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WALKING THE REGULATORY TIGHTROPE: BALANCING BULLIES’ FREE SPEECH RIGHTS AGAINST THE RIGHTS OF VICTIMS TO BE LET ALONE WHEN REGULATING OFF CAMPUS K-12 STUDENT CYBER-SPEECH

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LISA SMITH-BUTLER*

I. INTRODUCTION

Jared and Delilah—two high school students at James Island County High—dated for months, claiming each other as “soul mates.” A new student, Perry, then arrived at school, and Delilah broke up with Jared to pursue a relationship with Perry. After the breakup, Jared hated Delilah and thought the worst of her. While working from home on his laptop, Jared posted comments to his Facebook page, stating that Delilah was a lying, cheating whore who was HIV positive. Other derogatory comments followed. Classmates shared Jared’s post. Many of the school’s students and some of the school’s personnel read the comments while at home. A national news reporter related to one of the school’s teachers saw the post, picked up the story, and began publishing a series of articles on teen cyberbullying. The school was in an uproar. Students sided with either Jared or Delilah. No one stayed neutral. Delilah and her parents went to school to complain to the principal. They alleged that Jared’s behavior constituted harassment of Delilah because of her sex. Delilah and her parents insisted that the school punish Jared.

While the above is a hypothetical, it is a scenario that schools and school administrations are facing across the country. This is speech that takes place off-campus and after school hours yet it impacts the school. Can the principal address the issue and punish Jared for this speech? Should the

principal tell Delilah and her parents that their options are limited to suing Jared for libel? Can the school lose its funding from the Department of Education for failing to enforce anti-harassment policies? Is there liability to which the school will be subjected at the state level for failing to adequately address cyberbullying? These are conflicts that American school personnel now face on a frequent basis. How do school officials handle and resolve the conflicting rights of students, their parents, and teachers regarding free speech with the right to be let alone and be free from bullying and cyberbullying?

This article will examine whether public school officials can regulate and punish off-campus student cyberspeech when this speech makes its way onto the school's campus. It will review recent federal district and circuit court decisions from the past decade that interpret and apply the Supreme Court of the United States' student speech analysis.¹ It will examine the interaction of this analysis with the First Amendment,² the Department of Education's Office for Civil Rights' laws and the Department of Education's interpretation of harassment that applies to schools,³ and state legislatures' attempts to limit and cope with cyberbullying in the public school setting.⁴

While bullying has been an issue with which schools and students have coped for decades, if not centuries, cyberbullying is a recent phenomenon.⁵ How is cyberbullying defined,⁶ and how does it differ from bullying?

* Lisa Smith-Butler is the Associate Dean for Information Resources and Associate Professor of Law at the Charleston School of Law where she teaches Children and the Law. She would like to thank her research assistants, Brianna Hewitt, Annie Andrews, and Cassandra Hutchens for their research assistance with this article and her assistant, Carrie Cranford. She would also like to thank colleagues, present and former, as well as the librarians at the Charleston School of Law, for reviewing the article and offering suggestions.

1. See discussion *infra* Part II.B–C.

2. See discussion *infra* Part II.

3. See discussion *infra* Part III. The Department of Education's Office of Civil Rights enforces civil rights laws for programs that receive federal funding from the Department of Education. OCR: *Know Your Rights*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/know.html> (last modified April 5, 2012). Because of this, the Department of Education interacts frequently with school administrators for elementary and secondary schools, vocational schools, colleges and universities, proprietary schools, state education agencies, libraries, and museums. See 20 U.S.C. § 3413 (2006); see also OCR: *Know Your Rights*, *supra*. The Office of Civil Rights enforces the statutes prohibiting discrimination “on the basis of race, color, and national origin, sex, [and] disability.” OCR: *Know Your Rights*, *supra*; see also 20 U.S.C. § 1681; 42 U.S.C. §§ 12131, 2000d.

4. See *infra* note 78 and accompanying text.

5. See Robin M. Kowalski, *Teasing and Bullying*, in *THE DARK SIDE OF INTERPERSONAL COMMUNICATION* 169, 169 (Brian H. Spitzberg & William R. Cupach eds., 2d ed. 2007); R. CHACE RAMEY, *STUDENT FIRST AMENDMENT SPEECH AND EXPRESSION RIGHTS: ARMBANDS TO BONG HITS* 139 (Melvin I. Urofsky ed., 2011).

Several decisions from lower courts provide examples that demonstrate courts' definitions of cyberbullying. In the last few years, the United States Courts of Appeals for the Second, Third, Fourth, and Eighth Circuits heard arguments and then published decisions involving off-campus student cyber-speech.⁷ A review of each decision provides examples of what the courts and legislatures consider to constitute cyberbullying or threats. While the United States Court of Appeals for the Second and Third Circuits have handed down two decisions each on the topic,⁸ the United States Court of Appeals for the Fourth and Eighth Circuits each issued only one opinion.⁹

The United States Court of Appeals for the Second Circuit considered two cases involving off-campus student cyberspeech.¹⁰ Both decisions involved speech that was critical of school officials.¹¹ In one case, a middle school student created an instant message icon on his home computer that showed a "pistol firing a bullet at a person's head, above which were dots representing spattered blood. Beneath the drawing appeared the words 'Kill Mr. VanderMolen.'"¹² Four years later, the court confronted a similar case in which a student disagreed with a school's decision to refuse to allow students to use a certain facility on a particular date for Jamfest.¹³ The school gave the students the option to hold Jamfest in another location or reschedule the

6. The Oxford English Dictionary defines cyberbully as "cyberbully, *n*[oun], (a) an experienced user of computers who intimidates new users (*nonce-use*); (b) a person who engages in cyberbullying." *Cyber-bully*, OXFORD ENG. DICTIONARY, <http://www.oed.com/view/Entry/250879?redirectedFrom=cyber-bully#eid212385813> (subscription required) (last visited Nov. 10, 2012) (copy on file with *Nova Law Review*). "The anonymity afforded by cyberbullying suggests that cyberbullies are, in all likelihood, not the same individuals as the schoolyard bullies." Kowalski, *supra* note 5, at 190.

7. See *Doninger v. Niehoff (Doninger II)*, 642 F.3d 334, 340, 358 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35, 40 (2d Cir. 2007); *Layshock ex rel. Layshock v. Hermitage Sch. Dist. (Layshock II)*, 593 F.3d 249, 263 (3d Cir.), *vacated en banc, reh'g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (J.S. ex rel. Snyder II)*, 593 F.3d 286, 295, 308 (3d Cir.), *vacated en banc, reh'g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *cert. denied*, 132 S. Ct. 1097 (2012); *Kowalski v. Berkeley Cnty. Sch. (Kowalski I)*, 652 F.3d 565, 567, 577 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist.* No. 60, 647 F.3d 754, 756, 767 (8th Cir. 2011).

8. See *Doninger II*, 642 F.3d at 344; *J.S. ex rel. Snyder II*, 593 F.3d at 307–08; *Layshock II*, 593 F.3d at 263; *Wisniewski*, 494 F.3d at 39–40.

9. *D.J.M. ex rel. D.M.*, 647 F.3d at 764, 767; *Kowalski I*, 652 F.3d at 574.

10. *Doninger II*, 642 F.3d at 344–48; *Wisniewski*, 494 F.3d at 39–40.

11. *Doninger II*, 642 F.3d at 344–48; *Wisniewski*, 494 F.3d at 39–40.

12. *Wisniewski*, 494 F.3d at 36 (footnote omitted).

13. *Doninger II*, 642 F.3d at 339.

event.¹⁴ Students objected.¹⁵ One student, Avery Doninger, created a blog at home on her parents' computer, urging students, their parents, and concerned citizens to call the "douchebags" at the school office to complain.¹⁶ In both of these decisions, the school's punishment of the students' speech was allowed to stand.¹⁷

The United States Court of Appeals for the Third Circuit also dealt with cases that involved the use of the internet to criticize school officials.¹⁸ The court confronted two cases in its 2009 term.¹⁹ One case arose from the Middle District of Pennsylvania,²⁰ while the other case came out of the Western District of Pennsylvania.²¹ Both cases involved similar facts yet two different panels appeared to reach opposite results.²² In one case, a high school senior created a parody profile of his high school principal while at home on his MySpace account, referring to the principal as a "big steroid freak," "big whore," and "big fag" along with other "big" insults.²³ He then shared the profile parody with other friends from school.²⁴ While the court was sympathetic to the principal's distress, it concluded that the school's punishment had violated the student's free speech rights.²⁵ On the same day, a different panel of the United States Court of Appeals for the Third Circuit also handed down a decision, arising from the United States District Court for the Middle District of Pennsylvania, involving another high school parody of a school

14. *Id.*

15. *Id.*

16. *Id.* at 334, 340–41.

17. *Id.* at 351, 358; *Wisniewski*, 494 F.3d at 40.

18. *See, e.g., J.S. ex rel. Snyder II*, 593 F.3d 286, 286, 290 (3d Cir.), *vacated en banc, reh'g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *cert. denied*, 132 S. Ct. 1097 (2012).

19. *Id.* at 286; *Layshock II*, 593 F.3d 249, 249, 251 (3d Cir.), *vacated en banc, reh'g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. *J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

20. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (J.S. ex rel. Snyder I)*, No. 3:07cv585, 2008 WL 4279517, at *1 (M.D. Pa. Sept. 11, 2008), *aff'd in part, rev'd in part en banc*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

21. *Layshock ex rel. Layshock v. Hermitage Sch. Dist. (Layshock I)*, 496 F. Supp. 2d 587, 587 (W.D. Pa. 2007) *aff'd in part en banc*, 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. *J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

22. Paul Easton, Comment, *Splitting the Difference: Layshock and J.S. Chart a Separate Path on Student Speech Rights*, 53 B.C. L. REV. E. SUPP. 17, 17 (2012), http://bclawreview.org/files/2012/02/02_easton.pdf. Compare *J.S. ex rel. Snyder II*, 593 F.3d at 307–08, with *Layshock II*, 593 F.3d at 264.

23. *Layshock II*, 593 F.3d at 252–53.

24. *Id.* at 253.

25. *Id.* at 264.

principal.²⁶ In this particular case, a student created an online profile of her high school principal, describing his interests as: “detention. being a tight ass. riding the fraintain. spending time with my child (who looks like a gorilla). baseball.my golden pen. [sic] fucking in my office. hitting on students and their parents.”²⁷ This decision upheld the school’s punishment of the student.²⁸

While both the United States Courts of Appeals for the Second and Third Circuits heard cases involving student criticism of school officials, the United States Court of Appeals for the Fourth Circuit heard and published an opinion in a case involving student-on-student internet speech.²⁹ The decision arose in West Virginia and involved a female student who created a web page that was allegedly about another classmate.³⁰ The website labeled the female student a “whore” and stated that “Shay [h]as [h]erpes.”³¹ The student, Kara Kowalski, was suspended and then she sued, alleging a violation of her free speech.³² The court concluded that the school did not violate her free speech rights when it punished her.³³

Lastly, the United States Court of Appeals for the Eighth Circuit reviewed, *de novo*, a decision for summary judgment from the United States District Court for the Eastern District of Missouri in *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60*.³⁴ *D.J.M. ex rel. D.M.* differs from the *Snyder v. Phelps*,³⁵ *Kowalski v. Berkeley County School (Kowalski I)*,³⁶ *Layshock ex rel. Layshock v. Hermitage School District (Layshock III)*,³⁷ *Doninger v. Niehoff (Doninger II)*,³⁸ and *Wisniewski v. Board of Education*³⁹

26. See *J.S. ex rel. Snyder II*, 593 F.3d at 286, 290–91; *J.S. ex rel. Snyder I*, No. 3:07cv585, 2008 WL 4279517, at *1 (M.D. Pa. Sept. 11, 2008), *aff’d in part, rev’d in part en banc*, 650 F. 3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

27. *J.S. ex rel. Snyder II*, 593 F.3d at 291 (footnote omitted).

28. *Id.* at 307–08.

29. *Kowalski I*, 652 F.3d 565, 565, 567 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); see also *Doninger II*, 642 F.3d 334, 334, 339–40 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *J.S. ex rel. Snyder II*, 593 F.3d at 286, 291; *Layshock II*, 593 F.3d at 249, 252; *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 34–36 (2d Cir. 2007).

30. *Kowalski I*, 652 F.3d at 567.

31. *Id.* at 568.

32. *Id.* at 567, 569–70.

33. *Id.* at 577.

34. 647 F.3d 754–55, 757 (8th Cir. 2011).

35. 131 S. Ct. 1207 (2011).

36. 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

37. 650 F.3d 205 (3d Cir. 2011) (en banc), *cert. denied sub nom.* *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

38. 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

39. 494 F.3d 34 (2d Cir. 2007).

decisions, because *D.J.M. ex rel. D.M.* involved threats against other students, made by D.J.M. to another classmate, via his home computer.⁴⁰ A concerned classmate shared the threatening emails, which included threats to “get[] a gun and shoot[] other students,” with the principal who then contacted the police.⁴¹ After D.J.M. was released from juvenile detention, he was suspended for ten days by the school; shortly thereafter, he was suspended for the remainder of the semester.⁴² D.J.M. and his parents then sued the school, arguing that his First Amendment speech rights had been violated as he contended that his threats did not constitute “true threats.”⁴³ The Eighth Circuit upheld the United States District Court for the Eastern District of Missouri’s grant of summary judgment in favor of the Hannibal School District.⁴⁴

All of the above cases describe factual backgrounds from circuit court decisions that involved off-campus student cyberspeech, which ultimately found its way on campus.⁴⁵ Students used their home computers, working on their own time rather than school time, to create web pages that were aimed at officials or classmates to protest or complain about school-related personnel, classmates, or events.⁴⁶ Although these web pages were created off-campus without school equipment, the schools punished—typically either with suspension or expulsion—the speech and the students.⁴⁷ These punishments were then appealed by parents, arguing such school conduct violated the students’ First Amendment rights.⁴⁸

This type of speech has existed for years in school settings.⁴⁹ Principals disciplined.⁵⁰ Students grumbled.⁵¹ Students insulted each other. Because the speech was not easily or readily publicized, it went unnoticed and was

40. Compare *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 756–57 (8th Cir. 2011), with *Snyder*, 131 S. Ct. at 1213, *Kowalski I*, 652 F.3d at 567, *Layshock III*, 650 F.3d at 207–08, *Doninger II*, 642 F.2d at 339, and *Wisniewski*, 494 F.3d at 35–36.

41. *D.J.M. ex rel. D.M.*, 647 F.3d at 756.

42. *Id.* at 757.

43. *Id.* at 759–60; see also U.S. CONST. amend. I.

44. *D.J.M. ex rel. D.M.*, 647 F.3d at 767.

45. See Martha McCarthy, *Student Electronic Expression: Unanswered Questions Persist*, 277 EDUC. L. REP. 1, 4–9 (2012).

46. *Id.*

47. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35–37 (2d Cir. 2007); McCarthy, *supra* note 45, at 4–8.

48. See McCarthy, *supra* note 45, at 5–8.

49. See RAMEY, *supra* note 5, at 1.

50. *Id.*

51. See *id.*

ignored.⁵² The internet, or cyberspace, changed this.⁵³ Principals and school personnel were mocked and insulted online.⁵⁴ Student rivalries and bullying moved off the playground and online.⁵⁵ What once took weeks, months, and sometimes years to travel through a community now buzzed through it in hours, if not minutes.⁵⁶ What was once only local news, now often goes viral, becoming national news in just hours.⁵⁷

If such behavior was ignored in the past, why are school authorities now eager to regulate this type of student speech? Are schools seeking to expand their authority and power over students? Or, are schools trying to reign in students and sort out threats, cope with the effects of student-on-student cyberbullying, and teach students civil discourse in addition to teaching the standard curriculum while also coping with the impact of No Child Left Behind? What happened?

April 20, 1999⁵⁸ altered the public school landscape as thoroughly as September 11, 2001⁵⁹ changed air travel. On April 20th, Eric Harris and Dylan Klebold opened fire at 11:19 a.m. at Columbine High School in Columbine, Colorado.⁶⁰ Their massacre lasted forty-nine minutes.⁶¹ They killed thirteen people and wounded twenty-four.⁶² Their rampage ended at 12:08 p.m. when they committed suicide,⁶³ bringing the total number killed in the

52. See VICTORIA STUART-CASSEL ET AL., U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES 1 (2011), available at <http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf>; Kowalski, *supra* note 5, at 185.

53. See RAMEY, *supra* note 5, at 139.

54. *Id.* at 139, 141.

55. See *id.* at 141–42; Jocelyn Ho, Note, *Bullied to Death: Cyberbullying and Student Online Speech Rights*, 64 FLA. L. REV. 789, 791 (2012).

56. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007); see DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 11 (2007).

57. For an example of local news rapidly becoming national news, consider the story of Karen Klein. *Online Campaign Winds Down for Bullied NY Woman*, AP: THE BIG STORY, July 20, 2012, 3:13 PM, <http://www.bigstory.ap.org/article/online-campaign-winds-down-bullied-ny-woman>. In June of 2012, Karen Klein, a bus monitor employed by the public school system in Greece, New York, was recorded being bullied by students on the bus. *Id.* The video was posted online and “show[ed] Klein enduring profanity, insults, and threats from middle school students on a school bus.” *Id.*

58. See DAVE CULLEN, COLUMBINE 4–5 (2009) [hereinafter CULLEN, COLUMBINE].

59. See Garrick Blalock et al., *The Impact of Post-9/11 Airport Security Measures on the Demand for Air Travel*, 50 J.L. & ECON. 731, 731, 733 (2007).

60. CULLEN, COLUMBINE, *supra* note 58, at 4–7, 35, 46.

61. *Id.* at 83.

62. *Id.* at 4–5.

63. *Id.* at 83.

Columbine Massacre to fifteen.⁶⁴ An investigation revealed hate-filled web sites created by the student killers, journal entries containing threats and plans, and other bizarre behaviors.⁶⁵ While some of these items came to the attention of law enforcement before the massacre, none of it was taken seriously until after the massacre.⁶⁶ Recrimination, blame, lawsuits, new school policies, and zero tolerance resulted.⁶⁷ When asked for an explanation for Harris's and Klebold's behavior, some said they had been bullied.⁶⁸

Besides school violence and school shootings,⁶⁹ cyberbullying and cyberharassment have become well-publicized problems that public schools are encountering.⁷⁰ In Massachusetts, in January of 2010, high school freshman, Phoebe Prince, committed suicide after enduring on-campus bullying and cyberbullying that her parents allege the school's administration knew about, but did nothing to stop.⁷¹ What cyberbullying was used? Besides in-school taunts and insults, students also posted on Prince's Facebook page, calling her a "slut" and "whore."⁷² Three of the six students charged with the criminal harassment, i.e., bullying, of Prince were placed on probation in May of 2011⁷³ while the town of South Hadley settled its suit by Prince's parents for

64. *See id.* at 5, 83–84.

65. CULLEN, COLUMBINE, *supra* note 58, at 35, 183–84.

66. *Id.* at 84–85, 165–66, 220.

67. David L. Hudson, Jr., *Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine*, 2000 L. REV. MICH. ST. U. DETROIT C.L. 199, 209–10 (2000).

68. CULLEN, COLUMBINE, *supra* note 58, at 157–58, 339.

69. Since April 20, 1999, there have been more than thirty public school shootings in the United States. *Time Line of Worldwide School and Mass Shootings*, INFOPLEASE, <http://www.infoplease.com/ipa/A0777958.html> (last visited Feb. 24, 2013).

70. Kathleen Conn, *Allegations of School District Liability for Bullying, Cyberbullying, and Teen Suicides After Sexting: Are New Legal Standards Emerging in the Courts?*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 227, 240–41 (2011).

71. Kevin Cullen, *A Mother's Farewell, Forbidding Vengeance: Phoebe Prince, Her Daughter, Lost, She Shares a Shattered Heart*, BOS. GLOBE, May 15, 2011, at A1.

72. *U.S. Teenagers Charged over Suicide of Irish 'New Girl' Targeted in 'Relentless' School Bullying Campaign*, MAIL ONLINE (Mar. 31, 2010, 12:03 AM), <http://www.dailymail.co.uk/news/article-1262487/phoebe-prince-9-us-teenagers-charged-suicide-death-irish-new-girl.html>.

73. Erik Eckholm, *3 Ex-Students Get Probation in Bullying Linked to a Suicide*, N.Y. TIMES, May 5, 2011, <http://www.nytimes.com/2011/05/06/us/06bully.html>.

\$225,000.⁷⁴ Since Prince's death, there have been several high profile cyber-bullying cases involving student suicides.⁷⁵

With school violence and cyberbullying increasing,⁷⁶ schools, school boards, state legislatures, and the Department of Education are attempting to create solutions to deal with the rise of bullying, cyberbullying, and cyber-harassment. According to the National School Board Association, forty-eight states as of April 2012⁷⁷ have enacted some form of legislation⁷⁸ that concerns bullying, cyberbullying, or harassment by students in the public school setting.⁷⁹ The Department of Education's Office for Civil Rights drafted and published a Dear Colleague Letter (DCL) on October 26, 2010,

74. O'Ryan Johnson, *Town Paid \$225G to Avoid Phoebe Prince Suit: ACLU Forces South Hadley to Disclose Sum*, BOS. HERALD, Dec. 28, 2011, http://bostonherald.com/news/regional/view/2011_1228town_paid_225g_to_avoid_prince_suit_aclu_forces_south_hadley_to_disclose_sum.

75. Ho, *supra* note 55, at 789. For further commentary, as well as discussion of specific cases of "bullycide," see Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 392-94 (2012).

76. Ho, *supra* note 55, at 789.

77. See NAT'L SCH. BDS. ASS'N, STATE ANTI-BULLYING STATUTES APRIL 2012 (2012), <http://www.nsba.org/SchoolLaw/Issues/Safety/Table.pdf>.

78. ALA. CODE §§ 16-28B-1 to -9 (2012); ALASKA STAT. §§ 14.33.200-.250 (2012); ARIZ. REV. STAT. ANN. § 15-341 (2012) (West); ARK. CODE ANN. § 6-18-514 (2012); CAL. EDUC. CODE §§ 32261, 48900, 48900.4 (West 2012); COLO. REV. STAT. §§ 22-93-101 to -106 (2012); CONN. GEN. STAT. § 10-222d (2012); DEL. CODE ANN. tit. 14, § 4112D (2012) (LexisNexis); FLA. STAT. § 1006.147 (2012); GA. CODE ANN. § 20-2-751.4 (2012); HAW. CODE R. §§ 8-19-2, -6 (LexisNexis 2012); IDAHO CODE ANN. § 18-917A (2012); 105 ILL. COMP. STAT. 5/10-22.6, 5/27-23.7 (2012); IND. CODE §§ 20-26-5-33, 20-33-8-0.2, 20-33-8-13.5 (2012); IOWA CODE § 280.28 (2012); KAN. STAT. ANN. § 72-8256 (2012); KY. REV. STAT. ANN. §§ 525.070, .080 (LexisNexis 2012); LA. REV. STAT. ANN. §§ 14:40.7, 17:416.1 (2012); ME. REV. STAT. tit. 20-A, § 1001 (2012); MD. CODE ANN., EDUC. §§ 7-424, 7-424.1 (LexisNexis 2012); MASS. GEN. LAWS ch. 71, § 37O (2012); MICH. COMP. LAWS § 380.1310b (2012); MINN. STAT. §§ 120B.232, 121A.0695 (2012); MISS. CODE ANN. §§ 37-11-20, -67 (2012); MO. REV. STAT. § 160.775 (2012); NEB. REV. STAT. §§ 79-267, 79-2,137 (2012); N.H. REV. STAT. ANN. §§ 193-F:1 to :6 (2012); N.J. STAT. ANN. §§ 18A:37-14, -15 to -15.3, -16, -17 (West 2012); N.Y. EDUC. LAW §§ 801-a, 2801 (McKinney 2012); N.C. GEN. STAT. §§ 115C-407.15-.18 (2012); N.D. CENT. CODE § 15.1-19-17-22 (2012); OHIO REV. CODE ANN. § 3313.666 (LexisNexis 2012); OKLA. STAT. tit. 70, §§ 24-100.2-.5 (2012); OR. REV. STAT. §§ 339.351, .353, .356, .359, .362, .364 (2012); 24 PA. STAT. ANN. §13-1303.1-A (West 2012); R.I. GEN. LAWS § 16-21-34 (2012); S.C. CODE ANN. §§ 59-63-110 to -150 (2012); TENN. CODE ANN. §§ 49-6-1014 to -1019 (2012); TEX. EDUC. CODE ANN. §§ 25.0342, 28.002, 37.001, 37.083 (West 2012); UTAH CODE ANN. §§ 53A-11a-102, -201, -202, -301, -302, -401, -402 (LexisNexis 2012); VA. CODE ANN. §§ 22.1-208.01, -279.6 (2012); VT. STAT. ANN. tit. 16, §§ 11, 570, 570c (2012); WASH. REV. CODE §§ 28A.300.285, 28A.600.480 (2012); W. VA. CODE §§ 18-2C-2 to -3 (2012); WIS. STAT. § 118.46 (2012); WYO. STAT. ANN. §§ 21-4-311 to -315 (2012).

79. NAT'L SCH. BDS. ASS'N, *supra* note 77.

concerning the same issue.⁸⁰ The problem has become so pervasive and persistent that the American Jewish Committee and the Religious Freedom Education Project jointly published *Harassment, Bullying, and Free Expression: Guidelines for Free and Safe Public Schools*.⁸¹

Students, disciplined under these school policies, are suing, arguing that their schools have violated their First Amendment rights by imposing discipline for what amounts to off-campus cyberspeech, which is protected by the First Amendment.⁸² Constitutional law scholar and dean, Erwin Chemerinsky,⁸³ argues in an essay that this is all part of the “deconstitutionalization of education” by the Supreme Court.⁸⁴ Chemerinsky concludes that the “Supreme Court’s overall approach has been to withdraw the courts from involvement in American schools.”⁸⁵ He examines the Court’s decisions in the areas of desegregation, school funding, and freedom of speech.⁸⁶ Chemerinsky argues that “[u]nder current First Amendment law, the most basic principle is that the government generally cannot restrict speech based on content unless strict scrutiny is met.”⁸⁷ Applying these principles to speech in the public university setting, Chemerinsky says “[a] public university simply cannot prohibit the expression of hate, including anti-Semitism, without running afoul of this principle. Punishing speech because of its hateful message is inherently a content-based restriction on speech and would violate the First Amendment.”⁸⁸

How are public schools handling student cyberspeech that can also be categorized as cyberbullying or cyberharassment? Courts are relying on the

80. See Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, to Colleague 1–2 (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html> [hereinafter Dear Colleague Letter].

81. AM. JEWISH COMM. & RELIGIOUS FREEDOM EDUC. PROJECT, HARASSMENT, BULLYING, AND FREE EXPRESSION: GUIDELINES FOR FREE AND SAFE PUBLIC SCHOOLS 1, 5 (2012), available at <http://www.nsba.org/schoollaw/issues/equity/harassment-bullying-and-free-expression-guidelines-for-free-and-safe-public-schools.pdf>.

82. Susan S. Bendlin, *Far from the Classroom, the Cafeteria, and the Playing Field: Why Should the School’s Disciplinary Arm Reach Speech Made in a Student’s Bedroom?*, 48 WILLAMETTE L. REV. 195, 195–96 (2011).

83. Erwin Chemerinsky, *Unpleasant Speech on Campus, Even Hate Speech, Is a First Amendment Issue*, 17 WM. & MARY BILL RTS. J. 765, 765 n.* (2009) [hereinafter Chemerinsky, *Unpleasant Speech*] (introducing Chemerinsky as “Dean and Distinguished Professor of Law, University of California, Irvine, School of Law”).

84. Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 112 (2004).

85. *Id.*

86. *Id.* at 113, 119, 124.

87. Chemerinsky, *Unpleasant Speech*, *supra* note 83, at 770.

88. *Id.*

1969 Supreme Court decision in *Tinker v. Des Moines Independent Community School District*⁸⁹ to regulate student cyberspeech in the public school setting.⁹⁰ Despite utilizing the *Tinker* test, both federal district and circuit courts have reached a variety of different conclusions.⁹¹ Are the courts misapplying or misunderstanding *Tinker*? Are the facts of each case determinative of the outcome? Are these decisions reconcilable or is there a circuit split?

This article will examine the existing speech cases from federal district and circuit courts in light of the *Morse* quartet, a series of Supreme Court decisions on student speech rights.⁹² Part II will review the holdings of these decisions and explore their interaction with the First Amendment.⁹³ Part III will review the Department of Education's Office for Civil Rights definition of harassment while Part IV will examine state cyberbullying legislation.⁹⁴ Part V will analyze and review the interplay of the United States Constitution, Supreme Court decisions, state legislation, the Department of Education's laws and interpretations thereof, and school policies with these cases, attempting to ascertain the appropriate analysis for student cyberspeech cas-

89. 393 U.S. 503 (1969).

90. *E.g.*, *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1370 (S.D. Fla. 2010).

91. A selected list of federal district court cases involving regulation of off-campus student speech includes: *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 771, 784 (N.D. Ind. 2011); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010); *Evans*, 684 F. Supp. 2d at 1367; *Mardis v. Hannibal Pub. Sch. Dist. No. 60*, 684 F. Supp. 2d 1114, 1115–16 (E.D. Mo. 2010); *Requa v. Kent Sch. Dist. No. 415*, 492 F. Supp. 2d 1272, 1274, 1276 (W.D. Wash. 2007); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 700 (W.D. Pa. 2003); *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 781 (E.D. Mich. 2002); *Coy ex rel. Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 795–96 (N.D. Ohio 2002). The Supreme Court of Pennsylvania also dealt with the issue in *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850 (Pa. 2002). For circuit court decisions on the topic, see *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 757 (8th Cir. 2011); *Kowalski I*, 652 F.3d 565, 567 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *Layshock III*, 650 F.3d 205, 207, 210 (3d Cir. 2011) (en banc), *cert. denied sub nom.* *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist. (J.S. ex rel. Snyder III)*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *Doninger II*, 642 F.3d 334, 342 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 37 (2d Cir. 2007).

92. See Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 380–84 (2007); see also *Morse v. Frederick*, 551 U.S. 393, 410 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986); *Tinker*, 393 U.S. at 514.

93. See discussion *infra* Part II.

94. See discussion *infra* Parts III–IV.

es.⁹⁵ Part VI will conclude that there is a circuit split that requires the intervention of the Supreme Court to be resolved.⁹⁶

II. FIRST AMENDMENT: STUDENT CYBERSPEECH

A. *First Amendment: What Does It Mean?*

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁹⁷

Protecting speech was so important that it was enshrined in the First Amendment of the Bill of Rights.⁹⁸ The Supreme Court has issued numerous opinions discussing this amendment.⁹⁹ As the Court recently stated in *Snyder v. Phelps*,¹⁰⁰ “[t]he First Amendment reflects ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’”¹⁰¹ Why? Quoting *Garrison v. Louisiana*,¹⁰² the Court noted that free speech “‘is more than self-expression; it is the essence of self-government,’”¹⁰³ while acknowledging that “‘speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.’”¹⁰⁴

How is *Snyder* applicable to the student cyberspeech cases? Besides providing the most recent Supreme Court First Amendment analysis, *Snyder*, like the school cyberspeech decisions, deals with speech that can be described as unkind or cruel.¹⁰⁵ The *Snyder* Court upheld Westboro Baptist’s right to picket outside an area near veterans’ funerals with signs that read “‘God Hates the USA/Thank God for 9/11,’” “‘Fag Troops,’” “‘Thank God for Dead Soldiers,’” and “‘God Hates You.’”¹⁰⁶ The Court’s majority opinion concluded:

95. See discussion *infra* Part V.

96. See discussion *infra* Part VI.

97. U.S. CONST. amend. I.

98. Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1108 (2000).

99. See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

100. 131 S. Ct. 1207 (2011).

101. *Id.* at 1215 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

102. 379 U.S. 64 (1964).

103. *Snyder*, 131 S. Ct. at 1215 (quoting *Garrison*, 379 U.S. at 74–75).

104. *Id.* at 1215 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

105. See *id.* at 1216–17, 1220.

106. *Id.* at 1216–17.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro¹⁰⁷

How do we apply these principles in the public school setting? Do students and teachers have free speech? What happens in public schools grades K–12 when teachers or principals punish students for speech made or directed at personnel or the students of the school? Is this speech protected? Can schools punish these student speakers even if the speakers “inflict great pain?”¹⁰⁸

B. Morse Quartet

The Supreme Court answered the question about students’ speech rights in the public school setting in its 1969 decision in *Tinker*.¹⁰⁹ The Court further delineated its student speech analysis with three later opinions.¹¹⁰ Grouped together, these four opinions are sometimes referred to as the “*Morse* quartet.”¹¹¹

Tinker was the first decision of the quartet.¹¹² It involved the now infamous, non-disruptive, black armband worn by Mary Beth Tinker to her school to protest the Vietnam War.¹¹³ Mary Beth was suspended from school until she agreed to no longer wear the armband to school.¹¹⁴ Her parents sued on her behalf, arguing the school’s actions violated Mary Beth’s First Amendment free speech rights.¹¹⁵ The *Tinker* Court agreed with Mary Beth, stating “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹¹⁶ *Tinker* established the analysis for the punishment of student speech as follows:

107. *Id.* at 1220.

108. *See Snyder*, 131 S. Ct. at 1220.

109. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

110. *See Dickler*, *supra* note 92, at 356.

111. *See id.* at 362.

112. *Id.* at 356.

113. *Tinker*, 393 U.S. at 504.

114. *Id.*

115. *Id.* at 504–05.

116. *Id.* at 506.

A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But 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.¹¹⁷

Between 1986 and 2007, the Court decided three more student speech cases, which limited the holding of *Tinker*.¹¹⁸ *Bethel School District No. 403 v. Fraser*¹¹⁹ allowed schools to punish lewd and offensive speech given at a high school assembly to a captive audience,¹²⁰ while *Hazelwood School District v. Kuhlmeier*¹²¹ permitted schools to exercise editorial control over speech for pedagogical purposes, which carried the imprimatur of the school.¹²² *Morse v. Frederick*¹²³ allowed the punishment of student speech occurring at a school-sanctioned off-campus event that appeared to advocate the use of illegal drugs.¹²⁴

In 1983, Matthew Fraser was suspended for three days and had his name removed from the list of potential graduation speakers because of a candidate speech he delivered to a high school assembly.¹²⁵ In the speech, Fraser used a sexual innuendo to refer to one of the candidates running for school office.¹²⁶ The United States District Court for the Western District of Washington and the United States Court of Appeals for the Ninth Circuit, both applying *Tinker*, held that the school violated Fraser's First Amendment

117. *Id.* at 512–13 (alteration in original) (citations omitted).

118. *Morse v. Frederick*, 551 U.S. 393, 410 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *see also* Dickler, *supra* note 92, at 356.

119. 478 U.S. 675 (1986).

120. *Id.* at 685.

121. 484 U.S. 260 (1988).

122. *Id.* at 273.

123. 551 U.S. 393 (2007).

124. *Id.* at 397, 410.

125. *Fraser*, 478 U.S. at 677–78.

126. *Id.*

rights.¹²⁷ The Supreme Court, in a majority opinion authored by then Chief Justice Burger, reversed, framing the issue as “whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.”¹²⁸ Concluding such discipline was allowed, the Court stated:

The First Amendment guarantees wide freedom in matters of adult public discourse. . . . It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. . . . [T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. As cogently expressed by Judge Newman, “the First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s jacket.”¹²⁹

Fraser was followed two years later by *Kuhlmeier*, which involved school censorship of a student-edited school newspaper.¹³⁰ The Court framed the issue as “the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school’s journalism curriculum.”¹³¹ The high school principal deleted two articles from the newspaper before it went to print.¹³² The paper’s student editors sued, alleging this censorship violated their First Amendment rights.¹³³ Again, the Court further eroded the holding in *Tinker*.¹³⁴ Writing for the majority, Justice White stated:

[W]e hold 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. This standard is consistent with our oft-expressed view that the

127. *Id.* at 679; *see also* U.S. CONST. amend. I; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512–13 (1969).

128. *Fraser*, 478 U.S. at 677, 680; *see also* U.S. CONST. amend. I.

129. *Fraser*, 478 U.S. at 682–83 (quoting *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring)); *see also* U.S. CONST. amend. I.

130. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988); *Fraser*, 478 U.S. at 675.

131. *Kuhlmeier*, 484 U.S. at 262.

132. *Id.* at 263–64.

133. *Id.* at 264; *see also* U.S. CONST. amend. I.

134. *See Kuhlmeier*, 484 U.S. at 272–73 & n.5 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.¹³⁵

The Court last addressed student speech in 2007 with its decision in *Morse*,¹³⁶ completing the series of cases that are sometimes referred to as the *Morse* quartet.¹³⁷ *Morse* involved off-campus speech at a school-sponsored activity.¹³⁸ The Olympic Torch Relay was scheduled to pass “through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah.”¹³⁹ During the procession, the relay was scheduled to pass by Frederick’s high school.¹⁴⁰ To celebrate and participate, Deborah Morse, school principal, allowed teachers and students to leave the school building and attend the relay on the city streets as a school-sponsored activity.¹⁴¹ As the television cameras rolled by, Joseph Frederick, a student, unfurled a fourteen-foot banner that proclaimed: “‘BONG HiTS 4 JESUS.’”¹⁴² Believing the banner to be advocating the use of an illegal drug, marijuana, Morse demanded that Frederick lower the banner.¹⁴³ He refused so she confiscated the banner and then suspended him for ten days.¹⁴⁴ Frederick sued, alleging Morse’s behavior violated his First Amendment rights.¹⁴⁵ He argued his banner was not promoting illegal drug use but rather was simply nonsense, designed to catch the television cameras’ attention.¹⁴⁶ The Court framed the issue as “whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.”¹⁴⁷ The Court then further explained its analysis and holding in *Fraser*, saying:

135. *Id.* at 262, 273 (footnote omitted) (citing *Bd. of Educ. v. Rowley ex rel. Rowley*, 458 U.S. 176, 208 (1982); *Wood v. Strickland*, 420 U.S. 308, 326 (1975), *abrogated on other grounds* by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)); *see also* U.S. CONST. amend. I.

136. *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007).

137. *See* Dickler, *supra* note 92, at 380.

138. *Morse*, 551 U.S. at 396–99.

139. *Id.* at 397.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Morse*, 551 U.S. at 398.

144. *Id.*

145. *Id.* at 399; *see also* U.S. CONST. amend. I.

146. *Morse*, 551 U.S. at 401 (quoting *Frederick v. Morse*, 439 F.3d 1114, 1117–18 (9th Cir.), *cert. granted*, 549 U.S. 1075 (2006), *and rev'd*, 551 U.S. 393 (2007)).

147. *Id.* at 403; *see also* U.S. CONST. amend. I.

[I]t is enough to distill from *Fraser* two basic principles. First, *Fraser's* holding demonstrates that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” Had *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, *Fraser's* First Amendment rights were circumscribed “in light of the special characteristics of the school environment.” Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the “substantial disruption” analysis proscribed by *Tinker*.

....

The case, [*Kuhlmeier*], is nevertheless instructive because it confirms both principles cited above. *Kuhlmeier* acknowledged that schools may regulate some speech “even though the government could not censor similar speech outside the school.” And, like *Fraser*, it confirms that the rule of *Tinker* is not the only basis for restricting student speech.¹⁴⁸

None of the above decisions deal with off-campus student cyberspeech; yet, these are the decisions that lower federal courts—both district and circuit—are relying upon to analyze whether school officials can punish off-campus student cyberspeech.¹⁴⁹ As the discussion below indicates, lower courts are applying the *Morse* quartet analysis with varying results.¹⁵⁰

C. Circuit Courts: Split or Reconcilable?

Between 2007 and 2011, the United States Courts of Appeals for the Second, Third, Fourth, and Eighth Circuits published opinions that dealt with off-campus student cyberspeech.¹⁵¹ Two decisions from the United States Circuit Court of Appeals for the Second Circuit involved student speech

148. *Morse*, 551 U.S. at 404–06 (citations omitted); see also U.S. CONST. amend. I.

149. See discussion *infra* Part II.C–D.

150. See discussion *infra* Part II.C–D.

151. See *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 756 (8th Cir. 2011); *Kowalski I*, 652 F.3d 565, 567 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *Layshock III*, 650 F.3d 205, 207 (3d Cir. 2011) (en banc), *cert. denied sub nom.* *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012); *J.S. ex rel. Snyder III*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *Doninger II*, 642 F.3d 334, 340 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007). Other circuit courts have yet to address the explicit issue of off-campus regulation of student cyberspeech.

about school officials.¹⁵² The court upheld the school's punishment of the student speech in both cases.¹⁵³ Meanwhile, the United States Court of Appeals for the Third Circuit published two decisions, issued by two different panels, on February 4, 2010¹⁵⁴ that appeared to reach different results with seemingly similar facts.¹⁵⁵ A decision from the United States District Court for the Middle District of Pennsylvania, which punished a student for an internet profile parody of her high school principal, was upheld.¹⁵⁶ However, a decision from the United States District Court for the Western District of Pennsylvania agreed with a student that his First Amendment rights were violated when he was punished for creating a profile parody of his principal on MySpace.¹⁵⁷ Because this appeared to many observers to reflect a split within the Third Circuit, the court re-heard both cases while sitting en banc.¹⁵⁸ Ultimately, the students prevailed in both cases with the court holding that school officials had violated the students' First Amendment rights.¹⁵⁹ The United States Circuit Court of Appeals for the Fourth Circuit heard a case that involved the school's punishment of a student for offensive cyber-speech made against another student.¹⁶⁰ The court upheld the school's punishment of the student.¹⁶¹ The United States Court of Appeals for the Eighth Circuit upheld the decision of the United States District Court for the Eastern District of Missouri, agreeing with the court that D.J.M.'s instant messages

152. See *Doninger II*, 642 F.3d at 340; *Wisniewski*, 494 F.3d at 36.

153. *Doninger II*, 642 F.3d at 357–58; *Wisniewski*, 494 F.3d at 40.

154. *J.S. ex rel. Snyder II*, 593 F.3d 286, 286, 290–91 (3d Cir.), *vacated en banc, reh'g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *cert. denied*, 132 S. Ct. 1097 (2012); *Layshock II*, 593 F.3d 249, 249, 252–54 (3d Cir.), *vacated en banc, reh'g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. *J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012); Easton, *supra* note 22, at 17.

155. See Easton, *supra* note 22, at 17.

156. *J.S. ex rel. Snyder II*, 593 F.3d at 307–08; *J.S. ex rel. Snyder I*, No. 3:07cv585, 2008 WL 4279517, at *1 (M.D. Pa. Sept. 11, 2008), *aff'd in part, rev'd in part en banc*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

157. *Layshock I*, 496 F. Supp. 2d 587, 587, 591, 606 (W.D. Pa. 2007), *aff'd in part en banc*, 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. *J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

158. See *J.S. ex rel. Snyder III*, 650 F.3d 915, 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); see also *Layshock III*, 650 F.3d 205, 207 (3d Cir. 2011) (en banc), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. *J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

159. See *J.S. ex rel. Snyder III*, 650 F.3d at 932, 933; see also *Layshock III*, 650 F.3d at 219.

160. *Kowalski I*, 652 F.3d 565, 567 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

161. *Id.* at 577.

threatening to get a gun and shoot classmates did constitute “true threats” that were not protected by the First Amendment.¹⁶²

Because similar fact patterns appeared to be involved in the above cases, with differing results reached, *Doninger II*, *J.S. ex rel. Snyder III*, and *Kowalski I* were appealed to the Supreme Court of the United States, based on the argument that a circuit split existed.¹⁶³ Despite the differing results, the Court denied certiorari for all three petitions, leaving the decisions to stand.¹⁶⁴ Is there a circuit split or can these cases be reconciled? This section will examine and review the decisions.

The decisions from the United States Circuit Court of Appeals for the Second Circuit will be reviewed first. This court has decided two cases, *Wisniewski* and *Doninger II*, on the subject.¹⁶⁵ In both decisions, the court upheld the school’s right to punish students for off-campus student cyber-speech that was ultimately aimed at school officials.¹⁶⁶

In *Wisniewski*, a middle school student, Aaron Wisniewski, was suspended from school because of an instant message he sent classmates from his parents’ home computer.¹⁶⁷ The message included an instant message icon with “a small drawing of a pistol firing a bullet at a person’s head, above which were dots representing spattered blood. Beneath the drawing appeared the words ‘Kill Mr. VanderMolen.’ Philip VanderMolen was Aaron’s English teacher at the time.”¹⁶⁸ While Aaron did not send the instant message icon or message to any school officials, he shared it with some of his classmates.¹⁶⁹ One of the classmates eventually shared the icon and message with Mr. VanderMolen who was reportedly distressed.¹⁷⁰ Mr. VanderMolen then shared it with school authorities.¹⁷¹ The school shared it with “the local police [department], the Superintendent . . . , and Aaron’s parents.”¹⁷² When confronted, Aaron admitted he had created the instant message and icon—though a police investigator determined that the icon was

162. D.J.M. *ex rel.* D.M. v. Hannibal Pub. Sch. Dist. No. 60, 647 F.3d 754, 756, 757 n.1, 762 (8th Cir. 2011).

163. See discussion *infra* note 325.

164. See discussion *infra* note 325.

165. *Doninger II*, 642 F.3d 334, 338 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007).

166. *Doninger II*, 642 F.3d at 340, 358; *Wisniewski*, 494 F.3d at 39–40.

167. *Wisniewski*, 494 F.3d at 35–36.

168. *Id.* at 36 (footnote omitted).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Wisniewski*, 494 F.3d at 36.

intended only as a joke.¹⁷³ Once the severity of the issue was pointed out to him, Aaron expressed regret.¹⁷⁴ Mr. VanderMolen asked to stop teaching Aaron, and this was allowed.¹⁷⁵

In the meantime, the police department investigated and questioned Aaron.¹⁷⁶ He was referred to a psychologist for testing.¹⁷⁷ Based on the testing and evaluation, the psychologist concluded the icon was intended as a joke, and that Aaron had no violent intent and posed no actual threat.¹⁷⁸ The police investigation was concluded with no arrest being made, but there was a hearing before the school superintendent.¹⁷⁹ At the hearing, the hearing officer found that “[s]ubstantial and competent evidence exists that Aaron engaged in the act of sending a threatening message to his buddies, the subject of which was a teacher.”¹⁸⁰ The hearing officer said: “He admitted it. . . . I conclude Aaron did commit the act of threatening a teacher . . . creating an environment threatening the health, safety, and welfare of others”¹⁸¹ Aaron was suspended for a semester.¹⁸²

Aaron sued, arguing his icon “was protected speech under the First Amendment.”¹⁸³ The court upheld the school’s punishment of Aaron, concluding that the fact that his conduct occurred off-campus did “not necessarily insulate him from school discipline.”¹⁸⁴ Instead, the court applied *Tinker*’s “reasonably foreseeable risk” test to the facts and concluded that it was foreseeable that school authorities would learn of Aaron’s pistol icon.¹⁸⁵ It was then foreseeable that the threatening icon would “materially and substantially disrupt” the school’s work.¹⁸⁶

A year later, the United States Court of Appeals for the Second Circuit heard arguments in *Doninger v. Niehoff (Doninger I)*,¹⁸⁷ which also involved student speech.¹⁸⁸ In *Doninger I*, Avery Doninger was involved in a dispute

173. *Id.*

174. *See id.*

175. *Id.*

176. *Id.*

177. *Wisniewski*, 494 F.3d at 36.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 36–37.

182. *Wisniewski*, 494 F.3d at 37.

183. *Id.*

184. *Id.* at 39–40 (footnote omitted).

185. *Id.* at 38–39 (citing *Morse v. Frederick*, 551 U.S. 393, 403 (2007)).

186. *Id.* (quoting *Morse*, 551 U.S. at 403).

187. 527 F.3d 41 (2d Cir. 2008), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

188. *See id.* at 44–46.

with school officials about the scheduling and location of a “battle of the bands” known as “Jamfest.”¹⁸⁹ Because of personnel issues, Doninger and the Student Council were advised that Jamfest would either have to be re-scheduled for another date or relocated to another facility if the Council was determined to adhere to the named date.¹⁹⁰ After learning of this, four members of the Student Council met in the computer lab and accessed a parent’s email account.¹⁹¹ From this email account, the students sent out two mass emails to students and parents—one of which included the contact information for Paula Schwartz, the district superintendent—advising them to contact the district office and forward the email to as many people as possible to see that Jamfest was held as scheduled in the new auditorium.¹⁹² Unhappy with the decision to cancel Jamfest, Avery Doninger then posted an entry on her blog from her home that said:

jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appreciate [sic] it. however, she got pissed off and decided to just cancel the whole thing all together [sic].¹⁹³

Because of the vulgar language of the blog and the manner in which Avery expressed disagreement with the school’s administration, Niehoff decided that Avery could not run for Senior Class Secretary because “Avery’s conduct . . . failed to display the civility and good citizenship expected of class officers.”¹⁹⁴ Avery’s mother sued, arguing Niehoff’s actions violated her daughter’s First Amendment rights.¹⁹⁵

As the United States Court of Appeals for the Second Circuit analyzed Doninger’s First Amendment claims, it began with *Tinker*, noting that “students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”¹⁹⁶ Yet while *Tinker* protected students’

189. *Id.* at 44.

190. *Doninger II*, 642 F.3d 334, 339 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

191. *Id.*

192. *Id.* at 339–40.

193. *Id.* at 340–41 (second alteration in original).

194. *Doninger I*, 527 F.3d at 46.

195. *Id.* at 46–47.

196. *Doninger II*, 642 F.3d at 344 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

speech rights,¹⁹⁷ the court concluded that these rights, in the public school setting, were not equal to the free speech rights of adults.¹⁹⁸ In fact, the court analyzed and discussed the student speech holdings of the Supreme Court and concluded that “school administrators [could] prohibit student expression” when certain circumstances were met.¹⁹⁹ Utilizing the “foreseeable disruption test” articulated by *Tinker*, the *Doninger I* court stated:

The Supreme Court has yet to speak on the scope of a school’s authority to regulate expression that, like Avery’s, does not occur on school grounds or at a school sponsored event. We have determined, however, that a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct “would foreseeably create a risk of substantial disruption within the school environment,” at least when it was similarly foreseeable that the off-campus expression might also reach campus.²⁰⁰

Meanwhile, the United States Court of Appeals for the Third Circuit handed down, via two panels, two decisions on school speech cases on February 4, 2010.²⁰¹ In two cases, involving seemingly similar facts, the two panels reached what appeared to be different results.²⁰² Consequently, the Third Circuit sat, en banc, to rehear both cases.²⁰³

197. *Tinker*, 393 U.S. at 506.

198. *Doninger II*, 642 F.3d at 344 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

199. *Id.* at 344 (citing *Tinker*, 393 U.S. at 513).

200. *Doninger I*, 527 F.3d at 48 (quoting *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007)).

201. See *J.S. ex rel. Snyder II*, 593 F.3d 286, 286, 307–08 (3d Cir.), vacated en banc, reh’g granted en banc, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), cert. denied, 132 S. Ct. 1097 (2012); *Layshock II*, 593 F.3d 249, 249 (3d Cir.), vacated en banc, reh’g granted en banc, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), cert. denied sub nom. *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

202. Easton, *supra* note 22, at 18; see also Shannon P. Duffy, *Do 3rd Circuit Rulings over Student Speech on MySpace Pages Contradict?*, LAW.COM (Feb. 5, 2010), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202442025383>.

203. *Layshock III*, 650 F.3d 205, 205 (3d Cir. 2011) (en banc), cert. denied sub nom. *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012). The Court vacated both earlier panel opinions. *Id.* at 207; *J.S. ex rel. Snyder III*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc), cert. denied, 132 S. Ct. 1097 (2012). Shortly after this decision was issued, Daniel J. Solove addressed the issue in a blog post. See Daniel J. Solove, *School Discipline for Off-Campus Speech and the First Amendment*, HUFFPOST EDUC. (June 20, 2011, 11:43 AM), http://www.huffingtonpost.com/daniel-j-solove/school-discipline-free-speech_b_877203.html.

In *Layshock ex rel. Layshock v. Hermitage School District (Layshock II)*,²⁰⁴ the initial panel comprising Judges McKee, Smith, and Roth,²⁰⁵ framed the issue before the court as whether “a school district can punish a student for expressive conduct that originated outside of the classroom, when that conduct did not disturb the school environment and was not related to any school sponsored event.”²⁰⁶ “Justin Layshock, . . . a . . . senior at Hickory High School . . . in Hermitage, Pennsylvania,” posted a “‘parody profile’ of his [high school] principal, Eric Trosch,” on his MySpace account while at his grandmother’s using her computer.²⁰⁷ While Justin copied and pasted Mr. Trosch’s photograph from the school’s web site, that is the extent to which a school resource was used.²⁰⁸ Justin’s parody gave bogus “big” answers to questions he pretended Mr. Trosch answered.²⁰⁹ Justin’s parody stated:

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
 In the past month have you gone Skinny Dipping: big lake, not
 big dick
 In the past month have you Stolen Anything: big keg
 Ever been drunk: big number of times
 Ever been called a Tease: big whore
 Ever been Beaten up: big fag
 Ever Shoplifted: big bag of kmart
 Number of Drugs I have taken: big²¹⁰

Justin shared the profile with his friends at school who then shared the profile with many other students.²¹¹ Mr. Trosch learned about the profile after three other students posted similar profiles, and Mr. Trosch’s eleventh grade daughter showed one of them to her father.²¹² The court noted that the profile spread through the school like “wildfire” and that students accessed

204. 593 F.3d 249 (3d Cir.), *vacated en banc, reh’g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. J.S. *ex rel.* Snyder, 132 S. Ct. 1097 (2012).

205. *Id.* at 251.

206. *Id.*

207. *Id.* at 252.

208. *Id.*

209. *Layshock II*, 593 F.3d at 252.

210. *Id.* at 252–53.

211. *Id.* at 253.

212. *Id.*

the profile at school.²¹³ Mr. Trosch explained he found the profile “‘degrading,’ ‘demeaning,’ ‘demoralizing,’ and ‘shocking.’”²¹⁴ After an investigation, the school district suspended Justin for ten days, placed him in the Alternative Education Program for his last semester of high school, banned him from all extracurricular activities, and refused to allow him to participate in his graduation ceremony.²¹⁵ The school district concluded that Justin had violated Hermitage School District’s Discipline Code, finding “[d]isruption of the normal school process; [d]isrespect; [h]arassment of a school administrator via computer/internet with remarks that have demeaning implications; [g]ross misbehavior; [o]bscene, vulgar, and profane language; [c]omputer [p]olicy violations (use of school pictures without authorization).”²¹⁶

Justin and his parents sued, arguing that the Hermitage School District had violated his First Amendment rights.²¹⁷ The United States District Court for the Western District of Pennsylvania agreed with Justin, granting him summary judgment.²¹⁸ The United States Court of Appeals for the Third Circuit panel published their opinion on February 4, 2010, and affirmed the decision of the lower court, holding “schools may punish expressive conduct that occurs outside of school as if it occurred inside the ‘schoolhouse gate’ under certain very limited circumstances, none of which are present here.”²¹⁹

On the same day, February 4, 2010, another panel of the United States Court of Appeals for the Third Circuit, comprising of Circuit Judges Fisher and Chagares and District Judge Diamond,²²⁰ published their opinion in *J.S. ex rel. Snyder v. Blue Mountain School District (J.S. ex rel. Snyder II)*.²²¹ In *J.S. ex rel. Snyder II*, J.S., an eighth grader, created a MySpace profile parody of her high school principle, Mr. McGonigle, with another friend, K.L., from their home computers.²²² As with *Layshock II*, J.S. and K.L. copied a picture of Mr. McGonigle from the school’s web site and pasted it on their

213. *Id.*

214. *Layshock II*, 593 F.3d at 253.

215. *Id.* at 254.

216. *Id.*

217. *Id.* at 254–55.

218. *Layshock I*, 496 F. Supp. 2d 587, 606 (W.D. Pa. 2007), *aff’d in part en banc*, 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder, 132 S. Ct. 1097 (2012).

219. *Layshock II*, 593 F.3d at 249, 263.

220. *J.S. ex rel. Snyder II*, 593 F.3d 286, 286, 290 (3d Cir.), *vacated en banc, reh’g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *cert. denied*, 132 S. Ct. 1097 (2012). Judge Diamond, of the Eastern District of Pennsylvania, was sitting on the panel by designation. *Id.* at 290 & n.*.

221. 593 F.3d 286, 290 (3d Cir.), *vacated en banc, reh’g granted en banc*, No. 08-4138, 2010 U.S. App. LEXIS 7342 (3d Cir. Apr. 9, 2010), *cert. denied*, 132 S. Ct. 1097 (2012).

222. *Id.* at 290–91.

MySpace parody profile.²²³ While the profile did not identify McGonigle by name or location, it included his school photograph and described him as saying:

HELLO CHILDREN

yes. it's your oh so wonderful, hairy, expressionless,
sex addict, 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 my space is because—I am

keeping an eye on you students

(who 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

so please, feel free to add me, message me whatever.²²⁴

J.S. and K.L. left the profile “public” on Sunday night.²²⁵ By Monday afternoon, students at Blue Mountain Middle School had seen the profile and were discussing it, so J.S. made the profile “private” when she went home.²²⁶

223. *Id.* at 291; *see also Layshock II*, 593 F.3d at 252.

224. *J.S. ex rel. Snyder II*, 593 F.3d at 291.

225. *Id.* at 292.

226. *Id.*

On Tuesday, a student at Blue Mountain approached McGonigle and told him about the profile.²²⁷ After McGonigle viewed the profile, he contacted the School Superintendent, Joyce Romberger, and the Director of Technology, Susan Schneider-Morgan.²²⁸ After meeting and reviewing the profile, the three “concluded that it violated the School District’s Acceptable Use Policy (AUP) because it violated copyright laws in misappropriating McGonigle’s photograph from the School District’s website without permission.”²²⁹

McGonigle then met with J.S. and K.L. and their mothers telling them he was suspending them for ten days and also considering legal action.²³⁰ While students could not view the profile at school because MySpace was a blocked site, McGonigle and other teachers testified that the profile parody disrupted school—students chattered about the profile in class and related disruptions in the hallways, requiring extra student supervision.²³¹ After the suspended students returned to school, they were greeted by fellow classmates who had decorated their lockers and offered them written congratulations for their behavior.²³²

J.S. and her parents sued, arguing the Blue Mountain School District had violated her First Amendment rights.²³³ The United States District Court for the Middle District Court of Pennsylvania decided in favor of the school, holding that the school did not violate J.S.’s First Amendment rights when disciplining her because of the on campus impact of her “lewd and vulgar” speech.²³⁴ The Third Circuit’s panel affirmed the lower court’s decision.²³⁵ According to the court’s panel, *Tinker*’s foreseeable and material and substantial disruption test was the appropriate analysis to be applied to the facts.²³⁶ Certainty regarding a disruption was not required; rather the court indicated that the standard was the reasonable foreseeability of disruption that schools had to anticipate and protect students from.²³⁷ Schools were

227. *Id.*

228. *Id.*

229. *J.S. ex rel. Snyder II*, 593 F.3d at 292.

230. *Id.* at 293.

231. *Id.* at 292, 294.

232. *Id.* at 294.

233. *Id.* at 294–95.

234. *J.S. ex rel. Snyder I*, No. 3:07cv585, 2008 WL 4279517, at *6–7 (M.D. Pa. Sept. 11, 2008), *aff’d in part, rev’d in part en banc*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

235. *J.S. ex rel. Snyder II*, 593 F.3d at 307–08. In this panel opinion, Judge Chagares concurred in part with the decision and also dissented in part. *Id.* at 308 (Chagares, Cir. J., concurring in part and dissenting in part).

236. *See id.* at 298 (majority opinion).

237. *See id.* at 298–99 (citing *Doninger I*, 527 F.3d 41, 51 (2d Cir. 2008), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Lowery v. Euverard*,

required to engage in a balancing analysis, balancing three rights: The right of students to be free from the invasion of their rights, the right of the students to avoid a “substantial disruption” at school, and the right of students to engage in protected First Amendment speech off-campus which does impact on campus activities.²³⁸ Thus, the court appeared to believe that *Tinker* required a balancing of the rights of others with the rights of an individual.²³⁹

As the court’s panel applied this analysis to the facts of the case, it concluded that a substantial disruption was not created on campus by J.S.’s profile of McGoingle.²⁴⁰ However, given the incendiary nature of the profile, i.e. indirectly suggesting that McGoingle engaged in pedophilic behavior with his students, the panel concluded that the school’s behavior did not violate J.S.’s First Amendment rights as McGoingle’s actions forestalled the threat of future disruptions.²⁴¹ This, the court indicated, satisfied the *Tinker* test.²⁴² The court refused to accept J.S.’s argument that off-campus speech could not be regulated by school authorities.²⁴³ Instead, it acknowledged the way that the evolving technology was blurring the boundaries between school and home and stated “[t]erritoriality is not necessarily a useful concept in determining the limit of [school administrators’] authority.”²⁴⁴

Given the similar facts of both cases, and yet the dissimilar dispositions,²⁴⁵ the United States Court of Appeals for the Third Circuit agreed to hear the cases en banc and did so in June of 2010.²⁴⁶ A year later, in June of 2011, the court published both opinions.²⁴⁷

497 F.3d 584, 591–92, 596 (6th Cir. 2007); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001)).

238. *See id.* (citing *Morse v. Frederick*, 551 U.S. 393, 405 (2007); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216 n.11 (3d Cir. 2001)).

239. *See id.* at 299 (citing *Morse*, 551 U.S. at 405; *Fraser*, 478 U.S. at 688 (Brennan, J., concurring); *Saxe*, 240 F.3d at 216 n.11); *see also Fraser*, 478 U.S. at 680–81; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969).

240. *J.S. ex rel. Snyder II*, 593 F.3d at 299.

241. *See id.* at 300–03.

242. *See id.* at 298, 300, 303; *see also Tinker*, 393 U.S. at 512–13.

243. *J.S. ex rel. Snyder II*, 593 F.3d at 301.

244. *Id.* (quoting *Doninger I*, 527 F.3d 41, 48–49 (2d Cir. 2008) (alteration in original), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011)).

245. *Compare id.* at 290–94, 303, with *Layshock II*, 593 F.3d 249, 252–54, 264 (3d Cir.), *vacated en banc, reh’g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

246. *J.S. ex rel. Snyder III*, 650 F.3d 915, 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *Layshock III*, 650 F.3d 205, 205 (3d Cir. 2011) (en banc), *cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

247. *J.S. ex rel. Snyder III*, 650 F.3d at 915; *Layshock III*, 650 F.3d at 205.

Layshock III affirmed and upheld the holding of the initial panel, published in February of 2010.²⁴⁸ The en banc court held that the school had violated Justin Layshock's First Amendment rights.²⁴⁹ After reviewing and reconciling several cases cited by the school district, including *Doninger I* and *Wisniewski*,²⁵⁰ the *Layshock III* en banc court concluded that school officials have very limited authority, according to the application of *Tinker* and *Fraser*, to punish off-campus student speech.²⁵¹ Quoting *Thomas v. Board of Education*,²⁵² the court stated that "[o]ur willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate."²⁵³ The court said that it was unnecessary to define the parameters of school authorities regarding off-campus student speech since Justin's speech clearly did not substantially or materially disrupt the school's activities.²⁵⁴ Without a substantial disruption, *Tinker* was not applicable.²⁵⁵ The court concluded that while *Fraser* allowed school authorities to discipline student speech that was "lewd" or "vulgar," this authority was limited to on campus lewd or vulgar speech.²⁵⁶ Discussing the applicability of *Fraser*, the court stated "*Fraser* does not allow the School District to punish Justin for expressive conduct [that] occurred outside of the school context."²⁵⁷ This holding seems to be at odds with the court's holding in *J.S. ex rel. Snyder v. Blue Mountain School District (J.S. ex rel. Snyder III)*,²⁵⁸ which announced that territoriality was not the defining factor when deter-

248. *Layshock III*, 650 F.3d at 207.

249. *Id.* at 207, 219.

250. The Court distinguished the facts in *Layshock III* from *Doninger I* and *Wisniewski* as well as other cases. *Id.*

251. *Id.* at 216, 219 (citing *Morse v. Frederick*, 551 U.S. 393, 404–05 (2007); *Layshock I*, 496 F. Supp. 2d 587, 599–600 (W.D. Pa. 2007), *aff'd in part en banc*, 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder, 132 S. Ct. 1097 (2012)).

252. 607 F.2d 1043 (2d Cir. 1979).

253. *Layshock III*, 650 F.3d at 219 (quoting *Thomas*, 607 F.2d at 1044–45).

254. *Id.*

255. *Id.* at 216; *see also* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

256. *Layshock III*, 650 F.3d at 217 n.17 (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001)); *see also* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

257. *Layshock III*, 650 F.3d at 219 (citing *Morse v. Frederick*, 551 U.S. 393, 404–05 (2007)).

258. Compare *id.* at 218–19, with *J.S. ex rel. Snyder III*, 650 F.3d 915, 936 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

mining the reach of school authorities to regulate off-campus student speech.²⁵⁹

In *J.S. ex rel Snyder III*, the en banc court remanded the decision to the district court, reversing in part and affirming in part.²⁶⁰ While the court concluded that the school's disciplinary policies were not facially unconstitutional, as J.S. and her parents alleged,²⁶¹ it reversed the holding that the school could punish J.S.'s speech.²⁶² Noting that schools could suppress or punish student speech in certain situations, the court stated "[t]he authority of public school officials is not boundless."²⁶³ The court then engaged in a discussion as to what the Supreme Court's basic analysis was when reviewing student speech punishment arguments, discussing *Tinker*'s "substantial disruption" requirement and noting the further exceptions created by *Fraser*, *Kuhlmeier*, and *Morse*.²⁶⁴

An examination of the court's analysis indicated that while the court acknowledged that a school could suppress or punish student speech in the public school setting, in order to prevail in court, "school officials must [show] that 'the forbidden [speech or] conduct would materially and substantially interfere with the . . . appropriate discipline in the operation of the school.'"²⁶⁵

The court noted that schools cannot satisfy this burden if they cannot demonstrate more than the "desire to avoid the discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint."²⁶⁶ When examining the implications and applications of *Fraser*, *Kuhlmeier*, and *Morse*, the court concluded that if *Tinker* was not applicable, then there was no need to establish a substantial disruption and instead the *Fraser*, *Kuhlmeier*, or *Morse* exceptions applied.²⁶⁷ The court said that *Fraser* allowed schools to discipline school speech, categorized as lewd or vulgar, when a captive audi-

259. *J.S. ex rel. Snyder III*, 650 F.3d at 940 (Smith, Cir. J., concurring).

260. *Id.* at 915, 936. As with the en banc opinion published in *Layshock III*, this opinion involved a concurrence. *Id.* at 936; *Layshock III*, 650 F.3d at 219. It also included a dissent. *J.S. ex rel. Snyder III*, 650 F.3d at 941.

261. *J.S. ex rel. Snyder III*, 650 F.3d at 936.

262. *Id.* at 933 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986)).

263. *Id.* at 925–26 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969)).

264. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Fraser*, 478 U.S. at 685; *Tinker*, 393 U.S. at 509; *J.S. ex rel. Snyder III*, 650 F.3d at 926–27 (citing *Morse v. Frederick*, 551 U.S. 393, 408 (2007); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 213–14 (3d Cir. 2001)).

265. *J.S. ex rel. Snyder III*, 650 F.3d at 926 (quoting *Tinker*, 393 U.S. at 509).

266. *Id.* (quoting *Tinker*, 393 U.S. at 509).

267. *See id.* at 926–27 (citing *Morse*, 551 U.S. at 408; *Tinker*, 393 U.S. at 506; *Saxe*, 240 F.3d at 213–14).

ence was involved,²⁶⁸ while *Kuhlmeier* allowed discipline, for pedagogical reasons of school sponsored speech.²⁶⁹ If neither of those categories were applicable, *Morse* then established that speech which advocated illegal drug use, even if off-campus but at a school sponsored event, could also be punished.²⁷⁰ Applying this analysis to the facts of the case, the court concluded that none of the exceptions articulated by *Fraser*, *Kuhlmeier*, or *Morse* were applicable.²⁷¹ Thus, *Tinker* would be the only standard by which the school could punish J.S.'s speech.²⁷² However, the court concluded that the school did not meet the "substantial disruption" test of *Tinker*, as the school had conceded in the district court that no substantial disruption occurred.²⁷³ Furthermore, the court said that J.S.'s profile of McGonigle "was so outrageous that no one could [or would] have taken it seriously . . . [t]hus it was . . . not reasonably foreseeable" that a "substantial disruption" would occur.²⁷⁴ In this way, the court concluded that *J.S. ex rel Snyder III* was distinguishable from *Doninger I* and *Wisniewski*.²⁷⁵

The Fourth Circuit also addressed this issue in July of 2011 with its decision in *Kowalski I*.²⁷⁶ Kara Kowalski, then a senior at Musselman High School, created a MySpace page at home with her home computer, naming the page "S.A.S.H.," which stated, "No No Herpes, We don't want no herpes."²⁷⁷ She invited one hundred or so of her friends to join the group page; of this number, approximately two-dozen were students from Musselman High.²⁷⁸ A friend and classmate at Musselman High, Ray Parsons, joined the group the day the page was created.²⁷⁹ He then uploaded a picture of himself, holding his nose with a sign that said "Shay Has Herpes."²⁸⁰ This was a reference to another Musseleman High classmate, Shay N.²⁸¹

268. *Id.* at 927 (citing *Saxe*, 240 F.3d at 213).

269. *Kuhlmeier*, 484 U.S. at 273; *see also J.S. ex rel. Snyder III*, 650 F.3d at 927 (citing *Saxe*, 240 F.3d at 214).

270. *J.S. ex rel. Snyder III*, 650 F.3d at 927 (citing *Morse*, 551 U.S. at 408).

271. *Id.* at 932, 932 n.10, 933.

272. *Id.* at 931–32.

273. *Id.* at 928.

274. *Id.* at 930.

275. *J.S. ex rel. Snyder III*, 650 F.3d at 931 n.8; *see also Doninger I*, 527 F.3d 41, 50–51 (2d Cir. 2008), *aff'd in part, rev'd in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011); *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35–36 (2d Cir. 2007).

276. *Kowalski I*, 652 F.3d 565, 565, 567 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

277. *Id.* at 567.

278. *Id.*

279. *Id.* at 568.

280. *Id.*

281. *Kowalski I*, 652 F.3d at 567–68.

According to the court, Parsons “had drawn red dots on Shay N.’s face to simulate herpes and added a sign near her pelvic region, that read, ‘[w]arning: Enter at your own risk.’”²⁸² “In the second photograph, he captioned Shay N.’s face with a sign that read, ‘portrait of a whore.’”²⁸³ Shay N. learned of the page later that evening.²⁸⁴ Her father contacted Parsons, expressing his anger.²⁸⁵ Parsons contacted Kowalski, who tried to take the page down but was not able to remove it.²⁸⁶

The next day, Shay N. and her parents went to Musselman High School where they met with Vice Principal Becky Harden.²⁸⁷ They filed a complaint of harassment with the school, and Shay then returned home, missing school because she was uncomfortable attending classes with students who had posted comments about her on Kowalski’s MySpace page.²⁸⁸ Ronald Stephens, the school’s Principal, “contacted the central school board . . . to determine whether” this was the type of behavior that should subject students to school discipline.²⁸⁹ The office responded affirmatively, so the school then conducted an investigation, interviewing the students involved with creating, posting to, and viewing the website.²⁹⁰ After the investigation, the school “concluded that Kowalski had created a ‘hate website’” that was in violation of the Berkeley Board of Education’s Harassment, Bullying and Intimidation Policy and its Student Code of Conduct.²⁹¹ The harassment policy defined bullying as

“[A]ny intentional gesture, or any intentional written, verbal or physical act that”

1. A reasonable person under the circumstances should know will have the effect of:
 - a. Harming a student or staff member;

...

282. *Id.* at 568.

283. *Id.*

284. *See id.*

285. *Id.*

286. *Kowalski I*, 652 F.3d at 568.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Kowalski I*, 652 F.3d at 568–69.

2. Is sufficiently inappropriate, severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for a student.²⁹²

“The Student Code of Conduct [required], ‘[a]ll students . . . shall behave in a safe manner that promotes a school environment that is nurturing, orderly, safe, and conducive to learning and personal-social development.’”²⁹³ Violators of either policy were subject to various punishments—one such punishment was a ten-day suspension.²⁹⁴ Applying the harassment and conduct policies to the facts, Stephens and Harden then “suspended Kowalski from school for 10 days and issued . . . a 90-day ‘social suspension’” from school extracurricular activities.²⁹⁵

Kowalski sued, arguing that the school had violated her First Amendment free speech rights.²⁹⁶ She argued that the school had disciplined her for “‘off-campus, non-school related speech’” for which it had neither the right nor the authority to punish her.²⁹⁷ The United States District Court for the Northern District of West Virginia disagreed,²⁹⁸ and Kowalski appealed its ruling to the Fourth Circuit.²⁹⁹

The Fourth Circuit defined the issue facing it as “whether Kowalski’s activity fell within the outer boundaries of the high school’s legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students.”³⁰⁰ Concluding it did, the court affirmed the district court’s decision, upholding the school’s punishment of Kowalski.³⁰¹ While acknowledging that “[t]here is surely a limit to the scope of a high school’s interest in the order, safety, and well-being of its students when the speech . . . originates outside the schoolhouse gate,”³⁰² the court concluded that “the language of *Tinker* supports the conclusion that . . . 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

292. *Id.* at 569 (alteration in original).

293. *Id.*

294. *Id.*

295. *Id.* at 568–69.

296. *Kowalski I*, 652 F.3d at 570.

297. *Id.* at 570–71.

298. *See* Order Granting Defendants’ Motion for Summary Judgment at 12, *Kowalski v. Berkeley Cnty. Pub. Sch.*, No. 3:07-CV-147 (N.D. W. Va. Dec. 22, 2009), ECF No. 37.

299. *Kowalski I*, 652 F.3d at 570.

300. *Id.* at 571.

301. *Id.* at 574 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); *Doninger I*, 527 F.3d 41, 51–52 (2d Cir. 2008), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011)).

302. *Id.* at 573.

and bullying.”³⁰³ The court stated that while the Supreme Court of the United States had not yet dealt with a case in which one student targeted another student for verbal abuse, it felt certain that *Tinker* would permit discipline for such speech as it “‘disrupts classwork,’ creates ‘substantial disorder,’ or ‘collid[es] with’ or ‘inva[des]’ ‘the rights of others.’”³⁰⁴ According to the court, the fact that the student speech involved occurred off-campus was not determinative of the ability of school administrators to impose discipline.³⁰⁵ Rather, the court stressed that *Tinker* permitted the school’s discipline because *Tinker* allowed schools to intervene where student speech “materially and substantially” interfered with school work and invaded the rights of others “to be let alone.”³⁰⁶ Since Kowalski’s speech targeted a classmate, the court proclaimed that it was “reasonably foreseeable” that the speech would impact students while at school and create substantial disruption.³⁰⁷

The last circuit court decision involved school discipline of a student for off-campus speech that was eventually held to constitute a true threat.³⁰⁸ *D.J.M. ex rel. D.M.* was decided by the United States Court of Appeals for the Eighth Circuit.³⁰⁹ This case differs from *Wisniewski*, *Doninger I*, *Layshock II*, *J.S. ex rel. Snyder III*, and *Kowalaski* in that it involved behavior by a student that did appear to constitute a true threat of physical violence against other students.³¹⁰ While the other five decisions involved off-campus student speech directed at school personnel or students whose behavior was disliked, *D.J.M. ex rel. D.M.* involved behavior that was perceived to constitute an actual threat to the physical well-being of school personnel and students.³¹¹

303. *Id.* at 572 (citing *DeJohn v. Temple Univ.*, 537 F.3d 301, 319–20 (3d Cir. 2008)).

304. *Kowalski I*, 652 F.3d at 571–72 (alteration in original) (quoting *Tinker*, 393 U.S. at 513).

305. *Id.* at 574.

306. *Id.* at 573–74 (citing *Tinker*, 393 U.S. at 508, 513).

307. *Id.* at 574.

308. *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 764 (8th Cir. 2011).

309. *Id.* at 755.

310. Compare *id.* at 756–59, with *Kowalski I*, 652 F.3d at 567–68, and *J.S. ex rel. Snyder III*, 650 F.3d 915, 920 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012), and *Layshock II*, 593 F.3d 249, 252–53 (3d Cir.), *vacated en banc, reh’g granted en banc*, No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *cert. denied sub nom.* *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012), and *Doninger I*, 527 F.3d 41, 44–46 (2d Cir. 2008), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011), and *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35–36 (2d Cir. 2007).

311. Compare *D.J.M. ex rel. D.M.*, 647 F.3d at 756–59, with *Kowalski I*, 652 F.3d at 567–68, and *J.S. ex rel. Snyder III*, 650 F.3d at 920, and *Layshock II*, 593 F.3d at 252–53, and *Doninger I*, 527 F.3d at 44, and *Wisniewski*, 494 F.3d at 35–36.

D.J.M. ex rel. D.M. involved a decision in which a student, D.J.M., was chatting via instant message with another classmate, C.M.³¹² During the chat, D.J.M. told C.M. that he was going to get a gun and kill certain classmates.³¹³ He named specific students that he would “get rid of.”³¹⁴ Named individuals included “a particular boy along with his older brother and some individual members of groups he did not like, namely ‘midget[s],’ ‘fags,’ and ‘negro bitches.’”³¹⁵ Concerned, C.M. contacted a school administrator, forwarding D.J.M.’s emails.³¹⁶ This resulted in D.J.M. being arrested by the police and detained in the psychiatric ward of the Lakeland Regional Hospital for a month.³¹⁷ After his release from the hospital, D.J.M. attempted to return to school, but he was initially suspended for ten days for making true threats.³¹⁸ After numerous parents expressed concern and demanded action, a school board hearing resulted in the suspension of D.J.M. for the remainder of the school year.³¹⁹

While D.J.M. argued that the school suspension violated his First Amendment free speech rights, the school disputed this, arguing that D.J.M.’s speech constituted a true threat, which violated the school’s conduct policy and was not protected by the First Amendment.³²⁰ The United States District Court for the Eastern District of Missouri held that “the evidence before the [c]ourt is that school was substantially disrupted because of Plaintiff’s threats. Under the *Tinker* test, Defendants could punish Plaintiff for his disruptive statements without violating his First Amendment rights.”³²¹ The United States Court of Appeals for the Eighth Circuit upheld the lower court’s decision, concluding that “[t]rue threats are not protected under the First Amendment . . . [H]ere [the school] was given enough information that it reasonably feared D.J.M. had access to a handgun and was thinking about shooting specific classmates at the high school.”³²²

Three of the above decisions, *Doninger II*, *J.S. ex rel. Snyder III*, and *Kowalski I*, were appealed to the Supreme Court of the United States during

312. *D.J.M. ex rel. D.M.*, 647 F.3d at 757.

313. *Id.* at 758.

314. *Id.*

315. *Id.* (alteration in original).

316. *Id.* at 759.

317. *D.J.M. ex rel. D.M.*, 647 F.3d at 759.

318. *Id.*

319. *Id.*

320. *Id.* at 759–60.

321. *Mardis v. Hannibal Pub. Sch. Dist. No. 60*, 684 F. Supp. 2d 1114, 1124 (E.D. Mo. 2010).

322. *D.J.M. ex rel. D.M.*, 647 F.3d at 764.

the 2011–2012 term.³²³ Despite what appears to be confusion, or what some would term a circuit split,³²⁴ the Court denied certiorari in all three cases.³²⁵

323. See generally *Kowalski I*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *J.S. ex rel. Snyder III*, 650 F.3d 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012); *Doninger II*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

324. McCarthy, *supra* note 45, at 1; see also Philip T.K. Daniel & Scott Greytak, *A Need to Sharpen the Contours of Off-Campus Student Speech*, 273 EDUC. L. REP. 21, 36 (2011).

325. See *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder (J.S. ex rel. Snyder IV)*, 132 S. Ct. 1097, 1097 (2012); *Kowalski v. Berkeley Cnty. Sch. (Kowalski II)*, 132 S. Ct. 1095, 1095 (2012); *Doninger v. Niehoff (Doninger III)*, 132 S. Ct. 499, 499 (2011). In her petition to the Supreme Court for certiorari, Avery Doninger, citing *Layshock I* and *J.S. ex rel. Snyder III*, among other cases, argued that the “divergent holdings [among the Second and Third Circuits] represent[ed] an actual concrete split . . . which this Court should resolve sooner rather than later.” Petition for Writ of Certiorari at 13, 16, *Doninger v. Niehoff*, 132 S. Ct. 499 (2011) (No. 11-113). Meanwhile, Niehoff, in the Respondents’ Brief in Opposition, argued that Doninger’s behavior satisfied the *Tinker* standard of “substantial disruption” and denied that a conflict between the circuits existed. Respondents’ Brief in Opposition at 20–22, *Doninger v. Niehoff*, 132 S. Ct. 499 (2011) (No. 11-113). Blue Mountain School District also filed a petition, requesting certiorari. Petition for a Writ of Certiorari at 1, *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012) (No. 11-502). Citing both the en banc and panel decisions of the Third Circuit, Blue Mountain argued there was not only a circuit split, but also a deepening split within the Third Circuit. *Id.* at 1, 14. The school also argued that lower district courts were split on the issue as to whether *Tinker*’s standard applied to student speech that originated off-campus. *Id.* at 15. Interestingly enough, J.S./Snyder’s respondent’s Brief in Opposition argued, as did the school’s brief in *Doninger III*, that there was no split among the courts as they applied *Tinker* to off-campus student speech. See Brief in Opposition at 2, *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012) (No. 11-502). Kowalski too petitioned the Supreme Court of the United States for certiorari, arguing, as did the Blue Mountain School District, that there was a split among the courts as to whether *Tinker* applied to off-campus speech not directed at the school. Petition for a Writ of Certiorari at 2–3, *Kowalski v. Berkeley Cnty. Sch.*, 132 S. Ct. 1095 (2012) (No. 11-461). She also requested that the Court clarify the meaning of *Tinker*’s “substantial disruption” test. See *id.* Berkeley School District responded, arguing—as did the student J.S. in *J.S. ex rel. Snyder*—that there was no circuit court split and that the Fourth Circuit had applied the First Amendment analysis as intended. Brief in Opposition to Petition for Writ of Certiorari at 8, 30, *Kowalski v. Berkeley Cnty. Sch.*, 132 S. Ct. 1095 (2012) (No. 11-461). The Marion B. Brechner First Amendment Project, the Alliance Defense Fund and Liberty Institute, and the Rutherford Institute all filed amicus curiae briefs to support Kowalski, urging the Court to hear the case and clarify the analysis. See Motion for Leave to File Brief in Support of Petitioner for Writ of Certiorari and Brief of Amicus Curiae Marion B. Brechner First Amendment Project at 1–2, *Kowalski v. Berkeley Cnty. Sch.*, 132 S. Ct. 1095 (2012) (No. 11-461); Motion for Leave to File Brief as Amici Curiae and Brief for the Alliance Defense Fund and Liberty Institute as Amici Curiae in Support of Petitioner at 2–3, *Kowalski v. Berkeley Cnty. Sch.*, 132 S. Ct. 1095 (2012) (No. 11-461); Motion of the Rutherford Institute for Leave to File an Amicus Curiae Brief and Amicus Curiae Brief in Support of Petitioner at 2, 14, *Kowalski v. Berkeley Cnty. Sch.*, 132 S. Ct. 1095 (2012) (No. 11-461). The Court denied certiorari in all three cases. *J.S. ex rel. Snyder IV*, 132 S. Ct. at 1097; *Kowalski II*, 132 S. Ct. at 1095; *Doninger III*, 132 S. Ct. at 499.

D. District Courts: More Confusion?

If the decisions from the United States Courts of Appeals for the Second, Third, Fourth, and Eighth Circuits appear confusing and inconsistent,³²⁶ an examination of nine decisions rendered by various United States District Courts across the country from 2002 to 2011 and the Pennsylvania Supreme Court reveals more inconsistency. This section will review eight cases decided by United States District Courts, in reverse chronological order, as well as a decision from the Pennsylvania Supreme Court that involved school discipline of what originated as off-campus student cyberspeech.

Most recently, the United States District Court for the Northern District of Indiana issued an opinion in *T.V. ex rel. B.V. v. Smith-Green Community School Corporation*.³²⁷ In *T.V. ex rel. B.V.*, several teenage girls at Churubusco High School, who played on the school's volleyball team, held slumber parties.³²⁸ At these parties, T.V. and other girls posed for various pictures that the court described as "raunchy."³²⁹

The girls posted pictures of themselves on Facebook, MySpace, and Photo Bucket licking "phallic-shaped rainbow colored lollipops," holding trident-shaped objects from their crotches, putting them in their buttocks, and kneeling beside one another "as if engaging in anal sex."³³⁰ The pictures came to the attention of other classmates who also played on the volleyball team.³³¹ Some classmates disapproved and then showed the web pages to their parents.³³² Some parents then contacted the school to complain about T.V. and M.K. being allowed to play on the volleyball team.³³³ After reviewing the school's extracurricular policy, which required that students "'demonstrate good conduct at school and outside of school,'"³³⁴ the school suspended T.V. and M.K. from participating in extracurricular activities, i.e. playing on the volleyball team, for part of the school year.³³⁵ While the girls argued that the school was violating their First Amendment rights, the school stated, "[t]he basis for the suspension was the determination that the photo-

326. See discussion *supra* Part II.C.

327. 807 F. Supp. 2d 767, 767 (N.D. Ind. 2011).

328. *Id.* at 771.

329. *Id.*

330. *Id.* at 772.

331. See *id.*

332. *T.V. ex rel. B.V.*, 807 F. Supp. 2d at 772.

333. *Id.* at 772–73.

334. *Id.* at 773 ("If you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extracurricular activities.").

335. *Id.* at 773–74.

graphs were inappropriate, and that by posing for them and posting them on the internet, the students were reflecting discredit upon the school.”³³⁶ Acknowledging that “the speech in this case doesn’t exactly call to mind high-minded civic discourse about current events,”³³⁷ the court agreed with T.V. that her First Amendment rights had been violated.³³⁸ After concluding that T.V.’s photographs were indeed speech protected by the First Amendment,³³⁹ the court then rejected the school’s argument that the photographs were obscene and constituted child pornography.³⁴⁰ Having concluded that the speech was protected, the court then applied *Fraser* and *Tinker* to determine whether T.V.’s posting of photographs on Facebook could be punished by school officials.³⁴¹ Since the speech was off-campus, the court concluded that *Fraser* was not applicable.³⁴² Concluding that *Tinker* was the appropriate standard to be applied, the court noted that *Tinker*’s “substantial disruption” test was not met.³⁴³ The court stated that “no reasonable jury could conclude that the photos of T.V. and M.K. posted on the internet caused a substantial disruption to school activities, or that there was a reasonably foreseeable chance of future substantial disruption” since only a few parents had complained.³⁴⁴ The court noted that “substantial disruption” required “more than the ordinary personality conflicts among” school children.³⁴⁵

In 2010, three student cyberspeech cases, *Evans v. Bayer*,³⁴⁶ *J.C. ex rel. R.C. v. Beverly Hills Unified School District*,³⁴⁷ and *Mardis v. Hannibal Public School District No. 60*,³⁴⁸ involved school punishment of students for off-campus cyberspeech.³⁴⁹ Stretching from coast to coast and including the

336. *Id.* at 774.

337. *T.V. ex rel. B.V.*, 807 F. Supp. 2d at 771.

338. *Id.* at 790.

339. *Id.* at 776.

340. *Id.* at 778.

341. *Id.* at 779–80; *see also* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 685 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

342. *T.V. ex rel. B.V.*, 807 F. Supp. 2d at 779 (citing *Fraser*, 478 U.S. at 688 (Brennan, J., concurring)).

343. *Id.* at 783–84 (citing *Tinker*, 393 U.S. at 509, 514).

344. *Id.* at 784.

345. *See id.* (quoting *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1119 (C.D. Cal. 2010)).

346. 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

347. 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

348. 684 F. Supp. 2d 1114 (E.D. Mo. 2010). *Mardis* was appealed to the United States Court of Appeals for the Eighth Circuit where an opinion was issued. *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 757 (8th Cir. 2011). For a discussion of the case and the opinion of the Eighth Circuit, *see infra*, notes 381–91.

349. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1098; *Evans*, 684 F. Supp. 2d at 1367; *Mardis*, 684 F. Supp. 2d at 1115.

heartland, the decisions ranged in geography, from the Southern District of Florida to the Central District of California, with a stop in Missouri to demonstrate student cyberspeech was an issue across America rather than just an urban bi-coastal problem.³⁵⁰

The *Evans* decision involved Katherine Evans, a high school senior at Pembroke Pines Charter School, who created a Facebook page and named it “Ms. Sarah Phelps is the worst teacher I’ve ever met.”³⁵¹ She invited students “to express your feelings of hatred” about Ms. Phelps at the site.³⁵² While “[t]he page included Ms. Phelps’ photograph,” it “did not contain threats of violence.”³⁵³ Students posted to the site, in support of Ms. Phelps while dismissing Evans’ comments.³⁵⁴ Two days later, Evans removed the post, but the posting still came to Peter Bayer’s attention.³⁵⁵ Bayer, the high school principal, reviewed the post and concluded that Evans had violated the school policy regarding “‘Bullying/Cyberbullying/Harassment towards a staff member’ and ‘Disruptive behavior.’”³⁵⁶ Because of this, he suspended Evans for three days and removed her from her advanced placement classes.³⁵⁷

Evans sued, arguing she was punished by the school for exercising her First Amendment speech rights.³⁵⁸ The court framed the issue as “whether the fact that Plaintiff’s speech was arguably aimed at a particular audience at the school is enough by itself to label the speech on-campus speech.”³⁵⁹ Analyzing the facts under *Tinker* and applying the *Morse* quartet’s holdings, the court found that Evans’s First Amendment rights had been violated, concluding, “Evans’s speech falls under the wide umbrella of protected speech. It was an opinion of a student about a teacher, that was published off-campus, did not cause any disruption on-campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior.”³⁶⁰

350. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1094; *Evans*, 684 F. Supp. 2d at 1365; *Mardis*, 684 F. Supp. 2d at 1114; see also *Bullying Statistics 2010*, BULLYING STAT., <http://www.bullyingstatistics.org/content/bullying-statistics-2010.html> (last visited Feb. 24, 2013).

351. *Evans*, 684 F. Supp. 2d at 1367.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Evans*, 684 F. Supp. 2d at 1367.

357. *Id.*

358. *Id.* at 1368.

359. *Id.* at 1371.

360. *Id.* at 1374; see also *Morse v. Frederick*, 551 U.S. 393, 405 (2007).

J.C. ex rel. R.C. involved student on student misbehavior.³⁶¹ In *J.C. ex rel. R.C.*, J.C. and several of her classmates went to a restaurant after school ended.³⁶² While there, they discussed and made comments about classmates.³⁶³ A classmate, C.C., who was not present at the restaurant, was called a “slut,” “spoiled,” and “the ugliest piece of shit I’ve ever seen in my whole life.”³⁶⁴ While this conversation ensued, J.C. recorded it with her video camera.³⁶⁵ After she went home, she then uploaded the four and a half minute video rant against C.C. and posted it on YouTube.³⁶⁶ She invited five to ten students from Beverly Hills High to view it.³⁶⁷ J.C. also contacted C.C. directly, telling her to view it.³⁶⁸ C.C. viewed it, was upset, and took her mother in to complain to the principal the next day.³⁶⁹ The students who viewed the video did so from their homes with home computers since access to YouTube was blocked at school.³⁷⁰ The school investigated and consulted “the [local] Director of Pupil Personnel for the District.”³⁷¹ The director indicated that the student could be suspended; the school then suspended J.C. for two days.³⁷²

J.C. sued the school district, arguing the school “violated her First Amendment rights.”³⁷³ The school district disagreed, arguing J.C.’s conduct caused a “substantial disruption” as required by *Tinker*.³⁷⁴ The court reviewed and examined *Tinker*, *Fraser*, *Hazelwood*, and *Morse*, concluding that *Tinker*’s analysis governed.³⁷⁵ The court rejected J.C.’s “geography-based argument,” holding that “*Tinker* applies to both on-campus and off-campus student speech.”³⁷⁶ In its analysis, the court emphasized the importance of the “substantial disruption” test in determining whether schools could regulate off-campus student speech.³⁷⁷ Applying *Tinker* to the facts of

361. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010).

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1098.

367. *Id.*

368. *Id.*

369. *Id.*

370. *See id.* at 1099.

371. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1099.

372. *Id.*

373. *Id.* at 1097, 1100.

374. *See id.* at 1119.

375. *Id.* at 1103, 1109–10.

376. *J.C. ex rel. R.C.*, 711 F. Supp. 2d at 1107–08.

377. *Id.* at 1104, 1107–08.

the case, the court concluded that J.C.'s conduct was "too *de minimis* . . . to constitute a substantial disruption."³⁷⁸ Rather *Tinker's* "substantial disruption" required "something more than the ordinary personality conflicts among middle school students that may leave one student feeling hurt or insecure."³⁷⁹ Thus, the school could not punish J.C.'s speech since it failed to satisfy *Tinker's* substantial disruption test.³⁸⁰

While the United States Court of Appeals for the Eighth Circuit later weighed in and upheld the lower court's decision in *D.J.M. ex rel. D.M.*,³⁸¹ this section will offer a brief discussion of the decision in the case from the lower court. *Mardis* came out of Missouri.³⁸² It involved an off-campus student instant message exchange between D.J.M. and a classmate, Carly Moore.³⁸³ During the chat, D.J.M. told Moore "that he was going to get a gun and kill certain classmates."³⁸⁴ Moore was truly concerned so she contacted a school administrator.³⁸⁵ The police then arrested D.J.M. and detained him in the psychiatric ward at Lakeland Regional Hospital.³⁸⁶ Once released, D.J.M. was initially suspended for ten days for making threats.³⁸⁷ The superintendent then extended his suspension for the remainder of the school year.³⁸⁸

Angry, D.J.M. sued the school district, arguing that his instant messages did not constitute "true threats," and thus the school's suspension violated his First Amendment free speech.³⁸⁹ The school disputed this, arguing that D.J.M.'s speech constituted a true threat, which was not protected by the First Amendment.³⁹⁰ The court agreed with the school district.³⁹¹

In 2007, the United States District Court for the Western District of Washington dealt with off-campus student cyberspeech in *Requa v. Kent School District No. 415*.³⁹² Gregory Requa was a high school junior at Ken-

378. *Id.* at 1117.

379. *Id.* at 1119.

380. *Id.* at 1122.

381. *D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 767 (8th Cir. 2011).

382. *Mardis v. Hannibal Pub. Sch. Dist. No. 60*, 684 F. Supp. 2d 1114, 1114 (E.D. Mo. 2010).

383. *Id.* at 1115.

384. *Id.*

385. *Id.* at 1122.

386. *Id.* at 1115.

387. *Mardis*, 684 F. Supp. 2d at 1115–16.

388. *Id.* at 1116.

389. *Id.* at 1119; *see also* U.S. CONST. amend. I.

390. *Mardis*, 684 F. Supp. 2d at 1119; *see also* U.S. CONST. amend. I.

391. *Mardis*, 684 F. Supp. 2d at 1119.

392. 492 F. Supp. 2d 1272, 1272, 1274 (W.D. Wash. 2007).

tridge High School when he allegedly “surreptitiously” recorded his high school teacher in her classroom.³⁹³ While standing behind Ms. M., Requa made faces, put up rabbit ears, “and ma[de] pelvic thrusts in her general direction.”³⁹⁴ He filmed the teacher’s buttocks and referred to them as “booty.”³⁹⁵ He then edited the recording, adding commentary about the teacher’s hygiene.³⁹⁶ He uploaded and posted the recording to YouTube, where it languished until a local Seattle news station did a story about high school students who posted videos to YouTube that were critical of teachers.³⁹⁷ During the development of this story, the reporter “contacted the Kentridge administration for comment.”³⁹⁸ The news station then included Requa’s YouTube clip in its broadcast to the Seattle area.³⁹⁹

The school then conducted an investigation to satisfy its administrative policies and determine which student, either Requa or S.W., had made the recordings.⁴⁰⁰ Requa denied that he had been involved in the “filming, editing or posting [of] the video,” but four unnamed students disputed this.⁴⁰¹ The school then suspended Requa for forty days, indicating his suspension resulted from the filming of Ms. M. in class.⁴⁰² The school’s handbook prohibited “sexual harassment” and the school concluded that the pelvic thrusts and shots of Ms. M.’s buttocks constituted sexual harassment.⁴⁰³ After a school hearing and an appeal to the Board of Directors, the punishment was upheld.⁴⁰⁴

Requa sued, alleging violation of his First Amendment rights and arguing that he had a right to criticize his teacher.⁴⁰⁵ The school district again affirmed its defense, which was that Requa was punished for his behavior in class, i.e., “secretly filming the teacher,” rather than his internet posting.⁴⁰⁶ The court established that *Tinker*’s “substantial disruption” was the applicable test to determine whether Requa’s in-class behavior was protected

393. *Id.* at 1274.

394. *Id.*

395. *Id.*

396. *Id.*

397. *Requa*, 492 F. Supp. 2d at 1274.

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. *Requa*, 492 F. Supp. 2d at 1275–76.

403. *Id.*

404. *Id.*

405. *See id.* at 1273, 1276, 1279.

406. *Id.* at 1277.

speech.⁴⁰⁷ Examining Requa's behavior, which consisted of standing behind a teacher in class and filming her while "making 'rabbit ears' and pelvic thrusts," the court concluded that Requa's behavior satisfied *Tinker*'s "substantial disruption" test.⁴⁰⁸ Thus, his speech was unlikely to be "protected speech" within the meaning of *Tinker*.⁴⁰⁹ Ultimately the school prevailed, as the court noted that Requa's "admitted free speech activities outside the classroom—posting a link to the YouTube video on the internet—are protected speech and the school district agrees that he may not be disciplined for [his] out-of-school expression of his viewpoint."⁴¹⁰ This is an example of the existing confusion about the application of *Tinker* to off-campus student cyberspeech. While the United States District Court for the Central District of California says that *Tinker* is applicable to off-campus student speech that arrives on campus,⁴¹¹ the United States District Court for the Western District of Washington indicates that *Tinker* is not applicable to off-campus student speech.⁴¹²

In 2003, the United States District Court for the Western District of Pennsylvania confronted an off-campus student cyberspeech issue in *Flaherty v. Keystone Oaks School District*.⁴¹³ "Jack Flaherty, Jr. posted three messages from . . . home and one from school" to a public message board discussing, in juvenile terms, his school's volleyball team.⁴¹⁴ Once the school coaches learned of the postings, Flaherty was disciplined based on a policy that defined harassment as "any ongoing pattern of *abuse*, whether physical or verbal."⁴¹⁵ Flaherty sued, arguing the school policies used to punish his off-campus conduct and speech were overreaching and "unconstitutionally overbroad and vague [so] that they fail to limit a school official's authority to discipline."⁴¹⁶ Examining the school's policy in light of the mandates of *Tinker*, the court concluded that the discipline policy was both overbroad and

407. *Requa*, 492 F. Supp. 2d at 1280 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001)).

408. *Id.* (citing *Tinker*, 393 U.S. at 513).

409. *Id.* at 1279 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *Tinker*, 393 U.S. at 513).

410. *Id.* at 1283.

411. *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1094, 1105, 1107–08 (C.D. Cal. 2010).

412. *Requa*, 492 F. Supp. 2d at 1272, 1283.

413. 247 F. Supp. 2d 698, 698, 700 (W.D. Pa. 2003).

414. *Id.* at 700.

415. *Id.* at 700, 701 & n.3.

416. *Id.* at 701, 705.

vague in its definition and application.⁴¹⁷ The court announced that the policy failed to follow *Tinker*'s mandate and limit the authority of the school to discipline student expression except in cases of "substantial disruption."⁴¹⁸ Instead, the court stated that the discipline policy "could be interpreted to prohibit a substantial amount of protected speech."⁴¹⁹ Thus, the court granted Flaherty's motion for summary judgment.⁴²⁰

In 2002, two federal district court cases involved student cyberspeech, as did a decision from the Pennsylvania Supreme Court.⁴²¹ *Coy ex rel. Coy v. Board of Education*⁴²² involved a middle school student named Jon Coy.⁴²³ While at home, using his own computer, Coy created a website, posting "pictures and biographical information" about himself and some of his school friends.⁴²⁴ The site also contained a section named "losers" and included pictures of classmates with derogatory sentences under the photos.⁴²⁵ Specifically, "[t]he 'losers' section contained the pictures of three boys who attended the North Canton Middle School. . . . Most objectionable was a sentence describing one boy as being sexually aroused by his mother."⁴²⁶ Middle school students learned of the website and eventually reported it to the math teacher, who reported it to the principal, Mr. Stanley.⁴²⁷ Nothing was done until Coy accessed the website from the school's computer lab.⁴²⁸ After that, Stanley suspended Coy for four days for violating the school's student conduct code and internet policy.⁴²⁹ The school found that Coy violated the following portion of the student conduct code: "Inappropriate Action or Behavior: Any action or behavior judged by school officials to be inappropriate and not specifically mentioned in other sections shall be in violation of the Student Conduct Code."⁴³⁰

417. *Id.* at 704, 705; *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

418. *Flaherty*, 247 F. Supp. 2d at 704; *see also Tinker*, 393 U.S. at 509.

419. *Flaherty*, 247 F. Supp. 2d at 706.

420. *Id.*

421. *Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 781 (E.D. Mich. 2002); *Coy ex rel. Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 794-95 (N.D. Ohio 2002); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 850 (Pa. 2002).

422. 205 F. Supp. 2d 791 (N.D. Ohio 2002).

423. *Id.* at 794.

424. *Id.* at 795.

425. *Id.*

426. *Id.*

427. *Coy ex rel. Coy*, 205 F. Supp. 2d at 795.

428. *Id.* at 795-96.

429. *Id.* at 796.

430. *Id.*

Coy and his parents sued.⁴³¹ Coy argued that the school disciplined him, not for viewing the website at school, but rather for the content of the website, which was created off-campus and thus constituted protected speech under *Tinker*.⁴³² The school disputed this, saying that it punished Coy because he violated school policy.⁴³³ Discussing both *Tinker*'s and *Fraser*'s requirements, the court refused to grant the school summary judgment, indicating that it must demonstrate a substantial disruption in order to discipline Coy's speech.⁴³⁴

In November of 2002, the United States District Court for the Eastern District of Michigan also dealt with a student cyberspeech issue in *Mahaffey ex rel. Mahaffey v. Aldrich*.⁴³⁵ Joshua Mahaffey, a high school student, created a website with another student and named it "Satan's web page."⁴³⁶ The site stated "[s]tab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do It [sic]. unless [sic] Im [sic] there to watch."⁴³⁷

A parent of another student at the school learned of the web site and reported it to the police.⁴³⁸ The police investigated and were told that computers at the high school "may have been used to create the website."⁴³⁹ The police then notified the school.⁴⁴⁰ The school then began an investigation, and Mahaffey indicated that he created the website "for laughs" and because he was "bored."⁴⁴¹ The school's investigation centered upon Mahaffey's conduct that was alleged to violate the school's code of conduct.⁴⁴² After the investigation, the principal, Carol Baldwin, recommended expulsion because Mahaffey's behavior violated the school's *Conduct Policy* which prohibited "[b]ehavior [d]angerous to [the] [s]elf and [o]thers."⁴⁴³

431. *Id.* at 794.

432. *Coy ex rel. Coy*, 205 F. Supp. 2d at 794, 797 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

433. *Id.* at 794, 796.

434. *Id.* at 799–801.

435. 236 F. Supp. 2d 779, 779, 781–82 (E.D. Mich. 2002).

436. *Id.* at 781.

437. *Id.* at 782.

438. *Id.*

439. *Id.*

440. *Mahaffey ex rel. Mahaffey*, 236 F. Supp. 2d at 782.

441. *Id.* at 781.

442. *Id.* at 782.

443. *Id.* The school advised Mahaffey that "based upon the admitted and alleged violation of Categories 5-Behavior Dangerous to Self and Others, 23-Internet Violations and 24-Intimidation and Threats of the Waterford School District Code of Conduct" he was being expelled. *Id.*

The school then recommended expulsion but offered to provide a hearing.⁴⁴⁴ Mahaffey sued, arguing that the school's conduct violated his First Amendment rights.⁴⁴⁵ The court, applying the *Tinker* analysis, agreed with Mahaffey.⁴⁴⁶ When analyzing and applying *Tinker*, the court concluded that Mahaffey's activity had to have occurred on or with school property in order for the school to have taken action.⁴⁴⁷ In addition to the geography requirement, the *Tinker* test would require that Mahaffey's behavior must then have created a substantial disruption to the work of the school.⁴⁴⁸ Only after establishing this could the school discipline Mahaffey for his speech.⁴⁴⁹ Applying *Tinker* to the facts at hand, the court announced that the school produced no evidence that Mahaffey used school equipment to make his website nor had it established that Mahaffey communicated its existence to others at the school.⁴⁵⁰ It stated:

[R]egulation of Plaintiff's speech on the website without any proof of disruption to the school or on campus activity in the creation of the website was a violation of Plaintiff's First Amendment rights. Therefore, Plaintiff's motion for summary judgment shall be granted on his free speech and free expression claims.⁴⁵¹

The last case to be discussed in this section involved a decision handed down by the Supreme Court of Pennsylvania in *J.S. ex rel. H.S. v. Bethlehem Area School District*⁴⁵² in 2002.⁴⁵³ J.S., an eighth grade student, created a website on his home computer, from home, and titled it "Teacher Sux."⁴⁵⁴ It made derogatory comments about the school's algebra teacher, Mrs. Fulmer, and the school principal.⁴⁵⁵ On the website, J.S. posted a question that asked "Why Should She Die?"⁴⁵⁶ Beneath the heading, J.S. then requested "\$20 to help pay for the hitman."⁴⁵⁷ In addition to other comments and diagrams,

444. *Mahaffey ex rel. Mahaffey*, 236 F. Supp. 2d at 782–83.

445. *Id.* at 781.

446. *See id.* at 784, 786.

447. *See id.* at 783–84.

448. *Id.* at 784 (quoting *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 509 (1969)).

449. *Mahaffey ex rel. Mahaffey*, 236 F. Supp. 2d at 784.

450. *Id.* at 786.

451. *Id.*

452. 807 A.2d 847 (Pa. 2002).

453. *Id.* at 847.

454. *Id.* at 850–51.

455. *Id.* at 851.

456. *Id.*

457. *J.S. ex rel. H.S.*, 807 A.2d at 851.

the final page of the website showed a “drawing of Mrs. Fulmer with her head cut off and blood dripping from her neck.”⁴⁵⁸ Students, faculty, and administrators at the school viewed the website.⁴⁵⁹ Mrs. Fulmer testified that the website frightened her, and that she was afraid “someone would try to kill her.”⁴⁶⁰ She went on medical leave which meant that three substitute teachers had to finish teaching her class, creating a substantial disruption in the educational process.⁴⁶¹

While the school knew of the website before the school year ended in May, it did not take action until July.⁴⁶² In July, the school notified J.S. and his parents that he would be suspended for three days.⁴⁶³ Why was he being suspended? The school said “that J.S. violated School District policy [with a] threat to a teacher, harassment of a teacher and principal, and disrespect to a teacher and principal, each resulting in actual harm to the health, safety, and welfare of the school community.”⁴⁶⁴ The school district conducted a hearing and then suspended J.S. for ten days.⁴⁶⁵ Shortly thereafter, it expelled J.S.⁴⁶⁶

J.S. then appealed the district’s decision.⁴⁶⁷ The Court of Common Pleas affirmed the school’s discipline and the Commonwealth Court upheld their decision.⁴⁶⁸ J.S. then appealed to the Supreme Court of Pennsylvania.⁴⁶⁹ While J.S. argued that the school’s behavior violated his First Amendment rights, the school disagreed, saying that J.S.’s speech was not entitled to First Amendment protection since it constituted a true threat.⁴⁷⁰ As the court analyzed the facts, it agreed with J.S. that his speech did not constitute a true threat since the school failed to take action for several months after learning about the website.⁴⁷¹ Thus, the court concluded that the *Tinker* analysis was appropriate.⁴⁷² As the court understood *Tinker*, it believed that it must first determine whether the speech occurred on-campus as it appeared to believe

458. *Id.*

459. *Id.* at 851–52.

460. *Id.* at 852.

461. *Id.*

462. *J.S. ex rel. H.S.*, 807 A.2d at 850, 852.

463. *Id.* at 852.

464. *Id.*

465. *Id.*

466. *Id.* at 853.

467. *J.S. ex rel. H.S.*, 807 A.2d at 853.

468. *Id.* at 869.

469. *Id.* at 847, 853.

470. *Id.* at 855–56.

471. *Id.* at 860.

472. *See J.S. ex rel. H.S.*, 807 A.2d at 867–68.

that *Tinker* was inapplicable to off-campus student speech.⁴⁷³ Determining that J.S. had accessed the website while at school from school computers, the court concluded that the nexus between off-campus speech and on-campus access was satisfied.⁴⁷⁴ Lastly, the court had to determine whether J.S.'s speech created a "substantial disruption" as required by *Tinker*.⁴⁷⁵ Given the nature of the statements made on the website, the court announced that the uproar generated by students, parents, and school staff because of the website did indeed result in a substantial disruption in the work of the school.⁴⁷⁶ Applying the *Tinker* analysis, the court announced that the school did not violate J.S.'s First Amendment rights, stating "we find that the School District's disciplinary action[s] taken against J.S. did not violate his First Amendment right to freedom of speech."⁴⁷⁷

As the above facts and holdings demonstrate, courts are interpreting and applying the *Tinker* analysis in various ways that do not seem to be consistent.⁴⁷⁸ Some courts indicate that *Tinker* applies to both on and off-campus student speech while others courts conclude that it applies only to on-campus speech.⁴⁷⁹ Facts that establish a "substantial disruption" vary from district to district.⁴⁸⁰ Sometimes the geographic location of the speech is determinative, while at other times courts consider the nexus between the off-campus speech and the on-campus impact when deciding if *Tinker* is applicable.⁴⁸¹ If the lack of clarity from the cases is not sufficient, the article will next consider the impact of the Department of Education's Office for Civil Rights' laws and interpretations regarding harassment as well as state legislation that

473. *Id.* at 864.

474. *Id.* at 865.

475. *Id.* at 868–69.

476. *Id.* at 869.

477. *J.S. ex rel. H.S.*, 807 A.2d at 869.

478. *See, e.g., Kowalski I*, 652 F.3d 565, 574 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012); *J.S. ex rel. H.S.*, 807 A.2d at 869.

479. *Compare Kowalski I*, 652 F.3d at 574, with *J.S. ex rel. H.S.*, 807 A.2d at 865.

480. *Compare Kowalski I*, 652 F.3d at 574, with *J.S. ex rel. H.S.*, 807 A.2d at 869.

481. *Compare Kowalski I*, 652 F.3d at 574, with *J.S. ex rel. H.S.*, 807 A.2d at 865. The K–12 student speech and school discipline cases continue to arise and head into court. *See, e.g., Kowalski I*, 652 F.3d at 567. Three appellate briefs involving schools and student speech cited to *Tinker*. Brief of Appellees at 13–22, *C.H. ex rel. Hardwick v. Heyward*, No. 12–1445 (4th Cir. Aug. 17, 2012); Brief of Appellants at 21, *Bell v. Itawamba Cnty. Sch. Bd.*, No. 12–60264 (5th Cir. June 6, 2012) [hereinafter Brief of Appellants, *Bell*]; Brief of Appellees at 21–33, *Wynar v. Douglas Cnty. Sch. Dist.*, No. 11–17127 (9th Cir. May 7, 2012) [hereinafter Brief of Appellees, *Wynar*]. Another case involving school discipline and student speech was decided on September 6, 2012. *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist.* No. 2149, No. 12–588, 2012 WL 3870868, at *1 (D. Minn. Sept. 6, 2012).

mandates school boards provide “safe” schools.⁴⁸² Both the Department of Education and several state legislatures not only ask, but require, public schools to enact and enforce certain policies that involve schools with off-campus student cyberspeech.⁴⁸³ Are these regulations and legislation, at both the state and federal levels, constitutional, given the various interpretations of the Supreme Court decisions about off-campus student cyberspeech?

III. THE DEPARTMENT OF EDUCATION’S OFFICE OF CIVIL RIGHTS

If interpreting and applying the legal analysis required by the *Morse* quartet is confusing,⁴⁸⁴ add more confusion to the analysis when the anti-harassment provisions, monitored by the Department of Education’s Office for Civil Rights, are thrown into the mixture.⁴⁸⁵ In 2010, the Department of Education drafted a DCL⁴⁸⁶ that lauded efforts by school boards to deal with the harmful effects of bullying.⁴⁸⁷ However, the letter warned schools not to forget that some behaviors, labeled as bullying, actually constituted peer harassment on the basis of “race, color, national origin, sex, and disability.”⁴⁸⁸ Understanding the distinction between what constitutes bullying and what constitutes harassment is crucial because the Department of Education’s Office for Civil Rights concerns itself with the imposition of liability for peer harassment that is “based on race, color, national origin, sex or disability.”⁴⁸⁹ The Department of Education reminded schools of their legal obligations regarding the enforcement of civil rights statutes by the Depart-

482. See discussion *infra* Part III. The Department of Education’s Office for Civil Rights enforces civil rights laws for programs that receive federal funding from the Department of Education. OCR: *Know Your Rights*, *supra* note 3; see also 20 U.S.C. § 3413(a) (2006). Because of this, the Department of Education interacts with school administrators for elementary and secondary schools, vocational schools, colleges and universities, proprietary schools, state education agencies, libraries, and museums. OCR: *Know Your Rights*, *supra* note 3. The Office for Civil Rights enforces the statutes “prohibit[ing] discrimination on the basis of race, color [or] national origin, sex, [and] disability.” *Id.*; see also 20 U.S.C. § 1681(a); 42 U.S.C. §§ 2000d, 12131(2).

483. See, e.g., MO. REV. STAT. § 160.775 (2012); OCR: *Know Your Rights*, *supra* note 3.

484. See Dickler, *supra* note 92, at 380–81.

485. OCR: *Know Your Rights*, *supra* note 3.

486. Dear Colleague Letter, *supra* note 80, at 1. This letter is occasionally referred to as the DCL in other texts. Letter from Francisco M. Negrón, Jr., Gen. Counsel, Nat’l Sch. Bds. Ass’n, to Charlie Rose, Gen. Counsel, U.S. Dep’t of Educ. 1 (Dec. 7, 2010) [hereinafter Negrón Letter], available at <http://www.nsba.org/schoollaw/issues/nsba-letter-to-ed-12-07-10.pdf>.

487. Dear Colleague Letter, *supra* note 80, at 1.

488. *Id.* at 1–2.

489. *Id.*

ment of Education's Office for Civil Rights.⁴⁹⁰ Failure to meet these obligations could result in the imposition of liability.⁴⁹¹ Schools, coping with students' First Amendment rights and state legislatures' anti-bullying statutes, must also deal with the Department of Education's peer harassment requirements.⁴⁹² What happens when there is a conflict? This section will explore those topics.

By 2010, the topic of school bullying had become so widespread and public⁴⁹³ that the Assistant Secretary for the Department of Education's Office for Civil Rights, Russlynn Ali, spoke to the subject with a DCL on October 26, 2010.⁴⁹⁴ Directed to "state departments of education and local school districts," the letter applauded the anti-bullying efforts made by these organizations, noting: "Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential."⁴⁹⁵ The letter indicated that some behavior that would fall under a school's anti-bullying policy might also "trigger responsibilit[y] under one or more of the federal antidiscrimination laws enforced by the Department[] [of Education]."⁴⁹⁶ The Department of Education then warned schools to not only address student conduct that fell under its bullying policies, but also to consider whether such conduct resulted in discriminatory harassment.⁴⁹⁷

According to the letter, labels used by schools to pigeon-hole behavior were not determinative as to how a school was expected to respond to an incident.⁴⁹⁸ The letter advised schools to impartially investigate incidents from a perspective of ascertaining whether the conduct involved harassment that was based on "race, color, national origin, sex, [or] disability."⁴⁹⁹ To further explain, the Department of Education indicated that "[h]arassing conduct [could] take many forms."⁵⁰⁰ It suggested the following examples:

- "verbal acts and name-calling;"

490. *Id.* at 1–3.

491. *See id.*

492. McCarthy, *supra* note 45, at 11–13.

493. *See Bullying Statistics 2010*, *supra* note 350.

494. Dear Colleague Letter, *supra* note 80, at 1, 10.

495. *Id.* at 1.

496. *Id.*

497. *Id.*

498. *Id.* at 3.

499. Dear Colleague Letter, *supra* note 80, at 2–3.

500. *Id.* at 2.

- “graphic and written statements, which may include the use of cell phones or the [i]nternet;”
- “or other conduct that may be physically threatening, harmful, or humiliating.”⁵⁰¹

The letter stated that “[h]arassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.”⁵⁰² Instead, “[h]arassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”⁵⁰³ The letter then explained that “[w]hen such harassment is based on race, color, national origin, sex, or disability, it violates the civil rights laws that [the Office for Civil Rights] enforces.”⁵⁰⁴

After defining harassment, the letter told schools that “[a] school is responsible for addressing harassment incidents about which it knows or reasonably should have known. . . . When responding to harassment, a school must take immediate and appropriate action to investigate or otherwise determine what occurred.”⁵⁰⁵ If the school determined there had been discriminatory harassment, it was advised to “take prompt and effective steps . . . to end the harassment.”⁵⁰⁶ Punishment of the student offender would not necessarily suffice.⁵⁰⁷ Instead, the school has a responsibility to discover and eradicate the problem, handle the transgressors, provide training, and put a program in place to see that the harassment did not reoccur.⁵⁰⁸

Concerned about the implications of the above letter, Francisco M. Negrón, General Counsel for the National School Boards Association, responded on December 7, 2010, writing to Charlie Rose, the Department of Education’s General Counsel.⁵⁰⁹ The letter began by stating the Board’s fear “that absent clarification, the [Department of Education’s] expansive reading of the law as stated in the DCL will invite misguided litigation.”⁵¹⁰ Referring to the Supreme Court’s decision in *Davis v. Monroe County Board of Educa-*

501. *Id.*

502. *Id.*

503. *Id.*

504. Dear Colleague Letter, *supra* note 80, at 2.

505. *Id.*

506. *Id.*

507. *See id.* at 3.

508. *Id.*

509. Negrón Letter, *supra* note 486, at 1, 11.

510. *Id.* at 1.

tion,⁵¹¹ the letter noted that *Davis* imposed liability only upon the demonstration that the school had *actual knowledge* of the harassment, while the October 10th Department of Education letter provided for the imposition of liability for harassment about which the school *knows or reasonably should have known*.⁵¹² Besides the distinction between *actual knowledge* and the standard of *should have known*, the letter further noted that:

Davis holds that only “harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit” may result in [the imposition of] liability for the school district. The DCL, in contrast, states the following: “Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, *or* persistent so as to *interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by the school*.”⁵¹³

On page six, Negrón’s letter noted that the Department of Education’s October 26th letter only minimally acknowledged the limitations of schools to discipline students regarding harassment when students’ First Amendment free speech rights were involved.⁵¹⁴ Negrón wrote:

[S]chool districts may discipline students within the limitations of First Amendment for on-campus, non-school sponsored speech in the following instances only: if the speech is likely to cause a “substantial disruption of or material interference with school activities” or the speech collides with “the rights of other students to be secure and . . . let alone;” if the speech is “sexually explicit, indecent or lewd;” or if it “can reasonably be regarded as encouraging illegal drug use.”⁵¹⁵

Because of the *Morse* quartet, Negrón argued that many state legislatures, when enacting cyberbullying or bullying legislation, attempted to define bullying, cyberbullying, and harassment in such a way that the terms did not run afoul of the meaning and application of students’ First Amendment rights as delineated by the *Morse* quartet.⁵¹⁶ However, Negrón argued that the De-

511. 526 U.S. 629 (1999).

512. Negrón Letter, *supra* note 486, at 2; *see also* Dear Colleague Letter, *supra* note 80, at 2.

513. Negrón Letter, *supra* note 486, at 2–3.

514. *Id.* at 1, 6.

515. *Id.* at 6 (footnotes omitted).

516. *See id.*; *see also* Dickler, *supra* note 92, at 361–62.

partment of Education's interpretation, enforcement, and imposition of liability upon schools for violating the Department's Civil Rights' laws showed no such understanding.⁵¹⁷ How could a school deal with *Snyder's* hate speech without running afoul of the Department's Civil Rights' laws?⁵¹⁸ It was indeed a dilemma.

IV. STATE ANTI-BULLYING LAWS

Between 1995 and April 2011, forty-six states enacted legislation to deal with bullying.⁵¹⁹ A quick look at the state legislation indicates that state legislatures have frequently used "harassment" and "bullying" interchangeably.⁵²⁰ Given the specific legal definition of "harassment" as enforced by the Department of Education's Office for Civil Rights,⁵²¹ more confusion ensues.⁵²² Some states apply the legislation to off-campus speech while others do not.⁵²³ Some address cyberspeech while others ignore it.⁵²⁴

In December of 2011, the Department of Education released a report, *Analysis of State Bullying Laws and Policies*.⁵²⁵ The study states that between 1999 and 2010, there were over one hundred and twenty bills introduced or amended by state legislatures to either require schools or the juvenile justice system to deal with bullying.⁵²⁶ While some of these laws require discipline by schools when bullying occurs, other laws require the intervention of the juvenile justice system.⁵²⁷ Some legislatures included model bullying policies that schools could adopt in order to show compliance.⁵²⁸

517. See Negrón Letter, *supra* note 486, at 6–7.

518. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1213 (2011); Dear Colleague Letter, *supra* note 80, at 1–3.

519. STUART-CASSEL ET AL., *supra* note 52, at 15, 17.

520. NAT'L SCH. BDS. ASS'N, *supra* note 77. States whose legislation uses the words "bullying," "cyber-bullying," or "harassment" include, but are not limited to the following states: Arizona, Florida, Hawaii, Idaho, Mississippi, Nevada, Oklahoma, South Carolina, Texas, Washington, and West Virginia. *Id.*

521. Dear Colleague Letter, *supra* note 80, at 2.

522. See STUART-CASSEL ET AL., *supra* note 52, at 17–18.

523. NAT'L SCH. BDS. ASS'N, *supra* note 77.

524. *Id.*

525. STUART-CASSEL ET AL., *supra* note 52, at i–ii.

526. See *id.* at 16.

527. *Id.* at 16, 19–20.

528. *Id.* at 19.

According to the report's executive summary, forty-six states have enacted bullying laws.⁵²⁹ Forty-three of these states direct schools to create anti-bullying policies; yet three of these states fail to define the behavior that constitutes bullying.⁵³⁰ Thirty-six states prohibit bullying via electronic media while thirteen of the forty-six states give schools the authority to discipline off-campus behavior if the behavior creates a hostile school environment.⁵³¹

As state legislatures and school agencies as well as local school boards grapple with cyberbullying, the First Amendment, and the Department of Education's Office for Civil Rights definition of "harassment," there are many publications offering model legislation that will allegedly satisfy everyone and every requirement.⁵³² According to Stuart-Cassel and Dayton, state legislatures should ensure that school bullying legislation incorporates the following components:

- a statement of purpose that explains the reason for the legislation,⁵³³
- a statement of scope that defines the extent or reach of the legislation, i.e. to what behaviors is it applicable and to what behaviors is it not applicable;⁵³⁴
- definitions and examples of behaviors that constitute bullying, cyberbullying, and harassment; these definitions should protect students from the day to day realities of bullying yet not be so overbroad that free speech rights are intruded upon;⁵³⁵

529. *Id.* at x. Hawaii, Montana, Michigan, and South Dakota were the only states that did not have some form of bullying legislation in effect as of April 2011. STUART-CASSEL ET AL., *supra* note 52, at 17.

530. *Id.* at 25. Arizona, Minnesota and Wisconsin enacted anti-bullying legislation but did not define the behavior that constitutes bullying. *Id.*

531. *Id.* at 15.

532. See Dayton et al., *Model Anti-Bullying Legislation: Promoting Student Safety, Civility, and Achievement Through Law and Policy Reform*, 272 EDUC. L. REP. 19, 24–32 (2011); see also STUART-CASSEL ET AL., *supra* note 52, at 89–94. John Dayton, Anne Proffitt Dupre, and Ann Elizabeth Blankenship discussed the creation of a model anti-bully statute that would protect students and promote civility and safety in a recent article. See Dayton et al., *supra* note 532, at 25–32.

533. STUART-CASSEL ET AL., *supra* note 52, at 22; see also Dayton et al., *supra* note 532, at 25.

534. STUART-CASSEL ET AL., *supra* note 52, at 23; see also Dayton et al., *supra* note 532, at 26.

535. STUART-CASSEL ET AL., *supra* note 52, at 24–25; see also Dayton et al., *supra* note 532, at 24, 26–27.

- the development and creation of state wide school policies that protect children's rights to be free from bullying and to exercise their First Amendment rights; such policies can be shared by school districts throughout the state;⁵³⁶
- a requirement that school personnel model appropriate behavior and enforce anti-bullying policies;⁵³⁷
- a requirement that schools publicize and communicate the existence of school anti-bullying policies;⁵³⁸
- a requirement that training be provided for school personnel to model appropriate behavior and counsel students whose behavior violates school policies;⁵³⁹
- a mandatory reporting requirement, requiring schools to report violations of school policies;⁵⁴⁰
- a requirement that criminal acts be treated as criminal acts and not as bullying;⁵⁴¹ and
- a requirement that appropriate counseling and disciplinary provisions be provided for students whose conduct violates school bullying policies.⁵⁴²

While the above suggestions for model legislation and model school policies regarding bullying are useful, they are still not sufficiently detailed to answer the questions that courts and school districts continue to ask: Can off-campus student cyberspeech be punished by schools?⁵⁴³ If so, under what circumstances can off-campus speech be punished?⁵⁴⁴ Answering these

536. STUART-CASSEL ET AL., *supra* note 52, at 18–19, 22, 24–25, 28.

537. *Id.* at 33; Dayton et al., *supra* note 532, at 27–28.

538. STUART-CASSEL ET AL., *supra* note 52, at 32.

539. Dayton et al., *supra* note 532, at 30.

540. STUART-CASSEL ET AL., *supra* note 52, at 36–37; Dayton et al., *supra* note 532, at 28.

541. STUART-CASSEL ET AL., *supra* note 52, at 20; Dayton et al., *supra* note 532, at 30–31.

542. STUART-CASSEL ET AL., *supra* note 52, at 69–70; Dayton et al., *supra* note 532, at 30.

543. *See, e.g., Coy ex rel. Coy v. Bd. of Educ.*, 205 F. Supp. 2d 791, 798 (N.D. Ohio 2002) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

544. Presently, there are two student speech cases being appealed from federal district courts to federal circuit courts that involved the discipline of off-campus student cyberspeech. Brief of Appellants, Bell, *supra* note 481, at 7 (appealing to the United States Court of Ap-

questions addresses the intersection of students' First Amendment rights, the Department of Education's enforcement of civil rights laws, and state anti-bullying legislation.⁵⁴⁵

V. ANALYSIS

As *Snyder* so clearly stated: Speech, even painful and hurtful speech, is revered and protected in America.⁵⁴⁶ Why? It is believed that self-government, to a great degree, is determined by the free exchange of ideas even if it does lead to an “uninhibited [and] robust” discussion.⁵⁴⁷ “[T]he essence of self-government” is believed to be the ability to speak out on matters of public importance and to discuss unpopular viewpoints.⁵⁴⁸ The suppression of speech counteracts this belief.⁵⁴⁹ So deeply ingrained in the American psyche is the principle of free speech that America, as a society, was willing to tolerate the free speech rights of Nazis to march through a

peals for the Fifth Circuit); Brief of Appellees, Wynar, *supra* note 481, at 7 (being appealed to the United States Court of Appeals for the Ninth Circuit). In *Bell v. Itawamba County School Board*, Taylor Bell wrote and published, via Facebook and YouTube, a rap song that was critical of his coaches. 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012). Taylor was suspended for a week and then moved to an alternative school for the remainder of the semester because his rap song was deemed by the school board to constitute both harassment of school employees and threats. *Id.*; Brief of Appellants, Bell, *supra* note 481, at 16. In *Wynar v. Douglas County School District*, Wynar instant messaged a classmate, saying that he wanted to “shoot” named classmates. No. 3:09-cv-0626-LRH-VPC, 2011 WL 3512534, at *1 (D. Nev. Aug. 10, 2011); Brief of Appellees, Wynar, *supra* note 481, at 12. These instant messages were forwarded to school administration. *Wynar*, 2011 WL 3512534, at *1; Brief of Appellees, Wynar, *supra* note 481, at 14–15. The school then suspended Wynar for ninety days. *Wynar*, 2011 WL 3512534, at *1; Brief of Appellees, Wynar, *supra* note 481, at 18. Also, there is a pending case in the District Court of Minnesota that involves off-campus discipline of a student for cyberspeech. *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist.* No. 2149, No. 12-588, 2012 WL 3870868, at *1 (D. Minn. Sept. 6, 2012). In that case, R.S. complained about a hall monitor and communicated about sex with a classmate via Facebook. *Id.* at *1–2. The classmate’s guardian complained to the school principal. *Id.* at *2. To determine the accuracy of these statements, R.S. was detained and her Facebook account was searched by school officials. *Id.*

545. See *Morse v. Frederick*, 551 U.S. 393, 403 (2007); *Kuhlmeier*, 484 U.S. at 273; *Frasser*, 478 U.S. at 681–83; *Tinker*, 393 U.S. at 506.

546. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011).

547. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

548. *Snyder*, 131 S. Ct. at 1215 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)).

549. See *id.* at 1219 (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

village of Holocaust Jewish survivors in Skokie, Illinois.⁵⁵⁰ Given the priority that is placed on speech in American life, do K–12 students and their teachers have free speech rights in school where they are learning to participate in the ““marketplace of ideas?””⁵⁵¹

In 1969, the Supreme Court made it plain in *Tinker* that students and teachers did not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁵⁵² After *Tinker*, some would argue that later Supreme Court decisions on the topic made it less clear to what extent student speech rights existed and when schools could suppress or punish student speech. *Fraser*, *Kuhlmeier*, and *Morse* all indicated that while protection of student speech rights was important, it was not absolute.⁵⁵³ In *Fraser*, Justice Burger wrote that “simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, [does not mean that] the same latitude must be permitted to children in a public school.”⁵⁵⁴ It became obvious between 1986 when *Fraser* was decided, and later in 2007 when Chief Justice Roberts authored the majority opinion in *Morse*, that confusion within the courts as to the correct analysis regarding student speech still existed.⁵⁵⁵ Justice Roberts sought to clarify by writing:

[I]t is enough to distill from *Fraser* two basic principles. First, *Fraser’s* holding demonstrates that “*the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.*” Had *Fraser* delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, *Fraser’s* First Amend-

550. See Robert D. Richards & Clay Calvert, *Nadine Strossen and Freedom of Expression: A Dialogue with the ACLU’s Top Card-Carrying Member*, 13 GEO. MASON U. C.R. L.J. 185, 203 (2003). The article indicates that the ACLU’s defense of the Nazis to march through Skokie, Illinois, a town then heavily populated with Jewish survivors of the Holocaust, reflected the fact that while many theoretically agreed with *free speech*, the ACLU still lost 15% of its membership for defending the free speech rights of Nazis in Skokie in 1978. *Id.* at 203 & n.79. According to the article, Strossen concluded that while the principle of free speech was *firmly entrenched* within the United States legal system, it was also poorly understood. *Id.* at 203.

551. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

552. *Id.* at 503, 506.

553. See *Morse v. Frederick*, 551 U.S. 393, 396–97, 410 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266, 273, 276 (1988) (citing *Tinker*, 393 U.S. at 506, 509, 512–13); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986).

554. *Fraser*, 478 U.S. at 677, 682.

555. See *Morse*, 551 U.S. at 396, 409–10; *Kuhlmeier*, 484 U.S. at 264–66, 276; *Fraser*, 478 U.S. at 679–80, 685–86.

ment rights were circumscribed “in light of the special characteristics of the school environment.” Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the “substantial disruption” analysis prescribed by *Tinker*.⁵⁵⁶

With four Supreme Court opinions on K–12 student speech from 1969 through 2007, it would seem that the issue was settled.⁵⁵⁷ The analysis should have been clear for lower courts to apply to the facts of cases before them. However, the lower courts have applied the *Tinker* analysis to cases that involved similar facts; yet these courts have reached dissimilar conclusions.⁵⁵⁸

In *Doninger II*, the United States Court of Appeals for the Second Circuit reiterated the problems facing lower courts.⁵⁵⁹ In addition to the confusion surrounding the application of the *Morse* quartet analysis to student speech cases, courts and schools are now grappling with the implications of off-campus cyberspeech that ends up on-campus and is often described by schools as “cyberbullying.”⁵⁶⁰ *Doninger II* eloquently captured the dilemma of lower courts, saying “[t]he law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile, and courts often struggle to determine which standard applies in any particular case.”⁵⁶¹ Judges are not alone in their confusion.⁵⁶² As Naomi Harlin Goodno states in an article that she authored: “There is no Supreme Court case squarely on point. The split in the lower courts’ decisions shows that the law is ambiguous.”⁵⁶³

What is a principal to do? He or she is “damned if they do and damned if they don’t” act when confronted with off-campus cyberspeech that makes

556. *Morse*, 551 U.S. at 396, 404–05 (emphasis added) (citations omitted).

557. *See id.* at 410; *Kuhlmeier*, 484 U.S. at 273, 276; *Fraser*, 478 U.S. at 686–87; *Tinker*, 393 U.S. at 514.

558. *Compare Mahaffey ex rel. Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 783–84, 790 (E.D. Mich. 2002), *with J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 869 (Pa. 2002).

559. *See Doninger II*, 642 F.3d 334, 353 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

560. *See, e.g., J.S. ex rel. H.S.*, 807 A.2d at 850–52; *see also Evans v. Bayer*, 604 F. Supp. 2d 1365, 1367 (S.D. Fla. 2010).

561. *See Doninger II*, 642 F.3d at 353 (citing *Morse*, 551 U.S. at 430).

562. *E.g., Naomi Harlin Goodno, How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 657 (2011).

563. *Id.* (footnote omitted).

its way on-campus and involves either bullying or harassment. Principals, school boards, and school districts face numerous questions, including:

- Whether schools can regulate off-campus student speech that is online, i.e., cyberspeech, if it is directed at either school personnel or students, and then arrives on-campus?⁵⁶⁴ If so, under what circumstances can this speech be regulated?⁵⁶⁵
- Whether geography, i.e., on-campus or off-campus, can be the litmus test for regulation of this speech?⁵⁶⁶
- Whether a substantial disruption is established by the arrival, in any form, of off-campus speech on the school's campus?⁵⁶⁷ If not, is chaos required to meet the substantial disruption test? What constitutes a substantial disruption?
- Whether the individual student's free speech right that collides with another student's right to be *let alone* will prevail? What about a student's right to be free from bullying and harassment?⁵⁶⁸

Unfortunately, there appear to be more questions than answers, which is why many are urging the Supreme Court of the United States to grant certiorari and resolve the issue.⁵⁶⁹

The issues facing the courts, the schools, the state legislatures, the students, and the Department of Education can be summarized as: Can a school regulate student speech or expression that occurs outside of school and is not connected to a school sponsored event, yet subsequently makes its way on-campus by either the speaker or others? If so, under what circumstances can the speech be regulated? If such speech is beyond the school's ability to regulate, can schools escape the imposition of liability by the Department of Education and state laws for failure to respond to harassment or bullying?⁵⁷⁰

564. See Thomas Wheeler, *Facebook Fatalities: Students, Social Networking, and the First Amendment*, 31 PACE L. REV. 182, 214 (2011).

565. See *id.* at 199–200.

566. *Morse*, 551 U.S. at 405; see Wheeler, *supra* note 564, at 214–15.

567. See Wheeler, *supra* note 564, at 199–200.

568. See *id.* at 217.

569. See *id.* at 185.

570. See *id.* at 183–85.

If it is possible to evade liability, how do schools, parents, and society want to handle the bullying that sometimes leads to suicide?⁵⁷¹

A thorough review of *Tinker* reveals that the Court began its discussion by acknowledging that earlier court decisions affirmed “the comprehensive authority of the [s]tates and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the school[.]. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.”⁵⁷² The language of *Tinker* indicates that the Court considered student speech to have First Amendment protection regardless of whether it took place inside or outside of the classroom.⁵⁷³ The Court said:

*A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others. But 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.*⁵⁷⁴

The Court cites to the earlier decisions of *Burnside v. Byars*⁵⁷⁵ and *Blackwell v. Issaquena County Board of Education*,⁵⁷⁶ to support the above conclusion.⁵⁷⁷

A literal reading of *Tinker* reflects that schools can regulate or discipline student speech that occurs off-campus if it has an on-campus impact that either causes a substantial disruption with the school’s work, is reasonably foreseeable that it will cause a substantial disruption with the school’s

571. See, e.g., *id.* at 183–84, 227; see also BULLY, <http://www.thebullyproject.com/movement/> (last visited Feb. 24, 2013) (providing information about the film, *Bully*, produced by The Bully Project).

572. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (citations omitted).

573. *Id.* at 512–13.

574. *Id.* (emphasis added) (citation omitted).

575. 363 F.2d 744, 749 (5th Cir. 1966).

576. 363 F.2d 749, 753 (5th Cir. 1966).

577. *Tinker*, 393 U.S. at 512–13.

work, or it collides with the rights of others.⁵⁷⁸ While some lower courts have debated whether a school's authority even extends to off-campus student speech in any format, *Tinker* does not appear to contemplate that.⁵⁷⁹ From my perspective, *Tinker* is applicable to off-campus speech, including cyberspeech, that arrives on-campus and either creates a substantial disruption or collides with the rights of others.⁵⁸⁰ Given the technological advances of the last twenty years, a geographical litmus test as to when student speech can be disciplined by schools is too limited.⁵⁸¹

While courts have discussed and analyzed both the "substantial disruption" and the "reasonably foreseeable substantial disruption" *Tinker* tests, courts have paid little attention to *Tinker*'s third prong, the "collides with the rights of others" test.⁵⁸² Perhaps this third prong, in conjunction with the "substantial disruption" test could be developed and used to analyze student speech cases that do not fit the parameters of *Fraser*, *Kuhlmeier*, and *Morse*.⁵⁸³ Utilization of the "collides with the rights of others" test might resolve some of the behaviors that so bedevil and trouble school administrators.⁵⁸⁴ How? This prong could be used to discipline student speech that does not substantially disrupt the school's work but that can be described as bullying, harassing, libelous, or threatening. Speech described as bullying, harassing, libelous, or threatening, if it is directed at other students or school personnel, is not protected speech and can be disciplined even if it does not create a "substantial disruption."⁵⁸⁵ Why should this approach be allowed? The school's goal is to teach students civil discourse and debate while pro-

578. See *id.* at 514.

579. See *id.* at 507–08; see also *Morse v. Frederick*, 551 U.S. 393, 405 (2007). The Court in *Morse* explained that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Morse*, 551 U.S. at 405. This statement adds further confusion to the analysis, as some lower courts have concluded that *Fraser* meant lewd speech, if off-campus, could not be regulated under any circumstances. See *Layshock III*, 650 F.3d 205, 219 (3d Cir. 2011) (en banc), *cert. denied sub nom.* Blue Mountain Sch. Dist. v. J.S. *ex rel.* Snyder, 132 S. Ct. 1097 (2012).

580. *Tinker*, 393 U.S. at 512–13.

581. See *J.S. ex rel. Snyder I*, No. 3:07cv585, 2008 WL 4279517, at *9 n.5 (M.D. Pa. Sept. 11, 2008), *aff'd in part, rev'd in part en banc*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

582. See *Tinker*, 393 U.S. at 513–14; see e.g., *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

583. See *Tinker*, 393 U.S. at 513–14; see also *Morse*, 551 U.S. at 403; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–73 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 677–80 (1986).

584. See *Tinker*, 393 U.S. at 513–14.

585. See *id.*

protecting their rights to debate contentious issues.⁵⁸⁶ Yet the schools must also provide a safe environment in which students can thrive and learn without being subjected to harassment, bullying, libel, or threats. Schools want to protect student political speech rights yet also allow schools the flexibility to cope with the cruelty, racism, sexism, libel, or threats that other types of student speech create.⁵⁸⁷

With the above approach, the analysis of student school speech, whether on or off-campus, then becomes the following:

- Is the speech lewd, involving a captive audience, and used on campus?⁵⁸⁸ If so, apply *Fraser*.

- If not, is it speech that carries the imprimatur of the school and involves pedagogy?⁵⁸⁹ If so, apply *Kuhlmeier*.

- If not, is the speech off-campus speech at a school sponsored event that appears to promote illegal drug use?⁵⁹⁰ If so, apply *Morse*.

- If neither *Fraser*, *Kuhlmeier*, or *Morse* is applicable, apply *Tinker*'s "substantial disruption" test. Did the speech arrive on-campus and disrupt school classes or administration?⁵⁹¹ If so, the speech can be disciplined.⁵⁹² An exception to the "substantial disruption" test might mean that pure political speech can be protected even if it does cause a "substantial disruption." What is a substantial disruption? Courts are still debating this.⁵⁹³ In *Doninger II*, the United States Court of Appeals for the Second Circuit found a "substantial disruption" occurred when the school administration was forced to have numerous meetings and handle many irate parental emails and phone calls because of Avery Donginger's blog post.⁵⁹⁴ Yet the United States Court of Appeals for the Third Circuit, in *Layshock III*, held that the student discussion and administrative uproar caused by Jason Layshock's parody posting

586. See Dear Colleague Letter, *supra* note 80, at 1–2.

587. See *id.* at 2.

588. See *Fraser*, 478 U.S. at 684; see also *Bd. of Educ. v. Pico ex rel. Pico*, 457 U.S. 853, 859 (1982); *Ginsberg v. New York*, 390 U.S. 629, 636 (1968).

589. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

590. See *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

591. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

592. *Id.* at 513.

593. See *Layshock III*, 650 F.3d 205, 218–19 (3d Cir. 2011) (en banc), *cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012); *Doninger II*, 642 F.3d 334, 347 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

594. See *Doninger II*, 642 F.3d at 341, 351.

about the school's principal did not constitute a substantial and material disruption.⁵⁹⁵ If the Supreme Court would define substantial disruption, it would greatly assist the analysis of student speech cases. The definition should not be too restrictive, i.e. one person's bad day should not constitute a substantial disruption, yet neither chaos nor turmoil should be required to establish substantial disruption. A description or list of behaviors that demonstrate substantial disruption would help resolve the issue. From my perspective, student speech that requires school personnel to spend 75% of their week dealing with the problems generated by the speech could be considered a substantial disruption. School personnel responding to telephone calls, emails, student and parent visits, counseling sessions, disciplinary sessions, hearings, and classroom time are examples of substantial disruption.

- If the speech does not cause a substantial disruption, it could be regulated under *Tinker's* third prong—the “collides with the rights of others” test—if the speech is directed at other students or school personnel and can be described as speech that is bullying, harassing, libelous or threatening.⁵⁹⁶

The above analysis would balance competing rights, allowing schools to operate without chaos and disruption while preserving the political speech of students and providing a safe school environment that neither permits, condones, or ignores student bullying or harassment.

How should courts then handle *Tinker's* “reasonably foreseeable disruption” test? While the United States Court of Appeals for the Second Circuit held that it was reasonably foreseeable that a violent instant message icon in *Wisniewski* would cause a substantial disruption,⁵⁹⁷ district courts in Indiana and California concluded that raunchy student photos and bullying YouTube videos did not substantially disrupt nor was it foreseeable that the student behavior involved would disrupt school operations.⁵⁹⁸ Perhaps the “reasonably foreseeable” test could be retired. If the “substantial disruption” and “collides with the rights of others” tests are used, the “reasonably foreseeable” test becomes irrelevant.⁵⁹⁹ Avery Doninger's blast email and blog created a substantial disruption, because parents and students behaved as she

595. See *Layshock III*, 650 F.3d at 207–09, 219.

596. See *Tinker*, 393 U.S. at 508–09, 513 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

597. See *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 38–39 (2d Cir. 2007).

598. *T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 784 (N.D. Ind. 2011); *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1107–08, 1117 (C.D. Cal. 2010).

599. *J.C. ex rel R.C.*, 711 F. Supp. 2d at 1122.

requested, contacting the school and bombarding the school with messages on the topic of Jamfest.⁶⁰⁰ School personnel spent days dealing with phone calls, emails, and parental concerns that resulted from the Jamfest post.⁶⁰¹ Too much staff time was wasted on an issue that can be judged to be relatively unimportant.⁶⁰² The “substantial disruption” test is necessary because Doninger’s speech did not fit in the category of a threat or libel nor did it constitute harassment or bullying which would be necessary to apply in a “collides with the rights of others” test.⁶⁰³

Using the “collides with the rights of others” test means the court’s holding in *Wisniewski* is correct, as it involved a true threat which would permit Wisniewski’s speech to be disciplined.⁶⁰⁴ *T.V.*’s holding is also then correct under this analysis.⁶⁰⁵ In *T.V. ex rel B.V.*, the raunchy pictures did not involve harassment, bullying, libel, or threats.⁶⁰⁶ They also did not create a substantial disruption at school as only two or three parents complained to the school.⁶⁰⁷ This is not speech with which the school should be involved.⁶⁰⁸ This speech, while raunchy, should be protected.⁶⁰⁹ Parents who objected to it should interact directly with *T.V.*’s parents rather than requesting that the school act as the intermediary. In *T.V. ex rel B.V.*, there is not a sufficient nexus between the student’s speech, the aggrieved students and parents, and the school.⁶¹⁰ This speech involved off-campus behavior that should have been handled by and among parents rather than involving the school. Thus, the United States District Court for the Northern District of Indiana reached

600. *Doninger I*, 527 F.3d 41, 44–45, 49–50 (2d Cir. 2008) (quoting *Wisniewski*, 494 F.3d at 40), *aff’d in part, rev’d in part*, 642 F.3d 334 (2d Cir.), *cert. denied*, 132 S. Ct. 499 (2011).

601. *See id.* at 44–45.

602. *See id.* at 46.

603. *See id.* at 53; *see also* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

604. *See* *Wisniewski v. Bd. of Educ.*, 494 F.3d at 37–38 (citing *Tinker*, 393 U.S. at 513). While some of the courts discussed “real” threats as opposed to “perceived” threats, this distinction is not helpful. Given the ability of individuals to heavily arm themselves and then massacre those with whom they disagree, it seems unfair to place school administrators in the position of trying to sort through what constitutes a real threat as opposed to a joke.

605. *See T.V. ex rel. B.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767, 784 (N.D. Ind. 2011).

606. *See id.* at 771, 775.

607. *Id.* at 784.

608. *See id.* at 783–84.

609. *Id.* at 776.

610. *T.V. ex rel B.V.*, 807 F. Supp. 2d at 783.

the correct decision in *T.V. ex rel B.V.*, as did the United States Court of Appeals for the Second Circuit in *Wisniewski*.⁶¹¹

Yet while the United States District Court for the Central District of California applied the correct analysis to the facts in *J.C. ex rel. R.C.*, it reached the wrong conclusion.⁶¹² J.C.'s behavior toward C.C. constituted harassment, bullying, and possibly libel. Had the court used the "collides with the rights of others" test rather than the "substantial disruption" test, it would have been easy for the school to discipline J.C. without worrying about whether J.C.'s behavior resulted in a substantial disruption of work at school.

Using the above analysis, i.e., the student's speech either creates a substantial disruption at school or collides with the rights of others, I would argue that the United States Court of Appeals for the Fourth Circuit reached the correct decision in *Kowalski I*, using the wrong analysis. Kara Kowalski used the internet to mock, taunt, bully, and harass a fellow classmate, Shay N.⁶¹³ While Kara's off-campus speech may not have created a substantial disruption in terms of additional work created for school administrators, it was conduct that could certainly be described as bullying or harassing another classmate.⁶¹⁴ Again using the above analysis, the United States Court of Appeals for the Third Circuit, in its en banc opinions in *Layshock III*⁶¹⁵ and *Snyder III*,⁶¹⁶ reached incorrect decisions and used the wrong analysis. Since both of those decisions involved off-campus student cyberspeech that could be described as libelous or harassing of school personnel, one could conclude, using the "collides with the rights of others" test, that *Tinker* was satisfied and that both Layshock and Snyder could be disciplined for their speech.⁶¹⁷

As *Tinker* is now being construed, it is difficult for courts to apply the appropriate analysis to the particular facts of a case before them.⁶¹⁸ Melinda

611. *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir. 2007); *T.V. ex rel B.V.*, 807 F. Supp. 2d at 784.

612. *See J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1117–18, 1122 (C.D. Cal. 2010).

613. *See Kowalski I*, 652 F.3d 565, 567–69 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (2012).

614. *See id.* at 572.

615. *Layshock III*, 650 F.3d 205, 207 (3d Cir. 2011) (en banc), *cert. denied sub nom. Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 132 S. Ct. 1097 (2012).

616. *J.S. ex rel. Snyder III*, 650 F.3d 915, 915 (3d Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1097 (2012).

617. *See J.S. ex rel. Snyder III*, 650 F.3d at 930; *Layshock III*, 650 F.3d at 219.

618. *See discussion supra* Part II.C–D.

Cupps Dickler's excellent article suggests that despite the confusion of the student speech cases that the justices agree on the following principles:

- “[S]tudents retain significant First Amendment protection [while] in school;”⁶¹⁹
- However, students’ rights are limited and are not as extensive as those of adults;⁶²⁰
- “[S]chool officials [are] permitted substantial discretion to maintain discipline, even” if that results—not intentionally, but as a consequence—in the restriction of speech;⁶²¹
- “[P]olitical . . . speech is strongly protected . . . from viewpoint discrimination;”⁶²²
- “*Tinker*’s ‘substantial disruption’ test [is still] applicable to any student speech that [is] not . . . regulated . . . by *Fraser*, *Kuhlmeier*, and *Morse*.”⁶²³

VI. CONCLUSION

Schools, state legislatures, courts, students, parents, and the Department of Education continue to grapple with balancing the speech rights of students with the rights of students to be “let alone.”⁶²⁴ Since the Supreme Court denied certiorari in three cases this past term, it seems clear that they consider the matter settled.⁶²⁵ However, a reading of decisions from the various district and circuit courts in the last decade indicates confusion still exists.⁶²⁶ Lower courts are applying, misapplying, or misunderstanding the holdings from the Court’s decisions in this area.⁶²⁷ Different results, often with similar factual situations, continue.⁶²⁸ A citation analysis of *Kowalski*, indicates

619. Dickler, *supra* note 92, at 380.

620. *See id.*

621. *Id.*

622. *Id.*

623. *Id.*

624. McCarthy, *supra* note 45, at 19–20; *see also* discussion *supra* Part II.C–D.

625. *See* discussion *supra* Part II.C.

626. *See* discussion *supra* Part II.C–D.

627. *See* discussion *supra* Part V.

628. *See* discussion *supra* Part II.C–D.

that cases in the secondary student cyberspeech arena continue through the court's pipelines.⁶²⁹ Given the importance of bully prevention, the liability issues involved, and the confusion surrounding what is deemed to be the appropriate reaction of school officials to off-campus student cyberspeech that comes on campus, it would be very helpful if the Court addressed this subject and provided a clear analysis soon.

629. See, e.g., *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist.* No. 2149, No. 12-588, 2012 WL 3870868, at *1 (D. Minn. Sept. 6, 2012); *Bell v. Itawamba Cnty. Sch. Bd.*, 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012); *Wynar v. Douglas Cnty. Sch. Dist.*, No. 3:09-cv-0626-LRH-VPC, 2011 WL 3512534, at *1 (D. Nev. Aug. 10, 2011).

“DOG DAYS IN THE LAW LIBRARY”: PHILOSOPHICAL, FINANCIAL, AND ADMINISTRATIVE ISSUES RAISED BY FACULTY SUMMER GRANT PROGRAMS

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I. INTRODUCTION

Our law school has a faculty summer grant program,¹ as do most law schools.² Our program’s rules, set out in the appendix to this article, are

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1. Our law school was founded in 1974 and began its summer grant program in 1982 after a faculty member, who had recently returned from a visit at Southwestern Law School, reported on its system to our dean. The first work funded was a book about the nation’s drug epidemic. *See* STEVEN WISOTSKY, *BREAKING THE IMPASSE IN THE WAR ON DRUGS* xxi (1986) (“Former Dean Ovid Lewis . . . selected my book proposal in a competition for a summer research grant, liberating me from the financial necessity of teaching summer school to pay the mortgage. That support conferred upon me an exceptional opportunity to read and think about my subject free of mundane distractions.”).

2. Officially, it is unclear just how many law schools have faculty summer grant programs. Anecdotally, however, it appears only a few do not have them. *See, e.g.*, ASSOCIATION OF LEGAL WRITING DIRECTORS & LEGAL WRITING INSTITUTE, 2012 SURVEY REPORT xii, *available at* <http://www.lwionline.org/uploads/FileUpload/2012Survey.pdf> [hereinafter 2012 ALWD-LWI Survey] (reporting that of the 153 law schools fully completing the survey, 147 had summer grant programs).

It is also unclear exactly when law schools first started offering summer grants. However, in a 1961 study, “two institutions reported the availability of summer research grants which relieve the faculty member from the pressure of having to engage in other money-producing pursuits in summer months.” ASSOCIATION OF AMERICAN LAW SCHOOLS—

simple in theory: interested professors submit applications in January, get funded in June, and are expected to have a completed manuscript sometime thereafter. In practice, however, the program has raised a host of knotty philosophical, financial, and administrative issues. Because these issues have also bedeviled other law schools,³ and as almost nothing has been written about summer grant programs for law professors,⁴ we examine the subject in greater detail below.

SPECIAL COMMITTEE ON LAW SCHOOL ADMINISTRATION AND UNIVERSITY RELATIONS, ANATOMY OF MODERN LEGAL EDUCATION: AN INQUIRY INTO THE ADEQUACY AND MOBILIZATION OF CERTAIN RESOURCES IN AMERICAN LAW SCHOOLS 389 (1961) (the study does not reveal the identity of either school). The earliest law review article that we have been able to find that specifically mentions being funded by a summer grant is Rodolfo Batiza, *The Unity of Private Law in Louisiana Under the Spanish Rule*, 4 INTER-AM. L. REV. 139, 139 n.* (1962) (“The writer expresses deep appreciation to the Council of Research, the School of Law and the Institute of Comparative Law, Tulane University, for a Summer grant which made it possible to undertake research in the General Archives of the Indies, Seville, Spain on which the present article is principally based.”).

3. See, e.g., Erik Gerding, *Summer Research Policies*, THE CONGLOMERATE, May 31, 2011, at <http://www.theconglomerate.org/2011/05/summer-research-policies.html> (asking readers “are summer research [grants at your law school] given on merit or are they treated as essentially a salary supplement? If they are given on merit, how is merit measured? Based on whether past grants have yielded scholarship? Based on the placement success of past law review articles? Are the untenured given any preference? What accountability is required after the summer is over? Do recipients have to submit their work to the administration? Present at a faculty colloquium?”).

4. We are surprised that no previous article has focused on such grants, given that the subject is among the ones that regularly preoccupy law school faculties:

Another cause for decanal celebration is finding a faculty member who can disagree with his or her colleagues—and the dean—without being disagreeable during the often heated annual debates in faculty meetings over such issues as faculty class schedules, teaching loads, first year class size, admission standards, faculty and student diversity matters, summer research grants, resources devoted to clinical programs, and the ever-present discussions about how the school can best move up in the *U.S. News & World Report* rankings of law schools.

James K. Robinson, *Tribute to Joseph D. Grano*, 46 WAYNE L. REV. 1289, 1295 (2000). See also Clark Freshman, *Lie Detection and the Negotiation Within*, 16 HARV. NEGOT. L. REV. 263, 265 (2011) (“I asked [the dean] again about how he considered . . . ‘pay’ and how it might include other items like ‘summer salary’ or ‘grants’ or ‘bonuses[.]’”); Paul M. Secunda, *Tales of a Law Professor Lateral Nothing*, 39 U. MEM. L. REV. 125, 147 (2008) (“[T]he sweetness of [a lateral] offer can be made especially sweet if summer grants and travel budgets are not only generous, but guaranteed for a few years after your arrival . . .”).

Apparently, summer grants also preoccupy other types of academicians:

[While serving as the dean of the law school,] I once attended a glamorous dinner, at the residence of [the] university president, to honor a [non-law school] professor who was retiring. The food was excellent, the speeches and tributes moving, and the recognition of a life’s work impressive. But the professor, enjoying the moment, still confessed to me his deepest reaction: fury at having been denied a summer grant by an administrator more than a decade before. Academic institutions, law schools included, inspire long memories and injured egos more than most other workplaces.

Kent Syverud, *Three Principles of Effective Deaning*, 31 U. TOL. L. REV. 751, 752 (2000).

II. PURPOSE

According to our law school's rules, summer grants "provide financial support for research projects."⁵ This somewhat ambiguous statement has led to four competing views as to the program's purpose.

Because we are on nine-month contracts,⁶ some faculty members see the program as largely a salary supplement. As such, they believe that all professors who want a summer grant should receive one. They also feel that just about any project will do and are not terribly concerned with the finished product. Thus, surveys, chapter updates, and the like are all acceptable.

Other faculty members regard the program as a home for "big ideas." To them, only truly groundbreaking proposals should be funded (with a strong preference given to books), even if they turn out to be so grand, or so complex, that they never come to fruition.⁷

The third group considers the program a way to enhance the reputation of the law school. These folks, with their sights set firmly on moving up in

5. See Appendix at VI.B.1.

Although we have never done it, we know of at least one law school that has considered the idea of setting aside summer grants for specific types of research. See *SMU School of Law, Centre for NAFTA and Latin American Legal Studies—Background Information*, 4 NAFTA: L. & BUS. REV. AM. 23, 26 (Winter 1998) (discussing the possibility of setting aside funds for summer grants "into NAFTA, Latin American and Caribbean related subject matters[.]").

6. The majority of law professors, of course, are on nine-month contracts:

The traditional period for most law faculty appointments is nine months. At many schools, particularly those giving faculty summer research grants, a tenure-track teacher will devote at least part of the three remaining months to scholarly pursuits; the normative expectations are that a teacher will be prepared, regardless of how the summer is spent, to teach his or her courses once the academic year begins.

Jan M. Levine, "You Can't Please Everyone, So You'd Better Please Yourself": *Directing (or Teaching in) a First-Year Legal Writing Program*, 29 VAL. U. L. REV. 611, 632 n.68 (1995).

Interestingly, a law professor's nine-month contract proved crucial to the plot of the 1942 film *The Talk of the Town* (Columbia Pictures). As the movie opens, Michael Lightcap (played by Ronald Colman), a faculty member at Boston's Commonwealth Law School, is seen arriving in the small town of Lochester. Upon meeting his new landlady Nora Shelley (Jean Arthur), he tells her, "I've just finished teaching, for nine months 400 weary young men the rudiments of law, Miss Shelley." ARK TV, *Talk of the Town—Transcript*, at 00:03:48, available at [http://livedash.ark.com/transcript/according_to_jim-\(the_stick\)/13/KOFY/Monday_April_12_2010/190281/](http://livedash.ark.com/transcript/according_to_jim-(the_stick)/13/KOFY/Monday_April_12_2010/190281/). The next morning Shelley turns away various visitors by explaining, "Professor Lightcap came here for a quiet summer. He wants to write a book." *Id.* at 00:21:46-00:21:48. Lightcap's plans went awry, however, after he became involved in a local murder trial and a love triangle with Shelley and the accused, a political activist named Leopold Dilg (Cary Grant).

7. In defending this view, one of our colleagues once remarked (as best as we can now recall), "After you finish the great American novel, stick it in a desk drawer. After all, the challenge is in the writing—not the publishing."

the *U.S. News & World Report* rankings, prefer to fund articles that are likely to be completed in a timely fashion and have a realistic chance of appearing in a top law review.⁸

The final faction looks at the program as a way to help faculty members who do not have time to write during the school year⁹ or are new to the academy and just beginning to write. Like the salary supplementers, this wing is not terribly concerned with what is produced but does hope that by having a block of time to devote to scholarship the recipients will catch “the writing bug” and be eager to tackle future projects.¹⁰

One point on which all four groups agree is that summer grants are only available for projects that will produce a tangible work product.¹¹ As a re-

8. This is probably the view held by most law professors. See Edward Gordon, *Roundtable on Prospects for Publishing in International Law*, 85 AM. SOC'Y INT'L L. PROC. 522, 533 (1991) (“If you are in academic life and are going for tenure, or if you already have tenure but have a summer grant that you need to justify, you are going to be somewhat limited in your choice of journals in which to publish and formats to use. So far as I am aware, doing short, pithy case notes, intellectually stimulating or not, gives you no professional credit whatsoever.”). See also Bridget Crawford, *If Steve Jobs Had Been a Law School Dean*, THE FACULTY LOUNGE, July 26, 2012, at <http://www.thefacultylounge.org/2012/07/if-steve-jobs-had-been-a-law-school-dean.html> (quiz involving a fictional law school dean who refuses “to give Professor X a summer research grant to support yet another bar magazine publication”).

9. Because of the nature of their jobs, legal research and writing teachers rarely find it possible to write during the year. See Susan P. Liemer, *The Quest for Scholarship: The Legal Writing Professor's Paradox*, 80 OR. L. REV. 1007, 1008 n.2 (2001) (“I would like to thank Southern Illinois University School of Law for providing the summer grant that made it possible for me to have time to write this summer. Without that grant it is likely I still would not have had the time to write about finding the time to write.”).

10. At least some faculty members do catch the writing bug. After one of our colleagues published her first article with the help of a summer grant, she exclaimed (as we remember it), “Once you see your name in print, you just can’t wait to get started on the next article.”

Admittedly, there is a danger in giving summer grants to faculty members early in their careers, as they may become crutches. Although we have worried about this possibility, we have accepted the risk. Other law schools have done likewise. See, e.g., James Lindgren, *Fifty Ways to Promote Scholarship*, 49 J. LEGAL EDUC. 126, 135 (1999) (“New faculty should receive grants automatically their first summer—like a smart drug dealer, you want to get them hooked.”); Ruth Fleet Thurman, *A Remembrance of Dean W. Gary Vause*, 33 STETSON L. REV. 89, 89 (2003) (“I mention my assignments—all of which I vividly remember and loved—as an example of the heavy demands on teachers in the mid-1970s. These were the days before new teachers were given lighter teaching loads and summer research grants. Most of us taught summer school to make ends meet.”).

11. See Appendix at VI.B.1. This is true elsewhere. See, e.g., Frederick M. Lawrence, *Jack Friedenthal: A Scholar, a Teacher, and a Dean's Dean*, 78 GEO. WASH. L. REV. 3, 5 (2009) (“Jack’s signature program[,] designed to enhance the scholarly life of the school and the productivity of the faculty[,] was the institution of summer research grants, a program that still exists at the Law School today. These grants are contingent on the production of a manuscript of a law review article, a book chapter, or the like.”).

sult, our rules state that the following activities do *not* qualify for summer grants: “(1) attendance or participation in summer conferences; (2) advanced academic study; (3) teaching; (4) working in clinical programs; (5) activity or travel as a director, reporter, advisor or consultant to a professional project, publication or conference; (6) programs of summer reading or “enrichment”; and (7) class preparation.”¹²

One issue we have only begun to face is whether summer grants are available for works that will appear only in blogs. We have had just one such application, and it was approved and funded. Of course, law schools have been struggling for some time over whether such works constitute scholarship. For an examination of the issue from multiple perspectives, see Symposium, *Bloggership: How Blogs Are Transforming Legal Scholarship*, 84 WASH. U. L. REV. 1025 (2006). See also Steven Keslowitz, *The Transformative Nature of Blogs and Their Effects on Legal Scholarship*, 2009 CARDOZO L. REV. DE NOVO 252 (2009).

12. See Appendix at VI.B.1. Faculty members at our law school who are interested in these activities can use their individual faculty development allotments (currently \$1,850 a year) or seek funding from our dean’s office.

Other law schools’ summer grant programs similarly favor scholarship over teaching. See, e.g., Gordon A. Christenson, *Scholarship and Teaching After 175 Years*, 76 U. CIN. L. REV. 1, 11 (2007) (“One of the strongest signals of dedication to faculty scholarship was [my] controversial decision [while serving as dean of the University of Cincinnati law school in the 1980s] to eliminate summer classes in favor of summer faculty research grants with funded student assistants. Some excellent teachers who taught summer classes for extra compensation were upset. But it gave the scholars good incentives to finish works in progress and begin new ones.”).

The notion that summer grants should be available only for scholarship is not universally-shared. See, e.g., Donald B. King, *Commercial Law: Times of Change and Expansion*, in COMMERCIAL AND CONSUMER LAW: NATIONAL AND INTERNATIONAL DIMENSIONS 121, 145 (Ross Cranston & Royston Miles Goode eds. 1993) (“Law schools should also consider giving commercial-law professors summer grants, not with the requirement of researching and writing an article or book, but for the study and learning of their greatly changing and expanding subject.”); Rogelio A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 99 (2010) (“In addition, law schools should provide summer ‘teaching grants’ that provide the same level of compensation as summer research grants. This would permit teachers to develop effective assessment programs that can become an integral part of their teaching.”); Lea B. Vaughn, *Integrating Alternative Dispute Resolution (ADR) Into the Curriculum at the University of Washington School of Law: A Report and Reflections*, 50 FLA. L. REV. 679, 690 n.31 (1998) (“In most law schools, summer stipends or grants are to be used solely for research. Law schools may want to reconsider this policy. In the current period of curricular upheaval, it may be well worth temporarily, if not permanently, diverting some research dollars to funding efforts that improve teaching and curriculum.”). See also Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U. L. REV. 563, 586 (2007) (suggesting that a portion of the money currently used for summer grants be redirected to faculty who serve as law review advisors); Michael Millemann, *The Institutional Barriers and Advantages Panel*, 39 WM. & MARY L. REV. 489, 502 (1998) (discussing the possibility of using summer grants “to support teachers who agree[] to develop and teach . . . new ethics units.”).

III. ELIGIBILITY

All faculty members are eligible for summer grants at our law school. But because our rules do not clearly define the word “faculty,” questions have arisen with respect to: (a) adjuncts; (b) visitors; (c) administrators; (d) legal research and writing teachers; (e) clinicians; (f) academic support instructors; and, (g) departing faculty members.¹³

We do not allow adjuncts to apply for summer grants. However, our dean recently began holding talks with an individual who is interested in funding adjuncts who want to conduct research. It is too early to know what will become of this idea.¹⁴

We likewise do not give summer grants to visitors, although we are occasionally asked. It has been our feeling that visitors should receive grants from their home institutions.

At one time, faculty members serving as administrators on 12-month contracts were assumed to be ineligible for summer grants, inasmuch as our grant rules require recipients to devote a minimum of eight weeks to their projects.¹⁵ However, when the issue was actually raised, we decided that applicants should not be penalized for their administrative service.¹⁶

13. Because we are still a relatively young law school, we have not faced the question of whether emeritus faculty members are eligible for summer grants. For an example of a law school funding such a professor, see Ludwik A. Teclaff, *The River Basin Concept and Global Climate Change*, 8 PACE ENVTL. L. REV. 355, 355 n.* (1991) (“Professor of Law Emeritus, Fordham University School of Law. The author wishes to acknowledge receipt of a summer research grant from Fordham University School of Law which aided in the writing of this article.”).

14. Providing support for practitioners who want to write would help, at least in a small way, bridge the gap between the academy and the bar. Cf. Yale Kamisar, *Why I Write (and Why I Think Law Professors Generally Should Write)*, 41 SAN DIEGO L. REV. 1747, 1756 (2004) (“The distance between professors and practitioners grows still wider when one remembers that practicing lawyers are not awarded research leave or summer grants in order to write.”).

15. See Appendix at VI.B.3 ¶ 1.

At other law schools, it appears that administrators are still prohibited from receiving summer grants. While discussing his book *The Vanderbilt Law School: Aspirations and Realities*, Associate Dean D. Don Welch noted, “Then there is the question of pay. For me, this was my scholarly activity, so I continued to draw my regular salary and did not expect any additional pay. Those of you who are on nine-month appointments, however, should arrange to get a summer research grant so you are not forced to teach while trying to work on your book.” *Law School Histories: A Panel Discussion*, 32 CAMPBELL L. REV. 311, 319 (2010).

16. We currently have six faculty members serving in the following 12-month positions: dean; associate dean—academic affairs; associate dean—international programs; associate dean—critical skills program; associate dean for AAMPLE and online programs; and assistant dean—law library and technology center.

Like most law schools, our legal research and writing teachers are eligible for summer grants.¹⁷ Our clinicians are also eligible.¹⁸ However, our academic support instructors are not.

In a few instances, we have awarded grants to faculty members who later announced that they would be leaving us for one reason or another. Except in unusual circumstances, we have required them to forfeit their grants.

IV. APPLICATION

At our law school, summer grant applications are initially handled by the Faculty Development Committee (“FDC”).¹⁹ Early in the fall semester, the FDC asks for non-binding “expressions of interest.”²⁰ In addition to getting a sense of who might be interested in a summer grant,²¹ the FDC’s inquiry gets folks to start thinking seriously about their projects.²²

17. According to the ALWD-LWI, legal research and writing teachers are eligible for summer grants at 104 law schools. See 2012 ALWD-LWI Survey, *supra* note 2, at xii.

18. Like legal research and writing teachers, clinicians have sought to be included in summer grant programs. See, e.g., Douglas L. Colbert, *Broadening Scholarship: Embracing Law Reform and Justice*, 52 J. LEGAL EDUC. 540, 541 (2002) (“We view institutional support, such as summer research grants, as an important affirmation of our scholarship.”). But as they have pointed out, to achieve maximum effectiveness such programs need to take into account their specific circumstances:

Every spring, the dean circulates a notice to the faculty regarding applying for summer research grants. Funding is set aside for this purpose in order to encourage scholarship. Faculty may also teach in the six-week summer program for additional pay. Although the clinic faculty are free to teach summer school or to apply for research grants, neither option is particularly attractive to those of us who are already working full-time during summers . . . managing continuing case loads[,] including some big cases, while also overseeing clinic grant-mandated community service and training activities. Albany appears to be typical of other law schools in this regard. Perhaps the summer stipend should be made available, by application, to clinic faculty for significant summer clinical work or “clinical scholarship.” Such scholarship could include significant case activity, the development of new clinical courses or programs, or other major clinic projects.

Nancy M. Maurer, *Handling Big Cases in Law School Clinics, or Lessons From My Clinic Sabbatical*, 9 CLINICAL L. REV. 879, 897-98 (2003) (footnotes omitted).

19. The FDC is one of our nine standing faculty committees. Its composition changes annually and all faculty members are eligible to sit on it (and are limited to three years of consecutive service).

20. See Appendix at VI.B.2 ¶ 1.

21. Because who writes affects who is available to teach summer school, the FDC works closely with the associate dean for academic affairs during this phase of the application process. The importance of maintaining a good balance is clearly illustrated by what happened at the University of San Diego. Its in-house criminal clinic folded in 1995 when it became impossible to find enough faculty members to act as supervisors, in part because of summer grants:

Even with only three students per instructor, supervision of the in-house clinic was enormously time-consuming. Given the demands of tenure and various pay incentives (including merit pay

Completed applications are due by January 31.²³ Pursuant to our rules, an applicant is expected to describe his or her project; explain what type of tangible work product will be produced; indicate when the project will be finished; and list all prior grants (and their outcomes).²⁴

At one time, we permitted both “alternative projects” and “multiple projects” applications. Now, however, we insist that applicants pick a single project.²⁵ Somewhat surprisingly, our rules do not require applicants to list any potential conflicts of interest.²⁶

The FDC typically meets in February to review and vote on the applications.²⁷ Although our rules do not contain express guidelines, over the years the FDC has developed a three-part test: 1) does the project appear to have

increases and summer research grants), instructors became more interested in producing scholarship than cooling their heels in courtroom hallways.

Jean Montoya, *The University of San Diego Criminal Clinic: It's All in the Mix*, 74 MISS. L.J. 1021, 1025 n.11 (2005).

22. It appears that more advanced planning is necessary at some law schools: “Eligibility for summer research grants [at the University of Illinois College of Law], for example, is tied to demonstrated research productivity during the prior two academic years.” Thomas M. Mengler, *Celebrating the Multiple Missions of a Research I University-Based Law School*, 31 U. TOL. L. REV. 681, 682 n.4 (2000).

23. See Appendix at VI.B.2 ¶ 2. If January 31 falls on a Saturday, Sunday, or holiday, applications are due on the next business day.

Our rules do not indicate what penalty, if any, attaches to a late application. By longstanding practice, the FDC accepts late applications but places them “at the back of the line” for funding priority purposes.

24. See *id.* Similar requirements are in place at other law schools. See, e.g., Richard C. Boldt, *Public Education as Public Space: Some Reflections on the Unfinished Work of Marc Feldman*, 61 MD. L. REV. 13, 18 n.26 (2002).

25. Other law schools, however, allow such applications. See, e.g., Gordon G. Young, *Federal Maritime Commission v. South Carolina State Ports Authority: Small Iceberg or Just the Tip?*, 47 ST. LOUIS U. L.J. 971, 971 n.* (2003) (“Special thanks are due . . . the Dean of the [University of Maryland] School of Law for a summer grant that funded, among other research, work on this article.”); Steven H. Resnicoff, *The Attorney-Client Relationship: A Jewish Law Perspective*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 349, 349 n.* (2000) (“I express my gratitude to the DePaul University College of Law for the 1999 summer research grant that enabled me to write this and other articles about Jewish law.”).

26. Thus, for example, we do not require applicants to disclose that they plan to use their grant to write an article to help a law firm that has retained them as an expert witness. However, such a conflict might have to be disclosed when filling out our university’s annual employee conflicts form. See Nova Southeastern University, *Conflicts of Interest Declaration & Disclosure Statement*, available at http://www.nova.edu/cwis/hrd/orientation/forms/conflicts_interest.pdf. For a further discussion of the issue, see, e.g., Shireen A. Barday, Note, *Punitive Damages, Remunerated Research, and the Legal Profession*, 61 STAN. L. REV. 711 (2008).

27. It frequently happens that a committee member is also a grant applicant. In such cases, the person is excused from the room when his or her application is being considered.

“scholarly promise”?; 2) will the project require at least eight weeks of sustained effort?; and, 3) is the project capable of completion in a reasonable amount of time?²⁸

Projects approved by the FDC are sent to the dean with a recommendation that they be funded.²⁹ Although our rules do not address the issue, pro-

28. While individual faculty members can and do interpret this test differently, there have been only a handful of instances when the FDC has been split over a project’s merit.

There is, of course, always the concern that applications will be voted up or down based on personalities or politics. *See, e.g.,* ALLIANCE FOR JUSTICE, JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN 33 (1993), available at <http://www.afj.org/assets/resources/resources2/Justice-for-Sale.pdf> (“[A Harvard Law School] professor, who describes himself as liberal, requested a summer research grant [from a fund linked to the John M. Olin Program in Law and Economics]. Although the subject of the research was ‘squarely within the law and economics field,’ he was denied the grant because, he believes, he was not of the correct, i.e. conservative, philosophical orientation.”).

At some law schools, it has been alleged that race has been used against summer grant candidates:

A [minority law] professor moved from his previous position to one at a large research university. Once there, to his surprise he found his requests for research assistance, a computer grant, and summer stipends regularly rejected. This happened even though the professor’s writing record was at least as good as that of majority race colleagues who received funding. Among the proposals rejected was one requesting support for an article the professor subsequently had accepted in a highly-ranked law review. The next year, the professor requested support for an article that, unknown to the research committee, had already been accepted by an even more highly ranked review. This proposal was also rejected.

Richard Delgado & Derrick Bell, *Minority Law Professors’ Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 363 (1989).

In her autobiography, Anita Hill feared she would be victimized in a similar way: “I questioned my own decision to return to the University of Oklahoma in the fall of 1995. I was certain that my participation in the normal campus activities would never be the same. The activities in whose involvement I had been welcomed—faculty committees, faculty awards and recognition, university projects, summer research grants—may in fact be off limits, judged by a standard and procedure limited to me. . . .” ANITA HILL, SPEAKING TRUTH TO POWER 340 (1997).

The possibility of racial discrimination is not, of course, limited to minority law professors. In summarizing his summer grants experience, a white law professor wrote:

I first considered writing about Stetson’s racist past in the Spring of 2000. My thought at the time was to include it in the upcoming *Stetson Law Review* symposium issue celebrating the College [of Law]’s centennial. Per my usual practice, I applied to the College for a grant that summer to finance the research. My application stated: “I plan on writing about the College’s history of racial exclusion. A recent article came out in the *Florida Law Review* chronicling Virgil Hawkins’s failed attempt at integrating UF. I want to explore Stetson’s history.” Because I had received a dozen grants for previous summer projects, (indeed, I had never been turned down) I assumed that I would receive one again. The College denied my application.

Mark R. Brown, *Affirmative Inaction: Stories From a Small Southern School*, 75 TEMP. L. REV. 201, 229 n.204 (2002).

29. For much of its existence, the FDC felt that its job was done once all the applications had been reviewed and forwarded with a cover note to the dean. Nowadays, however, the FDC is taking a much more active role in mentoring applicants (particularly junior faculty

posals that fail to win the committee's support are returned to the applicant, who is normally given 7-10 days to submit an amended application. Applicants have generally been limited to one revision.

While this process has worked well, a number of questions have arisen over the years. First, some faculty members find the January 31 deadline off-putting. They would prefer that all interested faculty members be given "conditional grants," without the need to specify a topic or commit to a particular schedule. Under this system, payment would be made only after the project was completed.

A second question has involved the necessary level of detail. While some submissions include lengthy descriptions, extensive bibliographies, and even partial drafts, others are little more than bare-bones summaries. These latter applications have caused the FDC some difficulty. Of course, this is a chicken-and-egg problem, because until faculty members do preliminary research, they cannot say what they will be able to accomplish. Yet what is the point of having the program if applicants must devote time during the school year to a summer project that might not be approved?

A third question concerns the appropriate burden of proof. Some faculty members believe that applications should be deemed "presumptively approved," and thus rejected only if they are seriously deficient. In contrast, a different wing of the faculty believes that the burden of proof rests with the applicant, who should have to demonstrate that his or her project is both academically worthwhile and technically feasible. This division has led to the closely related issue of whether the FDC should send applications (either all or just the questionable ones) to outside experts. Of course, adding an external review component would greatly increase the time and money needed to administer the program.

A final question has concerned co-authored projects. Our rules do not say whether they are permitted, but the FDC has generally allowed them if they otherwise meet our criteria.³⁰

The FDC only has advisory powers; under our rules the final decision on whether to fund a particular application rests with the dean.³¹ With a sin-

members) and helping them turn their ideas into published works. In addition, we recently named our first director of faculty development. This position's duties include assisting professors with their scholarship.

30. The same appears to be true elsewhere. *See, e.g.*, H. Mitchell Caldwell et al., *The Art and Architecture of Closing Argument*, 76 TUL. L. REV. 961, 961 n.*** (2002) ("The authors are grateful to Pepperdine University School of Law for its funding of this Article through summer research grants.").

31. *See* Appendix at VI.B.4. At other law schools, summer grants are often the responsibility of an associate dean. *See, e.g.*, Linda Crane, *Accepting the Job and First Key Steps*, 31 SEATTLE U. L. REV. 847, 850 (2008) (explaining that after she became John Marshall Law

gle exception, deans have accepted the FDC's recommendations. In the one instance where the dean did not go along with the FDC, he funded a project that the committee felt was submitted by an ineligible applicant.³²

School's first associate dean for faculty development, "we sort of had a ping-pong thing going with [respect to who should oversee] summer research grants[.]").

32. As with everything else they do, deans can be praised or scorned for how they handle summer grants. Those who start or enlarge summer grant programs are hailed as heroes. *See, e.g.,* Michael C. Blumm, *The Bow-Tie Era of Lewis and Clark Law School: Dean Jim Huffman, 1993-2006*, 37 ENVTL. L. v, vi (2007) ("Huffman dramatically expanded summer research grants for faculty as well as research assistant positions for students. The result was an unprecedented outpouring of scholarship[.]"); Harvey Gelb, *Tribute to Peter C. Maxfield*, 34 LAND & WATER L. REV. ix, x (1999) ("[As dean of the University of Wyoming law school, Maxfield] worked to provide summer research grants for faculty and other incentives for meritorious performance as teachers and scholars."); Shirley A. Wiegand, *In Memoriam—Howard B. Eisenberg*, 86 MARQ. L. REV. 348, 351 (2002) ("Faculty were awarded substantial summer research grants and professional development funds, fulfilling [Dean Howard B. Eisenberg's] goal of encouraging [Marquette's] faculty to produce more and better scholarship and rewarding them when they did so."). *See also* Thomas C. Galligan, Jr., *The View From the Podium*, 31 U. TOL. L. REV. 593, 594 (2000) (presenting a hypothetical conversation between a law professor and a dean in which the former asks the latter what she has accomplished during her first two years as dean and then suggests as a possible answer: "Increase summer research grants[.]").

Conversely, deans who have to cut summer grants are viewed as ogres and can lose their jobs:

The profit from [the Law and Economics] Center programs helped to provide summer research grants to members of the faculty. Faculty members had great confidence in [Henry G.] Manne's ability to raise funds for the law school, and they believed that with sufficient effort he could raise the funds the school needed. Their expectations were probably unrealistically high, and when the profit from the Center's programs decreased and funds for summer faculty grants had to be cut, Manne got the blame. The personal loss of expected research funds coupled with the resentment that members of the faculty had accumulated over several years sparked the faculty revolt that ultimately led to Manne's resignation.

William H. Adams, III, *The George Mason Experience*, 50 CASE W. RES. L. REV. 431, 442-43 (1999) (footnote omitted). Although bad, Manne's experience was not the worst:

In a recent dean search at a law school, a background search was conducted on all candidates. One of the candidates had, at least once during his service as a dean, refused to give a summer research grant to a faculty member who was black. This event was reported to several people who then evidently reported it to the people conducting the background check. The description of the candidate eventually evolved to "He has a problem with race," or "He is insensitive to issues of race." His candidacy was dead. Further investigation revealed that, due in large measure to his efforts, minority enrollment at his law school had increased substantially as had involvement of the local minority bar.

Jeffrey L. Harrison, *Race Lines: Immunities and Bonuses . . . and Readers' Response*, 48 FLA. L. REV. 419, 427 n.27 (1996).

Of course, the street runs both ways, inasmuch as deans can use summer grants to reward or punish faculty members:

The fact is, absent a specific policy or law to the contrary, the school retains a wide array of possible negative actions. Most commonly, we can refuse to give a salary increase. We can reassign teaching responsibility. We can deny summer research grants and sabbaticals. We could, I suppose, reduce a faculty member's salary.

In our program's early years it was not possible for the dean to fund all of the projects recommended by the FDC. In recent times, we have had enough money to fund every approved application.³³

V. COMPENSATION

During our program's early years, summer grants equaled 22% of a recipient's regular salary.³⁴ Today, the figure is fixed at \$12,000 (the same as a

Thomas F. Guernsey, *Continuing Professional Development in Law Schools*, 41 U. TOL. L. REV. 291, 303-04 n.49 (2010). See also Martin H. Belsky, *Law Schools as Legal Education Centers*, 34 U. TOL. L. REV. 1, 17 n.126 (2002) ("Faculty now receive compensation from commercial bar review courses. Having law schools provide this compensation [by moving the courses in-house] means that academic administrators have one more quiver—in addition to summer teaching, summer research grants, faculty travel, etc.—that they can use."). As a result, one commentator has argued that summer grant decisions should never be placed solely in the hands of the dean:

One difference I've noticed from school to school is the manner in which the summer research grant is awarded. At some institutions the process is purely a matter of decanal discretion, at others it is a committee consisting of the dean and others. . . .

I think the best model is a committee model. . . . [L]eaving all the power for scholarly awards in the hands of the Dean can lead to favoritism or an unwillingness on the part of a faculty member to rock the boat on an issue because it may come back to bite them when summer grant time comes around.

Greg McNeal, *Comment*, THE FACULTY LOUNGE, Dec. 30, 2009 (2:11 p.m.), at <http://www.thefacultylounge.org/2009/12/encouragingfacilitatingrecognizingrewarding-faculty-scholarship.html> (responding to Jacqueline Lipton, *Encouraging/Facilitating/Recognizing/Rewarding Faculty Scholarship*).

33. We consider ourselves quite fortunate in this regard. Compare, e.g., Jayne W. Barnard, *Reflections on Britain's Research Assessment Exercise*, 48 J. LEGAL EDUC. 467, 483 (1998) ("Certainly many [law] schools (including my own [William and Mary]) with competitive programs for faculty summer research grants already make distinctions between fundable scholarship and other scholarly activities that will need to seek funding elsewhere."); Clifford Larsen, *The Future of Comparative Law: Public Legal Systems*, 21 HASTINGS INT'L & COMP. L. REV. 847, 862 (1998) ("[F]aculty may run into constraints, such as the limitation on summer research grants that makes them available for research that leads to publication of an article but not for research that leads to the publication of a book."). See also Allan W. Vestal, "A River to My People . . ." *Notes From My Fifth Year as Dean*, 37 U. TOL. L. REV. 179, 185 (2005) (observing that in tough economic times, "salary increases may be lower than expected; the number of staff assistants may shrink. In truly dire circumstances, the amount of Xeroxing may go down, summer research grants may become tight, or travel budgets may disappear.").

34. This put us in the middle of the pack. See Manuel R. Ramos, *Legal and Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 909 n.121 (1996) ("[L]aw professors usually are entitled to summer teaching or summer writing grants that are anywhere between 10% and 30% of their base salaries.").

three-credit summer school course).³⁵ From what little information is publicly available, this appears to be about average.³⁶

Our law school generally awards 25 grants each summer,³⁷ meaning that our program costs \$300,000. This is just a bit more than 1% of our law

35. Because it is treated as an “overload,” this amount does not qualify for our university’s 401(k) retirement match. And, of course, under the IRS’s rules it is fully taxable. See Marci Kelly, *Financing Higher Education: Federal Income-Tax Consequences*, 17 J.C. & U.L. 307, 315 n.48 (1991).

Under our university’s rules, faculty members hold the rights to their writings. See Nova Southeastern University, *Copyright and Patent – Policy Number 9* (revised Oct. 2004), available at <http://www.nova.edu/cwis/hrd/orientation/forms/copyright.pdf> (“All copyrights on Works will be reserved by the Staff Member. . . .”). Where this is not the case, the potential exists for a law school to argue that a grant-funded project constitutes a “work made for hire”:

A more difficult issue may arise in the context of the summer research grant or sabbatical leave, whereby the university compensates the faculty member for devoting a summer, semester or year to producing a scholarly work. The summer grant or sabbatical leave is usually provided after a letter or memorandum outlining the research project is submitted to the dean or department head. The dean or department head usually issues the grant, or permits the sabbatical leave, with a note to the faculty member that the time is to be spent working on the agreed upon project and not on consulting or similar activities. Thus, this factor has equities on both sides because the faculty member’s remuneration could be considered a salary or a contract price for a specified job.

Sherri L. Burr, *A Critical Assessment of Reid’s Work for Hire Framework and Its Potential Impact on the Marketplace for Scholarly Works*, 24 J. MARSHALL L. REV. 119, 135 (1990).

36. See 2011-12 SALT Salary Survey, SALT EQUALIZER, May 2012, at 1 (listing amounts ranging from \$5,000 to \$25,000). Because only 66 law schools were willing to participate in this survey, see *Survey Information and Methodology*, SALT EQUALIZER, May 2012, at 1, it is hard to draw definite conclusions. See also *Fruehwald v. Hofstra University*, 2010 WL 1980810, at *1 (N.Y. Sup. Ct. Apr. 12, 2010), *aff’d*, 920 N.Y.S.2d 183 (App. Div. 2011) (legal writing professor whose contract was not renewed sought reinstatement, back pay, and “a summer research grant of \$12,000 for the summer of 2009.”). The much-larger AWLD-LWI Survey reports that the average grant is \$8,897. See 2012 ALWD-LWI Survey, *supra* note 2, at xii.

Even when law schools do report on their summer grants, how they report can make comparisons very difficult:

For instance, although the University of Virginia publicly reports faculty salaries . . . those results may be distorted by the inclusion or exclusion of certain benefits, depending on whether they are paid out of private or state funds. As a result, two professors with the same salary and summer research grant may be reported as having vastly different salaries if the first receives a summer research grant from private funds that are not reported and the second from public funds that are.

Clayton P. Gillette, *Law School Faculty as Free Agents*, 17 J. CONTEMP. LEGAL ISSUES 213, 222 n.24 (2008).

37. This covers 45% of our full-time faculty. The remainder either teach summer school (35%) or engage in activities that are not compensated by the law school (20%).

school's total annual revenues.³⁸ As such, the program's impact on student tuition is negligible.³⁹

38. Because the money for our summer grants comes from law school revenues, our university does not play any role in how we operate our program. Where this is not the case, things can become very difficult:

Every year the law school gets \$100,000 in enhancement funding. This is essentially non-recurring but annually awarded money that the law school has used for travel, speakers, and the like. [One year, when] my budget officer sought to have the funds transferred to help fund summer research grants, we were told that the funds had been transferred earlier by the President's office to the capital projects division. . . .

Allan W. Vestal, "Today the Administration Building Burned Down . . ." *Notes From My First Year as Dean*, 33 U. TOL. L. REV. 251, 254 (2001). See also David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993, 1002 (1991) ("University bureaucrats, unfamiliar with the norms of legal scholarship, may deliberately devalue the scholarship that is produced. They may fail to provide sufficient incentives and supports for scholarship, such as merit-based salary increases, summer research grants, or sabbatical leaves.").

In August 2012, Saint Louis University Dean Annette Clark resigned. In a letter to the faculty and staff, she explained that the "last straw" involved a dispute with the university over the funding of summer grants:

I dealt for months with convincing the university leadership to permit the law school to continue to provide summer research support to the faculty, finally reaching agreement on a process and working with the faculty to follow all of the prescribed steps, only to be told by the vice president in May that the president would not permit the funding of any summer research stipends in the law school. When I objected and took the issue to the faculty, I received a peremptory letter from the vice president informing me that further opposition to the president's or vice president's decisions would not be tolerated.

I could go on, but the last straw, the one that tipped the balance for me in deciding to resign, is the president's flagrant violation of an agreement he made just six weeks previously, an act that took from the law school over a quarter of a million dollars raised from our alumni.

A little over two weeks ago, one of my staff members discovered that on June 30, the last day of the fiscal year, \$260,000 was transferred without our knowledge or agreement from the law school's annual fund to the President's Opportunity Fund. If you do the math, you'll see that \$260,000 equals 20 summer research stipends at \$13,000 each. In other words, despite the president's agreement at the May 19th meeting with five faculty members and me that we could fund 20 summer research stipends from the law school operating budget, he purposefully undid that agreement a little more than two weeks after being embarrassed by the article that appeared in the Missouri Lawyers Weekly.

In a phone call, the vice president confirmed my suspicions, admitting that the withdrawal from the annual fund was for the summer research stipends. When I challenged him that this went against the prior agreement, he then claimed that the withdrawal was justified by the law school's revenue shortfall. However, in truth there was no substantial change in the enrollment/tuition revenue picture between May 19th when the president made the commitment and June 30th when this withdrawal occurred. In addition, an ordinary budget cut would not come from the annual funds contributed by our donors, it would come from specified lines in the operating budget, plus there is no apparent reason why the amount would be exactly equal to 20 summer research stipends. I am thus firmly convinced that the president's withdrawing \$260,000 from the School of Law's annual fund was in retaliation for the truthful and accurate emails I sent to the faculty and the article that appeared in the Missouri Lawyers Weekly. . . .

So, now we are left in a position where the president first authorized us to use our operating budget to pay for the summer stipends and, then, after we made legally binding commitments to the faculty, he unilaterally withdrew the amount of the summer stipends from the law

The entire grant is paid in one lump sum on June 15 (i.e., one month into the grant period). Although we would prefer it to be otherwise (so as to increase recipient accountability), we are unable to change the lump sum policy because: 1) any funds not expended by June 30 revert to our university; and, 2) most faculty members have their paychecks “direct deposited.”⁴⁰

school’s annual fund, putting us in a far worse financial position than if he had simply disapproved the summer stipends. The vice president’s response to the concerns I raised was to shrug his shoulders and to tell me to start making cuts in discretionary expenditures. He also told me specifically, when I asked what to tell the faculty, that I was not to say that this “budget cut” was related to the summer stipends.

I am appalled and shocked by the president’s and vice president’s actions surrounding the summer research stipends generally, but especially by this most recent withdrawal from the annual fund. I am telling you what has occurred, even though doing so is in clear contravention of the orders I received from the vice president, because I believe I have an ethical obligation to disclose this conduct, which I view to be immoral, in violation of an express commitment made by the president, and harmful to the law school. I do not wish to be complicit in, or provide cover for, these actions.

Letter from Annette Clark, Dean—Saint Louis University School of Law, to her Faculty and Staff (dated Aug. 8, 2012), *available at* <http://www.scribd.com/doc/102368276/SLU-Law-Dean-Annette-Clark-Resignation-Announcement-to-Faculty-Staff-8-8-2012>.

39. Eliminating the summer grant program would save each of our 1,000 students approximately \$300 a year in tuition. While this amount is nothing to sneeze at, we believe that the scholarship produced by our grantees has at least an equal amount of intrinsic value. When one couples this with how much the recipients grow as experts in their field; the publicity their work generates; and the overall burnishing of the law school’s reputation, we view the program as a bargain.

Unfortunately, because of the on-going collapse in student enrollment, summer grants are definitely on the chopping block, both at our law school and elsewhere. *See, e.g.*, Jack Crittenden, *How to Cut Tuition*, NAT’L JURIST, Mar. 2013, at 22, 26 (quoting Gene Nichol, a professor of law at the University of North Carolina, as saying “schools should consider eliminating sabbaticals, trimming travel and reducing summer research grants.”). Of course, in an ideal world we would not have to tap tuition dollars at all. *Cf.* Kenneth C. Randall, *The Dean as Fundraiser*, 33 U. TOL. L. REV. 149, 150 (2001) (exhorting law school deans to “be active in . . . fundraising [to] endow chairs[,] fund professorships . . . [and] provide support funds for faculty travel, research assistance, and summer research grants.”); Charles Silver, *The Lost World: Of Politics and Getting the Law Right*, 26 HOFSTRA L. REV. 773, 774 (1998) (“In the summer of 1994, Kent Syverud and I received a grant from the International Association of Defense Counsel . . . and the Defense Research Institute . . . to undertake the first comprehensive academic study of the professional responsibilities of insurance defense lawyers. . . . The grant replaced summer research funds that we would have received in any event from our law schools.”). As explained *supra* note 26, one has to be careful that outside donors do not end up controlling what is researched or published.

40. Other law schools, however, have found a way around these problems. *See* Barnard, *supra* note 33, at 492 (observing that “some universities pay out summer research grants as ‘progress payments’ to ensure that the project is completed.”).

Our program does not pay for travel and other out-of-pocket costs.⁴¹ However, such money is potentially available through our President's Faculty Research and Development Grant program.⁴²

VI. DUTIES

Under our law school's rules, "[t]he grant period consists of not less than eight weeks of full time work."⁴³ Because our summers run from May 15 to August 15, this means that recipients are expected to spend the bulk of their summers working on their projects.

In the past, some recipients also taught. Eventually, this became a problem, and so we amended our rules to prohibit grantees from teaching "summer school at NSU or any other school."⁴⁴

Despite the seeming clarity of this portion of our rules, there are a number of open issues. First, does work done on the grant either before or after the summer count towards the "eight weeks of full time work"? In other words, could a recipient spend eight weeks on his or her project in, say, March and April and take the summer off? Alternatively, could he or she do nothing during the summer and then spend eight weeks on the project in September and October? And what if a recipient, although intending to use all of June and July for his or her grant, is forced at the last moment to use those months to care for a sick relative? We have had colleagues fall into each of these categories, and to date have always looked the other way.

A second issue stems from our use of the phrase "eight weeks." Is this shorthand for the standard 35-hour work week? If so, recipients would need to spend a minimum of 280 hours on their projects. Of course, the typical law professor works closer to 50 hours per week,⁴⁵ which would boost the required number to 400 hours.

41. Some law schools do pay for such expenses. See, e.g., Richard H. Chused, Saunders (a.k.a. Javins) v. First National Realty Corporation, 11 GEO. J. ON POVERTY L. & POL'Y 191, 191 n.** (2004) ("Georgetown University Law Center provided me with a summer writer's grant in 2002 as well as funds to gather a large collection of legal documents in the *Javins* case.").

42. For a description of this program, see Nova Southeastern University, *President's Faculty R & D Grant*, available at <http://www.nova.edu/cwis/vpaa/facscholar/index.html>.

43. See Appendix at VI.B.3 ¶ 1.

44. *Id.* We do permit recipients to teach in our on-line and intensive trial advocacy programs. *Id.*

45. See Laura T. Kessler, *Paid Family Leave in American Law Schools: Findings and Open Questions*, 38 ARIZ. ST. L.J. 661, 683 (2006) ("Even if many law professors generally work fewer hours than lawyers in private firms, many law professors do work fifty to sixty hours a week; these time demands can be quite unbounded."); Patrick E. Longan, *The Law and Economics of Aging and the Aged*, 26 STETSON L. REV. 667, 674 n.22 (1996) ("A law

Assuming that one picks the latter figure, what should be done with the highly-efficient (or perhaps merely insomniac) law professor who works 100 hours per week? Would he or she be done after four weeks? To date, this problem has been more theoretical than real, inasmuch as most recipients have needed more than 400 hours to complete their projects. In those few instances in which recipients have finished with time to spare, they have usually worked on a second project.

A third issue has to do with grant recipients who simultaneously serve as expert witnesses, bar review lecturers, and the like. As explained above, our rules only ban summer school teaching. Accordingly, many of our grantees have earned outside money while collecting their stipends, although this does not appear to have kept any recipient from completing his or her grant project.⁴⁶

A final issue concerns the role of student research assistants. Relying on such help is always tricky.⁴⁷ But a summer grant, which commits the

professor who is doing his or her job responsibly, however, will spend many more hours than [what is required by the accreditation rules]. Preparing for class, meeting with students, assisting with the governance of the law school and the University, participating in bar association activities, and conducting scholarship are just a few of the duties that keep law professors working happily for more than forty hours per week.”).

46. What should be done with the faculty member who, having been paid by a law firm to be an expert witness, later requests a grant to turn his or her research into an article or book? Our rules do not address such “double dipping,” which also raises the conflict of interest problem discussed *supra* note 26.

A more common form of double dipping involves a faculty member who gets a raise (or promotion) based on a piece for which he or she previously received a summer grant. The inequity is heightened if professors who spent their summers teaching (because they did not get a grant) are passed over at raise (or promotion) time. Of course, one way to fix this is to give “summer teaching grants,” as some commentators have suggested, see *supra* note 12, and then value teaching more at raise (and promotion) time. See further Brent E. Newton, *Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105 (2010) (arguing that law schools focus too much on scholarship and not enough on teaching).

Because our sabbaticals only last a semester, we do encourage applicants to tack on a summer grant whenever possible. Other law schools appear to do likewise. See, e.g., Pedro A. Malavet, *LatCritical Encounters with Culture, in North-South Frameworks*, 55 FLA. L. REV. 1, 1 n.* (2003) (“I am grateful to the Levin College of Law [at the University of Florida] for allowing me to use a Summer Research Grant and part of a sabbatical to work on this project.”); Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 343 n.* (1997) (“The preparation of this article was greatly aided by the grant of a summer research stipend and a sabbatical leave from Brooklyn Law School in the Fall of 1996.”).

47. Law professors face a host of ethical issues when they use student research assistants: Some law professors use lengthy tracts written by their research assistants in their own books or articles, representing that they wrote the work themselves. Some acknowledge the “able as-

recipient to producing a specific piece of writing in a relatively short period, exacerbates the difficulties.

VII. COMPLETION

When an applicant receives a summer grant, he or she is expected to see the project through to the end.⁴⁸ Occasionally, however, a grantee will want (or need) to change topics.⁴⁹ After years without a formal mechanism, we recently adopted a specific rule to deal with such situations.⁵⁰ It provides that substitution requests are to be made to the associate dean for academic affairs, with a right of appeal to the dean.⁵¹

sistance” of research assistants in footnotes. Very few explain that “sections II and III of this article were drafted by X.” Even fewer make the research assistant a co-author or put quotation marks around the section written by the student.

Law professors—who, like practicing lawyers, are experts in rationalization—offer many justifications for the use of the written work of research assistants without attribution. They might say:

◆ The research assistant is “just a law student;” he was just doing the drudge work. All the ideas in the piece were mine.

◆ All law professors use the written work of research assistants without listing them as co-authors. Everyone understands that my work may include some writing by a research assistant.

◆ The research assistant is getting paid. His work is a “work for hire.” It belongs to me.

All of these explanations sidestep the moral questions. One moral question is whether the professor is or is not being truthful in representing that he or she is the author of the work. Another moral question is whether the appropriation of the work of a research assistant is an abuse of power, whether it is wrong because it is disrespectful or exploitative of the research assistant.

Lisa G. Lerman, *Misattribution in Legal Scholarship: Plagiarism, Ghostwriting, and Authorship*, 42 S. TEX. L. REV. 467, 471-72 (2001) (footnotes omitted).

48. See Appendix at VI.B.5 ¶ 1.

49. Professors at other law schools have encountered the same situation. See, e.g., Vernellia R. Randall & Vincene Verdun, *Two Black Women Talking About the Promotion, Retention, and Tenure Process in Law Schools*, in BLACK WOMEN IN THE ACADEMY: PROMISES AND PERILS 213, 214 (Lois Benjamin ed. 1997) (“Last summer I [University of Dayton law professor Vernellia Randall] . . . received a summer research grant to write an article on fetal alcohol syndrome. But you know how things go. At the very beginning of the summer I got involved in the health care reform issue. So I went to the dean and told him I wanted to change the topic for my summer research. He agreed to the switch.”).

50. See Appendix at VI.B.5. In the years before the rule, some recipients decided they were stuck with their topic and unhappily soldiered on; others sought out the chair (or, if he or she was unavailable, a member) of the FDC and asked for permission to change topics; still others went to the dean or associate dean for academic affairs; and a few simply switched topics on their own.

51. See Appendix at VI.B.5 ¶ 2.

In drafting this rule we thought about having the recipient go back to the FDC. However, because substitution requests are likely to occur during the summer, this was impractical

Recipients must report on their progress to the FDC every six months, and this obligation continues until the project is done.⁵² Once it is accepted for publication, the recipient is eligible to apply for a new grant.⁵³

Generally speaking, recipients cannot receive a second grant for the same project.⁵⁴ We have two exceptions to this rule. First, those writing books (or the equivalent) can apply for a second grant.⁵⁵ Second, junior faculty members who have never published a scholarly work are entitled to a second grant if they can demonstrate “substantial progress.”⁵⁶

Although suggestions have sometimes been made that they should, neither the FDC nor the dean reviews a recipient’s final work product.⁵⁷ Nor are

for two reasons: 1) most faculty are not around during the summer, making it difficult to convene a meeting; 2) our faculty committees change personnel on July 1, meaning that the recipient would in all likelihood be speaking to a different committee than the one that approved the original topic. By putting the decision in the hands of the administration, the first problem is avoided (because administrators are on 12-month contracts) and the second problem is largely (although not entirely) eliminated.

52. See Appendix at VI.B.3 ¶ 2. Fall reports are due by October 15 and spring reports are due by April 15. *Id.* To facilitate the process, the FDC sends an e-mail to each recipient prior to these dates requesting a status report. The responses are then compiled by the FDC and circulated by e-mail to the entire faculty and posted on a secure intranet page. Grantees are on their honor with respect to what they report.

53. *Id.* A faculty member whose project is “substantially completed” is also eligible for future grants. *Id.*

Although becoming eligible for future grants is certainly important, there are many other financial reasons for wanting to get a piece finished. As has been explained elsewhere:

[V]irtually all the material rewards that tenured faculty members receive, other than basic job security, depend on their research production[:] salary raises, their summer grants, their supplementary expense funding, and their access to funds for organizing conferences or speaker series that are of interest to them. It also determines whether they receive competing offers from other law schools, which not only provide the psychic reward of recognition, but also generally include a salary increase, and even if not accepted, can be used to extract further salary increases from their home institution.

Edward Rubin, *Should Law Schools Support Faculty Research?*, 17 J. CONTEMP. LEGAL ISSUES 139, 141-42 (2008) (footnote omitted).

54. See Appendix at VI.B.3 ¶ 2.

55. *Id.* Other law schools also recognize that book-length projects will often need multiple grants. See, e.g., Judith Kilpatrick, *Wiley Austin Branton: A Role Model for All Times*, 48 How. L.J. 827, 827 n.* (2005) (“The University of Arkansas School of Law has supported the research with summer grants in 2001, 2002, and 2004. This Article will become part of a more complete biography of Mr. Branton.”).

56. See Appendix at VI.B.3 ¶ 2.

57. At one time, we required summer grant recipients to present a talk about their research findings to the faculty (and held weekly luncheons for this purpose). As explained *supra* note 52, we instead now circulate by e-mail the various progress reports. There is much to be said, however, for oral presentations:

A related suggestion is that those of us who benefit in any way from support for research, such as the recipients of summer research grants, should be expected to give a public lecture thereafter (that is, during the following school year) on some aspect of the matters researched.

bonuses awarded for pieces that are accepted by top-tier publishers. As a result, there is a natural temptation to pick easy topics (especially because future eligibility depends on completing one's existing project). The FDC and the dean are expected to serve as a check against proposals that try to game the system.

Occasionally, a grantee is unable to finish his or her project. This is usually caused by some combination of writer's block, boredom, and exhaustion, although the fault sometimes lies with a recalcitrant co-author. Similarly, we have had instances in which grantees discovered, just as they were finishing their project, that they either had been preempted by another author or an unexpected development had rendered their piece unpublishable. While our rules do not address such situations, the dean has sometimes given such individuals "amnesty," thereby making them again eligible for future grants.

VIII. CONCLUSION

In his recent book attacking legal education, Professor Brian Tamanaha harshly criticizes the practice of paying law professors to write in the summer:

The proliferation of summer research grants at law schools in the past several decades is indicative of the enhanced flow of money to law professors. Professors are paid for thirty-nine weeks a year; classes range from twenty-six to twenty-eight weeks; and the teaching load is six hours or less each week. There is ample already-compensated time within this schedule to produce scholarship. Yet schools now also provide additional money to professors to write during the summer.

A mercenary pay-me-to-write quality attaches to these grants. One school, for example, offers a base summer grant of \$8000, plus a \$6000 bonus for placement in a second- or third-tier journal (journals outside the top 50 schools in *US News*), a \$10,000 bonus for placement in a first-tier journal, or a \$15,000 bonus for a top-twenty placement or for producing two separate articles in first- or second-tier or peer-reviewed journals. A more common practice is to offer a standard amount, say \$15,000 or \$20,000, half up front

As it is now, it is hard for others to discover what any particular recipient might have done and learned with the aid provided. These public lectures, too, should help students appreciate what truly matters to the faculty.

George Anastaplo, *Legal Education, Economics, and Law School Governance: Explorations*, 46 S.D. L. REV. 102, 122 (2001).

and half after the article is done. At top schools the summer research stipend runs in the tens of thousands of dollars (twenty-eight professors at Texas law school received summer stipends above \$60,000). Schools justify this as a way to boost compensation to meet the competition, to reward active writers, and to motivate people who might not otherwise write. One must wonder whether scholarship motivated in this way suffers in quality or value owing to the lack of an intrinsic desire on the part of the scholar to write.⁵⁸

Because Professor Tamanaha does not provide any evidence for his assertion that summer-funded scholarship suffers in comparison to regular-funded scholarship, it is difficult to comment on his position, other than to say that at our law school we have not detected any difference between the two types of scholarship.⁵⁹ Indeed, we have found that some of our law school's best writing has been produced precisely because we have a summer grant program.⁶⁰

APPENDIX

*NOVA SOUTHEASTERN UNIVERSITY
SHEPARD BROAD LAW CENTER
FACULTY HANDBOOK 24-25 (rev. ed. 2011)*

58. BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 50 (2012) (footnotes omitted). *See also* Steven Hetcher, *Desire Without Hierarchy: The Behavioral Economics of Copyright Incentives*, 48 U. LOUISVILLE L. REV. 817, 823 (2010) (“All a law school has to do if it wants to insure some desired level of faculty output is to give summer grants contingent on production of publishable work. We see then that money can indeed incentivize creativity.”).

59. Of course, some question the value of all legal scholarship. *See, e.g.*, Kenneth Lason, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 950 (1990) (“True, I like to think I have had something original to say (and have guiltlessly accepted remuneration via research grant or summer stipend). Yet all of my ‘scholarship’—as that of most others—must be viewed as exceedingly modest when compared to that of a true scholar.”).

60. For those who have made it this far and may be wondering, we wrote this essay while taking a break from the projects for which we *did* receive Summer 2012 grants (respectively, a biography of an Indiana lawyer and a family law book).

VI. COMPENSATION/COURSES, GRANTS, SABBATICALS

B. *SUMMER RESEARCH GRANTS*

1. Purpose.

Summer research grants provide financial support for research projects. The proposed project should be designed to produce scholarship such as (1) traditional research articles, (2) book chapters, (3) monographs or books, and (4) innovative teaching materials. Proposals that would not be considered for summer research grant support include: (1) attendance or participation in summer conferences; (2) advanced academic study; (3) teaching; (4) working in clinical programs; (5) activity or travel as a director, reporter, advisor or consultant to a professional project, publication or conference; (6) programs of summer reading or “enrichment”; and (7) class preparation.

2. Procedures.

The Faculty Development Committee will administer summer research grant proposals pursuant to the following procedures. Early in the fall semester, faculty members requesting a summer research grant will be required to notify the committee of such intent. This notification serves as a general commitment by the faculty member that the administration will utilize for planning purposes, including scheduling summer school classes.

All faculty members seeking a grant must submit a detailed proposal summarizing their intended research project by January 31. The proposal should also include the following elements:

- a. Synopsis and statement of purpose: What is the thesis and general subject matter of the proposed research? Why does the faculty member want to undertake the project and what does he or she hope to accomplish?
- b. A description of format, i.e., book, research monograph, book chapter, law review article, innovative teaching materials, etc.;
- c. A timetable for completion;
- d. A statement of prior grants the applicant has received and a list of all publications that resulted from grant-funded projects. If the applicant has previously received a grant that did not result in a publication, or innovative teaching materials, he or she shall pro-

vide a detailed explanation, which must include any unfinished work product.

3. Grant Requirements.

The grant period consists of not less than eight weeks of full time work. Because the grantee should devote eight consecutive weeks to the project, he or she is not permitted to teach in summer school at NSU or any other school. This limitation does not apply to AAMPLE™ online, MHL, other NSU non-law Master's programs, and Intensive Trial Advocacy.

Each faculty member receiving a research grant of any type will be required to submit a detailed report to the committee and to the Dean on the use of funds and the projects undertaken. This report shall be updated every Oct. 15 and April 15 until the project is completed. Faculty members are generally ineligible to receive subsequent grants until their previous grant work product has been accepted for publication. However, applicants whose previous grant work is substantially completed, but has not yet been accepted for publication, and those who are working on longer term substantial projects such as book length manuscripts, may be awarded a second grant upon review and approval of their work progress by the committee. In addition, recognizing the difficulty of publishing the first traditional law review article, new faculty members who have never published a scholarly work who received a grant to write this type of piece may apply for another grant to complete their project if they can demonstrate "substantial progress" after the first summer. The committee must evaluate the draft or other work submitted, as well as reasons for failure to finish, in determining whether to award a second grant.

4. Award of Grants.

The Dean retains final authority to award grants and determine funding.

5. Project Substitution.

Once a project has been approved, it is expected that the faculty member will complete it. If a faculty member wishes to change his or her project, a written request to do so must be made to the Associate Dean for Academic Affairs ("ADAA") at the earliest possible moment. Ordinarily, requests will be granted if: (a) there is a compelling reason for the change; (b) the substituted project is meritorious; and, (c) the substituted project would most likely have been approved by the Faculty Development Committee.

The ADAA will give the faculty member a written decision in as timely a manner as possible, and will advise the faculty by e-mail of the decision. If the ADAA rejects the request, the faculty member may appeal to the Dean. Except in highly unusual circumstances, the Dean will not reverse the decision of the ADAA.

2012 SURVEY OF JUVENILE LAW

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MICHAEL J. DALE*

I. INTRODUCTION

The Florida intermediate appellate courts decided a series of cases in the child welfare field ranging from issues related to representation of parents in dependency proceedings and proper procedure at shelter hearings, to a range of issues in termination of parental rights (TPR) cases this past survey year. The intermediate courts ruled on a lesser number of delinquency area cases. As is true with each survey, decisions in the delinquency area that are linked to issues of criminal procedure, and which are not unique to the juvenile delinquency field, are not covered.¹ Finally, this article summarizes the symposium held at Nova Southeastern University, Shepard Broad Law Center regarding the American Bar Association Model Act Governing Representation of Children in Abuse, Neglect, and Dependency Proceedings.²

II. DEPENDENCY

Dependency proceedings often start when the child is removed from the home and taken into custody based upon a probable cause determination that the child is “abused, neglected, or abandoned or . . . is in imminent danger of [an] illness or injury as a result of abuse, neglect, or abandonment,” there is a violation of an order of the court, or there are no parents or other guardians available.³ When the law enforcement officer takes the child into custody, the officer may release the child to a parent or legal custodian or other re-

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1. See Michael J. Dale, *2010 Survey of Juvenile Law*, 35 NOVA L. REV. 137, 137 (2010) [hereinafter Dale, *2010 Survey of Juvenile Law*].

2. See generally Symposium, 36 NOVA L. REV. 309 (2012).

3. FLA. STAT. § 39.401(1)(b) (2012).

sponsible adult, or may place the child in the care of an authorized agent of the Department of Children and Families (DCF).⁴ The child may also be placed in shelter care under certain circumstances.⁵ When placement in a shelter occurs, the parent must be notified, and a shelter care hearing shall take place, generally speaking, within twenty-four hours after the placement.⁶ At that shelter hearing, the court will determine if there is probable cause to keep the child in shelter status pending further investigation of the case.⁷ Because parents are statutorily entitled to counsel at all stages of dependency proceedings in Florida, they must be advised of their right to counsel at the shelter hearing.⁸ Unfortunately, the intermediate appellate courts periodically must reverse on the grounds that the trial court failed to advise the parents of their right to counsel. In *A.G. v. Florida Department of Children & Families*,⁹ that is exactly what happened.¹⁰ At the shelter hearing, the court did not ask the father if he had representation, and the court did not “clarify whether the father wished to waive his right to counsel.”¹¹ Only at the conclusion of the hearing did the court appoint counsel for future hearings.¹² On that basis the appellate court granted the father’s writ of certiorari.¹³ In *G.W. v. Department of Children & Families*,¹⁴ the Third District Court of Appeal was faced with the same issue.¹⁵ The appellate court granted a father certiorari from an order at a shelter hearing in Miami in which the father claimed he was denied his rights to counsel.¹⁶ In granting the writ of certiorari, the appellate court was blunt in its reversal.¹⁷ The following description is instructive:

In the midst of the staccato-paced hearing conducted by the trial court in this case, the court stated, inter alia, “and I’m appointing counsel for the father.” Under the circumstance, the father missed the point. As the hearing continued, both the father and his family members begged to speak to the court. The father stated on

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4. *Id.* §§ 39.01(21), .401(2).
 5. *Id.* § 39.402(4).
 6. *Id.* § 39.402(5), (8)(a)–(b).
 7. *Id.* § 39.402(8)(d)1.
 8. FLA. R. JUV. P. 8.320(a)(1), 8.515(a)(1).
 9. 65 So. 3d 1180 (Fla. 1st Dist. Ct. App. 2011).
 10. *See id.* at 1183.
 11. *Id.* at 1181.
 12. *Id.* at 1182.
 13. *Id.* at 1181.
 14. 92 So. 3d 307 (Fla. 3d Dist. Ct. App. 2012).
 15. *See id.* at 308.
 16. *Id.*
 17. *See id.* at 310.

two occasions: “Can I say something?” “Can I say something, please?” Then, as the trial court indicated she was prepared to close down the hearing, he asked, “Why can’t I say anything?” to which the court finally acceded briefly. On the *last page* of the shelter hearing transcript, the . . . court stated, “And you call your lawyer, [G.W.], okay?” to which G.W. responded, “Hold on, I didn’t know I had one.” An unidentified speaker said, “They’re going to give [one] to you.” After scheduling dates for further proceedings, the hearing then concluded.¹⁸

After referencing the due process right to counsel at a shelter hearing describing the statute as “replete with language requiring counsel at this critical stage of the dependency process,” the appellate court in *A.G.* closed with the following statement: The trial court’s failure to provide the father the opportunity to have counsel present at the shelter hearing “constituted a clear departure from the essential requirements of the law amounting to a miscarriage of justice.”¹⁹

In *K.G. v. Florida Department of Children and Families*,²⁰ decided on the same day as *A.G.*,²¹ the First District Court of Appeal granted a petition for certiorari sought by the mother because, at a shelter hearing, the court would not allow the mother’s attorney to speak and directed that the child be placed with the maternal grandmother without allowing the mother to present any evidence or otherwise be heard.²² Florida law explicitly requires the trial court to provide an appearing party an opportunity to be heard and present evidence at all of the hearings.²³ The appellate court held that the failure to allow the mother to present evidence violated her due process right to be heard and was “a clear departure from the essential requirements of the law amounting to a miscarriage of justice.”²⁴

*S.M. v. R.M.*²⁵ is yet another case in which the court failed to allow evidence at a shelter hearing.²⁶ In *S.M.*, the appellate court treated the appeal as

18. *Id.* at 309 (alteration in original) (footnotes omitted).

19. *A.G. v. Fla. Dep’t of Children & Families*, 65 So. 3d 1180, 1182–83 (Fla. 1st Dist. Ct. App. 2011).

20. 66 So. 3d 366 (Fla. 1st Dist. Ct. App. 2011).

21. *A.G.*, 65 So. 3d at 1180; *K.G.*, 66 So. 3d at 366.

22. *K.G.*, 66 So. 3d at 367.

23. FLA. STAT. § 39.402(8)(c)(3) (2012); *see also* FLA. R. JUV. P. 8.305(b)(4); Dep’t of Children & Family Servs. v. Heart of Adoptions, Inc. (*In re Interest of J.T.*), 947 So. 2d 1212, 1215 (Fla. 2d Dist. Ct. App. 2007); *L.M.C. v. Dep’t of Children & Families*, 935 So. 2d 47, 47 (Fla. 5th Dist. Ct. App. 2006); *F.M. v. Dep’t of Children & Families*, 758 So. 2d 1262, 1264 (Fla. 5th Dist. Ct. App. 2000).

24. *K.G.*, 66 So. 3d at 368–69.

25. 82 So. 3d 163 (Fla. 4th Dist. Ct. App. 2012).

a writ of certiorari and reversed.²⁷ Contained in the opinion is the following statement from the transcript:

Mother's Attorney: I object to the entire lack of due process in this case, to the procedure that has been followed, the questioning, and my failure to be allowed to put on any witnesses, the sudden urgency of the hearing The guardian ad litem's report being admitted without any cross-examination and my [not being allowed] to put on one witness.²⁸

In granting the writ, the appellate court described the cases as being "indistinguishable" from *K.G.*²⁹

Chapter 39 of the *Florida Statutes* provides that a petition may be filed for dependency "by an attorney for the [DCF] or any other person who [is] knowledge[able] of the facts . . . or is informed of them and believes that they are true."³⁰ In *Florida Department of Children & Families v. Y.C.*,³¹ a mother filed a dependency proceeding naming herself as the respondent.³² Described as a private dependency petition,³³ the mother "alleged that . . . her children were at risk of harm based on [the father's] various acts of violence."³⁴ DCF had previously determined that intervention was not warranted.³⁵ The mother was upset with this finding and commenced the proceeding herself.³⁶ The Guardian Ad Litem (GAL) Program "moved to have the trial court order the [DCF] to file a case plan and provide services."³⁷ Then "DCF filed a limited appearance to object to [the] motion."³⁸ The trial court, without holding a trial or admitting any evidence, "entered an order of dependency."³⁹ As the appellate court explained, "[t]he sole basis then or ever asserted for the order was the fact that Y.C. had defaulted and thus 'ad-

26. *Id.* at 164.

27. *Id.*

28. *Id.* at 166 (alterations in original).

29. *Id.* at 170.

30. FLA. STAT. § 39.501(1) (2012).

31. 82 So. 3d 1139 (Fla. 3d Dist. Ct. App. 2012).

32. *Id.* at 1140.

33. *Id.*; Michael J. Dale, 2011 *Survey of Juvenile Law*, 36 NOVA L. REV. 179, 183 (2011) [hereinafter Dale, 2011 *Survey of Juvenile Law*].

34. *Y.C.*, 82 So. 3d at 1140.

35. *Id.*

36. *Id.*

37. *Id.* at 1140–41.

38. *Id.* at 1141.

39. *Y.C.*, 82 So. 3d at 1141.

mitted' her own allegations of dependency."⁴⁰ DCF sought a writ which the appellate court granted.⁴¹ In so doing, the appellate court explained that there was no "case or controversy and . . . therefore, [no] basis for court action."⁴² The court explained that one cannot file a lawsuit, admit the allegations, and thus control authority of the court to act.⁴³ Finally, the appellate court added the following: "We are bound to say that neither the trial court nor the GAL should have allowed itself to become involved in the combination charade-theatre of the absurd, which played itself out below."⁴⁴

Chapter 39 contains a number of grounds for findings of dependency.⁴⁵ One of them is that while there is no present abuse, neglect, or abandonment, one of the three can be made out upon the basis that the parent's behavior constitutes a present threat to the child which, although "prospective" in nature, is imminent.⁴⁶ The issue in *S.S. v. Department of Children & Families*⁴⁷ was whether allegations of chronic use of a controlled substance or alcohol, acts of violence, neglect of the children's dental health, and psychological instability were proven to be prospective and imminent.⁴⁸ The appellate court reversed, finding that while the mother drank a lot it was not sufficient to constitute "extensive, abus[e], and chronic use" and that a single item of evidence of alleged illegal substance abuse was the result of inadmissible hearsay evidence.⁴⁹ The child protective investigator "neither administered [a urine screen, nor] performed the chemical analysis, [n]or interpreted the results," and so could not testify "to lay the necessary predicate to introduce the lab report containing the drug test results."⁵⁰ There was no evidence that the children witnessed or that they were affected by incidents of domestic

40. *Id.* (emphasis omitted).

41. *See id.* at 1141 & n.6.

42. *Id.* at 1141 & n.7.

43. *Id.* at 1141-42.

44. *Y.C.*, 82 So. 3d at 1145 n.17.

45. *See* FLA. STAT. § 39.401 (2012).

46. *S.S. v. Dep't of Children & Families*, 81 So. 3d 618, 621 (Fla. 1st Dist. Ct. App. 2012) (quoting *J.B.M. v. Dep't of Children & Families*, 870 So. 2d 946, 951 (Fla. 1st Dist. Ct. App. 2004)); *see also* FLA. STAT. § 39.401(1)(b)(1); Dale, *2011 Survey of Juvenile Law*, *supra* note 33, at 182.

47. 81 So. 3d 618 (Fla. 1st Dist. Ct. App. 2012).

48. *Id.* at 621-23.

49. *Id.* at 621-22 (citing *J.B.M.*, 870 So. 2d at 949).

50. *Id.* (citing *J.B.M.*, 870 So. 2d at 949).

violence.⁵¹ Finally, there was no nexus between the mother's psychiatric disorder and the children's health.⁵²

A question upon which the intermediate appellate courts are split is whether a finding that a child who was "at substantial risk of imminent abuse, abandonment, or neglect"⁵³ may be made where there was a prior adjudication of dependency against the other parent.⁵⁴ The issue before the Third District Court of Appeal in *D.A. v. Department of Children and Family Services*,⁵⁵ was whether it should follow the opinion of the Fifth District Court of Appeal in *P.S. v. Department of Children and Families*,⁵⁶ which held that, as a matter of statutory construction, after a finding of neglect as to one parent, the only finding of dependency in the supplemental order against the second parent is that there be "actual" abuse, abandonment, or neglect.⁵⁷ The Third District Court of Appeal rejected this approach in a split opinion, finding that the word "actual" is not in the statute, that the Fifth District Court of Appeal hindered the purpose behind the statutory prohibition against more than one dependency adjudication, and that two different standards have no apparent rationale.⁵⁸

An interesting sidelight in *D.A.* is the fact that the DCF confessed error based upon the *P.S.* case, whereas the GAL Program took the position "that the trial court's supplemental adjudication [in the] dependency [was] correct."⁵⁹ Of interest here is the fact the GAL Program undertook the role of petitioner to prove the allegation of prospective neglect.⁶⁰ This action, taking on the role usually played by DCF—seeking to prove the allegation of neglect—is permissible under Florida law although the usual role of the GAL in a dependency case around the country is solely to represent the best interest of the child oftentimes as a non-party expert.⁶¹

51. *Id.* at 623.

52. *S.S.*, 81 So. 3d at 623 (quoting *B.D. v. Dep't of Children & Families*, 797 So. 2d 1261, 1264 (Fla. 1st Dist. Ct. App. 2001)) (citing *I.T. v. State, Dep't of Health & Rehabilitative Servs.*, 532 So. 2d 1085, 1088 (Fla. 3d Dist. Ct. App. 1988)).

53. FLA. STAT. § 39.01(15)(f) (2012).

54. Compare *D.A. v. Dep't of Children & Family Servs.*, 84 So. 3d 1136, 1138–39 (Fla. 3d Dist. Ct. App. 2012), with *P.S. v. Dep't of Children & Families*, 4 So. 3d 719, 720–21 (Fla. 5th Dist. Ct. App. 2009).

55. 84 So. 3d 1136 (Fla. 3d Dist. Ct. App. 2012).

56. 4 So. 3d 719 (Fla. 5th Dist. Ct. App. 2009).

57. *D.A.*, 84 So. 3d at 1139 (citing *P.S.*, 4 So. 3d at 720–21); *P.S.*, 4 So. 3d at 720–21.

58. *D.A.*, 84 So. 3d at 1140, 1141; see also FLA. STAT. § 39.01(15)(f).

59. *D.A.*, 84 So. 3d at 1138.

60. See *id.*

61. See Michael J. Dale, Reporting the Child Crisis § 406 [1] pp 4 - 67 - 70 (LexisNexis 2012), FLA. STAT. §§ 39.501(2), .807(2)(a)–(b); see also FLA. R. JUV. P. 8.215. In addition,

Another case involving the issue of prospective neglect is *S.T. v. Department of Children & Family Services (In re Interest of K.C. & D.C.)*.⁶² In that case, DCF alleged that there was “prospective abuse [and] neglect by the father and prospective neglect by the mother.”⁶³ The allegations were that the father’s use of alcohol was “chronic, extensive, and abusive [and] . . . would likely continue” and thus cause the children to be at “substantial risk of imminent abuse and neglect from the father . . . [and] that the mother was aware of the father’s use . . . but denied that he had a problem and allowed the father to transport the children home from school, despite his alcohol problem.”⁶⁴ In a heavily documented analysis of the allegations, the appellate court demonstrated why it is necessary that the petitioner should present any admissible evidence that may form the basis of the court’s finding.⁶⁵ DCF presented “[n]o representative of the [agency] who had contact with the family, . . . nor . . . either child, nor . . . any expert witness such as a psychologist or counselor.”⁶⁶ The individuals who testified were the parents, the elementary school principal, the assistant kindergarten teacher, and the surrogate grandmother.⁶⁷ The trial court discounted the parents’ testimony based upon credibility.⁶⁸ However, the Second District Court of Appeal stated, “it is difficult to discern the evidence the circuit court relied upon to support its determination of dependency as to the mother.”⁶⁹ As to the father, the independent witnesses did not provide evidence of the father’s alcohol use or that his use demonstrably affected the children as required by Florida law.⁷⁰ Further, there was no “competent evidence that the mother knew that the father was endangering the children by his conduct.”⁷¹ Thus the Second District Court of Appeal reversed.⁷²

In a dependency proceeding, after an adjudication and disposition involving the development of the case plan, when the parent complies with the case plan, the parent may file a motion for a reunification.⁷³ In *C.M. v. De-*

both DCF and the GAL Program are agencies of the executive branch. *See* FLA. STAT. §§ 20.19(2)(a), 39.8296(2)(a).

62. 87 So. 3d 827, 828 (Fla. 2d Dist. Ct. App. 2012).

63. *Id.*

64. *Id.* at 828–29.

65. *See id.* at 833.

66. *Id.* at 829.

67. *In re Interest of K.C. & D.C.*, 87 So. 3d at 834.

68. *Id.*

69. *Id.*

70. *Id.* at 834–35.

71. *Id.* at 835.

72. *In re Interest of K.C. & D.C.*, 87 So. 3d at 836.

73. FLA. STAT. § 39.621(10) (2012).

partment of Children & Family Services (In re Interest of G.M.),⁷⁴ the mother appealed from two final orders of the trial court.⁷⁵ The court “denied her motion for reunification and terminated protective supervision with her child [who was] in the custody of [a] nonoffending father.”⁷⁶ The child had been adjudicated dependent two years later and was reunified with his father in Georgia, where the child resided since that time.⁷⁷ Under Florida law, there are a set of standards that the court must apply on a motion by a parent for reunification or increased contact with a child.⁷⁸ In the case at bar, the trial court failed to include any of the findings required under either statute, and the Second District Court of Appeal was forced to reverse.⁷⁹

A second reunification case involved the obligation of the court not to select a better permanency option, but rather to determine that the parent has complied with the case plan and to allow reunification, unless the reunification would endanger the child.⁸⁰ This was the issue in *S.V.-R. v. Department of Children & Family Services*.⁸¹ A mother of two children appealed from an order denying her motion for reunification with the child following substantial compliance with the tasks in the case plan.⁸² The Third District Court of Appeal held, in reversing the trial court, that neither DCF nor the GAL proved endangerment of the safety, well-being, or health of the child.⁸³ It also held that the permanency determination granting custody to the father instead of the mother incorrectly applied the best interest factor.⁸⁴ The difficult issue described by the Third District Court of Appeal was how the law applies when a non-offending parent seeks to become the permanent custodial parent when a dependency proceeding ends with the offending parent seeking reunification.⁸⁵ The appellate court noted that the trial court charge was not to select the better dependency option, and that neither DCF nor the GAL program demonstrated that the health and well-being of the children

74. 73 So. 3d 320 (Fla. 2d Dist. Ct. App. 2011).

75. *Id.* at 321.

76. *Id.*

77. *Id.*

78. FLA. STAT. §§ 39.522(2), .621(10).

79. *In re Interest of G.M.*, 73 So. 3d at 323.

80. *S.V.-R v. Dep’t of Children & Family Servs.*, 77 So. 3d 687, 689–90 (Fla. 3d Dist. Ct. App. 2011) (per curiam).

81. 77 So. 3d 687, 688 (Fla. 3d Dist. Ct. App. 2011) (per curiam).

82. *Id.*

83. *Id.* at 689.

84. *Id.* (citing FLA. STAT. § 39.621(10) (2012)).

85. *Id.* at 690.

will be endangered by the reunification.⁸⁶ Thus the appellate court reversed.⁸⁷

The Florida Rules of Juvenile Procedure provide for discovery which in most respects follows the Florida Rules of Civil Procedure.⁸⁸ The issue in *Colaizzo v. Office of Criminal Conflict & Civil Regional Counsel*,⁸⁹ was whether the Office of Regional Counsel or DCF should pay the fee to an expert witness in a deposition taken in a TPR case.⁹⁰ “The doctor sent a bill for the deposition to” the Office of Regional Counsel.⁹¹ He had not been paid by an organization known as the “Child Protection Team, an independent, non-profit organization [that] investigat[ed] allegations of child abuse,” which was funded by the State, and operated under the Florida Department of Health for whom he worked.⁹² The Fourth District Court of Appeal held that under the Florida Rules of Civil Procedure, the party seeking to take an expert deposition is responsible for the fee.⁹³ Thus, the appellate court reversed and remanded to the trial court to hold a hearing under the Rules of Civil Procedure that provides “[u]nless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery.”⁹⁴

The issue of the court’s ability in a dependency proceeding to order parties to submit to a psychological evaluation was before the Fourth District Court of Appeal in *J.B. v. M.M.*⁹⁵ In a private dependency proceeding brought by the child’s paternal grandparent, the appellant brought a writ of certiorari to the Fourth District Court of Appeal in order to challenge the trial court’s order that she submit to a psychological evaluation.⁹⁶ Under Florida law, in order to require such an examination, there must be a finding that the mental health of the parent is in controversy and good cause must be shown.⁹⁷ While the mother suffered from a schizoaffective disorder, there was no finding of good cause because the only evidence of “the mother’s alleged inability to parent her daughter [was] over eight years old.”⁹⁸ Thus,

86. *S.V.-R.*, 77 So. 3d at 690.

87. *Id.* at 690–91.

88. Compare FLA. R. JUV. P. 8.245, with FLA. R. CIV. P. 1.280.

89. 82 So. 3d 195 (Fla. 4th Dist. Ct. App. 2012).

90. *Id.* at 195.

91. *Id.* at 196.

92. *Id.*

93. *Id.* at 197–98; see also FLA. R. CIV. P. 1.280(b)(5)(A), (C), 1.390(c).

94. *Colaizzo*, 82 So. 3d at 197–98 (quoting FLA. R. CIV. P. 1.280(b)(5)(C)).

95. 92 So. 3d 888, 889 (Fla. 4th Dist. Ct. App. 2012) (per curiam).

96. *Id.*

97. FLA. STAT. § 39.407(15) (2012).

98. *J.B.*, 92 So. 3d at 890.

the Fourth District Court of Appeal granted the writ.⁹⁹ Oddly, the GAL attorney assigned to the case took no position on the issue.¹⁰⁰

III. TERMINATION OF PARENTAL RIGHTS

Among the grounds for TPR in Chapter 39 is when a parent is involved in conduct that “threatens the life, safety, well-being, or physical, mental, or emotional health of the child.”¹⁰¹ In addition, it must be shown that termination is in the manifest best interests of the child.¹⁰² Applying this law to the facts in *Caso v. Department of Health & Rehabilitative Services*,¹⁰³ the Third District Court of Appeal found that the parent’s mental health problems made the parent unable to understand or appreciate the needs of the child.¹⁰⁴ Experiencing delusions which made the parent unable to appreciate the reality of the situation apparent to a child are grounds for a finding of TPR.¹⁰⁵

Issues involving proper application of the Supreme Court of Florida’s 1991 seminal opinion in *Padgett v. Department of Health & Rehabilitative Services*¹⁰⁶ come up regularly in the intermediate appellate courts.¹⁰⁷ In *Padgett*, the court had determined that if the termination was based solely on abuse of the sibling, the welfare department must also prove before the court that there was a substantial risk of significant harm to the child from the abuse of the sibling.¹⁰⁸ The issue in *Department of Children & Family Services v. K.D. & Z.H. (In re Interest of Z.C.(1) & Z.C.(2))*,¹⁰⁹ was whether applying the so-called “nexus test” for a prospective conflicted relationship between the past abuse of the child and prospective abuse of another child involves a totality of circumstance analysis.¹¹⁰ The court then applied the

99. *Id.*

100. *Id.*

101. FLA. STAT. § 39.806(1)(c).

102. *In re Interest of Baby Boy A.*, 544 So. 2d 1136, 1137 (Fla. 4th Dist. Ct. App. 1989); *see Caso v. Dep’t of Health & Rehabilitative Servs.*, 569 So. 2d 466, 468 (Fla. 3d Dist. Ct. App. 1990); *In re Interest of J.A.*, 561 So. 2d 356, 358 (Fla. 3d Dist. Ct. App. 1990) (per curiam); *In re Interest of M.J.*, 543 So. 2d 1323, 1324 (Fla. 4th Dist. Ct. App. 1989).

103. 569 So. 2d 466 (Fla. 3d Dist. Ct. App. 1990).

104. *See id.* at 470.

105. *D.B. v. Dep’t of Children & Families*, 87 So. 3d 1279, 1281 (Fla. 4th Dist. Ct. App. 2012).

106. 577 So. 2d 565 (Fla. 1991).

107. *See Dale, 2011 Survey of Juvenile Law, supra* note 33, at 182.

108. *Padgett*, 577 So. 2d at 571.

109. 88 So. 3d 977 (Fla. 2d Dist. Ct. App. 2012) (en banc).

110. *Id.* at 982–86.

totality of circumstances test developed in the series of cases following *Padgett*¹¹¹ and found that the nexus existed.¹¹²

Florida law provides that in dependency cases, a case plan is generally required.¹¹³ One of the grounds for TPR in Florida is the situation where the child is adjudicated dependent, the parent has been offered a case plan, and that the welfare department alleges that the “child continues to be abused, neglected, or abandoned.”¹¹⁴ This ground is evaluated in terms of whether the parent has substantially complied with the case plan.¹¹⁵ The question of whether the parent substantially complied with the case plan was before the Second District Court of Appeal in *N.F. v. Department of Children & Family Services (In re Interest of N.F.)*.¹¹⁶ Whether there has been substantial compliance is an evidentiary question.¹¹⁷ In reversing and remanding the finding of TPR, the appellate court in *In re Interest of N.F.* said: “In short, [DCF’s] position amounted to nothing more than parroted statutory phrases and bald incantations of buzzwords. Such conclusory assertions, devoid of factual support, were not competent [to stand as] substantial evidence—let alone clear and convincing evidence—of anything.”¹¹⁸

A second case dealing with TPR based upon an assertion that the parent failed to substantially comply with the case plan is *E.R.-J. v. Department of Children & Family Services (In re Interest of N.R.-G.)*.¹¹⁹ In that case, the Second District Court of Appeal also reversed.¹²⁰ The sole ground for termination was that “the [f]ather . . . [failed] to substantially comply with [the] case plan.”¹²¹ The appellate court noted that “failure to comply with [the]

111. *Id.* at 983–86 (citing Fla. Dep’t of Children & Families v. F.L., 880 So. 2d 602, 608, 611 (Fla. 2004) (per curiam); R.F. v. Fla. Dep’t of Children & Families (*In re Interest of M.F. & M.F.*), 770 So. 2d 1189, 1194 & n.13 (Fla. 2000) (per curiam); T.L. v. Dep’t of Children & Family Servs. (*In re Interest of D.L.H.*), 990 So. 2d 1267, 1272–73 (Fla. 2d Dist. Ct. App. 2008); K.A. v. Dept. of Children & Family Servs. (*In re Interest of K.A. & K.A.*), 880 So. 2d 705, 709–10 (Fla. 2d Dist. Ct. App. 2004); A.D. v. Dep’t of Children & Family Servs. (*In re Interest of G.D. & C.D.*), 870 So. 2d 235, 238 (Fla. 2d Dist. Ct. App. 2004); C.M. v. Dep’t of Children & Family Servs. (*In re Interest of C.M., C.M., & Z.M.*), 844 So. 2d 765, 766 (Fla. 2d Dist. Ct. App. 2003)); *see also Padgett*, 577 So. 2d at 571.

112. *In re Interest of Z.C.(1) & Z.C.(2)*, 88 So. 3d at 986.

113. FLA. STAT. § 39.806(1)(e) (2012).

114. *Id.* § 39.806(1)(e)1.

115. *Id.*

116. 82 So. 3d 1188, 1192 (Fla. 2d Dist. Ct. App. 2012).

117. *See id.*

118. *Id.* at 1195–96 (citing C.D. v. Dep’t of Children & Families, 974 So. 2d 495, 502 (Fla. 1st Dist. Ct. App. 2008); Norris v. Norris, 926 So. 2d 485, 488 (Fla. 2d Dist. Ct. App. 2006)).

119. 86 So. 3d 574, 575 (Fla. 2d Dist. Ct. App. 2012).

120. *Id.* at 582.

121. *Id.* at 579; *see also* FLA. STAT. § 39.806(1)(e) (2012).

case plan is not sufficient, in and of itself, to support [TPR].”¹²² The appellate court held that there was no evidence that the child’s welfare and safety was in danger by any of the father’s alleged abuses of the case plan such as lack of financial resources, completing the parenting plan, or moving to Oklahoma.¹²³ Finally, the court noted that the failure to comply with the case plan was “attribut[ed] to the [f]ather’s lack of financial resources” as well as DCF’s “failure to provide services.”¹²⁴ Thus the appellate court reversed.¹²⁵

Just because the parent fails to complete a case plan does not mean that his or her parental rights should be terminated.¹²⁶ In *A.H. v. Florida Department of Children & Family Services*,¹²⁷ the First District Court of Appeal agreed with the DCF’s concession that the evidence did not establish that the parent’s continuing involvement in his children’s lives threatened their safety or well-being because the DCF did not prove that the appellant failed to substantially comply with the case plan within the meaning of the *Florida Statutes*.¹²⁸ The *Florida Statutes* also require evidence that “the well-being and safety of the children would in any way be endangered if they were [with the] appellant.”¹²⁹

The parents appealed from an order terminating their parental rights based upon their failure to comply with the case plan in *D.M. v. Department of Children & Families*.¹³⁰ The Third District Court of Appeal affirmed as to the father but reversed as to the mother, finding that there was no “clear and convincing proof that [the mother’s] parental rights should be terminated.”¹³¹ Specifically, the evidence showed that the mother made consistent efforts to improve and was on track for additional progress.¹³² The first therapist’s testimony applied favorably to the mother, as did the testimony of the GAL.¹³³ In fact, the undisputed testimony was that the mother would not

122. *In re Interest of N.R.-G.*, 86 So. 3d at 580 (citing *In re Interest of N.F.*, 82 So. 3d at 1192; *I.Z. v. B.H.*, 53 So. 3d 406, 410 (Fla. 4th Dist. Ct. App. 2011); *R.F. v. Dep’t of Children & Family Servs. (In re Interest of S.F., P.F., & C.F.)*, 22 So. 3d 650, 654 (Fla. 2d Dist. Ct. App. 2009)).

123. *Id.*

124. *Id.*

125. *Id.* at 582.

126. *A.H. v. Fla. Dep’t of Children & Family Servs.*, 85 So. 3d 1213, 1217 (Fla. 1st Dist. Ct. App. 2012); *see also* FLA. STAT. § 39.806(1)(e)2.

127. 85 So. 3d 1213 (Fla. 1st Dist. Ct. App. 2012).

128. *Id.* at 1218–19; *see also* FLA. STAT. § 39.806(1)(c).

129. *A.H.*, 85 So. 3d at 1218; *see also* FLA. STAT. § 39.806(1)(c).

130. 79 So. 3d 136, 137 (Fla. 3d Dist. Ct. App. 2012).

131. *Id.* at 137, 139.

132. *Id.* at 139.

133. *Id.*

usually decline therapy.¹³⁴ In an interesting piece of dictum, the court rejected a challenge by one of the lawyers to the participation of the GAL.¹³⁵ That the GAL's recommendation regarding termination was contrary to the child's express wishes was not reversible error because, while a party, the child's wishes are not the sole governing factor in a TPR proceeding.¹³⁶

Thirty-three years ago, the Supreme Court of Florida held that parents were entitled to counsel in a TPR proceeding.¹³⁷ In *T.M.W. v. T.A.C.*,¹³⁸ the trial court failed to provide counsel to a father in a TPR proceeding.¹³⁹ In this case, the mother, rather than the DCF, filed a petition to terminate the father's parental rights.¹⁴⁰ The petition alleged that, *inter alia*, the father's rights should be terminated because he had been sentenced to life in prison for attempted first degree murder.¹⁴¹ "The trial court heard both [the father's *pro se*] motion to dismiss and the petition to terminate parental rights at a single telephonic hearing" as the father was in prison.¹⁴² Although there was no transcript of the hearing provided to the appellate court, the father, *pro se* before the appellate court, argued that "the trial court did not advise him that he had a right to counsel, and denied [him counsel] when he asked for representation even though he [told] the trial court that he was indigent."¹⁴³ The appellate court held that there was no evidence that the court appointed counsel for the father, nor was there evidence that the judge made "written findings indicating that [the father] waived that right."¹⁴⁴ The appellate court noted that, even in the context of a private TPR proceeding, under the state statute there is the right to counsel as the law makes no distinction in the type of proceeding.¹⁴⁵ Incredibly, "the trial court [also] held that [the father] did not have standing to contest the TPR because he was not listed on the putative father registry, was not on the child's birth certificate, [and] had never been named as the father by any court," nor had he ever paid child support.¹⁴⁶

134. *Id.* at 139–40.

135. *D.M.*, 79 So. 3d at 140.

136. *Id.* (citing FLA. STAT. § 39.810 (2012)); *see also* FLA. STAT. § 39.807(2)(b). It appears that one of the children was not represented by counsel. *See D.M.*, 79 So. 3d at 137.

137. *In re Interest of D.B. & D.S.*, 385 So. 2d 83, 91 (Fla. 1980).

138. 80 So. 3d 1103 (Fla. 5th Dist. Ct. App. 2012).

139. *Id.* at 1105.

140. *Id.* at 1104.

141. *Id.*

142. *Id.* at 1104–05.

143. *T.M.W.*, 80 So. 3d at 1105.

144. *Id.* at 1106.

145. *Id.* at 1105–06; *see also* FLA. STAT. § 39.807(1)(a) (2012).

146. *T.M.W.*, 80 So. 3d at 1105.

The appellate court found that there was “a final judgment of paternity in the record . . . establish[ing] that [the individual was] the father of the child.”¹⁴⁷

IV. JUVENILE DELINQUENCY

A juvenile appealed from a conviction of trespass on school grounds.¹⁴⁸ In *B.C. v. State*,¹⁴⁹ the issue on appeal was whether there was any evidence that the school principal or his designee ordered the respondent to leave the school grounds.¹⁵⁰ That requirement is part of the statute, and thus, the First District Court of Appeal reversed.¹⁵¹ The person who ordered the individual to leave was a deputy police officer who described himself as a “‘school board police officer’ assigned to [the] school.”¹⁵² The evidence demonstrated that the police officer “was not under the ‘command’ of the . . . principal and had no ‘connection’ with the principal’s office.”¹⁵³ In reversing the decision, the court recognized conflict with the Third District Court of Appeal’s decision in *D.J. v. State*.¹⁵⁴ To the extent that the opinion did not comport with the Third District opinion, the First District certified conflict.¹⁵⁵

As previous surveys have indicated, among the various dispositional alternatives available in Florida is an order of restitution.¹⁵⁶ In *D.W. v. State*,¹⁵⁷ the juvenile appealed the restitution order requiring her to pay \$400 to her grandmother.¹⁵⁸ The Second District Court of Appeal reversed based upon procedural irregularities.¹⁵⁹ The juvenile court ordered the restitution matter to be heard by a magistrate.¹⁶⁰ The appellate court reversed because first, it could “[find] no . . . authority that allowed the juvenile court to delegate its judicial determination of the amount of restitution to a magistrate,” and second, the magistrate relied upon a rule of juvenile procedure related to de-

147. *Id.*

148. *B.C. v. State*, 70 So. 3d 666, 668 (Fla. 1st Dist. Ct. App. 2011); *see also* FLA. STAT. § 810.097(2).

149. 70 So. 3d 666 (Fla. 1st Dist. Ct. App. 2011).

150. *Id.* at 669.

151. *Id.* at 671.

152. *Id.* at 668.

153. *Id.*

154. *B.C.*, 70 So. 3d at 669; *see also* *D.J. v. State*, 43 So. 3d 176, 177 (Fla. 3d Dist. Ct. App.), *review granted*, 47 So. 3d 1287 (Fla. 2010), *and rev’d*, 67 So. 3d 1029 (Fla. 2011).

155. *B.C.*, 70 So. 3d at 669, 671.

156. *See* Dale, *2010 Survey of Juvenile Law*, *supra* note 1, at 150; Michael J. Dale, *2009 Survey of Juvenile Law*, 34 NOVA L. REV. 199, 216 (2009).

157. 77 So. 3d 804 (Fla. 2d Dist. Ct. App. 2011).

158. *Id.* at 804.

159. *Id.*

160. *Id.*

pendency cases which would allow the child to file exception for the magistrate's ruling.¹⁶¹ Based upon this strange behavior—the appellate court also noted “that the magistrate usually [handles] dependency hearings and has little experience with . . . restitution,”—the appellate court reversed.¹⁶²

In a case involving a rather minor contretemps between a police officer and a juvenile, the juvenile appealed from adjudication on two grounds—providing a false name and resisting an officer without violence.¹⁶³ Under the facts of the case, the police officer saw a group of individuals standing near a “no loitering or soliciting” sign.¹⁶⁴ “There [is] no evidence that the officer in any way restrained [the] appellant's . . . movement . . . or in any way indicated to [the] appellant and his friends that they were not free to leave.”¹⁶⁵ Thus, when the appellant provided a false name to the officer, the two “were engaged in a consensual encounter.”¹⁶⁶ If there was no lawful detention or arrest, the juvenile could not be guilty of the crime of providing a false name.¹⁶⁷ Furthermore, evidence of the existence of the no trespassing sign was insufficient to establish that the property was posted in a way within the meaning of Florida law so that the officer would have probable cause to arrest the appellant for trespassing.¹⁶⁸

At the dispositional stage of a delinquency case, the court is given the authority to deviate from the recommendations of the Department of Juvenile Justice (DJJ) when the DJJ issues a predisposition report (PDR).¹⁶⁹ In *M.H. v. State*,¹⁷⁰ the juvenile “pled guilty to possession with intent to sell, manufacture, or deliver a controlled substance.”¹⁷¹ The trial court deviated from the recommendations of probation and placed the juvenile in a moderate-risk facility.¹⁷² The test for deviation is contained in *E.A.R. v. State*.¹⁷³ There, the Supreme Court of Florida set out a two-part test which makes deviation a

161. *Id.* at 805 (citing *Mansell v. State*, 498 So. 2d 604, 604 (Fla. 2d Dist. Ct. App. 1986)).

162. *D.W.*, 77 So. 3d at 805.

163. *D.T. v. State*, 87 So. 3d 1235, 1237–38 (Fla. 4th Dist. Ct. App. 2012).

164. *Id.* at 1237.

165. *Id.* at 1238.

166. *Id.* (citing *State v. Page*, 73 So. 3d 351, 353 (Fla. 4th Dist. Ct. App. 2011); *O.A. v. State*, 754 So. 2d 717, 718 (Fla. 4th Dist. Ct. App. 1998)).

167. *Id.* (citing *K.D. v. State*, 43 So. 3d 829, 829 (Fla. 1st Dist. Ct. App. 2010) (per curiam)).

168. *D.T.*, 87 So. 3d at 1240 (citing *Baker v. State*, 813 So. 2d 1044, 1045 (Fla. 4th Dist. Ct. App. 2002)).

169. *See* FLA. STAT. § 985.433(7)(b) (2012); *see also* *M.H. v. State*, 69 So. 3d 325, 326 (Fla. 1st Dist. Ct. App. 2011).

170. 69 So. 3d 325 (Fla. 1st Dist. Ct. App. 2011).

171. *Id.* at 326.

172. *Id.*

173. 4 So. 3d 614, 638 (Fla. 2009).

difficult matter.¹⁷⁴ The trial court must do more than place generalized reasons on the record.¹⁷⁵ Rather, it must engage in a well-reasoned and complete analysis of the PDR of the court and the type of facility to which the court intends to send the child.¹⁷⁶

A second case involving a deviation from a recommendation of the DJJ in a delinquency case is *B.L.R. v. State*.¹⁷⁷ There the First District Court of Appeal reversed a court order committing a child to a maximum-risk facility rather than a high-risk facility as suggested by the DJJ.¹⁷⁸ Applying *E.A.R.*, the appellate court held that the trial court may not deviate just because it disagrees with the disposition recommended by the DJJ, and it may neither “‘parrot’ [n]or ‘regurgitate’ the information in the PDR to support [the] departure” decision.¹⁷⁹

V. CONCLUSION

In the survey year, the Florida appellate courts focused heavily on dependency and TPR cases.¹⁸⁰ The Supreme Court of Florida was inactive regarding these issues.¹⁸¹ And finally, in February of 2012, the *Nova Law Review* sponsored a symposium on the implementation of the American Bar Association Model Act governing representation of children in abuse, neglect, and dependency proceedings, co-sponsored by the American Bar Association.¹⁸² *Nova Law Review* published eight articles from authors around the country.¹⁸³ Included are articles directed to the ABA Model Act¹⁸⁴ and

174. *See id.*

175. *See id.*

176. *See id.*; *see also* C.M.H. v. State, 25 So. 3d 678, 679 (Fla. 1st Dist. Ct. App. 2010) (per curiam) (quoting *E.A.R.*, 4 So. 3d at 638).

177. 74 So. 3d 173, 174 (Fla. 1st Dist. Ct. App. 2011) (per curiam).

178. *Id.*

179. *Id.* at 176 (quoting *E.A.R.*, 4 So. 3d at 633, 638); *see also* M.J.S. v. State, 6 So. 3d 1268, 1270 (Fla. 1st Dist. Ct. App. 2009) (per curiam) (quoting *E.A.R.*, 4 So. 3d at 638); N.B. v. State, 911 So. 2d 833, 835 (Fla. 1st Dist. Ct. App. 2005) (citing *K.M. v. State*, 891 So. 2d 619, 620 (Fla. 3d Dist. Ct. App. 2005)).

180. *See* S.T. v. Dep’t of Children & Family Servs. (*In re* Interest of K.C. & D.C.), 87 So. 3d 827, 828 (Fla. 2d Dist. Ct. App. 2012); D.A. v. Dep’t of Children & Family Servs., 84 So. 3d 1136, 1137 (Fla. 3d Dist. Ct. App. 2012); S.S. v. Dep’t of Children & Families, 81 So. 3d 618, 620 (Fla. 1st Dist. Ct. App. 2012); T.M.W. v. T.A.C., 80 So. 3d 1103, 1104 (Fla. 5th Dist. Ct. App. 2012); D.M. v. Dep’t of Children & Families, 79 So. 3d 136, 137 (Fla. 3d Dist. Ct. App. 2012).

181. *See Florida Supreme Court 2012 Opinions*, FLA. SUPREME CT., <http://www.floridasupremecourt.org/decisions/2012/index.shtml> (last visited Feb. 24, 2013).

182. Athornia Steele, *Introduction to the Symposium*, 36 NOVA L. REV. 309, 309 n.* (2012).

183. *See generally* Symposium, *supra* note 2.

the role of counsel or lack of counsel for children in Connecticut,¹⁸⁵ Florida,¹⁸⁶ Georgia,¹⁸⁷ New York,¹⁸⁸ and Washington.¹⁸⁹

184. Steele, *supra* note 182, at 309–11; *see generally* Amy Harfeld, *The Right to Counsel Landscape After Passage of The ABA Model Act—Implications for Reform*, 36 NOVA L. REV. 325 (2012); Andrea Khoury, *The True Voice of the Child: The Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, 36 NOVA L. REV. 313 (2012).

185. Steele, *supra* note 182, at 310; *see generally* Carolyn Signorelli, *Connecticut’s Road to “Real” Attorneys for Kids*, 36 NOVA L. REV. 391 (2012).

186. Steele, *supra* note 182, at 310–11; *see generally* Clark Peters & John Walsh, *Fiscal Returns on Improved Representation of Children in Dependency Court: The State of the Evidence*, 36 NOVA L. REV. 435 (2012); Michael J. Dale & Louis M. Reidenberg, *The Kids Aren’t Alright: Every Child Should Have an Attorney in Child Welfare Proceedings in Florida*, 36 NOVA L. REV. 345 (2012).

187. Steele, *supra* note 182, at 310; *see generally* Ira Lustbader & Erik Pitchal, *Implementation of the Right to Counsel for Children in Juvenile Court Dependency Proceedings: Lessons from Kenny A.*, 36 NOVA L. REV. 407 (2012).

188. Steele, *supra* note 182, at 310; *see generally* Gary Solomon & Tamara Steckler, *Perspective: New Era in Representing Children*, 36 NOVA L. REV. 387 (2012).

189. Steele, *supra* note 182, at 310; *see generally* Erin Shea McCann & Casey Trupin, *Kenny A. Does Not Live Here: Efforts in Washington State to Improve Legal Representation for Children in Foster Care*, 36 NOVA L. REV. 363 (2012).

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I. INTRODUCTION

The 2010 school year began the same for Tyler Clementi as it had for college students the year before, and as it will for others in the future at Rutgers University—full of excitement and promise—but ended abruptly on September 22, 2010, when Tyler jumped off of the George Washington

Bridge and plunged into the Hudson River.¹ Tyler, an accomplished violinist and talented individual,² took his own life after “his roommate . . . secretly used a webcam to stream [Tyler]’s romantic [encounter] with another man over the [i]nternet.”³ Word of Tyler’s death reached Rutgers in an ironic fashion: On the same day the University had begun a campaign to raise awareness of the “use and abuse of new technology.”⁴ The unfortunate circumstances leading up to Tyler’s suicide created more than a splash.⁵ Tyler’s death has produced a wave of change evidenced in the New Jersey Legislature’s recent amendments to anti-bullying legislation: The “Anti-Bullying Bill of Rights.”⁶

As methods of communication have advanced, our lives have become laced with technology, establishing new methods of transmitting and sharing information as well as creating byproducts; unforeseen side effects produced as a direct result of internet social networking.⁷ Cyberbullying is recognized as “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”⁸ Essentially, any form of harassment, intimidation, or bullying (HIB) that is executed by means of technology may constitute cyberbullying.⁹

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1. See Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1.

2. *Id.*

3. Tyler Clementi, N.Y. TIMES TOPICS, http://topics.nytimes.com/top/reference/timestopics/people/c/tyler_clementi/index.html (last updated Mar. 16, 2012).

4. Foderaro, *supra* note 1.

5. See *id.*

6. See N.J. STAT. ANN. § 18A:37-13.1-2, -16 to -30 (West 2012).

7. See Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1104-06 (2011).

8. SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE 1 (2010) [hereinafter HINDUJA & PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE], available at http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf.

9. BARBARA C. TROLLEY & CONSTANCE HANEL, CYBER KIDS, CYBER BULLYING, CYBER BALANCE 33-34, 39 (2012); see *What Is Cyberbullying*, STOPBULLYING.GOV, <http://www.stopbullying.gov/cyberbullying/what-is-it/index.html> (last visited Feb. 24, 2013).

Cyberbullying presents a novel issue for schools and adults because exposure is more difficult to detect, control, and monitor than traditional forms of bullying, like pushing a peer into lockers or one student taunting another.¹⁰ School districts also “walk a very fine line in prohibiting cyberbullying by conducting a balancing act between a student’s constitutional rights and the policing of off-campus student-on-student harassment.”¹¹ Cyberbullying has gained increasing attention in society as a result of the spike in youth suicides and violence resulting from the behavior.¹² Enough lives have been lost to cyberbullying for anti-bullying activists to coin the term “bullycide”—“a suicide provoked by the depression and distress that results from bullying and harassment.”¹³ Several states around the nation have been forced to draft or reform anti-bullying legislation in order to keep pace with technology and combat the growing problem, while others have struggled with formulating an approach.¹⁴ New Jersey has enacted the “Anti-Bullying Bill of Rights”—the most stringent law of its kind—in order to treat this growing epidemic threatening students of all ages.¹⁵

This article will begin with an overview of cyberbullying divided into the methods, causes, evidentiary findings, and outcomes of victims who are bullied through the advancement and popularity of social networking sites.¹⁶ Next, legislative solutions that address the evasive characteristics of cyberbullying will be discussed in relation to formulating a thorough law.¹⁷ Then, the recently amended New Jersey “Anti-Bullying Bill of Rights” will provide a model framework for the nation in addressing cyberbullying.¹⁸ This analysis will include the valuable lessons learned through the Tyler Clementi and

10. *What Is Cyberbullying*, *supra* note 9.

11. Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 659–60 (2009).

12. Susan Hayes, *Cyberbullying Is a Serious Problem*, in CYBERBULLYING 11, 11 (Lauri S. Friedman ed., 2011).

13. Jason A. Wallace, Note, *Bullycide in American Schools: Forging a Comprehensive Legislative Solution*, 86 IND. L.J. 735, 741 (2011); *see also* SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., CYBERBULLYING RESEARCH SUMMARY: CYBERBULLYING AND SUICIDE 1 (2010) [hereinafter HINDUJA & PATCHIN, CYBERBULLYING RESEARCH SUMMARY], available at http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf (referring to suicides attributed to cyberbullying as “cyberbullicide”).

14. *See* BULLY POLICE USA, <http://www.bullypolice.org> (last visited Feb. 24, 2013).

15. Winnie Hu, *Bullying Law Puts New Jersey Schools on Spot*, N.Y. TIMES, Aug. 31, 2011, at A1; *see* HINDUJA & PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 8, at 2.

16. *See* discussion *infra* Part II.

17. *See* discussion *infra* Part III.

18. *See* discussion *infra* Part III.A.

Dharun Ravi case in New Jersey,¹⁹ which have helped foster the improvements in the law.²⁰ A breakdown of key anti-bullying law components will follow the New Jersey statute for comparison.²¹ Additionally, perceived weaknesses in the New Jersey law will be examined.²² Furthermore, this article will address the gaps state legislators must bridge in existing laws to craft effective legislation that curtails cyberbullying.²³

II. CYBERBULLYING: THE “CANCER” OF INTERNET SOCIAL NETWORKING

Words have always been referred to as weapons, but innovations in technology and the enhancement of communications have reengineered the amount of damage words can cause in the twenty-first century.²⁴ Bullying has become the cancer of online social networking—exposing victims to harsher, more frequent, and even unprovoked attacks—evidenced in the increasing number of suicides as a result of harmful behavior that occurs through modern forms of communication.²⁵ Traditional bullying is categorized by its direct and physical nature that occurs in a more controlled setting, whereas cyberbullying is characterized by intimidation through a virtual setting without physical constructs.²⁶ Further, cyberbullying can occur through phone calls, text messages, e-mails, or posts on social networking sites—limitless lines of communication that are at our fingertips.²⁷

Cyberbullying can be executed in various ways, directly or indirectly, through harassment, cyberstalking, denigration, impersonation, or outing.²⁸ Harassment involves “[r]epeatedly sending offensive and insulting mes-

19. See Indictment at 1–4, *State v. Ravi*, No. 11-04-00596 (N.J. Super. Ct. App. Div. Mar. 16, 2012).

20. See BULLY POLICE USA, *supra* note 14.

21. See discussion *infra* Part IV.A.

22. See discussion *infra* Part IV.B.

23. See discussion *infra* Part IV.C.

24. See Turbert, *supra* note 11, at 652.

25. See HINDUJA & PATCHIN, CYBERBULLYING RESEARCH SUMMARY, *supra* note 13, at 1; Michel Walrave & Wannes Heirman, *Towards Understanding the Potential Triggering Features of Technology*, in TRUTHS AND MYTHS OF CYBER-BULLYING: INTERNATIONAL PERSPECTIVES ON STAKEHOLDER RESPONSIBILITY AND CHILDREN’S SAFETY 27, 40 (Shaheen Shariff & Andrew H. Churchill eds., 2010) (inferring the “toxic effect” of cyberbullying on schools).

26. TROLLEY & HANEL, *supra* note 9, at 33–34; Walrave & Heirman, *supra* note 25, at 35–36.

27. TROLLEY & HANEL, *supra* note 9, at 33; see A. James Spung, Comment, *From Backpacks to Blackberries: (Re)Examining New Jersey v. T.L.O. in the Age of the Cell Phone*, 61 EMORY L.J. 111, 119 (2011).

28. TROLLEY & HANEL, *supra* note 9, at 39.

sages” to an individual, becoming “[t]he online equivalent of direct bullying.”²⁹ Cyberstalking occurs when technology is used to harness control over an abusive relationship through use of a threat or fear.³⁰ Denigration is a form of cyberbullying that involves “[s]ending or posting cruel gossip or rumors about a person [in order] to damage his or her reputation or friendships.”³¹ Impersonation is a result of one person pretending to be another to “make the person look bad” or even damage his or her reputation.³² Finally, outing pertains to “[s]haring someone’s secrets or embarrassing information,” which can be obtained through deception.³³ These forms of online bullying can be achieved either directly by the bully or indirectly through another person who serves as a “proxy”—an individual acting on the behalf of the bully.³⁴ This advanced form of intimidation can be attributed to the increased sense of anonymity by bullies, the continuous access to the victim, a lesser likelihood of detection by adults, the larger audience, and lack of physical contact required to carryout the harassment.³⁵ Although these methods and tools of cyberbullying are not exhaustive, they provide a greater understanding of what is required to lead to better detection, protection, and prevention through legislation.³⁶

The prevalence of cyberbullying is very often underestimated by parents and underreported by victims in research.³⁷ While cyberbullying may not be continuous, victims are often left with lasting psychological effects such as “anger, fear, helplessness, and loss of concentration” for a prolonged period of time after the occurrence.³⁸ Cyberbullying presents a “growing problem because increasing numbers of kids [and young adults] are using and have completely embraced interactions via computers and cell phones.”³⁹ As technology continues to progress, so do the methods of destroying self-esteem and disseminating harmful information about others—graying the

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. TROLLEY & HANEL, *supra* note 9, at 39.

34. *Id.* at 34.

35. See Walrave & Heirman, *supra* note 25, at 34–35.

36. *See id.* at 33–34.

37. *Id.* at 28.

38. See Dianne L. Hoff & Sidney N. Mitchell, *Gender and Cyber-bullying: How Do We Know What We Know?*, in TRUTHS AND MYTHS OF CYBER-BULLYING: INTERNATIONAL PERSPECTIVES ON STAKEHOLDER RESPONSIBILITY AND CHILDREN’S SAFETY 51, 60 (Shaheen Shariff & Andrew H. Churchill eds., 2010).

39. HINDUJA & PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 8, at 2.

line between direct and indirect methods of bullying—in several taps of the keyboard and just a few clicks of a mouse.⁴⁰

A. *Methods of Cyberbullying*

Cyberbullying has spread alongside the exploding popularity of social networking sites like MySpace and Facebook, but has also gained momentum through cell phones and smart phones.⁴¹ This type of intimidation is easily distinguished from the more traditional forms of bullying because technology separates the bully from the victim and removes the “face-to-face” confrontation that is normally associated with bullying.⁴² Harassment morphs into cyberbullying when technology, such as social networking, is used as the conduit for delivery of rumors, insults, or hurtful messages.⁴³ This harassment can be accomplished directly—through text, email, or instant messages—or indirectly where social networking sites are used to post or disseminate harmful messages about the victim.⁴⁴ However, the line between direct and indirect cyberbullying has blurred as technology continues to shrink “the distance between worlds, which are separated by time and space in reality” making the resulting harm more serious.⁴⁵

1. Direct Cyberbullying

While direct bullying is often associated with actions like “hitting, kicking, shoving, [and] spitting,” cyberbullying can still be performed directly without any of these actions.⁴⁶ Bullies can utilize tactics such as “taunting, teasing, . . . [or] verbal harassment” to effectuate bullying.⁴⁷ These methods are made possible by technology and often do not require a physical assault in order to trigger or result in more serious outcomes, such as suicide.⁴⁸ Di-

40. *See id.* at 1–2.

41. Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 641 (2011).

42. *Id.* at 650.

43. *See* Natasha Rose Manuel, Comment, *Cyber-Bullying: Its Recent Emergence and Needed Legislation to Protect Adolescent Victims*, 13 LOY. J. PUB. INT. L. 219, 221 (2011).

44. *Cyberbullying*, U.N.C. SCH. OF L., <http://www.unc.edu/courses/2010spring/law/357c/001/Cyberbully/criminal.html> (last visited Feb. 24, 2013).

45. *See* Walrave & Heirman, *supra* note 25, at 36.

46. *See* Patti Agatston, *Cyber Bullying: Bullying in the Digital Age*, NAT’L CENTER FOR MENTAL HEALTH PROMOTION & YOUTH VIOLENCE PREVENTION, http://www.promoteprevent.org/webfm_send/1152 (last visited Feb. 24, 2013).

47. *Id.*

48. Wallace, *supra* note 13, at 741; Agatston, *supra* note 46.

rect bullying is no longer required in order to inflict physical pain on individuals because psychological harm leads victims to inflict pain upon themselves.⁴⁹ Thus, while direct bullying appears to pose a viable threat, the inherent indirect nature of cyberbullying creates a more serious danger as a result of the relationship with the bully; “psychologists believe that a victim of cyberbullying may experience ‘low self-esteem, depression, chronic illness . . . school problems, familial problems, and suicidal ideation.’”⁵⁰

2. Indirect Cyberbullying

Cyberbullying can also be performed through indirect means, often referred to as bullying by “proxy.”⁵¹ Indirect forms of cyberbullying include using another’s social networking account to generate harassing posts, messages, or spreading rumors about the victim.⁵² Bullies can manipulate, impersonate, or “send inflammatory messages to online discussion groups or social networks under the guise of the victim.”⁵³ Although direct actions in traditional bullying can be distinguished based on the actor and behavior, cyberbullying blurs the line between direct and indirect bullying.⁵⁴ For example, cell phones and accounts that belong to individuals are easily hijacked and accessed without the owner’s knowledge or consent.⁵⁵ This makes the bullying less direct and more indirect because the perceived actor is operating as a “proxy” for the bully by generating the harassing messages at the victim’s expense.⁵⁶ Therefore, the distinction between direct and indirect bullying has decreased as the function and use of technology continues to increase mobility and accessibility.⁵⁷

B. Causes of Cyberbullying

The purpose of cyberbullying “is similar to that of traditional bullying in that the aggressor seeks power and control.”⁵⁸ There are often “three primary motivations for conventional bullying [including] the need to demonstrate dominance, to receive a reward (e.g. admiration by peers) and finally,

49. Wallace, *supra* note 13, at 741.

50. Lipton, *supra* note 7, at 1112; Turbert, *supra* note 11, at 655.

51. TROLLEY & HANEL, *supra* note 9, at 34.

52. *See id.* at 40; Agatston, *supra* note 46.

53. Lipton, *supra* note 7, at 1114.

54. *See id.* at 1113–14.

55. *See id.* at 1114–15; Spung, *supra* note 27, at 119.

56. TROLLEY & HANEL, *supra* note 9, at 34.

57. *See* Lipton, *supra* note 7, at 1113–14.

58. Turbert, *supra* note 11, at 653.

the satisfaction of causing suffering and injury [to] a victim.”⁵⁹ The lack of social cues, such as observing the victim’s reaction, may leave some bullies “unconvinced that they are actually harming or hurting someone badly.”⁶⁰ Coincidentally, the lack of social cues with the victim can leave the bully “genuinely convinced that they are not doing anything wrong.”⁶¹ Additionally, the physical and social disconnect between the bully and the victim can be attributed to participation in cyberbullying by well-rounded students; individuals that would not typically participate in traditional forms of bullying.⁶²

Many cyberbullies perform or continue their actions because “some adults have been slow to respond to cyberbullying” and, therefore, a belief exists that “there are little to no consequences for their actions” as a result.⁶³ Technology has innovated traditional bullying and left statutes powerless or ineffective because of the differentiating characteristics that separate cyber from ordinary forms of bullying.⁶⁴ “Until recently, these [i]nternet-based forms of communication [like social networking sites] and file sharing were accessible exclusively through personal computers.”⁶⁵ Currently, smartphones incorporate wireless access to the internet, simplifying one’s ability to enter social networking sites virtually anywhere; therefore, taking even less effort than before to reach an audience.⁶⁶ The accessibility associated with cyberbullying has become a factor in promulgating its expansion and discouraging victims from reporting its occurrence.⁶⁷ Some of the main attractions of cyberbullying—higher anonymity, increased access, lower detection, a greater audience, and lack of physical contact—also act as catalysts in avoiding legislation attempting to address this harmful activity.⁶⁸

1. Increased Anonymity

Online anonymity creates such a perception that “may lead pupils to think that they can get away with cyberbullying without being sanctioned.”⁶⁹

59. Walrave & Heirman, *supra* note 25, at 41.

60. *Id.*

61. *Id.*

62. See TROLLEY & HANEL, *supra* note 9, at 35, 43; Lipton, *supra* note 7, at 1114.

63. HINDUJA & PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 8, at 2.

64. See Goodno, *supra* note 41, at 650–53.

65. Spung, *supra* note 27, at 117.

66. See *id.* at 117–18.

67. See TROLLEY & HANEL, *supra* note 9, at 41–42.

68. See Goodno, *supra* note 41, at 650–53.

69. Walrave & Heirman, *supra* note 25, at 34.

While anonymity can be viewed as a benefit in some respects, this feature of cyberbullying “strip[s] away non-verbal communication cues by the victim,” and does not allow for the bully to witness the victim’s reaction.⁷⁰ Although anonymity may create a perception of a less personal threat, or even a cowardly attempt to bully another, ignoring the behavior usually results in more inflammatory comments.⁷¹ As a result, anonymity often leads bullies to “post messages or create websites . . . to be more hurtful because they can launch their invective with little fear of reprisal.”⁷² The anonymous nature of cyberbullying causes the bully to act more aggressively⁷³ and the victim to suffer greater humiliation because of the unknown, larger audience and resulting embarrassment.⁷⁴ When anonymity is partnered with continuous access, lower detection rates, a larger audience for cyberbullies to reach, and no required physical contact, the totality of circumstances can create a more devastating scenario for the victim.⁷⁵ These characteristics of cyberbullying can be directly linked to extreme actions of victims, like suicide.⁷⁶ “The anonymity provided by the [i]nternet may increase the volume of abusive conduct because it may encourage individuals who would not engage in such conduct offline to do so in the anonymous virtual forum provided by the [i]nternet”⁷⁷ Subsequently, “anonymity naturally makes it more difficult for victims and law enforcement officers to identify and locate cyber-wrongdoers.”⁷⁸

2. Continuous Access

Historically, bullying was something that occurred before, after, or during school, providing victims with an eventual escape.⁷⁹ Even though traditional bullying can occur anywhere, access to the victim is often limited.⁸⁰ Cyberbullying “victims often do not know who the bully is, or why they are

70. *Id.* at 33, 39.

71. *See id.* at 41; Shira Auerbach, Note, *Screening Out Cyberbullies: Remedies for Victims on the Internet Playground*, 30 CARDOZO L. REV. 1641, 1643–44 (2009).

72. Auerbach, *supra* note 71, at 1643–44.

73. *Id.* at 1643–44, 1644 n.17.

74. *See* Walrave & Heirman, *supra* note 25, at 38–39.

75. *See id.* at 34–39.

76. Hayes, *supra* note 12, at 12.

77. Lipton, *supra* note 7, at 1114.

78. *Id.*

79. *See* Walrave & Heirman, *supra* note 25, at 35–36.

80. *See id.*

being targeted.”⁸¹ Traditional bullying allows a victim to know his or her attacker and possibly retreat to safety.⁸² Having “24/7 accessibility to the victim is a new issue,” as a result of social networking and increased availability of internet access.⁸³ While “[t]raditional types of bullying occur mostly at school, on the school bus, or walking to and from school,” cyberharassment is novel because—unlike traditional notions of intimidation—limits of “time and space” do not exist.⁸⁴ For example, “if a victim moves offline, this does not stop others from posting harmful things about her that may continue to harm her personal and professional development.”⁸⁵ Improvements in technology allow “minors to extend bullying episodes beyond the confines” of the classroom.⁸⁶ This scenario provides the bully an opportunity to continue his or her attack on the victim, even though school is not in session or there is no longer any physical contact between the bully and the victim.⁸⁷ Bullies’ access to their victims has been furthered by advancements and the increasing popularity of social networking sites where “the home environment” is no longer considered “a safe retreat.”⁸⁸ Therefore, “[o]nline communications . . . have a permanent quality that real world conduct lacks,” intensifying the negative effects resulting from the bullying.⁸⁹

3. Lower Detection

Cyberbullying is very difficult to observe because it often occurs “beyond the boundaries of school supervision,” therefore, victimized students fail to report the incident to parents or teachers.⁹⁰ While “many forms of traditional bullying share an increased likelihood of remaining unnoticed for teachers and school administrators,” the lower detection rate of cyberbullying—alongside anonymity and access to the victim—also makes it less likely to be reported as a result of its inconspicuous nature.⁹¹ In addition, “[o]ne striking variation [from traditional bullying] is that cyberbullies often have

81. HINDUJA & PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 8, at 2.

82. *See id.*

83. Walrave & Heirman, *supra* note 25, at 36.

84. *Id.*

85. Lipton, *supra* note 7, at 1113.

86. Walrave & Heirman, *supra* note 25, at 35.

87. *See id.* at 35–36.

88. HINDUJA & PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 8, at 1; Walrave & Heirman, *supra* note 25, at 36.

89. Lipton, *supra* note 7, at 1112.

90. Walrave & Heirman, *supra* note 25, at 37.

91. *See id.* at 34–38.

good relationships with their teachers, thus making their detection even harder.”⁹² Although several scenarios involving traditional bullying can remain undetected by adults, adolescents remain more inclined to “engage in covert types of bullying [like cyberbullying], because they believe that adults and bystanders are unlikely to intervene.”⁹³

Most cyberbullying occurs in group-chats, through social networking websites, and via text messages, making detection more challenging.⁹⁴ It has even begun spreading to “portable gaming devices, in 3-D virtual worlds and social gaming sites, [including] newer interactive sites such as Formspring and ChatRoulette.”⁹⁵ The use of cell phones and computers removes physical restrictions, allowing adolescents to take “pictures in a bedroom, a bathroom, or another location where privacy is expected,” and share the images with another who subsequently posts or distributes the photo online where privacy is nonexistent.⁹⁶ A clear example of this behavior is exemplified in more recent events, like the Tyler Clementi and Dharun Ravi case, where video footage was captured and streamed over the internet for others to “see, rate, tag, and discuss.”⁹⁷

4. Greater Audience, Less Physical Contact

In addition to higher anonymity, increased access, and lower detection rates, cyberbullying targets—and often reaches—a larger audience than traditional forms of bullying.⁹⁸ While bullying can subject the victim to several or many members of an audience, cyberbullying amplifies “hurtful texts and images” by exposing the individual to a virtually “unlimited audience in a very short period of time.”⁹⁹ This feature of cyberbullying is compounded by attributing a more “permanent quality [to the actions] that real world conduct lacks,” because the posts or messages often remain accessible to the audience for a prolonged or indefinite period of time.¹⁰⁰ The “viral” nature of information through social networks “can greatly expand the extent of victimiza-

92. TROLLEY & HANEL, *supra* note 9, at 43.

93. Walrave & Heirman, *supra* note 25, at 37–38.

94. HINDUJA & PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 8, at 1.

95. *Id.*; see Walrave & Heirman, *supra* note 25, at 36.

96. HINDUJA & PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 8, at 1; Walrave & Heirman, *supra* note 25, at 36.

97. Indictment, *supra* note 19, at 1; HINDUJA & PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 8, at 1; Foderaro, *supra* note 1.

98. Walrave & Heirman, *supra* note 25, at 37–38.

99. *Id.* at 38.

100. Lipton, *supra* note 7, at 1112.

tion” when the bully is aware “that the embarrassing or harmful content is being viewed and shared—perhaps repeatedly—by so many people.”¹⁰¹ The rampant nature of bully-shared information online creates the appearance of audience approval, which parallels to the gratification a traditional bully receives from a chanting crowd.¹⁰²

Also, cyberbullying requires no physical contact in order to carry out an attack on a victim.¹⁰³ This magnifies the likelihood that more individuals will participate in the bullying since the need for “physical confrontation” has been removed by technology.¹⁰⁴ “[I]n cyberbullying, the perpetrator is less likely to see any suffering from the victim, which might reduce the gratification for [those] who enjoy watching pain and suffering” and leave the bully unfulfilled or unaffected by his or her actions.¹⁰⁵ The lack of physical contact does not allow the victim to merely step away, or remove him or herself from the bullying; “in today’s interconnected world that is not a viable option, as people who are forced offline forgo important personal and professional opportunities.”¹⁰⁶ “Since emotional feedback is missing, cyberbullies may assess quite wrongly the damage they are causing,” and exercise less restraint in what is said or written.¹⁰⁷ Finally, “it is often easier to be cruel using technology because cyberbullying can be done from a physically distant location, and the bully doesn’t have to see the immediate response by the target.”¹⁰⁸ Furthermore, statistics reporting cyberbullying frequently fail to capture the actual impact this behavior will have on victims because the defining characteristics of cyberbullying—anonymity, access, detection, audience, and lack of physical contact—make it inherently difficult to accurately project.¹⁰⁹

C. *Statistical Evidence*

The high occurrence of cyberbullying can be attributed to a combination of the frequency minors use the internet and the increasing popularity of so-

101. SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., ELECTRONIC DATING VIOLENCE: A BRIEF GUIDE FOR EDUCATORS AND PARENTS 2 (2011), available at http://www.cyberbullying.us/electronic_dating_violence_fact_sheet.pdf.

102. See Walrave & Heirman, *supra* note 25, at 38–39.

103. Goodno, *supra* note 41, at 652.

104. *Id.*

105. Walrave & Heirman, *supra* note 25, at 41.

106. Lipton, *supra* note 7, at 1113.

107. Walrave & Heirman, *supra* note 25, at 39–40.

108. HINDUJA & PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 8, at 2.

109. See *id.* at 1–2.

cial networking sites.¹¹⁰ The number of youths who have experienced cyberbullying—“ranging from 10-40% or more”—is dependent on the age of the group being studied alongside the definition used to describe cyberbullying.¹¹¹ In 2010, a study based on a random sample of 4400 eleven to eighteen-year-olds revealed that 20% of the participants had become a victim of cyberbullying at some point.¹¹² Approximately “35% of kids have been threatened online,” and “[n]early one in five has experienced it more than once.”¹¹³ Accordingly, about “53% of kids admit having said something mean or hurtful to another person online,” where “[m]ore than one in three have done it more than once.”¹¹⁴ Perhaps the most disturbing statistic indicates that “75% of those who are bullied or harassed will go on to bully or harass others.”¹¹⁵ Therefore, victimization is not an indication that bullied individuals will learn from their experiences and not recreate the harm that they have endured.¹¹⁶

Revenge and embarrassment are a common concern for victims who report cyberbullying.¹¹⁷ In actuality, “adult intervention is problematic in cyberbullying [because] a considerable proportion of victimized students choose not to tell anything about the harassment.”¹¹⁸ An English study revealed that 43.7% of victims “did not report the [cyberbullying] to parents or teachers.”¹¹⁹ Additional studies have revealed similar results, where victims “preferred not to tell an adult because they feared that their internet and mobile phone access would be suspended in case parents and teachers found things out.”¹²⁰ “Furthermore, many teens report that they would rather try to handle cyberbullying by themselves, by signing off the internet, deactivating their accounts on a site, or by ignoring or blocking any persistent or hurtful messages, rather than tell anyone about the cyberbullying.”¹²¹ Thus, cyber-

110. Matthew C. Ruedy, Comment, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & TECH. 323, 331 (2008).

111. HINDUJA & PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 8, at 1.

112. *Id.*

113. TROLLEY & HANEL, *supra* note 9, at 41.

114. *Id.*

115. *Id.* at 47.

116. *See id.*

117. Manuel, *supra* note 43, at 225.

118. Walrave & Heirman, *supra* note 25, at 37.

119. *Id.*

120. *Id.*

121. Bethan Noonan, *Crafting Legislation to Prevent Cyberbullying: The Use of Education, Reporting, and Threshold Requirements*, 27 J. CONTEMP. HEALTH L. & POL'Y 330, 336 (2011).

bullying statistics reflect only a portion of actual victims that fall prey to online assaults.¹²²

D. *The Aftermath*

Subsequently, “60% of cyberbullying victims are negatively” impacted as a result of the harassment.¹²³ The absence of physical harassment—commonly associated with harming the victim—does not discount the “short- and long-term effects” of cyberbullying.¹²⁴ Emotional harm is only the beginning for some victims, escalating to severe psychiatric issues, and possible suicidal ideation when a victim does not receive relief or treatment.¹²⁵ “[S]ocial isolation, discrimination, and bullying” that leads to suicide is often associated with homosexual youths, who “experience higher rates of bullying than their straight peers.”¹²⁶ Verbal and textual abuse through cyberbullying that leads to another’s suicide—“cyberbullycide”—is not limited to homosexual youths.¹²⁷ This abuse allows aggressors to “kill their victims without ever laying a hand on them,” where the harassment instills such psychological pain that victims are lead to commit suicide.¹²⁸ All forms of cyberbullying have been found to contribute to the “increases in suicidal ideation,” where “20% of respondents reported seriously thinking about attempting suicide.”¹²⁹ Research has also revealed that victims of bullying and cyberbullying face an increased risk of suicidal thoughts when compared to offenders, and cyber victims are more likely to attempt suicide than individuals exposed to traditional bullying scenarios.¹³⁰ The perception of permanence is a qualifying characteristic of cyberharassment, intimidation, and bullying that may explain the increased ideation of suicide when compared to traditional bullying.¹³¹ Therefore, the perception of permanence in the harm continues beyond the initial harassment and metastasizes—like cancer—spreading into other aspects of a victim’s life.¹³²

122. *See id.*

123. Manuel, *supra* note 43, at 225.

124. *Id.*

125. *See id.* at 226.

126. Wallace, *supra* note 13, at 741.

127. *See, e.g.,* HINDUJA & PATCHIN, CYBERBULLYING RESEARCH SUMMARY, *supra* note 13, at 2.

128. Wallace, *supra* note 13, at 741.

129. HINDUJA & PATCHIN, CYBERBULLYING RESEARCH SUMMARY, *supra* note 13, at 1.

130. *Id.* at 1–2.

131. *See id.*; Lipton, *supra* note 7, at 1112–13, 1116.

132. *See* Lipton, *supra* note 7, at 1112–13, 1116.

Trends in the harm faced by victims of cyberbullying and bullies alike can be linked to damaging the “educational, social, and health related” aspects of individuals, but “the lasting effects of cyberbullying have yet to be determined.”¹³³ Victims of cyberbullying often forfeit educational opportunities by not attending school as a result of the stress and anxiety that flows from the harassment.¹³⁴ In addition, cyberbullying can create trust issues for a victim, which “affects a child’s ability to make and keep friends,” complicating the individual’s potential to cope with and recover from the harassment.¹³⁵ The effects of cyberbullying take an immediate toll on victims.¹³⁶ Cyberbullying legislation fails when it does not provide a response or remedy at the onset of the bullying, resulting in more severe, and often fatal outcomes. Therefore, in order to adequately address unknown concerns—like the long-term effects of cyberbullying—legislators must consider the known categories affected by cyberbullying: “[E]ducation, social, and health related” interests of targeted individuals.¹³⁷

III. LEGISLATIVE “CURES” TO CURB CYBERBULLYING

Until recently, “[c]urrent criminal laws, including those targeted specifically at online conduct, [have] fail[ed] to comprehensively deal with today’s cyber-abuses.”¹³⁸ In 2009, only thirty-six states had anti-bullying statutes.¹³⁹ Currently, forty-nine states—excluding Montana—have passed legislation addressing cyberbullying either explicitly or through electronic harassment.¹⁴⁰ Bully Police USA, a watch-dog organization that advocates for state bullying legislation, grades each state using letters “A++” through “F” based on a jurisdiction’s commitment to meeting twelve criteria.¹⁴¹ New

133. Noonan, *supra* note 121, at 336, 338.

134. *Id.* at 336–37.

135. *Id.* at 337–38.

136. *See id.*

137. *See id.* at 336–38.

138. Lipton, *supra* note 7, at 1117.

139. Auerbach, *supra* note 71, at 1659.

140. BULLY POLICE USA, *supra* note 14; *see also* NAT’L SCH. BDS. ASS’N, STATE ANTI-BULLYING STATUTES APRIL 2012 (2012), <http://www.nsba.org/SchoolLaw/Issues/Safety/Table.pdf>.

141. Auerbach, *supra* note 71, at 1659 nn.109–10; *see also* Brenda High, *Making the Grade: How States Are “Graded” on Their Anti Bullying Laws*, BULLY POLICE USA, <http://www.bullypolice.org/grade.html> (last visited Feb. 24, 2013) (establishing grading criteria for state legislation based upon: 1) utilizing the word “bullying;” 2) creating a law that is clearly anti-bullying and not a school safety net; 3) including the definitions of bullying and harassment; 4) recommending a model policy; 5) providing an implementation plan; 6) mandating anti-bullying programs; 7) setting a deadline for schools to establish policy; 8) provid-

Jersey ranks among the highest with an “A+,” awarded for meeting all twelve criteria—including a direct reference to cyberbullying and electronic harassment with an eye toward victim care.¹⁴² While all states that have bullying laws require a school policy, forty-three provide school sanctions as punishment, twelve provide for criminal sanctions, and only ten—including New Jersey—apply the policy to off-campus behavior.¹⁴³

The defining characteristics that make cyberbullying more invasive, such as anonymity, access, detection, audience, and lack of physical contact, make many anti-bullying statutes throughout the country ineffective.¹⁴⁴ Many authors who have addressed cyberbullying agree that “[t]he prevalence of this conduct suggests that more effective means are necessary to redress online wrongs and to protect victims’ reputations, but action against cyber-abusers has posed significant challenges for the legal system.”¹⁴⁵ Contrary to previous articles on cyberbullying, this Article examines the challenges cyberbullying presents to legislation, analyzes New Jersey’s framework in the “Anti-Bullying Bill of Rights,” and advocates for states to adopt a similar legislative approach—laws embodying key components that address the gaps in current statutes and bridge policy to legislation resulting in successful application to cyberbullying.

A. *New Jersey & the “Anti-Bullying Bill of Rights”*

The New Jersey “Anti-Bullying Bill of Rights” is currently being considered the Nation’s most stringent legislation designed to tackle bullying of all forms that have an effect on education in public schools.¹⁴⁶ Since New Jersey enacted the public school anti-bullying statute in 2002, a 2009 study has revealed that “32% of students aged 12 through 18 were bullied in the previous school year,” and “25% of the responding public schools indicated that bullying was a daily or weekly problem.”¹⁴⁷ The “[s]tate amended th[e]

ing protection from retaliation; 9) granting a school district protection for compliance; 10) assigning counseling for victims; 11) requiring accountability reports; and 12) including provisions for cyberbullying or “electronic harassment”).

142. High, *supra* note 141; *see* BULLY POLICE USA, *supra* note 14.

143. SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., STATE CYBERBULLYING LAWS: A BRIEF REVIEW OF STATE CYBERBULLYING LAWS AND POLICIES 1 (2013) [hereinafter HINDUJA & PATCHIN, STATE CYBERBULLYING LAWS], available at http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf.

144. *See* Goodno, *supra* note 41, at 650–53.

145. Lipton, *supra* note 7, at 1106; *see also* Goodno, *supra* note 41, at 642–43; Noonan, *supra* note 121, at 332.

146. N.J. STAT. ANN. § 18A:37-13.2 (West 2012); Hu, *supra* note 15.

147. N.J. STAT. ANN. § 18A:37-13.1a.

law in 2007 to include cyberbullying and [again] in 2008 to require each school district to post its anti-bullying policy [and report of occurrences] on its website and distribute it annually to parents or guardians of students enrolled in the district.¹⁴⁸ Finally, in 2010—the most recent amendment, approved January 5, 2011—several sections of the law have been amended to facilitate successful implementation in schools throughout the state—specifically, application to institutions of higher education, minimum policy requirements, and funding.¹⁴⁹

The purpose of amending the law, which originated in 2002, was “to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of [HIB] of students that occur on school grounds and off school grounds under specified circumstances.”¹⁵⁰ First, title 18A, section 37-13.2 establishes that the Act, including the amendments “shall be known and may be cited [to] as the ‘Anti-Bullying Bill of Rights Act.’”¹⁵¹ Title 18A, section 37-13.1 provides legislative findings on the prevalence of HIB and sets forth the goals of the amendments: Clarity, fiscal responsibility, and effectiveness.¹⁵² The legislature noted that “[HIB] is also a problem which occurs on the campuses of institutions of higher education” in the State of New Jersey.¹⁵³

Next, title 18A, section 37-15.3 of the amendment makes the law applicable to conduct “that occurs off school grounds,” where the implementation is “consistent with the board of education’s code of student conduct and other provisions of the board’s policy on [HIB].”¹⁵⁴ Subsection five requires an incident report be provided to the principal within two days of its occurrence, or within two days of receiving notice of its occurrence.¹⁵⁵ Subsection six allows ten days to conduct an investigation, two days subsequent to the investigation to apprise the superintendent of the findings, and five days following the investigation to make a report available on the incident.¹⁵⁶ This is a large step forward for state legislation because it creates a definite timeline

148. *Id.* § 18A:37-13.1d.

149. *See id.* § 18A:37-13.1g.–j.

150. N.J. DEP’T OF EDUC., GUIDANCE FOR SCHOOLS ON IMPLEMENTING THE ANTI-BULLYING BILL OF RIGHTS ACT 1 (2011), <http://nj.gov/education/students/safety/behavior/hib/guidance.pdf> [hereinafter N.J. DEP’T OF EDUC., GUIDANCE FOR SCHOOLS].

151. N.J. STAT. ANN. § 18A:37-13.2.

152. *See id.* § 18A:37-13.1e.–i.

153. *Id.* § 18A:37-13.1j.

154. *Id.* § 18A:37-15.3.

155. *Id.* § 18A:37-15b.(5).

156. N.J. STAT. ANN. § 18A:37-15b.(6)(a)–(d).

to investigate and address bullying.¹⁵⁷ Although the majority of cyberbullying that occurs through social networking sites and technology may occur off campus, the effect it has on a victim touches and concerns the education process by impacting the victim's concentration and focus in the classroom.¹⁵⁸ Lower self-esteem, self-worth, and grades are characteristics attributable to individuals that are continually harassed, intimidated, or bullied regardless of where the acts take place.¹⁵⁹

In addition, title 18A, section 37-17 requires schools to adopt an educational program for bullying prevention¹⁶⁰ and section 37-20 requires the appointment of an "anti-bullying specialist" who leads in investigations, addresses incidents, and works with the district anti-bullying coordinator, who strengthens school policies and collaborates with the superintendent to eventually provide data to the Department of Education regarding HIB.¹⁶¹ This is significant because it provides an organized line of communication that requires adults to be educated, aware, and proactive in addressing bullying. Also, section 37-21 has created a school "safety team," which is responsible for receiving complaints, maintaining copies of the complaints, "identify[ing], and address[ing] patterns," as well as offering and participating in professional development on the prevention of HIB.¹⁶² Beyond educating adults in the school setting, professional development alerts educators of the impact and consequences this conduct can have on a victim.¹⁶³ This theme is evidenced in section 37-22, requiring all newly-certified teachers to complete a program in HIB as established by the State Board of Education and made applicable to district administrators' certification through section 37-23.¹⁶⁴

Additionally, title 18A, section 37-24 commands schools to develop a "guidance document for use by parents or guardians, students, and school districts" to aid in the understanding and implementation of the law.¹⁶⁵ This portion of the statute attempts to reconcile the low rate of detection by parents or guardians in addition to victims' frequent failure to report bullying.¹⁶⁶ Sections 37-25 and 37-26 place the Commissioner of Education in charge of training, implementation, and communication with the county superinten-

157. *See id.*

158. *See* Manuel, *supra* note 43, at 243–44; Turbert, *supra* note 11, at 686.

159. *See* N.J. DEP'T OF EDUC., GUIDANCE FOR SCHOOLS, *supra* note 150, at 2–3; Turbert, *supra* note 11, at 654–55.

160. N.J. STAT. ANN. § 18A:37-17a.

161. *Id.* § 18A:37-20.

162. *Id.* § 18A:37-21a., c.(1)–(3), d.

163. *See* Noonan, *supra* note 121, at 356.

164. N.J. STAT. ANN. §§ 18A:37-22a.–c., -23.

165. *Id.* § 18A:37-24a.

166. *See id.* § 18A:37-24a.(2); Walrave & Heirman, *supra* note 25, at 37.

dents to ensure compliance with the “Anti-Bullying Bill of Rights”.¹⁶⁷ Therefore, administrators are accountable to victims of bullying and the bullies themselves.¹⁶⁸ Section 37-27 requires that the Commissioner of Education make an “online tutorial [available regarding] harassment, intimidation, and bullying.”¹⁶⁹ Ultimately, this portion of the law informs parents and students of the causes and safeguards in place to detect and rectify bullying at its onset.¹⁷⁰

Subsequently, title 18A, section 37-28 creates a fund for the Department of Education—the “Bullying Prevention Fund”—in order to carry out the provisions of the “Anti-Bullying Bill of Rights.”¹⁷¹ This additional funding addresses shortcomings in previous amendments due to the economic climate, by providing the financial support to aid districts with compliance.¹⁷² In section 37-29, the week starting with the “first Monday in October of each year is designated as a ‘Week of Respect’ in the State of New Jersey,” where education and instruction focus on preventing HIB.¹⁷³ By providing education specified in the law as “age-appropriate,” this provision is created to reinforce the regulations, channels of communication, and consequences associated with bullying to deter students from promulgating or participating in this behavior.¹⁷⁴ Section 37-30 states that the law does not affect the “provisions of any collective bargaining agreement,” whereas section 3B-68 requires “public institution[s] of higher education [to] adopt [the] policy.”¹⁷⁵ The tragic incident between Tyler Clementi and Dharun Ravi occurred at Rutgers University—a New Jersey institution for higher education—demonstrating the significance of applicability beyond high school.¹⁷⁶ Finally, section 37-31 encourages nonpublic schools to adopt the provisions of the “Anti-Bullying Bill of Rights,” and sections 37-13 and 37-32 state that the amendments strengthen the rights of victims and do not remove certain prior protections put in place by previous revisions.¹⁷⁷

167. N.J. STAT. ANN. §§ 18A:37-25, -26.

168. *See id.*

169. *Id.* § 18A:37-27.

170. *See id.*; N.J. DEP’T OF EDUC., GUIDANCE FOR SCHOOLS, *supra* note 150, at 1.

171. N.J. STAT. ANN. § 18A:37-28.

172. *See id.*

173. *Id.* § 18A:37-29.

174. *See id.*; N.J. DEP’T OF EDUC., GUIDANCE FOR SCHOOLS, *supra* note 150, at 13.

175. N.J. STAT. ANN. §§ 18A:37-30, :3B-68a.

176. Foderaro, *supra* note 1.

177. N.J. STAT. ANN. §§ 18A:37-31a., -13.1(f), -32.

B. *Tyler Clementi, Dharun Ravi, and the Effects of this New Legislation*

Dharun Ravi filmed his roommate—Tyler Clementi—without his knowledge, using the camera on his computer to capture an intimate moment between Tyler and another man.¹⁷⁸ About two days later, Tyler discovered that his privacy was compromised over the internet, and ultimately took his own life by jumping off the George Washington Bridge on September 22, 2010.¹⁷⁹ The Grand Jurors of the State of New Jersey indicted Ravi on fifteen counts including: Invasion of privacy, attempted invasion of privacy, bias intimidation, tampering with physical evidence, hindering apprehension or prosecution, and witness tampering.¹⁸⁰ The prosecutor argued that these charges stemmed from a planned hate crime, designed to violate “his roommate’s privacy,” and subsequently “expose Mr. Clementi’s sexual orientation and an intimate encounter with another man.”¹⁸¹ In response, the defense emphasized Ravi’s immaturity, rather than categorizing his actions as a failure to respect his roommate’s privacy—claiming no link to Tyler’s sexual orientation.¹⁸² The 2008 amendments to the anti-bullying legislation in New Jersey incorporated cyberbullying through the term “electronic communication,” but like many other states, failed to account for institutions of higher education or provide applicability to off-campus activity.¹⁸³ Tyler’s death sparked “public outcry” leading to “comprehensive antibullying policies,” which now includes “increase[d] staff training and adhere[nce] to tight deadlines for reporting episodes” of HIB.¹⁸⁴ Although New Jersey would have eventually passed a broader law, the circumstances Tyler faced and his subsequent suicide resonated with legislators and motivated the express passage of a more sweeping, comprehensive approach.¹⁸⁵

Essentially, Ravi—an eighteen-year-old Indian citizen—cyberbullied Tyler—an eighteen-year-old homosexual—leading Tyler to commit suicide after tricking, denigrating, and outing him.¹⁸⁶ Tricking refers to someone’s attempt to have another reveal secrets or share information through deceit

178. Foderaro, *supra* note 1; Pervaiz Shallwani, *Clementi Case Trial Begins*, WALL ST. J., Feb. 25, 2012, at A15.

179. Foderaro, *supra* note 1; Shallwani, *supra* note 178.

180. Indictment, *supra* note 19, at 1–5; Shallwani, *supra* note 178.

181. Shallwani, *supra* note 178.

182. *Id.*

183. See HINDUJA & PATCHIN, STATE CYBERBULLYING LAWS, *supra* note 143, at 1, 9–10.

184. Hu, *supra* note 15.

185. Matt Friedman, *Christie Signs Anti-Bullying Legislation*, RECORD (N.J.), Jan. 7, 2011, at A3.

186. Foderaro, *supra* note 1; Shallwani, *supra* note 178.

online for purposes of humiliation.¹⁸⁷ Ravi set up a camera without Tyler's knowledge, after he had agreed to leave their shared dorm room and give Tyler complete privacy.¹⁸⁸ Ravi tricked Tyler by physically leaving the room, setting up a camera, and invading his privacy.¹⁸⁹ "Denigration" occurs when "cruel gossip or rumors about a person" are spread "to damage his or her reputation or friendships," which is also "[t]he online equivalent to indirect bullying with wider dissemination."¹⁹⁰ Ravi indirectly bullied Tyler by streaming a live video feed from their room, without Tyler's knowledge, and tweeting an open invitation for others to iChat Ravi and view Tyler's intimate moment live.¹⁹¹ In addition, outing occurs when a bully "[s]har[es] someone's secrets or embarrassing information or images online," without their permission or knowledge.¹⁹² Tyler was described as a private person, who kept to himself, and his sexual orientation remained unclear; Tyler was not openly homosexual.¹⁹³

The amendments made to the 2002 bullying law in 2007, 2008, and 2010 have been the direct product of gaps in the legislation made evident by cases like Tyler's where the law does not provide a clear resolution.¹⁹⁴ Prior to Tyler's death, one of the law's shortcomings included a failure to "expressly instruct a district on how to thwart off-campus cyberbullying, which is a problem considering that the majority of cyberbullying does not occur on school grounds but rather in the comfort of students' homes."¹⁹⁵ The New Jersey Legislature's most recent revision has addressed concerns regarding applicability and workability in formulating the latest set of amendments to the anti-bullying law.¹⁹⁶ The State has mandated a system where experts advise and oversee the implementation of the law.¹⁹⁷ By maintaining current education programs in New Jersey that address HIB, a web of delegated administrators and district employees collect data, report incidents, and teach students about the dangers of this behavior.¹⁹⁸ "Each school must designate an anti-bullying specialist to investigate complaints; each district must, in

187. TROLLEY & HANEL, *supra* note 9, at 39.

188. See Foderaro, *supra* note 1.

189. See *id.*

190. TROLLEY & HANEL, *supra* note 9, at 39.

191. Foderaro, *supra* note 1.

192. TROLLEY & HANEL, *supra* note 9, at 39.

193. See Foderaro, *supra* note 1.

194. N.J. STAT. ANN. § 18A:37-13.1c.-d. (West 2012); see Hu, *supra* note 15, see also N.J. DEP'T OF EDUC., GUIDANCE FOR SCHOOLS, *supra* note 150, at 1.

195. Turbert, *supra* note 11, at 659.

196. See, e.g., N.J. STAT. ANN. § 18A:37-15.3.

197. See Hu, *supra* note 15.

198. See *id.*

turn, have an anti-bullying coordinator; and the State Education Department will evaluate every effort, posting grades on its Web site” for each school district in the state.¹⁹⁹ The Department of Education oversees the process, which involves data collection and reports and providing clearer education for parents online in addition to a response timeline.²⁰⁰ Students have one week of every school year that focuses on education to prevent HIB.²⁰¹ This improved system is reinforced by a new state fund created through the law to provide financial support and execute bullying education while maintaining funding for the program.²⁰² Some districts in the state have even partnered with local authorities to ease reporting and “up[] the ante by involving law enforcement rather than resolving issues in the principal’s office.”²⁰³ Therefore, New Jersey has incorporated the new additions into their bullying law with the preexisting functions to forge a well-oiled machine that operates effectively. Furthermore, the law’s reach goes beyond school grounds to include off-campus incidents of bullying that conflict with the board of education’s policies and spread applicability to public institutions of higher education.²⁰⁴ At first blush, the implications of the law appear to expose school boards and open court houses to increased litigation, but ultimately, this marks the beginning of schools and communities sharing accountability and responsibility for controlling cyberbullying at its roots through broader legislation.

IV. WHY OTHER STATES SHOULD ADOPT THE “ANTI-BULLYING BILL OF RIGHTS”

The Garden State provides a comprehensive approach to the growing problem of cyberbullying—through the “Anti-Bullying Bill of Rights”—because New Jersey’s law includes key components such as the policy, the policy review, and the revision of the policy in addition to legal remedies for victims.²⁰⁵ A complex problem like cyberbullying requires a well-guided approach to detect, report, address, and avert repetition in the future. New

199. *Id.*

200. See N.J. STAT. ANN. § 18A:37-24a.-b.; N.J. DEP’T OF EDUC., GUIDANCE FOR PARENTS ON THE ANTI-BULLYING BILL OF RIGHTS ACT 38-39 (2012), <http://www.state.nj.us/education/students/safety/behavior/hib/ParentGuide.pdf>.

201. N.J. STAT. ANN. § 18A:37-29.

202. *Id.* § 18A:37-28.

203. Hu, *supra* note 15.

204. See N.J. STAT. ANN. §§ 18A:37-15.3, :3B-68.

205. *New Jersey Anti-Bullying Laws & Policies*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/new-jersey.html> (last visited Feb. 24, 2013); see also N.J. STAT. ANN. §§ 18A:37-13.1-2, -16 to -30.

Jersey's approach provides a model framework that other states throughout the country should adopt for several reasons. First, the law provides a communication network and protocol to monitor and document bullying.²⁰⁶ Second, the statute creates an educational program to strengthen the faculty and students' understanding of the effects of HIB.²⁰⁷ "Education provides a way for states to combat cyberbullying while avoiding the negative effects that result from imposing criminal penalties on children."²⁰⁸ In addition, education is key to overcoming the disregard for cyberbullying resulting from misconceptions that lead many to believe "there are more serious forms of aggression to worry about."²⁰⁹ Finally, legal ramifications continue to be an important part of the formula in addressing cyberbullying by allowing victims to seek other legal remedies and placing future bullies on warning.²¹⁰

A. *Key Components of a Model Anti-Bullying Law*

In order to achieve results, the Education Secretary of the United States has set forth a list of eleven "Key Components in State Anti-Bullying Laws" and policies throughout the nation.²¹¹ The first component of a cyberbullying law requires a purpose statement to "[o]utline[] the range of detrimental effects bullying has on students, including impacts on student learning, school safety, student engagement, and the school environment."²¹² This initial section should include a declaration "that any form, type, or level of bullying is unacceptable, and that every incident needs to be taken seriously by school administrators, school staff (including teachers), students, and students' families."²¹³ Next, the statute should provide specific types and examples of prohibited conduct alongside "a clear definition of cyberbullying."²¹⁴ In addition, an "Enumeration of Specific Characteristics" should explain conduct included in the behavior, but not limit bullying to specific acts or any par-

206. Adam Cohen, *Why New Jersey's Antibullying Law Should Be a Model for Other States*, TIME IDEAS (Sept. 6, 2011), <http://ideas.time.com/2011/09/06/why-new-jerseys-antibullying-law-should-be-a-model-for-other-states/>.

207. *Id.*; Friedman, *supra* note 185.

208. Kelsey Farbotko, Comment, *With Great Technology Comes Great Responsibility: Virginia's Legislative Approach to Combating Cyberbullying*, 15 RICH. J.L. & PUB. INT. 55, 73 (2011).

209. HINDUJA & PATCHIN, CYBERBULLYING: IDENTIFICATION, PREVENTION, AND RESPONSE, *supra* note 8, at 2.

210. See *Key Components in State Anti-Bullying Laws*, STOPBULLYING.GOV, <http://www.stopbullying.gov/laws/key-components/index.html> (last visited Feb. 24, 2013).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

ticular characteristic.²¹⁵ The next guideline calls for “Development and Implementation of [Local Educational Agency] Policies” that memorialize the prohibited conduct and provide a course of action that includes reporting, recording, and referring the victim and bully for professional help.²¹⁶ Additionally, effective laws must face state review to remain current and “ensure the goals of the state statute are met.”²¹⁷ Successful statutes “[i]nclude[] a plan for notifying students, students’ families, and staff of policies related to bullying, including the consequences for engaging in bullying.”²¹⁸ States should “[i]nclude[] a provision [mandating] school districts to provide training [and education] for all school staff”—not only teachers—in “preventing, identifying, and responding to bullying.”²¹⁹ Training and transparency emerge as key components to a comprehensive statute because they include a reporting system and allow districts to draft their own policy, creating accountability and responsibility that leads to greater community awareness and investment.²²⁰ Finally, a statement of legal rights should be included allowing other paths of recourse for the victim.²²¹

B. *Perceived Weaknesses in the New Jersey Law*

The “Anti-Bullying Bill of Rights” has taken an aggressive approach to HIB by incorporating all faculty and staff—an all-hands-on-deck approach—into the law’s education and enforcement.²²² The law became effective in classrooms throughout the State of New Jersey in the Fall of 2011.²²³ Administrators in school districts have labeled the law a tall order that “has gone well overboard” in allocating additional responsibility to employees by requiring them “to police the community [twenty-four] hours a day.”²²⁴ In most districts, guidance counselors and social workers already on staff, have acquired the additional responsibilities mandated by the law, including investigations, reports, and anti-bullying education.²²⁵ Enforcement of the law—requiring additional time and effort—is being achieved by current staff members with existing job descriptions, therefore, raising compliance con-

215. *Key Components in State Anti-Bullying Laws*, *supra* note 210.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *See Key Components in State Anti-Bullying Laws*, *supra* note 210.

221. *Id.*

222. N.J. STAT. ANN. § 18A:37-13 (West 2012); Hu, *supra* note 15.

223. *See* Hu, *supra* note 15.

224. *Id.*

225. *Id.*

cerns with regard to time and experience.²²⁶ Training equips every employee, like janitors and aides, who may come into contact with students and witness bullying to file an incident report.²²⁷ Accordingly, superintendents throughout the state argue that the statute subjects districts to increased opportunities of “lawsuits from students and parents dissatisfied with the outcome” from a school district’s response to bullying allegations.²²⁸ While fiscal responsibility remains a concern for boards of education, many schools within the state are building on existing programs and policies or making use of local authorities to help comply with and enforce the law.²²⁹

“[L]aws . . . serve an important expressive function about acceptable modes of online behavior even in situations where their enforcement may be limited by a variety of . . . factors.”²³⁰ The benefits reaped by schools under the law’s bullying policy mandate outweigh the burdens placed on state administrators and districts.²³¹ Newspaper articles have examined these financial, legal, and interpretive implications regarding compliance with the law, but continue to view this statute as a touchstone for anti-bullying legislation.²³² Despite the expenses districts have incurred as a result of the legal requirements for compliance, schools have been “proactive [to address bullying] regardless of the money” received through the anti-bullying fund.²³³ Utilizing guidance counselors and social workers has helped the state’s schools take on the additional responsibilities associated with fulfilling these requirements.²³⁴ In addition, the state is limiting the liability of districts by establishing a baseline of protection through investigating, holding a hearing, and issuing a decision—appealable to the Commissioner of Education—all of which are governed by individual timelines.²³⁵ While critics tend to focus on the ability of schools to correctly categorize behavior as actionable under the statute, it is important to note that schools formulate their own policies under the law.²³⁶ The legislation sets a minimum level of safeguards and

226. *Id.*

227. *Key Components in State Anti-Bullying Laws*, *supra* note 210.

228. Hu, *supra* note 15.

229. *See id.*

230. Lipton, *supra* note 7, at 1116.

231. Cohen, *supra* note 206.

232. *See, e.g., id.* (arguing the shortcomings of the law’s compliance and noting the importance of New Jersey’s stance in bullying victim rights).

233. Charles Hack, *School Districts Stunned by Disparity in Anti-Bullying Funding Awards*, NJ.COM (July 3, 2012, 4:44 PM), http://www.nj.com/hudson/index.ssf/2012/07/school_districts_stunned_by_di.html.

234. *See* Hu, *supra* note 15.

235. N.J. STAT. ANN. § 18A:37-15b.(6)(a)–(e) (West 2012).

236. *See* Turbert, *supra* note 11, at 659; *see also* N.J. STAT. ANN. § 18A:37-15b.

criteria that must be present in each policy throughout the state, while affording inherently different school districts flexibility to detail and define bullying.²³⁷ An urban school in New Jersey faces different challenges in regulating the school climate rather than a suburban location.²³⁸ Giving boards of education the ability to establish policy in their respective school systems creates a greater sense of investment by the community into anti-bullying education and injects efficacy into the programs.²³⁹

C. *Bridging the Gaps in Anti-Bullying Legislation with Policy*

“Other states’ laws have similar aims but lack the rigorous oversight and quick response mechanisms that New Jersey is putting in place.”²⁴⁰ As of January 2013, forty-nine states have passed some type of law that addresses bullying, forty-seven of which include electronic harassment, and sixteen states have legislation that uses the term “cyberbullying.”²⁴¹ While only ten states currently have laws that regulate off-campus bullying, nine states have proposed general updates to their bullying legislation—but only two of those proposals incorporate the addition of off-campus bullying.²⁴² State laws should address off-campus behavior, provide a clear and accessible policy, and provide an education of cyberbullying awareness that includes remedies for faculty, staff, students, and parents.²⁴³ From nonprofit organizations to governmental agencies, these groups agree with the establishment of a baseline for anti-bullying legislation consisting of eleven criteria.²⁴⁴

In an effort to bridge the existing gaps in states’ anti-bullying legislative attempts, an effective statute should include: (1) A purpose statement; (2) the scope of the law; (3) specification of prohibited conduct; (4) additional characteristics of prohibited conduct; (5) collaborative policy development; (6) an investigative, reporting, responding, and recording policy; (7) a frequent policy review provision; (8) a communication plan; (9) a training and preventative education provision; (10) transparency and monitoring; and (11) the right to other legal recourse.²⁴⁵ These characteristics may not be entirely

237. See N.J. STAT. ANN. § 18A:37-15b.

238. Hack, *supra* note 233.

239. See Turbert, *supra* note 11, at 659; see, e.g., N.J. STAT. ANN. § 18A:37-15b.

240. Cohen, *supra* note 206.

241. HINDUJA & PATCHIN, STATE CYBERBULLYING LAWS, *supra* note 143, at 1.

242. *Id.* at 1–2, 4, 6–9.

243. See Turbert, *supra* note 11, at 685.

244. See BULLY POLICE USA, *supra* note 14; *Key Components in State Anti-Bullying Laws*, *supra* note 210.

245. *Key Components in State Anti-Bullying Laws*, *supra* note 210.

exhaustive, but address the primary facets of a comprehensive bullying law needed for states throughout the nation.²⁴⁶

V. CONCLUSION

Enacting detailed legislation for cyberbullying is an important step that states must take in order to curb this growing problem. “Cyberbullying is venomous student expression that scars schools’ basic educational mission and the development of civility in children.”²⁴⁷ The psychological sting that results from cyberbullying is attributed to increased anonymity, constant internet access, lower detection by adults, and the increased audience with a lack of physical contact between the bully and the victim.²⁴⁸ Unlike traditional notions of bullying, cyberbullying and electronic harassment contribute more harmful, long-term effects to victims resulting from the virtual permanence of the actions and perceived inability of escape by the victim.²⁴⁹ The difference between comprehensive laws on anti-bullying and ineffective legislation is traced through the level of response and treatment of the victim.²⁵⁰

In the wake of Tyler Clementi’s suicide, New Jersey has developed a meticulous piece of legislation that details the prohibition of harassment, intimidation, and bullying by going beyond the key components of an effective law.²⁵¹ Through an anti-bullying legislation amendment, the state has created a model framework to define, monitor, and deter bullying beyond its roots in the school zone, branching out to off-campus activity.²⁵² Although Tyler’s death ignited the prompt revision and application of anti-bullying policies in institutions of higher education,²⁵³ this statute has been created to address indefinites—like the many forms of cyberbullying—with definite timelines of response to reported incidents.²⁵⁴ New Jersey has taken the guesswork out of policy formulation by enlisting experts to oversee the state’s protocol, procedure, and communication.²⁵⁵ Alternatively, critics of the law highlight funding, categorization of bullying, and increased litigation

246. *See id.*

247. Turbert, *supra* note 11, at 686.

248. *See* discussion *supra* Part II.B.

249. Walrave & Heirman, *supra* note 25, at 35–36; Manuel, *supra* note 43, at 224–25.

250. *See Key Components in State Anti-Bullying Laws*, *supra* note 210; *see also* Cohen, *supra* note 206.

251. *See* N.J. STAT. ANN. § 18A:37-15 (West 2012); Cohen, *supra* note 206.

252. *See* N.J. STAT. ANN. § 18A:37-15.3.

253. *See id.* § 18A:3B-68a.; Friedman, *supra* note 185.

254. *See* N.J. STAT. ANN. §§ 18A:3B-68a., :37-13.1f.; *see also* Friedman, *supra* note 185.

255. *See* N.J. STAT. ANN. § 18A:37-20.

as inherent flaws to the statute.²⁵⁶ The amendments forming the “Anti-Bullying Bill of Rights” utilize existing members of faculty, such as psychologists and counselors, to alleviate some of the financial straps attributed to the law in light of actual funding awards.²⁵⁷ In addition, many schools in the state have built on preexisting policy and procedure, dovetailing the new requirements into practice.²⁵⁸ Education and transparency have been mandated throughout the process to reinforce bullying detection and proactively decrease future occurrences.²⁵⁹ Furthermore, while increased exposure to litigation initially alarmed districts,²⁶⁰ the law has created a responsive, hierarchical system that provides a procedural checklist for school districts under state supervision.²⁶¹ Ultimately, the benefits of enacting a comprehensive approach to bullying encompassing its multifaceted contexts outweigh the burdens expressed by critics.²⁶² The gaps between state bullying legislation and victims’ needs must be bridged to ameliorate the disconnect under current law. These bridges should not become a resource that inadvertently facilitates the suicide of cyberbullying victims because of the absence of legislative relief. The Garden State has cultivated a twenty-first century law, designed to keep pace with technology and bullying through continuous re-evaluation of policy; like software updates built directly into the statute, New Jersey has enacted the latest hardware in anti-bullying legislation.

256. Cohen, *supra* note 206; *see also* Hu, *supra* note 15.

257. *See* N.J. STAT. ANN. § 18A:37-20a.; *see also* Hu, *supra* note 15.

258. *See, e.g.*, Hu, *supra* note 15.

259. *See, e.g.*, N.J. STAT. ANN. § 18A:37-24; *see also* Cohen, *supra* note 206.

260. *See* Hu, *supra* note 15.

261. *See* N.J. STAT. ANN. § 18A:37-15; Hu, *supra* note 15.

262. Cohen, *supra* note 206.

**PRESIDENT BARACK OBAMA’S & THE DEPARTMENT OF
HOMELAND SECURITY’S TEMPORARY RELIEF FOR
QUALIFIED UNDOCUMENTED INDIVIDUALS IN THE
ABSENCE OF CONGRESSIONAL ACTION FOR PERMANENT
RELIEF**

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STEPHANIA BERTONI*

I. INTRODUCTION

It is June 15, 2012, and Annie Soto¹ has just heard President Barack Obama give a live speech concerning immigration reform in the United

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States.² For the majority of Americans, this speech was like any other speech made by the President before an election. However, for Annie and almost one million undocumented young people in the United States who are in her similar position, President Obama's speech could potentially be life altering. Four years ago, Annie graduated top of her class from a local south Florida high school. As a result of her hard work, Annie was awarded for her merits with a full scholarship to a Florida university that upcoming semester. Unfortunately, Annie would have to decline an opportunity which a majority of her peers can only dream of having. Like thousands of other undocumented teenagers in the United States, Annie was brought to America illegally by her parents as a young child. Moreover, Annie, like so many others, was oblivious to her status in the United States. In her eyes, she is, and will always be, an American. Annie has been in the United States for twenty-one years; she is now twenty-two. This talented young woman has had to put down her studies for what she thought would be an indefinite period of time. The President's speech however, gave this young woman, alongside hundreds of thousands of undocumented young people who were brought to the United States illegally and raised Americans, some hope of continuing the education that was promised to them their whole lives. It is an opportunity for individuals like Annie, who have worked hard to reach that point in their lives, to live from amongst the shadows again.³ For Annie, this means that she can now remain in the United States without the fear of being deported at any given time.⁴ But most importantly, this will allow Annie, and the 800,000 other undocumented individuals in Annie's same shoes, to continue their efforts toward legislation that will grant them a pathway to citizenship—allowing them to finally further their education like the friends they grew up with and have the chance to achieve the American

science and interdisciplinary studies/social science and a minor in history. The author wishes to thank her family and loved ones for all of their support, love, and motivation throughout the years. The author would also like to thank her mother and father for encouraging her to pursue her legal education and always believing in her. Additionally, the author would like to extend sincere gratitude to *Nova Law Review*, its members, and the faculty for all their hard work and dedication.

1. Annie Soto is a fictional character, whose story is based on the lives of thousands of undocumented young people living in the United States.

2. President Barack Obama, Remarks by the President on Immigration (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

3. *See id.*

4. *See id.*

dream.⁵ The speech and actions by the Department of Homeland Security (DHS) have allowed this select group of qualified individuals a chance to surface from amidst the shadows without fear of deportation to estranged countries.⁶ However, this action is in no way a permanent fix, which means that this effort may be rescinded at any time by a future administration.⁷ This will mean that once again, these individuals, who are not a threat to American society, may be subject to deportation.⁸ The resolution to these individuals' problems is an act by Congress.⁹ The President in his speech stated, "Congress needs to act" since these individuals merit a permanent fix, not just a temporary solution to their ongoing problem.¹⁰

There have been critics who have surfaced stating that the President and the DHS have gone beyond their constitutional authority in executing this new immigration policy that immediately stops the deportation or future deportation of more than 800,000 young, undocumented individuals who meet a certain criteria.¹¹ Such critics have stated that the President and the DHS have circumvented Congress by halting the deportation of individuals who would have qualified for the DREAM Act,¹² which was rejected in Congress on numerous accounts, the latest rejection being in 2010.¹³ Moreover, critics want the Supreme Court of the United States to overturn the DHS's use of prosecutorial discretion in relation to halting the deportation of these qualified immigrants.¹⁴ This article will attempt to explain in detail the new immigration policy laid out by President Obama, his administration, and the

5. Humberto Sanchez, *Marco Rubio's Immigration Plans Foiled*, ROLL CALL, June 18, 2012, http://www.rollcall.com/issues/57_152/Marco_Rubio_Immigration_Plans_Foiled-215430-1.html.

6. President Barack Obama, *supra* note 2.

7. *Id.*

8. See Press Release, Office of the Press Sec'y, Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low> [hereinafter Deferred Action Press Release]; President Barack Obama, *supra* note 2.

9. President Barack Obama, *supra* note 2.

10. *Id.*

11. *Kelly's Court: Is President Obama's Immigration Move Legal?*, at 2:39 (FOX News television broadcast June 18, 2012), available at <http://video.foxnews.com/v/1695684924001/is-president-obamas-immigration-move-legal/>; see Sanchez, *supra* note 5.

12. *Kelly's Court: Is President Obama's Immigration Move Legal?*, *supra* note 11, at 5:00; see also DREAM Act of 2010, S. 3992, 111th Cong. § 1 (2010) (stating that "[t]his Act may be cited as the 'Development, Relief, and Education for Alien Minors Act of 2010'").

13. Sanchez, *supra* note 5.

14. See *Kelly's Court: Is President Obama's Immigration Move Legal?*, *supra* note 11, at 3:44.

DHS on June 15, 2012.¹⁵ This article will further explain the right of the Executive Branch to execute its prosecutorial discretion in immigration cases by first explaining the role of prosecutorial discretion in immigration cases, followed by an explanation of the role prosecutorial discretion plays in immigration cases today and the role of judicial review.¹⁶ Next, this article will address how the DREAM Act, a law exclusive to the determination of Congress, differs from the Executive Branch's use of prosecutorial discretion on individuals who would have qualified for the DREAM Act.¹⁷ Lastly, this article will address the potential future of the individuals who will be affected by the new immigration policy in regards to Congress's possible passing of legislation that will give a more permanent answer to an ongoing problem.¹⁸

II. THE EXECUTIVE HALT ON THE DEPORTATION PROCEEDINGS OF QUALIFIED UNDOCUMENTED ALIENS

President Barack Obama, acting as head of the Executive Branch, alongside Janet Napolitano, Secretary of Homeland Security, an entity of the Executive Branch,¹⁹ executed a memorandum enforcing "the Nation's immigration laws against certain young people who were brought to [the United States] as children and know only this country as home."²⁰ The President announced in a live speech on June 15, 2012, that Secretary Napolitano had proclaimed that the DHS and the President's administration will be taking "new actions . . . to mend [the] nation's immigration policy."²¹ The President also stated that the administration's efforts along with the efforts of the DHS would ensure the fairness and efficiency of the new immigration policy regarding certain individuals who meet the strict criteria.²² The President referred to the individuals that would be affected by this new enforcement by the Executive Branch as "Dreamers," similar to the "Dreamers" associated

15. *See infra* Part II.A.

16. *See infra* Part II.B.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *The Executive Branch*, THE WHITE HOUSE, <http://www.whitehouse.gov/our-government/executive-branch> (last visited Feb. 24, 2013).

20. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration & Customs Enforcement 1 (June 15, 2012), available at <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people.pdf>.

21. President Barack Obama, *supra* note 2.

22. *Id.*

with the DREAM Act.²³ However, the DREAM Act, as the President points out and as outlined above, has failed numerous times in Congress due to “politics.”²⁴ Despite Congress’s rejection of the proposed legislation, the President stated in his speech that effective immediately, the DHS would halt the deportation proceedings of eligible individuals that do not pose a threat to the security of the nation or the safety of the public.²⁵ Such individuals who meet the criteria presented by the DHS will be able to request, within the upcoming months, “temporary relief from deportation proceedings and apply for work authorization.”²⁶

The President went on to assure the nation that this effort on behalf of his administration and the DHS was not the DREAM Act, since the passing of the DREAM Act is left to Congress to decide, but rather is a temporary relief for individuals who meet certain strict criteria.²⁷ The temporary relief received by qualified individuals will not provide the individual with permanent lawful status in the United States, nor will it lead to permanent lawful status.²⁸ Rather, it is the job of “Congress, acting through its legislative authority, [to] confer these rights” to permanent lawful status.²⁹ The President also assured that this action was not amnesty and would not promote the continuation of illegal immigration into the United States.³⁰ Moreover, the President explained that immigration enforcement would be and has been directed at individuals who are a threat to national security and the public, as well as the strengthening and prioritizing of their efforts to block the borders from individuals attempting to enter the United States illegally.³¹ The President also stated that individuals who would be eligible for requesting temporary relief from deportation would have to meet strict guidelines, explained in further detail in a following section.³²

23. *Id.* The President stated:

These are young people who study in our schools, they play in our neighborhoods, they’re friends with our kids, they pledge allegiance to our flag. They are Americans in their heart[s], in their minds, in every single way but one: on paper. They were brought to this country by their parents—sometimes even as infants—and often have no idea that they’re undocumented until they apply for a job or a driver’s license, or a college scholarship.

Id.

24. *Id.*

25. President Barack Obama, *supra* note 2.

26. *Id.*

27. *Id.*

28. *ICE FAQ: Deferred Action Process*, ICE, 2, <http://www.ice.gov/doclib/about/offices/ero/pdf/faq-deferred-action-process.pdf> (last visited Feb. 24, 2013).

29. Memorandum from Janet Napolitano, *supra* note 20, at 3.

30. President Barack Obama, *supra* note 2.

31. *Id.*

32. See Memorandum from Janet Napolitano, *supra* note 20, at 1; President Barack Obama, *supra* note 2; *infra* Part II.A.

A. *Provisions Outlined in the Memorandum Executed by the Department of Homeland Security*

The Secretary of Homeland Security has executed the provisions regarding the recent enforcement of immigration laws in a memorandum pursuant to the ongoing efforts by DHS to direct the allocation of funds on high priority cases like the deportation of criminals and terrorists.³³ The memorandum dated June 15, 2012 sets out the immediate exercise of “prosecutorial discretion”³⁴ in the enforcement of “the Nation’s immigration laws against certain young people.”³⁵ The characteristics of the qualifications for this temporary immigration effort are almost identical to the required qualifications for an individual who would have benefited from the proposed DREAM Act legislation.³⁶ The efforts of the recent enforcements, as discussed by the President in his speech earlier this year, is a temporary pathway for the possibility of passing a form of DREAM Act legislation by Congress, on which members of both parties can come to a consensus.³⁷ Moreover, the DHS and the Obama Administration are focusing their efforts on prosecuting high priority cases, which include individuals who had the intent to cross American borders and remain illegally in the United States, and towards individuals who pose a threat to national security and the safety of the public.³⁸ Rather, the President has stated that individuals who pose no threat like the individuals typically referred to as “Dreamers,” should be given temporary relief from deportation proceedings through “deferred action”³⁹ due to their lack of intent in committing the crime of purposely remaining in the United States illegally.⁴⁰

The first requirement for an individual to qualify for the DHS’s immigration efforts is that the individual arrived in the United States before the

33. See Memorandum from Janet Napolitano, *supra* note 20, at 1–3.

34. *Id.* at 1. The use of prosecutorial discretion “confers no substantive right, immigration status, or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the [E]xecutive [B]ranch . . . to set forth policy for the exercise of discretion within the framework of the existing law.” *Id.* at 3.

35. *Id.* at 1.

36. Compare *id.* at 1–3, with DREAM Act of 2010, S. 3992, 111th Cong. § 4 (2010).

37. President Barack Obama, *supra* note 2.

38. Memorandum from Janet Napolitano, *supra* note 20, at 1–2; President Barack Obama, *supra* note 2.

39. President Barack Obama, *supra* note 2. “Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. Deferred action does not confer lawful status upon an individual.” *ICE FAQ: Deferred Action Process*, *supra* note 28, at 2.

40. Memorandum from Janet Napolitano, *supra* note 20, at 1; see President Barack Obama, *supra* note 2.

age of sixteen,⁴¹ is currently below the age of thirty, and knows only this country as his or her country.⁴² The Secretary of Homeland Security stated that such individuals “lacked the intent to violate the law,” and thus, are not priority cases to which the DHS should focus its efforts on deporting.⁴³ Moreover, the individual must demonstrate that he or she has “continuously resided in the United States for a [sic] least five years”⁴⁴ before the actual date of the memorandum—June 15, 2012.⁴⁵ Additionally, the individual must show that he or she is either currently enrolled in school, such as high school, “has graduated from high school, [or] has obtained a general education development certificate” (GED).⁴⁶ Honorably discharged veterans who have served in the Coast Guard or Armed Forces may qualify for temporary relief as well.⁴⁷ Furthermore, to qualify for temporary relief, the individual must “undergo [a] biographic and biometric background check[.]”⁴⁸ The last requirement to be eligible is the need for good standing and a virtually clean record.⁴⁹ The person may not receive this help if they are a convicted felon, have been convicted of “a significant misdemeanor offense,” or more than three misdemeanor offenses that did not occur on one specific date or arise from a specified act.⁵⁰ Individuals that risk the security of the nation or the safety of the public are disqualified from receiving temporary relief from deportation.⁵¹ The above requirements must be met through “verifiable doc-

41. Memorandum from Janet Napolitano, *supra* note 20, at 1. Documentation used to evidence that an individual came to the U.S. prior to the age of sixteen “includes, but is not limited to: financial records, medical records, school records, employment records, and military records.” *ICE FAQ: Deferred Action Process*, *supra* note 28, at 4.

42. Memorandum from Janet Napolitano, *supra* note 20, at 1.

43. *Id.*

44. *Id.* Documentation used to demonstrate that an individual has been in the U.S. for five years preceding June 15, 2012 “includes, but is not limited to: financial records, medical records, school records, employment records, and military records.” *ICE FAQ: Deferred Action Process*, *supra* note 28, at 4.

45. Memorandum from Janet Napolitano, *supra* note 20, at 1.

46. *Id.* Documentation used to show that an individual “is currently in school, has graduated from high school, or has obtained a GED certificate includes, but is not limited to: diplomas, GED certificates, report cards, and school transcripts.” *ICE FAQ: Deferred Action Process*, *supra* note 28, at 5.

47. Memorandum from Janet Napolitano, *supra* note 20, at 1. Documentation used to demonstrate an individual “is an honorably discharged veteran of the Coast Guard or Armed Forces . . . includes, but is not limited to: report of separation forms, military personnel records, and military health records.” *ICE FAQ: Deferred Action Process*, *supra* note 28, at 5.

48. *Id.* at 4.

49. *See id.*

50. Memorandum from Janet Napolitano, *supra* note 20, at 1; *ICE FAQ: Deferred Action Process*, *supra* note 28, at 4.

51. *ICE FAQ: Deferred Action Process*, *supra* note 28, at 4.

umentation” before the individual can qualify for temporary relief.⁵² Each case will be decided on an individual basis and the DHS will not provide assurance as to whether or not a qualified individual will be granted temporary relief.⁵³

1. Process for Individuals Encountered by a Division of the Department of Homeland Security

Additional requirements addressed in the memorandum by the Secretary of Homeland Security pertain to individuals who have encountered United States Immigration and Customs Enforcement (ICE), United States Customs and Border Protection (CBP), or United States Citizenship and Immigration Services (USCIS).⁵⁴ ICE and CBP must exercise discretion on an individual level when dealing with individuals who have met the above requirements to avoid qualified individuals being⁵⁵ “apprehended, placed into removal proceedings, or removed.”⁵⁶ USCIS will ensure the implementation of the guidelines concerning “notices to appear” expressed in the memorandum.⁵⁷ The above process is to ensure that ICE and CBP narrow their efforts on high priority cases, rather than cases pertaining to individuals who pose no threat to national security or to public safety and simply wish to further their education.⁵⁸

2. Process for Individuals Currently in Removal Proceedings

The memorandum issued by Janet Napolitano also focuses one of its sections in addressing the steps ICE will take in relation to individuals who have met the aforementioned requirements for temporary relief, but are currently “in removal proceedings but not yet subject to a final order of removal.”⁵⁹ In such cases, ICE, through its prosecutorial discretion, will immediately offer deferred action for a two-year period with the possibility of renewal.⁶⁰ The memorandum further directs ICE to begin implementation of the provisions pursuant to the memorandum within sixty days of the date of

52. Deferred Action Press Release, *supra* note 8.

53. *Id.*

54. Memorandum from Janet Napolitano, *supra* note 20, at 2.

55. *Id.*

56. *ICE FAQ: Deferred Action Process*, *supra* note 28, at 3.

57. Memorandum from Janet Napolitano, *supra* note 20, at 2.

58. *See ICE FAQ: Deferred Action Process*, *supra* note 28, at 3.

59. Memorandum from Janet Napolitano, *supra* note 20, at 2.

60. *Id.*; Deferred Action Press Release, *supra* note 8.

the memorandum, dated June 15, 2012.⁶¹ ICE must also “use its Office of Public Advocate to [allow] individuals who believe they [have met] the above [requirements to present] themselves through a clear and efficient process.”⁶²

3. Process for Individuals Not in Removal Proceedings

In addition to the aforementioned practices to now be taken by the agencies, the memorandum explains the process to be taken by USCIS when dealing with individuals who have met the requirements mentioned previously, and who also have not begun removal proceedings, but passed a background check.⁶³ According to the memorandum, the “USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by deferring action” on individuals who are at least fifteen and meet the requirements.⁶⁴ The deferred action shall consist of temporary relief for two years, with the possibility of renewal.⁶⁵ This process set forth by USCIS must be made available to all persons, despite age, to whom a final order for deportation has been entered.⁶⁶ In order for the USCIS to begin the above process on an individual, the individual must submit a request to allow the USCIS to review the individual’s case.⁶⁷

4. Qualifications for Work Authorization

Finally, the memorandum states that for all individuals who have received “deferred action” by ICE or USCIS, pursuant to the new immigration policy outlined in the memorandum, USCIS must accept said individuals’ applications⁶⁸ for determination of eligibility “for work authorization during

61. Memorandum from Janet Napolitano, *supra* note 20, at 1–2.

62. *Id.* at 2. The Office of the Public Advocate is a division created by ICE. *Public Advocate*, ICE, <http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/> (last visited Feb. 24, 2013). “The public advocate works directly for ICE’s Executive Assistant Director of Enforcement and Removal Operations (ERO).” *Id.*

63. Memorandum from Janet Napolitano, *supra* note 20, at 2–3.

64. *Id.*

65. *Id.* at 3.

66. *Id.*

67. See Deferred Action Press Release, *supra* note 8.

68. Memorandum from Janet Napolitano, *supra* note 20, at 3. Individuals, who qualify for temporary relief, may request work authorization by filing a Form I-765, Application for Employment Authorization. See *id.* at 2–3; *I-765, Application for Employment Authorization*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/> (follow “Forms” menu; click on “Application for Employment Authorization” hyperlink) (last updated Nov. 29, 2012).

th[e] period of defer[ment].”⁶⁹ The individual must prove that he or she has “an economic necessity for . . . employment” to receive authorization to work during the deferment period.⁷⁰ Furthermore, once the two-year period has expired, and an individual requests and successfully receives an additional two years of deferment, the individual must also re-request an extension on his or her employment authorization if the economic need is still present.⁷¹

B. *The Role of Prosecutorial Discretion in Immigration Cases*

Prosecutorial discretion plays a crucial part in immigration cases.⁷² Doris Meissner, Commissioner of the then Immigration and Naturalization Service (INS),⁷³ issued a memorandum directing all service officers of the INS to execute prosecutorial discretion when dealing with immigration cases and reiterating the importance of the role of prosecutorial discretion when dealing with illegal immigration.⁷⁴ The Meissner memorandum, which is still in use today by the DHS, highlights how prosecutorial discretion is to be used by officers acting on behalf of the INS on a case-by-case basis.⁷⁵ The role of prosecutorial discretion is of utmost importance in the enforcement of immigration law, so much that the Meissner memorandum begins with the most important direction for the execution of such discretion by stating:

Service officers are not only authorized by law but expected to exercise discretion in a judicious manner at all stages of the enforcement process—from planning investigations to enforcing final orders—subject to their chains of command and to the particular responsibilities and authority applicable to their specific position. In

69. Memorandum from Janet Napolitano, *supra* note 20, at 3.

70. *ICE FAQ: Deferred Action Process*, *supra* note 28, at 2.

71. *Id.* at 3.

72. *See, e.g.*, Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Serv., to Reg’l Dirs., Dist. Dirs., Chief Patrol Agents, & Reg’l & Dist. Counsel 1 (Nov. 17, 2000), available at <http://Iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view>.

73. *Id.* In 2003, the Bush Administration reorganized the presidential power by combining the INS with the Customs Service. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 244 (5th ed. 2003).

74. *See* Memorandum from Doris Meissner, *supra* note 72, at 1.

75. *See id.*; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge, & All Chief Counsel 1 (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>; Memorandum from Janet Napolitano, *supra* note 20, at 2.

exercising this discretion, officers must take into account . . . [the] effective enforcement of the immigration laws and the interest[] of justice.⁷⁶

Prosecutorial discretion extends in a number of ways, such as deciding which “offenses or populations to target; whom to stop, interrogate, and arrest; whether to detain or to release a noncitizen; whether to initiate removal proceedings; whether to execute a removal order; and various other decisions.”⁷⁷ However, prosecutorial discretion is the sole responsibility of the agencies responsible for the enforcement of the law.⁷⁸ It is solely within their discretion to prosecute an individual or not.⁷⁹ The Supreme Court has consistently held, in cases such as *Heckler v. Chaney*⁸⁰ and *Reno v. American Arab Anti-Discrimination Committee*,⁸¹ that it is an agency’s responsibility to enforce laws and it has the sole discretion of whether to enforce the laws or whether or not to prosecute an individual.⁸² The purpose of executing prosecutorial discretion in immigration cases is to make sure that the allocation of money is directed where it is most needed.⁸³ This is specifically laid out in the Meissner memorandum, which states that prosecutorial discretion is not a summons for the violation of the law, but “[r]ather . . . a means to use the resources [the INS has] in a way that best accomplishes [their] mission of administering and enforcing the immigration laws of the United States.”⁸⁴ The Meissner memorandum is still the basis for the use of prosecutorial discretion at the DHS today.⁸⁵ Shoba Sivaprasad Wadhia, Professor at Pennsylvania State University Dickinson School of Law, highlights the importance of prosecutorial discretion in attaining “cost-effective law enforcement and relief for individuals who present desirable qualities or humanitarian circumstances.”⁸⁶ The primary need for this tool is because it is economically impossible to be able to prosecute and investigate all the violations incurred as

76. Memorandum from Doris Meissner, *supra* note 72, at 1.

77. Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010); *see also* Memorandum from Doris Meissner, *supra* note 72, at 2.

78. *See* Memorandum from Doris Meissner, *supra* note 72, at 2.

79. *Id.*

80. 470 U.S. 821 (1985).

81. 525 U.S. 471 (1999).

82. Memorandum from Doris Meissner, *supra* note 72, at 3 (quoting *Chaney*, 470 U.S. at 831) (citing *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 483–84).

83. *See* Wadhia, *supra* note 77, at 244.

84. Memorandum from Doris Meissner, *supra* note 72, at 4.

85. *See* Memorandum from John Morton, *supra* note 75, at 1.

86. Wadhia, *supra* note 77, at 244.

a result of illegal immigration.⁸⁷ Therefore, by using prosecutorial discretion, the allocation of money has been geared to a priority system, with the most concern and money distribution going to cases considered high priority.⁸⁸ High priority cases include those that concern the “protecti[on] [of] public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law.”⁸⁹ Without this tool—which has been widely used for years in matters concerning immigration law—such high priority cases will go unresolved, which may result in danger to the public and the nation as a whole.⁹⁰

It is important to note, as President Barack Obama and Secretary Napolitano have stated numerous times, that the execution of prosecutorial discretion does not confer any form of immigration status on an individual, nor is it a pathway to citizenship; rather, it is a temporary halt to the deportation proceedings of certain qualified individuals.⁹¹ This has been addressed multiple times when executing the INS’s prosecutorial discretion in immigration cases, including the Meissner memorandum, which directed all agencies that “it must [be made] clear to the alien that exercising prosecutorial discretion does not confer any immigration status, . . . or any enforceable right or benefit upon the alien.”⁹²

1. Deferred Action as a Primary Function of Prosecutorial Discretion

One of the ways prosecutorial discretion is exercised is through the use of “deferred action.”⁹³ Deferred action has been and still remains one of the primary ways the DHS executes its right to prosecutorial discretion.⁹⁴ Furthermore, the “theory of prosecutorial discretion” has been used in immigration cases for over sixty years on both an individual level and a group level.⁹⁵

87. Memorandum from Doris Meissner, *supra* note 72, at 4.

88. *Id.*

89. *Id.*

90. *See id.* at 3–4.

91. President Barack Obama, *supra* note 2; *see also* Memorandum from Janet Napolitano, *supra* note 20, at 3.

92. Memorandum from Doris Meissner, *supra* note 72, at 12; *see also* Memorandum from Janet Napolitano, *supra* note 20, at 3.

93. Wadhia, *supra* note 77, at 246. “Deferred action is a discretionary action initiated at the discretion of the agency or at the request of the alien” Memorandum from Emilio T. Gonzalez, Dir., U.S. Citizen & Immigration Servs., to Prakash Khatri, Ombudsman, U.S. Citizen & Immigration Servs. 1 (Aug. 7, 2007), *available at* http://www.dhs.gov/xlibrary/assets/cisombudsman_rr_32_o_deferred_action_uscis_response_08-07-07.pdf.

94. Wadhia, *supra* note 77, at 246; *see also* Memorandum from Janet Napolitano, *supra* note 20, at 2–3.

95. Wadhia, *supra* note 77, at 265.

Secretary Napolitano stated that deferred action is an act of prosecutorial discretion which an agency—DHS—must employ.⁹⁶ But it is important to note, however, that an individual or group may not request deferred action unless the DHS has granted it.⁹⁷

The use of prosecutorial discretion has been evident in recent years.⁹⁸ Secretary Napolitano announced four years ago that the granting of deferred action for a period of two years would be issued to both widows and widowers, who have been married to their citizen spouse for less than two years and reside in the United States, alongside their unmarried children who are below the age of twenty-one.⁹⁹ More recently, however, the DHS has executed its prosecutorial discretion through the use of deferred action at a micro level concerning individuals who would have qualified for the DREAM Act.¹⁰⁰ For instance, in 2009 the DHS granted deferred action at a micro level to eighteen-year-old Taha, who was brought to the United States by his parents at the age of two from Bangladesh, India.¹⁰¹ Now, effective June 15, 2012, the Obama Administration and the DHS, in an attempt to fix the current American immigration system absent action by Congress, used its prosecutorial discretion by deferring the deportation or future deportation of young individuals who meet a certain criteria.¹⁰² The purpose for this, as both President Obama and Secretary Napolitano announced, is to “focus [the] immigration enforcement resources in the right place[.]”¹⁰³ However, the President and Secretary Napolitano have assured the American people and critics that this action on behalf of the DHS is within its scope of prosecutorial discretion and that such discretion has been a part of the immigration system since long before the current presidential term.¹⁰⁴

96. Memorandum from Janet Napolitano, *supra* note 20, at 1–2.

97. Wadhia, *supra* note 77, at 265.

98. *Id.* at 262–63.

99. Press Release, Office of the Press Sec’y, DHS Establishes Interim Relief for Widows of U.S. Citizens (June 9, 2009), http://www.dhs.gov/ynews/releases/pr_1244578412501.shtm.

100. See *News Flash: Taha Receives Deferred Action!!!*, DREAM ACTIVIST (July 24, 2009), <http://www.dreamactivist.org/news-flash-taha-recieves-deffered-action/>.

101. *Id.*

102. President Barack Obama, *supra* note 2.

103. *Id.*; see also Memorandum from Janet Napolitano, *supra* note 20, at 1.

104. See Memorandum from Janet Napolitano, *supra* note 20, at 3; President Barack Obama, *supra* note 2.

2. The Possibility of Judicial Review for the Use of Prosecutorial Discretion

Many critics have questioned the constitutionality of the latest move made by the DHS and the Obama Administration, arguing that both groups went beyond their constitutional authority when executing their prosecutorial discretion to halt the deportation of more than 800,000 young individuals who meet a certain criteria.¹⁰⁵ However, the memorandum issued on June 15, 2012 to David Aguilar, Acting Commissioner CBP,¹⁰⁶ Alejandro Mayorkas, Director of the USCIS,¹⁰⁷ and John Morton, Director of ICE¹⁰⁸ specifically notes that “[t]his memorandum confers no substantive right, immigration status or pathway to citizenship. Only . . . Congress, acting through its legislative authority, can confer these rights. It remains for the [E]xecutive [B]ranch . . . to set forth policy for the exercise of discretion within the framework of existing law.”¹⁰⁹ Thus, if the issue were submitted to the Supreme Court to review the current actions of the DHS, the likely outcome would most likely go in favor of the DHS, due to precedent cases demonstrating the Court’s hesitation to review discretionary decisions made by immigration agencies.¹¹⁰ Professor Wadhia has commented on the matter, stating that immigration agencies are “virtual[ly] immun[e] from judicial review.”¹¹¹ The reason that the Supreme Court hesitates in reviewing the prosecutorial decisions of immigration agencies is because such decisions are based on a multitude of unknown factors considered by the agencies in making their decisions whether or not to prosecute an individual.¹¹² In *Chaney*, the Supreme Court reasoned that the agencies are better equipped than the courts in making expert decisions as to whether or not to enforce the law.¹¹³

105. *Kelly’s Court: Is President Obama’s Immigration Move Legal?*, *supra* note 11, at 0:04, 0:10, 1:56.

106. Federal Government’s unified border agency. ALEINIKOFF ET AL., *supra* note 73, at 244.

107. Federal agency that deals with matters pertaining to “naturalization and . . . immigration benefits.” *Id.*

108. *ICE Overview*, ICE, <http://www.ice.gov/about/overview> (last visited Feb. 24, 2013). U.S. Immigration and Customs Enforcement is the principal investigative arm of the U.S. Department of Homeland Security . . . and the second largest investigative agency in the federal government. [It was] [c]reated in 2003 through a merger of the investigative and interior enforcement elements of the U.S. Customs Service and the Immigration and Naturalization Service, [which are no longer in effect] . . .

Id.

109. Memorandum from Janet Napolitano, *supra* note 20, at 3.

110. Wadhia, *supra* note 77, at 287.

111. *Id.* at 286.

112. *Id.* at 287.

113. Heckler v. Chaney, 470 U.S. 821, 831–32 (1985).

The Court stated that “the agency must not only assess whether a violation has occurred, but whether [the] agency resources are best spent on this violation or another . . . [or] whether the agency has enough resources to undertake the action at all.”¹¹⁴ Furthermore, the Court also stated that Congress would have to essentially decide whether an agency’s decisions should be subject to review, and that it is not up to the courts to make such a determination.¹¹⁵ Similarly, in *American-Arab Anti-Discrimination Committee*, the Supreme Court held that decisions by the Attorney General as to whether or not to “commenc[e] proceedings, adjudicat[e] cases, [or] execut[e] removal orders” against an undocumented individual were discretionary in nature and not subject to judicial review.¹¹⁶ Supreme Court precedent has made it difficult for judicial review in this area absent some congressional act to limit the prosecutorial discretion of immigration agencies.¹¹⁷ For this reason, it is unlikely that—without some congressional act to limit DHS’s prosecutorial discretion—the Supreme Court will review the actions of Secretary Napolitano and the Obama Administration in halting the deportation of more than 800,000 undocumented individuals.¹¹⁸

III. THE DREAM ACT

This morning, Secretary Napolitano announced new actions my administration will take to mend our nation’s immigration policy, to make it more fair, more efficient, and more just—specifically for certain young people sometimes called “Dreamers.” These are young people who study in our schools, they play in our neighborhoods, they’re friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper. They were brought to this country by their parents—sometimes even as infants—and often have no idea that they’re undocumented until they apply for a job or a driver’s license, or a college scholarship.¹¹⁹

The above excerpt comes from a speech given by the President of the United States on June 15, 2012 in the Rose Garden of the White House.¹²⁰

114. *Id.* at 831.

115. *Id.* at 838.

116. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483, 485–86 (1999).

117. *See Chaney*, 470 U.S. at 832.

118. *See Kelly’s Court: Is President Obama’s Immigration Move Legal?*, *supra* note 11, at 0:11; *see also Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 483; *Chaney*, 470 U.S. at 832.

119. President Barack Obama, *supra* note 2.

120. *Id.*

To those Americans familiar with the DREAM Act, a federal legislative act that recently failed in Congress in 2010, the President's speech sounds all too familiar.¹²¹ However, this speech was not an announcement that the federal government would provide a pathway to citizenship for hundreds of thousands of undocumented minors.¹²² Rather, this speech was the announcement of an executive decision not to prosecute or deport certain young undocumented individuals that meet specific detailed criteria, provided for by the DHS.¹²³ As the President stated in his speech the morning of June 15, 2012, "[t]his is a temporary stopgap measure that lets us focus our resources wisely while giving a degree of relief and hope to talented, driven, patriotic young people. It is the right thing to do."¹²⁴ Many critics have stated that the President and the DHS's actions circumvented congressional authority since Congress most recently denied the DREAM Act in 2012.¹²⁵ However, although the concept and individuals affected by this new immigration policy remain the same, the outcome is significantly different.¹²⁶ As stated previously in this article, the DHS and the Obama Administration have made it clear that the execution of prosecutorial discretion through the use of deferred action on qualified individuals is not permanent relief like the relief that would be afforded by the DREAM Act.¹²⁷ Rather, it is a temporary "policy for the exercise of discretion within the framework of the existing law."¹²⁸ Thus, this action does not evade congressional authority, and is also within the scope and nature of executive authority.¹²⁹ This recent decision

121. *Id.*; see 8 U.S.C. § 1229b (2006 & Supp. II 2008). "[A] year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. It got [fifty-five] votes in the Senate, but Republicans blocked it." President Barack Obama, *supra* note 2.

122. Memorandum from Janet Napolitano, *supra* note 20, at 3; President Barack Obama, *supra* note 2.

123. Memorandum from Janet Napolitano, *supra* note 20, at 2; President Barack Obama, *supra* note 2.

124. President Barack Obama, *supra* note 2.

125. *Kelly's Court: Is President Obama's Immigration Move Legal?*, *supra* note 11, at 1:34, 2:45.

126. *PBS Newshour: What Obama's Immigration Move Means for Undocumented Youth, Politics* (PBS television broadcast June 15, 2012), available at www.pbs.org/newshour/bb/politics/jan-june12/dreamact_06-15.html. Cecilia Munoz, Director of the White House Domestic Policy Counsel, points out in an interview with PBS that the decision by Secretary Napolitano is not permanent and will not give these qualified undocumented individuals a pathway to citizenship as would the DREAM Act, which is up to Congress to decide on, not the DHS. *Id.*

127. See Memorandum from Janet Napolitano, *supra* note 20, at 3; President Barack Obama, *supra* note 2.

128. Memorandum from Janet Napolitano, *supra* note 20, at 3.

129. See *id.*

leaves an opportunity for Congress to once again act in a positive way and create a pathway to citizenship for undocumented minors, who through no fault of their own have been brought to the United States and raised Americans.¹³⁰ As the President stated, “[p]recisely, because [the execution] is temporary, Congress needs to act.”¹³¹

This portion of the article will explain the DREAM Act that was rejected by the Senate in 2010 and its provisions, as well as the differences between it and the DHS’s execution of prosecutorial discretion. Moreover, this section will discuss the future of the individuals affected by both a future passing of the DREAM Act and the new immigration policy laid out by both the Obama Administration and the DHS.

A. Overview of the DREAM Act

Up until June 15, 2012, undocumented minors who were brought to the United States illegally as young children or infants through no fault of their own could potentially be deported at any moment by the ICE.¹³² Some of these individuals, if lucky, would receive deferred action through the use of prosecutorial discretion at the micro level.¹³³ However, not every undocumented minor who met these criteria would receive deferred action, and most would have to be deported back to countries they may not know “or even speak the language.”¹³⁴ This constant deportation of young, talented individuals from the United States is what brought about the creation of some form of legislation that would allow these hardworking individuals to continue their quest to live the American Dream.¹³⁵ The legislative act that resulted from this need for fairness was the DREAM Act; however, numerous versions of the DREAM Act have been before Congress throughout the years, yet not one version has been able to pass Congress and become law.¹³⁶ The most recent version presented to Congress of the DREAM Act was in 2010.¹³⁷ Ironically, both the Republican and the Democratic Parties drafted

130. President Barack Obama, *supra* note 2. “There is still time for Congress to pass the DREAM Act this year, because these kids deserve to plan their lives in more than two-year increments.” *Id.*

131. *Id.*

132. See Memorandum from Janet Napolitano, *supra* note 20, at 1–2; President Barack Obama, *supra* note 2.

133. Elisha Barron, *The Development, Relief, and Education for Alien Minors (DREAM) Act*, 48 HARV. J. ON LEGIS. 623, 624 (2011).

134. *Id.*; Memorandum from Janet Napolitano, *supra* note 20, at 2.

135. Barron, *supra* note 133, at 623–24.

136. *Id.* at 623.

137. *Id.*

the legislation.¹³⁸ However, only the Democratic Party voted for it in the House of Representatives while the Republican Party did not.¹³⁹ Although the provisions of the 2010 DREAM Act were more restrictive than the previously presented versions, the concepts of each version of the DREAM Act have remained, for the most part, constant since its creation in 2001.¹⁴⁰ Each version of the DREAM Act has contained two essential parts that the activists of the DREAM Act have pushed for: The first includes a pathway to citizenship for individuals who were illegally brought into the United States before the age of sixteen, and the second part consists of the receipt of public benefits that would have otherwise been unavailable to those individuals due to their lack of legal status in the United States.¹⁴¹

The first benefit provided for by the 2010 version of the DREAM Act is its pathway to citizenship for individuals who qualify.¹⁴² To qualify for the DREAM Act, an undocumented individual must have arrived in the United States prior to the age of sixteen and have remained in the United States for at least five consecutive years.¹⁴³ The 2010 version of the DREAM Act also requires that the individual qualifying for the DREAM Act be no more than thirty years of age at the time of its enactment.¹⁴⁴ Thus, an individual who is thirty-five and who arrived in the United States at the age of twelve would not qualify for citizenship under the DREAM Act.¹⁴⁵ Additionally, to qualify, an individual must demonstrate that he or she has been “admitted to an institution” of postsecondary education in the United States and must also show that he or she has received a high school diploma or a certificate of GED.¹⁴⁶ However, it should be noted that while an individual may meet the above requirements for qualification of the DREAM Act, an individual may still be disqualified for a number of different reasons including having a criminal background,¹⁴⁷ being a threat to the safety of the public, or a threat to the security of the nation.¹⁴⁸ The last and most puzzling of the requirements necessary to qualify for the DREAM Act is the requirement that an individual must have “good moral character.”¹⁴⁹ While no definition for

138. President Barack Obama, *supra* note 2.

139. *Id.*

140. See Barron, *supra* note 133, at 632–33.

141. *Id.* at 626.

142. *Id.*

143. DREAM Act of 2010, S. 3992, 111th Cong. § 4(a)(1)(A) (2010).

144. *Id.* § 4(a)(1)(F).

145. See *id.*

146. *Id.* § 4(a)(1)(D); Barron, *supra* note 133, at 627.

147. 8 U.S.C. § 1227(a)(2) (2006 & Supp. II 2008).

148. *Id.* § 1227(a)(4).

149. Barron, *supra* note 133, at 628.

“good moral character” exists in any of the versions of the DREAM Act, the Immigration and Nationality Act (INA) has provided a set list of activities which are to be used in determining whether an individual would qualify as having “good moral character” or not.¹⁵⁰ Moreover, the INA states that this is not an exhaustive list and that other activities may disqualify an individual from having “good moral character.”¹⁵¹ More importantly, the decision is left to the discretion of the Secretary of Homeland Security, who will make the determination as to whether an individual is of “good moral character” if he or she acts in a way not listed by the INA, but acts in a questionable manner.¹⁵² Thus, if an individual is found to have violated any of the requirements of the DREAM Act, “[t]he Secretary of Homeland Security shall terminate the conditional nonimmigrant status,”¹⁵³ by returning the individual to his previous status of undocumented alien.¹⁵⁴

Once the individual is found to have met the requirements necessary to qualify for the DREAM Act, the individual must take steps outlined by the Secretary of Homeland Security as to the procedures for applying.¹⁵⁵ Not only do these individuals have to qualify and apply for relief, they are also required to apply no later than one year from the date the individual was admitted to a postsecondary school in the United States,¹⁵⁶ the date the individual received a high school diploma or GED in the United States,¹⁵⁷ or the date of enactment of the DREAM Act,¹⁵⁸ whichever is latest.¹⁵⁹ Additionally, each individual is required to submit biometric and biographic data to rule out past criminal history.¹⁶⁰ Moreover, the individual must undergo a medi-

150. *Id.*

[T]he INA states that an individual shall not be found to have good moral character if he or she: (1) is or was a habitual drunkard; (2) derives income principally from illegal gambling activities; (3) has been convicted of two or more gambling offenses; (4) has given false testimony for the purpose of obtaining any benefit under the INA; (5) has been incarcerated for 180 days or more as a result of conviction; or (6) has been convicted of an aggravated felony.

Id.

151. *See* 8 U.S.C. § 1101(f) (2006).

152. Barron, *supra* note 133, at 628.

153. DREAM Act of 2010, S. 3992, 111th Cong. § 5(c)(1) (2010). “The term ‘conditional nonimmigrant’ means an alien who is granted conditional nonimmigrant status under this Act.” *Id.* § 3(3)(A).

154. *Id.* § 5(c)(2).

155. *See id.* § 4(a)(3).

156. *Id.* § 4(a)(4)(A).

157. S. 3992 § 4(a)(4)(B).

158. *Id.* § 4(a)(4)(C).

159. *Id.* § 4(a)(4).

160. *Id.* § 4(a)(5)–(6). Without an individual submitting both biometric and biographic data, “[t]he Secretary of Homeland Security may not cancel [or defer] the removal of an” individual who would otherwise qualify for relief under the 2010 DREAM Act. *Id.* § 4(a)(5).

cal examination pursuant to the policies laid forth by the Secretary of Homeland Security,¹⁶¹ and must “register[] under the Military Selective Service Act.”¹⁶² Once an individual has met all of the requirements and has qualified and applied for the DREAM Act, the individual may begin the pathway to citizenship promised by the Act itself.¹⁶³

The 2010 bill presented to the 111th Congress required that an individual go through three stages before completing the pathway to citizenship with the minimum time frame being thirteen years.¹⁶⁴ The first stage is a conditional ten-year period during which time the individual receives a “nonimmigrant status.”¹⁶⁵ This status may be revoked at any time if the individual is found to have violated certain restrictions.¹⁶⁶ During this time, the individual is not required to complete “postsecondary education or military service.”¹⁶⁷ Furthermore, the earliest an individual may request his or her status to change from “nonimmigrant” to “alien lawfully admitted for permanent residence,” the second stage of the DREAM Act, is in the ninth year of the first stage.¹⁶⁸ Thus, if an individual applies for relief under the DREAM Act at the age of eighteen, he or she would not be able to request a status change until the age of twenty-seven.¹⁶⁹ Up until that time, the individual will be conditionally legal in the United States.¹⁷⁰ Upon the individual’s completion of the first stage, the individual’s status becomes ““alien lawfully admitted for permanent residence.””¹⁷¹ However, unlike the first stage, the second stage would require the individual to have completed at least two years of postsecondary education or military service.¹⁷² Moreover, an exception to the requirements necessary for the second stage exists.¹⁷³ If an individual can demonstrate that he or she had “compelling circumstances” that did not allow him or her to meet the requirement, and he or she can show unusual hardship, then the Secretary of Homeland Security may waive the

Such data will then be used by the DHS to conduct background checks to determine whether an individual is harmful to the security of the public or the nation. S. 3992 § 4(a)(6).

161. *Id.* § 4(a)(7).

162. *Id.* § 4(a)(8).

163. *See id.* § 6(k); *see also* Barron, *supra* note 133, at 626.

164. Barron, *supra* note 133, at 626.

165. *Id.*

166. *Id.*

167. *Id.*

168. S. 3992 § 6(a), (c); Barron, *supra* note 133, at 626–27.

169. *See* S. 3992 § 6(c).

170. *Id.*

171. Barron, *supra* note 133, at 626–27.

172. *Id.* at 627.

173. *Id.* at 630.

requirement pursuant to the right of prosecutorial discretion.¹⁷⁴ The last stage “provides for naturalization¹⁷⁵ upon compliance with all relevant provisions of the INA, and after three years of residence in the United States as a legal permanent resident.”¹⁷⁶ It should be noted that the three-year wait for application is different than the normal five-year wait required by those applying for legal residence in the United States.¹⁷⁷ Aside from the benefit of possibly becoming a citizen of the United States, the DREAM Act would also provide for the receipt of limited public benefits to individuals who qualified.¹⁷⁸ However, such benefits have been limited substantially in the 2010 version of the DREAM Act compared to the DREAM Act presented in 2001.¹⁷⁹

B. *Comparing and Contrasting the DREAM Act to the New Executive Immigration Policy*

The DREAM Act and the DHS’s new execution of prosecutorial discretion would ultimately affect the same group of individuals.¹⁸⁰ Although this is true, the two reliefs consist of very different outcomes for these individuals and ultimately determine the rights afforded to them in the long run.¹⁸¹ As previously stated, the DHS’s execution of prosecutorial discretion is not a pathway to citizenship and does not change the immigration status of the individuals that qualify for deferred action.¹⁸² Rather, these individuals are only given the peace of mind of not being deported for a period of two years, as well as the possibility of receiving work authorization upon proof of economic necessity.¹⁸³ On the other hand, the passing of the DREAM Act would provide these qualified individuals with both a pathway to citizenship and public benefits, which would otherwise only be accessible to legal residents and/or citizens of the United States.¹⁸⁴ It is important to note that the

174. S. 3992 § 6(d)(2)(A)(ii)–(iii); Barron, *supra* note 133, at 630.

175. “The term ‘naturalization’ means the conferring of nationality of a state upon a person after birth, by any means whatsoever.” 8 U.S.C. § 1101(a)(23) (2006).

176. Barron, *supra* note 133, at 627.

177. Compare S. 3992 § 4(a)(1)(A), with *id.* § 6(k).

178. Barron, *supra* note 133, at 631; see also S. 3992 § 11.

179. Barron, *supra* note 133, at 631. The 2010 Bill did not include the possibility for individuals who qualified to receive affirmative school grants, rather they would be able to receive student loans, which would have to be paid back. *Id.*; see also S. 3992 § 11.

180. See President Barack Obama, *supra* note 2.

181. Compare *id.*, with Memorandum from Doris Meissner, *supra* note 72, at 2–4.

182. Memorandum from Janet Napolitano, *supra* note 20, at 3; President Barack Obama, *supra* note 2; see *supra* Part II.B.

183. Memorandum from Janet Napolitano, *supra* note 20, at 2–3; see *supra* Part II.A.3., 4.

184. Barron, *supra* note 133, at 632; see *supra* Part III.A.

DREAM Act would provide an individual with nonimmigrant status, which would enable the individual to work as well as the right to travel in and out of the United States without a visa.¹⁸⁵ However, as Secretary Napolitano and the President have stated, the deferred action of these 800,000 individuals is not a legal status and will give no permanent relief.¹⁸⁶ Thus, it would not permit the individual to travel in and out of the country nor allow the individual to qualify for work authorization absent a showing of economic necessity.¹⁸⁷

As a result of the 2010 failure of the DREAM Act, these undocumented individuals were afforded no relief and could be subject to deportation at any time,¹⁸⁸ thus clouding the system with cases not worthy of deportation.¹⁸⁹ Therefore, in order to use its resources wisely, the DHS, using its right to prosecutorial discretion, chose to defer the deportation or future deportation of individuals who for all intents and purposes posed no threat to national security or the public.¹⁹⁰ The DHS and the President, without taking into account their views on the DREAM Act, used cost-effective tools to prioritize the individuals who will or will not be deported out of the country.¹⁹¹ By deferring the deportation proceedings of low-priority cases, the DHS will be able to focus on the deportation of high-priority cases such as drug dealers, criminals, terrorist, and other cases that may pose a threat to the public and society while giving temporary relief to individuals who have not purposely violated any of the immigration laws of the country.¹⁹² However, such action would afford only temporary relief, while still leaving the need for permanent relief.¹⁹³

IV. “THE RIGHT THING TO DO”

Although this execution of prosecutorial discretion is temporary relief for individuals who have not purposely violated the law, it is a form of relief

185. DREAM Act of 2010, S. 3992, 111th Cong. § 5(a)–(b) (2010).

186. President Barack Obama, *supra* note 2; *see also* Memorandum from Janet Napolitano, *supra* note 20, at 3; *Kelly’s Court: Is President Obama’s Immigration Move Legal?*, *supra* note 11, at 3:48.

187. *See* Memorandum from Janet Napolitano, *supra* note 20, at 3.

188. *See* Barron, *supra* note 133, at 623–24, 626.

189. *See* Memorandum from Janet Napolitano, *supra* note 20, at 1.

190. *Id.*

191. *Id.* at 2–3; *see also* President Barack Obama, *supra* note 2.

192. *See* Memorandum from Janet Napolitano, *supra* note 20, at 1–2; *see also* President Barack Obama, *supra* note 2.

193. President Barack Obama, *supra* note 2; *see* Memorandum from Janet Napolitano, *supra* note 20, at 3.

that will allow qualified undocumented individuals to remain in the United States without the fear of possible deportation to estranged countries.¹⁹⁴ More important is the fact that this action would allow the DHS to direct its limited funds at cases that pose a threat to the safety of the public and the nation.¹⁹⁵ These individuals will be allowed to remain in the United States for a period of two years with the possibility of renewal,¹⁹⁶ which will allow Congress to focus on the more important issue of actually passing the true goal, the DREAM Act.¹⁹⁷ Such efforts will aid Congress in the future when passing the DREAM Act, which will provide these individuals—otherwise affected by DHS’s new immigration policy—with permanent relief through a pathway to citizenship.¹⁹⁸ It is very important that these immigrants, who would have to meet a very stringent set of requirements to qualify for the DREAM Act,¹⁹⁹ be able to receive some form of permanent relief, as living in two-year increments is not a positive way to live.²⁰⁰ There are, however, proponents of the DREAM Act, who are not on board with the DHS’s execution of prosecutorial discretion.²⁰¹ Republican Senator of Florida, Marco Rubio, has stated that the recent Act by DHS “is a short-term answer to a long-term problem . . . [T]his short term policy will make it harder to find a balanced and responsible long-term one.”²⁰² It is important for both the Democratic and Republican parties to come to some form of agreement as to the DREAM Act so that these individuals are afforded the right to remain in the United States as citizens of the only country they know as home. It needs to be remembered by those opposing the law that this country was founded by immigrants,²⁰³ and at one point there was no set of immigration laws to follow.²⁰⁴ Eligible immigrants were afforded the right to stay in this country and to beneficially contribute to the growth and prosperity of the United

194. See Memorandum from Janet Napolitano, *supra* note 20, at 1–2; President Barack Obama, *supra* note 2.

195. Memorandum from Janet Napolitano, *supra* note 20, at 1; President Barack Obama, *supra* note 2.

196. Memorandum from Janet Napolitano, *supra* note 20, at 2–3.

197. President Barack Obama, *supra* note 2.

198. See Memorandum from Janet Napolitano, *supra* note 20, at 2–3; President Barack Obama, *supra* note 2.

199. See Barron, *supra* note 133, at 626–30; see also DREAM Act of 2010, S. 3992, 111th Cong. §§ 4–5 (2010).

200. See President Barack Obama, *supra* note 2.

201. See Sanchez, *supra* note 5.

202. *Id.*

203. President Barack Obama, *supra* note 2.

204. See *History of Immigration Laws in the U.S.*, EBSCOHOST CONNECTION, <http://connection.ebscohost.com/us/immigration-restrictions/history-immigration-laws-us> (last visited Feb. 24, 2013).

States.²⁰⁵ Therefore, it would only seem logical that immigrants who have not purposely violated any laws be allowed to remain in the United States given they demonstrate a commitment to becoming legal Americans and further abiding by the requirements necessary to qualify for a pathway to citizenship. It is also noteworthy to point out that many of these individuals will or are already beneficially contributing to the country in numerous ways. One of the important ways in which these individuals are contributing is through the economy.²⁰⁶ As the President has stated to the people of the United States, “it [would] make[] no sense to expel talented young people . . . who want to staff our labs . . . start new businesses, or defend our country simply because of the actions of their parents.”²⁰⁷ President Obama is not the only one who believes the DREAM Act will add greatly to the economy of the United States, as many activists and politicians have stated time and time again that expelling young individuals who have done no wrong and are ready and willing to learn and contribute to society would greatly disadvantage the United States.²⁰⁸ Studies have demonstrated that, in the long run, the benefits of the DREAM Act are great.²⁰⁹ The Congressional Budget Office estimates that the DREAM Act, if passed, would increase revenue by more than two billion dollars, as well as reduce deficits by more than one billion dollars over a ten year period.²¹⁰ What is brushed aside is the amount of money Americans have already invested in these qualified undocumented individuals.²¹¹ By not allowing them to directly contribute to the United States’ economy, the American public is essentially losing money.²¹² These are individuals who, for all intents and purposes, have lived and gone to school in the United States their entire lives, schools that Americans pay for through taxes.²¹³ By passing the DREAM Act, these individuals would be allowed to continue their education and contribute to society and the econo-

205. See President Barack Obama, *supra* note 2; Javier Palomarez, *Make the DREAM Act a Reality*, S. FLA. SUN SENTINEL, Dec. 18, 2010, at A20; *History of Immigration Laws in the U.S.*, *supra* note 204.

206. Palomarez, *supra* note 205.

207. President Barack Obama, *supra* note 2.

208. *Id.*; Palomarez, *supra* note 205. “[W]e [Americans] actually want well-educated kids in our country who are able to succeed and become part of this economy and part of the American dream.” *Barack Obama in 2008 Democratic Debate on the Eve of Super Tuesday*, ONTHEISSUES (Jan. 31, 2008), http://www.onthissues.org/archive/2008_dems_super_tuesday_barack_obama.htm.

209. Palomarez, *supra* note 205.

210. *Id.*

211. *Id.*; see Sanchez, *supra* note 5.

212. See Palomarez, *supra* note 205.

213. *Id.*

my.²¹⁴ Additionally, the DREAM Act will aide in the “nation’s efforts to have the highest proportion of college graduates in the world by 2020.”²¹⁵ Seeing that many Americans are concerned that the DREAM Act will incentivize the future illegal immigration of many undocumented individuals, it is important that the DREAM Act be passed as part of a larger comprehensive immigration plan to discontinue illegal immigration into the United States.²¹⁶ Such a plan would prevent the future crossing of hundreds of thousands of undocumented individuals while still providing permanent relief to those individuals who have been paying the price of their parents’ mistakes.²¹⁷

V. CONCLUSION

A better understanding of the actions of the government is the first step to a better immigration system in the United States. The public’s awareness of the role the DHS plays in the expelling or non-expelling of individuals from our country is crucial in the support of legislation that will further benefit the country as well as hundreds of thousands of worthy candidates. The DHS and the President have not gone beyond their constitutional authority by using prosecutorial discretion in picking and choosing what cases to give high priority to, as the Supreme Court has consistently held that prosecutorial discretion is the sole right of the immigration agencies to conserve the limited resources available to them.²¹⁸ It is important to note that the most recent use of prosecutorial discretion by the DHS will affect the same group of individuals who would have otherwise qualified for the DREAM Act had it passed in the Senate in 2010.²¹⁹ But it will by no means give the same result. Therefore, it is up to the American public to push the government and its politicians to pass the DREAM Act in order to give Annie and other similar individuals, who are living in and beneficially contributing to the United States, the protections afforded to Americans under the United States Constitution. “It is the right thing to do.”²²⁰

214. *Id.*

215. *Id.*

216. *See* Barron, *supra* note 133, at 648.

217. *See* President Barack Obama, *supra* note 2.

218. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (citing *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974), *superseded by statute*, FED. R. EVID. 104 (a), *as recognized in* *Bourjaily v. United States*, 483 U.S. 171 (1987); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868)); *see also* Memorandum from Doris Meissner, *supra* note 72, at 3.

219. *Compare* Memorandum from Doris Meissner, *supra* note 72, at 7–8, *with* DREAM Act of 2010, S. 3992, 111th Cong. § 4(a)(1)(A)–(F) (2010).

220. President Barack Obama, *supra* note 2.

RECONSIDERING A FEDERAL ASSAULT WEAPONS BAN IN THE WAKE OF THE AURORA, OAK CREEK, AND PORTLAND SHOOTINGS: IS IT CONSTITUTIONAL IN THE POST-HELLER ERA?

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BRIAN ROTH*

I. INTRODUCTION

James Huberty drove to a McDonald’s restaurant “after announcing casually to his wife, ‘I’m going to hunt humans.’” Stepping into the restaurant with a 9-millimeter Browning automatic pistol in his belt and a 12-gauge shotgun and a 9-millimeter UZI semiautomatic rifle slung over his shoulders, Huberty called out, “‘Everybody on the floor.’ About 45 patrons were present. As they scrambled to comply, Huberty marched around the restaurant calmly spraying gunfire

Maria Diaz ran out the side door in panic when the shooting started, then remembered that her two-year-old son was still inside. She crept back to a window and saw him sitting obediently in a booth. She motioned him toward the door, nudged it open, and the boy toddled to safety.”

Not everyone was so fortunate.

After SWAT sharpshooters finally killed Huberty, “police and hospital workers moved in on the gruesome scene. A mother and father lay sprawled across their baby, apparently in an attempt to shield it. All three were dead.”

The carnage was clearly far worse than it would have been had Huberty not been armed with semiautomatic weapons. He fired hundreds of rounds. “The gunfire was so heavy that police at first assumed that more than one gunman was inside. A fire truck took six shots before reversing direction and backing off. One fire fighter was grazed by a bullet that tore through the truck and then landed softly on his head.”

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In all, of the 45 patrons in the restaurant, Huberty killed 21 and wounded 15 others.¹

Unfortunately, this is just one of many instances where the use of assault weapons has resulted in catastrophic tragedy.² The shootings in Aurora, Colorado,³ Oak Creek, Wisconsin,⁴ and Portland, Oregon⁵ are some of the most recent incidents involving assault weapons.

On July 20, 2012, a gunman—James Eagan Holmes—entered a movie theater in Aurora, Colorado and opened fire.⁶ He first launched gas grenades and then began calmly and methodically shooting.⁷ One of the individuals present described the scene: “He was sitting there like target practice. He was trying to shoot as many people as he could.”⁸ As another person observed: “There was gunfire, there were babies, there were kids, there was blood everywhere.”⁹ The gunman killed twelve and wounded fifty-eight.¹⁰ Authorities speculated that the carnage would have been worse, but for the fact that the gunman’s assault weapon jammed.¹¹

On August 5, 2012, Wade Michael Page killed six and wounded four at a Sikh temple in Oak Creek, Wisconsin.¹² Page was allegedly motivated by a

1. Kasler v. Lockyer, 2 P.3d 581, 587 (Cal. 2000) (citations omitted).

2. See, e.g., *Assault Weapons Policy Summary*, L. CENTER TO PREVENT GUN VIOLENCE (May 21, 2012), <http://smartgunlaws.org/assault-weapons-policy-summary/>. Assault weapons have been the weapon of choice in many high-profile incidents, including the “1993 office shooting[s] at . . . 101 California Street . . . in San Francisco, [California],” the “1999 Columbine High School massacre in [Columbine,] Colorado,” and the 2007 Westroads Mall shooting in Omaha, Nebraska. *Id.*

3. Jennifer Brown, *Midnight Massacre: Aurora Theater Shooting “Our Hearts are Broken,”* DENVER POST, July 21, 2012, at A1.

4. *Police Identify Army Veteran as Wisconsin Temple Shooting Gunman*, CNN U.S. (Aug. 7, 2012, 7:50 AM), http://www.cnn.com/2012/08/06/us/wisconsin-temple-shooting/index.html?hpt=hp_t1.

5. John Bacon, *Oregon Mall Shooter, Victims Identified*, USA TODAY (Dec. 12, 2012, 6:51 PM), <http://www.usatoday.com/story/news/nation/2012/12/11/oregon-mall-shooting/1762473/>.

6. See Brown, *supra* note 3.

7. *Id.*

8. *Id.*

9. Ed Pilkington & Matt Williams, *Colorado Theater Shooting: 12 Shot Dead During The Dark Knight Rises Screening*, THEGUARDIAN (July 20, 2012, 10:20 AM), <http://www.guardian.co.uk/world/2012/jul/20/colorado-theater-shooting-dark-knight>.

10. Brown, *supra* note 3.

11. David A. Fahrenthold et al., *A Day of Tears and Twists in Colorado*, WASH. POST, July 23, 2012, at A1.

12. *Police Identify Army Veteran as Wisconsin Temple Shooting Gunman*, *supra* note 4; see also Todd Richmond, *Wade Michael Page, Sikh Temple Shooter, Acted Alone, FBI Says*, HUFF POST (Nov. 20, 2012, 6:01 PM), <http://www.huffingtonpost.com/2012/11/20/wade->

fervent commitment to white supremacy causes.¹³ The deceased victims ranged in age from thirty-nine to eighty-four years old.¹⁴ Page was armed with a lawfully-purchased “Springfield Armory XDM 9-[millimeter] semiautomatic pistol.”¹⁵

On December 11, 2012, Jacob Tyler Roberts entered a mall near Portland, Oregon with an AR-15 semiautomatic assault rifle.¹⁶ On a busy holiday shopping day, Roberts killed two people and seriously injured a third person before turning the gun on himself.¹⁷ Clackamas County Sheriff, Craig Roberts, said “the death toll would have been higher had the shooter’s assault rifle not jammed and law enforcement not responded within minutes of the first shot.”¹⁸

The incidents in Aurora, Oak Creek, and Portland have undoubtedly invigorated the gun control debate.¹⁹ This article argues that although the deci-

michael-page-acted-alone_n_2168229.html (reporting that the FBI concluded Page acted alone).

13. Miranda Leitsinger, *Experts: Alleged Temple Gunman Wade Michael Page Led Neo-Nazi Band, Had Deep Extremist Ties*, NBCNEWS.COM (Aug. 6, 2012, 2:48 PM), http://usnews.nbcnews.com/_news/2012/08/06/13147115-experts-alleged-temple-gunman-wade-michael-page-led-neo-nazi-band-had-deep-extremist-ties.

14. Erica Goode & Serge F. Kovaleski, *A Killer Who Fed and Was Fueled by Hate*, N.Y. TIMES, Aug. 7, 2012, at A1.

15. *Temple Shooter Bought Gun at Suburban Shop*, CHANNEL3000.COM (Aug. 7, 2012, 3:18 PM), <http://www.channel3000.com/news/Temple-shooter-bought-gun-at-suburban-shop/-/1648/16004660/-/eqy0rf/-/index.html> (reporting that Page lawfully purchased the semiautomatic weapon on July 28, and Page retrieved the firearm on July 30 after clearing a required background check); see also Molly Hennessy-Fiske & Kim Murphy, *Sikh Temple Shooting: Gun Shop Owner Says Wade Page Seemed Normal*, L.A. TIMES (Aug. 8, 2012, 4:30 AM), <http://www.latimes.com/news/nation/nationnow/la-na-nn-sikh-shooting-guns-20120807,0,7536671.story>.

16. Bacon, *supra* note 5.

17. Rachel La Corte & Steven Dubois, *Oregon Mall Shooting: Gunman Opens Fire at Clackamas Town Center Mall in Portland, Kills 2, Self*, HUFF POST (Dec. 12, 2012, 8:34 PM), http://www.huffingtonpost.com/2012/12/12/oregon-mall-shooting_n_2285243.html.

18. Bacon, *supra* note 5; see also Teresa Carson, *Deadly Oregon Mall Shooting Appeared to Be Lone, Random Rampage*, REUTERS (Dec. 12, 2012, 6:08 PM), <http://www.reuters.com/article/2012/12/12/us-usa-shooting-oregon-idUSBRE8BB01720121212> (stating that “carnage from the shooting likely was limited by the fact the gun jammed”); Kirk Johnson & Serge F. Kovaleski, *Series of Turning Points Kept Mall Toll Lower than Feared*, N.Y. TIMES, Dec. 13, 2012, at A20 (reporting that although the gunman’s assault rifle jammed, he was able to fire approximately sixty rounds); *Police ID Suspect in Oregon Mall Shooting, Say Gun Jammed Possibly Preventing More Deaths*, FOXNEWS.COM (Dec. 12, 2012), <http://www.foxnews.com/us/2012/12/12/gun-jammed-in-oregon-mall-shooting-as-authorities-id-suspect/?test=latestnews> (opining that the jamming likely prevented additional deaths).

19. See Jennifer Brown & Colleen O’Connor, *Past Shooting Victims Unite in Urging Action*, DENVER POST, Dec. 15, 2012, at A1; see also Rick Jervis & John McAuliff, *Colo.*

sion of the Supreme Court of the United States in *District of Columbia v. Heller* (*Heller I*)²⁰ marks a high point in individual rights under the Second Amendment, assault weapons bans nevertheless fall outside of the Second Amendment's scope.²¹ Further, this article proposes that Congress should promptly enact a law proscribing the manufacture, sale, and possession of assault weapons due to their propensity to inflict catastrophic violence.²²

Part II of this article briefly explores the history of the Second Amendment, including the various modes of its interpretation and the major Supreme Court cases in this area.²³ This section also concisely defines assault weapons and discusses the prevalence of assault weapons bans throughout the United States.²⁴

Part III analyzes how lower courts have dealt with challenges to their jurisdictions' assault weapons bans after *Heller I* was decided.²⁵

Part IV argues that some of these lower court decisions were correctly decided, and that *Heller I*'s holding does not bestow a constitutional right to keep and bear assault weapons for any purpose.²⁶ This section also proposes a bill, drafted by the Law Center to Prevent Gun Violence, on which Congress should vote to criminalize the manufacture, sale, and possession of assault weapons.²⁷

Rampage Adds Fuel to Gun-Control Debate, USA TODAY (July 24, 2012), <http://www.usatoday.com/news/nation/story/2012-07-24/aurora-gun-control-debate/56465980/1>. Surprisingly, however, Americans' views on gun control laws remain relatively unchanged. THE PEW RESEARCH CTR., VIEWS ON GUNLAWS UNCHANGED AFTER AURORA SHOOTING 1-2 (2012), available at <http://www.people-press.org/2012/07/30/views-on-gun-laws-unchanged-after-aurora-shooting/> (stating that "[t]he issue remains a highly partisan one: Republicans prioritize gun rights by a 71% to 26% margin, while Democrats prioritize gun control by a 72% to 21% margin").

20. 554 U.S. 570 (2008).

21. See discussion *infra* Part IV.A.

22. See discussion *infra* Part IV.C.

23. See discussion *infra* Part II.A-B; see also U.S. CONST. amend. II.

24. See discussion *infra* Part II.C.

25. See discussion *infra* Part III; see also *Heller I*, 554 U.S. at 577.

26. See discussion *infra* Part IV.A-B; see also *Heller I*, 554 U.S. at 625 (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

27. See discussion *infra* Part IV.C.

II. BACKGROUND

A. *The Second Amendment and Its Modes of Interpretation*

The Second Amendment to the United States Constitution states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”²⁸

The meaning of these twenty-seven words has been the source of marked contention.²⁹ Broadly speaking, there are two primary theories of interpretation: A collective people’s right and an individual’s right.³⁰ Individual’s right theorists believe that the Second Amendment right should not be interpreted differently from other constitutional provisions, which confer individual rights.³¹ Collective people’s right supporters contend that the founders’ concern regarding the Second Amendment primarily revolved around “the allocation of military power,” and as a result, the right conferred is a collective people’s right.³² “Each side of the debate claims that its view is in accord with the” framers’ intent.³³ Each side also maintains that its interpretation is in line with the original and plain meanings.³⁴ To be sure,

28. U.S. CONST. amend. II.

29. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 26 (3d ed. 2006) (referring to the Second Amendment as a source of “heated debate among scholars” and laymen alike).

30. *See id.*; *see also* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 793–94, 794 n.2, 810 (1998); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 613 (2000).

31. Volokh, *supra* note 30, at 794, 810 (stating that the First, Fourth, and Ninth Amendments use the phrase “the right of the people” and there is general agreement that those amendments confer individual rights; similarly, the Second Amendment confers such a right); *see also* U.S. CONST. amend. II.

32. *See* Yassky, *supra* note 30, at 598–99, 620–21 n.130 (stating that “the Second Amendment speaks only of ‘the people’ in their collective capacity as militiamen”); *see also* U.S. CONST. amend. II.

33. CHERMERINSKY, *supra* note 29, at 27. *Compare* *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) (holding that the Second Amendment protects only a collective people’s right to keep and bear arms), *abrogated in part by* *District of Columbia v. Heller*, 554 U.S. 570 (2008), *with* *United States v. Emerson*, 270 F.3d 203, 264 (5th Cir. 2001) (holding that the Second Amendment protects an individual’s right to keep and bear arms).

34. *See* PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* 16–17 (2009) (stating that individual right theorists maintain that “‘people’ is primarily [used] in the Bill of Rights when referring to the individual,” and consequently the Second Amendment protects individuals. Collective right theorists, on the other hand, contend “that because the militia was composed of a [group] of people . . . the ‘right to keep and bear arms’ can only be exercised by the collective people when . . . servi[ng] [in] the militia.”); *see also* STEPHEN P. HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS* 325 (2008) (examining the early

these modes of interpretation do not produce any satisfying answer to the question of which right the Second Amendment confers. The case law, then, must be analyzed to address this issue.

B. *Major Supreme Court Decisions Pertaining to the Second Amendment*

1. *United States v. Cruikshank*: The Second Amendment's Inapplicability to the States

*United States v. Cruikshank*³⁵ was the first Supreme Court case that directly addressed the Second Amendment.³⁶ In that case—which centered on the Colfax massacre in Louisiana—the defendants were charged with violating a federal statute prohibiting individuals from conspiring to deprive other individuals of their constitutionally-protected rights.³⁷ A Second Amendment issue arose—not because the defendants confiscated the black citizens' firearms or prevented them from joining the state militia—but because the defendants prevented the black citizens from voting and thereby restricted them from bearing arms.³⁸

In addressing the plaintiffs' Second Amendment claim, the Court agreed with the plaintiffs that the Second Amendment declares that the right to keep and bear arms shall not be infringed.³⁹ The Court clarified, however, that this right “means no more than that it shall not be infringed by Congress,” and as a result, the Second Amendment is not a restraint on state governments or private individuals.⁴⁰

dictionary definition of “‘people,’” which includes “‘persons in general’” and “‘the commonalty [sic], as distinct from men of rank,’” and subsequently determining that “‘the people’” refers to individuals); H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 168–211 (2002) (analyzing briefly the scholarly contributions of Sanford Levinson, Carl Bogus, William Van Alstyne, Akhil Reed Amar, and David Yassky, and determining that these learned authors support disparate views).

35. 92 U.S. 542 (1875), *abrogated by* McDonald v. City of Chi., 130 S. Ct. 3020 (2010).

36. CHARLES, *supra* note 34, at 64 (stating that this case marked the first time that the Supreme Court gave “the Second Amendment any significant attention”); *see also* U.S. CONST. amend. II.

37. *Cruikshank*, 92 U.S. at 548; JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* 22–23 (2011) (describing the sociopolitical and legal circumstances surrounding the Colfax massacre).

38. CHARLES, *supra* note 34, at 64 (stating that the Second Amendment became an issue in addition to the right to peacefully assemble and the right to enjoy life and liberty); *see Cruikshank*, 92 U.S. at 548; *see also* U.S. CONST. amend. II.

39. *Cruikshank*, 92 U.S. at 553; *see also* U.S. CONST. amend. II.

40. *Cruikshank*, 92 U.S. at 553 (stating further that “[t]his is one of the amendments that has no other effect than to restrict the powers of the national government”); *see also* U.S.

2. *Presser v. Illinois*: A Narrow Second Amendment

Just eleven years after *Cruikshank* came *Presser v. Illinois*,⁴¹ in which the plaintiff contested an Illinois law that made it unlawful for citizens to assemble and form a militia bearing arms without the express consent of the governor.⁴² The plaintiff argued, *inter alia*, that the law violated the Second Amendment.⁴³

The Court reaffirmed its core holding in *Cruikshank* and confirmed that the Second Amendment prohibits “only . . . the power[s] of Congress and the National [G]overnment.”⁴⁴ The Second Amendment did not protect the plaintiff’s purported right to keep and bear arms because neither Congress nor the National Government enacted the law at issue and the state government did not eliminate its militia.⁴⁵ The Court further explained that although states cannot enact laws that eviscerate the militia force, any law short of that would not be invalidated by the Second Amendment.⁴⁶

3. *United States v. Miller*: The “Well-Regulated Militia” Requirement

*United States v. Miller*⁴⁷ was perhaps the most important Supreme Court decision pertaining to the Second Amendment prior to 2008.⁴⁸ In that case, the defendants were indicted for possessing a shotgun with “a barrel less than [eighteen] inches” in violation of a federal statute.⁴⁹ The trial court quashed the indictment, holding that the law violated the defendants’ Second Amendment right to keep and bear arms.⁵⁰

CONST. amend. II; STEVENS, *supra* note 37, at 23 (stating that this “unfortunate decision paved the way for continued racial violence and the enactment of state laws throughout the South that deprived blacks of full citizenship for decades”).

41. 116 U.S. 252 (1886); *see generally Cruikshank*, 92 U.S. 542.

42. *Presser*, 116 U.S. at 262.

43. *Id.* at 264.

44. *Id.* at 265; *see also Cruikshank*, 92 U.S. at 553.

45. *Presser*, 116 U.S. at 264–65.

46. *Id.* at 265.

47. 307 U.S. 174 (1939).

48. With that said, however, *Miller* has also been heavily criticized by commentators due to its brevity and relatively simplistic analysis. *See, e.g.*, BRIAN DOHERTY, GUN CONTROL ON TRIAL: INSIDE THE SUPREME COURT BATTLE OVER THE SECOND AMENDMENT 15 (2008) (“*Miller* is an unusual case on which to rest an entire edifice of constitutional interpretation.”); *see UVILLER & MERKEL, supra* note 34, at 18–19 (characterizing *Miller* as “problematic from the standpoint of Second Amendment doctrine” because people arguing from each side of the aisle repeatedly “read the same language from the *Miller* opinion as confirming” its view).

49. *Miller*, 307 U.S. at 175.

50. *Id.* at 177.

Hearing the case on direct appeal, the Supreme Court reversed the trial court's ruling, and issued the following, now famous, statement:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.⁵¹

For many decades, *Miller* was understood to stand for the proposition that the Second Amendment conferred a right only in connection with militia service.⁵² That is to say that *Miller* turned on whether the *weapon* at issue was connected to the militia; it did not hinge on whether the *individual* was connected to the militia.⁵³

C. *How Do Assault Weapons Fit Into All of This?*

Assault weapons may be thought of as semiautomatic firearms that require an individual trigger pull to discharge each bullet.⁵⁴ After one bullet is discharged, "the cartridge automatically reloads in preparation for the next shot."⁵⁵ Fully automatic firearms, in contrast, discharge bullets so long as the trigger is being pulled.⁵⁶

In 1994, Congress passed a ten-year ban on assault weapons.⁵⁷ The ban reached its sunset in 2004.⁵⁸ The law "ban[ned] the manufacture, sale, and

51. *Id.* at 178 (citing *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840)). Interestingly, the Court did not quickly conclude that the defendants were not members of a militia; to the contrary, it declared that all males are capable of constituting the militia, but, nevertheless, a sawed-off shotgun has no relation to any militia. See DOHERTY, *supra* note 48, at 17.

52. *Id.*; see UVILLER & MERKEL, *supra* note 34, at 18–19.

53. See UVILLER & MERKEL, *supra* note 34, at 18–19; see also *Miller*, 307 U.S. at 179.

54. Daniel Abrams, Comment, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488, 491 (1992).

55. *Id.*; see also *Assault Weapons Policy Summary*, *supra* note 2 (stating that these weapons allow for "rapid and accurate spray firing").

56. See Abrams, *supra* note 54, at 491–92 (analogizing fully automatic weapons with machine guns).

57. *Assault Weapon Ban Expires*, CBSNEWS (Feb. 11, 2009, 7:52 PM), <http://www.cbsnews.com/stories/2004/09/13/politics/main642984.shtml>; David Johnston & Steven A. Holmes, *Clinton Signs Crime Bill into Law*, PITTSBURGH POST-GAZETTE, Sept. 14, 1994, at A8.

58. See *Assault Weapon Ban Expires*, *supra* note 57.

possession of 19 [specific] assault weapons.”⁵⁹ The regulations promulgated under the assault weapons ban contained many definitions.⁶⁰

First, the regulations listed the nineteen specific weapons by make and model number.⁶¹ Second, the regulations included in its definition *semiautomatic rifles* that can accept detachable magazines and have at least two of the following: “(1) A folding or telescoping stock, (2) [a] pistol grip that protrudes conspicuously beneath the action of the weapon, (3) [a] bayonet mount, (4) [a] flash suppressor or threaded barrel designed to accommodate a flash suppressor, and (5) [a] grenade launcher.”⁶² Third, the regulations included in its definition *semiautomatic pistols* that can accept a detachable magazine and have at least two of the following:

- (1) An ammunition magazine that attaches to the pistol outside of the pistol grip, (2) [a] threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer, (3) [a] shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned, (4) [a] manufactured weight of 50 ounces or more when the pistol is unloaded, and (5) [a] semiautomatic version of an automatic firearm.⁶³

Fourth, the regulations included in its definition *semiautomatic shotguns* that have at least two of the following: “(1) A folding or telescoping stock, (2) [a] pistol grip that protrudes conspicuously beneath the action of the weapon, (3) [a] fixed magazine capacity in excess of [five] rounds, and (4) [a]n ability to accept a detachable magazine.”⁶⁴

These definitions are helpful when attempting to grasp the precise notion of an assault weapon.⁶⁵ For a simpler definition, it may be useful to consider three factors in determining whether a particular firearm is an assault weapon: (1) Military appearance, (2) likelihood and ease of transformation into a fully automatic weapon, and (3) cartridge size.⁶⁶

Aside from the Federal Assault Weapons Ban of 1994, numerous state and municipal jurisdictions have implemented similar assault weapons bans

59. Johnston & Holmes, *supra* note 57.

60. See 27 C.F.R. § 178.11 (2002).

61. *Id.* § 178.11, at 1139.

62. *Id.* § 178.11, at 1139–40.

63. *Id.* § 178.11, at 1140.

64. *Id.*

65. See 27 C.F.R. § 178.11.

66. Abrams, *supra* note 54, at 492 (stating that these are the factors that the Bureau of Alcohol, Tobacco, and Firearms use in identifying weapons as assault weapons).

to thwart the dangerous propensity of these firearms.⁶⁷ Prior to the Supreme Court's decision in *Heller I*, there was little doubt that assault weapons bans were constitutional and not in violation of the Second Amendment. The question emerges then, whether *Heller I* changed the constitutional landscape of assault weapons bans.⁶⁸

D. *Heller I: Shaking the Second Amendment Terrain*

In *Heller I*, the Supreme Court addressed the Second Amendment head-on for the first time in nearly seven decades when it was called to decide whether a District of Columbia ban on handguns in the home is constitutional.⁶⁹ The District of Columbia criminalized the possession of an unregistered handgun, and handgun registration was prohibited, thereby effectuating a handgun ban.⁷⁰

The Court first thoroughly examined the meaning of the Second Amendment, and in particular, its linguistic components.⁷¹ Justice Scalia, writing for the Court that was split on ideological lines, analyzed the Second Amendment's operative clause—"right of the people to keep and bear

67. See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) (upholding California's assault weapons ban), *abrogated in part by* *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 525–26, 539 (6th Cir. 1998) (citing *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 252 (6th Cir. 1994)) (examining Columbus's assault weapons ban); *Richmond Boro Gun Club, Inc. v. City of N.Y.*, 97 F.3d 681, 683, 689 (2d Cir. 1996) (upholding New York City's assault weapons ban); *Coal. of N.J. Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d 666, 669, 693 (D.N.J. 1999) (upholding New Jersey's assault weapons ban); *Robertson v. City & Cnty. of Denver*, 874 P.2d 325, 335–36 (Colo. 1994) (en banc) (upholding Denver's assault weapons ban); *Benjamin v. Bailey*, 662 A.2d 1226, 1228, 1242 (Conn. 1995) (upholding Connecticut's assault weapons ban); *City of Cincinnati v. Baskin*, 859 N.E.2d 514, 519 (Ohio 2006) (upholding Cincinnati's assault weapons ban); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 166, 173, 175 (Ohio 1993) (upholding Cleveland's assault weapons ban). Of course, those cases were all decided before *Heller I*. See *Heller I*, 554 U.S. 570, 635 (2008).

68. See *Heller I*, 554 U.S. at 635.

69. *Id.* at 573; DOHERTY, *supra* note 48, at 15. As a background note, the idea to challenge the District of Columbia's handgun ban was very well thought out and methodical. See DOHERTY, *supra* note 48, at 23 (crediting Robert Levy, a renowned libertarian, as the organizer and financier of the effort).

70. *Heller I*, 554 U.S. at 574–75. For the pertinent statutory provisions, please see sections 7-2501.01(10), (12), 7-2502.01, 7-2502.02, 7-2551.01, and 7-2551.02 of the District of Columbia Code.

71. *Heller I*, 554 U.S. at 579–99; see also U.S. CONST. amend. II.

[a]rms”—and its prefatory clause—“[a] well regulated Militia, being necessary to the security of a free State.”⁷²

With regard to the operative clause, the Court determined that “the people” could refer to only the individual, especially in light of the Fourth and Ninth Amendments’ use of “the people.”⁷³ The Court also discovered that “[n]owhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.”⁷⁴ The Court further stated that “the most natural reading of ‘keep [and bear] Arms’ . . . is to ‘have [and carry] weapons.’”⁷⁵ This right applied to militiamen and ordinary citizens alike.⁷⁶

With respect to the prefatory clause, the Court concluded that this language merely “announces the purpose for which the right was codified: [T]o prevent elimination of the militia.”⁷⁷ Nothing in the prefatory clause indicates that the *sole* reason that the right to keep and bear arms exists was to maintain the militia.⁷⁸

After concluding this analysis, the Court then compared the Second Amendment to analogous state constitutional provisions enacted at the time of the Constitution’s ratification.⁷⁹ Specifically, the Court referenced the constitutional provisions that confer the right to bear arms in Pennsylvania, Vermont, North Carolina, and Massachusetts: “defence of themselves,” “defence of the State,” and “the common defence,” respectively.⁸⁰ The Court determined that the only logical conclusion was that these state constitutions “secured an individual[’s] right to [keep and] bear arms for [self-defense],” and consequently that was the original understanding of the federal constitutional provision at the time.⁸¹

The Court turned next to the historical interpretation of the Second Amendment, including its own case law, from the amendment’s ratification up to the present case.⁸² The Court analyzed the post-ratification commen-

72. *Heller I*, 554 U.S. at 577, 579–98 (citations omitted); see also HALBROOK, *supra* note 34, at 337 (stating that the founders intended the Constitution to be readable by any citizen, and that an “exhaustive textual analysis of the Second Amendment” became necessary only in the last half-century).

73. *Heller I*, 554 U.S. at 579 (quoting U.S. CONST. amend. IV, IX).

74. *Id.* at 580.

75. *Id.* at 582 (quoting U.S. CONST. amend. II).

76. *Id.* at 583.

77. *Id.* at 599.

78. *Heller I*, 554 U.S. at 599.

79. *Id.* at 600–03.

80. *Id.* at 601.

81. *Id.* at 602–03.

82. *Id.* at 605–26.

tary of St. George Tucker, William Rawle, and Joseph Story.⁸³ It then considered relevant pre-Civil War case law,⁸⁴ including *Houston v. Moore*,⁸⁵ *Nunn v. State*,⁸⁶ *State v. Chandler*,⁸⁷ and *Aymette v. State*.⁸⁸ After that, the Court examined the post-Civil War commentators and legislation.⁸⁹ The Court also analyzed its own precedents in *Cruikshank*, *Presser*, and *Miller*.⁹⁰

After an extensive and exhaustive evaluation, the Court concluded that the “Second Amendment confers an individual right to keep and bear arms,” and it rejected the argument that the amendment applies only in connection with militia service.⁹¹ As a result, the District of Columbia handgun ban was unconstitutional, because “the inherent right of self-defense has been central to the Second Amendment right.”⁹² The Court determined that the District of Columbia law prohibited an entire class of weapons that are most popular among American citizens for self-defense, and this ban extended to an individual’s home where the need for self-defense is paramount.⁹³ The District of Columbia handgun ban therefore failed to pass constitutional muster under any standard of scrutiny.⁹⁴

E. McDonald v. City of Chicago: *The Incorporation of the Second Amendment to the States*

In *McDonald v. City of Chicago*,⁹⁵ just two years after *Heller I*, the Court evaluated Chicago and Oak Park laws that effectively amounted to handgun bans.⁹⁶ The Court was faced with the important task of determining

83. *Heller I*, 554 U.S. at 606–10.

84. *Id.* at 610–14.

85. 18 U.S. (5 Wheat.) 1 (1820).

86. 1 Ga. 243 (1846).

87. 5 La. Ann. 489 (1850).

88. 21 Tenn. (2 Hum.) 154 (1840).

89. *Heller I*, 554 U.S. at 614–19.

90. *Id.* at 619–25; *see also* *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), *abrogated by* *McDonald v. City of Chi.*, 130 S. Ct. 3020 (2010); *Presser v. Illinois*, 116 U.S. 252, 264–65 (1886); *United States v. Miller*, 307 U.S. 174, 178, 182 (1939).

91. *Heller I*, 554 U.S. at 622.

92. *Id.* at 628.

93. *Id.* at 628–29.

94. *Id.*

95. 130 S. Ct. 3020 (2010).

96. *Id.* at 3026. The Chicago “ordinance [stated] that ‘[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm.’” *Id.* (second alteration in original). In a separate provision, the Chicago Municipal Code prohibited most handgun registration, thereby “effectively banning handgun possession” within Chicago city limits. *Id.* Oak Park had a law that was similar to that of Chicago. *Id.* That law made it “‘unlawful for any person to possess . . . any firearm,’ a term that include[d]

whether the Second Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.⁹⁷ The Court noted that the majority of the Bill of Rights guarantees have been incorporated.⁹⁸ Indeed, only a few of these guarantees have not been incorporated.⁹⁹

The Court determined that neither *Cruikshank* nor *Presser* precluded it from considering whether the Second Amendment is applicable to the

‘pistols, revolvers, guns and small arms . . . commonly known as handguns.’” *McDonald*, 130 S. Ct. at 3026.

97. *Id.* at 3028, 3031. *Heller I* did not decide this issue because at issue in that case was a District of Columbia handgun ban—as opposed to a state handgun ban—and therefore the Court did not determine whether the Second Amendment is applicable to the states. *Heller I*, 554 U.S. at 573.

98. *McDonald*, 130 S. Ct. at 3034; *see also* *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (recognizing the incorporation of the Eighth Amendment right against excessive bail); *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (incorporating the Double Jeopardy Clause of the Fifth Amendment); *Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968) (incorporating the Sixth Amendment right to trial by jury in criminal cases); *Washington v. Texas*, 388 U.S. 14, 17–19 (1967) (incorporating the Sixth Amendment right to compulsory process); *Klopper v. North Carolina*, 386 U.S. 213, 222 (1967) (incorporating the Sixth Amendment right to a speedy trial); *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (incorporating the Sixth Amendment right to confront an adverse witness); *Aguilar v. Texas*, 378 U.S. 108, 110 (1964) (incorporating the Fourth Amendment warrant requirement), *overruled on other grounds by* *Illinois v. Gates*, 462 U.S. 213 (1983); *Malloy v. Hogan*, 378 U.S. 1, 3 (1964) (incorporating the Fifth Amendment right against self-incrimination), *abrogated on other grounds by* *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (incorporating the Sixth Amendment right to assistance of counsel), *abrogated by* *Scott v. Illinois*, 440 U.S. 367 (1979); *Robinson v. California*, 370 U.S. 660, 667 (1962) (incorporating the Eighth Amendment right against cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (incorporating the Fourth Amendment exclusionary rule); *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (incorporating the Fourth Amendment right against unreasonable searches and seizures), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961); *In re Oliver*, 333 U.S. 257, 273, 278 (1948) (incorporating the Sixth Amendment right to a public trial); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (incorporating the Establishment Clause of the First Amendment); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause of the First Amendment); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (incorporating the First Amendment right to freely assemble); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (incorporating the First Amendment right of the press); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment right to freely speak); *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 233 (1897) (incorporating the Just Compensation Clause of the Fifth Amendment).

99. *McDonald*, 130 S. Ct. at 3034, 3035 & n.13. The Bill of Rights guarantees that have not been fully incorporated are “the Third Amendment [right] against [the] quartering of soldiers,” the Fifth Amendment right to indictment by a grand jury, “the Seventh Amendment right to a [trial by jury] in civil cases, and . . . the Eighth Amendment[] prohibition [against] excessive fines.” *Id.* at 3035 n.13.

states.¹⁰⁰ The Court reasoned that neither of those cases affected the present case because the “selective incorporation” under the Due Process Clause had yet to begin at the time of those decisions.¹⁰¹ In considering whether the right to keep and bear arms is “deeply rooted in this Nation’s history and tradition,” the Court pointed directly to *Heller I* itself for guidance.¹⁰²

As expressed in *Heller I*, the right to self-defense is at the core of the Second Amendment.¹⁰³ The *McDonald* Court echoed this sentiment and reasoned that, in the absence of *stare decisis* considerations, the Second Amendment is a fundamentally protected right, and it applies to state governments with equal force as the federal government.¹⁰⁴ Thus, the Court held “that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right [as defined] in *Heller I*.”¹⁰⁵

This begs the question, then, how does the Supreme Court’s Second Amendment jurisprudence affect state and local governments in promoting assault weapons bans? Has anything changed since *Heller I* and *McDonald* were decided? For the following reasons, I argue that assault weapons bans remain constitutional.

100. *Id.* at 3031 (citing *Heller I*, 554 U.S. at 620 n.23); see also *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), *abrogated by McDonald v. City of Chi.*, 130 S. Ct. 3020 (2010).

101. *McDonald*, 130 S. Ct. at 3031; see also DOHERTY, *supra* note 48, at 15 (noting that the conclusions in *Cruikshank* and *Presser* are outdated in light of the Supreme Court’s recent trend in selectively incorporating the Bill of Rights).

102. *McDonald*, 130 S. Ct. at 3036 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)) (citing *Heller I*, 554 U.S. at 628–29).

103. *Heller I*, 554 U.S. at 628 (categorizing the right to self-defense as “inherent” and “central to the Second Amendment right”).

104. *McDonald*, 130 S. Ct. at 3050 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 & n.14 (1968)).

105. *Id.*; see also *Heller I*, 554 U.S. at 628–29. The Court was not dissuaded by the governments’ argument that there are strong, “controversial public safety implications” at stake. *McDonald*, 130 S. Ct. at 3045. The majority simply pointed to other Bill of Rights guarantees that have been incorporated to the states despite the possibility of negative public safety implications. *Id.*; see, e.g., *Hudson v. Michigan*, 547 U.S. 586, 591–92 (2006) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)) (reflecting on the immense social costs of the Fourth Amendment exclusionary rule); *Barker v. Wingo*, 407 U.S. 514, 522 (1972) (recognizing the possibility of extremely harsh consequences resulting from the Sixth Amendment right to a speedy trial).

III. ANALYSIS

Since the Supreme Court's watershed decision in *Heller I*, lower courts have been increasingly faced with interpreting the Court's exact holding.¹⁰⁶ One of the more difficult areas of interpretation, it seems, has been *Heller I*'s applicability to assault weapons bans.¹⁰⁷ This section analyzes *Heller I*'s progeny in the lower courts with respect to assault weapons bans.

A. Determining the Applicable Standard of Review

First, it is useful to examine some of the levels of scrutiny that have been applied in Second Amendment cases. Interestingly, the Supreme Court has never articulated the precise level of scrutiny implicated by the Second Amendment right.¹⁰⁸ As a result, lower courts have struggled to settle on the proper standard.¹⁰⁹

A minority of courts have applied strict scrutiny in purported accordance with the majority opinion in *Heller I*, which states that the right to keep and bear arms is "pre-existing," analogizes the right to keep and bear arms to other fundamental rights, and asserts "that the right to have arms was 'fundamental for English subjects' at the time of the founding."¹¹⁰ Strict scrutiny requires that a law "be narrowly tailored to serve a compelling governmental interest."¹¹¹ Strict scrutiny is not deferential toward government policy.¹¹²

106. *E.g.*, *Heller v. District of Columbia (Heller III)*, 670 F.3d 1244, 1252–53, 1256, 1264–67 (D.C. Cir. 2011); *People v. James*, 94 Cal. Rptr. 3d 576, 578–79, 584–86 (Ct. App. 2009), *cert. denied*, 130 S. Ct. 1517 (2010); *Wilson v. Cnty. of Cook (Wilson II)*, 968 N.E.2d 641, 655–56 (Ill. 2012).

107. *See, e.g.*, *James*, 94 Cal. Rptr. 3d at 578–80, 585.

108. *Heller v. District of Columbia (Heller II)*, 698 F. Supp. 2d 179, 184 (D.D.C. 2010), *aff'd in part, vacated in part*, 670 F.3d 1244 (D.C. Cir. 2011).

109. *See id.* at 184–88 (analyzing the variety of approaches applied by lower courts in the wake of *Heller I*).

110. *Id.* at 185 (quoting *Heller I*, 554 U.S. at 592–93); *see also* *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1231–32 (D. Utah 2009) (citing *Heller I*, 554 U.S. at 593–94) (applying strict scrutiny because *Heller I* defined the Second Amendment as "fundamental," and made strong comparisons between the Second Amendment right and other fundamental rights that were reviewed under strict scrutiny).

111. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997).

112. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1267, 1269 (2007) (stating that the strict scrutiny standard is often said to be "'strict in theory, but fatal in fact'"). *But see* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (quoting *Fulilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (flatly rejecting that strict scrutiny is "'strict in theory, but fatal in fact,'" and strongly criticizing the phrase)).

Some courts have applied the “undue burden” test, which was first articulated in the abortion realm.¹¹³ The “undue burden” test treats a law as constitutional so long as it does not place “a substantial obstacle in the path” of the person attempting to engage in constitutionally permissible conduct.¹¹⁴

The majority of courts, however, have concluded that Second Amendment laws are subject to intermediate scrutiny.¹¹⁵ As a result, this Article argues through an intermediate scrutiny lens. Intermediate scrutiny requires that a law “be substantially related to an important governmental” interest.¹¹⁶

B. *People v. James*

*People v. James*¹¹⁷ was one of the first and most influential cases to address assault weapons bans following the Supreme Court’s decision in *Heller I*. There, the appellate court reviewed the defendant’s conviction for unlawful possession of an assault weapon pursuant to the California Penal Code.¹¹⁸ The defendant argued that his conviction was contrary to his Second Amendment right to bear arms.¹¹⁹

113. *Heller II*, 698 F. Supp. 2d at 185 (citing *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir.), *vacated, reh’g granted*, 664 F.3d 774 (9th Cir. 2011), *cert. denied*, 81 U.S.L.W. 3364 (2013)); see *People v. Flores*, 86 Cal. Rptr. 3d 804, 809 & n.5 (Ct. App. 2008) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992)) (analogizing the Second Amendment right to the abortion right, and holding that a gun restriction will receive heightened scrutiny only where it poses an “undue burden” on an individual’s right to keep and bear arms, just as with restrictions on the abortion right).

114. *Casey*, 505 U.S. at 877.

115. *Heller III*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) (concluding that the intermediate scrutiny standard is appropriate because assault weapons bans “do not impose a substantial burden upon [the Second Amendment] right,” and for that same reason, strict scrutiny is not the proper standard of review); see *United States v. Marzarella*, 595 F. Supp. 2d 596, 604 (W.D. Pa. 2009) (opining that intermediate scrutiny is proper in Second Amendment cases, and that just because the Supreme Court deemed the Second Amendment a “fundamental right,” does not necessarily mean that it is subject to strict scrutiny review because “[t]he Court has never purported to apply strict scrutiny in every provision of the Bill of Rights”), *cert. denied*, 131 S. Ct. 958 (2011); Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 229 (2006) (noting that other rights are considered “far more fundamental” than the Second Amendment right to keep and bear arms).

116. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

117. 94 Cal. Rptr. 3d 576 (Ct. App. 2009), *cert. denied*, 130 S. Ct. 1517 (2010).

118. *Id.* at 577. For the pertinent statutory provisions, please see CAL. PENAL CODE §§ 12275–90 (West 2009) (repealed 2010).

119. *James*, 94 Cal. Rptr. 3d at 577.

In rejecting the defendant's argument, the Court of Appeal of California determined that possession of an assault weapon does not fall within the scope of the Second Amendment as defined in *Heller I*.¹²⁰

The court first pointed to the legislative intent behind the assault weapons ban.¹²¹ It found that the legislature was attempting to cure the gigantic threat that assault weapons pose to society.¹²² The legislature proscribed particular firearms based on their "high rate of fire and capacity for fire-power that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings."¹²³

With the legislative intent as a backdrop, the court found that *Heller I* did not confer a right to possess any type of weapon.¹²⁴ Although *Heller I* does indeed stand for the proposition that an individual may possess a handgun in his home for self-defense, nothing in the Supreme Court's opinion suggests that this protection extends to atypical weapons,¹²⁵ the assault weapons classified by the California legislature were "weapons of war."¹²⁶ In concluding, the California court found that the assault weapons ban was constitutional and noted that the firearms at issue were "at least as dangerous and unusual" as the weapon at issue in *Miller*.¹²⁷

120. *Id.*

121. *Id.* at 580–81; *see also* CAL. PENAL CODE §§ 12275–90.

122. *James*, 94 Cal. Rptr. 3d at 580–81 (quoting *Kasler v. Lockyer*, 2 P.3d 581, 586 (Cal. 2000)) (describing the widespread use of assault weapons as a "crisis"); *see also* CAL. PENAL CODE §§ 12275–90.

123. *James*, 94 Cal. Rptr. 3d at 580 (quoting CAL. PENAL CODE §§ 12275–90). The legislature commented that it was merely attempting to protect "the health, safety, and security" of California citizens, and it was not interested in legalizing firearms intended for "legitimate sports or recreational activities." *Id.* at 580–81 (quoting CAL. PENAL CODE §§ 12275–90).

124. *Id.* at 585 (quoting *Heller I*, 554 U.S. 570, 626 (2008)).

125. *See Heller I*, 554 U.S. at 626, 635.

126. *James*, 94 Cal. Rptr. 3d at 586.

127. *Id.* (discussing *United States v. Miller*, 307 U.S. 174, 175 (1939)). This is an interesting conclusion by the California court, because although *Heller I* certainly did not overrule *Miller*, it did not speak very favorably of the opinion. *See Heller I*, 554 U.S. at 623 (chiding Justice Stevens, who wrote the dissenting opinion, for placing too much reliance on *Miller*, because "the case did not even purport to be a thorough examination of the Second Amendment," and for that reason it is especially incorrect "to read *Miller* for more than what it said"). Even with that aside, the court in *James* repeatedly mentions that it is examining the Second Amendment right "as defined in *Heller I*," but then, rather abruptly, reverts back to *Miller* in the end. *James*, 94 Cal. Rptr. 3d at 586.

C. Heller III

One of the more comprehensive decisions to come down regarding *Heller I*'s effect on assault weapons bans is *Heller v. District of Columbia (Heller III)*.¹²⁸ Following the Supreme Court's 2008 decision in *Heller I*, the District of Columbia enacted firearm regulations that it seemingly thought were constitutional.¹²⁹ The plaintiffs challenged specific provisions of the District of Columbia's gun laws, including the registration requirement and assault weapons prohibition.¹³⁰

In evaluating the plaintiff's constitutional challenge against assault weapons and large-capacity magazines, the court engaged in a two-part analysis.¹³¹ The court first noted that the record was devoid of any evidence indicating that assault weapons bans are longstanding and thus entitled to a presumption of legal validity.¹³²

The first part of the court's analysis sought to answer the question of whether "the prohibitions impinge upon the Second Amendment right?"¹³³ Surprisingly, the court stated that assault weapons are in "common use," as described in the majority opinion in *Heller I*.¹³⁴ The court noted that although that may be true, assault weapons—even if commonly used—are not necessarily used for self-defense.¹³⁵ As a result, assault weapons bans likely do not impinge upon the Second Amendment right.¹³⁶ The court did not definitively answer the question, though, because it maintained that intermedi-

128. 670 F.3d 1244 (D.C. Cir. 2011).

129. *Id.* at 1247.

130. *Id.* The particular law was the Firearms Registration Amendment Act of 2008, which amended the Firearms Control Regulations Act of 1975. *Id.*; see also D.C. CODE §§ 7-2502.01(a), .02(a)(6) (2012), *invalidated by* District of Columbia v. Heller, 554 U.S. 570 (2008); *Id.* §§ 7-2502.03(a), (b), (d), (e), .04(c), .07a(a), (c), (d); *Id.* § 7-2506.01(b), *invalidated in part by* Herrington v. United States, 6 A.3d 1237 (D.C. Cir. 2010).

131. *Heller III*, 670 F.3d at 1260–64.

132. *Id.* at 1260–61.

133. *Id.*

134. *Id.* at 1261 (predicating this determination on the fact that "[a]pproximately 1.6 million AR-15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market"); *Heller I*, 554 U.S. 570, 627 (2008). The court also considered the fact that "fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000." *Heller III*, 670 F.3d at 1261.

135. *Heller III*, 670 F.3d at 1261.

136. *Id.* at 1262.

ate scrutiny was the appropriate standard of review, and the assault weapons ban at issue did pass constitutional muster under this standard.¹³⁷

The second part of the court's analysis focused on whether the assault weapons ban survived intermediate scrutiny.¹³⁸ The court issued a reminder that it is the government that carries the burden of proof under intermediate scrutiny.¹³⁹ Consequently, the District of Columbia was responsible for demonstrating that its assault weapons ban bears a substantial relationship to its important government interest in crime control and prevention.¹⁴⁰

The District of Columbia had no difficulty showing that assault weapons are dangerous.¹⁴¹ It pointed to a series of empirical studies supporting the government's contention that assault weapons are especially likely to result in danger for law enforcement personnel because of their "high firepower."¹⁴² The government seemingly placed heavy reliance on studies evaluating the federal assault weapons ban from 1994 to 2004.¹⁴³

These studies suggest that assault weapons were "most commonly used in crime before the [federal assault weapons] ban," as opposed to other purposes, such as for hunting or in self-defense.¹⁴⁴ Moreover, one study found that assault weapons—like the ones at issue in *Heller III*—"account for a larger share of guns used in mass murders and murders of police, crimes for

137. *Id.* at 1261–62.

138. *Id.* at 1261–64. In determining that intermediate scrutiny was appropriate, the court noted that the plaintiffs proffered no evidence supporting the assertion that assault weapons are encompassed within the core Second Amendment right, which would have heightened the level of scrutiny. *Id.* at 1262–63. The court provided an example of how the plaintiffs could have done this by pointing to several statistical conclusions from empirical studies. *Heller III*, 670 F.3d at 1262 (citing DEP'T OF THE TREASURY, STUDY ON THE SPORTING SUITABILITY OF MODIFIED SEMIAUTOMATIC ASSAULT RIFLES 38 (1998), available at <http://www.atf.gov/firearms/industry/april-1998-sporting-suitability-of-modified-semiautomatic-assault-rifles.pdf>; Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 185 (1995)). These statistics suggest that handguns are overwhelmingly used in self-defense, and that assault weapons are "not generally recognized as particularly suitable for or readily adaptable to sporting purposes." *Id.* (quoting DEP'T OF THE TREASURY, *supra*, at 38).

139. *Id.*

140. *Id.*

141. *See Id.* at 1262–64.

142. *Heller III*, 670 F.3d at 1263 (quoting BRADY CTR. TO PREVENT GUN VIOLENCE, ASSAULT WEAPONS "MASS PRODUCED MAYHEM" 3 (2008)).

143. *See id.* (basing support for its conclusion on two empirical studies).

144. *Id.* at 1263 (quoting CHRISTOPHER S. KOPER WITH DANIEL J. WOODS & JEFFREY A. ROTH, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003, at 11 (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf>).

which weapons with greater firepower would seem particularly useful.”¹⁴⁵ The same study concluded that crime decreased after the federal assault weapons ban was enacted, and for that reason, the District of Columbia argued that assault weapons bans significantly further its governmental interest in crime control and prevention.¹⁴⁶

The D.C. Circuit found validity in the government’s argument and agreed that its assault weapons ban “promote[d] the [g]overnment’s interest in crime control in the densely populated urban area that is the District of Columbia.”¹⁴⁷ The court concluded by determining that the District of Columbia “carried its burden of showing [that its law bears] a substantial relationship” to the important government interest in crime control and prevention.¹⁴⁸ Therefore, the court held that the plaintiffs’ Second Amendment rights were not violated, and hence the government’s assault weapons ban was constitutional.¹⁴⁹

In a lengthy dissenting opinion, Judge Kavanaugh maintained that the District of Columbia’s assault weapons ban was unconstitutional.¹⁵⁰ In support of his position, he noted that “[t]he vast majority of handguns today are semi-automatic,” and thus no line can be easily drawn between handguns and assault weapons bans in accordance with a close and correct reading of *Heller I*.¹⁵¹ In sum, according to Judge Kavanaugh, there is simply no constitutional distinction that can be logically drawn between the handgun ban at issue in *Heller I* and the assault weapons ban at issue in *Heller III*.¹⁵² Judge Kavanaugh’s dissenting opinion may prove to be instrumental in subsequent cases that may ultimately reach the Supreme Court.

145. *Id.* (quoting KOPER WITH WOODS & ROTH, *supra* note 144, at 87).

146. *Id.* (citing KOPER WITH WOODS & ROTH, *supra* note 144, at 51).

147. *Heller III*, 670 F.3d at 1263.

148. *Id.* at 1264.

149. *Id.*

150. *Id.* at 1269 (Kavanaugh, J., dissenting). Judge Kavanaugh is generally viewed as a very conservative jurist. Charlie Savage, *Appeals Courts Pushed to Right by Bush Choices*, N.Y. TIMES, Oct. 29, 2008, at A1. “[H]e was Assistant to the President and Staff Secretary to President [George W.] Bush.” Brett M. Kavanaugh, U.S. CTS. OF APPEALS D.C. CIRCUIT, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+BMK> (last visited Feb. 24, 2013). He was also a law clerk for Justice Kennedy. *Id.* It may be safe to assume that Judge Kavanaugh’s dissenting opinion adequately represents at least one traditionally conservative perspective on the constitutionality of assault weapons bans. See *Heller III*, 670 F.3d at 1269–70.

151. *Heller III*, 670 F.3d at 1286.

152. *Id.* at 1289 (stating that “[t]he fundamental flaw in the majority opinion is that it cannot persuasively explain why semi-automatic handguns are constitutionally protected (as *Heller I*) held) but semi-automatic rifles are not.”).

D. *Wilson v. County of Cook* (Wilson II)

In 1993, Cook County, Illinois enacted an ordinance that banned specific firearms defined as assault weapons.¹⁵³ The Cook County Board of Commissioners determined that these particular weapons needed to be outlawed due to their uniquely dangerous attributes.¹⁵⁴ Recently, a group of plaintiffs decided to challenge the ordinance's constitutionality.¹⁵⁵ "The trial court dismissed [the] plaintiffs' first amended complaint," determining that the ordinance did not violate the right to keep and bear arms under either the United States Constitution or the Illinois Constitution.¹⁵⁶ In what became a particularly interesting procedural history, the plaintiffs first appealed following the Supreme Court's decision in *Heller I*.¹⁵⁷ The appellate court found in favor of Cook County, as it interpreted *Heller I* to extend only to federal laws.¹⁵⁸ Immediately thereafter, the plaintiffs filed a petition for leave to appeal to the Supreme Court of Illinois; however during the time when the petition was pending, *McDonald* was decided.¹⁵⁹ The Supreme Court of Illinois directed the appellate court to vacate its prior holding and reconsider its ruling in light of *McDonald*.¹⁶⁰

The plaintiffs' argument was that they possessed a Second Amendment right—as interpreted in *Heller I* and applied to the states in *McDonald*—to keep and bear arms, including the purported "assault weapons" prohibited by the ordinance.¹⁶¹ The plaintiffs further contended that many of the proscribed firearms were actually commonly owned, and as such, they were well within the scope of *Heller I*.¹⁶² The appellate court affirmed the trial court's ruling once again, holding "that the [S]econd [A]mendment right does not extend to assault weapons and that the [o]rdinance is substantially related to

153. *Wilson II*, 968 N.E.2d 641, 645 (Ill. 2012).

154. *See id.* Among the commissioners' findings were:

1,000 of the 4,500 trauma cases handled by [the] Cook County Hospital that year were due to gunshot wounds; there were more federally licensed gun dealers in Cook County than gas stations; an estimated 1 in 20 high school students had carried a gun in the prior month; and assault weapons [were] 20 times more likely to be used in the commission of a crime than other kinds of weapons.

Wilson v. Cook Cnty. (*Wilson I*), 943 N.E.2d 768, 771 (Ill. App. Ct.), *review granted*, 949 N.E.2d 1104 (Ill. 2011), *and aff'd in part, rev'd in part*, 968 N.E.2d 641 (Ill. 2012).

155. *Wilson II*, 968 N.E.2d at 646.

156. *Wilson I*, 943 N.E.2d at 770.

157. *See Wilson II*, 968 N.E.2d at 647.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 646–47.

162. *Wilson II*, 968 N.E.2d at 656.

an important government[al] interest.”¹⁶³ The plaintiffs appealed to the Supreme Court of Illinois.¹⁶⁴

In reversing the trial court with regard to the plaintiffs’ Second Amendment claim, the Supreme Court of Illinois held that the plaintiffs sufficiently pleaded a cause of action for a constitutional violation.¹⁶⁵ The court reasoned that, given the procedural posture of the case, it could not evaluate the nexus between the assault weapons ban and the interest sought to be protected.¹⁶⁶ The court was not willing to determine that “no set of facts [could] be proved that would entitle plaintiffs to relief on” their Second Amendment claim.¹⁶⁷ The court further stated:

Plaintiffs seek to present evidence to support their allegation that this particular Ordinance encompasses a myriad of weapons that are typically possessed by law-abiding citizens for lawful purposes and fall outside the scope of the dangers sought to be protected under the Ordinance. Without a national uniform definition of assault weapons from which to judge these weapons, it cannot be ascertained at this stage of the proceedings whether these arms with these particular attributes as defined in this Ordinance are well suited for self-defense or sport or would be outweighed completely by the collateral damage resulting from their use, making them “dangerous and unusual” as articulated in *Heller I*. This question requires us to engage in an empirical inquiry beyond the scope of the record and beyond the scope of judicial notice about the nature of the weapons that are banned under this Ordinance and the dangers of these particular weapons.¹⁶⁸

In essence, the court refused to interpret *McDonald* and *Heller I* as categorically permitting the proscription of assault weapons and it opted not to follow *James* and *Heller v. District of Columbia (Heller II)*¹⁶⁹ on that score.¹⁷⁰

163. *Id.* at 647 (citing *Wilson I*, 943 N.E.2d 768, 780–81 (Ill. App. Ct.), *review granted*, 949 N.E.2d 1104 (Ill. 2011), and *aff’d in part, rev’d in part*, 968 N.E.2d 641 (Ill. 2012)).

164. *Id.*

165. *Id.* at 657.

166. *Id.*

167. *Wilson II*, 968 N.E.2d at 657.

168. *Id.* at 656.

169. 698 F. Supp. 2d 179 (D.D.C. 2010), *aff’d in part, vacated in part*, 670 F.3d 1244 (D.C. Cir. 2011).

170. *Wilson II*, 968 N.E.2d at 656–57.

IV. PROPOSAL

I propose that *Heller II* and *James* were indeed correctly decided, and that assault weapons bans are constitutional, consistent with *Heller I*'s core holding.

A. *Assault Weapons Bans Do Not Implicate the Core Second Amendment Right, and Consequently These Bans Need Not Survive Intermediate Scrutiny*

The Supreme Court's holding in *Heller I* was very narrow: "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."¹⁷¹ Self-defense is undoubtedly at the core of the Second Amendment right.¹⁷² Moreover, the Court's decision expressly encompasses handguns in the home.¹⁷³ Assault weapons, as previously articulated, are neither generally used in self-defense nor are they handguns, and for those two reasons, assault weapons fall outside of the scope of *Heller I*.¹⁷⁴

171. *Heller I*, 554 U.S. 570, 635 (2008).

172. *Id.* at 628, 632 (stating that "the inherent right of self-defense has been central to the Second Amendment right" and that the historical underpinnings of this right support this conclusion).

173. *Id.* at 635. *But see* Moore v. Madigan, No. 12-1788, 2012 WL 6156062, at *9 (7th Cir. Dec. 11, 2012) (holding that Illinois's ban on ready-to-use guns in public is unconstitutional). In *Moore*, the Seventh Circuit was charged with interpreting the holdings of *McDonald* and *Heller I*. *Id.* at *3, *9. Judge Posner, writing for the majority, stated:

To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller [I]* and *McDonald*.

A gun is a potential danger to more people if carried in public than just kept in the home.

....

A blanket prohibition on carrying gun [sic] in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof it would.

....

The Supreme Court has decided that the [Second A]mendment confers a right to bear arms for self-defense, which is as important outside the home as inside. The theoretical and empirical evidence (which overall is inconclusive) is consistent with concluding that a right to carry firearms in public may promote self-defense.

Id. at *3-4, *7, *9.

174. *See Heller III*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (expressing uncertainty as to "whether [assault] weapons are commonly used . . . for self-defense" purposes). *Heller III* also reflects on testimony put on by the government that supports the claim that, even if assault weapons are sometimes used in self-defense, "the tendency is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders." *Id.* at 1263-64. That is to say that there are other extrinsic re-

Furthermore, the Supreme Court's opinion in *Heller I* conceded that the Second Amendment is not so robust that it evades all limitation.¹⁷⁵ Indeed, the Court explicitly recognized that the "longstanding prohibitions" on certain types of weapons are not necessarily altered by its opinion in *Heller I*.¹⁷⁶ Although *Heller I* lists only a few examples of longstanding prohibitions on the right to keep and bear arms, there is nothing in the opinion that suggests that this is an exclusive or exhaustive list.¹⁷⁷ Thus, it can be convincingly said that our Nation's longstanding prohibition on assault weapons need not be disturbed.¹⁷⁸

Additional support for this proposition can be found later in the opinion.¹⁷⁹ The Court cited *Miller* favorably and mentioned that that decision protected only weapons "'in common use at the time.'"¹⁸⁰ The Court interpreted this as a prohibition against the possession of "'dangerous and unusual weapons.'"¹⁸¹ Numerous authoritative studies support the contention that assault weapons are "'dangerous and unusual'" weapons, and for that reason, they are unprotected by the Second Amendment.¹⁸² Certainly, if assault weapons were not considered "dangerous and unusual," one would have a troublesome time imagining which weapons would qualify as such.

For these reasons, it appears evident that assault weapons bans do not implicate the core Second Amendment right.¹⁸³ Consequently, these bans

percussions that must be considered in concluding that assault weapons are used in self-defense.

175. *Heller I*, 554 U.S. at 626 ("Like most rights, the right secured by the Second Amendment is not unlimited.").

176. *Id.* at 626–27 & n.26 (providing examples of classic firearm prohibitions, such as "possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms").

177. *Id.*

178. *See id.* Assault weapons are admittedly a relatively recent development. Nevertheless—as aforementioned—governments have sought to control and ban assault weapons since their inception. *See supra* text accompanying note 67.

179. *See Heller I*, 554 U.S. at 627.

180. *Id.* (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

181. *Id.*

182. *See Heller III*, 670 F.3d 1244, 1262–64 (D.C. Cir. 2011) (quoting *Heller I*, 554 U.S. at 627) (discussing several studies that describe assault weapons as tools that facilitate "'mass produced mayhem'" and "'are designed to enhance their capacity to shoot multiple human targets very rapidly'"). In a society that values the sanctity of life, these weapons certainly can be thought of as "'dangerous and unusual.'" *Id.* at 1263 (quoting *Heller I*, 554 U.S. at 627).

183. *Id.* at 1264.

need not be subjected to intermediate scrutiny and are therefore constitutionally consistent with *Heller I*.¹⁸⁴

B. Even Assuming, Arguendo, that Assault Weapons Bans Do Implicate the Core Second Amendment Right, These Bans Nevertheless Pass Constitutional Muster Under Intermediate Scrutiny

Even assuming, *arguendo*, that assault weapons bans do implicate the core Second Amendment right—that is, assault weapons are found to be used in self-defense—these bans withstand the intermediate scrutiny analysis.¹⁸⁵

1. Governments Have an Important Governmental Interest in Banning Assault Weapons

Governments have an important governmental interest in banning assault weapons, because these bans aid in crime control and prevention, and in that sense, they enhance safety.¹⁸⁶ The Law Center to Prevent Gun Violence concluded that assault weapons are unique firearms in that they are not used for “sport,” as are many other lawful firearms.¹⁸⁷ To the contrary, assault weapons are strongly conducive to accurate and efficient spray firing.¹⁸⁸ In other words, these firearms make it easier to kill.¹⁸⁹ And, not only that, these guns make it easier to kill a larger number of individuals than more traditional classes of firearms.¹⁹⁰ The Law Center to Prevent Gun Violence found that assault weapons have been increasingly used against law enforcement agents; in particular, because assault weapons have proliferated within drug and gang communities.¹⁹¹

Courts have long recognized governments’ interest in preserving and enhancing public safety.¹⁹² In one heavily cited Supreme Court decision, Justice John Marshall Harlan said:

184. *Id.* app. at 1266.

185. *See id.* at 1263–64.

186. *See Heller III*, 670 F.3d at 1263 (stating that “[i]n short, the evidence demonstrates a ban on assault weapons is likely to promote the Government’s interest in crime control”).

187. *Assault Weapons Policy Summary*, *supra* note 2; *see also* *People v. James*, 94 Cal. Rptr. 3d 576, 580–81 (Ct. App. 2009), *cert. denied*, 130 S. Ct. 1517 (2010).

188. *Assault Weapons Policy Summary*, *supra* note 2.

189. *See id.*

190. *Id.*

191. *Id.*; *see also* *Robertson v. City & Cnty. of Denver*, 874 P.2d 325, 333 (Colo. 1994) (en banc) (explaining that assault weapons are easily concealed and therefore are likely to be used to accomplish criminal objectives).

192. *See, e.g., Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 263, 268–69 (7th Cir. 1982) (upholding a gun control ordinance that was expressly directed at preserving safety); *Benja-*

There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that “persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.”¹⁹³

This passage truly illuminates the rationale for why safety is an important governmental interest: Safety, in certain circumstances, can actually promote the curtailment of certain rights. In that sense, then, it can hardly be argued that safety is anything other than an important governmental interest if it has stood to restrict other fundamental rights. Perhaps it is axiomatic to state that a democratic society values the safety of all of its citizens, and, without which, it would fail to operate effectively—or maybe even cease to operate at all.

2. Assault Weapons Bans Bear a Substantial Relationship to Governments’ Important Governmental Interest

Assault weapons bans, like the ones in *Heller III*, *James*, and *Wilson v. County of Cook (Wilson II)*,¹⁹⁴ bear a substantial relationship to the governments’ important interests in crime control and prevention.¹⁹⁵ The bans are

min v. Bailey, 662 A.2d 1226, 1233 (Conn. 1995) (arguing that states have traditionally been able “to protect the health, safety and morals of the citizenry”); *State v. Comeau*, 448 N.W.2d 595, 597 (Neb. 1989) (quoting *Louis Finocchiaro, Inc. v. Neb. Liquor Control Comm’n*, 351 N.W.2d 701, 703 (Neb. 1984)) (asserting that the public safety and welfare are undoubtedly sound reasons to regulate the right to keep and bear arms).

193. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (quoting *Mo., Kan. & Tex. Ry. Co. v. Haber*, 169 U.S. 613, 629 (1898); *R.R. Co. v. Husen*, 95 U.S. 465, 471 (1877); *Thorpe v. Rutland & Burlington R.R. Co.*, 27 Vt. 140, 150 (1855)).

194. 968 N.E.2d 641 (Ill. 2012).

195. See *Heller III*, 670 F.3d 1244, 1264 (D.C. Cir. 2011); *People v. James*, 94 Cal. Rptr. 3d 576, 586 (Ct. App. 2009), cert. denied, 130 S. Ct. 1517 (2010); *Wilson II*, 968 N.E.2d at 647 (citing *Wilson I*, 943 N.E.2d 768, 780–81 (Ill. App. Ct.), review granted, 949 N.E.2d 1104 (Ill. 2011), and aff’d in part, rev’d in part, 968 N.E.2d 641 (Ill. 2012)).

incredibly specific and tightly worded to fit this objective, as the legislation at issue in these cases list specific brands and models that are proscribed.¹⁹⁶ In these cases, the government proscribed particular assault weapons based on legislative findings that these weapons pose a direct and uncontroverted threat to society at large.¹⁹⁷ While it is true that legislative bodies are not entirely insulated from judicial review, legislatures must be afforded “substantial deference” so long as their conclusions have been based on substantial evidence.¹⁹⁸

Furthermore, the assault weapons bans at issue in *Heller III*, *James*, and *Wilson v. Cook County (Wilson I)*,¹⁹⁹ do not criminalize the category of firearms that is “overwhelmingly chosen by American society”—non-semiautomatic handguns.²⁰⁰ Those bans target only weapons that are narrowly defined as “assault weapons” in an effort to promote the important governmental interest in public safety and crime control and prevention.²⁰¹ Most other types of firearms remain available for lawful use.²⁰² Thus, it cannot be credibly argued that similar assault weapons bans are not a substantial fit to further the government’s important governmental interest.

196. See *Heller III*, 670 F.3d at 1248–49; *James*, 94 Cal. Rptr. 3d at 579–80 nn.5–6; *Wilson II*, 968 N.E.2d at 648–49.

197. See *Heller III*, 670 F.3d at 1261 (citing reports on the District of Columbia legislation that found that “assault weapons ‘have no legitimate use as self-defense weapons, and would in fact increase the danger to law-abiding users and innocent bystanders if kept in the home or used in self-defense situations’”); *James*, 94 Cal. Rptr. 3d at 580 (recognizing the legislative intent behind the assault weapons ban at issue: “‘The Legislature hereby finds and declares that the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state. The Legislature has restricted the assault weapons specified in Section 12276 based upon finding that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill human beings’”); *Wilson II*, 968 N.E.2d at 656 (stating that the ordinance at issue set forth numerous findings indicating that “‘there is no legitimate sporting purpose for the military style assault weapons now being used on our streets,’ and that ‘assault weapons are twenty times more likely to be used in the commission of a crime than other kinds of weapons’”).

198. See *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665–66 (1994).

199. 943 N.E.2d 768 (Ill. App. Ct.), review granted, 949 N.E.2d 1104 (Ill. 2011), and *aff’d in part, rev’d in part*, 968 N.E.2d 641 (Ill. 2012).

200. *Heller I*, 554 U.S. 570, 628 (2008) (stating that handguns constitute the most popular class of firearms for self-defense purposes); *Heller III*, 670 F.3d at 1261–62; *James*, 94 Cal. Rptr. 3d at 577, 579 n.5; *Wilson I*, 943 N.E.2d at 781.

201. See *Heller III*, 670 F.3d at 1249, 1262–63; *James*, 94 Cal. Rptr. 3d at 580; *Wilson I*, 943 N.E.2d at 771.

202. See *James*, 94 Cal. Rptr. 3d at 580–81.

C. *There Is Strong Public Support in Favor of Banning Assault Weapons, and Therefore Congress Should Enact Legislation Criminalizing the Manufacture, Sale, and Possession of Assault Weapons*

Recent polls strongly suggest that the general public is in favor of restricting the “manufacture, sale, and possession of . . . assault [weapons].”²⁰³ One poll reveals that approximately 62% of Americans are in favor of “ban[ning] the sale of semi-automatic assault weapons, [with a limited] except[ion] for use by the military or police.”²⁰⁴ Another nationwide poll suggests that 57% of Americans are in favor of banning the “manufacture, sale, and possession of [some] semi-automatic [weapons], such as . . . AK-47[s].”²⁰⁵ Shockingly, “a majority of gun-owning households [support a nationwide] ban on assault weapons, although by [an admittedly] smaller margin.”²⁰⁶

Also, in the aftermath of the expiration of the federal assault weapons ban in 2004, polls indicated that 61% of Americans were dissatisfied with its expiration, whereas only 12% were satisfied with its expiration.²⁰⁷ Additionally, polls at the time suggest that Democrats, Republicans, and Independents alike favored extending the federal assault weapons ban, thereby indicating the support of assault weapons bans across the political spectrum.²⁰⁸ In other words, the issue seemingly transcends traditional political cleavages.

Due to strong public support, Congress should once again enact legislation criminalizing the manufacture, sale, and possession of assault weapons.²⁰⁹ The following is a proposed law drafted by the Law Center to Prevent

203. ORC INT’L, CNN/ORC POLL 3 (Aug. 2012), available at <http://i2.cdn.turner.com/cnn/2012/images/08/09/rel7a.pdf>; see, e.g., Frank James, *Little Election-Year Incentive for Obama or Romney to Join Gun Debate*, NPR (July 23, 2012, 5:40 PM), <http://www.npr.org/blogs/itsallpolitics/2012/07/23/157230177/little-election-year-incentive-for-obama-or-romney-to-join-gun-debate> (reporting a recent Time poll from June 2011).

204. *Guns* (p. 2), POLLINGREPORT.COM, <http://www.pollingreport.com/guns2.htm> (last visited Feb. 24, 2013).

205. ORC INT’L, *supra* note 203, at 3.

206. CBS NEWS & NY TIMES, POLL: THE ECONOMY, THE BUDGET DEFICIT AND GUN CONTROL (2011), available at http://www.cbsnews.com/htdocs/pdf/Jan11_Econ.pdf?tag=contentMain;contentBody. This poll also suggests that there has been an increase in overall public support for a nationwide assault weapons ban since 2009. *Id.*

207. *Guns* (p. 2), *supra* note 204 (referencing a poll conducted by NBC News and the Wall Street Journal in September 2004).

208. *Id.* (referencing a poll conducted by the Harris Poll in September 2004).

209. See *id.* Indeed, some lawmakers, such as Senator Diane Feinstein (D-CA), have reportedly taken steps to reintroduce a federal assault weapons ban. Ryan Keller, *Senator*

Gun Violence (formerly the Legal Community Against Violence), modified for adoption by Congress.²¹⁰ The law encompasses ideas from the 1994 federal assault weapons ban and has many commonalities with the assault weapons bans at issue in *Heller III*, *James*, and *Wilson II*²¹¹:

1. Findings

....

Whereas assault weapons are semi-automatic firearms designed with military features to allow rapid and accurate spray firing for the quick and efficient killing of humans;

Whereas assault weapons have been the weapon of choice in many mass shootings of innocent civilians;

Whereas assault weapon shootings are responsible for a significant percentage of the deaths of law enforcement officers killed in the line of duty;

Whereas approximately [two] million assault weapons are already in circulation in the United States;

Whereas the wide availability of assault weapons is a serious risk to public health and safety;

Whereas most citizens—including most gun owners—support assault weapons bans and believe that assault weapons should not be available for civilian use;

Therefore, the [United States Congress] hereby adopts the following:

Feinstein Looking to Introduce New Assault Weapons Ban, EXAMINER.COM (Nov. 8, 2012), <http://www.examiner.com/article/senator-feinstein-looking-to-introduce-new-assault-weapons-ban>.

210. See LEGAL CMTY. AGAINST VIOLENCE, BANNING ASSAULT WEAPONS—A LEGAL PRIMER FOR STATE AND LOCAL ACTION 58 (2004), available at http://smartgunlaws.org/wp-content/uploads/2012/05/Banning_Assault_Weapons_A_Legal_Primer_8.05_entire.pdf.

211. See *id.*; see also 18 U.S.C. § 922 (1994); *Heller III*, 670 F.3d 1244, 1249 (D.C. Cir. 2011); *People v. James*, 94 Cal. Rptr. 3d 576, 578–80 (Ct. App. 2009), *cert. denied*, 130 S. Ct. 1517 (2010); *Wilson II*, 968 N.E.2d 641, 648–49 (Ill. 2012).

2. Definitions

- (a) “Assault weapon” means any:
- (1) Semi-automatic or pump-action rifle that has the capacity to accept a detachable magazine and has one or more of the following:
 - (i) A pistol grip;
 - (ii) Any feature capable of functioning as a protruding grip that can be held by the non-trigger hand;
 - (iii) A folding, telescoping, or thumbhole stock;
 - (iv) A shroud attached to the barrel, or that partially or completely encircles the barrel, allowing the bearer to hold the firearm with the non-trigger hand without being burned, but excluding a slide that encloses the barrel; or
 - (v) A muzzle brake or muzzle compensator.
 - (2) Semi-automatic pistol, or any semi-automatic, centerfire rifle with a fixed magazine, that has the capacity to accept more than [ten] rounds of ammunition;
 - (3) Semi-automatic pistol that has the capacity to accept a detachable magazine and has one or more of the following:
 - (i) Any feature capable of functioning as a protruding grip that can be held by the non-trigger hand;
 - (ii) A folding, telescoping, or thumbhole stock;
 - (iii) A shroud attached to the barrel, or that partially or completely encircles the barrel, allowing the bearer to hold the firearm with the non-trigger hand without being burned, but excluding a slide that encloses the barrel;
 - (iv) A muzzle brake or muzzle compensator; or
 - (v) The capacity to accept a detachable magazine at any location outside of the pistol grip;

- (4) Semi-automatic shotgun that has one or more of the following
 - (i) A pistol grip;
 - (ii) Any feature capable of functioning as a protruding grip that can be held by the non-trigger hand;
 - (iii) A folding, telescoping, or thumbhole stock;
 - (iv) A fixed magazine capacity in excess of 5 rounds; or
 - (v) An ability to accept a detachable magazine;
 - (5) Shotgun with a revolving cylinder;
 - (6) Conversion kit, part, or combination of parts, from which an assault weapon can be assembled if those parts are in the possession or under the control of the same person[s].
- (b) “Assault weapon” does not include any firearm that has been made permanently inoperable.
-
- (c) “Detachable magazine” means any ammunition feeding device, the function of which is to deliver one or more ammunition cartridges into the firing chamber, which can be removed from the firearm without the use of any tool, including a bullet or ammunition cartridge.
 - (d) “Large capacity magazine” means any ammunition feeding device with the capacity to accept more than [ten] rounds, but shall not be construed to include any of the following:
 - (1) A feeding device that has been permanently altered so that it cannot accommodate more than [ten] rounds.
 - (2) A [twenty-two] caliber tube ammunition feeding device.
 - (3) A tubular magazine that is contained in a lever-action firearm.
 - (e) “Muzzle brake” means a device attached to the muzzle of a weapon that utilizes escaping gas to reduce recoil.

(f) “Muzzle compensator” means a device attached to the muzzle of a weapon that utilizes escaping gas to control muzzle movement.

3. Prohibitions

(a) No person, corporation or other entity in the [United States] may manufacture, import, possess, purchase, sell, or transfer any assault weapon or large capacity magazine.

(b) Subsection (a) shall not apply to:

(1) Any government officer, agent, or employee, member of the armed forces of the United States, or peace officer, to the extent that such person is otherwise authorized to acquire or possess an assault weapon and/or large capacity magazine, and does so while acting within the scope of his or her duties; or

(2) The manufacture, sale, or transfer of an assault weapon or large capacity ammunition feeding device by a firearms manufacturer or dealer that is properly licensed under federal, state, and local laws to any branch of the armed forces of the United States, or to a law enforcement agency in [the United States] for use by that agency or its employees for law enforcement purposes.

....

(c) Any person who, prior to the effective date of this law, was legally in possession of an assault weapon or large capacity magazine shall have [ninety] days from such effective date to do any of the following without being subject to prosecution:

(1) Remove the assault weapon or large capacity magazine from the [United States];

(2) Render the assault weapon permanently inoperable; or

(3) Surrender the assault weapon or large capacity magazine to the appropriate law enforcement agency for destruction.²¹²

212. LEGAL CMTY. AGAINST VIOLENCE, *supra* note 210, at 59–61. Appendix G is part of a report, *Banning Assault Weapons—A Legal Primer for State and Local Action*, which is a publication of the Legal Community Against Violence (now known as the Law Center to Prevent Gun Violence). *Id.* at 57; *About Us*, L. CENTER TO PREVENT GUN VIOLENCE,

V. CONCLUSION

Although *Heller I* is widely viewed as a pro-guns-rights case, assault weapons bans remain constitutional under the Second Amendment.²¹³ The Second Amendment is subject to limitations and regulations similar to other fundamental rights, and nothing in *Heller I* suggests anything to the contrary.²¹⁴ *Heller I*'s narrow holding does not confer a right to keep and bear assault weapons, and consequently assault weapons bans are constitutionally permissible.²¹⁵ Congress should promptly enact legislation criminalizing the manufacture, sale, and possession of assault weapons consistent with prevailing public opinion, such as the law suggested by the Law Center to Prevent Gun Violence. This measure can only aid in subsequent prevention of catastrophic violence, like that which occurred in Aurora, Colorado, Oak Creek, Wisconsin, and Portland, Oregon.

<http://smartgunlaws.org/about-gun-laws> (last visited Feb. 24, 2013). The model law is modified for adoption by the United States Congress. See LEGAL CMTY. AGAINST VIOLENCE, *supra* note 210, at v, 15. Intentionally absent is a “penalty” or “punishment” section, as this article merely opines that assault weapons manufacture, sale, and possession should be subject to criminal liability and chooses to abstain from addressing the broader policy question of criminal punishment.

213. See *Heller I*, 554 U.S. 570, 635 (2000); *Heller III*, 670 F.3d at 1263–64; see also *supra* Part IV.A–B.

214. *Heller I*, 554 U.S. at 626.

215. See *id.* at 627, 635; *Heller III*, 670 F.3d at 1261.