THE UNCERTAINTY OF DENYING CERT: WHY NO ANSWER WAS THE WRONG ANSWER WHEN IT COMES TO STUDENT INTERNET SPEECH

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I. INTRODUCTION

On January 17, 2012, the Supreme Court handed down its latest decision regarding student speech rights. Unfortunately, that decision was that “The Nine,” as they are often referred to, were not yet ready to hear a case involving student Internet speech. In denying certiorari on three student Internet speech cases, the Supreme Court left a very important question unanswered: Can schools regulate student Internet speech created off-campus? The Court’s current jurisprudence regarding student speech rights has left lower courts ill-equipped to answer the questions raised by cell phones and the Internet which frequently brings student speech onto campus regardless of its origin. As a result, lower courts dealing with the question have come out with drastically different answers, even from the same court. Additionally, and perhaps more importantly, the lack of a clear rule regarding student Internet speech leaves schools in a state of confusion as to whether the regulation of Internet speech is permissible in an age where cyberbullying is a growing problem across the country.

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2 Id.
5 Karly Zande, When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Cyberbullying, 13 Barry L. Rev. 103, 113 (2009).
determining which cases to take, the Court erred in declining to grant certiorari when it had an opportunity to provide clarification in this difficult area.

II. THE CERT PROCESS

In 2011, the Court received petitions for certiorari on Layshock v. Hermitage School District, J.S. v. Blue Mountain School District, and Kowalski v. Berkeley County Schools. All three cases involved the issue of student Internet speech and all three petitions were denied. An examination of the cert process leads one to question why cert was denied on such a hotly debated area of law.

The process by which the Court reviews petitions for certiorari is far different than its review of a case on the merits. One of the key differences is that the process is largely secretive. Where a review of the case on the merits yields a decision in which the public can learn how each individual Justice voted, the cert process provides no such details. As a result, the public often never learns why the Court grants or denies certiorari on a given case. Even so, there are a number of factors that help guide the Court’s decision-making process at the certiorari stage.

According to its own rules, one of the primary factors the Supreme Court considers in deciding whether to grant or deny certiorari is whether a lower court has entered a decision in conflict with another such court on an important federal question. As the nation’s highest court, the Supreme Court has an obligation to clarify a point of law if there is confusion between the lower courts on a federal

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6 See Mears, supra note 1.
7 Id.
9 Id. at 402.
10 Id.
11 Id. at 400.
question. As a result, history has shown that a conflict between lower courts is a strong indication that the Court will grant certiorari.

However, confusion in the lower courts is not the sole determinant of whether the Court will hear a case on the merits. Other factors lend themselves toward granting cert as well. The nature of the issue itself often dictates a grant of certiorari, especially if it is a matter of national importance. Additionally, the Court will sometimes wait for the “right” case on a certain issue before granting cert to make sure the it has the right vehicle for answering an important question. Moreover, the Court sometimes allows an issue to “percolate” in the lower courts, ensuring that all possible answers have been explored, before granting certiorari.

In light of these determining factors and the current state of the law regarding student speech rights, the time has come for the Court to hear a case involving student Internet speech.

II. SUPREME COURT PRECEDENT REGARDING STUDENT SPEECH

Since 1969, the Supreme Court has handed down four major decisions involving student speech rights. In all of these decisions, the Court was forced to negotiate a difficult balance between a student’s First Amendment rights and a school’s interest in maintaining discipline and carrying out its pedagogical mission.

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12 *Id.* at 402.
13 *Id.* at 407.
14 *Id.* at 410.
15 *Id.* at 403.
16 *Id.* at 403-04.
18 *See* Markey, supra note 3, at 134-35.
The Court’s first decision, *Tinker v. Des Moines Independent Community School District*, involved a group of students who were suspended for wearing black armbands to school in protest to U.S. involvement in Vietnam. In that case, the Court recognized that a school could regulate student speech, but also stated that students and teachers do not check their First Amendment rights “at the schoolhouse gate.” While holding that the school erred in disciplining the students, the Court noted that student speech must cause, or forecast, a “material and substantial” disruption or invade the rights of others before the school can take action. After establishing this baseline test, the Court then began to carve out exceptions.

In 1986, the Court handed down its next decision in *Bethel School District No. 403 v. Fraser*. In *Fraser*, a student was suspended after delivering a speech involving numerous graphic and sexual metaphors at a school assembly. In upholding the suspension, the Court refused to apply the test it established in *Tinker*. Rather, the Court held that schools have an interest in teaching socially appropriate behavior and could ban “vulgar and lewd speech” as a result.

Then, in 1988, the Court carved out another exception to *Tinker* in *Hazelwood School District v. Kuhlmeier*. In *Kuhlmeier*, the Court allowed a school to refuse

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20 *Id.* at 506.
21 *Id.* at 509.
23 *Id.* at 677.
24 *Id.* at 681
25 *Id.*
publication of school newspaper articles regarding divorce and teen pregnancy. The Court upheld the school’s decision not to publish the articles, stating that school did not have to endorse student speech through “school-sponsored” activities as long as they had legitimate concerns about the speech.

Finally, twenty years later, the Court rendered its most recent decision in Morse v. Frederick. In Morse, a student was suspended for holding up a sign that read “BONG HiTS 4 JESUS” across the street from school while the Olympic Torch procession was passing by the school. Again, the Court chose not to apply the test laid out in Tinker, but instead allowed the suspension because the school had an interest in preventing speech that promoted drug use.

It is against the backdrop of these cases that lower courts and school districts must make decisions as to when regulation of student speech is permissible.

III. THE NEWEST PROBLEM: STUDENT INTERNET SPEECH

While it is often difficult to define a “substantial disruption,” new problems have emerged. With the rise of the Internet, text messaging, and social networking, schools face issues that do not fit so neatly within the context of the precedents established in the Court’s prior decisions. Those decisions dealt with speech that was ruled to be on-campus. The biggest First Amendment issue facing schools today, and consequently the judicial system, is what to do when speech originates off-campus and is subsequently brought onto campus in some way or another.

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27 Id. at 263.
28 Id. at 273.
29 Morse v. Frederick, 551 U.S. 393 (2007).
30 Id. at 401.
31 Id. at 408.
32 See Zande, supra note 5, at 119.
With the advent of blogs and websites, students can now make statements off-campus, even in the privacy of their own homes, and then have that speech broadcast to campus through Internet access at school in the form of text messages, status updates, and emails.33

Interestingly, the Court had an opportunity to provide an answer this question in Morse. However, despite the off-campus location of the student’s actions, the school treated Morse as a case of on-campus speech because the banner was unfurled at a school-sanctioned activity.34 It was this decision to treat Morse as on-campus speech that has left the lower courts floundering in a gray area when it comes to student Internet speech.

IV. CONFUSION IN THE LOWER COURTS

Without a clear rule, lower courts have used Tinker as a framework for answering the question regarding the propriety of school’s regulating student speech originating off-campus. The results have led to a great deal of confusion in the lower courts as they attempt to determine whether or not schools have jurisdiction to regulate Internet speech.35

For example, the Third Circuit Court of Appeals applies a “sufficient nexus” standard, arguing that a school can regulate speech when there is a close connection

33 Id. at 109-10.
35 See Zande, supra note 5, citing Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 618 (5th Cir. 2004) (“The line dividing fully protected ‘off-campus’ speech form less protected ‘on-campus’ speech is unclear in cases such as this involving off-campus speech brought on-campus without the knowledge or permission of the speaker.”).
between a disruption at school and the speech in question. The Second Circuit Court of Appeals applied a different test in Doninger v. Niehoff, finding that a school could regulate off-campus speech by applying Tinker when it is “reasonably foreseeable” that the speech will reach campus. Still other courts have found that schools lack jurisdiction all together when speech originates from an off-campus location and makes its way inside the “schoolhouse gate.” Justice Alito lent some support to this school of cases in his concurrence from Morse when he opined that regulation of speech across the street from school was as far as the First Amendment would allow.

Others think that Tinker itself provides a possible answer to student Internet speech involving cyberbullying because the Court specifically mentioned allowing the regulation of speech that “invades the rights of others.” Similarly, others argue that cyberbulling is not speech that is afforded the protection of the First Amendment to begin with because it constitutes a “true threat.” While there is little case law supporting these positions, its presence in the debate conveys the breadth of different answers courts can arrive at in the absence of a unifying standard.

What is more troubling than the confusion amongst the lower courts is the confusion within the individual courts. For example, in applying its “reasonable

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37 Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2008).
39 Morse, 551 U.S. at 425.
40 Tinker, 393 U.S. at 513.
41 See Wheeler, supra note 34, at 221, citing Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002).
foreseeability” test, the Second Circuit seems unsure whether intent on the part of
the student is a necessary element. In Doninger, the court stressed the importance
of a student’s intent that a blog posting reach campus before allowing regulation.\(^42\)
In contrast, it held that intent that speech reach campus was not a requirement for
punishing a student for an Instant Messaging icon depicting the assassination of a
teacher in Wisniewski v. Board of Education of the Weedsport Central School
District.\(^43\)

The Third Circuit appeared similarly confused in reaching its decisions in
those two cases, two separate panels of the Third Circuit delivered very different
findings on the same day. In both Layshock and J.S., students were disciplined after
they created disparaging MySpace profiles of their principals while they were at
home and the profiles later came to the attention of the schools.\(^44\) In Layshock, the
student used a picture from the school website to create the profile and accessed the
profile from school on numerous occasions to show other students.\(^45\) In J.S., the
student discussed the site with friends, but included privacy settings that made it
accessible to only some students.\(^46\) Additionally, no students accessed the profile
while they were at school although a student later provided a printout of the site at
the school’s request.\(^47\) Despite these similar facts, the Third Circuit upheld the
school’s actions in J.S. and ruled that the school overstepped its bounds in

\(^{42}\) See Zande, supra note 5, at 125-26, citing Doninger, 527 F.3d at 45.
\(^{44}\) Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 252 (3d Cir. 2010); J.S. v. Blue Mountain Sch. Dist.,
593 F.3d 286, 292 (3d Cir. 2010).
\(^{45}\) Layshock, 593 F.3d at 252.
\(^{46}\) J.S., 593 F.3d at 289.
\(^{47}\) Id.
\textit{Layshock}.\textsuperscript{48} While Third Circuit articulated specific reasons for these divergent results, it also recognized the tension they created and granted a rehearing en banc.\textsuperscript{49} Notably, \textit{Layshock} and \textit{J.S.} were two of the cases for which the Supreme Court denied certiorari in January.\textsuperscript{50}

Given this confusion, the Supreme Court’s own rules regarding the cert process seem to dictate granting certiorari on the issue of student Internet speech. The conflicting decisions in \textit{Layshock} and \textit{J.S.} only serve to illustrate the depth of this confusion as courts struggle to arrive at an answer to this important federal question. Moreover, the sheer breadth of different answers provided by the lower courts conveys that the issue has “percolated” enough. The Court should have granted cert and helped define the outer boundaries of the First Amendment in the context of student speech.

V. THE CYBERBULLYING PROBLEM

The need for a clear rule regarding student Internet speech has become even more pressing with the rise of cyberbullying. Cyberbullying is defined as the use of technology to humiliate, embarrass, or intimidate another individual.\textsuperscript{51} In 2009, approximately twenty percent of students admitted to being cyberbullied in some form or another.\textsuperscript{52} Unfortunately, with the increased availability of technology, that number has risen significantly, reaching almost 50\% in 2012.\textsuperscript{53} This trend presents a real problem for schools. Bullying and hazing has long been a problem that has

\textsuperscript{48} \textit{Layshock}, 593 F.3d at 260-63; \textit{J.S.}, 593 F.3d at 300-02.
\textsuperscript{49} See Wheeler, supra note 34, at 212-13.
\textsuperscript{50} See Mears, supra note 1.
\textsuperscript{51} See Zande, supra note 5, at 106-07.
\textsuperscript{52} Id.
existed within Tinker’s “schoolhouse gate.” However, cyberbullying creates a scenario where bullies can initiate the harassment from within their own homes and then bring the problem to school through technology.\textsuperscript{54} Moreover, the effects of cyberbullying are often brought to school and stay with the student regardless of where the initial attack took place.\textsuperscript{55}

The effects of cyberbullying have often ended in the worst possible way. In 2011, Pauline Prince, a high school student in Massachusetts, hung herself after months of being tormented via text message by her classmates.\textsuperscript{56} Ryan Halligan, Jeff Johnston, and Megan Meier also took their own lives after experiencing harassment and ridicule online.\textsuperscript{57} Other students have been forced to change schools to escape their tormentors.\textsuperscript{58} Given these tragedies, there is little doubt that something must be done.

Numerous states have passed anti-harassment and anti-bullying laws in order to help curb this epidemic.\textsuperscript{59} Currently, forty-nine states have adopted laws against bullying with fourteen states including the word “cyberbullying” within the statute and forty states using the words “electronic harassment.”\textsuperscript{60} Yet, despite these laws, schools are often left unsure of what action they can take. While schools

\textsuperscript{54} See Zande, supra note 5, at 110.
\textsuperscript{55} Id. at 132-33.
\textsuperscript{56} See Wheeler, supra note 34, at 182-83.
\textsuperscript{57} See Zande, supra note 5, at 105.
\textsuperscript{58} Id.
\textsuperscript{60} Id.
may wish to intervene in cyberbullying incidents, it is often unclear whether they have the authority to do so under the First Amendment.\footnote{See Zande, supra note 5, at 113.}

While some clamor for action on the part of schools, many have argued that it is not a school’s job to intervene in these situations.\footnote{Allison Belnap, \textit{Tinker at a Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public School regulation of Off-Campus Speech}, 2011 B.Y.U. L. Rev. 501, 531-32 (2011).} Compelling arguments can be made that parents should be the ones to discipline the activities of their children when those activities take place outside of school.\footnote{Clay Calvert, \textit{Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve}, 7 First Amend. L. Rev. 210, 248 (2009).} Others maintain that cyberbullying should fall under the purview of law enforcement rather than school administrators.\footnote{See Belnap, supra note 62.} However, the reality is that schools often represent the first line of defense in these situations and the absence of defined law leaves them uncertain of the appropriate action.\footnote{See Zande, supra note 5, at 113.} It is continuing this climate of uncertainty in the face of a national problem like cyberbullying that makes the Court’s denial of cert so troubling.

\section*{VII. CONCLUSION}

The Supreme Court’s current jurisprudence regarding student speech leaves glaring questions as to how the First Amendment applies to student Internet speech that originates off-campus. In attempting to answer the question of whether schools can regulate speech that makes its way onto campus through the Internet, the lower courts have been unable to arrive at a clear answer, often adding more confusion to an issue that already needs clarity. Moreover, the rise cyberbullying has only served
to highlight the necessity of a new rule as school administrators struggle to
determine when and if they should intervene. The time has come for the Court to
lend its voice to this debate, and it had an opportunity to provide an answer in
January of this year.

Unfortunately, the Court voted not to hear the case, leaving both the courts
and schools in the dark as to the best course of action. Given the confusion on this
issue in the lower courts, one can assume the Court denied certiorari because it
needs more time in order to arrive at the “right” answer. While this desire to arrive
at the correct answer is laudable, it does not provide for the most pressing need at
this moment: an answer. Scholars, judges, lawyers, and schools have a myriad of
opinions as to what the “right” answer is (and this author certainly has an opinion of
his own), but the only wrong answer was leaving the question blank. By denying
cert on these student Internet speech cases, for whatever reason, the Court failed in
one of its most essential responsibilities, guiding the lower courts and the people of
United States by shedding light on those murkier areas of law.