

## Censoring artistic expression

IN RECENT YEARS, public schools in Springfield, Ore., Pearl, Miss., Jonesboro, Ark., Paducah, Ky., Littleton, Colo., and Santee, Calif., have been devastated by school violence as youths opened fire on their schoolmates. School officials have had to deal with bomb threats, graphic drawings, online assaults, suicide poems and violent rap songs. Arguably, sometimes school officials may need to punish some students for such expressive conduct. But sometimes school officials may have overreacted, leading to instances of censorship.<sup>1</sup>

Students have been suspended for writing short stories, poems and artwork that school officials have deemed dangerous. Several students have been subjected to long-term suspensions, psychological examinations and, in at least one case, jail time.

Thirteen-year-old Christopher Beamon was suspended from junior high school in Ponder, Texas, and jailed for his Halloween essay. His English assignment was to write a horror story; Beamon's essay depicted him accidentally shooting his teacher and other students in a dark classroom. His short essay of run-on sentences and misspelled words, which received an "A" from his teacher, depicted violence:

*This bloody body dropped odwn in front of us and scared us half to death and about 20 kids started cracking up and pissed me off so I shot Matt, Jake, and Ben started laughing so hard that I accsedently shot Mrs. Henry.*

While his composition was not high-level literary material, Beamon followed the instructions for writing a Halloween horror story. He fulfilled his assignment much too well, however; school administrators said his depictions of violence constituted a threat. He spent six days in jail.

Soon after the school shooting in Spring, Ore., school officials in Whatcom County, Wash., suspended 17-year-old James LaVine after a teacher interpreted his poem "Last Words" as a threat of violence. The teenager said

*Students have been suspended for writing short stories, poems and artwork that school officials have deemed dangerous.*

that he felt “inspired” to write a poem about “the problems of teen violence in schools.” LaVine’s work (reprinted here with errors as written) depicts a student who feels powerful feelings of loneliness after his violent act.

*As I walked,  
through the,  
now empty halls,  
I could feel,  
my hart pounding.*

*As I approached,  
the classroom door,  
I drew my gun and,  
threw open the door,  
Bang, Bang, Bang-Bang.*

Another passage describes the mental anguish suffered by the young killer:

*No tears  
shall be shead,  
in sarrow,  
for I am  
alone,  
and now,  
I hope,  
I can feel,  
remorce,*

*for what I did,  
without a shed,  
of tears,  
for no tear,  
shall fall,  
from your face,  
but from mine,  
as I try,  
to rest in peace,  
Bang!*

Even though his poem depicted violence, a federal judge noted that “there was no overt action, violent demeanor, or other threatening behavior manifested by James LaVine.”<sup>2</sup>

School officials in Owasso, Okla., suspended a high school student for writing a poem about a student who fantasized about killing a teacher. The student’s lawyer said the poem was a work of fiction, not a threat. But school officials were disturbed enough to suspend the student, identified in court papers only as M.G., for two semesters.

Bluestem Unified School District officials in Kansas expelled 17-year-old Sarah Boman because they interpreted her artwork as threatening. She crafted a “compulsive-repetitive” poem from the point of view of a madman angry over the killing of his dog:

*Dammit, Who?  
Who killed my dog?  
Who killed him?  
Who killed my dog?  
I’ll kill you all.*

When Boman placed a poster of this poem on a classroom door, school officials cited her for “posting a threat of violence in the school.” She was expelled, and the school superintendent said that Boman could return to school only after the school board received a written report from a psychologist that she “is not a threat.”

Fortunately, these students were reinstated, and three of them had their suspensions expunged after judicial action. Federal district court judges issued rulings in the *LaVine*, *Boman* and *M.G.* cases, finding that the school officials violated the students’ free-expression rights under *Tinker* because school officials could not reasonably forecast that the student speech would create a material interference or substantial disruption of the school environment.

However, in July 2001, a three-judge panel of the 9th U.S. Circuit Court of Appeals reversed the district judge’s ruling in the *LaVine* case.<sup>3</sup> The panel reasoned that the “backdrop of actual school shootings” in part justified school officials’ decision to expel James LaVine until they could determine he was not a real threat to others or himself.<sup>4</sup>

“When we look to all of the relevant facts here, we conclude that the school did not violate the First Amendment when it ... expelled James,” the panel wrote. The panel said that the school may have “overreacted,” but said the school did not violate the First Amendment because “the school was foremost concerned about student safety.”<sup>5</sup> The case was appealed to the full 9th Circuit and to the U.S. Supreme Court, to no avail.

Judge Andrew Kleinfeld dissented in the 9th Circuit’s denial of full-panel review. He disparaged the panel decision in *LaVine*, saying it distorted the *Tinker* doctrine:

*After today, members of the black trench coat clique in high schools in the western United States will have to hide their art work. They have lost their free speech rights. If a teacher, administrator or student finds their art disturbing, they can be punished, even though they say nothing disruptive, defamatory or indecent and do not intend to threaten or harm anyone. School officials may now subordinate students’ freedom of expression to a policy of making high schools cozy places, like daycare centers, where no one may be made uncomfortable by the knowledge that others have dark thoughts, and all the art is of hearts and smiley faces. The court has adopted a new doctrine in First Amendment law, that high school students may be punished for non-threatening speech that administrators believe may indicate that the speaker is emotionally disturbed and therefore dangerous.<sup>6</sup>*

In the Oklahoma case — *D.G. v. Independent School District No. 11* — a federal judge determined that school officials overreacted partly because of the Columbine shootings.<sup>7</sup>

*“The First Amendment protects our freedom to be individuals. We are Americans, we are all different people.”*

— SARAH BOMAN, litigant

“The concern for faculty and student safety is particularly high in view of recent episodes of student violence in Colorado, Oklahoma and other states,” the judge wrote. But the judge ruled that the poem did not create a substantial disruption of the school environment.

“Essentially the argument is that if student’s act of disrespect goes unpunished, it will be a substantial disruption to the school system in general because it will undermine the school’s authority to discipline students,” the judge wrote. “However, that argument simply cannot hold water against the rights found in the First Amendment.”

Judge Wesley Brown determined in *Boman v. Bluestem Unified School District No. 205* that “any commotion caused by the poster did not rise to the level of a substantial disruption required to justify a long-term suspension of the plaintiff.”<sup>8</sup>

Brown further determined that requiring Sarah Boman to undergo a psychiatric evaluation before returning to school “would impermissibly infringe on plaintiff’s rights under the First Amendment.”

Jerry Boman, Sarah’s father, said, “The judge’s decision renewed my faith and hope in the Constitution and law in our society.” Sarah herself said it best: “The First Amendment protects our freedom to be individuals. We are Americans, we are all different people.”

Breean Beggs, LaVine’s lawyer, said students such as Sarah Boman and James LaVine should never be punished for their artistic expression or asked to undergo psychological testing. Beggs said the overreaction occurred in part because of publicity on school shootings. “There has been a definite decline in the day-to-day application of student rights in schools,” Beggs said. “School officials want total control regardless of First Amendment rights. ... The whole purpose of the public education system is to socialize young people as to their rights and responsibilities as citizens. When school officials act outside of the First Amendment, they do grave damage to educating students in citizenship.”

Paul Rebein, Sarah Boman’s lawyer, agreed that the damage from repressive school policies deeply affects young people. “Students are getting the message that their rights don’t count.”

## PERSPECTIVE

*Zero tolerance in the age of Columbine*

**SARAH BOMAN** faced a long-term suspension for her artwork because her school officials had adopted a get-tough attitude represented in a “zero-tolerance” policy. The concept of zero tolerance came about as schools grappled with dangerous issues such as drugs and guns. The term now applies to any get-tough school policy that promotes rigid discipline over case-by-case adjudication.

In the age of Columbine, more and more schools have turned to such policies. Zero-tolerance advocates point out that safety in schools should trump all other concerns.

“While a zero-tolerance policy may be inflexible, it does give school officials an iron-clad way to avoid problems,” said Kelly Johnson, a lawyer for the school district that suspended Sarah Boman.

Johnson said sometimes schools have been “caught between a rock and a hard place” in trying to ensure both student safety and freedom of expression. “Sometimes, it is hard for a principal to tell whether some form of student speech is a threat,” he said, referring to the *Boman* case.

But the *Boman* case may represent an egregious example of how reaction to the Columbine shootings, combined with a zero-tolerance policy, can lead to overreaction.

Paul Houston, executive director of the American Association of School Administrators, said that in the spring of 1999, school officials were justified in clamping down on student expression. “In the aftermath of Columbine, there was a lot of hysteria, a fear of copycat crimes and a host of bomb threats,” he said.

But Houston said that zero-tolerance policies are not the answer. “Zero tolerance means zero judgment,” he said. “A nail file is not the same thing as a weapon; Midol is not the same as an illegal drug.”

The strange phenomenon, according to Houston, is that student deaths at schools have actually decreased, rather than increased. “The perception is that school violence has increased, the media has increased its coverage of school violence, but the number of deaths has declined,” Houston said. A recent study by the U.S. Department of Education found that crime has decreased at public schools since 1990.



Courtesy ACLU.org

*Sarah Boman, a Wichita, Kan., high school student, was suspended for creating a poem depicting the thoughts of a psychotic man.*

# Students express themselves online

THE PRIMARY FIRST AMENDMENT battleground for the 21st century is the Internet.

The Internet affords students unprecedented opportunities to receive information and ideas as well as communicate their own feelings. Federal judges have described the Internet as “the most participatory form of mass speech yet developed” and “an international free flow of ideas and information.”

No one questions the educational opportunities the Net delivers to students, but many worry that too much material on the Internet is unsuitable for children. The difficulty is how to balance the competing interests of protecting minors and preserving free speech.

The issues that have appeared most prominently in the public school arena are the debate over filtering Internet access and punishment of students for their own Internet speech.

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## Federal regulatory efforts

The extent to which the government may regulate the content of material on the Internet is a key First Amendment issue that features the clash between protecting minors and preserving freedom of speech.

In 1997, the U.S. Supreme Court struck down portions of the federal Communications Decency Act, which criminalized patently offensive and indecent online communications.

Described as granting the Internet its “legal birth certificate,” *Reno v. ACLU* established the general principle that laws regulating the content of Internet speech must be subjected to the most exacting form of judicial review.<sup>1</sup>

The First Amendment generally prohibits laws or policies that discriminate

against the content of speech. So-called content-based laws are said to be presumptively unconstitutional unless government officials can show the law or policy furthers a compelling government interest and is narrowly drawn.

However, the constitutional dimensions become more complex when minors are involved because they do not enjoy the same level of First Amendment protection as adults. Protecting minors has become an acknowledged and entrenched “compelling” interest used to justify numerous speech-restrictive laws. In fact, some have said that the protection of minors has become a buzzword for the abrogation of constitutional rights.

The high court noted that it is difficult, if not impossible, for Web-site operators to segregate minor Web users from adults. The net effect of laws



The Associated Press

Sen. Patrick Leahy, D-Vt., during an address against the Communications Decency Act

that criminalize “indecent” material is that adults will be reduced to reading only that which is fit for children — a state of affairs the U.S. Supreme Court rejected as patently unconstitutional in the 1957 decision *Butler v. Michigan*.<sup>2</sup>

The U.S. attorney general’s office attempted to justify the Internet indecency provisions of the Communications Decency Act by saying it protected minors. The law was necessary to protect children from online smut, government

attorneys argued.

However, the high court noted that the term “indecent” — which was not defined in the legislation — could be applied to constitutionally protected material for older minors.

After the defeat in the federal courts of the Communications Decency Act, Congress returned with the Child Online Protection Act, or COPA.

In several respects, COPA is more narrowly drafted than its predecessor. For example, COPA applies to communications on the Web, rather than the Internet as a whole. COPA purports to target only commercial

pornographers. Finally, COPA criminalizes only material that is “harmful to minors,” unlike the CDA, which criminalized “indecent” material.

The day after COPA became law, the American Civil Liberties Union, the American Booksellers Foundation for Free Expression and 15 other groups challenged it in federal court. In February 1999, U.S. District Judge Lowell Reed granted the ACLU a preliminary injunction preventing enforcement of COPA. Reed ruled that COPA was an unconstitutional content-based law that did not advance the government’s compelling interests in a narrow enough way.<sup>3</sup> “Indeed, perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection,” wrote the federal judge.<sup>4</sup>

On appeal, the 3rd Circuit agreed in June 2000 in *ACLU v. Reno* — though the panel reached its decision on different grounds than Reed.<sup>5</sup> The government argued that COPA was a narrowly drafted way of addressing the compelling interest of protecting minors from harmful materials. The 3rd Circuit agreed that protecting minors was a compelling interest, writing: “It is undisputed that the government has a compelling interest in protecting children from material that is harmful to them, even if not obscene by adult standards.”

However, the panel said that COPA’s definition of “harmful to minors” — with a “contemporary community standards clause” — could not be applied in cyberspace. The appeals panel focused on the fact that “Web publishers are without any means to limit access to their sites based on the geographic location of particular Internet users.”<sup>6</sup>

The appeals court was concerned with forcing Web-site publishers to comply with varying local community standards. “Web publishers cannot restrict access to their site based on the geographic locale of the Internet user visiting their site,” the panel wrote.

ACLU lawyer Ann Beeson called on government leaders to “close the book on this early chapter of Internet history and embrace free speech online.” However, the government appealed the decision to the U.S. Supreme Court.

On May 13, 2002, the high court ruled that the 3rd Circuit acted too quickly in refusing to allow the enforcement of COPA solely on the community-standards rationale. The Court ruled 8-1 in *ACLU v. Ashcroft* to send the case back to the 3rd Circuit for further constitutional review.<sup>7</sup> Justice Clarence Thomas wrote for the majority that the Court’s obscenity cases establish that publishers must conform to different community standards. “If a publisher

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— U.S. DISTRICT JUDGE  
LOWELL REED

chooses to send its material into a particular community, this Court's jurisprudence teaches that it is the publisher's responsibility to abide by that community's standards," Thomas wrote. "The publisher's burden does not change simply because it decides to distribute its material to every community in the Nation."<sup>8</sup>

The net effect was that the Supreme Court sent the case back down to the 3rd Circuit to conduct a more thorough First Amendment analysis. After the Supreme Court decision, the parties again filed legal papers and argued before the 3rd U.S. Circuit Court of Appeals. On March 6, 2003, the three-judge panel of the 3rd Circuit affirmed the district court judge's granting of

a preliminary injunction, preventing the government from enforcing COPA. The appeals court determined that COPA was not narrowly tailored enough in several aspects to survive First Amendment review.<sup>9</sup>

The panel focused on the definition of "harmful to minors" in COPA, which described such material as "any communication, picture, image, file, article, recording, writing, or other matter of any kind" that satisfies the prurient-interest, patently offensive and serious-value categories of the harmful-to-minors standard.

The problem with this definition, according to the panel, was that one sexual image could be considered harmful to minors even "if it were to be viewed in the context of an entire collection of Renaissance artwork."<sup>10</sup>

The panel also found constitutional flaws in the fact that the statute did not distinguish between different ages of minors. "Regardless of what the lower end of the range of relevant minors is, Web publishers would face great uncertainty in deciding what minor could be exposed to its publication, so that a publisher could predict, and guard against, potential liability," the panel wrote.

The appeals court also determined that COPA's definition of "commercial purposes" was too broad, applying to far more than commercial pornographers. "We are satisfied that COPA is not narrowly tailored to proscribe commercial pornographers and their ilk, as the Government contends, but instead prohibits a wide range of protected expression," the panel wrote.<sup>11</sup>



The Associated Press

*Attorney General  
John Ashcroft*

The panel also determined that the voluntary use of filtering software by parents was a less speech-restrictive alternative than the broad criminal penalties imposed by COPA.

In addition, the panel found that COPA “is substantially overbroad in that it places significant burdens on Web publishers’ communication of speech that is constitutionally protected as to adults and adults’ ability to access such speech.” The Justice Department again appealed to the U.S. Supreme Court, which agreed to hear the case. The Court will issue its decision in 2004.

The fate of COPA will determine the fate of state online decency laws. Although the federal courts continue to strike down these laws, government officials appear dogged about Internet content regulation. Some commentators have pointed out that the regulations on the Internet follow a general pattern of government officials overreacting to new technology. First Amendment expert Robert Corn-Revere called it a “culture of regulation.”<sup>12</sup>

Numerous states have followed the lead of the federal government in enacting their own Internet censorship laws. Federal courts have struck down — at least temporarily — state laws in New York, New Mexico, Georgia and Michigan. However, the pattern of states’ enacting new Internet content restrictions continues.

### Filtering Internet content in schools

Opponents of Internet censorship laws argue that it is the job of parents, not the government, to determine what material their children read on the Internet. Parents can buy filtering software that blocks access to Web sites with harmful material. However, when government officials install blocking software on computers, they are regulating speech based on content and implicating the First Amendment.

The controversy over filtering at public institutions takes place most prominently in public libraries and public schools. In a federal case from Virginia, *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, a library policy requiring filtering at all computer terminals was found to violate the First Amendment. The court ruled that, while the library is not obligated to provide Internet access to its patrons, if it does so it is “restricted by the First Amendment in the limitations it is allowed to place on patron access.”<sup>13</sup>

The court reasoned that filtering Internet content for adults and minors would reduce adults to reading only that which is fit for children. “It has

*Some commentators have pointed out that the regulations on the Internet follow a general pattern of government officials overreacting to new technology.*

long been a matter of settled law that restricting what adults may read to a level appropriate for minors is a violation of the free speech guaranteed by the First Amendment.”<sup>14</sup>

*Schools have argued that they are not subject to constitutional scrutiny because the decisions on which Web sites to block are made by private companies that produce the software.*

Public schools, however, face a different issue because the majority of Internet users will be minors. Numerous public schools across the country have installed filtering software on school computers to prevent kids from accessing harmful material. Schools face a particularly tricky problem because they do act *in loco parentis* and have responsibilities to protect children. One Florida county school system was sued for failing to install filtering software on school computers.

Filtering advocates point out that at public schools, the vast majority of Internet users are minors, and the government has a compelling interest to protect them. However, filtering products do not distinguish between a 17-year-old user and a 7-year-old user. Older minors have substantial First Amendment rights to view material that may well be unsuitable for a younger minor.

Jonathan Wallace, author of *Sex, Laws, and Cyberspace* and a noted opponent of filtering software in public institutions, said that “there are definite constitutional problems with having the same filtering criteria applied for kindergarten through 12th grade.”

“Many of these filtering software products treat all children 1-17 as the same,” he said. “It is a well-known constitutional principle that there is a scale of constitutional rights that increases as a child gets older.” Many courts have recognized this and interpreted their state harmful-to-minors laws as applying to a reasonable 17-year-old.

Schools have argued that they are not subject to constitutional scrutiny because the decisions on which Web sites to block are made by private companies that produce the software. However, the judge in the *Mainstream Loudoun* case rejected that argument, noting that “a defendant cannot avoid its constitutional obligation by contracting out its decision making to a private entity.”

The central problem with filtering software is that it blocks some constitutionally protected material. Sex-education sites, AIDS information sites and breast-cancer sites represent just a few examples of useful topics that have been blocked. The Censorware Project, a New York-based group that opposes the use of filtering software in public institutions, released a

report in March 1999 showing that Smartfilter, the software nearly all Utah public schools use, blocks a “great number of socially useful sites,” including Web sites containing the Declaration of Independence, Shakespeare’s plays, a brochure by the National Institute on Drug Abuse and a site for the children’s board game Candyland.

The Censorware Project released another study on the filtering product Bess, which revealed that various non-pornographic materials were barred, including the Feminists Against Censorship Web site, sex-education sites, a gay-owned bookstore’s site and articles from *Time* magazine’s Netly News.

John Bowen, a former high school journalism teacher in Ohio, went to his principal to have the filtering product Bess turned off because his journalism students could not complete their assignments. His students could not access Web sites dealing with AIDS, prison rape, sex education and breast cancer. Bowen says the filter blocked “teens and everything. It blocked sites on Pink Floyd and even a Student Press Law Center article that mentioned a case where a college paper was cited for using the term ‘butt-licking.’

“Schools absolutely should not use filters because students can always get around them and the filters more often than not block things they should not,” Bowen said. “Well-educated teachers, willing to teach students how to use the Internet, would be far more cost-effective.” Bowen said that schools overreact to pornography. “If pornography is a real problem, then we must teach our students to deal with it, not live in fear of it.”

Several states have contracted with private companies to provide filtering software for public schools. Utah public schools use the product Smartfilter virtually statewide. Tennessee, Oklahoma and Wisconsin, plus some schools in Maine, California, Ohio and Massachusetts, use Bess.

### **Federal filtering legislation for public libraries and public schools**

In December 2000, Congress passed an amendment to a large spending bill mandating that public schools and libraries receiving federal funds for Internet hookups install blocking software.

The Children’s Internet Protection Act (CHIPA or CIPA) required schools to install a “technology protection measure” to restrict computer access to “visual images” that contain obscenity, child pornography and material

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deemed harmful to minors. Another part of the law, called the Neighborhood Children’s Internet Protection Act, would allow school boards to block material that is “inappropriate for minors.” The law said that the determination of what matter is inappropriate will be made “by the school board, local educational agency or other authority.”

In March 2001, the ACLU filed a lawsuit on behalf of public libraries, library associations, library patrons and others challenging the constitutionality of CIPA as it relates to public libraries.<sup>15</sup> The complaint said that the law “distorts the traditional function of libraries, which is to provide uncensored access to the widest possible range of ideas and information.”

The same month, the American Library Association headed a group of library associations in filing a separate challenge to CIPA.<sup>16</sup> The suit challenged the law as it applied to public libraries. In separate lawsuits that eventually were consolidated, both the ALA and ACLU contended that the new law unconstitutionally forces libraries to restrict speech or forego vital federal funds. Both groups said that the federal law turns libraries, traditionally places of freedom, into bastions of censorship.

The government countered that the challenged provisions of CIPA were valid exercises of Congress’ spending power under the Constitution, which provides that “Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States.”

A special panel of three federal judges consolidated the cases and heard seven days of testimony in March and April 2002. The plaintiffs presented evidence showing that many commonly used filters restrict too much constitutionally protected material. One exhibit showed 395 Web sites blocked by filtering products. These included music sites, gay and lesbian magazines, a Planned Parenthood site, a plastic-surgery site and art galleries.

### **CIPA panel decision**

On May 31, 2002, the panel of three federal judges — 3rd U.S. Circuit Court of Appeals Judge Edward Roy Becker and federal district court Judges John Fullam and Harvey Bartle III — ruled in favor of the plaintiffs in *ALA v. U.S.*<sup>17</sup> The panel cited the plaintiffs’ evidence that the filtering programs “overblocked” or restricted access to constitutionally protected material: “We find that commercially available filtering programs erroneously block a

huge amount of speech that is protected by the First Amendment.”<sup>18</sup>

“At least tens of thousands of pages of the indexable Web are overblocked by each of the filtering programs evaluated by experts in this case, even when considered against the filtering companies’ own category definitions,” the panel wrote.<sup>19</sup> “Because of the inherent limitations in filtering technology, public libraries can never comply with CIPA without blocking access to a substantial amount of speech that is both constitutionally protected and fails to meet even the filtering companies’ own blocking criteria.”<sup>20</sup>

The government argued that Congress had the right under the spending power to tie federal funds to the libraries’ use of filtering programs. But the plaintiffs contended that the spending power could not be used to force libraries to violate the First Amendment. The government also argued that the use of filters presented no constitutional problem in part because it was similar to the editorial discretion that libraries must exercise every day concerning which books to acquire for their collections.

The court rejected this analogy, focusing on the fact that the library, in providing Internet access, had created a designated public forum. “In short, public libraries, by providing their patrons with access to the Internet, have created a public forum that provides any member of the public free access to information from millions of speakers around the world.”<sup>21</sup>

According to the panel, there were several less-restrictive alternatives that the government could have used rather than blocking substantial amounts of constitutionally protected speech under CIPA. These included adopting Internet-use policies coupled with Internet-use logs, requiring minors to use certain computers that are in direct view of library staff, placing unfiltered terminals in remote locations, and installing privacy screens or recessed monitors to prevent patrons from being exposed to material viewed by others. The court acknowledged that some of the alternatives could create problems of their own. For example, the judges wrote: “We acknowledge that privacy screens and recessed monitors suffer from imperfections as alternatives to filtering. Both impose costs on the library, particularly recessed monitors, which, according to the government’s library witnesses, are expensive.”<sup>22</sup> But panel concluded that the problems with the less-restrictive alternatives were “not insurmountable” and that the government had failed to show that the alternatives would be ineffective.

Predictably, free-speech advocates cheered and anti-pornography groups jeered the decision. “The court today barred the government from turning librarians into thought police armed with clumsy blocking programs,” said Ann Beeson, litigation director of the ACLU’s Technology and Liberty

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Scott MacLay

Ann Beeson, litigation director of the American Civil Liberties Union's Technology and Liberty Program

Program. "The court found that these programs are inherently flawed and will inevitably prevent library patrons all over the country from accessing valuable speech online."

Anti-pornography advocates disagreed. Jay Sekulow, executive director of the American Center for Law and Justice, said that CIPA "is constitutional because it does not require that all computer terminals in libraries or public schools be outfitted with porn-filtering software. Those computers earmarked for use by minors must include the porn filters, but other computers used by adults do not. The Children's Internet Protection Act does not run afoul of the First Amendment and is an effective way to protect minors while permitting adults to use a filter-free Internet."<sup>23</sup>

### Supreme Court Review of CIPA

The government appealed the panel decision to the U.S. Supreme Court. On June 23, 2003, the Court ruled 6-3 in *United States v. American Library Association* that CIPA was constitutional.<sup>24</sup> Chief Justice William Rehnquist, in his plurality opinion, reasoned that Congress may attach conditions to the receipt of federal funds in order to protect young people from illegal and harmful online pornography. According to Rehnquist, Congress had such authority under the spending clause of the Constitution.

The plurality reasoned that libraries provide Internet access not to facilitate a diversity of viewpoints but to "facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality."<sup>25</sup> The plurality determined that public libraries could exclude pornography online just as they can exclude pornography from their print collections. The plurality also determined that Internet access in a public library was not a public forum that would subject librarians' decisions to greater First Amendment scrutiny. In First Amendment law, speech regulations are harder to justify in places known as traditional or designated public forums than in nonpublic forums. It referred to Internet access as "no more than a technological extension of the book stack."<sup>26</sup>

Rehnquist said that it was reasonable to prevent access to pornography on the Internet because public libraries regularly exclude pornography from their print collections. In other words, if libraries don't provide print pornography, why should they provide online pornography?<sup>27</sup>

The lower court had based its decision in part on filtering software’s alleged problems with overblocking. The plurality minimized this concern, noting “the ease with which patrons may have the filtering software disabled.”<sup>28</sup> Justice Anthony Kennedy also pressed this point in his concurring opinion.

The existence of less speech-restrictive ways of protecting children from online pornography was immaterial, according to the plurality. Furthermore, if a public library wished to provide unfiltered access, it would be free to refuse federal funds for Internet connections.

Three justices — John Paul Stevens, David Souter and Ruth Bader Ginsburg — dissented, with Stevens and Souter each writing separate opinions. Stevens characterized CIPA as a “statutory blunderbuss” that censored too much constitutionally protected speech.<sup>29</sup> “It is as though the statute required a significant part of every library’s reading materials to be kept in unmarked, locked rooms or cabinets, which could be opened only in response to specific requests,” he added.<sup>30</sup>

For his part, Souter compared filtering the Internet to purchasing books and “cutting out pages with anything thought to be unsuitable for all adults.”<sup>31</sup>

While the primary impetus for filtering measures like the Children’s Internet Protect Act was protecting children from pornography, in the wake of several school shootings, filtering supporters have cited a wider array of “harmful” material on the Web, including information on hate speech, bomb-making, guns, drug usage, religious bigotry and violence.

Written testimony submitted to a 1999 federal congressional hearing on filtering legislation by Mark Potok of the Southern Poverty Law Center, a group that tracks hate speech on the Internet, said that “The two youths who opened fire (in Columbine) ... may well have been inspired, in part, by neo-Nazi propaganda they encountered on the Net. It seems clear that they found plans for building pipe bombs and other weapons there.”

Howard P. Berkowitz, national chairman of the Anti-Defamation League, invoked Littleton, Colo., in noting that “the Internet offers both propaganda and how-to manuals for those seeking to act out fantasies of intolerance and violence.”

At least some free-speech advocates have found the use of the Columbine tragedy in this argument distasteful. “It troubles me that Columbine is being used by everybody to push their own agenda,” said Paul K. McMasters, the

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— JUSTICE JOHN  
PAUL STEVENS

Freedom Forum's First Amendment Ombudsman. "We do not need the rationing and parceling out of speech according to federal fiat. We don't need members of Congress and other policymakers using the tragedy of Columbine to disinvest the younger generation of their First Amendment heritage."

Larry Ottinger, a lawyer with People for the American Way, added, "It is absurd for anyone to claim Net filtering is the answer to school violence. Clearly, if parents weren't aware of pipe bombs being made in a garage, it is hard to see how censoring the Internet would make a difference."

### **Silencing student speech**

Students, in addition to virtually everyone else in society, have taken advantage of the Internet to express themselves on a variety of issues. Sometimes they use the Web to criticize school officials or policies. Administrators have responded in some circumstances by punishing the students, even if the speech did not take place on school grounds.

In 1995, Newport (Wash.) High School student Paul Kim used his home computer, on his own time, to create a Web site that was a parody related to his school. The principal contacted several colleges to which Kim had applied and withdrew the school's nomination of Kim as a National Merit finalist. Under pressure from the Washington ACLU, the school settled, agreeing to pay Kim \$2,000 in compensation for loss of the National Merit scholarship and issued a public apology: "The district has no right to punish students who, on their own time and with their own resources, exercise their right of free speech on the Internet."

Kim, who attended Columbia University and is headed to law school, stated after the settlement: "Do I have any regrets? It may not have been the most prudent thing to do. But at least this decision helps to establish that kids have a right for self-expression without fear of punitive actions."

Kim's situation has not established such a right. Instead, school officials nationwide have cracked down on students who engage in critical speech on the Internet, even while using home computers:

- An Ohio school district suspended a 16-year-old for making negative comments about a band teacher on his Web site. The school later settled for \$30,000.

- A school district in Brimfield, Ohio, suspended 11 students after they posted material on a Gothic Web site. The American Civil Liberties Union of Ohio has filed a lawsuit on behalf of six of the students.<sup>32</sup>
- School officials at Westlake High School suspended a student for his site, which lampooned his band teacher. The school eventually agreed to settle the case by paying \$30,000 and expunging the suspension from the student's record.<sup>33</sup>
- A student at Timberline High School in Olympia, Wash., was suspended for what school officials deemed to be "very offensive" speech on his Web site. The American Civil Liberties Union of Washington successfully sued on his behalf.<sup>34</sup>
- A Georgia 8th grader was suspended for creating a Web site called "Natasha's Heckling Page" which listed 11 ways to disrupt class and identified an administrator as the person "we try to avoid the most."<sup>35</sup>

*The courts that have rendered decisions regarding students' Internet speech have nevertheless reached different outcomes through different rationales.*

Lawyer Ann Beeson identified the censoring of student Web sites as one of the major "disturbing trends" in the First Amendment landscape. "In many cases, especially since the Littleton tragedy, school officials are punishing students for their online speech," Beeson said. "If a student publishes material on his home computer, that is the parents' jurisdiction, not the school's. It is an intrusion on the parent-child relationship."

School officials can't exercise greater control over off-campus speech than for behavior on-campus. If a student constructs his Internet site at home, does not use school resources and does not distribute the material at school, then the school officials don't have jurisdiction over the speech, no matter how offensive.

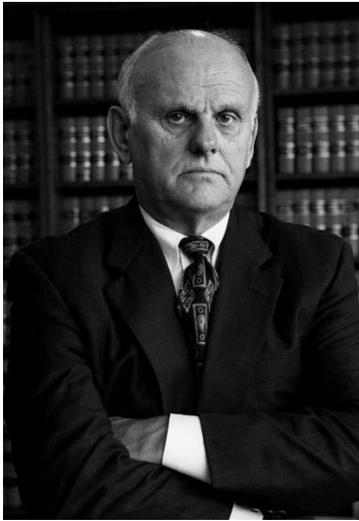
Raymond Vasvari, legal director for the American Civil Liberties Union of Ohio, said, "There is no U.S. Supreme Court precedent for the principle that students enjoy diminished First Amendment rights when they are off-campus simply by virtue of being young. When students are engaging in expression off-campus, they wearing the hat of a young citizen, not of a student."

Older decisions involving off-campus student expression serve as a guide for courts examining student Web sites. For example, in 1986 a federal court in Maine ruled that school officials did not have the authority to suspend a student who made an obscene gesture to a teacher at an off-campus restaurant.<sup>36</sup>

Even if the student's Web site directly involves school matters, school officials must still conform to the *Tinker* standard — the student expression can only be censored if it creates a substantial disruption or material interference with the educational process. The courts that have rendered decisions regarding students' Internet speech have nevertheless reached different outcomes through different rationales.

### ***Beussink v. Woodland R-IV School District***

School officials at Woodland High School in Missouri suspended Brandon Beussink for posting a Web page critical of the school. Beussink used vulgar language to convey his opinions regarding teachers, the principal and the school's own Web site.



The Associated Press

*U.S. District Judge John C. Coughenour ruled in favor of a student who was suspended for posting fake student obituaries.*

In *Beussink v. Woodland R-IV School District*, a federal district court judge issued a preliminary injunction, ruling that the school district likely violated the First Amendment free-speech rights of Beussink for suspending him because they disliked his speech.<sup>37</sup>

“Disliking or being upset by the content of a student’s speech is not an acceptable justification for limiting student speech under *Tinker*,” the judge wrote.<sup>38</sup> “Indeed, it is provocative and challenging speech, like Beussink’s, which is most in need of the protection of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure. It is unpopular speech which needs the protection of the First Amendment. The First Amendment was designed for this very purpose. ...<sup>39</sup>

“The public interest is not only served by allowing Beussink’s message to be free from censure, but also by giving the students at Woodland High School this opportunity to see the protections of the United States Constitution and the Bill of Rights at work.”

*Emmett v. Kent School District No. 415*<sup>40</sup>

In the *Emmett* case, an 18-year-old honor student posted a Web page from his home titled the “Unofficial Kentlake High Home Page.” The site included a disclaimer that the site was not sponsored by the school and was for entertainment purposes only.

Nick Emmett’s home page contained mock obituaries of two of his friends, which became the topic of discussion at school among students, faculty and administrators. The site also allowed Web page visitors to vote on who would die next.

The controversy came after an evening TV news story depicted his site as containing a “hit list” of people to be killed. Even though Emmett immediately removed his site from the Internet, the principal placed him on emergency expulsion for harassment, intimidation and disruption to the educational environment and copyright violations.

The expulsion was later modified to a five-day suspension. Emmett sued in federal court, contending that the suspension violated his First Amendment rights.

U.S. District Judge John C. Coughenour analyzed the case under *Tinker*. The judge then distinguished Emmett’s case from the school assembly speech at issue in *Fraser* and the school-sponsored speech at issue in *Hazelwood*. “Emmett’s Web site was not produced in connection with any class or school project. Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school’s supervision or control.”

The judge acknowledged that school officials are operating in a post-Columbine world: “The defendant argues, persuasively, that school administrators are in an acutely difficult position after recent school shootings in Colorado, Oregon and other places.”

Coughenour even acknowledged that content on a student Web page can indicate a student’s “violent indications.” However, the judge noted that the school officials failed to present any evidence that the “mock obituaries and voting on this Web site were intended to threaten anyone, or manifested any violent tendencies whatsoever. ...

“This lack of evidence, combined with the above findings regarding the out-of-school nature of the speech, indicates that the plaintiff has a substantial

likelihood of success on the merits of his claim.”

The school district later settled the dispute by agreeing to pay \$1, attorney fees and to remove the suspension from Emmett’s record.

*Beidler v. North Thurston School District No. 3*<sup>41</sup>

Karl Beidler created a Web page in January 1999 while he was a junior at Timberline High School in Thurston County, Wash. His site, titled “Lehnis Web,” parodied Dave Lehnis, the then-assistant principal of his school. The site showed Lehnis participating in a Nazi book-burning, drinking beer and spray-painting graffiti on a wall.

In January 1999, the school principal placed Beidler on “emergency expulsion.” According to Beidler, the principal told him some teachers said they felt uncomfortable about having Beidler in their classes due to the content of his Web site. The principal testified that he found the Web site “personally appalling” and “inappropriate.”

*“Schools can and will adjust to the new challenges created by such students and the Internet, but not at the expense of the First Amendment.”*

— FROM THE  
*Beidler* DECISION

The plaintiffs contended the case was “remarkably similar” to *Beussink*. They argued that the school district “has no authority to police students’ off-campus or Internet speech.” The plaintiffs argued that even if the court applied the *Tinker* standard, the plaintiff should still prevail because the Web site did not cause substantial disruption.

On July 18, 2000, a Washington state court judge ruled that school officials infringed on Beidler’s First Amendment rights. “Today the First Amendment protects students’ speech to the same extent as in 1979 or 1969, when the U.S. Supreme Court decided *Tinker v. Des Moines*. . . .”<sup>42</sup>

“Schools can and will adjust to the new challenges created by such students and the Internet, but not at the expense of the First Amendment,” the decision read.<sup>43</sup>

*J.S. v. Bethlehem Area School District*<sup>44</sup>

In May 1998, an 8th-grade student at Nitschmann Middle School in Bethlehem, Pa., created a Web page on his home computer that made numerous derogatory comments about his algebra teacher, the school principal and others.

His Web page contained comments such as, “She’s a bitch,” “Why Should She Die?” and “Take a look at the diagram and the reasons I gave, then give me \$20.00 to help pay for the hitman.”

School officials considered some of these statements to be threats and called law enforcement officials, including the FBI. The student voluntarily removed the Web site after the principal learned of the material.

School officials permanently expelled the student. The student challenged the disciplinary action in court and lost before a court of common pleas. On appeal, the school officials continued to prevail. The Pennsylvania Supreme Court determined that the Web site disrupted the school’s learning environment in its decision in *J.S. v. Bethlehem Area School District*.<sup>45</sup>

The court dismissed the argument that the Web page was “off-campus control”—beyond the school’s jurisdiction. “We find there is a sufficient nexus between the Web site and the school campus to consider the speech as occurring on-campus.”<sup>46</sup> The court categorized the speech as on-campus because the student accessed the site at school, showed it to a fellow student and informed other students of the site.

“We hold that where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech,” the court said.<sup>47</sup>

The court then stated that school officials could punish the student under the *Fraser* standard because the speech on the Web site was vulgar and highly offensive. It also could punish the student under the *Tinker* standard because the site caused a substantial disruption of school activities.<sup>48</sup>

Courts are applying different standards and reaching different outcomes with respect to student Internet Web site speech. Court must determine whether the speech occurred at the student’s home or on school computers. Ken Paulson, executive director of the First Amendment Center, has written that “the long arm of high school censors shouldn’t reach students’ homes.”<sup>49</sup> If the student created the material at home and did not distribute the material at school, there is a good legal argument that the schools simply do not have jurisdiction to punish the student. It becomes a matter for parents to handle, or in the case of truly threatening material, for law enforcement.

The Internet often gets blamed for troubled teen behavior or for other societal ills. However, the Internet offers an outlet for students who feel

*If the student created the material at home and did not distribute the material at school, there is a good legal argument that the schools simply do not have jurisdiction to punish the student.*

alienated at school. It may even afford officials an opportunity to examine the potential dangerousness of certain disturbed students.<sup>50</sup>

What has become clear over the past few years is that much First Amendment litigation has taken place and will continue to take place in the online arena. More and more students are taking to the Internet to express their frustrations with school administrators, teachers and classmates. Federal and state legislators continue to introduce and pass laws requiring filtering software or imposing other content restrictions on the Internet.

The ultimate outcome of litigation involving the Child Online Protection Act should provide more clarity with respect to the online legal landscape.

The Court's decision in *United States v. American Library Association* means that public libraries and public schools will continue to filter Internet access if they wish to receive federal funds. It is unlikely, however, that the filtering controversy will disappear.

## School uniforms and dress codes

*“I suppose that a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtails. But the ideas of ‘life, liberty, and the pursuit of happiness,’ expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course freedom of expression and a wide zone of privacy.”*

— JUSTICE WILLIAM DOUGLAS, 1968

**ALTHOUGH STUDIES HAVE SHOWN** that school violence has declined,<sup>1</sup> school officials do face a daunting task in trying to ensure a safe learning environment as they confront problems with violence, gangs, drugs and other disruptions. One solution has been regulation of students’ appearance through dress codes and mandatory school uniforms.

President Clinton weighed in on the issue in his 1996 State of the Union address:

*If it means that teenagers will stop killing each other over designer jackets, then our public schools should be able to require school uniforms. If it means that the schoolrooms will be more orderly, more disciplined and that our young people will learn to evaluate themselves by what they are on the inside instead of what they’re wearing on the outside, then our public schools should be able to require their students to wear school uniforms.*



The Associated Press

Supreme Court Justice  
William O. Douglas

The president ordered the federal Department of Education to issue manuals on the efficacy of school uniforms. The manual stated that school uniforms represent “one positive and creative way to reduce discipline problems and increase school safety.”

Many states have laws permitting school boards to regulate student dress. For example, California allows public schools to require school uniforms.

Tennessee empowers school boards to enact dress codes banning “gang-related” clothing. Delaware authorizes school boards to “establish and enforce a dress code program, which may include school uniforms.”

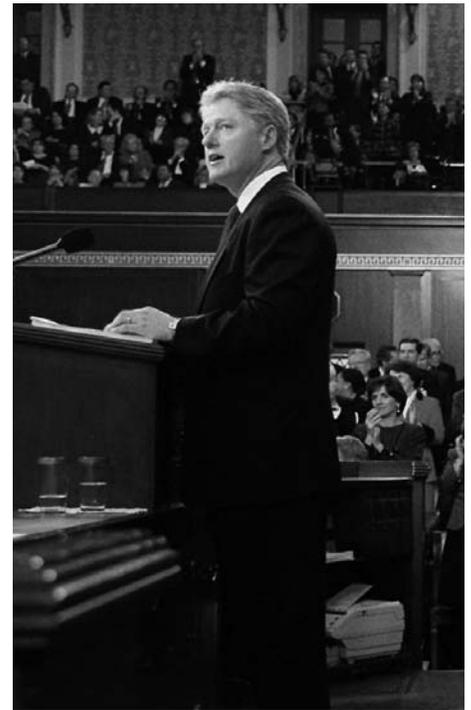
Many school principals believe that dress codes and uniform policies not only calm student behavior but also prepare students to “dress for success” in the real world. Doug Crosier, principal of Franklin (Tenn.) High School, which has a dress code banning hats and other head-coverings, “unnatural” colors of hair, most body-piercing and many kinds of advertising and slogans on T-shirts, said that strict dress codes create a more “business-like atmosphere” in schools.

Many school administrators have said school uniforms have a strong positive impact on student behavior. In Long Beach, Calif., where 56 elementary schools, 14 middle schools and one high school adopted school uniforms, administrators said school absences declined, violent incidents dropped and academic performance improved.

Student-rights advocates, however, cautioned that the regulation of clothing represents a Band-Aid solution that could rob students of an important means of self-expression. Lawsuits have been filed across the country challenging dress codes and uniforms.

While some administrators argue that schools provide many outlets for student expression, including the school newspaper and student government, opponents of uniforms and dress-code policies warn that students often communicate through clothing and fear that such policies stifle student creativity.

ReLeah Lent, a Florida high school teacher who received a national First Amendment award for combating school censorship, said that kids must be free to express themselves and a “major part of how young people communicate is through their clothing.”<sup>2</sup> First Amendment ombudsman Paul McMasters objects to the notion that schools should be run like businesses. “If school officials think that school uniforms are such a great idea, then they should wear uniforms also,” he said.



The Associated Press

*President Clinton during the  
1996 State of the Union address*

Avi Hein, founder of Youthspeak and the National Youth Rights Association, said school officials should not underestimate the valuable medium that clothing can become for everybody, especially young people. “Throughout generations, in the United States and around the world, clothing serves as a means of expression,” he said. “Not only, as has often been said, do they express individuality but also show membership to specific groups, such as ethnic or religious groups.

“School uniforms infringe on the rights of students to express their pride in their culture and heritage, particularly those who want to reconnect to their heritage,” Hein said.

Kevin O’Shea, publisher of the monthly newsletter *First Amendment Rights in Education*, said that “there are serious First Amendment problems with a mandatory uniform policy or with a mandatory restrictive dress code.”

### Dress codes

When looking at a constitutional challenge to a dress-code policy, some courts have applied the *Tinker* standard: Student expression cannot be censored unless it creates a material interference or substantial disruption in the classroom environment, particularly if a student wears clothing containing a political message. Although the text of the First Amendment places no qualification on the type of speech, the law places primary importance on political speech — the type of speech the high court has said is at the “core” of the First Amendment.

“Everyone now understands that serious political expression is constitutionally permissible,” said Louisiana State University professor Richard Fossey.

Many of the lawsuits have involved student expression that school administrators and judges consider nonpolitical speech. Though the case involved an actual student speech before a school assembly, lower courts have used the *Fraser* decision on regulation of indecent student speech to uphold school restrictions on T-shirts and other clothing with lewd messages.

For example, a federal court in Virginia upheld a middle school student’s suspension for wearing a T-shirt with the message “Drugs Suck.” Rejecting the student’s argument that the shirt expressed an anti-drug message, the court focused instead on the fact that the word “suck” was vulgar.<sup>3</sup>

*“School uniforms infringe on the rights of students to express their pride in their culture and heritage.”*

— AVI HEIN, founder of  
*Youthspeak and the National  
Youth Rights Association*

The 6th U.S. Circuit Court of Appeals applied the more deferential *Fraser* standard to uphold the suspension of Ohio teen Nicholas J. Boroff, who wore several T-shirts bearing slogans of shock-rocker Marilyn Manson. One of the shirts showed a three-faced Jesus with the words “See No Truth, Hear No Truth, Speak No Truth.” The back of the shirt bore the word “BELIEVE” with the letters “LIE” highlighted.

The 6th Circuit in *Boroff v. Van Wert City Board of Education* determined that *Fraser* was the controlling legal standard, writing that because the T-shirt was not related to any political viewpoint, “the standard for reviewing the suppression of vulgar or plainly offensive speech is governed by *Fraser*.”<sup>4</sup>



The Associated Press

Rocker Marilyn Manson's T-shirt image led to suspension for Ohio student Nicholas J. Boroff.

However, the majority wrote that “the record is devoid of any evidence that the T-shirts, the ‘three-headed Jesus’ T-shirt particularly, were perceived to express any particular political or religious viewpoint” and concluded that school officials prohibited the shirt because they determined that “this particular rock group promotes disruptive and demoralizing values which are inconsistent with and counter-productive to education.”

One judge dissented, finding that school officials may have censored the T-shirts because of the viewpoint they expressed. “Unlike the majority, I believe that a jury could reasonably find that the reason why school officials declared Boroff’s Marilyn Manson T-shirts ‘offensive’ was because the first Marilyn Manson T-shirt he wore contained a message about religion that they considered obnoxious.

“This particular T-shirt was found ‘offensive’ because it expresses a viewpoint that many people personally find repugnant, not because it is vulgar,” the dissenting judge wrote.

Kevin O’Shea warned that the *Boroff* decision is dangerous for student expression “because its rationale would permit public school officials to restrict virtually any student speech they deem to be offensive. That is plainly not the intent of either *Tinker* or *Fraser*, nor is it consistent with the words or the spirit of the First Amendment.”

Other courts have taken a different approach when determining whether student clothing constitutes First Amendment-protected expression. The courts will first ask whether the student clothing constitutes “expressive conduct” deserving of First Amendment protection.

These courts apply a two-part test from the U.S. Supreme Court’s well-

known flag-burning case *Texas v. Johnson*. First, the student clothing must convey a “particularized” message. Next, the message must be one that a reasonable viewer would understand.<sup>5</sup>

The 1995 case of *Bivens v. Albuquerque Public Schools* shows a court adopting this approach in rejecting a public high school students’ constitutional challenge of a school dress code.<sup>6</sup>

Richard Bivens sued school officials after they suspended him for violating a high school dress code against wearing “sagging” pants. Bivens claimed the suspension violated his First Amendment free-expression rights. He pointed out that his pants did not cause any disruption in the school environment. Relying on the *Tinker* case, he argued that his wearing of sagging pants was a form of expressive conduct akin to the wearing of black armbands.

The federal district court took a dimmer view, writing that “the wearing of a particular type or style of clothing usually is not seen as expressive conduct” and that “not every defiant act by a high school student is constitutionally protected speech.”

The court applied the two-part test from the flag-burning case to determine whether certain “expressive conduct” merited First Amendment protection. First, the student must intend to convey a “particularized message.” Second, there must be a “great likelihood” that others would understand this particularized message.

The judge ruled that Bivens had cleared the first hurdle — that he intended to convey a particularized message “to express his link with his black identity, the black culture and the styles of black urban youth.” However, the court ruled that Bivens failed to show that others would likely understand his particularized message: “Sagging is not necessarily associated with a single racial or cultural group, and sagging is seen by some merely as a fashion trend followed by many adolescents all over the United States.”<sup>7</sup>

Another court determined that the *Tinker* analysis did not apply to the constitutional challenge of a mandatory uniform policy at an Arizona elementary school. In *Phoenix Elementary School District No. 1 v. Green*, an Arizona state appeals court ruled that the school dress code was a “content neutral regulation of student dress.”<sup>8</sup>

Instead, the Arizona court analyzed the constitutional challenge based on where the speech took place — a public school. Under a legal concept known

*“Not every defiant act by a high school student is constitutionally protected speech.”*

— FROM THE  
*Bivens* DECISION

as forum analysis, government officials have greater leeway to regulate speech in certain nonpublic places, called nonpublic *fora*, rather than in public *fora* — places traditionally open to discussion, such as public parks and streets.

According to the Arizona court, a public school is a nonpublic forum where school officials have great leeway to control student expression. The school’s dress code “regulated the medium of expression rather than the message,” said the court.

## Uniforms

A popular approach to regulating students’ dress in public schools has been the adoption of school uniforms. Supporters cite the success of the Long Beach Unified School District in California, which in 1994 became the first public school system to require uniforms in all of its elementary and many of its middle schools.

Long Beach school officials have said uniforms were a catalyst for positive change in student behavior. “School uniforms help to improve the learning

climate, eliminate gang attire, encourage students to take school seriously as their place of business, reduce friction between students from different backgrounds and level the playing field so that students are judged by what they learn and can do, not by the price of what they wear,” Superintendent of Schools Carl Cohn wrote to parents.

Jon Meyer, principal of the only Long Beach high school that has adopted uniforms, agreed that uniforms have had a positive impact on student behavior: “We have powerful indicators supported by data that shows that uniforms have reduced tension among students and create an atmosphere of mutual civility.”



The Associated Press

*Mark Twain Middle School in San Antonio is part of the largest school district in Texas with a uniform policy.*

While uniform proponents point to a study released by the American Medical Association that found incidents of school violence dropped dramatically from 1991 to 1997, other studies did not show a link between student dress and behavior. Harold Wenglinsky, a researcher for the

Educational Testing Service in Princeton, N.J., found in a 1999 study of 13,000 students in grades 8–12 that “what a student wears is not going to change his or her behavior.” He concluded that “if a student has a propensity to be disrespectful to teachers, clothes aren’t going to make a bit of difference.”

Sociology professors David Brunsmas and Kerry A. Rockquemore’s published study on “The Effects of Student Uniforms on Attendance, Behavior Problems, Substance Use and Academic Achievement” also found no direct link between school uniforms and student behavior.<sup>9</sup>

“Our findings indicate that school uniforms have no direct effect on substance use, behavioral problems or attendance,” the researchers said. “A negative effect of uniforms on student academic achievement was found.” The Notre Dame professors concluded that the “the argument that uniforms have caused the decrease in school crime is simply not substantial.”

Several uniform policies are being challenged as violations of student free-expression rights and infringements on parental autonomy.

In *Byars v. City of Waterbury*, four students and their parents sued various Waterbury, Conn., school officials, challenging the constitutionality of sections of the school attire policy requiring uniforms and other regulations.<sup>10</sup>

They asserted numerous constitutional claims, including a claim that the policies infringed on the adults’ First Amendment rights to parental autonomy and the students’ freedom of expression.

The school attire policy consisted of three main components: a mandatory dress code prohibiting certain items of clothing, jewelry and electronic devices; a uniform policy that allowed parents to opt out of the program; and a dress code specifically for high school students.

The plaintiffs, all of whom were middle school students, challenged the first two parts of the policy, including a ban on blue jeans. School officials said that the policies were “rationally related to legitimate educational interests” in creating a safe learning environment.

The Connecticut state court refused to grant summary judgment to the school officials except for the prohibition of baggy pants. The court wrote:

*“Our findings indicate that school uniforms have no direct effect on substance use, behavioral problems or attendance.”*

— DAVID BRUNSMAS AND  
KERRY A. ROCKQUEMORE,  
*sociologists*

*In the context of a motion for summary judgment, however, the defendants have the burden of submitting affidavits and other submissions that are sufficient to support a determination that there is a rational relationship between the prohibition of many colors, styles and fabrics of clothing and the achievement of the stated objective of removing the cause of disruption to the educational program. The defendants' submission makes that showing only with regard to baggy pants that pose a safety hazard.*



The Associated Press

*Las Cruces, N.M., 6th-grader Justin Guiffre challenged his school's uniform policy.*

However, many other courts have upheld uniform and dress-code policies as a reasonable way for educators to enforce discipline and create a better learning environment. In *Canady v. Bossier Parish School Board*, 40 parents sued the Bossier Parish School Board in Louisiana, contending the mandatory uniform policy violated free-expression rights under both the U.S. and state constitutions.

The parents alleged the policy, which did not allow them to opt their children out even for religious reasons, was “illegal, improper and unconstitutional.”

According to the complaint, the policy violated “a First Amendment right to free speech, free and open expression and religious freedom because it denies freedom of expression in personal appearance and amounts to forced speech and appearance similar to totalitarian regimes.”

However, in January 2001, the 5th U.S. Circuit Court of Appeals rejected the parents' constitutional arguments.<sup>11</sup>

The 5th Circuit recognized that students' choice of clothing implicated their First Amendment rights. However, the court said the school uniform policy did not violate those rights. The court wrote:

*The School Board's purpose for enacting the uniform policy is to increase test scores and reduce disciplinary problems throughout the school system. This purpose is in no way related to the suppression of student speech. Although students are restricted from wearing clothing of their choice at school, students remain free to wear what they want after school hours.<sup>12</sup>*

Another panel of 5th Circuit judges upheld the uniform policy of a school district in Texas. The appeals court panel wrote that “the record demonstrates that the Uniform Policy was adopted for other legitimate reasons unrelated to the suppression of free expression.”<sup>13</sup>

Another uniform policy faces legal challenge in Pascagoula, Miss., where more than 20 parents contended the policy violated the First Amendment. In *Brody v. The Jackson County Board of Education*, the parents wrote that “requiring students to wear particular clothing interferes with students’ right of freedom of expression and personal liberty.”

The parents alleged that the policy failed constitutional review because it did not contain an opt-out provision for religious beliefs. The parents in the *Brody* case were not alone. Numerous groups of parents have fought similar policies around the country.<sup>14</sup>

Professor Richard Fossey, an advocate for uniforms, criticized many of the dress-code challenges: “Many of these cases are simply contrived. They are so far removed from the *Tinker* case and the profound concern about the Vietnam War. I wore black armbands. That resonates with me. But many of these cases simply trivialize the First Amendment.”<sup>15</sup>

Others said the lawsuits are not trivial. Kary Love, a lawyer who represented a teen suspended for wearing T-shirts bearing the name of the rock bands Korn and Tool, said, “Just because a case is contrived doesn’t mean it isn’t important. Sometimes contrived cases are important. I seem to remember people sitting in buses and sitting at lunch counters. Those contrived cases led to important constitutional rights.”<sup>16</sup>

# The Confederate flag: symbol of controversy

**PERHAPS NO SYMBOL** evokes deeper emotional responses in America, and particularly in public schools, than the Confederate flag. Whether it symbolizes Southern heritage or racial oppression to those who see or display it, the flag elicits powerful emotions. It creates controversy whether it's seen in football stadiums, state capitols, on license plates or roadside displays. But some of the fiercest debate over the flag — that symbol of hate or heritage — occurs in public schools.<sup>1</sup>

Students across the country have unfurled flag banners, T-shirts, patches and artwork containing the flag. Many school administrators have responded with suspensions and expulsions:

- Ten high school students in Chesapeake, Va., were suspended for flying Confederate flags from their trucks' antennas as they entered the school parking lot. One student, Alan Lowry, sued in federal court.<sup>2</sup>
- Three high school students in Icard, N.C., were suspended for wearing rebel flag T-shirts. The school prohibits disruptive and offensive clothing.<sup>3</sup>
- School officials at Central York High School in York, Pa., banned the symbol last spring. The officials said the flag was causing arguments among students.<sup>4</sup>
- A student at Ledford (N.C.) Senior High School was suspended for refusing to remove a Confederate flag from his truck. The student is now being represented by the Southern Legal Resource Center, a nonprofit law firm that focuses on preserving Southern heritage.<sup>5</sup>
- A student at Stewart County High School in Dover, Tenn., was suspended after he superimposed four Confederate flags over the face of former heavyweight boxing champion Mike Tyson in a collage for an English assignment. The student sued in federal court.<sup>6</sup>

*Perhaps no symbol evokes deeper emotional responses in America, and particularly in public schools, than the Confederate flag.*

## Court decisions

Many federal courts examining cases involving the Confederate flag in public schools have applied the *Tinker* standard. Students suspended for Confederate flag clothing have contended that the display of the flag is entitled to the same protection as the black armbands in *Tinker*. They argued that both symbols were a form of political speech — the type of speech entitled to the most First Amendment protection. Opponents countered that the flag aroused racial tensions and, thus, should be treated differently than more innocuous symbols.

Following the 1969 *Tinker* decision and in the wake of school desegregation, several federal courts have had to examine the First Amendment claims of students suspended for wearing Confederate clothing to school, and they have tended to defer to school administrators' concerns about racial tensions.



The Associated Press

*Kim Bokern, left, with her daughter, Kelly, who was taken out of class for wearing a shirt with an image of the Confederate flag*

In *Augustus v. School Board of Escambia*, the 5th U.S. Circuit Court of Appeals ruled that school officials could prohibit the flag.<sup>7</sup> In *Melton v. Young*, the 6th U.S. Circuit Court of Appeals reached the same conclusion.<sup>8</sup> Both courts cited racial incidents at the school to justify officials' actions.

In *Augustus*, the 5th Circuit wrote that it is “axiomatic that many symbols are inappropriate for use in public institutions in this country.” In *Melton*, the 6th Circuit acknowledged it faced a “troubling case” pitting free-speech concerns against educators' need to maintain an environment conducive to learning. The 6th Circuit called the flag a “precipitating cause” of racial tension at a Chattanooga, Tenn., high school.

In 1997, a federal district court in South Carolina rejected the First Amendment claim of a South Carolina middle school student who was suspended for wearing a Confederate-flag jacket. Applying the *Tinker* standard, the court cited “several incidents of racial tension” to determine that school officials did not violate the First Amendment.

According to the court in *Phillips v. Anderson County School District*, “school officials are not required to wait until disorder or invasion occurs” but only need “the existence of facts which might reasonably lead school officials to forecast substantial disruption.”<sup>9</sup>

One federal appeals court — the 11th Circuit in *Denno v. School Board of Volusia County* — went so far as to say that the controlling legal standard comes not from *Tinker* but from the Matthew Fraser case.<sup>10</sup>

School officials’ actions must be analyzed, according to the 11th Circuit, under “the more flexible *Fraser* standard, where the speech involved intrudes upon the function of the school to inculcate manners and habits of civility.”

The student’s lawyer in *Denno* said the decision indicated that public school officials “have absolute *carte blanche* to unilaterally infringe on student rights with impunity.” In a later decision, the 11th Circuit allowed school officials at Sante Fe High School in Alachua County, Fla., to ban the display of the Confederate flag on school premises.<sup>11</sup>

### The Derby case

No Confederate flag case has attracted more attention than the case of T.J. West (identified only as T.W. in court papers). An assistant principal at Derby (Kan.) Middle School alleged that West violated the school’s “racial harassment and intimidation” policy by doodling a picture of the Confederate flag during math class.

That policy was adopted in 1995 by a 350-member task force of parents, teachers and other community leaders after racial problems occurred at the local high school. The policy, which was also adopted for the district’s middle school, states: “Students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred.”

The policy listed examples of “racially divisive” symbols, including “any item that denotes Ku Klux Klan, Aryan Nation-White Supremacy, Black Power, Confederate flags or articles, neo-Nazi or other ‘hate’ group.”

West argued that his drawing of the flag was “peaceful and non-threatening.” However, the district court sided with the school district: “While T.W. may not have intended to harass anyone by drawing the Confederate flag, it is

*An assistant principal at Derby (Kan.) Middle School alleged that West violated the school’s “racial harassment and intimidation” policy by doodling a picture of the Confederate flag during math class.*

clear to the court that he knowingly and intentionally violated the policy against possession of such symbols at school.<sup>12</sup>

“The fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean that the district was required to sit and wait for one,” the district court wrote.

*“If you are going to have free expression in school classrooms, then you must allow discussion in the hallways and cafeterias.”*

— JASON SNEED, lawyer

On appeal, the 10th U.S. Circuit Court of Appeals agreed with the district court in its March 2000 opinion in *West v. Derby Unified School District No. 260*.

The court noted that the student’s “display of the Confederate flag could well be considered a form of political speech to be afforded First Amendment protection outside the educational setting.”<sup>13</sup> Nevertheless, the federal appeals court panel cited the high school’s past evidence of racial tension to support the lower court decision. “The evidence in this case, however, reveals that based upon recent past events, Derby School District officials had reason to believe that a student’s display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone.”

In June 2000, West appealed the decision to the U.S. Supreme Court. On Oct. 2, 2000, the U.S. Supreme Court declined to review the 10th Circuit’s decision. “It was an illogical opinion,” said West’s lawyer, Jason Sneed. “The 10th Circuit’s opinion conflicts with the U.S. Supreme Court’s decision in *Tinker*.”

Sneed pointed out that the school district did not prohibit pictures of the Confederate flag in textbooks, library books or in a plaque in the school library of all 50 state flags. (The Confederate flag is pictured on the state flags of Georgia and Mississippi).

“I don’t believe that school officials can simply limit the discussion of controversial issues to the school-approved context in the classroom,” Sneed said. “If you are going to have free expression in school classrooms, then you must allow discussion in the hallways and cafeterias. If students discuss the Confederate flag or the Vietnam War in class, then they must be allowed to talk about these subjects outside of class.”

Sneed says that the effect of the 10th Circuit’s opinion is that the Confederate flag has become *per se* disruptive. “The 10th Circuit basically determined that the flag is tantamount to vulgar profanity and can be banned from public schools.”

Both Terry West, T.J.'s father, and T.J. himself insist that T.J. did not harass or intend to harass anyone by drawing a picture of the flag. The school district never disputed the Wests' claims. However, the school district insisted that the Confederate flag is a racially divisive symbol that must be banned. Terry West disagreed.

"Before this situation, I had never heard of the flag as a symbol of hate," he said. "To me the flag has represented heritage and individualism." T.J. said he was confused by the hubbub caused by his drawing. "It was just not that big a deal," he said.

"The decisions of the lower courts basically allow school officials to trample all over kids' First Amendment rights," Terry West said. "When they suspended my son for this, I was outraged and decided that I had had enough.

"There can be abuses of the First Amendment and the freedom of speech, such as yelling fire in a crowded theater," West said, referring to the famous quote from Justice Oliver Wendell Holmes. "First Amendment rights — and constitutional rights in general — are fragile in this country. Every day someone is chipping away at our rights."

School officials face many difficulties when deciding what to do with Confederate attire. They must respect the rights of minority students and prevent outbreaks of racial violence. However, they must also remember the oft-cited statement from *Tinker* that students "do not shed their constitutional rights to freedom of expression and speech at the schoolhouse gate."

Another problem for school officials: If they ban Confederate-flag attire, must they also ban Malcolm X T-shirts or other forms of expression that might inflame the passions of other students? The Confederate flag-wearing students often argue that the school is engaging in viewpoint discrimination because it treats them differently from others.

One recent federal appeals court applied this reasoning in reinstating a lawsuit filed by two Kentucky public high school students suspended for wearing Hank Williams Jr. concert shirts to school. The school principal suspended the students twice for three days after they refused to quit wearing the shirts, which contained two Confederate flags on the back with the word "Southern Thunder."

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— TERRY WEST, *parent*

The principal suspended the students for violating the part of the dress code that prohibited any clothing containing any “illegal, immoral or racist implications.”

After a federal district court threw out the suit, saying the students’ shirts did not raise a First Amendment issue, one student appealed. In March 2001, a three-judge panel of the 6th U.S. Circuit Court of Appeals reinstated the suit, saying that the school officials failed to satisfy the *Tinker* standard by showing any reasonable forecast of substantial disruption.<sup>14</sup>

The school noted that the school officials appeared to allow the wearing of Malcolm X clothing. “The school’s refusal to bar the wearing of this apparel along with the Confederate flag gives the appearance of a targeted ban, something that the Supreme Court has routinely struck down as a violation of the First Amendment,” the court wrote in *Castorina v. Madison County School Board*.<sup>15</sup>

One of the students’ lawyers praised the court’s decision, saying that it had “saved the principles of *Tinker*.”

The net effect of these Confederate-flag cases has been to encourage school officials and courts to use the *Tinker* standard to censor student expression. Kevin O’Shea, publisher of *First Amendment Rights in Education*, finds this “somewhat ironic.”

“If *Tinker* stands for anything, it symbolizes protection for student expression and sets a high standard for school officials before they can censor,” he said. “Now the courts rely on the ‘substantial disruption’ or ‘invade the rights of others’ language in *Tinker* to justify censorship.”

Vanderbilt University law professor Thomas McCoy agreed that “it’s ironic that the case seen as the hallmark of student expression (*Tinker*) now serves as a basis for viewpoint discrimination.”

What may be even more disturbing is that some courts are using the *Fraser* standard to impose a blanket ban on the Confederate flag. These courts determine that school officials can ban the Confederate flag because it is highly offensive expression. Such a rule will provide little protection for freedom of speech in America’s schools.<sup>16</sup>

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