Legal issues involving student cyber speech in the United States

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OPSOMMING

Regskwessies met Betrekking op Kuber-Spraak in die Verenigde State

Sake wat oor leerders se vryheid van uitdrukking handel het oor die afgelope vier dekades die federale- en staatshowe se aandag geëis. Tot en met die laaste dekade was hierdie kwessies se fokus op leerder-uitdrukking by skole of by skoolaktiwiteite. Meer onlangs het die howe egter 'n stryd begin voer met leerder-uitdrukking wat nie op die skoolperseel geskep of gelewer is nie, liewer, kuber-spraak wat buite die skoolterrein geskep is maar toegang daarna word by die skool verkry. 'n Uitdaging vir die aanspreek van kuber-spraak is dat die persoon wat toegang tot die kuber-spraak verkry iemand anders kan wees as die persoon wat die inhoud daarvan geskep het. staats- en federale howe moes hierdie kuber-spraak uitdaging met konstitusionele vryheid van uitdrukking toetse aanspreek wat vir uitdrukking direk op die skoolperseel of by skoolaktiwiteite ontwerp is. Die gevolglike vonnise het tot 'n verwarrende waterval van interpretasie gelei, waar die uitkoms kan afhang van watter Hoogeregshof leerder-uitdrukking sake op gesteun word as presedent. Die implikasies van interpretasies van grondwetlikereg aangaande vrye spraak het 'n impak op die gesag van skooldistrikte om gedragskodes neer te lê en af te dwing, leerder-uitdrukking regte, en die reg van ouers om hul kinders se opvoeding rigting te gee.

1 Introduction

Student expression cases have become a mainstay of federal and state courts over the past four decades. Until the past decade the issues have focused on student speech at school or school activities. However, more recently courts have had to struggle with student speech not created or delivered on school premises, but rather cyber speech created off campus and accessed through computers at school. Complicating the challenge of addressing cyber speech is that the person accessing the cyber speech may be someone different from the person who created the speech content.

State and federal courts have had to address this cyber speech challenge with constitutional free expression tests designed for expressive conduct directly on school premises or at school activities. The resulting case law has produced a confusing cascade of interpretations where the outcome can depend on which of the Supreme

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Court student free-speech cases are relied upon as precedent. The implications of judicial interpretations of constitutional law involving free expression impacts the authority of school districts to impose and enforce codes of conduct, the expressive rights of students, and the right of parents to direct the education of their children. The purposes of this article are to assess the multiple legal standards created by the Supreme Court and analyze the legal implications of those standards on the rights of schools, students, and parents.

2 Supreme Court Student Free Expression Tests

The United States (US) Supreme Court's declaration in *Tinker v Des Moines Independent Community School District*,[1] that "students … [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"[2] has become the constitutional benchmark for determining the extent to which school officials can restrict student expression. In upholding the right of students to wear black armbands to protest the war in Vietnam as a form of passive speech, the Court set a fairly high standard of limiting school restriction of student expression to that which would "materially and substantially disrupt the work and discipline of the school"[3] for restricting student speech. *Tinker* produced yet a second less publicized test, namely that schools can prohibit expression that "intrudes upon … the rights of other students".[4] To date, this second Tinker test has had minimal impact on court decisions,[5] despite some indication that "the right to be let alone"[6] as a broad reading of the second Tinker test, applies regardless of whether student expression that causes "young people to question their self-worth and their rightful place in society"[7] has had no disruptive impact on a school or its programs.

The notion that *Tinker* confers constitutional rights on students (under either test) has not been without its critics. In a belated critique of *Tinker*,

1 393 U.S. 503 (1969).
2 *Idem* 506.
3 *Idem* 513.
4 *Idem* 508. This second test was referenced by the Ninth Circuit in *Harper v Poway Unified School District*, 445 F.3d 1166, 1175 [208 Ed. Law Rep. 164] (9th Cir. 2008) to prohibit a student from wearing a T-shirt with a religious message in opposition to sexual orientation; however, the *Harper* Court of Appeals also found the religious message inconsistent with the *Fraser* standard regarding "fundamental values of habits and manners of civility essential to a democratic society," [*Harper*, 445 F.3d at 1185, citing *Fraser*, 478 U.S. at 681] so the second *Tinker* standard does not have a clear record of standing on its own as does the *Tinker* disruption standard.
5 For an analysis of the second *Tinker* test suggesting that it should be the basis for restricting student speech, see Martha McCarthy, 240 *Ed. Law Rep.* 1, 15 ("school authorities should prohibit harassing and demeaning student expression even if it does not threaten a disruption of the educational process.").
6 *Harper*, 445 F.3d at 1178.
7 *Ibid*

Justice Thomas asserted that the Court's awarding of constitutional rights to students in *Tinker* "[was] without basis in the Constitution"[8] and that the Court should return to the common-law doctrine of *in loco parentis* under which "the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order".[9] Despite such criticism, the *Tinker* decision has demonstrated remarkable resilience.

In three post-*Tinker* decisions, *Bethel School District v Fraser*,[10] *Hazelwood School District v Kuhlmeier*,[11] and *Morse v Frederick*,[12] the Supreme Court sought to broaden the control of school personnel over students. Thus, in *Fraser*, the Supreme Court, in refusing to grant free speech protection to a lewd and vulgar campaign speech delivered to students in an assembly, invoked a school's responsibility to instill "the habits and manners of civility".[13] In *Hazelwood*, the Court, in refusing to award free speech protection to the school newspaper articles of a student editor, emphasized a reasonableness standard for school control over the school curriculum where the school's actions were "reasonably related to legitimate pedagogical concerns",[14] and where students, parents, and members of the public might reasonably perceive student expressive activities "to bear the imprimatur of the school".[15] Finally, in upholding the suspension of a student who had displayed a banner expressing support for marijuana, ("BONG HiTS 4 JESUS"),[16] the *Morse* Court underscored the substantial interest that a school has in safeguarding "those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use"[17] in violation of an "established school's policy"[18] against student use of illegal drugs.

The challenge for courts has been applying the student free expression case law from the *Tinker*, *Fraser*, *Hazelwood*, and *Morse* decisions to new sets of facts. In *Morse*, the Supreme Court's observations regarding *Tinker*, *Fraser*, and *Hazelwood* reflected some of the uncertainty as to how the legal principles of each case can be influenced by the facts of each case. *Morse* perceived *Tinker* as dealing with "political speech" where the school's only interests in that case had been the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint", or "an urgent wish to avoid the controversy which

8 *Morse v Frederick*, 551 U.S. 393, 410 [220 Ed. Law Rep. 50] (2007) (Thomas J concurring).
9 *Safford Unified School Dist. No. 1 v Redding*, 129 S.Ct. 2633, 2646 (2009) (Thomas J concurring in the judgment in part and dissenting in part).
10 478 U.S. 675 (1986).
11 484 U.S. 260 (1988).
12 551 U.S. 393 (2007).
13 *Fraser*, 478 U.S. at 681.
14 *Hazelwood*, 484 U.S. at 273.
15 *Idem* 271.
16 *Morse*, 551 U.S. at 397.
17 *Ibid*.
18 *Idem* 408.

might result from the expression".[19] *Fraser*, according to *Morse*, would have been decided differently if the student had "delivered the same speech in a public forum outside the school context".[20] Finally, the Court in *Morse* found *Hazelwood* inapplicable to its set of facts because "no one would reasonably believe that Frederick's banner bore the school's imprimatur".[21]

Further complicating the picture of student expressive rights has been a wide range of cases concerning free speech protection for the messages on student T-shirts[22] that has not yet reached the Supreme Court, as well as cases arguing protection for student religious expression which has.[23] In a pre-*Morse* Second Circuit decision involving a T-shirt, *Guiles v Marineau*,[24] the Court of Appeals suggested that *Tinker* was the default standard for student free expression cases in the absence of evidence that student T-shirt expression explicitly violated the *Fraser* or *Hazelwood* standards. *Morse*, with its new standard of refusing to protect student support of drugs in violation of established school policy, arguably has done nothing to challenge this default theory.

In religious expression cases, religious speech claims, trumped by the Establishment Clause, have afforded reduced protection for student expression. In the Supreme Court's decision, *Santa Fe Independent School District v Doe*,[25] the Court invoked *Hazelwood* to reject a student religious speech claim and to strike down student prayer prior to football games. More recently, the Supreme Court, in *Christian Legal Society v Martinez*,[26] referenced both *Tinker*[27] and *Hazelwood*[28] in rejecting a law school student religious organization's free speech claim that a law school non-discrimination policy prohibiting discrimination on the basis of sexual orientation violated the organization's free speech right to determine the

19 *Idem* 403-04, citing *Virginia v Black*, 538 U.S. 343, 365 (2003); and *Tinker*, 393 U.S. at 509 - 510.
20 *Morse*, 551 U.S. at 405.
21 *Ibid.*
22 Mawdsley "The Uncertain Currents of T Shirt Expression in the U.S., 2007 (12) *Australia and New Zealand Journal of Law and Education* 69.
23 Mawdsley, "The Rise and Fall of Constitutionally Protected Religious Speech in the United States," 2009 (14) *International Journal of Law and Education* 71.
24 461 F.3d 320 [212 Ed. Law Rep. 143] (2d Cir. 2006).
25 530 U.S. 290 [145 Ed. Law Rep. 21] (2000).
26 130 S.Ct. 2971(2010).
27 *Idem* 2988. ("[T]his Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'" *Tinker*, 393 U.S. at 507 (1969)).
28 *Idem* 2988 referencing the Court's "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Hazelwood,* 484 U.S. at 273.

religious requirements for its members.[29] In *Harper v Poway Unified School District*,[30] the Ninth Circuit upheld, against a student's religious expression claim, a school district's ban on a T-shirt with phrases that degraded homosexuality.[31] The Court of Appeals reasoned that "school officials' statements and any other school activity intended to teach Harper the virtues of tolerance constitute a proper exercise of a school's educational function".[32]

In the past decade, a new genre of student cyber expression case law involving the use of webpages and the Internet has captured the attention of school officials and the courts. This case law affords far more subtle expressive issues than the positions of student organizations on social issues[33] or student messages on T-shirts.[34] Courts are called upon to apply student expression standards designed in the context of physical symbols and signs (*Tinker*, *Morse*), direct face-to-face student expression (*Fraser*), and school-sponsored curriculum (*Hazelwood*) to student-generated electronic cyber expression accessed in schools where the person who originated the message may not be the person who accesses or distributes it within the school setting. In cyber expression, the authority of schools to punish students may be contingent on such issues as the place or origin of the expression (on or off school premises), the place of access to the expression (on or off school premises), the person(s) who accesses the expression (staff or other students), the content of the electronic expression, and the impact of the expression on the school. The analysis of student cyber expression in this article will begin with two cases, one punishing a student and a second refusing to punish a student.

3 Punishing Student Cyber Expression

In *J.S. v Bethlehem Area School District* (*Bethlehem*),[35] the Supreme Court of Pennsylvania upheld expulsion of an eighth grade student resulting

29 For a pre-*CLS v Martinez* analysis of protected speech for religious organizations, see Mawdsley & Mawdsley, "Balancing a University's Non-discrimination Policy Regarding Sexual Orientation with the Expressive Rights of Student Religious Organizations: A USA Perspective" 2007 (12) *Australia & New Zealand Journal of Law and Education* 47.

30 445 F.3d 1166 [208 Ed. Law Rep. 164] (9th Cir. 2006).

31 *Idem* 1171. The language on the T-shirt stated that "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED", was handwritten on the front and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" on the back.

32 *Idem* 1189-90, citing *Tinker,* 393 U.S. 508.

33 *Bannon v School District of Palm Beach County*, 387 F.3d 1208 [193 Ed. Law Rep. 78] (11th Cir. 2004) (citing *Hazelwood* in permitting the school to delete religious murals that had been painted by the Fellowship of Christian Athletes on hallway panels where the murals were considered by the Court of Appeals to be school sponsored speech).

34 *Guiles*, 461 F.3d at 327-28 where a student T-shirt worn for two weeks at school with pictures of martinis and drugs was considered to be acceptable political speech in opposition to the President of the United States.

35 807 A.2d 847 [170 Ed. Law Rep. 302] (Pa. 2002).

from his home-generated website containing threatening and derogatory comments about a teacher. The student in this case, J.S., apparently did not care for his algebra teacher and created a website at home entitled "Teacher Sux", which contained among other items, a picture of the teacher that morphed into a picture of Adolph Hitler and a hand-drawn picture of the teacher in a witch's costume. More serious, though, was a webpage regarding the teacher with the caption, "Why Should She Die?", with a request from the reader to give him "$20 to help pay the hitman".[36] Another page contained a small drawing of the teacher "with her head cut off and blood dripping from her neck".[37] The website was viewed by student members at the middle school, at least one of whom was directed to the site by J.S.. One of the school's instructors brought the webpage to the attention of the middle school principal who notified the local police and the Federal Bureau of Investigation (FBI), both of which declined to file charges against J.S.. The principal also informed the algebra teacher about the webpage. After viewing the webpage the teacher:

> testified she was frightened, fearing someone would try to kill her, [and] suffered stress, anxiety, loss of sleep, loss of weight, a general sense of loss of well-being, short term memory loss, inability to go out of the house and mingle with crowds and headaches requir[ing] her to take anti-anxiety/anti-depressant medication.[38]

In addition, she was unable to finish the 1997-98 school year and "applied for and was granted a medical leave for the 1998-99 school year because of her inability to return to teaching".[39] As a result, the school was required to utilize three substitute teachers for the 1998-99 school year "which disrupted the educational process of the students".[40]

The parents of J.S. enrolled him in an out-of-state school which prevented his attending one of the two dates for the school board expulsion hearing.[41] In expelling J.S., the board characterized J.S.' webpages as "a threat", "harassment", and "disrespect to the teacher… resulting in actual harm to the… school community [and] to the teacher".[42] J.S.' parents appealed the expulsion to a Pennsylvania state trial and appeals court, both of which upheld the expulsion. The State Appeals Court, in language reminiscent of *Tinker*, held that the school was justified in taking student threats seriously "where the conduct materially and substantially interferes with the educational process".[43]

On appeal to the Supreme Court of Pennsylvania, the court affirmed the expulsion but only after carefully parsing the nature of the student's

36 *Idem* 851.
37 *Ibid.*
38 *Idem* 852.
39 *Ibid.*
40 *Ibid.*
41 *Idem* 853. J.S. was able to attend the hearing on Aug 19 but not on Aug 26.
42 *Ibid.*
43 *Ibid.*

speech and the protection of the Free Speech Clause of the First Amendment. The State Supreme Court determined that J.S.' speech did not fit within a category known as "true threats" which the US Supreme Court has ruled has no free speech protection.[44] In comparing J.S.' threats to other cases in which courts had found "a true threat",[45] the Supreme Court of Pennsylvania, in assessing the context in which J.S.' statements were made, the reaction of listeners, and the nature of the comments, determined that the statements did not constitute true threats.[46] Thus, the Pennsylvania Supreme Court had to weigh whether J.S.' constitutional free expression rights had been abridged by the school board's expulsion.

Citing *Tinker*, *Hazelwood*, and *Fraser,* the Supreme Court of Pennsylvania determined that the relevant criteria were the location of the speech (on or off-campus), the form of the speech (political, lewd, vulgar, offensive), the effect of the speech (level of disruption), the setting in which the speech is communicated (school assembly, classroom), and the speech as part of a school sponsored expressive activity (newspaper, play).[47] While finding that the website was created off-campus, the State Supreme Court noted that J.S. had "facilitated the on-campus nature of the speech by accessing the website on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the website".[48] Although finding that J.S.' website was not the "political message" of *Tinker*, nor was it the "lewd, vulgar and offensive speech" of *Fraser* or the school sponsored speech of *Hazelwood,*[49] the Pennsylvania Supreme Court, nonetheless, decided that either *Fraser* or *Tinker* might be able to support the school board's expulsion of J.S.. However, while the court opined that "the 'Teacher Sux' website [was] no less lewd, vulgar or plainly offensive than the speech expressed at the school assembly"[50] it ruled that, ultimately,

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44 *Watts v U.S.*, 394 U.S. 705 (1969) (holding that a Vietnam protestor stating that he would get L.B.J. in his sights was "political hyperbole," not a violation of a federal statute prohibiting threats against the President).

45 *Lovell v Poway Unified School District*, 90 F.3d 367 [111 Ed. Law Rep. 116] (9th cir. 1996) (finding that, against a backdrop of violence in schools, a student's threat to kill her guidance counselor if she did not make changes in the student's schedule, a reasonable person in the student's position would interpret the statement as a serious expression of intent to harm or assault); *In the Interest of A.S.*, 626 N.W.2d 712 (Wis. 2001) (finding a true threat in a 13-year-old student's detailed descriptions of violence to a police officer, middle school principal, social studies teacher, and a fellow student where an objective, reasonable person would interpret the statement as a serious expression of a purpose to inflict harm).

46 *J.S.*, 807 A.2d at 858-59 (finding that the threatening statements were not made conditionally since no address was given to collect money for a hit man, that the threatening statements had not been made directly to the teacher, that J.S. had made no prior statements to the teacher, and that the teacher had no reason to believe J.S. had the propensity for violence).

47 *J.S.,* 807 A.2d 864.

48 *Idem* 865.

49 *Idem* 865-66.

50 *Idem* 868.

"it is the issue of disruption, potential or actual, that dissemination of 'Teacher Sux' caused to the work of the school"[51] that had to be considered. In rejecting the claims of J.S.' parents that the disruption was minimal, the supreme court found disruption in "the direct and indirect impact of the emotional and physical injuries to [the teacher]", the anxiety of certain students "for their safety", and concerns voiced by parents "for school safety and the delivery of instruction by substitute teachers".[52]

The opposite result was reached in *Layshock v Heritage School District*[53] where the Third Circuit held that the school district had violated a 17-year-old student's free speech rights by punishing him for creating a parody web profile of his principal on MySpace.[54] Using his grandmother's computer at her home, Layshock's profile of his high school principal was formed from bogus answers to phony questions that indicated in part the principal's use of drugs and steroids, as well as theft of items. Word of the profile spread throughout the school and was accessed at school by Layshock and other students, in addition to spawning several other unflattering profiles prepared by other students. The principal, while not being concerned for his life, found the profiles to be "degrading", "demeaning", "demoralizing", and "shocking".[55] Although the principal considered the profiles to constitute harassment, defamation or slander, no civil claims or criminal charges were filed against Layshock or other creators of profiles. Approximately a week after creating the profile, Layshock apologized orally to the principal, followed by a written apology. Notwithstanding these apologies, Layshock was determined by the school to have violated the school's disciplinary code[56] and, in addition to a ten-day suspension, was placed in the Alternative Education Program, was banned from extracurricular activities, and was not allowed to participate in graduation.[57] In upholding summary judgment for Layshock, the Third Circuit, after discussing *Tinker*, *Kuhlmeier*, and *Fraser*, relied on *Morse* for the controlling principle that, had the student's expression occurred in a public forum outside a school-sponsored activity, "it would have been protected".[58] Relying on this reasoning, the Third Circuit in *Layshock* observed that:

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51 *Ibid.*
52 *Idem* 869.
53 593 F.3d 249 [253 Ed. Law Rep. 31] (3d Cir. 2010).
54 MySpace is a popular social-networking website that "allows its members to create online 'profiles,' which are individual webpages on which members post photographs, videos, and information about their lives and interests". *Doe v MySpace, Inc.,* 474 F.Supp.2d 843, 845 (W.D.Tex.2007).
55 *Layshock*, 593 F.3d 253.
56 *Idem* 254. The language of the Discipline Code cited was: "Disruption of the normal school process; Disrespect; Harassment of a school administrator via computer/internet with remarks that have demeaning implications; Gross misbehavior; Obscene, vulgar and profane language; Computer Policy violations (use of school pictures without authorization)".
57 *Ibid.*
58 *Idem* 260, citing *Morse*, 551 U.S. 404.

> It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in using his grandmother's computer while at his grandmother's house would create just such a precedent and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.[59]

While the defendant school district did not dispute that the *Tinker* disruption standard did not apply, it did argue that the MySpace profile of the school principal was "vulgar, lewd, and offensive" under *Fraser*.[60] In examining other cases that had addressed cyber messages, including *Bethlehem*,[61] the Third Circuit could find no authority "support[ing] punishment for creating such a profile unless it results in foreseeable and substantial disruption of school".[62]

The Third Circuit refused to address whether the school could have punished the student under defamation or whether the webpage was a parody protected by free speech, limiting itself to a determination that the school could not, under the First Amendment, punish Layshock for expressive conduct outside of school that the school considered was lewd and offensive.[63] Worth noting is that, while the student in Layshock had a protected First Amendment right in his webpage created off-campus, his parents did not have a protected right under the Fourteenth Amendment Liberty Clause to direct the upbringing of their son,[64] the Third Circuit observed that "they [had been] able to take the action they

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59 *Ibid.*

60 *Idem* 261.

61 For two other cases discussed by the Third Circuit, see *Wisniewski v Board of Education of the Weedsport Central School District*, 494 F.3d 34 [223 Ed. Law Rep. 34] (2d Cir. 2007) (upholding a one semester suspension of a student who had shared a crude drawing suggesting that a named teacher should be shot and killed with his friends); *Doninger v Niehoff*, 527F.3d 41 [233 Ed. Law Rep. 30] (2d Cir. 2008) (upholding the school district's disqualification of a student's eligibility to run for an elective office, finding the student's use of mass mailing in protest to an administration decision inappropriate).

62 *Layshock*, 593 F.3d 263.

63 *Ibid.* Parodies are entitled to First Amendment protection when the speech cannot "reasonably be understood as describing actual facts [about the subject of the parody]". *Hustler Magazine, Inc. v Falwell*, 485 U.S. 46, 57(1988). In commercial speech areas, expression may be entitled to free speech protection where a product is not likely to create confusion under the Copyright or Trademark Acts between the parodies and the goods being parodied. See *Cardtoons v Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996) (finding a free speech protected parody by Cardtoons of baseball player cards published by the MLBA).

64 For a discussion of legal changes in the right of parents to direct the education of their children in the face of the development of students' constitutional rights, see Mawdsley, "The Changing Face of Parents' Rights", (2003) *Brigham Young University Education and LJ* 165.

thought necessary to communicate their displeasure with their son's actions and the inappropriateness of his behavior".[65]

4 Sorting Out the Legal Theories

Both *Bethlehem* and *J.S.* reflect the difficulty in applying the Supreme Court's student discipline standards to student expression that originates off-campus. Although the Supreme Court of Pennsylvania in *Bethlehem* did not find the student's message to be a "true threat", the case does suggest a starting point for analysis in determining whether student expression is either a "true threat" for which no free protection exists, or is a threat that violates one or more of the student discipline standards. Thus, in *Wisniewski v Board of Education of the Weedsport Central School District* (*Wisniewski*),[66] the Second Circuit found that an American Online (AOL) Instant Messaging icon, showing a pistol firing a bullet at a person's head with dots representing spattered blood and the words, "Kill Mr. Van der Molen" (the student's English teacher), below the icon, fell within *Tinker*. The Court of Appeals refused to address whether the icon, which had been sent to other students but not to the teacher, was a "true threat", finding instead, that under *Tinker*, "school officials have significantly broader authority to sanction student speech".[67] In upholding suspension of the student, the Second Circuit concluded that the student's icon "cross[ed] the boundary of protected speech and constitute[d] student conduct that pose[d] a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would 'materially and substantially disrupt the work and discipline of the school".[68] Thus, unlike *Bethlehem* where the student's message was read by the teacher, the message in *Wisniewski*, sent to other students, had not come to the attention of the teacher. Nonetheless, the Second Circuit found that because the "risk" that the icon distributed to students "would come to the attention of school authorities and the teacher whom the icon depicted being shot"[69] was "at least foreseeable to a reasonable person, if not inevitable", the icon represented "a risk of substantial disruption within the school environment".[70]

The notion that off-campus speech that "causes or reasonably threatens to cause a substantial disruption of or material interference with a school" can be regulated was reinforced by the Third Circuit in *J.S. v Blue Mountain School District* (*Blue Mountain*).[71] In *Blue Mountain*, two

65 *Layshock*, 593 F.3d 264. The case notes that the parents "were understandably upset over Justin's behavior, … discussed the matter with him, expressed their extreme disappointment, grounded him, and prohibited him from using their home computer." *Idem* 254.
66 494 F.3d 34 (2d Cir. 2007).
67 *Idem* 38.
68 *Idem* 38-39, citing *Tinker*, 393 U.S. 513.
69 *Idem* 39.
70 *Idem* 40.
71 593 F.3d 286, 301 [253 Ed. Law Rep. 48] (3d Cir. 2010).

students created a fictitious profile on MySpace of one of their middle school principals that included in the profile's Uniform Resource Locator (URL) the phrase, "kidsrockmybed", identified his interests as "hitting on students and their parents", and "mainly watching the playboy channel on directv", described himself in an "about me" section as a "sex addict", "I have come to MySpace so I can pervert the principal's [sic] to be just like me", and declared that "I love children [and] sex of (any kind)".[72] J.S. and her colleague, K.L., when confronted by the teacher, admitted to creating the webpage, apologized in his office, and later wrote letters of apology, but were still punished with a ten-day suspension. The principal considered criminal harassment charges but elected not to pursue them when informed by police that the charges would ultimately be dropped. The disruption to the school was limited: A teacher had to silence seven or eight students who wanted to talk about the profile in class, some eighth grade girls approached another teacher expressing concern about comments regarding the principal and his family, and several girls were reprimanded for decorating the lockers of J.S. and K.L. on the day they returned from their ten-day suspension.[73] In upholding the suspensions, the Third Circuit, in applying *Tinker* to this set of facts, refused to limit off-campus speech to "any geographical technicality"[74] in terms of the authority of the school to control such expression. The Court of Appeals examined the motives of the two girls ("they created the profile not as a personal, private, or anonymous expression of frustration or anger, but as a public means of humiliating [the principal]"),[75] the immediate effect on the school ("at least twenty-two members of the Middle School community … discussed the profile in-school and undoubtedly talked about it out-of-school as well"),[76] and the reasonable future impact of the profile ("students and parents inevitably would have begun to question [the principal's] demeanor and conduct at school, the scope and nature of his personal interests, and his character and fitness to occupy a position of trust with adolescent children").[77] The Third Circuit refused to limit the disciplinary reach of school authorities to off-campus generated speech only if it "satisfied the elements of criminal harassment or defamation", holding instead, that "the potential impact of the profile's language alone is enough to satisfy the *Tinker* substantial disruption test".[78] Sweeping within *Tinker* both the profile's "level of vulgarity" and "reckless and damaging information",[79] the Third Circuit held that *Tinker*'s disruptive standard applied to the "undermin[ing] of the principal's authority within the school",[80] as well as the "potentially

72 *Idem* 300.
73 *Idem* 294 for full description of disruption and school discipline.
74 *Idem* 301.
75 *Ibid.*
76 *Ibid.*
77 *Ibid.*
78 *Idem* 302.
79 *Ibid.* The Third Circuit expressly applied *Tinker* to the set of facts and refused to apply *Fraser. Idem* 301 n 8.
80 *Idem* 302.

arous[ing] [of] suspicions among the school community about his character".[81]

It is worth noting that just as in *Layshock,* the Third Circuit in *Blue Mountain* refused to address the substantive question whether the rights of parents to direct the education of their children could be pursued independently from the student's free speech claim. As in *Layshock*, the Court of Appeals in *Blue Mountain* noted as a practical matter, that the school's discipline had not preempted that of the parents since "they [had] also punished her 'for a very long time' for creating the profile".[82]

The rejection of student free speech claims in the *Bethlehem*, *J.S.*, and *Blue Mountain* needs to be juxtaposed to a series of generally older Federal District Court decisions finding on behalf of students. In the earliest of the cases, *Beussink v Woodland R-IV School District*,[83] a Missouri Federal District Court granted a preliminary injunction against a ten-day suspension awarded to a student as a result of an off-campus created homepage that "was highly critical of the administration at Woodland High School [and] used vulgar language to convey his opinion regarding the teachers, the principal and the school's own homepage".[84] Even though the principal and the computer teacher "were upset by the homepage",[85] the teacher had nonetheless permitted students to access the homepage in class. Citing *Tinker*, the District Court found that "no significant disruption to school discipline [had] occurred"[86] and, indeed, in turning the case into one purely of free speech, the court pointedly declared that the student had not been disciplined "because he was disrespectful or disruptive in the classroom … [but] because he [had] expressed an opinion on the Internet which upset [the] Principal and [the computer teacher]".[87] In addition to enjoining the school district from using the ten-day suspension served by the plaintiff in any manner to adversely affect his grades, the District Court also enjoined the school district "from restricting [the student's] use of his home computer to repost that homepage".[88]

Three years later, a Pennsylvania Federal District Court, in *Killion v Franklin Regional School District*,[89] granted injunctive relief to a student suspended for webpage content created at his home that contained a list of uncomplimentary comments about the athletic director.[90] In

81 *Ibid.*
82 *Idem* 305.
83 30 F.Supp.2d 1175 [131 Ed. Law Rep. 1000] (E.D. Mo. 1998).
84 *Idem* 1177.
85 *Idem* 1178.
86 *Idem* 1181.
87 *Ibid.*
88 *Idem* 1182.
89 136 F.Supp.2d 446 [153 Ed. Law Rep. 90] (W.D. Pa. 2001).
90 *Idem* 448. Among the comments about the athletic director were that: "He is constantly tripping over his chins"; "The girls at the 900 #'s [sic] keep hanging up on him"; and, "He has to use a pencil to type and make phone calls because his fingers are unable to hit only one key at a time".

overturning the ten-day suspension awarded to the student because his list "contained offensive remarks about a school official",[91] the District Court limited *Fraser* and *Hazelwood* to their narrow set of facts[92] and applied *Tinker*. In addition to noting that the list was not "threatening", (even though it was "upsetting") to the athletic director, the school district adduced no evidence of "actual disruption";[93] there was "no evidence that teachers were incapable of teaching or controlling their classes because of the list, [and] indeed, the list [had been] on school grounds for several days before the administration became aware of its existence, and at least one week passed before the defendants took any action".[94] A copy of the list had been downloaded and appeared at school although the school district was not able to produce any credible evidence that the student who created the webpage had been the one responsible;[95] in any case, even if the student had brought a hard copy of the list to school, the absence of disruption would most likely have produced the same result.

One year later, two Federal District Courts, one in Michigan, *Mahaffey v Aldrich* (*Mahaffey*),[96] and the other in Ohio, *Coy v Board of Education of the North Canton City Schools* (*Coy*),[97] relied on *Tinker* to address suspensions related to student-created websites. In *Mahaffey*, a high school suspended a student who had contributed the following content to a website he had created:

> SATAN'S MISSION FOR YOU THIS WEEK: stab someone for no reason then set them on fire throw them off of a cliff, watch them suffer and with their last breath, just before everything goes black, spit on their face. Killing people is wrong don't do It [sic]. Unless [sic] Im [sic] there to watch. ___ Or just go to Detroit. Hell is right in the middle. Drop by and say hi.
>
> PS: NOW THAT YOU'VE READ MY WEB PAGE PLEASE DON'T GO KILLING PEOPLE AND STUFF THEN BLAMING IT ON ME. OK? [98]

The District Court in *Mahaffey* found the comments did not constitute a threat because "there was no evidence that [the student] communicated the statements on the website to anyone".[99] More importantly, in granting summary judgment to the student, the court

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91 *Idem* 449.
92 *Idem* 454 (The expression in *Killion* "was not at a school assembly" [*Fraser*] and "was not in a school sponsored newspaper [*Hazelwood*]").
93 *Idem* 455.
94 *Ibid.*
95 *Idem* 458 n2.
96 236 F.Supp.2d 779 (E.D. Mich. 2002).
97 205 F.Supp.2d 791 [166 Ed. Law Rep. 535] (N.D. Ohio 2002).
98 *Mahaffey*, 236 F.Supp.2d at 782. The Federal District Court inserted the "sic" references.
99 *Idem* 785. The court accepted the student's assertion on the website that it had been created "for laughs" and viewed the last sentence as a disclaimer that no reasonable person would interpret as "an intent to harm or kill anyone listed on the website". *Idem* 786.

observed that the school district had produced "[no] proof of disruption to the school or on-campus activity".[100]

Coy differed from *Mahaffey* in that the school district alleged that it had expelled a student, not for the content of his webpage, but for violating a school rule prohibiting use of school computers to visit unauthorized sites. The Federal District Court in *Coy* found sufficient evidence to warrant a middle school student going to trial on a free speech claim following his suspension for four days after creating a webpage that contained: "a few insulting sentences written under each picture [of three other middle school students]", "two pictures of boys giving the 'finger'", "some profanity", "and a depressingly high number of spelling and grammatical errors".[101] Although the District Court refused to grant summary judgment to the student (Coy), it did determine that the case should be resolved under a *Tinker* rather than a *Fraser* or *Hazelwood* standard. Even though the website was "crude", it did not contain the "elaborate, graphic, and explicit sexual metaphor" in *Fraser*[102] nor had Coy been "speaking or attempting to speak in front of a captive student audience".[103] Likewise, *Hazelwood* was not applicable because Coy's "activity was not sanctioned by the school nor did the school knowingly provide any materials to support the expression".[104] In sending the case back for trial, the District Court established two key benchmarks: (1) "If the school disciplined Coy purely because they did not like what was contained in his personal website, the plaintiff will prevail";[105] and, (2) even if the school established that it punished the student, not because of website content, but because he had violated a school policy prohibiting accessing non-approved websites using school computers, the school would still have to demonstrate under *Tinker*, that accessing the website had an "effect upon the school district's ability to maintain discipline in the school".[106]

5 Analysis and Implications

The dominating force of *Tinker* in addressing student creation of, and access to, webpages created off-campus, limits the disciplinary authority of school districts. *Coy* casts doubt as to whether school suspensions would be possible simply because a student has used a school computer to access a student-created website, although disciplinary sanctions restricting or prohibiting student access to school computers would seem to be plausible since students would not be excluded from the school setting. However, much seems to depend on the language of school disciplinary codes. The district court in *Coy* held that a school conduct

100 *Idem* 786.
101 *Coy*, 205 F.Supp.2d 795.
102 *Idem* 799, citing *Fraser*, 478 U.S. 678.
103 *Idem* 800.
104 *Ibid.*
105 *Idem* 801.
106 *Ibid.*

provision prohibiting the use of "obscenity, profanity, any form of racial slur or ethnic slurs, or other patently offensive language or gesture",[107] was unconstitutionally overbroad,[108] since "it reached language, distasteful as it might be, that is protected under the First Amendment".[109] Nonetheless, the court upheld the language as not being unconstitutionally vague, and thus could be enforced by the school, because it applied only to "school property, at school-sponsored events off school grounds, or during travel to and from school".[110] In effect, schools have discretion in formulating discipline policies defining inappropriate language as long as students are afforded sufficiently clear notice.

The second *Tinker* standard, "intrudes upon ... the rights of other students" or "colli[des] with the rights of other students to be secure and to be let alone",[111] has supported school district discipline where students have worn T-shirts with messages expressing hostility or lack of tolerance for persons representing protected category viewpoints,[112] but one can question whether it applies with the same force to website messages created off-campus. In many of the cases discussed in this article, the students who created their webpages also accessed the website at school for their friends. Arguably, the student creator accessing his/her own webpage could be compared to a student choosing a T-shirt with a vulgar or offensive message to be worn at school, but the comparison breaks down when the person accessing the webpage at school is not the creator of the website. At some point, regardless how distasteful or vulgar, the school should not be able to reach into a student's home to punish him or her for the message created there. Indeed, at some point one returns to the facts of *Tinker* where the students who wore the black armbands were simply following the example of their parents,[113] although none of the webpage cases suggest that student vulgar comments on the Internet merely reflected the parents' views of school personnel. Nonetheless, in the absence of the kind of disruption required under *Tinker*, one can argue that the function of education should not be to engage in a kind of mind control to

107 *Idem* 803.
108 A law or regulation is overbroad under the First Amendment if it "reaches a substantial number of impermissible applications" relative to the law's legitimate sweep, *Coy*, 205 F.3d at 801, citing to *Déjà Vu of Nashville, Inc. v Metro Gov't*, 274 F.3d 377, 389 (6th Cir. 2001), or "imposes restrictions so broad that it chills speech outside its legitimate regulatory purpose." *Coy*, 205 F.3d 801, citing *Deja Yu*, 274 F.3d 377.
109 *Coy* 205 F.Supp.2d 802.
110 *Idem* 803.
111 *Tinker*, 393 U.S. 508.
112 *Harper*, 445 F.3d 1178 (finding that a student's handwritten message on a T-shirt, "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" violated the second *Tinker* standard because "[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.").
113 *Tinker*, 393 U.S. 504.

eradicate the personally or politically unacceptable student views of the moment.[114] As the Second Circuit observed in the post-*Tinker*, but pre-*Fraser*, case, *Thomas v Board of Education* (*Thomas*),[115] student activity in creating a satirical publication for distribution in school which "was deliberately designed to take place beyond the schoolhouse gate"[116] could not, in the absence of disruption, be the subject of school discipline. The Second Circuit opined in *Thomas* that "our willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate".[117]

None of the courts deciding cases discussed in this article addressed the substantive question whether the disciplinary reach of school officials into the home violates not only the free speech rights of the student, but the constitutional rights of the parents to direct the education of their children. Clearly, as the US Supreme Court noted in *Troxel v Granville*,[118] "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children".[119] While the Third Circuit in *Layshock* observed that it could envision situations "where a school's reaction to student's conduct could interfere with the parents' ability to exercise appropriate control and authority over their child and his/her upbringing and education",[120] the Court of Appeals provided no insights into what those situations might be. As far as the case before the Third Circuit was concerned, the court observed that the parents had communicated their displeasure with their son and "the school's inappropriate response to [their son's] actions in no way interfered with [the parents'] liberty interest in raising their son".[121] At the very least, *Layshock* is indicative of current legal developments where "a child's constitutional rights will not always be coterminous with his/her parents' liberty interests",[122] and children are recognized as possessing

114 See e.g., *Beussink*, 30 F.Supp.2d 1177 where the student "did not intend the [his] homepage to be accessed or viewed at [his high school]; he just wanted to voice his opinion".
115 607 F.2d 1043 (2d Cir. 1979).
116 *Idem* 1050. The articles in the publication included such topics as masturbation and prostitution, as well as more standard fare such as "school lunches, cheerleaders, classmates, and teachers". *Idem* 1045.
117 *Idem* 1045.
118 530 U.S. 57 (2000) (invalidating a state statute granting grandparents visitation rights where those rights would be contrary to the custodial parent's rights).
119 *Idem* 67 (relying for support on the seminal Supreme Court decisions recognizing parent rights protected under the Liberty Clause, *Meyer v Nebraska*, 262 U.S. 390 (1923) and *Pierce v Society of Sisters*, 268 U.S. 510 (1925)).
120 *Layshock*, 593 F.3d 264.
121 *Ibid.*
122 *Ibid*.

constitutional rights even if parents have no constitutional claims.[123]

No one, certainly not the courts, is suggesting that students who create offensive websites should go unpunished, but, in the absence of *Tinker* disruption, school suspensions or expulsions should not be the appropriate means of punishment.[124] In several of the cases, school officials contemplated civil or criminal action, but then, whether dissuaded by the attendant publicity or the school board, decided not to proceed.[125] Should they decide to go forward with a judicial proceeding, school officials would probably have a difficult task in prevailing in civil damages or criminal claims,[126] but such difficulty should not become the proof text for bringing the full force of the school district to bear against the student.

Unlike the *Harper* T-shirt message or the *Morse* sign that requires some advance planning and materials, the Internet is instantaneous. What students could accomplish fifty years ago by writing and passing notes to only one or two students in class can now be readily accessible to a wide number of students almost at the moment of creation by punching a few keys on a keyboard. Contrary to the notes passed in schools in the past, most of the objectionable Internet webpages have originated in the students' own homes.

Perhaps Justice Thomas was correct that in granting constitutional rights for students we have opened a Pandora's Box of legal interpretation and enforcement of free expression that has served to separate the enforcement rights of schools from the role and responsibility of parents to direct the education of their children. It is worth noting that in the cases discussed in this article, some students not only apologized for their webpages, but were also punished by their parents.[127] By setting up school officials as the final arbiters of what is distasteful or inappropriate in student, home-generated webpages,

123 See e.g., *The Circle Schools v Pappert*, 381 F.3d 172 [191Ed. Law Rep. 629] (3d cir. 2004) (invalidating a state statute requiring that parents be notified if their children failed to participate in the Pledge of Allegiance pursuant to student's right of privacy, but refusing to reach the merits of parents' Liberty Clause claim). See generally, Mawdsley (2003) *Brigham Young University Education and LJ* 179-183.

124 For an example of a creative alternative not involving suspension or expulsion, see *Doninger v Niehoff*, 527 F.3d 41 [233 Ed. Law Rep. 30] (2d Cir. 2008) where the Second Circuit upheld denial of a preliminary injunction to a student disqualified by her high school from running for Senior Class Secretary after she posted a vulgar and misleading message, referring to school administrators as "douchebags," about the supposed cancellation of an upcoming school event; the Court of Appeals found that the language was not only "plainly offensive", but "foreseeably create[d] a risk of substantial disruption within the school environment" by being "hardly conducive to cooperative conflict resolution". *Idem* 50-51.

125 See e.g., *Coy*, 205 F.Supp.2d 796.

126 *Blue Mountain*, 593 F.3d 293 (a state police officer, after reviewing a student's webpage, told the principal he could press criminal charges "but they would likely be dropped").

127 See e.g., *Layshock*, 593 F.3d 254.

schools have not only made adversaries of parents but, have made certain that the webpage content that was probably accessed by only a relatively few students will now be memorialized in West Publishing Company's Reporter series.

6 Conclusion

Student, web-based cyber speech presents multi-layered constitutional issues. At the very core of these issues is the protected privacy right of students to express their views in websites created off school premises. In terms of the authority of school districts to punish objectionable webpages, much depends on the nexus between the person creating the webpage and the school. After all, no school district could seriously argue that it had authority to punish a person who waited until the day after graduation to create an objectionable webpage. The reality in the cyber speech debate is that cyber speech content has a ready audience only when the person creating the webpage and those accessing it do so in the context of their mutual participation in an educational setting. Cyber speech presents an enforcement dilemma for schools simply because the nature of the speech content assures that an audience exists that can identify with, and be responsive to, the speech content. Thus, student claims of privacy where webpages are created off campus need to be assessed, not just in terms of their place of creation but also, in terms of the accessibility of that webpage content at school. As a result, once student cyber speech expression reaches some part of the school audience within the school, the privacy notion that a person has a right "to be left alone" becomes subject to result-oriented and content-based free speech tests. Whether the motive of the person creating a webpage should be considered in terms of student accessibility has received little attention from courts, but one can argue that placing content in a webpage format is considerably different from a word document stored on one's computer at home. Once a student has entered the Internet world through a webpage, he/she has chosen, in effect, *not* "to be left alone".

Layered on top of the student's right to privacy to create a webpage is the right of a student to express the views of his/her parents. While many of the cases to date have involved cyber speech that parents found objectionable, little attention has been accorded to student cyber speech that mirrors the views of parents in the home. The legal issue raised thus far as to whether school punishment of a student deprives a parent of the right of punishment under the Liberty Clause to direct the education of their child falls short of the key *Tinker*-type set of facts where a student's expression modeled the parental views on a social or political issue. School officials would have no jurisdiction to sanction parents who created webpages outrageously critical of school programs, but would they be able to punish a student whose name appears, along with those of the parents, as the creator of an objectionable webpage?

Ultimately, the overarching layer to the analysis of student cyber speech is the legal standard to be applied to student expression. The notion that the *Tinker* disruption test is the default standard does little to quiet concerns as to how that standard should be applied where student expression was never accessed at school or the extent to which *Tinker* can be superseded by the second *Tinker*, the *Fraser*, the *Kuhlmeier*, or the *Morse* tests. Justice Thomas' concern about the reach of schools in punishing the expression of students, one can argue, is not misplaced. What the Supreme Court has produced, Justice Thomas suggests, has not been a clarification of a student's expressive rights but an obfuscation of the balance between schools and homes. Arguably, by creating multiple legal touch points that schools can use to punish students for their expression, courts have permitted schools to assume the role of monitoring what is socially acceptable expression, even where a school's determination is contrary to other constitutional rights such as parental control of their children's education or the religious views of students and their parents.[128]

128 See e.g., *Harper*, 445 F.3d 1173 (a student's T-shirt critical of homosexuality, worn during a tolerance day, expressed the views of the parent, even though the school's assistant principal met with the parent to express the school's purpose in creating tolerance day).