

**Student Online Expression: What Do the Internet
and MySpace Mean for Students' First
Amendment Rights?**

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I. Introduction: Cyberspace realities and problems

Sidebar #1: The Deleting Online Predators Act

II. U.S. Supreme Court framework for student expression

III. Student Internet speech

Sidebar #2: Interview with litigant Cheryl Layshock

IV. Recommendations and reflections

Sidebar #3: Teachers suing students for defamation

V. Cases and resources

Chapter I: Introduction — Cyberspace realities and problems

Cyberbullying, cyberstalking, harassment, sexual predators and inflammatory gossip rear their ugly heads in cyberspace, or what has been called the Wild, Wild West of the Internet. No doubt the Net — “a far more speech-enhancing medium than print, the village green, or the mails” in the words of federal Judge Stewart Dalzell¹ — has revolutionized communications and amplified educational opportunities for young people. The Internet has increased all types of expression — the good, the bad and the ugly.

The bad and the ugly of cyberspace are what concern many school administrators, teachers, school board members and parents. Hit lists, vicious lampooning, bomb threats, vile defamation and character assassinations are a harsh reality in the online world. Some school officials have responded by clamping down on student online expression with a vice grip. A few administrators have overreacted and silenced student speech created privately outside school grounds.

Can school officials punish student speech that lampoons a school official? How far does school authority extend to speech created by a student on his or her own computer outside school grounds? Do teachers have any recourse when confronted with false and damaging statements posted about them online?

There are more questions than answers in this emerging area of law. The U.S. Supreme Court has never decided a student Internet-speech case. The Court has not addressed any type of pure student First Amendment free-expression case in nearly 20 years. This report examines leading issues regarding student online expression, U.S. Supreme Court case law on free expression, lower court decisions involving the

regulation of student Internet speech and recommendations offered for schools to deal with this contentious area.

The problems associated with student online expression have increased since the advent of commercial social-networking sites, such as MySpace, Facebook, Xanga and Friendster. Millions of people, mostly young, have flocked to these sites, creating content that spans the spectrum of human thought. A recent Pew Internet Project survey shows that 87% of teenagers use the Internet.² More than 90 million people of all ages are registered users of MySpace — a good portion of them teenagers.³

Much of the content created by students poses few or no First Amendment problems. Students routinely write about their favorite music performers, television shows or video games. Many students post pictures of themselves with their friends. However, sometimes expression posted online poses serious concerns for school administrators. It could be students posting false and damaging statements about a school official, an alienated student creating a list of students he would like to see harmed, or a student spewing vulgar and lewd content. Many students' hallway gossip and telephone rants are now posted online for the world to see. Sometimes criminal authorities have used material placed online to thwart Columbine-style plots of violence.⁴ Five students in Kansas were arrested in April 2006 for a plot to engage in a murderous spree on the seven-year anniversary of the infamous Columbine shootings.⁵

“The explosion of interest in social-networking sites — that make it far easier for non-technically inclined teens to disseminate material that is causing emotional harm to other students — is creating many difficulties for schools as it relates to school climate and the well-being of students,” says Nancy Willard, head of the Center for Safe and

Responsible Internet Use. “A big problem is that school officials do not understand the technologies or what they can and can’t do legally in terms of regulating student online speech. So we are seeing inaction and overreaction.”⁶

Witold “Vic” Walczak, the legal director for the American Civil Liberties Union of Pennsylvania, agrees that mischief on these sites can tempt school officials to overexert their authority.⁷

School officials are not the only ones interested in the problems associated with student online speech. The U.S. House of Representatives entered the fray by passing a bill known as the Deleting Online Predators Act (DOPA).⁸

Sidebar: The Deleting Online Predators Act of 2006

On July 26, 2006, the U.S. House of Representatives overwhelmingly passed the Deleting Online Predators Act (DOPA), which would require public schools and libraries to block student access to commercial social-networking sites such as MySpace.com.⁹ The vote was 410-15.

DOPA would require public schools and libraries receiving federal funds for Internet access to provide a “technology protection measure” for minors to protect them from harmful material on the Internet, including child pornography, material that is obscene or harmful to minors, or “commercial social networking website(s) or chat room(s) unless used for an educational purpose with adult supervision.”

As applied to libraries, the measure provides that the “technology protection measure” must protect “against access by minors without parental authorization to a

commercial social networking website or chat room, and informs parents that sexual predators can use these websites and chatrooms to prey on children.”

According to the factual findings in the bill, sexual predators often “approach minors on the Internet using chat rooms and social networking websites” and that “one in five children has been approached sexually on the Internet.”¹⁰

“I am extremely pleased that the House moved so quickly to pass this important legislation,” said the measure’s chief sponsor, Rep. Michael G. Fitzpatrick, R-Pa., in a press release. “This legislation is the first of its kind to address the growing use of social networking sites by sexual predators. Passage of the ‘Deleting Online Predators Act’ demonstrates Congress’ commitment to safeguarding America’s families.”

Not everyone supports the legislation, which as of this publication still awaits Senate action. The American Library Association expressed disappointment July 26 at the House action. “This unnecessary and overly broad legislation will hinder students’ ability to engage in distance learning and block library computer users from accessing a wide array of essential Internet applications including instant messaging, email, wikis and blogs,” said ALA President Leslie Burger in a news release.

“Under DOPA, people who use library and school computers as their primary conduits to the Internet will be unfairly blocked from accessing some of the web’s most powerful emerging technologies and learning applications,” Burger said. “As libraries are already required to block content that is ‘harmful to minors’ under the Children’s Internet Protection Act (CIPA), DOPA is redundant and unnecessary legislation.”

Mark Uncapher, senior vice president and counsel for the Information Technology Association of America, also expressed opposition to DOPA. “We have

concerns that the legislation moved quickly without thorough committee review, particularly given existing law such as the Children’s Internet Protection Act,” Uncapher said.

CIPA, which the U.S. Supreme Court upheld from First Amendment challenge in *United States v. American Library Association* (2003), requires public schools and libraries to adopt an Internet safety policy that protects minors from online obscenity, child pornography and other material harmful to minors. ITAA’s position is that DOPA provides less flexibility than CIPA and is redundant. “We are concerned that DOPA would micromanage schools and libraries (in their) management of their E-Rate funded systems,” Uncapher added. E-Rate is a federal program that makes some technologies more affordable for eligible schools and libraries.

The question now is whether a similar measure will be introduced for similarly quick passage in the Senate. Jeff Urbanchuk, Fitzpatrick’s press secretary, said House supporters were waiting for a companion bill to be introduced in the Senate. “We do think it will happen,” he said, in this Congress or the next session.

Chapter II: U.S. Supreme Court framework for student expression

Many students have turned to the Internet to express a variety of viewpoints, including criticism of school officials. The First Amendment protects critical speech posted on the Internet. No less an authority than the U.S. Supreme Court in *Reno v. ACLU* (1997) wrote that speech on the Internet is entitled to the highest level of protection, on a par with the print medium.¹¹ The late, great First Amendment attorney Bruce Ennis hailed the decision as granting the Internet its “legal birth certificate.”¹² However, public school students do not receive the same level of free-expression rights as adults in a general setting. The basis for the Court’s decision in *Reno v. ACLU* was that restricting indecent speech on the Internet to protect minors unconstitutionally infringed on the free-speech rights of adults. The Supreme Court has emphasized that minors in general do not enjoy the same level of constitutional rights as adults. In circumscribing student constitutional rights, the Court has emphasized that they must be interpreted against the unique environment of the public school.

True-threat line of cases

A threshold issue involving student speech — particularly after horrific school shootings in Littleton, Colo., Paducah, Ky., Springfield, Ore., and other places — is whether student expression constitutes a true threat. True threats are not protected by the First Amendment. Students should be aware that threatening comments in general — on the Internet or not — could subject them not only to school discipline but also to criminal punishment.¹³

In First Amendment jurisprudence, the U.S. Supreme Court wrote in its 1969 decision *Watts v. U.S.* that true threats are not protected.¹⁴ The case involved an 18-year-

old political protester who said that if he had President Lyndon Johnson within the scope of his rifle, he would shoot him. Although the Court determined that this statement was more political hyperbole than any type of real threat, the justices did not provide a clear definition of true threats. The result has been a hodgepodge of different tests devised in the lower courts to try to distinguish among different kinds of threats.¹⁵

Some courts have determined that speech constitutes a true threat “if a reasonable person would foresee that an objective rational recipient of the statement would interpret its language to constitute a serious expression.”¹⁶ Other courts, in the school context, employ a multi-factor test, such as: the reaction of the listeners to the threat; whether the threat was conditional; whether the speaker communicated the threat directly to the victim; whether the speaker had a history of making threats against the victim; and whether the recipient had a reason to believe that the speaker had violent tendencies.¹⁷ Many other courts emphasize that a true-threat analysis must take into account the reality that school officials are operating in a post-Columbine environment, where threats to school safety are real.¹⁸

In a trilogy of cases in the late 20th century, the U.S. Supreme Court carved out a separate body of First Amendment law for public school students. Before these cases, students possessed no First Amendment free-expression rights. The first court cases dealing with students’ free-expression rights rejected those claims. For example, the Wisconsin Supreme Court ruled in 1908 that school officials could suspend two students for ridiculing the principal in a poem published by a local newspaper. The court wrote that “such power is essential to the preservation of order, decency, decorum, and good government in the public schools.”¹⁹

The U.S. Supreme Court finally recognized that public school students possessed some level of First Amendment rights in the 1943 flag-salute decision *West Virginia Board of Education v. Barnette*.²⁰ In that decision, the high court wrote that it must ensure “scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”²¹

Tinker v. Des Moines Independent Community School District

The trend toward greater respect for students’ First Amendment rights culminated in 1969 when the U.S. Supreme Court decided *Tinker v. Des Moines Indep. Comm. Sch. Dist.*²² The Court ruled that public school officials in Des Moines violated the First Amendment rights of several students when they suspended them for wearing black armbands to school to protest U.S. involvement in Vietnam. Writing that students do not “shed their constitutional rights to freedom of speech and expression at the schoolhouse gate,”²³ the Court established the so-called *Tinker* standard. This standard provides that school officials can censor student expression only if they can reasonably forecast that the student-initiated expression will create a material interference or substantial disruption of the educational environment or invade the rights of others.²⁴ The high court reasoned that school officials could not silence student expression simply because of “undifferentiated fear or apprehension.”²⁵

The vast majority of courts applying the *Tinker* standard ask whether school officials could reasonably forecast whether the student expression would create a substantial disruption. For years, it was assumed that the *Tinker* standard governed

student First Amendment cases. That changed dramatically with later U.S. Supreme Court decisions.

Bethel School District No. 403 v. Fraser

The legal landscape in the 1960s featured a U.S. Supreme Court led by Chief Justice Earl Warren that was considered liberal in many respects. That Court had desegregated public schools, revolutionized criminal procedure and invalidated teacher-led prayer in schools. When the Warren Court decided the *Tinker* case, a growing activism characterized America. It was a different time from the 1980s, when the Supreme Court featured mostly more conservative jurists. The Warren Court had given way to the Burger and Rehnquist Courts headed by Warren Burger and William Rehnquist. These Courts in the 1980s decided two student First Amendment cases that cut back on the protections of *Tinker*.

In 1986, the high court ruled in *Bethel School District No. 403 v. Fraser*²⁶ that public school officials could prohibit student speech that was vulgar, lewd or plainly offensive. Matthew Fraser, a junior at a Washington state high school, delivered a speech laced with sexual references before the student assembly. Fraser gave his speech to nominate a fellow classmate for elective office. Choosing sexual references to make his points, he said his classmate would be “firm in his pants” and “take it to the climax.” School officials suspended Fraser for several days even though his speech caused no real disruption. Fraser contended that, like the students wearing black armbands in the *Tinker* case, he had a right to engage in political free speech.

The Supreme Court in *Fraser* noted a “marked difference” between the political speech in *Tinker* and what it termed the “sexual speech” of Fraser.²⁷ It established a

balancing test: “the freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”²⁸ Chief Justice Burger, in his last opinion for the Court, wrote that “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”²⁹ This Court also gave less respect to student rights in general, writing that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”³⁰

Hazelwood School District v. Kuhlmeier

Two years later, the Court further narrowed the *Tinker* decision in a high school press case, *Hazelwood School District v. Kuhlmeier*.³¹ In *Hazelwood*, a high school principal in Missouri objected to two student articles in the school newspaper that dealt with teen pregnancy and the impact of divorce upon teenagers. The principal asserted that he had control over the newspaper, which was produced as part of a high school journalism class. He ordered the articles excised from the newspaper. Several students sued, claiming a violation of their First Amendment rights.

The Supreme Court sided with the school officials and established the *Hazelwood* standard: “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 related to legitimate pedagogical concerns.”³²

Many lower courts have applied the true-threat test and the *Tinker*, *Fraser* and *Hazelwood* trilogy of standards as follows:

- Is the student online expression a **true threat**? If yes, it is unprotected. If no, then the courts will proceed to applying the *Tinker, Fraser and Hazelwood* trilogy.³³
- Is the student speech **school-sponsored**? If yes, then *Hazelwood* applies and great deference is given to school officials.
- Is the student speech **vulgar, lewd or plainly offensive**? If so, then a reviewing court might well apply *Fraser*. Most courts tend to apply *Fraser* to all student speech that is vulgar and lewd. A few courts have said that *Fraser* applies to only vulgar student speech that is school-sponsored.³⁴ A few courts have extended *Fraser* to ban almost any offensive student speech.³⁵
- If the speech is not a true threat, is not school-sponsored and is not lewd, then the court will apply *Tinker* and ask whether school officials can **reasonably forecast** that the student expression will create a **substantial disruption** of school activities or invade the rights of others. In general, *Tinker* applies to all student-initiated speech that does not otherwise fall under *Fraser*.³⁶ Given recent developments, a court might also give greater analysis to whether the student speech **invades the rights of others**.³⁷

Chapter III. Student Internet speech

As a worldwide medium with instantaneous communication abilities, the Internet can reach an audience far beyond a high school auditorium or the circulation audience of a school newspaper. The question becomes how does student Internet speech fit into the existing U.S. Supreme Court jurisprudence. The regrettable reality is that the high court has provided very little guidance in the area of student speech since *Hazelwood*. As the Pennsylvania Supreme Court opined in 2002: “Unfortunately, the United States Supreme Court has not revisited this area for fifteen years. . . . Moreover, the advent of the Internet has complicated analysis of restrictions on speech.”³⁸

On-campus vs. off-campus

A threshold question concerns whether student Internet expression can be characterized as on-campus or off-campus. If the expression takes place off-campus, there is an argument that school officials simply do not have jurisdiction over the student’s speech. The matter would be one for parental, not school, discipline.

A case involving the physical, as opposed to the online, world is instructive. In *Klein v. Smith* (1986), a federal district court in Maine examined whether school officials were justified in suspending a public school student for 10 days for making a vulgar gesture (extending the middle figure) at a teacher at a local restaurant.³⁹ The school determined that it had the authority to discipline the student for the off-campus conduct and charged him with violating a rule prohibiting “vulgar or extremely inappropriate language or conduct directed to a staff member.”⁴⁰ The student disagreed, contending that school officials overstepped their authority. A federal district court sided with the student, noting that the conduct occurred off-campus, “far removed from any school

premises or facilities.”⁴¹ The court reasoned that school officials overreached in disciplining “the digital posturing of this splenetic, bad-mannered little boy”⁴² and concluded that any connection between the student’s disrespectful actions to the orderly operation of the school was “too attenuated.”⁴³ This case stands for the principle that school officials do not have jurisdiction over student expression that takes place off school grounds. *Klein v. Smith* could provide legal authority for the principle that school officials do not have the power to censor student online expression created off-campus.

This does not mean that school officials have no control over any student Internet speech. For example, if students create Internet content during class time or during a computer lab class, then school officials could sanction the students under the *Hazelwood* decision. That is because if a student creates content using school resources, the school can argue convincingly that the student speech is school-sponsored. If the student created the online material at home but distributed copies of it at school, it is likely that the *Tinker* “substantial disruption” standard would apply.⁴⁴

Students generally have broad freedom to express themselves on the Internet on their own time, using their own off-campus computers. However, some school officials have suspended students for their off-campus Internet postings that lampoon or criticize school officials or contain vulgar commentary or threats.⁴⁵

A few students have challenged these punishments on First Amendment grounds. Some reviewing courts have sided with the students, saying that school officials may not censor student speech unless they can reasonably forecast that the speech will cause a substantial disruption of the school environment or invade the rights of others.⁴⁶ Other

courts and commentators have said that school officials simply lack the authority to regulate students' off-campus behavior — on or off the Internet.⁴⁷

Beussink v. Woodland R-IV School District

The first published court decision involving student Internet speech occurred in Missouri. In *Beussink v. Woodland R-IV School District*,⁴⁸ a federal district court ruled in 1998 that school officials violated the First Amendment rights of a high school student when they suspended him for 10 days for his home page, which was critical of the school. Student Brandon Beussink's home page, created on his home computer, used vulgar language to criticize the principal, teachers and aspects of the school environment.

Beussink did not use school computers to create his Web page, though he apparently accessed it in the school library. The principal suspended Beussink because he was upset at the content of the Web page. After he was suspended, Beussink sued alleging a violation of his First Amendment rights. A federal judge agreed, finding that the principal committed legal error in punishing Beussink simply because he disliked the content of the page.

The judge wrote: "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*."⁴⁹ The judge explained his ruling as follows: "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."⁵⁰

Layshock v. Hermitage School District

School officials at Hickory High School in Hermitage, Pa., suspended senior Justin Layshock in 2006 for creating a parody profile of his principal on MySpace.com. Working on his grandmother's computer during nonschool hours in December 2005, Layshock used no school resources other than a photo of the principal in creating the parody. The school suspended Layshock for 10 days for "[d]isruption of the school process: [d]isrespect: [h]arassment of a school administrator via computer/internet with remarks that have demeaning implications." School officials said they had to temporarily block access to the school's computer system in part because of Layshock's page. The school also banned Layshock from extracurricular school activities and placed him in an alternative school for the remainder of the school year.

Layshock and his parents, Donald and Cheryl, filed a federal lawsuit, claiming a violation of his First Amendment rights and his parents' 14th Amendment rights to rear their child as they see fit. In January 2006, a federal judge denied the Layshocks' request for a temporary restraining order. The court applied the *Tinker* standard and focused on the the school district's assertion that it shut down student access to its computer system for several days because of several student Web sites, including Layshock's. The judge wrote that "defendants presented considerable evidence that Plaintiff's website caused actual disruption of the day-to-day operation of Hickory High School."

Then, in February 2006, school officials and the ACLU agreed that he could resume regular classes. Justin graduated and has moved on to St. Johns University, in New York City. However, the Layshocks' lawsuit continues in federal court. The judge refused to dismiss the parents' due-process claims, as well as the underlying First

Amendment claims. Their attorney, Vic Walczak of the ACLU of Pennsylvania, said that the case was still in discovery.

“In the Layshock case, we now have doubts whether school officials really shut down [student access to the school’s computer system],” said Walczak. “Also, we question whether school officials, if they did, needed to shut down [students’] computer [access].”

Walczak questioned the judge’s reasoning in denying temporary relief to Layshock and his parents over the ban on student computer use, which he termed an overreaction. “The danger in the opinion is that a school could overreact to speech and then point to that overreaction as the justification for censorship,” he explains. “School officials shouldn’t be able to take advantage of their overreaction to student speech.”

Nancy Willard agrees that the *Layshock* case was wrongly decided. “From all reports, [the parody] was not truly harmful — probably insulting, not at all as bad as some of the materials involved in the earlier cases. But at school lots of students tried to access the site and the school lost control of the situation. The reason the speech caused the disruption was lack of effective Internet-use management. The student was [barred from attending his normal school] and had to attend an alternative school. This was a damaging overreaction. I think this case was decided wrongly.”

(See interview with Cheryl Layshock at end of chapter.)

Emmett v. Kent School District

In *Emmett v. Kent School District*,⁵¹ a high school honors student in Washington state created a home page in 2000 that contained mock obituaries of two of his friends. The Web site became the big topic of discussion at school, and apparently someone

started a rumor that the site contained a hit list. Nick Emmett, the student who created the site, was suspended for harassment, intimidation, disruption of the educational environment and other violations.

Emmett sued in federal court, arguing that his First Amendment rights were violated. The judge noted that the home page was created at home and not as part of any class project. He quickly rejected the application of *Fraser*, focusing on the fact that Matthew Fraser's speech occurred before the student assembly, and *Hazelwood*, which involved school-sponsored speech. The judge at one point appeared to apply *Tinker* by focusing on the fact that school officials failed to present any evidence that the obituaries or any other material on the Web site were intended to threaten anyone "or manifested any violent tendencies."⁵² However, at another point, the judge seemed to suggest that the case was simply beyond the power of school authorities to regulate at all: "Although the intended audience was undoubtedly connected to Kentlake High School the speech was entirely outside of the school's supervision or control."⁵³

J.S. v. Bethlehem Area School District

In 2002 the Pennsylvania Supreme Court reached the opposite conclusion in another student Internet speech case, *J.S. v. Bethlehem Area School District*.⁵⁴ The case involved a Web site created by an unidentified eighth-grader at home that contained derogatory comments about an algebra teacher and the principal. Much of the site was devoted to ridiculing the math teacher, comparing her to Adolf Hitler and making fun of her appearance. The site even contained a phrase saying "give me \$20 to help pay for the hitman" and "Why Should She Die?" It also contained a drawing showing the teacher with her head cut off and dripping with blood.⁵⁵

School officials expelled the student, citing the extreme emotional distress suffered by the math teacher and the disruption the Web site apparently caused at the school. The student argued in a lawsuit that his Web page was a form of protected speech.

The Pennsylvania high court sided with the school district even though after examining the “full context” of the Web site, the justices concluded that it did not constitute a true threat. “We believe that the web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody,” the court wrote. “However, it did not reflect a serious expression of intent to inflict harm.”⁵⁶

The court then dismissed the argument that the Web page created at the student’s home was a form of off-campus expression beyond the jurisdiction of school officials. “We find there is a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus.”⁵⁷ The court determined the speech 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 reasoned.⁵⁸

The court then wrote that school officials could punish the student under the *Fraser* and *Tinker* standards because the speech on the Web site was clearly vulgar and highly offensive. However, the court recognized that “questions exist as to the applicability of *Fraser*” to a case involving a Web site created off-campus. Thus, the court examined the case under the *Tinker* standard. The court determined that school

officials could punish the student because the site caused a substantial disruption of school activities.⁵⁹ “The web site posted by J.S. (the student) in this case disrupted the entire school community — teachers, students and parents,” the court wrote. “The most significant disruption caused by the posting of the web site to the school environment was direct and indirect impact of the emotional and physical injuries to Mrs. Fuller,” the math teacher.⁶⁰

Principles from the decisions

The preceding cases illustrate the different ways in which lower courts have applied school-related First Amendment rulings to reach different results. For example, the courts disagree on whether to apply *Tinker*, *Fraser* or both standards or whether some off-campus speech is simply beyond the control of school officials altogether. The different results and reasoning used by the courts in these cases show that the issues surrounding student online speech are far from settled.

“I think it is less than clear where the authority of school officials reaches, but particularly so on the Internet,” says National School Boards Association staff attorney Thomas Hutton. “It is tricky enough for schools to determine whether they have the power to discipline students who have been drinking on the way to school. When you add the First Amendment to the equation, it gets even more complicated.”⁶¹

“There is no clear line,” says Nancy Willard of the Center for Safe and Responsible Internet Use. “And the line appears to be moving.”

Invading the rights of others

Another unresolved issue in student free-expression cases is the part of the *Tinker* decision that involves the “invasion of the rights of others.” The Supreme Court in *Tinker* wrote:

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.⁶²

For years, the lower courts had interpreted the *Tinker* test as the “substantial disruption test” — whether school officials could reasonably forecast that student expression would create a substantial disruption. However, the 9th U.S. Circuit Court of Appeals breathed new life into the “invasion of the rights of others” part of *Tinker* by ruling in *Harper v. Poway Unified School District* (2006) that a high school student could be prohibited from wearing T-shirts with anti-gay messages because they invaded the rights of gay and lesbian students.⁶³ The 9th Circuit may have tinkered with the *Tinker* test in reading rather broadly the “invasion of the rights of others” language.⁶⁴

An intriguing and unsettled question is whether other courts may use the “invasion” standard to punish students who write derogatory comments about other students. Will reviewing courts determine that school officials can punish students for invading others’ rights when they “cyberbully” other students?

“My other concern is that there has been no case law regarding truly harmful speech targeting another student,” Willard said. “The original *Tinker* standard addresses both interference at school [and] the rights of students to be secure and left alone. So what is the school administrator’s authority if truly harmful off-campus online speech by

one student has caused another student so much emotional distress that it is interfering with the student's ability to fully participate in school? I think school officials should have the clear authority to intervene with formal discipline in these kinds of cases — and despite the lack of direct case law, I believe that under *Tinker*, they do.”

It will probably take a decision by the U.S. Supreme Court to provide the necessary guidance to resolve the issue. Still, most courts continue to apply the “substantial disruption” standard from *Tinker*.

“I think the *Tinker* standard is actually appropriate and workable — as long as it also includes rights of students to be secure,” Willard said. “We have students committing suicide and some incidents of school violence associated with off-campus cyberbullying. If students do not think that school officials can help, they are going to suffer and take other steps on their own to seek to address the problem.

“I actually think *Tinker* is a good balance,” she said. “You have the right to swing your fist in the air until it threatens the security of my nose. You have the right to express your thoughts freely, until your expression of thoughts is or has the potential of causing substantial harm. We all need to be able to deal with disagreements, and people in positions of authority certainly must deal with the expression of speech that challenges their exercise of authority. But trashing other people for the enjoyment of trashing other people does not serve any purpose.”

Sidebar: Interview with litigant Cheryl Layshock

One of the leading student Internet speech cases arose in Pennsylvania in late 2005, when high school student Justin Layshock created a parody profile of his school principal using his grandmother's computer. School officials not only suspended

Layshock but also relegated him to an alternative school and disallowed him access to regular school functions.

Cheryl Layshock spoke with the First Amendment Center about the case.⁶⁵

Q: Many people's First Amendment rights are violated or many believe their First Amendment rights are violated at some point, but they don't go to the additional trouble of filing a lawsuit. What prompted you to take this battle to court to defend your rights?

A: Because of the type of punishment that Justin received. They placed him in alternative school and gave him no access to the classroom. We were going to let them get away with the 10-day suspension, even though we disagreed with that as well. We believed this was a matter of parental discipline, and we punished Justin ourselves.

Q: Do you think school officials should punish students for off-campus behavior?

A: No, we punished Justin for what he did. Schools should punish students for what they do at school.

Q: What has this experience taught you, if anything, about the First Amendment?

A: I had never really thought about it before this situation, but now I realize how important First Amendment rights are.

Q: You also sued claiming a violation of your own constitutional rights in this case. Could you explain that?

A: Yes, we contend that they interfered with our rights to raise our son as we see fit. It was our place, not theirs, to punish him for what he did.

Q: How is Justin doing? Is he thinking about the case or just about college?

A: He just went off to St. John's University. He is thinking about college, not about this case.

Q: Do you think you will prevail in this case?

A: I certainly hope that we will.

Chapter IV: Recommendations

School officials should not punish student online expression simply because they do not like it.

One clear recommendation offered with near uniformity by school-law experts is that school officials need to be careful that they do not respond in a knee-jerk fashion and censor student speech simply because they don't like it or find it offensive. As Judge Rodney Sippel wrote in the *Beussink* case: "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*."⁶⁶

"I do think schools want to be careful to reacting to anything they don't like with disciplinary action because courts tend to be very skeptical of school actions based on opposition to the content of a student's expression," said Thomas Hutton with the National School Board Association. "But courts should defer to school officials when the issue is the impact of the off-campus behavior on campus.

"Courts have knocked down schools when they rely on the 'I don't like the student speech' rationale," Hutton said. "But when schools provided evidence of how off-campus expression had a negative impact at school, the courts were much more deferential. Courts are and should be more deferential when it comes to questions of safety and potential threats."

Educators should open lines of dialogue with students and their parents.

Another recommendation from many experts is that school officials aren't bound to ignore harmful Internet content even if their authority may be limited. "School districts don't have to ignore harmful material on the Internet," says Aaron Caplan, an attorney with the American Civil Liberties Union of Washington, who has handled several student

Internet speech cases. “They can notify the parents, talk to the students involved and provide services to any students that may have been victimized.”⁶⁷

School officials should contact parents when their son or daughter has posted truly offensive content on the Internet. Those parents may want to get involved and impose their own disciplinary measures. Cheryl Layslock punished her son Justin for his offensive Web site parody of his principal. If school officials had left it up to parental discipline, they would have spared the school system costly litigation.

Educate students that their online material can come back to haunt them.

School officials may not wish to enter the legal thicket and punish students for online expression created off-campus. As this report has shown, the lower courts are divided on the question of whether school officials have gone too far in punishing non-threatening student speech that is merely offensive. However, this does not mean that students can impugn someone with impunity on the Internet. School officials may be well served to educate students that they can be sued for their defamatory comments.

“Kids have to understand there is a practical difference between playground/water-cooler talk and posting something on the Internet,” says Vic Walczak of the ACLU of Pennsylvania. “When you post something on the Internet, there can be REAL-WORLD consequences. Some of the stuff on the Internet is mind-boggling. I’ve heard about school employees Googling on the Internet to find student comments. There is a lesson for students about responsibility. While school officials may not legally be able to punish you, there may be other real-life consequences that should give students pause about posting something the whole world can see.”⁶⁸

Several students have faced civil defamation suits from school officials or even criminal charges from law enforcement officials. A high school student in Mount Carmel, Ind., was sued by three teachers at Mount Carmel High School for allegedly defaming them on his personal Web site. The case was settled with the student having to pay damages to the teachers.⁶⁹ A teacher in Orlando, Fla., sued a student for defamation after the student posted sexually demeaning comments about the teacher on the Internet.⁷⁰

Internet-use policies should be written in a way that clearly defines prohibited conduct.

Experts urge schools to state clearly what types of Internet activity are prohibited under the school code. “If school districts adopt Internet-use policies, they should clearly define what activities are prohibited,” said Caplan of the Washington ACLU. “If school districts do not provide clear guidance, they open themselves up to possible due-process challenges when they punish students, particularly if it is ambiguous whether the student has violated the policy.”

“I have great respect for constitutional protections and the benefits to our society these protections bring,” said Nancy Willard of the Center for Safe and Responsible Internet Use. “But based on what I have been seeing, very little of what many students are posting has any benefit to anyone. I would love to see more student action in posting material calling attention to things that are wrong, including things that are wrong in schools.”

Schools should not adopt a one-size-fits-all response to student expression on the Internet.

Schools must avoid an inflexible, zero-tolerance mindset. Some offensive student expression on the Internet merits First Amendment protection. Other material may cross

the line into unprotected categories of speech, such as true threats, or expose a child to potential civil liability. This reality mandates that schools not take a knee-jerk, one-size-fits-all approach.

“We do not advocate any one particular approach,” Hutton said. “If a school is going to go after student behavior off-campus, the school must make it clear in the code of student conduct so that it puts the students on notice. When it comes to using school equipment, the Internet-use policy should be very clear. There is a lot that schools can do short of imposing disciplinary actions, such as educating kids about responsibilities online and educating parents about the Internet. If a school official is aware of cyberbullying, one option is rather than imposing discipline, call the parent of the student who has been doing the cyberbullying.”

Conclusion

The law on student First Amendment rights and the Internet will continue to evolve. Congress could affect the area substantially with the passage of the Deleting Online Predators Act or a similar type of law. The U.S. Supreme Court could affect the area even more if it finally addresses another pure student First Amendment case. “It is still very early (in terms of) how these student Internet speech cases have progressed,” Hutton said. “There are not a lot of appellate cases.”

What is clear is that this emerging area is likely to become one of the most fertile fields of First Amendment jurisprudence. This will happen for at least several reasons: (1) the Internet is the new First Amendment frontier; (2) the U.S. Supreme Court is long overdue to decide a student Internet case; and (3) the explosion of commercial social-

networking sites ensures that a greater number of disciplinary actions will be taken against students for online expression.

Sidebar: Teachers suing students

Students often create material on the Internet without thinking of the consequences. They may believe that their speech on the Internet — particularly speech created at home — is absolutely protected. Such beliefs are mistaken, as student speech on the Internet, just like traditional speech in school, can lead to severe repercussions. Even if a school does not have the power to punish students, the students still are subject to basic criminal and civil laws.

For example, a student who posts a threat online can be charged with a crime. A student who defames a person can be sued in civil court. Some public school teachers are fighting back by suing students. This phenomenon of teacher-defamation suits has occurred in several states.

A case that illustrates this danger involves a public high school assistant principal near San Antonio, Texas, named Anna Draker. She sued two students and their parents after the students falsely assumed her identity and created a profile of her on MySpace. The two students used a picture of Draker and pretended to be her when creating the MySpace profile. The students falsely wrote that Draker was a lesbian and made several other false statements about her. Her Houston-based attorney, Murphy Klasing, described the statements as “four pages of filth.”

In *Draker v. Schreiber*, she sued the students and their parents for defamation and for negligent supervision. She claims in her lawsuit that the parents are liable because

they did not properly supervise their children's use of the Internet. As *San Antonio Express-News* columnist Ken Rodriguez wrote: "Draker's lawsuit will certainly spark debate on parental responsibility."⁷¹

"I think what this [defamation suits by teachers] highlights to me is the lack of the ability [of] schools to discipline kids in any realistic way," said Klasing. "It means that when students do something that violates a civil statute or some common-law theory, the only other recourse is the legal system. You can't do much in the way of discipline in the schools, and if parents aren't disciplining, there is not much of an alternative other than the legal system."

The *Draker* case also has sparked debate over when student speech crosses the line from protected to unprotected speech. "It is hard to draw a real bright line between protected critical speech and defamation," acknowledged Klasing. "Students do have a right to criticize school officials but do not have a right to defame a person.

"Consider if a student says the principal is a jerk as opposed to saying the principal is a sex offender," he said. "There is a line somewhere between those two statements. I am certainly generally on the side of protecting speech, but you have to be able to punish someone for defamatory speech."

Whatever the outcome of the Anna Draker lawsuit, the reality is that students must be aware that their online postings can have serious legal consequences.

U.S. Supreme Court Cases

***Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)**

The U.S. Supreme Court ruled that school officials did not violate the First Amendment rights of a student who was suspended for giving a vulgar speech before the student assembly. The Court determined that school officials can prohibit student speech that is vulgar, lewd or plainly offensive.

***Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1986)**

The U.S. Supreme Court ruled that school officials can censor most school-sponsored student expression if they can articulate a reasonable educational reason for their actions. The case involved a principal censoring school newspaper articles on teen pregnancy and divorce.

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

The U.S. Supreme Court ruled that school officials can censor student-initiated expression only if they can reasonably forecast that the student speech will cause a substantial disruption of school activities. The case involved students wearing black armbands to protest U.S. involvement in Vietnam.

Lower Court Student Internet Cases

***Beussink v. Woodland R-IV School District*, 30 F.Supp.2d 1175 (E.D. Mo. 1998)**

The student created a Web page at home that criticized the school administration. The page contained vulgar language and a hyperlink to the school's official site. The principal suspended the student for 10 days because he found the site offensive. A reviewing federal district court ruled in favor of the student, writing: "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under *Tinker*."

***Coy v. Board of Education of the North, Canton City Schools*, 205 F.Supp. 2d 791 (N.D. Ohio 2002)**

A middle school disciplined a student for creating an offensive Web site on his own computer. It contained a section on "losers" and the pictures of the boys the student claimed were "losers." The student accessed his site on school computers. A federal district court determined that there was a factual issue as to why the school punished the student. It writes: "If the school disciplined Coy [the student] purely because they did not like what was contained in his personal website, the plaintiffs will prevail."

***Emmett v. Kent School District*, 92 F.Supp. 2d 1088 (W.D. Wash. 2000)**

A student created a Web page at home and posted a mock obituary of two of his friends. The school responded by suspending the student and prohibiting him from participating in extracurricular activities. A federal district court ruled in favor of the student and implied that schools do not have authority to punish the student for his off-campus conduct.

***J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002)**

A student created a Web site that mocked his principal and his math teacher. The site contained much offensive commentary about the math teacher and even included a reference as why “she should die ... give me \$20 to help pay for a hitman.” School officials expelled the student, claiming that the site was a true threat. The Pennsylvania Supreme Court ruled that the site was not a true threat but still ruled in favor of the school, reasoning that under *Tinker* and *Fraser* the school should prevail. The court wrote: “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.”

***Killion v. Franklin Regional School District*, 136 F.Supp.2d 446 (W.D. Pa. 2001)**

A student created a Web site at home that contained an unflattering “top 10” list about the school’s athletic director. The student e-mailed his list to fellow students at home. The material found its way to campus and the student was suspended. A federal district court applied *Tinker* and determined that the speech, while offensive, did not create a substantial disruption.

***Layshock v. Hermitage School District*, 412 F.Supp. 2d 502 (W.D. Pa. 2006)**

A high school student created an online parody of his principal off-campus on his grandmother’s computer. School officials responded by suspending the student and then placing him in alternative education. The student and his parents sued, claiming a violation of the student’s First Amendment rights and the parents’ 14th Amendment rights to rear their child without undue interference. A federal district court denied the plaintiffs’ a temporary restraining order, finding that the school officials had presented evidence that the Web site had created a substantial disruption of school activities, including a temporary ban on student access to the school’s computer system. The case is still in discovery.

***Mahaffey v. Aldrich*, 236 F.Supp. 2d 779 (E.D. Mich. 2002)**

A student created a Web page mentioning Satan and “people I wish would die.” The site later stated: “Now that you’ve read my web page please don’t go killing people and stuff then blaming it on me.” The school disciplined the student, who

then filed a federal lawsuit. A federal district court judge ruled in favor of the student, finding that “there is no evidence that the website interfered with the work of the school or that any other student’s rights were impinged.”

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Internet resources

American Association of School Administrators

www.aasa.org

American Civil Liberties Union

<http://www.aclu.org/studentsrights/index.html>

Center for Safe and Responsible Internet Use

<http://csriu.org/>

Cyberbullying

<http://cyberbully.org>

First Amendment Center

www.firstamendmentcenter.org

National School Boards Association

www.nsba.org

National School Safety Center

www.nsscl.org

National Youth Rights Association

<http://www.youthrights.org>

PEW Internet and American Life Project

<http://www.pewinternet.org/>

Rutherford Institute

www.rutherford.org

¹ *ACLU v. Reno*, 929 F.Supp. 824, 882 (E.D. Pa. 1996).

² PEW Internet Project, “The Internet at School,” 8/2/2005 at http://www.pewinternet.org/PPF/r/163/report_display.asp

³ Whitney McFeron, “Censoring MySpeech: Is the First Amendment lost in the MySpace debate?” *Student Press Law Center Report* (Fall 2006), p. 22-23 at 22.

⁴ Wendy Davis, “Teens’ Online Postings Are New Tool For Police,” *The Boston Globe*, 5/15/2006, at A1.

⁵ *Id.*

⁶ Interview with Nancy Willard, 7/27/06.

⁷ Interview with Vic Walczak, 7/21/06.

⁸ David L. Hudson Jr. “House votes to restrict students from MySpace,” First Amendment Center Online, 8/1/06, at <http://www.firstamendmentcenter.org/news.aspx?id=17225>.

⁹ H.R. 5319 (109th Congress).

¹⁰ H.R. 5319 (Section 2).

¹¹ 521 U.S. 844 (1997).

¹² See David Hudson, “First Amendment triumphs mark attorney's Supreme Court record,” First Amendment Center Online, 9/25/1998, at <http://www.firstamendmentcenter.org/news.aspx?id=8583>.

¹³ See David L. Hudson Jr. First Report, “Student Expression in the Age of Columbine: Securing Safety and Protecting First Amendment Rights,” First Amendment Center, 2005.

¹⁴ 394 U.S. 705 (1969).

¹⁵ See *United States v. Miller*, 115 F.3d 361 (6th Cir. 1997); *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002).

¹⁶ *United States v. Miller*, 115 F.3d 361 (6th Cir. 1997).

¹⁷ *Doe v. Pulaski County Special School District*, 306 F.3d 616, 623 (8th Cir. 2002).

¹⁸ See generally David L. Hudson Jr. “Student Expression in the Age of Columbine.”

¹⁹ *State v. District Board of Sch. Dist. No. 1*, 135 Wis. 619, 116 N.W. 232 (1908).

²⁰ 319 U.S. 624 (1943).

²¹ *Id.* at 637.

²² 393 U.S. 503 (1969).

²³ *Id.* at 506.

²⁴ *Id.* at 513.

²⁵ *Id.* at 508.

²⁶ 478 U.S. 675 (1986).

²⁷ *Id.* at 679.

²⁸ *Id.* at 681.

²⁹ *Id.* at 683.

³⁰ *Id.*

³¹ 484 U.S. 260 (1988).

³² *Id.* at 273.

³³ David L. Hudson Jr. “Student Expression in the Age of Columbine,” at p. 7-8.

³⁴ See generally, David L. Hudson Jr. and John E. Ferguson Jr., “The Court’s Inconsistent Treatments of *Bethel v. Fraser* and the Curtailment of Student Rights,” 36 J. Marshall L. Rev. 181 (2002).

³⁵ See *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000).

³⁶ See e.g. *Chandler v. McMinnville School District*, 978 F.2d 524, 529 (9th Cir. 1992).

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- ³⁷ See *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006).
- ³⁸ *J.S. v. Bethlehem Area School District*, 807 A.2d 847, 863-864 (Pa. 2002).
- ³⁹ 635 F.Supp. 1440 (D. Me. 1986).
- ⁴⁰ *Id.* at 1440-41.
- ⁴¹ *Id.*
- ⁴² *Id.* at 1442.
- ⁴³ *Id.*
- ⁴⁴ See David L. Hudson Jr. “Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet and Columbine,” 2000 L. Rev. M.S.U.-D.C.L. 199, 219-221 (2000).
- ⁴⁵ See generally, David L. Hudson Jr. “Censorship of Student Internet Speech,” 200-01.
- ⁴⁶ See *Mahaffey v. Aldrich*, 236 F.Supp. 2d 779 (E.D. Mich. 2002); *Coy v. Board of Education of the North, Canton City Schools*, 205 F.Supp. 2d 791 (N.D. Ohio 2002).
- ⁴⁷ See *Emmett v. Kent Sch. Dist., No. 415*, 92 F.Supp. 2d 1088, 1090 (W.D. Wash. 2000).
- ⁴⁸ 30 F.Supp. 2d 1175 (E.D. Mo. 1998).
- ⁴⁹ *Id.* at 1180.
- ⁵⁰ *Id.* at 1182.
- ⁵¹ 92 F.Supp. 2d 1088 (W.D. Wash. 2000).
- ⁵² *Id.* at 1090.
- ⁵³ *Id.*
- ⁵⁴ 807 A.2d 847 (Pa. 2002).
- ⁵⁵ *Id.* at 851-852.
- ⁵⁶ *Id.* at 859.
- ⁵⁷ *Id.* at 865.
- ⁵⁸ *Id.*
- ⁵⁹ *Id.* at 867-869.
- ⁶⁰ *Id.* at 869.
- ⁶¹ Interview with Thomas Hutton, 8/3/06.
- ⁶² *Tinker*, 393 U.S. at 513.
- ⁶³ 445 F.3d 1166 (9th Cir. 2006).
- ⁶⁴ David L. Hudson Jr. “Tinkering with *Tinker* standards?” First Amendment Center Online, 8/9/06, at <http://www.firstamendmentcenter.org/analysis.aspx?id=17253>.
- ⁶⁵ Interview with Cheryl Layshock, 9/06. See also <http://www.aclupa.org/downloads/Layschockstmnt.PDF>.
- ⁶⁶ Beussink, 30 F.Supp.2d at 1180.
- ⁶⁷ Interview with Aaron Caplan, 8/5/06.
- ⁶⁸ Interview with Vic Walczak, 7/26/06.
- ⁶⁹ Student Press Law Center, “Libel Lessons: What do students learn about free speech from teachers who sue them for defamation?” (2000) at http://splc.org/report_detail.asp?id=615&edition=17.

⁷⁰ Kelli Kennedy, "Not-So-MySpace Any More," Associated Press, 4/23/2006, at <http://www.theledger.com/apps/pbcs.dll/article?AID=/20060423/NEWS/604230392/-1/NEWS0101>.

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