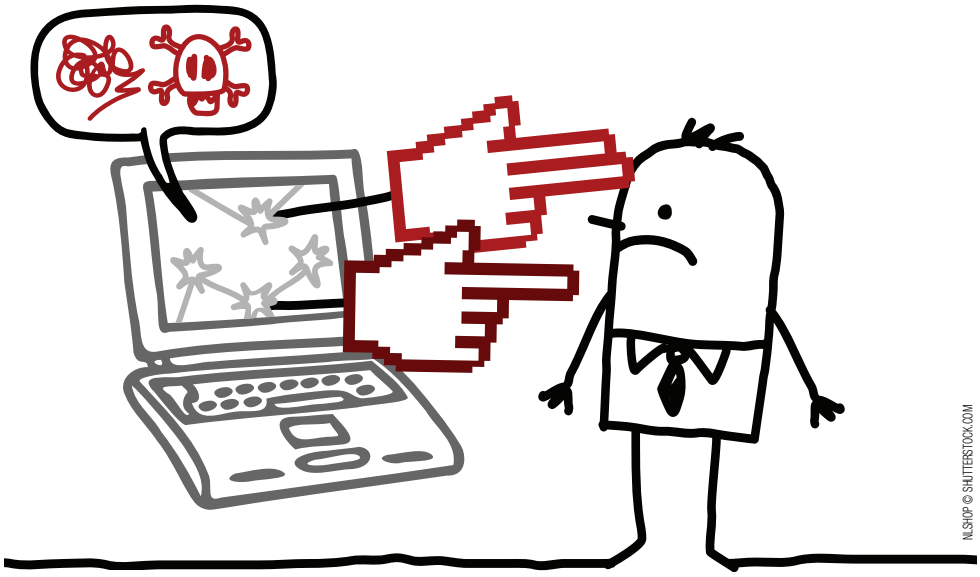
ONLINE LAW

Cyberbullying and the Law

BY THOMAS A. JACOBS



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Education law in the United States as it relates to student free speech and the First Amendment looks to four Supreme Court decisions. *Tinker*[1] is the litmus test for student expression, while *Fraser*,[2] *Hazelwood*,[3] and *Morse*[4] expand the concept to other areas of student life. Although these decisions can be looked to for guidance in cyberspace, none are on all fours with current legal challenges facing practitioners and the courts.

Electronic Challenges

The 21st century witnessed the beginning of a new challenge for state and federal legislative bodies and courts. The popularity of cellphones, computers and other technologies has advanced bullying at school beyond the traditional shove in the hallway or profane name-calling. Cyberbullying among classmates and against teachers and administrators occurs on and off campus. Although off-campus speech was addressed 100 years ago by the Wisconsin Supreme Court,[5] the issue has taken on an entirely different persona with the advent of cyberspace. Simply stated: What are the limits, if any, of student Internet speech? Does the First Amendment protect off-campus speech that adversely affects the school environment?

Since the late 1990s, courts and legislatures have wrestled with balancing student free speech against the responsibility of public schools to provide students a safe, hostile-free learning environment. Today, the same set of facts before different courts has resulted in opposite outcomes. Consequently, a growing body of statutes and case law merits consideration of the issue by the U.S. Supreme Court. A handful of cases have reached the high Court through *certiorari*, but all have been denied review. Attempts to pass federal legislation regarding cyberbullying were first introduced in 2008[6] and have failed.

It is well established that minors are recognized under the law as persons with protected constitutional rights. In 1967, the Court ruled that juveniles have distinct rights in the criminal setting.[7] Two years later, in *Tinker*, the justices endorsed the right of free expression for high school students while on campus or at a school event. In that benchmark decision, the Court stated that student speech is protected as long as it doesn't disrupt the school environment or violate the rights of another person. What a student does online, whether by email, Facebook status update, tweet or in a blog, may be censored and consequences imposed if inappropriate (*i.e.*, "disruptive" under the *Tinker* test).

In 1997, the Court ruled that the Internet is protected by the First Amendment.[8] But, as in all forms of communication, free speech is not absolute: "falsely shouting fire in a theatre and causing a panic"[9] is not protected speech. There are limits based on common sense and the *Tinker* holding.

A few examples illustrate the dilemma courts face when confronted with a civil rights case involving student online speech. There is a fine line between protected speech and that which is subject to disciplinary measures by the school or by criminal charges[10] or civil actions.[11]

Rulings on Online Speech Vary

Justin Layshock was a 17-year-old high school senior in Pennsylvania. In 2005, he created a fake Myspace profile of his principal. He did this at home on his grandmother's computer, and he added a photo of the principal taken from the school's website. He referred to the principal as a

INTERNET Timeline 2001

- September 11 attacks on World Trade Center.
- *Napster* case decision.
- Having your own Blog becomes hip.
- Blackberry releases first Internet cell phone in the United States.

INTERNET Timeline 2003

- *Snow Crash* by Neal Stephenson is published.
- President Bush signs the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act), which is intended to help individuals and businesses control the amount of unsolicited email they receive.
- Apple Computer introduces Apple iTunes Music Store, which allows people to download songs for 99 cents each.

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"big hard ass," a "big steroid freak," and a "big whore" in addition to other juvenile comments. Layshock received a 10-day suspension for being disrespectful, profane, disruptive and for using a school photo without permission. He also was prohibited from attending his graduation ceremony. He and his parents filed a lawsuit claiming his speech was protected—that it was not lewd or obscene (*Fraser*) and didn't create any disruption at school. The lower court agreed with Layshock, ruling that school officials are not censors of the World Wide Web.[12]

The following year, eighth-grade student Jill Snyder did much the same thing but at a different school in Pennsylvania. She created a lewd parody of her principal on her home computer and made inappropriate comments about his sex life. For example, Jill listed his email address as myspace.com/kidsrockmybed. She was suspended for 10 days and lost her appeal to the school board. She took the matter to court and lost with a decision that upheld the school's discipline due to the elaborate, graphic and sexual content of her postings.[13]

The school district in Layshock's case disagreed with the court's ruling and appealed to the Third Circuit Court of Appeals. Snyder also pursued her loss up the appellate ladder. At first, different panels on the Third Circuit came down with opposing decisions. They ruled against the school district in Layshock's case and upheld the discipline imposed in Snyder's case. Recognizing the problem this would cause in future cases, both decisions were vacated and re-argued before the full court. In 2011, rulings were issued on the same day: Layshock's disposition remained the same, and the court reversed itself in Snyder's case, finding her suspension a violation of her First Amendment right to free speech.[14] The cases were combined for purposes of seeking review by the Supreme Court, which denied *cert* in January 2012.[15]

On the other hand, 15-year-old Aaron Wisniewski used his parents' computer to create an InstantMessage icon. It depicted a hand-drawn gun pointed at a person's head. Underneath was written "Kill Mr. VanderMolen," Aaron's English teacher. Wisniewski was suspended for five days, which, based on the *Tinker* test, was upheld by a court because his creation was found to be disruptive and presented a foreseeable risk of harm. Wisniewski's petition for *certiorari* was denied.[16]

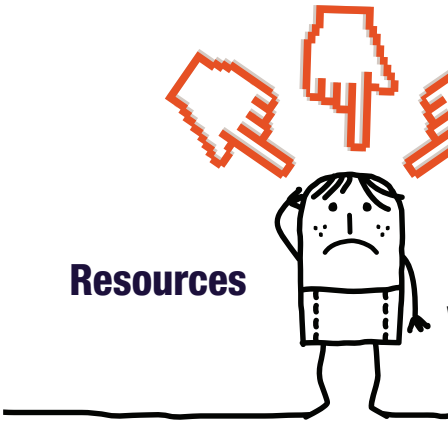
There is a fine line between protected speech and that which is subject to disciplinary measures.

In a case of student-on-student bullying, Kara Kowalski, a senior in West Virginia, started a social networking page called "S.A.S.H." It quickly became a vehicle for mean-spirited and hateful comments against a classmate whose initials were S.H. However, Kowalski explained that it really meant "Students Against Sluts' Herpes." Kara asked others to join in with comments about their classmate. Kowalski was suspended for five days and banned from extracurricular activities for a semester. Her lawsuit failed as well as her petition for *cert* that was denied in January 2012. The Fourth Circuit ruled that the distress her deeds inflicted on the targeted student disrupted the school environment.[17]

One final case where *certiorari* was sought involved a 17-year-old high school junior in Connecticut. In 2007, Avery Doninger was a class officer who wanted to run again in her final year. However, after blogging comments about the front office and what "douchebags" they were, she was prohibited from running. She won as a write-in candidate, but was prevented from assuming the office. Avery's pursuit for relief through the courts failed at every turn. The Second Circuit found that she failed to show she had a right to run for class office and that her speech was not protected. The Supreme Court denied *cert* in 2011.[18]

Court Should Re-Examine Student Free Speech

In balancing the rights of students with the school's responsibility to provide a safe learning environment, the court needs to weigh the concepts of true/actual threats, free expression and material and substantial disruption (*Tinker*) as applied to student speech in the digital world. Although the Supreme Court declined in *Hazelwood* to micro-manage school districts, it is time for the growing demographic of digital citizens to understand the limits of the First Amendment's freedom of speech.



Resources

National Suicide Prevention Hotline
www.suicide.org
1-800-273-8255

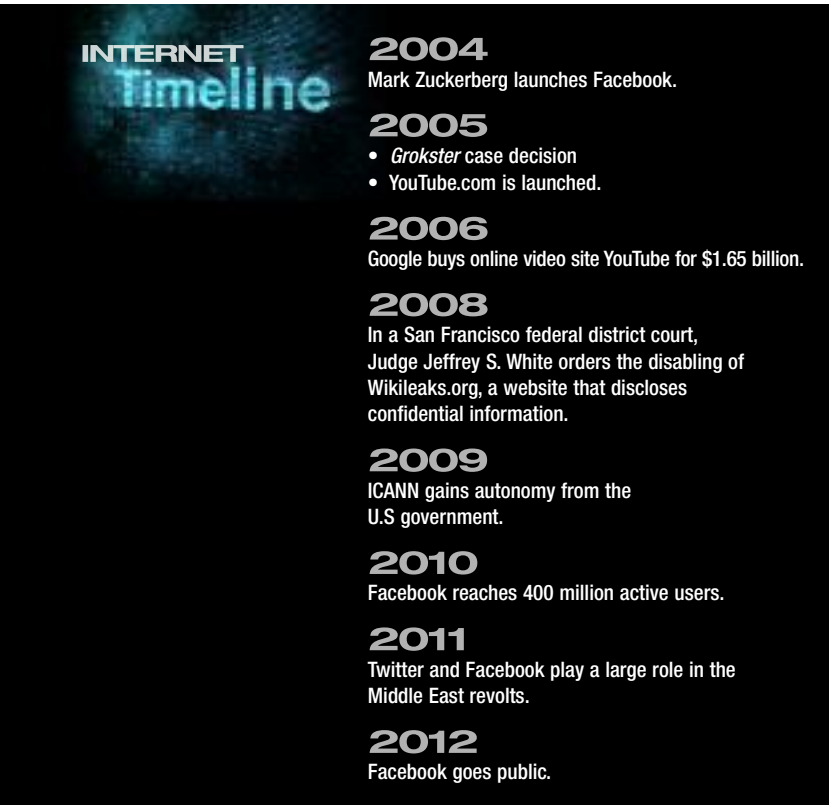
www.stopbullying.gov
(a federal government site with information; includes connections to helplines)

The Trevor Project, www.thetrevorproject.org, 1-866-488-7386
(a 24/7 lifeline for LGBT youth)

www.thatsnotcool.com (a useful site for all ages regarding digital citizenship)

Until the Supreme Court considers one of these cases, lower courts will continue to rely on *Tinker* and its progeny. In the meantime, legislation may be passed to rein in cyberbullying incidents. Most states, including Arizona, have anti-bullying laws on the books. However, only 16 states have added the word "cyberbully," while 47 states, including Arizona,[19] added "electronic harassment" to existing statutes.[20] In 2012, North Carolina became the first state to criminalize student-on-teacher cyberbullying.[21]

Our founding fathers couldn't foresee the Internet or the evolution of speech two centuries later. We are left with focusing on this gray and overlapping area of the law, keeping in mind the basic principles of our Constitution and Bill of Rights.



endnotes

1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (black armbands at school in protest of Vietnam War).
2. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) ("public schools may prohibit the use of vulgar and offensive terms in public discourse").
3. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) ("Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school sponsored expressive activities," *i.e.*, student yearbooks, newspapers and plays).
4. *Morse v. Frederick*, 551 U.S. 393 (2007) (school officials can censor speech that is "reasonably viewed as promoting illegal drug use").
5. *Dresser v. Dist. Bd. of School Dist. No. 1*, 116 N.W. 232 (Wis. 1908) ("school authorities have the power to suspend a pupil for an offense committed outside of school hours").
6. Megan Meier Cyberbullying Prevention Act (H.R. 1966–2008).
7. *Application of Gault*, 387 U.S. 1 (1967).
8. *Reno v. ACLU*, 521 U.S. 844 (1997).
9. *Schenck v. United States*, 249 U.S. 47, 52 (1919).
10. *A.B. v. State of Indiana*, 885 N.E.2d 1223 (Ind. 2008) (harassment charges); *I.M.L. v. State of Utah*, 61 P.3d 1038 (Utah 2002) (criminal libel); *United States v. Matthew Bean* (2011, no appeal taken) (federal prison and probation for online stalking).
11. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 47 (Pa. 2002) (in a separate action the teacher's civil suit resulted in a $500,000 verdict for her and her husband—no appeal taken).
12. *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587 (W.D. Pa. 2007).
13. *J.S.* ex rel. *Snyder v. Blue Mountain Sch. Dist.*, 2008 WL 4279517 (M.D. Pa. 2008).
14. *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011); *Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011).
15. *Layshock* and *Snyder* cases, 132 S.Ct. 1097 (2012).
16. *Wisniewski v. Weedsport Central Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007); *cert. denied*, 552 U.S. 1296 (2008).
17. *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*. 132 S. Ct. 1095 (2012).
18. *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011); *cert. denied*, 132 S. Ct. 499 (2011).
19. A.R.S. § 15-341(37).
20. Cyberbullying Research Center at: www.cyberbullying.us (as of November 2012).
21. School Violence Prevention Act, N.C. § 14-458.2.