEN SOCIAL NETWORKING SITES KNOCK ON THE SCHOOLHOUSE GATE

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I. INTRODUCTION

"Hey! Teacher! Leave those kids alone!"[1]

Suppose Tommy, a ninth-grade student, and a group of his friends are playing video games in Tommy's living room after school. Tommy is upset about being scolded in science class today, and he begins making offensive comments about his teacher, Mr. Doe. He mockingly refers to Mr. Doe as "Mr. Hoe," and makes vulgar jokes about "Mr. Hoe" fornicating with animals. Although Tommy's speech is offensive and not the type of language society would condone, it would offend our constitutional expectations to suggest that the school has the authority to regulate Tommy's expression while he is sitting in his living room outside of school hours.[2] Although this scenario is straightforward, if Tommy made the same disparaging comments on a website, the permissibility of school intervention becomes a more convoluted inquiry because the traditional free-speech legal paradigm does not neatly fit in the online context.

The Supreme Court has not yet addressed the scope of students' free-speech rights in the Internet context, but several circuit courts of appeals have grappled with the issue.[3] The Court has received several

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[1] PINK FLOYD, *Another Brick in the Wall (Part II), on* THE WALL (Columbia 1980).

[2] Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 216 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (U.S. 2012). ("[W]e do not think the First Amendment can tolerate the School District stretching its authority into Justin's grandmother's home . . . .").

[3] *See, e.g.*, J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct 1097 (2012); Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct 1095 (2012).

petitions for certiorari in online speech cases, but thus far the Justices have denied certiorari.[4] Because of the lack of guidance, lower courts have experienced difficulty applying the traditional student-speech jurisprudence to the online context where the expression occurs outside of school.[5]

Currently, four Supreme Court decisions govern the application of the First Amendment to the educational environment: *Tinker v. Des Moines Independent Community School District*,[6] *Bethel School District v. Fraser*,[7] *Hazelwood School District v. Kuhlmeier*,[8] and *Morse v. Frederick*.[9] Notably, all four cases were factually rooted in speech that occurred during school hours and/or on school property.[10] Online speech, which occurs in the "borderless medium" of the Internet, does not fit neatly into the on-campus/off-campus speech dichotomy of First Amendment precedent.[11] Because the inherent characteristics of the Internet render a determination of the precise location of online expression nearly impossible, this Comment argues that cyberspace is best viewed as a unique jurisdictional "location" for purposes of First Amendment analysis, and therefore online speech should not be subject to the traditional "on school grounds" legal framework. If the Supreme Court elects to hear one of the online student-speech cases in the future, the Court will have the opportunity to introduce some much-needed clarity to this area of jurisprudence by holding that schools may only regulate speech related to educators in cases where the speech causes a substantial disruption of school affairs.

The United States Court of Appeals for the Third Circuit addressed the scope of students' First Amendment protection in the Internet age in *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District*.[12] Factually, *Layshock* and *Blue Mountain* are

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[4] *See, e.g.*, cases cited *supra* note 3.

[5] Carolyn Joyce Mattus, Legal Update: *Is it Really My Space? Public Schools and Student Speech on the Internet After* Layshock v. Hermitage *and* Snyder v. Blue Mountain School District, 16 B.U. J. SCI. & TECH. L. 318, 332 (2010).

[6] 393 U.S. 503 (1969).

[7] 478 U.S. 675 (1986).

[8] 484 U.S. 260 (1988).

[9] 551 U.S. 393 (2007).

[10] *Tinker*, 393 U.S. 503; *Fraser*, 478 U.S. 675; *Kuhlmeier*, 484 U.S. 260; *Morse*, 551 U.S. 393.

[11] James M. Patrick, Comment, *The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against the School's Compelling Interests*, 79 U. CIN. L. REV. 855, 886 (2010) (internal quotation marks omitted).

[12] Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011); J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011).

substantially similar.[13] In both cases, a student created a false MySpace profile for a school principal, wrote unflattering and offensive descriptions of the principal on the profile, and was subsequently suspended for the conduct.[14] Despite the factual similarities, two Third Circuit panels, comprised of different judges, reached divergent legal conclusions, creating some intra-circuit friction.[15] The Third Circuit subsequently vacated both judgments and reheard the cases en banc.[16] The en banc decisions, issued on the same day, held that the two schools violated the students' First Amendment rights by imposing punishment for the online expression because the school districts could not show that the speech created a foreseeable risk of a substantial disruption in the school.[17]

Layshock and *Blue Mountain* provide interesting examples of the complex constitutional issues that can arise out of a childish prank expressing frustrations towards a teacher. In the online context, lower courts have struggled to harmonize the idea that students do not lose their First Amendment freedoms at the schoolhouse gate[18] with the Supreme Court's recognition that students' constitutional rights are not always analogous to the rights of adults.[19] The scope of school officials' authority to regulate students' Internet-based speech is an issue that is ripe for Supreme Court resolution.[20] Given the prevalence of Internet usage by today's schoolchildren,[21] guidance from the Supreme Court on the parameters of student speech is

[13] *See Layshock*, 650 F.3d 205; *Blue Mountain Sch. Dist.*, 650 F.3d 915.

[14] *Layshock*, 650 F.3d at 207–11; *Blue Mountain Sch. Dist.*, 650 F.3d at 920.

[15] Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2010), *vacated*, No. 07-4465, 2011 U.S. App. LEXIS 11994 (3d Cir. June 13, 2011); J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2010), *vacated*, No. 08-4138, 2011 U.S. App. LEXIS 11947 (3d. Cir. June 13, 2011); *see* Joseph Tomain, *Cyberspace Is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 100 (2010); Katie Maloney, *Conflicting Online Speech Rulings Vacated, Will be Heard by Full Third Circuit*, STUDENT PRESS L. CTR. (Apr. 13, 2010), https://www.splc.org/news/newsflash.asp?id=2066.

[16] *Layshock*, 650 F.3d 205; *Blue Mountain Sch. Dist.*, 650 F.3d 915.

[17] *Layshock*, 650 F.3d 205; *Blue Mountain Sch. Dist.*, 650 F.3d 915.

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

[19] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 682 (1986).

[20] Tomain, *supra* note 15, at 102.

[21] A 2010 report concluded that ninety-three percent of the school-aged population between the ages of twelve and seventeen use the Internet. Furthermore, seventy-three percent of "wired" teens use social networking websites. AMANDA LENHART ET AL., PEW RESEARCH CTR., SOCIAL MEDIA AND YOUNG ADULTS (2010), *available at* http://www.pewinternet.org/Reports/2010/Social-Media-and-Young-Adults/Summary-of-Findings.aspx.

desperately needed. Free speech in schools "impact[s] millions of students and thousands of school administrators."[22] Both students and administrators would benefit from the establishment of a standard governing online speech.[23] Presently, school officials are left guessing at when they do and do not have the authority to punish student speech,[24] and defending subsequent litigation is a waste of school resources and taxpayer dollars. From the students' perspective, the lack of clarity can result in a chilling effect where students are nervous to voice opinions on important issues due to fear of being censured for "inappropriate" language.[25]

Part II of this Comment details the Supreme Court jurisprudence governing the First Amendment's application to student speech. Part III of this Comment provides an overview of the Third Circuit cases illustrating the issues that arise when schools are confronted with a student's off-campus Internet speech. Part IV emphasizes the need for Supreme Court clarification of the applicable standard that courts should apply when confronted with offensive online student speech. Part IV continues with the argument that (1) cyberspace should be analyzed as a unique and independent location for First Amendment analysis, and (2) the *Tinker* standard requiring a showing of a substantial disruption within the school should be the governing inquiry in all student online speech cases where the subject of the speech is a school employee. Further, Part IV argues that the First Amendment should not preclude schools from imposing punishment in situations where the online speech is targeting a fellow student or where the speech poses a threat of violence within the school. Part V concludes, reiterating the ambiguity in the current law and proposing a solution to the troublesome problem.

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[22] David Hudson, *High Court Asked to Hear Student Online Speech Case*, FIRST AMENDMENT CTR. (July 29, 2011), http://www.firstamendmentcenter.org/high-court-asked-to-hear-student-online-speech-case (internal citation and quotation marks omitted).

[23] *See* Maloney, *supra* note 15.

[24] *See* Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1187 (2009) (arguing that when principals are faced with a decision between respecting a student's free speech rights and addressing a possible threat, it is a "no brainer" from the principal's perspective to restrict the speech).

[25] Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 407 (2011); Wendy Davis, *No More Pencils, No More Facebook*, THE NATIONAL PULSE (July 1, 2009, 9:30 PM), http://www.abajournal.com/magazine/article/no_more_pencils_no_more_facebooks.

II. FIRST AMENDMENT JURISPRUDENCE WITHIN THE "SCHOOLHOUSE GATES"

Four Supreme Court decisions establish the legal underpinnings of students' free-speech rights, all of which specifically address speech that occurred on the school property and/or during school hours.[26] The first case, *Tinker v. Des Moines*, is the seminal case governing First Amendment analysis in the public school context.[27] *Tinker* is generally recognized as the "high water mark" for students' freedom of expression; it is the most protective of students' rights[28] as it requires a showing that the speech posed a foreseeable risk of a substantial disruption within the school.[29] After that decision, the Supreme Court carved out three exceptions to the free-speech paradigm.[30] These exceptions, while limiting *Tinker*'s bite, did not overturn *Tinker*, which remains the starting point for all speech analysis inside the schoolhouse gate.[31] In the online context, lower courts have relied on these four cases as the crux of their First Amendment analysis, even though the original holdings were limited to traditional speech that was definitively on-campus.[32]

A. Tinker v. Des Moines

In *Tinker*, three students were suspended from school after they refused to remove the black armbands they wore as an expression of opposition to the military conflict in Vietnam.[33] The legal analysis began with the since oft-quoted maxim that, despite the unique characteristics of the education environment, neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[34] The Court emphasized the limitations on the authority of school officials to censor student opinions, especially in cases where the prohibition is based on a desire to suppress a particular viewpoint.[35] *Tinker* established the

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[26] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).

[27] *See* 393 U.S. 503; Tomain, *supra* note 15, at 109.

[28] Michael W. Macleod-Ball, *Youth and Social Media: Student Speech Online: Too Young to Exercise the Right of Free Speech?*, 7 J.L. & POL'Y FOR INFO. SOC'Y 101, 110 (2011).

[29] *Tinker*, 393 U.S. 503.

[30] *See Fraser*, 478 U.S. 675; *Kuhlmeier*, 484 U.S. 260; *Morse*, 551 U.S. 393.

[31] *See, e.g.*, Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011).

[32] *Id.*

[33] *Tinker*, 393 U.S. at 504.

[34] *Id.* at 506.

[35] *Id.* at 511. The court emphasized that the prohibition was clearly content-

standard that the First Amendment protects student speech unless school authorities reasonably believe the speech will cause a "substantial disruption of or material interference with school activities."[36] Therefore, unless the student "materially disrupts classwork, or . . . [creates] substantial disorder or invasion of the rights of others,"[37] the school cannot impose restrictions on students' freedom of expression.[38] Although *Tinker* involved a political message, the majority did not base its decision on the fact the expression was "high-value" speech.[39]

In defining what constitutes a substantial disruption, the Court opined that "mere desire to avoid the discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint" is an insufficient justification for infringing upon a student's First Amendment rights.[40] The politically charged context in which T*inker* was decided is extremely important for lower courts to keep in mind when applying the standard, given the divisive nature of the Vietnam War and the realistic potential for violent conflict over the war.[41]

Tinker's facts offer some guidance in discerning the parameters of the substantial disruption standard. The record in *Tinker* notes that the armbands caused some discussion outside of the classrooms,[42] that a dispute over the armbands interrupted a math lesson, and that some students made disparaging comments towards one of the armband-wearers.[43] The majority concluded that these incidents did not reach the level of a substantial disruption,[44] and thus set the standard for circumstances under which the school may punish student speech within the bounds of the Constitution.[45]

B. Bethel School District v. Fraser

The Supreme Court next addressed the parameters of free speech within public schools in *Bethel*, upholding the school district's

based, and thus was subject to a higher standard of scrutiny. *Id.*

[36] *Id.* at 514.

[37] *Id.* at 513–14.

[38] *Id.* at 513.

[39] *See generally id.*

[40] *Tinker*, 393 U.S. at 509.

[41] TOM WELLS, THE WAR WITHIN: AMERICA'S BATTLE OVER VIETNAM 297 (2005) ("America's high schools were the scenes of twenty-seven bombings and attempted bombings.").

[42] 393 U.S. at 514.

[43] *Id.* at 518–19 (Black, J., dissenting).

[44] *Id.* at 514.

[45] *See, e.g.*, Bethel Sch. District v. Fraser, 478 U.S. 675 (1986).

authority to suspend a high-school student after the student gave a sexually explicit speech during a school assembly.[46] The student used extended and elaborate sexual metaphors to reference a friend who was running for student government.[47] During the speech, students hooted and acted out the sexual gestures referenced in the speech.[48] In upholding the school's authority to suspend the student, the Court held that the First Amendment is not a barrier when school officials determine that allowing the vulgar and lewd speech during a school event would undermine the school's educational mission, and therefore the school seeks to disassociate itself from the vulgar content of the speech.[49]

In his concurring opinion, Justice Brennan emphasized the narrow application of *Fraser*.[50] The Justice opined that the holding was limited "to restrict a high school student's use of disruptive language in a speech given to a high school assembly"; the opinion did not give school officials limitless authority to regulate speech.[51] Legal scholars have read *Fraser* to require (1) some element of a captive audience, (2) speech with lewd or offensive sexual content, and (3) the school's needs to disassociate itself from the content of the speech.[52] Because *Fraser* involved offensive and vulgar student speech, the applicability of the *Fraser* holding to student speech over the Internet has attracted attention from lower courts and legal scholars.[53]

C. Hazelwood School District v. Kuhlmeier

In *Kuhlmeier*, the Court addressed the issue of the extent of editorial control that a school can permissibly exercise over the contents of a student-produced newspaper.[54] The students alleged that the school infringed upon their First Amendment rights when a teacher removed two articles from the final edition of the

[46] 478 U.S. 675. It is also important to note that students were required to either attend the assembly or report to study hall. *Id.* at 677.

[47] *Id.* at 677–78. "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. . . .". *Id.* at 687 (Brennan, J., concurring) (citations and internal quotation marks omitted).

[48] *Id.* at 677.

[49] *Id.* at 685.

[50] *Id.* at 689 (Brennan, J., concurring).

[51] *Id.*

[52] Tomain, *supra* note 15, at 104.

[53] *See, e.g.*, Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011).

[54] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).

newspaper—one describing pregnancy at the school and the other discussing the impact of divorce.[55] The Court concluded that, because the paper was intended to be a "supervised learning experience for journalism students," the school was within its authority to reasonably regulate content as long as the editorial control was related to a legitimate pedagogical concern.[56] In reaching this holding, the Court explicitly noted that the *Tinker* standard did not apply to circumstances where the school essentially endorses the speech through publication in the school paper and the school seeks to disassociate itself from the content.[57] Given the facts of *Kuhlmeier*, this case is of little applicable value in situations involving offensive online student speech where the speech is clearly not sanctioned by the school.

D. Morse v. Frederick

Morse[58] is the most recently defined exception to *Tinker*. In *Morse*, a group of students unfurled a banner that read "BONG HiTS 4 JESUS" during a school-sponsored field trip that occurred during school hours.[59] After one student refused to take down the banner, he was suspended for violating school policy by encouraging the use of drugs.[60] In a 5–4 decision, the Court held that a school may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[61] Justice Alito and Justice Kennedy contributed the final two votes necessary to reach a plurality decision,[62] and therefore "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[63] In joining with the judgment in *Morse*, Justice Alito repeatedly emphasized that the holding is narrowly limited to the regulation of drug-related speech, which "stand[s] at the far reaches of what the First Amendment permits."[64]

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[55] *Id.*

[56] *Id.* at 270–73.

[57] *Id.*

[58] Morse v. Frederick, 551 U.S. 393 (2007).

[59] *Id.* at 397–98.

[60] *Id.*

[61] *Id.* at 403.

[62] *Id.*

[63] Marks v. United States, 430 U.S. 188, 193 (1977) (citations and internal quotation marks omitted).

[64] *Morse*, 551 U.S. at 425 (Alito, J., concurring).

III. THE APPLICATION OF *TINKER* AND ITS PROGENY TO THE ONLINE SPEECH CONTEXT

Layshock v. Hermitage School District and *J.S. v. Blue Mountain School District* illustrate the difficulties that lower courts have experienced when discerning the permissible scope of school regulation of off-campus, online speech under traditional First Amendment legal precedents. The Second Circuit, in *Doninger v. Niehoff*, reached a conflicting conclusion and, perhaps more importantly, demonstrated the need for clarification of what constitutes a substantial disruption under the *Tinker* standard.[65]

A. Layshock v. Hermitage School District

Justin Layshock was a seventeen-year-old high school senior when he used his grandmother's computer after school to create a fictitious MySpace profile[66] of his principal, Eric Trosch.[67] Justin filled out the personal information section of the profile by falsely answering a series of survey questions, with all of the responses reflecting a theme of "big," which Justin intended to be a reference to Mr. Trosch's size.[68]

1. Birthday: too drunk to remember
2. Are you a health freak: big steroid freak
3. In the past month have you smoked: big blunt
4. In the past month have you been on pills: big pills
5. In the past month have you gone skinny dipping: big lake, not big dick . . . .[69]

Under the "[i]nterests" section of the profile, Justin wrote "Transgender Appreciators of Alcoholic Beverages" and listed "Steroids International" as a group in which Mr. Trosch was a member.[70] Justin proceeded to add other students as "friends" of the fake profile, and as a result, knowledge of the profile's existence quickly spread throughout the school.[71] Justin accessed the profile from school on two occasions—once to show friends in Spanish class,

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[65] *See* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011); Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011).

[66] MySpace is a popular social networking website, which allows users to share personal information with other users and add other users as "friends." Doe v. MySpace Inc., 474 F. Supp. 2d 843, 846 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413 (5th Cir. 2008).

[67] Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207–08 (3d Cir. 2011).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

and once purportedly to delete it before a teacher stopped him.[72]

Mr. Trosch learned about the profile through his daughter, a junior at the school.[73] School officials met with Justin and his mother, and Justin admitted to creating the profile.[74] After the meeting, Justin took it upon himself to apologize to Mr. Trosch, both in person and with a written letter of apology.[75] The School District nevertheless sent Justin a letter informing him that the punishment for his conduct was to be determined at an informal hearing.[76] At the hearing, the School District imposed the following punishment: (1) a ten-day suspension; (2) placement in an alternative education setting within the school for the remainder of the year; (3) a ban from all extracurricular activities; and (4) a ban from participation in his graduation ceremony.[77]

The Layshock family brought suit under 42 U.S.C. § 1983.[78] In the district court, both parties moved for summary judgment, and the court entered judgment in favor of Justin on the grounds that the punishment violated his First Amendment rights.[79] A Third Circuit panel affirmed this decision on the grounds that permitting the school to punish Justin for his out-of-school conduct could create a dangerous precedent.[80] The Third Circuit subsequently ordered a rehearing en banc.[81]

In the en banc opinion, the court commenced its legal analysis with a brief overview of the *Tinker*, *Fraser*, *Kuhlmeier*, and *Morse* standards.[82] Applying the facts of the case to the First Amendment analytical framework, the court concluded that "[w]e do not think the First Amendment can tolerate the School District stretching its authority into Justin's grandmother's home and reaching Justin while he is sitting at her computer after school in order to punish him for expressive conduct he engaged in there."[83] The court placed heavy

[72] *Id.* at 209.

[73] *Layshock*, 650 F.3d at 208.

[74] *Id.* at 209. Justin's parents also disciplined him for his conduct. *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 210.

[78] *Id.* (citing 42 U.S.C. § 1983 (2006)). Section 1983 creates a cause of action against state actors for the deprivation of an individual's constitutional and statutorily-granted civil rights. *Id.*

[79] *Layshock,* 650 F.3d at 211.

[80] Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 260 (3d Cir. 2010), *vacated for reh'g en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010).

[81] *Id.*

[82] *Layshock,* 650 F.3d at 211–14.

[83] *Id.* at 216.

emphasis on the school district's failure to establish that Justin's speech caused a substantial disturbance or a foreseeable expectation of a disturbance, and therefore held that Justin's speech could not be punished under *Tinker*.[84] The court opined that it would be bad policy to establish that a school has limitless authority to control student conduct at home to the same extent the school can control the student's conduct within school.[85]

The school district argued that the speech was punishable under *Fraser* because the language in the MySpace profile was vulgar, lewd, and offensive, and was aimed at the school community.[86] The court rejected this argument because *Fraser* does not apply to "conduct which occurred outside of the school context" and Justin's expression fell outside of the schoolhouse gate.[87]

In determining the scope of student free-speech rights, the *Layshock* court correctly applied *Tinker* as the governing standard, and appropriately declined to stretch *Fraser* to apply to all offensive student speech.

B. J.S. v. Blue Mountain School District

J.S., an eighth-grade honor-roll student, created a MySpace profile of the Blue Mountain Middle School principal, James McGonigle, with a friend in J.S.'s home after school.[88] The profile featured Mr. McGonigle's official school photograph, but falsely identified the user as a "bisexual Alabama middle school principal named 'M-Hoe.'"[89] J.S. depicted Mr. McGonigle's interests as "detention, being a tight ass, riding the fraintrain, spending time with my child (who looks like a gorilla), baseball, my golden pen, fucking in my office, [and] hitting on students and their parents."[90] In the "About me" section of the profile, J.S. posted the following unflattering description of McGonigle:

> HELLO CHILDREN[.] yes. It's your oh so wonderful, fagass, put on this world with a small dick PRINCIPAL[.] I have come to myspace so i can pervert the minds of other principal's [sic] to be just like me. I know, I know, you're all thrilled[.] Another reason I came to myspace is

[84] *Id.*

[85] *Id.*

[86] *Id.* at 216–17.

[87] *Id.* at 219.

[88] J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011).

[89] *Id.*

[90] *Id.* "Fraintrain" was a reference to McGonigle's wife, who was also a school employee. *Id.* at 941 (Fisher, J., dissenting).

> because—I am keeping an eye on my students (who[m] I care for so much)[.] For those who want to be my friend, and aren't in my school[,] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN.[91]

Initially, J.S. made the profile publically accessible to anyone, but later changed the settings to private so only individuals added as a "friend" could view the content.[92] Because the school's computers blocked MySpace, students could not access the profile from the school.[93] But the profile did make its way on to school grounds when McGonigle requested that a student bring him a printout of the site.[94] McGonigle held a conference with J.S., her friend, and both sets of parents, and the parties were informed that the students would receive a ten-day suspension.[95]

J.S.'s family sued the Blue Mountain School District under 42 U.S.C. § 1983.[96] The district court granted Blue Mountain's motion for summary judgment.[97] The district court held that even though the *Tinker* standard did not govern because the school failed to prove that a substantial disruption occurred or was likely to occur, the school had authority to punish J.S. under *Morse* and *Fraser* because the speech in question was "vulgar, lewd and potentially illegal speech [and] had an effect on campus."[98] J.S. appealed, and a Third Circuit panel affirmed and held that, under *Tinker*, "off-campus speech that causes or reasonably threatens to cause a substantial disruption or material interference with a school need not satisfy any geographical technicality in order to be regulated pursuant to *Tinker*."[99] Finding that there was a threat of a substantial disruption to the school, the Third Circuit panel concluded that the School District's suspension did not infringe J.S.'s First Amendment rights.[100] This decision was subsequently vacated for rehearing by the Third

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[91] *Id.* at 921.

[92] *Id.*

[93] *Id.* at 921.

[94] *Blue Mountain Sch. Dist.*, 650 F.3d at 921.

[95] *Id.* at 922. The School District Superintendent later approved this suspension. *Id.*

[96] *Id.* at 920.

[97] *Id.* at 923.

[98] *Id.* at 923 (internal citations omitted).

[99] J.S. v. Blue Mountain Sch. Dist, 593 F.3d 286, 301 (3d Cir. 2010), *vacated for reh'g*, No. 08-4138, 2011 U.S. App. LEXIS 11947 (3d Cir. June 13, 2011).

[100] *Id.* at 303.

Circuit en banc.[101]

In its en banc opinion affirming the panel's judgment, the Third Circuit began the legal analysis by "assum[ing], without deciding, that *Tinker* applies to J.S.'s speech in this case."[102] The court clarified the *Tinker* requirement that the speech must pose a foreseeable risk of a substantial disruption, but it does not need to be absolutely certain that disruption will occur.[103] The *Blue Mountain School District* court concluded that the general rumblings about the profile, slight class disturbance, and rearranging of a counselor's schedule did not amount to a substantial disruption under *Tinker*, and there was no valid reason for school officials to foresee a substantial disruption.[104]

The court rejected the school district's argument that the speech was punishable under *Fraser*, holding that the *Fraser* "lewdness" standard only applies to on-campus speech and does not reach online, out-of-school expression[105] The Third Circuit placed heavy emphasis on the fact that the content of the profile was so ridiculous that there was no way a reasonable person could have taken it as fact.[106]

The *Blue Mountain School District* dissent argued that, under *Tinker*, a substantial disruption did occur within the school, and furthermore, the decision "severely undermines" a school's ability to impose discipline on students that disrupt the school environment.[107] The dissent focused on the "malicious . . . vulgar and obscene" content of the profile as sufficient to render a showing of *potential* for a substantial disruption within the school.[108]

Similar to the holding in *Layshock*, the *Blue Mountain School District* court reached the proper result in denying the school district the authority to punish J.S. for her off-campus online speech.

C. Doninger v. Niehoff

The Second Circuit addressed a similar issue, but diverged from the Third Circuit in its approach to addressing the parameters of

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[101] J.S. v. Blue Mountain Sch. Dist., No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010).

[102] *Blue Mountain Sch. Dist.*, 650 F.3d at 926.

[103] *Id.* at 928

[104] *Id.* at 925, 929.

[105] *Id.* at 933.

[106] *Id.* at 930

[107] *Id.* at 941, 945 (Fisher, J., dissenting).

[108] *Blue Mountain Sch. Dist.*, 650 F.3d at 941 (Fisher, J., dissenting).

students' First Amendment rights.[109] In *Doninger v. Niehoff*, a student, Avery Doninger, was prohibited from accepting a student-government position after she sent a mass e-mail and posted comments on her blog expressing her feelings about the school administration's cancellation of an annual school music festival.[110] In her post, the student wrote that "jamfest [was] cancelled due to [the] douchebags in [the] central office," and urged other students to e-mail school administrators about the cancelled event to "piss [the principal] off more."[111] Doninger's efforts resulted in an influx of calls and e-mails to the school.[112] The school discovered the blog post two weeks after the resolution of the situation, and at that point the principal informed Doninger that she was no longer eligible to run for student government because of her inflammatory comments.[113] Despite not appearing on the ballot, Doninger won the election as a write-in candidate, but the school would not permit her to accept the position.[114]

The Second Circuit found that the deluge of e-mails, phone calls, angry students, and several disrupted schedules amounted to a substantial disturbance under *Tinker*; therefore, the school was within its authority to punish Doninger for her conduct.[115] In reaching this conclusion, the court explained that it was important in this case that the punishment imposed—restricting Doninger's participation in student government—was reasonable given that the "disruption" was related to a governmental function.[116]

Although the Second Circuit properly concluded that *Tinker* was the controlling standard in *Doninger*, the court's conclusion that the e-mails, phone calls, and upset students were sufficient to amount to a potential disruption[117] illustrates the need for clarification of what constitutes a substantial disruption, with particular emphasis on the context in which *Tinker* was originally decided.

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[109] Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011).

[110] *Id.*

[111] *Id.* at 340–41 (internal citations and quotation marks omitted).

[112] *Id.* at 341.

[113] *Id.* at 342.

[114] *Id.* at 343.

[115] *Doninger*, 642 F.3d at 348–49.

[116] *Id.* at 350.

[117] *Id.*

IV. CLARIFICATION OF THE *TINKER* STANDARD FOR INTERNET SPEECH

The unique nature of the school environment inherently requires some deviation from traditional First Amendment constraints in order for the school to operate effectively.[118] Obviously the same freedom to speak openly on a public sidewalk cannot be granted to students in the classroom since such freedom would seriously hinder the educational process.[119] Courts generally review cases involving the discretionary functions of school officials deferentially because of the unique decision-making processes and expertise that educational issues entail.[120] But courts note that this does not grant unlimited authority for schools officials to trammel the rights of students,[121] and the unique characteristics of the school setting do not permit school officials to "possess absolute authority over their students."[122] This creates a need for schools to balance students' rights with school efficiency.

Layshock and *Blue Mountain School District* are important because they demonstrate the irreconcilability of the current free speech paradigm established in *Fraser*, *Kuhlmeier*, and *Morse* with the advent of new media. As the Third Circuit correctly recognized, the *Tinker* substantial disruption standard is the only precedent that is neatly applicable in the Internet context and does not completely deprive students of free speech rights in all settings.[123] Because the outcome of student speech cases is so fact-sensitive,[124] any standard controlling online expression must be sufficiently broad to accommodate a variety of situations in order to have long-term applicability. The Supreme Court should grant certiorari in a student, online speech case to reform the First Amendment standard for online expression by (1) establishing cyberspace as a unique "location" for student speech analysis, and (2) situating *Tinker* as the governing standard for all situations that implicate student free speech over the Internet.

There are several important reasons for the Supreme Court to

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[118] Goldman, *supra* note 25, at 406. The author noted several less obvious examples of ways schools interfere with free speech: teachers are restricted in their freedom to discuss particular topics outside of the curriculum, grades are assigned based on the quality of a student's writing and speech, and writing prompts limit students' freedom to choose a topic. *Id.*

[119] *Id.*

[120] J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 925–26 (3d Cir. 2011).

[121] *Id.* at 926.

[122] Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 506, 511 (1969).

[123] *See generally Blue Mountain Sch. Dist.*, 650 F.3d 915; Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011).

[124] Mattus, *supra* note 5, at 332.

articulate a standard governing this issue. Under current free speech analysis, it can be difficult to advise educators as to when speech can be punished and when the First Amendment precludes a restraint on student speech.[125] The lack of a definition for the scope of online free speech rights can have equally significant implications for a teacher's or an administrator's right to voice his or her opinion online, as well as on students' rights, although the consequences of the ambiguity on educators is beyond the scope of this Comment.[126] "Just as the First Amendment tolerates some false speech to ensure true speech is not lost, the First Amendment tolerates online student speech that schools may find reasonably offensive to ensure valuable speech is not lost."[127] Freedom of expression fosters creative thinking in young adults, as they develop their voice and learn the value of civil discourse on controversial topics.[128] Schools certainly have an interest in discouraging students from engaging in offensive speech in relation to the school, but this interest is insufficient to justify giving schools the unbridled authority to control speech that occurs within a student's home using the Internet. The current ambiguity in the law could result in a chilling effect, with students hesitant to voice opinions on important social or political issues related to school for fear of punishment because of the language they use.[129]

A. Cyberspace as a Unique Location for Online Speech Purposes

The Supreme Court should eliminate the on-campus/off-campus dichotomy for online speech and simply treat cyberspace as an independent location for the purposes of free speech analysis. The creation of cyberspace as an independent location would allow traditional free speech precedent to peacefully co-exist with a new framework for online speech. This framework would promote simplicity and predictability in legal analysis by eliminating the need

[125] *See The Third Circuit Lays Out Rules for Responding to Off-Campus Expression*, DISCHELL, BARTLE, YANOFF, DOOLEY, http://dischellbartle.com/dbyd_difference_feb_10_part_i_ed_law/ (last visited Apr. 9, 2012).

[126] *See* Jeanette Rundquist & Peggy McGlone, *Teachers on Facebook: Hot-button Issue Examined Across N.J. in Wake of Teacher's Anti-gay Posts*, N.J. STAR-LEDGER, Oct. 18, 2011, *available at* http://www.nj.com/news/index.ssf/2011/10/nj_school_districts_grapple_wi.html (discussing a teacher's Facebook comments on the morality of homosexuality and the subsequent public reaction). As some parents are calling for the teacher's dismissal due to the comments, some guidance by the Court on the parameters of the First Amendment over the Internet would be beneficial to give teachers notice of the extent of their rights as well. *Id.*

[127] Tomain, *supra* note 15, at 105.

[128] Macleod-Ball, *supra* note 28, at 131.

[129] Goldman, *supra* note 25, at 407.

to weigh factors such as where the speech was originally created, where it was later accessed, and how and when it ever permeated school grounds.

Lower courts have noticed the difficulty in applying traditional location-based analysis to online speech.[130] "If courts and legal scholars cannot discern the contours of First Amendment protections for student Internet speech . . . then it is certainly unreasonable to expect school administrators . . . to predict where the line between on- and off-campus speech will be drawn in this new digital era."[131]

The prevalence of cell phones in schools has further complicated the analysis because many students own cell phones with Internet capabilities that enable them to access social networking sites from school property without using any school resources to do so.[132] As a borderless medium of communication, there is no obvious way to establish a location for Internet speech. Scholars have proposed a variety of ideas, which include designating the location of speech to be the location where the online expression was originally posted,[133] the location where the speech is ultimately disseminated to others,[134] or the location where the student intended the speech to reach,[135] among others. Although there are certainly merits to each of these proposals, establishing cyberspace as a distinct location would eliminate the fact-intensive threshold inquiry of determining a "location" of the speech—an ultimately arbitrary determination given the unique nature of cyberspace.[136]

By definitively articulating a standard in which online speech is neither on-campus nor off-campus, courts will not have to make artificial determinations regarding where online speech occurred and can devote all judicial resources to evaluating the merits of the case. Establishing cyberspace as a unique place will permit the Court to fashion new rules exclusively for the Internet[137]—such as the

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[130] *See* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 940 (3d Cir. 2011) (Smith, J., concurring) ("[H]ow can one tell whether speech takes place on or off campus? Answering this question will not always be easy.").

[131] Davis, *supra* note 25.

[132] *Blue Mountain Sch. Dist.*, 650 F.3d at 951 (Fisher, J., dissenting).

[133] Goldman, *supra* note 25, at 424.

[134] Erin Reeves, Note, *The "Scope of a Student": How to Analyze Student Speech in the Age of the Internet*, 42 GA. L. REV. 1127, 1148–49 (2008).

[135] *See* Patrick, *supra* note 11, at 888; *cf.* Alexander G. Tuneski, Note, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 178 (2003).

[136] Tomain, *supra* note 15, at 130.

[137] David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1379 (1996) (arguing for the establishment of cyberspace as a distinct location for purposes of trademark analysis, defamation law, fraud and

application of the *Tinker* standard as advanced in this Comment—without disrupting current First Amendment jurisprudence governing traditional speech. This will also prevent student speech from being "converted" into on-campus speech inadvertently for reasons outside of the speaker's control, as is possible in cases where another student accesses the content from a school computer unbeknownst to the original speaker.[138] Speech over the Internet is inherently different from a statement made in the classroom, and the Court should recognize it as such by leaving it unregulated by traditional First Amendment jurisprudence.

A potential counterargument is that schools should at least have the authority to punish students in instances where the student wrote the offensive content during school hours or used a school computer.[139] But there is an inherent line-drawing problem in this argument. For example, it is not apparent how this rule would apply to situations where an innocent website is made during school hours, but offensive material is added later at home on the student's personal computer. A bright-line rule that treats the Internet as a unique jurisdictional location for speech purposes works to eliminate ambiguity in the legal analysis. This is not to suggest that schools are powerless to regulate students' Internet use during school hours. On the contrary, schools can and do use blocking software to restrict access to certain websites on school computers,[140] and faculty should be encouraged to monitor computer use to ensure that students are engaging in legitimate educational activities. Teachers are well within their authority to prevent students from misusing educational resources and squandering class time and therefore are permitted to exercise authority to prevent prohibited conduct at the time when the student is engaging in it.

B. Tinker*, not* Fraser*, Should Govern the Scope of a School's Authority*

The unique characteristics of the school environment may warrant some limitations on students' First Amendment rights,[141] but

antitrust, and copyright law on the grounds that traditional legal frameworks are inapplicable to these areas over the Internet. The authors posit that establishing cyberspace as a distinct jurisdictional location will permit the formation of rules that are specifically tailored to the unique characteristics of the Internet).

[138] *See* Patrick, *supra* note 11, at 866 (arguing "this threshold can easily be manipulated by administrators or a student's enemies to bring the speech into the realm of on-campus speech").

[139] *See generally id.* at 883.

[140] Tomain, *supra* note 15, at 176.

[141] Goldman, *supra* note 25, at 406.

the Court has repeatedly emphasized that this does not equate to limitless authority over student expression.[142] Justice Brennan articulated in his dissent in *Kuhlmeier* that "[e]ven in its capacity as educator the State may not assume an Orwellian guardianship of the public mind[.]"[143] As one legal scholar noted, "[i]f students do not have free speech rights, *Tinker*'s 'schoolhouse gate' metaphor is meaningless because a student cannot shed rights that do not exist."[144] Granting schools the authority to punish students for speech that occurs off-campus and does not pose a foreseeable risk of a substantial disruption would "vest school officials with dangerously overbroad censorship discretion."[145] The Third Circuit properly applied First Amendment jurisprudence in *Layshock* and *Blue Mountain School District* by superimposing *Tinker* as the controlling legal analysis and declining to extend *Fraser* to the offensive online speech.

"Although *Tinker* may not be looking fabulous at forty" given the Supreme Court holdings in its wake, it is still viewed as the seminal student-speech case.[146] The *Tinker* standard not only permits schools to run efficiently without disturbances, but also protects students' freedom of expression in all cases where the educational purpose of the school is not impeded. In the online context under *Tinker*, a school can exercise its disciplinary authority in a constitutionally permissible manner where there are "any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities[.]"[147]

Some scholars have suggested that the substantial disruption test is overbroad in its coverage when the standard is applied to online speech.[148] To address concerns of abuse of the substantial disruption standard, the Court must clarify what is a "substantial disruption" to ensure predictability in its application. *Doninger v. Neihoff* illustrates the problem of applying the substantial disruption test to scenarios that clearly do not rise to the Supreme Court's articulated standards in *Tinker*.[149] In *Doninger*, the court found that phone calls, e-mails, and angry students were sufficient to amount to a substantial

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[142] *See* Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 511 (1969).

[143] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 286 (1988) (Brennan, J. dissenting) (citations omitted).

[144] Tomain, *supra* note 15, at 109.

[145] J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 933 (3d Cir. 2011).

[146] Calvert, *supra* note 24, at 1190.

[147] *Tinker*, 393 U.S. at 514.

[148] Goldman, *supra* note 25, at 408.

[149] Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011).

disruption of school affairs.[150] When these arguably commonplace occurrences are compared with the threat of violence posed by the expression in *Tinker*, the tremendous disparity in the levels of severity clearly demonstrates the need for reiteration of what constitutes a substantial disruption.

A substantial disruption requires more than "some remote apprehension of disturbance"; rather, there must be a legitimate threat of it occurring.[151] While, in some cases, angry students, phone calls, and e-mails to the school administration may appear to present the potential for a substantial disruption, these actions do not pose any threat to the school, as they are merely peaceful ways to express dissatisfaction with a particular school position. A desire to avoid discomfort by suppressing an unpopular viewpoint does not constitute a "substantial disruption."[152] This warrants the conclusion that, although the school may not want students to post negative comments about educators online, the mere fact that the comments portray the school in an unsavory light is not a valid reason to suppress the expression. While comments about a teacher or a school administrator on a social networking site may create a strained relationship between the adult and the student,[153] the Court should clearly establish that such situations, standing alone, do not amount to a foreseeable substantial disturbance, contrary to the point advanced by the dissent in *Blue Mountain*.[154] The Supreme Court should articulate that lower courts need to keep in mind the politically turbulent atmosphere that existed at the time *Tinker* was decided,[155] and judges should weigh the consequences of the speech in the case before them against the threat posed by the anti-war speech in *Tinker*.

The other three Supreme Court cases, while important in the traditional school speech setting, are ill-suited for application to online speech cases like *Layshock* and *Blue Mountain School District*. Of the three cases, *Fraser* appears to be the most relevant,[156] but it would

[150] *Id.* at 351.

[151] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 211 (3d Cir. 2001).

[152] *Tinker*, 393 U.S. at 509.

[153] Goldman, *supra* note 25, at 408.

[154] *See* J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 945 (3d Cir. 2011) (Fisher, J., dissenting).

[155] Despite the highly polarizing and emotional background of the Vietnam War, the *Tinker* Court did not find that the recognizably anti-war bands presented a foreseeable risk of disruption. *Tinker*, 393 U.S. at 514.

[156] Although it is also possible that an online student speech case could implicate *Morse*, this issue has not been raised in the courts yet and therefore does not merit

also be the most constitutionally problematic if applied to online speech, amounting to a vast expansion of the *Fraser* Court's holding.[157] To extend *Fraser* to all cases where students use offensive or sexual language in relation to a school issue would give schools virtually limitless authority to regulate student expression, even within the sanctity of the home.[158] Because of this, the Court should expressly articulate that *Fraser* is inapplicable to student speech over the Internet.[159]

An important element in *Fraser* is that the student speaker had a captive audience, as he gave the speech during a mandatory school assembly during school hours.[160] The sexually explicit nature of the speech in *Fraser* was another crucial factor, as the Court noted that "[t]he pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students[.]"[161] The grammatical structure of this statement suggests that the sexual innuendo was the specific reason that the Court categorized the speech as offensive.[162]

Under the *Tinker* standard, the Third Circuit correctly decided *Layshock* and *Blue Mountain School District* because the school districts could not show there was a substantial disturbance in either case. If the Third Circuit applied the *Fraser* standard, it is likely that the two students' suspensions could have been upheld because the profiles in *Layshock* and *Blue Mountain School District* both contained foul and sexually explicit language. This contrary holding could amount to a near abolition of student free speech rights because it would give officials expansive authority to regulate speech any time it contains offensive language and is directed at the school. Ultimately, this could lead to censorship in cases where the speaker is making a political point if the speaker chooses to express himself using sexualized or obscene language to emphasize his point. The Supreme Court should clarify that *Fraser* does not apply to online student speech to prevent the slippery slope of school regulation of all offensive speech.

significant discussion. Nevertheless, the limitations emphasized by the *Morse* Court would warrant the conclusion that the Court did not intend for *Morse* to be stretched. If a *Morse*-type of case were raised, the *Tinker* standard should be applied.

[157] Tomain, *supra* note 15, at 99.

[158] Mattus, *supra* note 5, at 334.

[159] *See* Tomain, *supra* note 15, at 104 (arguing that holding *Fraser* as inapplicable to online speech is "more than a mere logical application of *Fraser*").

[160] *See* Tomain, *supra* note 15, at 103–04.

[161] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683 (1986).

[162] Tomain, *supra* note 15, at 117 n.109.

C. Limitations to Tinker*'s Application in Online Speech*

The Supreme Court should further specify that the *Tinker* substantial disruption standard is controlling only in cases such as *Layshock* and *Blue Mountain School District* where the expression is not a threat of violence and the target of the speech is a school employee.

The need to maintain a safe educational environment is a common argument in support of permitting schools to regulate students' speech. The flaw of such an argument is that it overlooks that "true threats" are already categorically unprotected under First Amendment jurisprudence in all settings—including schools as well as other public places.[163] Furthermore, courts have generally shown greater deference to the determination that speech amounts to a true threat in the school setting, which independently grants schools greater authority to address threatening speech.[164] School officials are responsible for the safety of students on school property, and this compelling interest warrants increased discretion for school officials to act in cases where there is a plausible threat of violence that rises, even in situations where the threatening speech is on the borderline of the true threat jurisprudence.[165] There is a significant difference between name-calling or offensive remarks and speech that expresses a threat of violence; therefore, it follows that there should be a difference in the level of First Amendment protection that each is afforded.[166]

The emotional distinction between students and educators gives schools a more compelling interest to regulate student speech in cases involving peer-on-peer cyberbullying than online comments about a teacher. School-aged youth are "much more vulnerable to intimidation and mockery than teachers with advanced degrees and 20 years of experience."[167] Adolescent students lack the emotional

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[163] Virginia v. Black, 538 U.S. 343, 360 (2003) (defining true threat as statements that convey to a reasonable person a serious intent to cause violent harm or intent to make the victim fearful of bodily harm, even if the speaker does not intend to actually fulfill the threat).

[164] Goldman, *supra* note 25, at 412.

[165] *See* Boim v. Fulton Cnty. Sch. Dist., 494 F.3d 978 (11th Cir. 2007) (holding that the school had the authority to suspend a student for showing other students a detailed written description of a "dream" about shooting a teacher); Bystrom v. Fridley High Sch., 686 F. Supp. 1387 (D. Minn. 1987) (upholding the punishment of students who created a publication that applauded the vandalism of a teacher's home). These cases are examples of situations where the courts afforded school officials the discretion to address acts of violence, even though the threat may not have risen to the level of severity of a true threat.

[166] Dischell, *supra* note 125.

[167] Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials*

maturity to deal with derogatory speech in the same capacity as adults.[168] Cyberbullying has emerged as an important problem in today's schools, with one study concluding that thirty percent of middle-school students had been victimized by cyberbullying for at least two days in the past month.[169] These policy concerns, among others, warrant the conclusion that schools should have greater authority to prevent and respond to the online harassment of fellow students.[170]

When the online speech is aimed at an adult, a school's discretion to punish the student should be limited, absent a showing of a true threat of violence or reasonable foreseeability of a substantial disturbance in the school. Although studies suggest that teachers can be emotionally affected by student speech,[171] this concern is outweighed by the risk of chilling student speech about potentially important school matters. Teachers and administrators are in a better position to simply ignore the offensive online speech and view the speech as a necessary price to pay for the freedoms afforded by the Constitution.[172] Furthermore, school officials and employees are not left without recourse against students who choose to post inflammatory and offensive comments on the Internet.[173] School officials can pursue legal action for relief through the courts,[174] under causes of action such as defamation[175] and intentional infliction of emotional distress,[176] depending on the circumstances.[177]

and the Limits of School Restrictions, 19 WM. & MARY BILL RTS. J. 591, 641 (2011) (citing Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 952–53 (7th Cir. 2002)).

[168] Jacob Tabor, Note, *Students' First Amendment Rights in the Age of the Internet: Off-Campus Cyberspeech and School Regulation*, 50 B.C. L. REV. 561, 600 (2009).

[169] Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Cyberbullying and Self-Esteem*, Cyberbullying Res. Ctr., J. OF SCH. HEALTH (forthcoming 2010), *available at* http://www.cyberbullying.us/cyberbullying_and_self_esteem_research_fact_sheet.pdf.

[170] The legal standard governing school regulation of student-on-student online speech, although very important, is beyond the scope of this Comment.

[171] Waldman, *supra* note 167, at 644.

[172] *See* Adam Cohen, *Why Students Have a Right to Mock Teachers Online*, TIME, June 20, 2011, *available at* http://www.time.com/time/nation/article/0,8599,2078636,00.html.

[173] Davis, *supra* note 25.

[174] *Id.*

[175] *See, e.g.*, CAL. CIV. CODE § 45 (West) (2012); CONN. GEN. STAT. ANN. § 52-237 (West) (2011).

[176] *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988). This is assuming, *arguendo*, that the student's conduct rose to the requisite level of severity, which would likely not be legally sufficient in *Layshock* or *J.S.*

[177] Whether any particular cause of action would be available to a victimized educator would require a fact intensive inquiry. The underlying elements of the

Under the current framework, these alternative legal actions available to educators can also raise some concerns because the student could ultimately be punished twice for the same offensive conduct, which some scholars suggest amounts to judicial overkill.[178] The school employee can also take non-legal actions, such as simply sitting down with the student and politely asking for the content to be removed or speaking with the student's parent.[179]

A different standard for student speech that targets educators, as opposed to fellow students, is furthered justified by the potential for conflict-of-interest problems when the educator involved in the punishment is also the focus of the disparaging speech. In cases such as *Layshock* and *Blue Mountain School District* where the speech is directed at a key decision-maker in the school—the principal—that decision-maker's objectivity may be compromised because of the personal impact on him or her.[180] The decision-maker's personal feelings could influence any punishment imposed;[181] therefore, requiring teachers and administrators to show that the speech caused a substantial disruption would help curb the potential for abuse of discretion that could occur under a less protective standard of student speech.[182]

causes of actions and the remedies each affords are beyond the scope of this Comment.

[178] Calvert, *supra* note 24, at 1178.

[179] Although these solutions may, on their face, seem overly idealistic, they would likely be successful. For example, in *Layshock*, after the principal confronted Justin about the profile, Justin apologized verbally and through a letter and took down the profile immediately. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 209 (3d Cir. 2011). In one study, a researcher sent e-mails to adolescents with MySpace profiles that contained evidence of illegal or sexual behavior, suggesting that the individuals "modify their profiles or make them private." Although the researcher had no connection to the individuals contacted, some of the profiles were changed. Perri Klass, *Seeing Social Media More as Portal Than as Pitfall*, N.Y. TIMES, Jan. 9, 2012, *available at* http://www.nytimes.com/2012/01/10/health/views/seeing-social-media-as-adolescent-portal-more-than-pitfall.html. This suggests that, in cases where there is a relationship between the individuals, social pressure might lead to even higher voluntary compliance rates.

[180] Goldman, *supra* note 25, at 422.

[181] *Id.*

[182] For example, the *Fraser* "offensive" standard would have great potential for abuse. What is offensive to today's school-aged generation can be very different from what is offensive to an adult. If school districts were given the same deference by the courts to punish speech aimed at adults as students, it would not seem far-fetched to suggest that hurt feelings could bias an administrator's determination of whether the speech is in fact offensive.

V. CONCLUSION

"*Tinker* and its progeny are not well adapted to today's technological world where the once-certain schoolhouse gate is virtually nonexistent."[183] Under current law, all student-speech cases are controlled by four Supreme Court decisions;[184] however, all four cases were decided in the context of on-campus speech. The Supreme Court has never addressed the applicability of this First Amendment framework to student speech that occurs on the Internet, and therefore circuit courts and district courts alike have experienced difficulty in establishing the parameters of student online free speech rights.

Because of the unique characteristics of the Internet,[185] the Court should formulate a new standard establishing cyberspace as a unique location instead of forcing lower courts to struggle in applying the traditional student-speech framework, which focuses on the on-campus/off-campus distinction, to the Internet. The Court should set *Tinker* as the controlling standard for determining whether school officials have the authority to punish student speech. Furthermore, the Court should recognize the need to give school officials greater deference in situations where the speech poses a threat to school safety or when the speech targets a fellow classmate, as opposed to a school employee.

[183] Mattus, *supra* note 5, at 335; *see also supra* Part IV.

[184] *See* discussion of the four Supreme Court cases *supra* Part II.

[185] *See* Johnson, *supra* note 137.