Santa Clara University School of Law

Santa Clara Law Review

Volume 53 | Number 2 Article 5

8-22-2013

Sharing the Digital Sandbox: The Effects of Ubiquitous Computing on Student Speech and Cyberbullying Jurisprudence

Rashmi Joshi

SHARING THE DIGITAL SANDBOX: THE EFFECTS OF UBIQUITOUS COMPUTING ON STUDENT SPEECH AND CYBERBULLYING JURISPRUDENCE

Rashmi Joshi*

TABLE OF CONTENTS

* J.D. 2013, Santa Clara University School of Law. During my three years of law school I worked in various areas of intellectual property law, cultural property law, and public international law. I grew up in the Bay Area and attended the University of California at Los Angeles (UCLA) for my undergraduate studies. I would like to thank Professor Steinman for all his help in writing and editing this article.

INTRODUCTION

Freedom of speech, the fundamental freedom from a fettered tongue and frustrated mind, is a cornerstone of the United States Bill of Rights and is extended to the states through the Fourteenth Amendment.[1] Since its conception, this right has expanded to cover many forms of speech including student speech. However, as the Supreme Court cautioned in *Tinker v. Des Moines*, this is not an absolute right.[2] Today, when student speech broadcasted over the Internet emotionally wounds and even plays a role in the deaths of other students, the need for regulation is even more apparent.[3] New York Times columnist Charles Blow wrote on October 14, 2011 how being bullied in school led him to decide to commit suicide.[4] He was eight years old and felt the bleakness of the bullied.[5] This was before the days of cyberbullying. Back then, "[t]he schoolyard bullies beat you up and then [went] home," notes Parry Aftab, Internet safety expert and privacy lawyer.[6] Now "cyberbullies beat you up at home, at grandma's house, whereever [sic] you're connected to

1. *See* U.S. CONST. amend. I, XIV.

2. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

3. *See* Yunji de Nies et al., *Mean Girls: Cyberbullying Blamed for Teen Suicides*, ABC NEWS (Jan. 28, 2010), http://abcnews.go.com/GMA/Parenting/girls-teen-suicide-calls-attention-cyberbullying/story?id=9685026#.TwOeg9QV1_c.

4. Charles M. Blow, Op-Ed., *The Bleakness of the Bullied*, N.Y. TIMES, Oct. 14, 2011, http://www.nytimes.com/2011/10/15/opinion/blow-the-bleakness-of-the-bullied.html?_r=0.

5. *See id.*

6. de Nies, *supra* note 3.

technology."[7] Charles Blow changed his mind, but recent examples of suicides connected to cyberbullying show that many times these decisions are carried through to the very end. In January 2010, Phoebe Prince, fifteen, killed herself as a final response to weeks of cruel bullying inflicted by students at her school.[8] Phoebe's little sister found her hanging in the stairwell.[9] In March 2010, Alexis Pilkington, seventeen, took her life due to vicious taunting aimed at her from social networking sites.[10] There are many more stories of teenagers harassed over the Internet and courts are struggling with how and whether schools should punish the perpetrators.

This paper will examine the intersection of cyberbullying, student speech and ubiquitous computing. The principal legal problem is the circuit split over when and whether to use *Tinker v. Des Moines*. However, additional problems are presented by the ambiguous extent of schools' jurisdiction over speech originating off-campus and the nature of ubiquitous computing.

Part I of this Comment will provide essential background information on the issue, define cyberbullying and ubiquitous computing, and touch on the iconic Supreme Court quartet concerning student speech.[11] Part II will identify the legal issues at hand.[12] It will explore the circuit split and examine the various analyses utilized by the Third and Fourth Circuits when faced with cyberbullying in public schools.[13] This section will also examine issues related to the increased amount of data and access to student speech afforded to school and government officials due to the rise in ubiquitous computing.[14]

7. *Id.*

8. *See id.*

9. Nancy Gibbs, *When Bullying Goes Criminal,* TIME (Apr. 19, 2010) http://www.time.com/time/magazine/article/0,9171,1978773,00.html.

10. *Cyberbullying Continued After Teen's Death*, CBS NEWS (Mar. 29, 2010, 12:31 PM), http://www.cbsnews.com/stories/2010/03/29/earlyshow/main6343077.shtml.

11. *See infra* Part I

12. *See infra* Part II.

13. *See infra* Part II.

14. *See infra* Part II.

Part III will propose a possible solution to the circuit split and address some concerns about ubiquitous computing.[15] The proposed solution consists of (1) a process for establishing school jurisdiction over cyber-speech, (2) using a substantial disruption standard to determine whether the speech can be regulated, and (3) analyzing the effects of excessive data and ubiquitous computing on students' expectations of privacy both on-campus and off-campus.[16]

I. BACKGROUND INFORMATION

The term cyberbullying was first coined by Bill Belsey, creator and president of bullying.org, the world's first website devoted to bullying over the Internet.[17] His definition is as follows: "Cyberbullying involves the use of information and communication technologies to support deliberate, repeated, and hostile behaviour by an individual or group, that is intended to harm others."[18] This activity takes place every day in many forms throughout the country and mainly impacts young people.[19] A step above schoolyard bullying, cyberbullying is not restricted to school hallways, playgrounds, and classrooms. It leaks onto students' computer screens and washes through their phones, following them with unprecedented accuracy and range.

Cyberbullying is rapidly increasing due to the rise of ubiquitous computing. "As the third paradigm of computing, ubiquitous computing completes the shift of the computer's place and role from its mainframe roots to its embedded future."[20] Today, the computer is "embedded throughout the

15. *See infra* Part III.

16. *See infra* Part III.

17. *Bill Belsey: Pioneer Cyberbullying Activist*, CYBERBULLYING NEWS (May 23, 2010), http://www.cyberbullyingnews.com/2010/05/bill-belsey-pioneer-cyberbullying-activist.

18. Cyberbullying Definition, http://www.cyberbullying.org/ (last visited Feb. 27, 2013).

19. Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845, 847 (2010).

20. M. Scott Boone, *Ubiquitous Computing, Virtual Worlds and the Displacement of Property Rights*, 4 I/S: J.L. & POL'Y FOR INFO. SOC'Y 91, 93 (2008). The author notes that the first paradigm consisted of "the mainframe computer filling entire rooms, utilized only by specialists" and the second paradigm includes the world of personal computers used by a general populace.

physical world" and almost "universal . . . in its connectivity."[21] We utilize this connectivity in everyday tasks and it is no longer limited to personal computers.[22] With more students using smart phones, text messages, Facebook posts, emails, and other forms of instant thought, remote communications are more common, and easily used to bully others.[23]

Punishing such conduct is difficult because restrictions may not unconstitutionally curb student speech, and many states do not have specific legislation penalizing cyberbullying, so its victims must often resort to semi-related tort or criminal laws.[24] The topic of student speech is especially difficult because the Supreme Court has not ruled on the issue. Consequently, there is a circuit split over which framework and precedents to use in analyzing the issue.[25] The split will be discussed at length in Part II of this Comment.

A. The Tinker-Fraser-Kuhlmeier-Morse *Quartet*

Supreme Court precedent on student speech can be found in the iconic case quartet of *Tinker-Fraser-Kuhlmeier-Morse*.[26] In *Tinker*, the Court protected students' right to wear a black armband at school to protest the war in Vietnam and outlined a substantial disruption test for student speech.[27] The majority noted that though a student does not leave his constitutional rights at the schoolhouse gate, his exercise of such rights within the boundaries of the school are limited.[28]

Id. We are currently experiencing an overlap between the second paradigm and the beginning of the third paradigm.

21. *Id.*

22. *Id.*

23. *See* King, *supra* note 19, at 850.

24. *See id.* at 849.

25. *See generally* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011); Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011).

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

27. *See Tinker*, 393 U.S. at 505, 514.

28. *See id.* at 506–07.

The Court decided that "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[29]

In *Bethel School District v. Fraser*, the Court held that the First Amendment did not protect lewd speech by a student during an assembly.[30] The Court recognized a state "interest in protecting minors from exposure to vulgar and offensive spoken language" because such speech "undermine[s] the school's basic educational mission."[31]

In *Hazelwood School District v. Kuhlmeier*, the Court addressed the issue of school sponsorship of speech[32] and allowed the school to strike two articles from the student newspapers based on their content.[33] The Court noted that, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[34] The Court also gave "wide discretion to educators to determine reasonable pedagogical concerns, ranging from speech that is 'inadequately researched' to that which is 'unsuitable for immature audiences.'"[35] *Morse v. Frederick*, the most recent case, touched on speech outside of school grounds and involved a debate about whether a school could punish students for speech involving alleged advocacy for illegal drug use when that speech took place at an off-campus rally.[36] The Court upheld the punishment of the off-campus speech because it determined the event to be a school sponsored activity.[37] These cases form the groundwork for understanding the Court's treatment of student speech. The Internet, however, is changing the very nature of speech, and

29. *Id.* at 513.
30. *See Fraser*, 478 U.S. at 684.
31. *See id.* at 684–85.
32. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988).
33. *See id.* at 266.
34. *Id.* at 273.
35. *See* King, *supra* note 19, at 868 (quoting *Kuhlmeier*, 484 U.S. at 271)).
36. Morse v. Frederick, 551 U.S. 393, 401 (2007).
37. *Id.* at 401–02.

will require these principles to evolve as well.

B. Factual Backgrounds of the Cases on CyberBullying: J.S. ex rel. Snyder v. Blue Mountain School District*,* Layshock ex rel. Layshock v. Hermitage School District*, and* Kowalski v. Berkeley County School

Recent cases on cyberbullying have produced several different analyses in the circuit courts. Since the Supreme Court has never considered the issue specifically, the lower courts have no choice but to fashion different methods of handling the situation, causing splits between and even within the circuits. This Comment will examine three cases, *J.S.*, *Kowalski*, and *Layshock*, and explore the split between the Fourth and Third Circuit as well the as the split within each of these circuits.[38] *J.S.* and *Layshock* were both decided on June 13, 2011 by the Third Circuit, but the cases follow different frameworks.[39] *Kowalski*, the most recent case, decided by the Fourth Circuit on July 27, 2011, tipped the balance towards extending the authority of school officials when punishing students for off-campus cyberbullying.[40]

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

On March 18, 2007, J.S, an eighth grader, created a fake profile for her principal and posted it on MySpace, a social networking website.[41] She created the profile at home using her parents' computer.[42] The profile did not identify Principal McGonigle by name or post, but used his official picture from the school's website.[43] It was presented as a "self-portrayal of a bisexual Alabama middle school principal named 'M-Hoe'" and contained "crude content and vulgar language, ranging

38. *See generally* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011); Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011); Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011). These cases were chosen because they are the most recent examples of the legal issues dealt with by circuit courts in attempting to wade through cyberbullying and student speech jurisprudence. While this Comment mostly examines the split between the Third and Fourth Circuits, the chosen cases also refer to the issues tackled by the Second Circuit in similar circumstances.

39. *See J.S.*, 650 F.3d 915; *Layshock*, 650 F.3d 205.

40. *Kowalski*, 652 F.3d at 572.

41. *J.S.*, 650 F.3d at 920.

42. *Id.*

43. *Id.*

from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family."[44] J.S. listed the principal'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, hitting on students and their parents."[45]

This profile was first open to a general viewership but J.S. relegated it to a private status after several students from the school informed her that they had seen and "thought the profile was funny."[46] The Third Circuit commented that "[t]hough disturbing, the record indicates that the profile was so outrageous that no one took its content seriously. J.S. testified that she intended the profile to be a joke between herself and her friends."[47] Since the school computers blocked access to MySpace, no one could access the profile from school and Principal McGonigle learned of its existence through a student.[48] "McGonigle asked this student to bring him a printout of the profile to school the next day, which she did. It is undisputed that the only printout of the profile that was ever brought to school was one brought at McGonigle's specific request."[49]

The district court granted summary judgment in favor of the school and J.S. challenged.[50] The court of appeals reviewed the case *de novo* on whether the grant of summary judgment was appropriate in this case.[51] The Third Circuit affirmed the district court's ruling, but hearing the case again *en banc*, vacated its prior decision and reversed the ruling on the First Amendment issue in the lower court.[52] The court's ruling is as follows: the school district reasonably could not have forecast substantial disruption of, or material interference with, the school when an eighth grade student created, from her home computer, an Internet profile of the school principal using photos from the school website,

44. *Id.*
45. *Id.*
46. *Id.* at 921.
47. *Id*.
48. *Id.*
49. *Id.*
50. *See id.* at 925.
51. *See id.*
52. *See id.* at 920.

insinuating that he was a sex addict and pedophile. Therefore, the school district violated the student's First Amendment free speech rights when it suspended her for creating the profile. This is especially so considering she took specific steps to make the profile private so only her friends could access it, and the profile itself was so outrageous that no one could have taken it seriously, and no one did.[53]

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

Justin Layshock, a seventeen-year-old senior at a high school in Pennsylvania, also used MySpace to create a parody profile of his high school principal.[54] He created this profile sometime in December 2005, using a personal computer at his grandmother's house.[55] "The only school resource that was even arguably involved in creating the profile was a photograph of Trosch [the principal] that Justin copied from the School District's website."[56] Layshock restricted access to the profile, allowing only designated friends to view the material.[57] "Not surprisingly, word of the profile 'spread like wildfire' and soon reached most, if not all, of . . . [the] student body."[58] The administration became aware of the profile when a teacher spotted the profile on a student's computer screen and had to discipline several students for congregating around it and giggling.[59] The theme of Layshock's parody profile was 'big' because the principal "is apparently a large man."[60] The following is a sample of the profile:

> Birthday: too drunk to remember
> Are you a health freak: big steroid freak
> In the past month have you smoked: big blunt
> In the past month have you been on pills: big pills.[61]

After viewing this profile, several other students created

53. *Id.* at 928–31.
54. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 207–08 (3d Cir. 2011).
55. *Id.* at 207.
56. *Id.*
57. *Id.* at 208.
58. *Id.*
59. *See id.* at 209.
60. *Id.* at 208.
61. *See id.* (footnote omitted).

parody profiles for the same principal and "[e]ach of those profiles was more vulgar and more offensive than Justin's."[62]

Layshock used the school's computers to access the profile and show it to other students.[63] As a result of his profile and the derivate profiles of other students, the school had to suspend computer classes and monitor students' use of their personal computers.[64] Principal Trosch believed the profiles to be "degrading, demeaning, demoralizing, and shocking. He was also concerned about his reputation and complained to the local police."[65]

The district court granted summary judgment in favor of Layshock, and the Third Circuit affirmed the decision.[66] Sitting *en banc*, the Third Circuit later vacated its prior ruling, and once again affirmed the district court decision's finding in favor of Layshock.[67] The court ruled that though Layshock had used school computers to access the profile, this did not "forge a nexus between the School and Justin's profile."[68] There was no evidence that Layshock engaged in lewd or profane speech while in school, and his speech did not result in any substantial disruption of school.[69]

3. Kowalski v. Berkeley County School

Unlike the preceding cases, the cyberbullying in this case was targeted towards a fellow high school student, not a school official.[70] Kara Kowalski, a twelfth grade student at Musselman High School in the Berkeley County School District created a MySpace page titled Students Against Sluts Herpes (S.A.S.H).[71] "Kowalski claimed in her deposition that 'S.A.S.H.' was an acronym for 'Students Against Sluts Herpes,' but a classmate, Ray Parsons, stated that it was an acronym for "Students Against Shay's Herpes," referring to another Musselman High School Student,

62. *Id.*
63. *See id.* at 209.
64. *See id.*
65. *Id.*
66. *Id.* at 211.
67. *See id.* at 216.
68. *Id.* at 214–15.
69. *See id.* at 216.
70. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011).
71. *Id.* at 567.

Shay N. . . . ."[72]

Ray Parsons was the first one to join the group.[73] He uploaded a "photograph of himself and a friend holding their noses while displaying a sign that read, 'Shay Has Herpes,' referring to Shay N."[74] Kowalski promptly posted a positive response, stating "Ray you are soo funny!=)," after which Parsons added two more photographs of Shay N.[75] "In the first, he had drawn red dots on Shay N.'s face to simulate herpes and added a sign near her pelvic region, that read, 'Warning: Enter at your own risk.'"[76] In the second photograph, he captioned Shay N.'s face with a sign that read, "portrait of a whore."[77] The commentary posted on this webpage mostly targeted Shay N. and was authored by Musselman High School students.[78] Two posts singled Kowalski out as the creator of the page and credited her with "mastermind[ing] a group that hates [someone]."[79] After discovering the webpage, Shay N.'s parents complained to the school.[80] Shay N. refused to attend her classes, feeling targeted and harassed.[81] Kowalski claimed that she was unable to take down the webpage and renamed it "Students Against Angry People" in response to the harassment charges filed against her.[82] The school district disciplined her for these actions and Kowalski began this action by filing suit and contending that the school district had violated her rights to free speech and due process.[83] The district court granted summary judgment in favor of the school district holding that it was authorized to discipline Kowalski for her webpage.[84] Reviewing the case *de novo*, the Fourth Circuit upheld the judgment of the district court.[85]

72. *Id.*
73. *Id.* at 568.
74. *Id.*
75. *Id.*
76. *Id*.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 570.
84. *Id.* at 567, 570.
85. *Id.* at 567.

II. IDENTIFICATION OF THE LEGAL PROBLEM

The Supreme Court has never issued a decision concerning cyberbullying.[86] This leaves the circuit courts to their own devices in fashioning rules, limits, and guidelines for school districts. Though there is a set framework on regulating student speech within the schools, or student speech that contains the imprimatur of the school, it does not always cover situations created by the rise of ubiquitous computing.[87] Currently, there is a split among the circuits, and even within the Third Circuit, over how and when to use *Tinker* to regulate off-campus student bullying.[88]

The fragmented nature of the jurisprudence leaves school districts unsure of their jurisdiction over student actions, and more importantly, it leaves the victims of cyberbullying without guidance or assurance of a remedy. The fact that most states and cities do not have specific cyberbullying ordinances also makes it difficult for victims to seek retribution through the legal system.[89]

III. ANALYSIS

The rifts in the opinions analyzed here run along four main lines: (1) whether *Tinker* should be used for off-campus speech,[90] (2) if using *Tinker*, should a court look for a reasonable forecast of substantial disruption or for an actual substantial disruption,[91] (3) how the "everywhere at once" nature of ubiquitous computing affects student speech,[92] and (4) whether cyberbullying cases merit a departure from the

86. *See id.* at 571.

87. King, *supra* note 19, at 870. The *Tinker-Fraser-Kuhlmeier-Morse* quartet is useful for providing guidelines of student speech when it is political, lewd, or sponsored by the school in some way. However, these cases do not address the multitude of issues created by ubiquitous computing and cyberbullying and may in fact serve to stunt the growth of legal discourse in this area if they are applied without more thought to the current context and technology.

88. *See supra* Part I.B.

89. *See id.* at 849, 857.

90. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 936 (3d Cir. 2011) (Smith, J., concurring).

91. *See Kowalski*, 652 F.3d at 571; Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 217 (3d Cir. 2011).

92. *J.S.*, 650 F.3d at 940 (Smith, J., concurring).

Tinker-Fraser-Kuhlmeier-Morse framework.[93]

A. Whether Tinker *Should be Used for Off-Campus Speech*

In *Tinker,* the Supreme Court ruled that student speech is protected unless it causes a substantial disruption.[94] The case specifically referred to student speech that took place on-campus, but the framework can apply to cyberbullying that involves off-campus speech. However, as the opinions discussed below explain, the *Tinker* holding cannot be used as is. It should be modified to accommodate the evolution of speech.

J.S. helps illustrate the reasoning behind choosing a *Tinker* approach. In this case, the district court did not follow *Tinker*.[95] Instead, the court focused on the content of the online profile, which it found to be lewd and sexually explicit.[96] On appeal, however, the Third Circuit chose to apply the *Tinker* test, holding that adopting another standard would allow schools "to punish any speech by a student that takes place anywhere, at any time, as long as it is *about* the school or a school official, is brought to the attention of a school official, and is deemed 'offensive' by the prevailing authority."[97] The court also cautioned that "[u]nder this standard, two students can be punished for using a vulgar remark to speak about their teacher at a private party, if another student overhears the remark, reports it to the school authorities, and the school authorities find the remark 'offensive.'"[98] *Tinker* better captures the effect of cyberbullying, with its focus on the victim as opposed to other cases approached where the focus is on the individual student engaged in the speech.

Instead of creating a new standard for cyberbullying, the Third Circuit decided that since the Supreme Court had "analyzed the extent to which school officials can regulate student speech in several thorough opinions,"[99] it would use

93. *See Layshock*, 650 F.3d at 216.
94. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
95. *J.S.*, 650 F.3d at 923.
96. *See id.*
97. *Id.* at 933.
98. *Id.*
99. *Id.* at 925.

established precedent.[100] While the decision to use this iconic case was appropriate, the majority opinion should have taken the unique nature of the off-campus speech into consideration and not used *Tinker* as a prêt-à-porter case.

The decision to apply *Tinker*, however, was not unanimous. The *en banc* Third Circuit did not come to an even consensus and presented a splintered document with a lengthy concurrence and a strong dissent.[101] The concurrence, authored by Judge Smith and joined by Chief Judge McKee and Judges Sloviter, Fuentes, and Hardiman, varies on what the key issues should be, but reaches the same conclusion as the majority.[102] Judge Smith states:

> I write separately to address a question that the majority opinion expressly leaves open: whether *Tinker* applies to off-campus speech in the first place. I would hold that it does not, and that the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large.[103]

The dissent authored by Judge Fisher and joined by Judges Scirica, Rendell, Barry, Jordan, and Vanaskie,[104] embarks down a third path. It holds that while the application of the *Tinker* test to off-campus speech may be appropriate, the court did not apply the substantial disturbance test correctly to the facts.[105] The dissent highlights the fact that the speech here was lewd and vulgar, not political in nature like in *Tinker*.[106] Consistent with the rest of the opinion, the dissent is also at war with itself.[107] After applying the facts of this case to *Tinker's* rule and holding in favor of the school, Judge Fisher exhibits a discomfort with using *Tinker* for off-campus speech. He writes that "[i]n *Tinker*, the Court stated that 'conduct by the student, in class or out of it, which . . . materially disrupts classwork or involves substantial disorder or invasion of rights of others is, of course, not immunized by constitutional

100. *See id.* at 933.
101. *Id.* at 936–52.
102. *Id.* at 936 (Smith, J., concurring).
103. *Id.*
104. *Id.* at 941 (Fisher, J., dissenting).
105. *See id.*
106. *See id.* at 943.
107. *Id.* at 941–52.

guarantee of freedom of speech.'"[108] He finds the language unclear and asks whether *Tinker* "means to distinguish the classroom from the world beyond the schoolhouse gates, or if it simply means out of class but in the cafeteria, schoolyard, or other areas on school grounds."[109] It is obvious here that the judges agree that *Tinke*r is important but are unclear on how to use the case. The application of *Tinker* either needs to be modified so as to fit the nature of cyberspeech or the *Tinker* rule used must be supplemented by another theory that better accommodates the fluidity of boundaries created by the ubiquitous use of the Internet.

The Third Circuit also examined whether the *Tinker* test applied to off-campus speech in *Layshock*. Though the cases were decided on the same day, the *Layshock* decision takes an entirely different route.[110] The majority opinion in *Layshock* avoided *Tinker* altogether and chose to follow precedent set by the Second Circuit, asking whether there was a sufficient nexus between Layshock's speech and the school.[111] The strongly worded *J.S.* dissent chose to apply a new case, *Doninger v. Niehoff*, which would increase the school district's authority over off-campus speech.[112] In *Doninger*, the Second Circuit faced a situation where a high school student used a blog to encourage other students and members of the community to contact the school and complain about an allegedly cancelled concert.[113] *Layshock* points out that in this case, the Second Circuit upheld the student's punishment because it "'created a foreseeable risk of substantial disruption to the work and discipline of the school.'"[114] Despite the efforts of the Third Circuit, ignoring a landmark case like *Tinker* actually weakens the opinion and takes it farther away from existing jurisprudence.

108. *See id.* at 942 (Fisher, J., dissenting) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

109. *Id.*

110. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 220 (3d Cir. 2011).

111. *Id.* at 214.

112. *J.S.*, 650 F.3d at 915 (citing Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008)).

113. *Doninger*, 527 F.3d at 44–45.

114. *Layshock*, 650 F.3d at 218 (quoting *Doninger*, 527 F.3d at 53).

The Fourth Circuit in *Kowalski* chose to use *Tinker* to regulate off-campus student speech. Instead of assuming the case applied to the facts at issue like the Third Circuit did in *J.S.*, the majority opinion states "the language of *Tinker* supports the conclusion that public schools have a 'compelling interest' in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying."[115] The opinion then articulates that "student-on-student bullying is a 'major concern' in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide."[116] Therefore, just "as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use, schools have a duty to protect their students from harassment and bullying in the school environment."[117] It is important to note here that the court carefully specifies that halting "student-on-student" bullying is a compelling interest but did not widen its holding to other situations. In *J.S.* and *Layshock*, the bullying victims were adults and authority figures in the schools, possessing considerably greater power than the student victim in *Kowalski*. Here, in *Kowalski*, the strong application of *Tinker*, and expansion of the school's jurisdiction to off-campus speech was likely prompted by a concern for minors. The Third Circuit may have been less inclined to apply this brand of forceful reasoning because of the age of the victims in both *J.S.* and *Layshock*.

Based on the divisive split amongst courts, it is clear that the identity of the victim is extremely important to the evolution of caselaw. For example, two out of the three cases analyzed in this Comment have adult victims. Not only were they adults, but, as administrators or staff members of the schools, they possessed considerably greater power and influence over their bullies. As adults, they were also more likely to report and remedy the bullying incidents. Children are less likely to come forward as victims, less likely to seek legal recourse and therefore contribute less to the evolution of legal theory. Lack of litigation where minors are victims of

115. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 572 (4th Cir. 2011).
116. *Kowalski*, 652 F.3d at 572.
117. *Id.* (citation omitted).

cyberbullying may be the reason why courts are not applying *Tinker* in a way that would increase schools' jurisdiction over actions committed off-campus.

B. When Applying Tinker*, Should Courts Require a Reasonable Forecast of Substantial Disruption or an Actual Disruption?*

The Third Circuit specified in the majority opinion of *J.S.* that there must be a reasonable forecast of a substantial disruption at school in order to justify a restriction on student speech.[118] It further held that "[i]f *Tinker*'s black armbands—an ostentatious reminder of the highly emotional and controversial subject of the Vietnam war—could not 'reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,' neither can J.S.'s profile, despite the unfortunate humiliation it caused for [Principal] McGonigle."[119]

The concurring opinion took a different approach. Though it did not advocate applying *Tinker*, Judge Smith takes the time to declare that in the event a court were to choose to apply *Tinker*, it should not utilize the foreseeable standard, but rather look to whether there the speech caused an actual disruption.[120] He posits:

> I would have no difficulty applying *Tinker* to a case where a student sent a disruptive email to school faculty from his home computer. Regardless of its place of origin, speech intentionally directed towards a school is properly considered on-campus speech. On the other hand, speech originating off campus does not mutate into on-campus speech simply because it foreseeably makes its way onto campus.[121]

He insists that a "bare foreseeability standard could be stretched too far, and would risk ensnaring any off-campus expression that happened to discuss school-related matters."[122]

118. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 930 (3d Cir. 2011).
119. *Id.* at 929–30 (citation omitted) (quoting *Tinker*, 393 U.S. at 514).
120. *See id.* at 940 (Smith, J., concurring).
121. *Id.*
122. *Id.*

Interestingly, the dissenting opinion finds more common ground on this matter with the majority than does the concurrence.[123] The dissent condones using a foreseeability standard, but applies the facts of the *J.S.* case to the rule differently and ultimately comes out in favor of the school district.[124] In doing so, it aligns itself with the Second Circuit and its opinion in *Doninger*.[125] The dissent is more concerned with the school as an institution than the majority. To the dissent, the effects on the community and on the concept of public education are at the heart of the issue. This outlook focuses on the very foundation of the relationship between students and their teachers. Judge Fisher is concerned with students "making false accusations" and worries about leaving a school "powerless" against student speech.[126] Interestingly, the judges see the adult as one who is helpless and without the power to defend the institution. The dissent wants to protect public schools and therefore aligns with the school district and the Second Circuit.

Though the Third Circuit only requires that student speech have a reasonable forecast of causing disruption,[127] the Fourth Circuit in *Kowalski* advocated requiring an actual disruption of the school environment in order for the school to step in and regulate student speech. The majority opinion states, "[a]t bottom, we conclude that the school was authorized to discipline Kowalski because her speech interfered with the work and discipline of the school."[128] The court states in unequivocal terms that "Kowalski's speech caused the interference and disruption described in *Tinker*."[129] It added that because the purpose of the speech was to target a student with vicious remarks and accusations,

123. *See id.* at 941 (Fisher, J., dissenting).

124. *Id.*

125. *See id.* at 950–51.

126. *See id.* at 941 (Smith, J., concurring).

127. *See id.* (citing Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043 (2d Cir. 1979)). In *Thomas*, a group of high school students was suspended for producing a satirical publication targeted at the school community. *See* 607 F.2d 1043. They were careful to distribute the material away from school and did most of the work away from school. *Id.* at 1045. The Second Circuit determined that the publication was not sufficiently related to the school to justify its exercise of authority over it. *See id.* at 1050–53.

128. Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 574 (4th Cir. 2011).

129. *Id.* at 572.

the educational system was not required to tolerate it.[130] The deep disruption of a student's psyche was akin to the disruption mentioned in *Tinker*.[131] The Fourth Circuit was likely trying to separate itself from the inconclusive Third Circuit and set forth a strong precedent to protect future student victims of cyberbullying.

Strong opinions in the Third and Fourth Circuits seem to be choosing to apply *Tinker* and supporting the idea of a school environment safe from bullies. However, without a clear *Tinker* test, or even a more substantial choice to apply *Tinker* at all, lower courts around the country are seriously lacking in guidance on cyberbullying.

C. The "Everywhere at Once" Nature of Ubiquitous Computing and Student Speech

A notable section of the court's concurrence in the *J.S.* opinion expressly addresses the tricky web woven by ubiquitous computing around student speech.[132] Judge Smith asks "how can one tell whether speech takes place on or off campus?"[133] He then admits that "[t]he answer plainly cannot turn solely on where the speaker was sitting when the speech was originally uttered . . . [because this would] fail to accommodate the somewhat 'everywhere at once' nature of the internet."[134] The *Layshock* concurrence also sees the on-campus and off-campus distinction mentioned in its majority opinion, and in the majority opinion of *J.S.*, as largely obsolete. Judge Jordan writes that a student could use the tools of modern technology to "engineer egregiously disruptive events . . . while standing one foot outside school property, [and] the school administrators might succeed in heading off the actual disruption in the building but would be left powerless to discipline the student."[135] He sees this as problematic, finding it difficult "to see how words that may cause pandemonium in a public school would be protected by

130. *See id.* at 573.

131. *See id.* at 572.

132. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 940 (3d Cir. 2011).

133. *Id.*

134. *Id.*

135. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 221 (3d Cir. 2011).

the First Amendment simply because technology now allows the timing and distribution . . . to be controlled by someone beyond the campus boundary."[136] These words go to the heart of the technology issue. Ubiquitous computing "undoubtedly create[s] a plethora of legal issues, both by challenging the ability of existing legal rules to cope with radically new circumstances and by creating situations so new as to be seemingly ungoverned by existing legal rules."[137]

While the *Layshock* and *J.S.* opinions address the slippery nature of new technology, the *Kowalski* opinion is resolute in its silence on the matter.[138] This causes another split between the circuits. Reading the facts of the cases, "legal issues presented by the advent of ubiquitous computing are readily apparent . . . [and stem from] the potential loss of privacy in continuously monitored environments that constantly acquire, store and transmit information about individuals in those environments."[139]

When J.S. and Layshock created their parody profiles, both students designated the pages as private and only opened the discussions to other students.[140] Their materials, however, travelled beyond their designated boundaries and ultimately reached their school principals.[141] Without ubiquitous computing, the school would have no way to gather this data apart from using students to report each other. Before smart phones and social networking, this would have been an incident of passing notes between students. The teacher, assuming he noticed it, would most likely confiscate the note. Here, we have inter-student communication, which is also simultaneously being broadcasted worldwide, increasing the potential for the schools, and therefore the government, to capture this information. "Just as previous communication technologies . . . provided opportunities for the government to acquire information while it was in transit, ubiquitous computing technologies, particularly those aspects of ubiquitous

136. *Id.* at 222.

137. Boone, *supra* note 20, at 93.

138. *See J.S.*, 650 F.3d at 940 (Smith, J., concurring); Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565 (4th Cir. 2011); *Layshock*, 650 F.3d at 216.

139. Boone, *supra* note 20, at 94.

140. *J.S.*, 650 F.3d at 921; *Layshock*, 650 F.3d at 208.

141. *J.S.*, 650 F.3d at 921; *Layshock*, 650 F.3d at 208.

computing involved in sensing, storing, and transmitting data, create new opportunities for the government to intercept information."[142]

This is apparent in how the schools in all three cases discovered the bullying material.[143] Students using the interconnectivity and malleable nature of the Internet may not always perceive the ease with which it may be broadcasted to a much wider audience than originally intended. This "inherent interconnectivity of ubiquitous computing makes it so that the captured information may often be in the hands of one or more third parties. The government, in turn, may acquire the collected information from those third parties . . . ."[144] Consequently, schools can monitor more speech now, and as a result, may seek to exercise jurisdiction over more realms of student life because such speech makes its way into the schoolhouse.

Scott Boone, Associate Professor of Law at Appalachian Law and author, provides an example of how an entity could monitor and control remote behavior solely through collecting data previously unavailable to it.[145] In his article on legal issues presented by ubiquitous computing, he writes that recently, certain Californians who rented cars discovered upon return that their bill amounted to thousands of dollars instead of the expected hundreds.[146] "It turned out, unbeknownst to them, that GPS in the rentals had monitored the vehicle crossing into another state and that the fine print in the rental contract provided for relatively high additional charges if the rental was taken out of California."[147] The information was collected and conveyed by devices connected to the web. These devices were capable of broadcasting information previously thought unavailable to car rental companies.[148] This is very similar to cases of cyberbullying where access and capture of certain information may lead to fines and punishments. Students and schools are not

142. Boone, *supra* note 20, at 123.
143. *See J.S.*, 650 F.3d at 921; *Kowalski*, 652 F.3d at 568; *Layshock*, 650 F.3d at 209–10.
144. Boone, *supra* note 20, at 123.
145. *See id.* at 91, 144–45.
146. *See id.*
147. *Id.* at 145.
148. *See id.* at 144.

contracting parties, and therefore, there is no immediate result dictated by the increased monitoring. It is clear from reading recent case law, however, that this facet of communication technology needs regulations and rulings so schools can continue to protect student speech while also punishing and proscribing cyberbullying.

D. Whether Cyberbullying Cases Merit a Departure from the Tinker-Fraser-Kuhlmeier-Morse *Framework*

The Third Circuit decided *Layshock* and *J.S.* on the same day and, in attempting to forge some sort of unity, applied markedly different standards to the same set of facts.[149] As laid out in Part I, the facts of the two cases are almost identical. It stands to reason then, that the same judges would apply the same reasoning. The fact that they did no such thing serves to highlight the legal issues and rifts caused by cyberbullying. After providing a background on the *Tinker-Fraser-Kuhlmeier-Morse* quartet, the majority opinion in *Layshock* makes use of *Thomas v. Board of Education*, a Second Circuit case from 1979 dealing with the issue of satirical student speech.[150]

In *Thoma*s, several students produced a satirical publication directed at the school.[151] The periodical was created off-campus, never sold at school, and the principal only discovered it by confiscating it from a student who brought it on campus.[152] The Second Circuit focused on the fact that the activity only had a de minimis connection with the school and was therefore out of the school's jurisdiction.[153] The Third Circuit applied this analysis to Justin Layshock's situation and held that "the relationship between Justin's conduct and the school [was] far more attenuated than in *Thomas*."[154] The opinion added that "the First Amendment [could not] tolerate the School District stretching its authority into Justin's grandmother's home and reaching Justin . . . in

149. *See* Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 215 (3d Cir. 2011); *J.S.*, 650 F.3d at 926.

150. *Layshock*, 650 F.3d at 215 (citing Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043 (2d Cir. 1979)).

151. *See Thomas*, 607 F.2d at 1045.

152. *See id.*

153. *See id.* at 1050.

154. *Layshock*, 650 F.3d at 216.

order to punish him for the expressive conduct that he engaged in there."[155]

Like the dissent in *J.S.*, the *Layshock* majority opinion cites *Doninger* but discredits it based on the facts.[156] *Doninger*, a more recent case than *Thomas*, involves the same technology issues and is about off-campus student speech.[157] Interestingly, the court uses a much older case that does not address technology concerns to uphold its reasoning.[158] Reading the *Layshock* concurring opinion, it becomes evident that the majority used *Thomas* in order to avoid using *Tinker*, which would be sure to produce another splintered opinion.[159]

The concurring opinion in *J.S.* also offers an alternative to the traditional student speech framework. Judge Smith, in choosing not to apply *Tinker*, advocated using the First Amendment to analyze cyberbullying speech that takes place off-campus.[160] His standards are also less student-specific because he believes that "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large."[161] The concurring opinion chooses to discard *Tinker* and the rest of the framework because it believes the cases should be grounded in the special characteristics of the school environment.[162] The speech in *J.S.* was not created or transmitted in this environment and, therefore, the opinion reasons, a standard First Amendment analysis should apply to this sort of cyberbullying.[163]

III. PROPOSED SOLUTIONS

Cyberbullying in public schools can be regulated in a variety of ways including school policies, legislation, and court decisions. The path to regulation is currently unpaved and foggy without a clear decision from courts. School

155. *Id.*
156. *See id.* at 217.
157. *See* Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).
158. *See Layshock*, 650 F.3d at 215.
159. *See id.* at 220 (Jordan, J., concurring).
160. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 936 (3d Cir. 2011) (Smith, J., concurring).
161. *Id.*
162. *See id.* at 937.
163. *See id.*

districts are unclear about what they can regulate and how far they can go to prevent or punish bullying. "[S]chools represent a critical battleground for cyberbullying prevention" but "without direction on when and how they may legally punish student Internet expression, [they] are left paralyzed in the face of uncertainty."[164]

A. Deciding on Tinker

With the split between and within the nation's circuit courts on the use of *Tinker*, schools and pupils have no way of knowing which speech is protected and which is not. The questions to be solved by the courts are as follows: (1) should *Tinker* be applied to off-campus cyberbullying speech?, (2) if so, which standard should apply?, and (3) do the special characteristics of ubiquitous computing require additional privacy and due process analysis when student speech is involved?

B. Courts Should Use Tinker *if a School Can Show it Has Jurisdiction Over the Speech in Question*

1. Obtaining Jurisdiction—Adapting the Minimum Contacts Framework to Cyberspeech

All three cases discussed above spent a considerable amount of time and ink discussing the boundary of the schoolhouse and the location of the schoolhouse gate in order to determine whether the speaker was on-campus or off-campus. "With respect to speech, courts have recognized the unique characteristics of the school environment and have given schools the authority to suppress speech inside the school that would not be regulated outside of the school setting."[165] However, as the concurrence in *J.S.* states, the fluid nature of the Internet, combined with the expansive reach of "smart" devices, makes it difficult to determine which speech was strictly on-campus and which occurred off-grounds.[166] Therefore, eradicating this increasingly fictional

164. King, *supra* note 19, at 874–75.

165. Renee L. Servance, *Cyberbullying, Cyber-Harassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213, 1233 (2003).

166. *See J.S.*, 650 F.3d at 940 (Smith, J., concurring).

boundary may serve a greater purpose in cyberbullying jurisprudence than attempting to define it. The jurisdiction of schools is greatest when students are in class and in the school environment and decreases as the students move further away. That being said, a student with an iPhone linked with, for example, a Facebook application, could effectively be engaging in on-campus speech as he contacts other students, teachers and effects change in the school environment. Similarly, the same student could be speaking off-campus while wandering the school hallways.

The problem of school jurisdiction here is comparable to the question of when a particular state has jurisdiction over an individual. Much as the Third Circuit did in *Layshock* and *J.S.*, the early Supreme Court imagined jurisdiction based on a strictly geographical model. In the 1877 case of *Pennoyer v. Neff*, the Court stated that, "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."[167] The Court established that the defendant must be present within a state for it to exercise jurisdiction over him.[168] However, as the country matured and adopted new transportation technologies, its citizens became increasingly more motile and geographical boundaries became archaic determinations of jurisdiction. Student speech through ubiquitous computing is the equivalent of the transcontinental railroad, the system of interstate highways and the invention of the airplane all rolled into one sleek, portable device. One cannot expect results with analysis reminiscent of *Pennoyer* and the nineteenth century. On-campus and off-campus locations should not be used to determine whether schools may reach student speech, just as a defendant's location is no longer the sole determinant of whether a state can reach him.

Overturning the rigid geographical analysis of *Pennoyer*, the Court stated in *International Shoe* that a state may have jurisdiction over a defendant if said defendant has certain minimum contacts within the state, and the if the suit does not offend the traditional notions of fair play and substantial justice.[169] In sanctioning the State of Washington's

167. Pennoyer v. Neff, 95 U.S. 714, 720 (1877).
168. *See id.*
169. Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945).

jurisdiction over a commercial entity based in Delaware, the Court declared that if a company carries on systematic and continuous activities within a state, has agents in the forum, is putting products into the stream of commerce, and is benefitting from the state, it is considered "present" in that state.[170] The Court heightened this standard in *World-Wide Volkswagen Corp. v. Woodson*, declaring that minimum contacts meant the defendant had to purposefully avail himself of the state.[171] The activity in question had to be directed at the state with a set purpose in mind.[172] Additionally, the Court defined traditional notions of fair play and substantial justice to include: (1) evidence of minimum contacts, (2) foreseeability of injury, and (3) a showing of the state's interests.[173] Directly addressing the Internet, the Court declared in *Zippo Mfg. Co. v. Zippo Dot Com,* that a website would be considered "present" in a certain jurisdiction based on "the level of interactivity and commercial nature of the exchange of information."[174] A blog that simply and freely posts information for an open and undifferentiated audience is too passive to be present or to be purposefully availing itself of any particular population of a certain state of jurisdiction.[175]

These cases serve as a great frame of reference for courts dealing with cyberbullying and student speech issues. This jurisdictional analysis provides a clear answer to the question of whether school districts can reach certain speech. Courts should use this analysis to determine whether speech is "present" at school and then move on to use *Tinker*. In *Thomas* and *Layshock*, the Second and Third Circuits came close to this type of reasoning but did not articulate an applicable standard.[176] Both cases looked at the nexus of the speech with the school, which is very similar to what the Supreme Court was looking for in its minimum contacts

170. *See id.* at 320.

171. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

172. *See id.*

173. *See id.* at 291–92, 297.

174. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

175. *See id.* at 1126.

176. *See, e.g.*, Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 215 (3d Cir. 2011).

inquiry.[177] For student speech, courts should examine whether the speech, regardless of where it is composed, has minimum contacts with the school, whether it is targeted specifically at the school's agents, whether the proscription of the speech would be within the traditional notions of fair play and substantial justice and whether the cyber-content was presented in a passive or active manner. In keeping with precedent and policy, "school authority over off-campus speech is narrower because outside of the school environment, the freedom of speech is at its 'zenith.'"[178] "Therefore, courts impose a heavy burden on schools to show sufficient disruption to regulate off-campus speech."[179] In adapting these jurisdictional tests, courts should maintain the heavy burden for showing a substantial disruption caused by cyberbullying.

Using this analysis, the school in question would have jurisdiction over the speech if it could show that the speech in question had minimum contacts within the school. If the speech made systematic and continuous appearances on campus, was spread by students or other agents of the school, and is about any such agent, the speech will be considered within the school's jurisdiction. Adding the standard in *World-Wide Volkswagen*, a court would also ask whether the student purposefully availed himself of the school. This would include using school images, sharing speech specifically with the students of that that high school, or using the students to disseminate the speech.

To determine whether the extension of jurisdiction would be within the traditional notions of fair play and substantial justice, the court would look for the aforementioned minimum contacts, determine whether there is a foreseeability of injury stemming from the speech (this is similar to the *Tinker* standard already used by the Third Circuit), and the school would show that it had sufficient interest in extending its jurisdiction over the speech. In *J.S.*, the court cited a former decision that required a compelling interest from the school in

177. *See, e.g.*, *id.* at 215–16.

178. Servance, *supra* note 165, at 1234 (quoting Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1050 (2d Cir. 1979)).

179. *Id.*

order to sanction a proscription of speech.[180] In *Layshock*, the court observed that the school had a compelling interest in providing students with a drug free environment.[181] In *Kowalski*, the court used this same reasoning to suggest that the school had just as strong of an interest in providing students with a school environment free from bullying and harassment.[182] In addition, policy concerns for the welfare and development of minors would sway courts in favor of accepting a sufficient school interest in providing a safe and healthy environment for students.

The new standard for school jurisdiction could be as follows: (1) does the speech in question have minimum contacts with the school?, (2) can the school reasonably forecast a substantial disruption of its environment as a result of the speech?, and (3) does the school have a sufficient interest in curbing the speech? Additionally, the courts could also consider the ruling in *Zippo*, where the Court examined the level of interactivity and passiveness of the website being examined.[183] Once the school proves that the speech passes the criteria of minimum contacts and appears on an interactive and active website, the school will have jurisdiction to regulate the speech. However, it is most important to remember that just because a school has jurisdiction, it does not automatically have the ability to proscribe and punish speech.

C. Courts Should Use the Substantial Disruption Standard in Tinker

In the cases examined above, the courts seemed to assume that the school had jurisdiction over the speech in question. The current circuit split is over how and whether *Tinker* should apply—essentially, what type of cyberbullying speech the schools may punish. In order for the jurisprudence on this issue to be consistent, the split between

180. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 933 (3d Cir. 2011) (citing Gruenke v. Seip, 225 F.3d 290, 305 (3d Cir. 2000)).

181. *See Layshock*, 650 F.3d at 214 (citing Morse v. Frederick, 551 U.S. 393, 407 (2007)).

182. *See* Kowalski v. Berkeley Cnty. Sch., 652 F.3d 565, 572 (4th Cir. 2011).

183. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1126 (W.D. Pa. 1997).

and within the circuits must be mended. Courts should follow the reasoning in *Kowalski* and examine whether the speech actually caused a substantial disruption.[184] However, instead of keeping the reasoning identical to that case, courts should bring the *Tinker* reasoning into the Internet age.

Using a multifactor analysis involving student recklessness would tailor *Tinker's* requirement of substantial disruption to a cyberbullying context. For example, "the school district may not constitutionally punish the student's speech unless the student intentionally or recklessly caused the speech to be distributed on campus."[185] In this manner, even if the speech were created away from the school using student resources, the courts would examine the student's action in creating and distributing the speech in order to determine whether it was harmful to the school environment.

"Intentional distribution of speech occurs when the student . . . knows to a substantial certainty that the student's actions will cause the speech to be distributed inside the schoolhouse gates."[186] Furthermore, "[r]eckless distribution of speech occurs if the student, conscious of the risk that the Internet speech will be distributed on-campus, chooses to produce the Internet speech."[187] If the student has intentionally or recklessly caused cyberbullying speech to make a substantial disruption in the school, then a court may use the precedent in *Tinker* to punish such speech.

This is not allowable if the disruption is foreseeable and has not actually occurred. For example, if a student creates harmful cyberbullying speech on an active website targeted at a school agent and recklessly distributes it only to students of that school, the school may not punish him if the speech causes no disruption at the school. If the effects of the speech are not felt in school, the school cannot punish the speech. If however, the same speech is heavily discussed at school and causes disruptions, then the speech may be punished. In *Kowalski*, the website was shared with other students and

184. *See Kowalski*, 652 F.3d at 572.

185. Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 150 (2007).

186. *Id.*

187. *Id.*

Kowalski and several others said they were aware of the negative impact it would have on the target.[188] The pictures and comments were added by other high school students and distributed without regard for the fact that the speech would find its way into the school environment. The record shows that the victim of this speech felt its impact—refusing to attend her classes, causing a disruption in her schooling.[189] Therefore, the court in *Kowalski* would have been justified in punishing such speech even under the new reasoning.

In *Layshock* and *J.S.,* the websites were more passive than in *Kowalski*. As mentioned before, however, Layshock's speech more substantially disrupted school and was therefore punishable. In J.S.'s case, the student was not very reckless about the speech—she protected it as much as she could and the principal was only able to view it after a student printed a copy and brought it into school.[190] Classes were not disturbed and though the students spoke about it in class, the speech did not have much of an impact.[191] Therefore, this speech would not be punishable under the new standard. While the courts may be clear on which standards to apply in certain situations, and how exactly to apply *Tinker* to certain cases, the problem does not end there.

> Regardless of the manner in which the Court chooses to redefine *Tinker*, the greatest need is for an unambiguous guideline schools . . . can apply to Internet speech. Courts must strike a delicate balance between maintaining a productive and safe educational environment and allowing free speech and Internet dialogue to flourish.[192]

D. Data Proposal

The problem with ubiquitous computing is that not only is data simultaneously available to a great number of people, but this data is also logged away and archived for future access. Unlike a malicious note passed in class or a satirical newsletter, this data is preserved for years and easily

188. *See Kowalski*, 652 F.3d at 572–73.
189. *See id.* at 568.
190. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 921 (3d Cir. 2011).
191. *See id.*
192. King, *supra* note 19, at 876 (footnote omitted).

accessible. "A great deal of information about a user's online actions can be collected quite easily. Activities, which in the physical world traditionally have not led to the collection of potentially private information, can and do lead to such collection online."[193]

In the *Tinker-Fraser-Kuhlmeier-Morse* quartet, all the student speech was tangible in a way that cyberbullying is not. There, speech consisted of black armbands, a school newspaper, a student speech at an assembly, and a banner.[194]

In *J.S.*, *Layshock,* and *Kowalski*, the cyberbullying was conducted on websites and passed around to others through the Internet. Once published or produced, it was easy to replicate and difficult to completely eradicate. This means that school districts, in looking to regulate cyberbullying, will have a great deal more data on their students than previously available and this may have an effect on what speech school districts are allowed to proscribe and punish.

This data, which could have previously been a conversation among a group of frustrated students, a temporary venting of dissatisfaction or a quarrel, is now in the hands of the school district in a permanent format. This problem, created by the rise of ubiquitous computing, is not accounted for in any of the Supreme Court's decisions.[195] The concurrence in *J.S.* hints at the data issue but does not address it.[196] This increased access to data necessitates a stringent standard for regulating Internet speech. The jurisdiction analyses proposed earlier would ensure that even if the school had access to data, the school district's jurisdiction over such data would be limited and governed by the rule of law.[197] This will ensure that the schools do not repress students' constitutional rights but will let schools maintain a safe and bully-free environment for their students.

193. Boone, *supra* note 20, at 118.

194. Morse v. Frederick, 551 U.S. 393, 396 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

195. *See* King, *supra* note 19, at 866.

196. *J.S.*, 650 F.3d at 940 (Smith, J., concurring).

197. *See supra* Part III.B.1.

CONCLUSION

The intersection of student speech, cyberbullying, and ubiquitous computing is creating novel situations for courts around the country. Student speech cannot be chilled by excessive regulations and punishments. School officials must guard student welfare.[198] The circuit split examined in this Comment is a harbinger of additional rifts in cyberbulling jurisprudence. In order to fairly assess cyberbullying, courts must determine whether a school has jurisdiction over the speech.[199] Then courts must examine whether the speech caused a disruption in the school environment.[200] Courts must also be mindful of the excessive data available to the government due to ubiquitous computing[201] and be careful to guard against constitutional violations.[202]

198. *See* Servance, *supra* note 165, at 1215, 1217.
199. *See supra* Part III.B.1.
200. *See supra* Part III.C.
201. *See supra* Part III.D.
202. *See supra* Part III.D.