Student Speech in Online Social Networking Sites: Where to Draw the Line

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ABSTRACT: Do Facebook, Twitter, and MySpace require courts to *Tinker* with the Supreme Court's student speech trilogy of *Tinker* to *Bethel* to *Morse*? **Michael J. Kasdan** examines the struggle to define the proper place of so-called "student internet speech."

Introduction

The move toward online communication has the potential to throw off the historically careful balance that has been struck regarding First Amendment issues in the realm of "student speech." In a seminal trilogy of cases, the Supreme Court balanced the free speech rights of students with school districts' ability – and even responsibility – to regulate student speech that disrupts the learning environment. Before the proliferation of instant messaging, SMS texts, and social networking sites, the Court allowed schools to regulate on-campus speech in limited circumstances (i.e., when the speech disrupts the learning environment) but did not extend the school's authority to regulate speech that occurs off-campus (i.e., speech subject to traditional First Amendment protection). Electronic communication blurs the boundary between on- and off-campus speech. While a student may post a Facebook message from the seeming privacy of his or her own home, that message is widely accessible and could have a potentially disruptive effect on campus.

Because the Supreme Court has not yet addressed this particular issue, courts are struggling to define the proper place of so-called "student internet speech." Indeed, two different Third Circuit panels recently came to exactly opposite conclusions on the very same day about the ability of schools to regulate student internet speech: in one, the Third Circuit upheld a school's ability to discipline a student for creating a fake MySpace profile mocking the school's principal; in the other, the Third Circuit held the school could not regulate conduct (again, creation of a fake MySpace profile about the school's principal) that occurred within the student's home. Both opinions have since been vacated pending a consolidated rehearing *en banc*, but the message is clear: courts throughout the country require guidance on the appropriate legal principles applicable to student internet speech.

The remainder of this Article introduces the relevant Supreme Court precedent, explores in greater depth the two contradictory Third Circuit opinions, and offers some preliminary analysis as to how the Third Circuit (and perhaps ultimately the Supreme Court) may clarify

the law in the pending *en banc* decision.

Background – Supreme Court Precedent

The Supreme Court's seminal pronouncement that set the limits of a school's ability to regulate student speech came down in 1969. In *Tinker v. Des Moines Independent Community School District*, the Supreme Court addressed the issue of "First Amendment rights, applied in light of the special characteristics of the school environment." [FN1] The Court reasoned that while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the right to free speech must be balanced against the interest in allowing "[s]tates and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[FN2] The so-called *Tinker* rule holds that in order for a school district to suppress student speech (by issuing a punishment or discipline relating to that speech), the speech must materially disrupt the school, involve substantial disorder, or invade the rights of others: "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 class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."[FN3]

Since *Tinker*, the Supreme Court has addressed free speech issues in the context of schools in several cases. In each case, the Court addressed the tension between the students' right to free expression and the schools' need to regulate school conduct in favor of the schools. In *Bethel School District v. Fraser*, [FN4] the Court distinguished *Tinker* and found that a school's discipline of a student for his sexual-innuendo-charged assembly speech was not a violation of the student's First Amendment rights. [FN5] More recently, in *Morse v. Frederick*, the Court held that the First Amendment does not prevent school officials from suppressing student speech that was reasonably viewed as promoting illegal drug use at a school-supervised event.[FN6]

Today's Online Student Speech Cases

The degree to which student online speech may be regulated is an increasingly significant issue. As stated in a recent New York Times article, "the Internet is where children are growing up. The average young person spends seven and a half hours a day with a computer, television, or smart phone . . . suggesting that almost every extra curricular hour is devoted to online life." [FN7] And today's online speech has some distinguishing characteristics from "ordinary speech." It is extremely public. It may be rapidly distributed to a wide group of people extremely quickly. And it may potentially be saved forever.

A recent series of cases demonstrate that courts are grappling with how to apply the Supreme Court free-speech precedent to student speech that has moved to online mediums such as the now-ubiquitous Facebook or Twitter. None of the triumvirate of Supreme Court student speech cases maps easily to the arena of online student speech. As one state supreme court noted,

"[u]nfortunately, the United States Supreme Court has not revisited this area [of the First Amendment rights of public school students] for fifteen years. Thus, the breadth and contour of these cases and their application to differing circumstances continues to evolve. Moreover, the advent of the Internet has complicated analysis of restrictions on speech. Indeed, *Tinker*'s simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by [today's student's] complex multi-media website, accessible to fellow students, teachers, and the world." [FN8]

A recent series of cases from the Third Circuit demonstrates the complexities raised by these cases. In one case, a Third Circuit panel found a school's discipline of a student for his online speech to be a violation of the First Amendment and that the school's authority could not extend to such off-campus behavior. That very same day, a different Third Circuit panel addressing an almost identical fact pattern came to the opposite conclusion, finding no First Amendment violation when a school district punished a student for online speech.

Recent Online Student speech Cases

J.S. ex rel. Snyder v. Blue Mountain School District

In *J.S.*, the Third Circuit affirmed a district court ruling that a school district had acted within its authority in disciplining a student for creating an online profile on her MySpace page that alluded to "sexually inappropriate behavior and illegal conduct" by her principal. [FN9]

The student was a 14-year-old eighth-grader who, along with a friend, had been disciplined by the principal for a dress code violation. A month later, the students created a fictitious profile for the principal from a home computer on MySpace. The MySpace profile, which included a picture of the principal taken from the school's website, described him as a pedophile and a sex addict whose interests included "being a tight ass," "[having sex] in my office," and "hitting on students and their parents." Word of the MySpace profile soon spread around school. Eventually, the principal found out about it. In response, the principal issued the students a ten-day suspension for violating the school's rule against making false accusations against members of the school staff. [FN10]

The students' parents sued the school district, claiming that the suspension was a violation of their children's First Amendment rights. The district court disagreed and found for the school board, concluding that the school had acted properly in suspending the students and that their First Amendment rights had not been violated.[FN11]

On appeal, the Third Circuit affirmed. The Panel majority noted that although the Supreme Court "has not yet spoken on the relatively new area of student internet speech," courts can derive the relevant legal principles from traditional student speech cases, such as *Tinker, Bethel*, and *Morse*. [FN12] Drawing from the *Tinker* standard that a school may discipline students for speech that "create[s] a significant threat of substantial disruption" within the school, [FN13] the Third Circuit found that discipline was appropriate and permissible based primarily on the fact that the profile targeted the principal in a manner that

could have undermined his authority by referencing "activities clearly inappropriate for a Middle School principal and illegal for any adult." [FN14] The court also found that the online context of the speech, which allowed for quick and widespread distribution, exacerbated the situation and increased the likelihood of "substantial disruption." [FN15]

In a strongly written dissent, one of the panel Judges concluded that the *Tinker* standard had not been met: *Tinker* requires a showing of "specific and significant fear of disruption, not just some remote apprehension of disturbance." [FN16] While acknowledging the general power of school officials to regulate conduct at schools, the dissent concluded that the majority decision vests school officials with dangerously over-broad censorship authority in that it "adopt[s] a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or a school official . . . and is deemed 'offensive' by the prevailing authority." [FN17] The dissent further noted that "[n]either the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored and that caused no substantial disruption at school." [FN18]

Layshock v. Hermitage School District

Curiously, a different panel of Judges of the Third Circuit reached the opposite conclusion on the very same day in a similar case, *Layshock v. Hermitage School District*.[FN19] In *Layshock*, the Third Circuit panel affirmed a district court ruling that Hermitage School District's suspension of high school student Justin Layshock for his "parody profile" of the high school principal on his MySpace page was improper. The *Layshock* panel concluded that the high school's discipline of the student for his online behavior violated his First Amendment free speech rights and that the school's authority did not reach such off-campus behavior.[FN20]

The student, a 17-year-old high school senior, created a fake MySpace profile in the name of his principal, using a picture of the principal from the school's website. The profile mocked the principal, indicating that he was a "big steroid freak," a "big hard ass" and a "big whore" who smoked a "big blunt." When the principal learned of the profile, he issued a ten-day suspension and barred Justin from extracurricular activities for disruption of school activities, harassment of a school administrator over the Internet, and computer policy violations.[FN21]

Layshock's parents sued the school district and the principal, asserting violations of the First and Fourteenth Amendments. The district court ruled in their favor on the First Amendment claim, concluding that the school was unable to establish "a sufficient nexus between Justin's speech and a substantial disruption of the school environment, which is necessary to suppress students' speech per *Tinker*." [FN22]

On appeal, the Third Circuit agreed that "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." [FN23] The court refused to allow the School

District to exercise authority over a student "while he is sitting in his grandmother's home after school." [FN24]

On April 9, 2010, shortly after issuing the seemingly contradictory rulings in *J.S.* and *Layshock* , the Third Circuit agreed to rehear the two cases *en banc*. Given the factually similar circumstances of the two cases and their opposite results, it is not surprising that the Third Circuit found it necessary to provide clear guidance delineating what type of speech may be punished and how far school districts may go in punishing online speech. Argument was heard by the full court on June 3, 2010, and a ruling is expected sometime this year. The Third Circuit *en banc* review of the *J.S.* and *Layshock* cases may also be a precursor to a Supreme Court pronouncement on the topic of School regulation of online student speech.

Clarifying The Law?

One key issue raised in these *en banc* appeals – and in other cases around the country addressing similar issues [FN25] – is whether online speech by a student that is generated off school property and not during school hours, but is nonetheless directed at the school, can be regulated by a school district at all. That is, is such speech "student speech" that may be regulated under appropriate circumstances or is it "off-campus speech" that is out of the reach of school regulation under *Tinker*, *Bethel*, and *Morse*?

In the *en banc* appeals, the school districts argued in their briefing papers and at oral argument that the Supreme Court's reasoning in *Bethel* regarding the ability of schools to regulate disruptive student speech should likewise apply to online speech that is directed at school faculty. They argued that although such "speech" may be created outside of school, it is student speech, because it is specifically aimed at the school or a school administrator. Further, they argued that such speech may be restricted because it has a sufficient impact on the proper functioning of the school. [FN26] The districts reason that because students today create, send, and access communication using multiple methods including online social media sites, email, and text messaging, the proper focus is not where the speech was made, but whether its impact is felt in school.[FN27]

On the other hand, the students argued that a school district's ability to regulate disruptive student speech should not extend to speech outside of school and that the curtailment of students' off-campus speech is doctrinally indefensible.[FN28]

In my view, extending school districts' intentionally limited authority to off-campus speech — whether online or otherwise — would set a dangerous precedent. Indeed, during oral argument of the *en banc* appeals in June, Chief Judge McKee of the Third Circuit asked if a group of students could be punished if they were overheard in a baseball stadium calling their principal a "douchebag." The clear answer is no. Judge Rendell similarly noted that "the First Amendment allows people to say things that aren't nice." [FN29] These seem to be the right points to be making. In other words, how are the online profiles in the *J.S.* and *Layshock* cases any different than distasteful jokes or mocking speech about school officials made outside of school? The *Tinker-Bethel-Morse* trilogy of cases allows for limited

regulation of speech in school; they simply do not contemplate otherwise limiting speech outside of school. While online speech undoubtedly has some characteristics that distinguish it from Judge McKee's example — i.e., a mocking online profile can be rapidly accessed by a wide group of students and lasts longer than the spoken word — these differences do not justify redrawing the line in order to allow a school to regulate a student's out-of-school online speech.

A second key issue is, if schools were allowed to regulate such speech, how substantial must a disruption be to be considered a "substantial disruption" for which discipline is permitted? Is a school district's judgment that there is potential to cause disruption enough, or should more be required?

The school districts argue that they should have the authority to regulate speech when it is reasonably foreseeable that it would cause a substantial disruption in school.[FN30] But the students argue that if a school district is authorized to punish students' off-campus online speech based on a presumed "reasonable possibility" of future disruption, this would eviscerate the careful balance drawn in *Tinker*.

In my view, if schools are allowed to regulate online off-campus speech merely because it is directed towards school officials (a dubious proposition under Supreme Court First Amendment precedents), it is critical that this authority remain as limited as possible. One way to do that is to tie the school's authority to the presence of an in-school disruption. Giving schools the authority to determine that, in their view, there is a "reasonable potential" for a future disruption, even if there is no evidence of any disruption, seems to give them too much power. For instance, in the Third Circuit cases discussed above, it seems likely that anyone who viewed the fake MySpace profile would know it was intended as a joke. And there was no evidence of any disruption at all. Still, the school district punished the speech. This gives the school district too much power to discipline speech that occurs off-campus.

The principles set forth in the seminal Supreme Court student speech cases should favor the students in online speech cases – unless the courts adopt the view that online speech as inherently different from traditional speech. If so, then the rules regarding school regulation of student speech will change in turn. The Third Circuit *en banc* cases and perhaps one day the Supreme Court – must now grapple with that issue.[FN31]

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[FN1] 393 U.S. 503, 506 (1969). *Tinker* involved an in-school passive display of political "speech," students wearing black armbands in school to protest the Vietnam War. The Court found that while there is a need to provide for authority to regulate disruptive speech in schools, in this case the speech was silent and passive, and there was no "evidence that the authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students." *Id.* at 509. Accordingly, the discipline was found to be a violation of the First Amendment. *Id.* at 510-11.

[FN2] *Id.* at 506-07.

[FN3] *Id.* at 513.

[FN4] 478 U.S. 675 (1986).

[FN5] *Bethel*, unlike *Tinker*, did not involve political speech, nor was it of the silent variety. In *Bethel*, a student delivered a speech at a school event that was based wholly on "explicit sexual metaphor." *Id.* at 676. The speech, supporting the candidacy of the speaker's friend for student counsel, used repeated sexual innuendo to comic effect. In finding that the First Amendment did not prevent the school from disciplining the student for the speech, the Court remarked that it was "perfectly appropriate for the school to . . . make the point to pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. The in-school nature of the speech was central to this case. Indeed, Justice Brennan was careful to note in his concurrence that the holding should be narrowly limited to in-school circumstances. Brennan argued that under applicable Supreme Court precedent, if the same speech had been given "outside of the school environment, he could not be penalized simply because government officials considered his language to be inappropriate" because the speech was far removed from the category of "obscene" speech that is unprotected by the First Amendment. *Id.* at 688. Moreover, the discipline was not based on the fact that the school district disagreed with the political viewpoint of the speech; rather, the basis for the discipline was the school's interest in ensuring that a school event proceeded in an orderly manner. Accordingly, Justice Brennan cast the Court's holding narrowly: "the Court's holding concerns only the authority that school officials have to restrict a high school student's use of disruptive language in a speech given at a high school assembly." *Id.* at 689**.**

[FN6] Morse v. Frederick, 551 U.S. 393 (2007). In *Morse*, the Court found that a school district may discipline a student for speech at a school event that was regarded as encouraging illegal drug use without running afoul of the First Amendment. *Id.* at 408.

There, a student was suspended from school after refusing to take down a banner stating "BONG HiTS 4 JESUS" that he unfurled at a school event. *Id.* at 393. Under these circumstances, the Court found that even though there was no "substantial disruption" caused, *id.*, the discipline by the school was nevertheless appropriate in view of "the special characteristics of the school environment," *id.* (quoting *Tinker*), because schools are entitled to take steps to safeguard the students entrusted into their care from speech that could be reasonably regarded as encouraging illegal drug use.

[FN7] Stephanie Clifford, *Teaching About Web Includes Troublesome Parts*, N.Y. Times, Apr. 8, 2010, at A15.

[FN8] *J.S. ex rel. H.S. v. Bethlehem Area School Dist.*, 807 A.2d 847, 863-64 (Pa. 2002).

[FN9] *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 308 (3rd Cir. 2010).

[FN10] *Id.* at 291-93.

[FN11] *Id.* at 290-95.

[FN12] *Id.* at 295-97.

[FN13] *Id.* at 298.

[FN14] *Id.* at 300.

[FN15] *Id*.

[FN16] *Id.* at 312 (Chagares, J. concurring in part and dissenting in part).

[FN17] *Id.* at 318.

[FN18] *Id.* at 308.

[FN19] 593 F.3d 249 (3rd Cir. 2010).

[FN20] *Id.* at 252-54.

[FN21] *Id*.

[FN22] *Id.* at 259-60.

[FN23] *Id.* at 260.

[FN24] *Id*.

[FN25] The Third Circuit cases discussed in depth in this article are merely illustrative of the differing results courts addressing this issue have reached. Similar cases have arisen across the country. *See, e.g., Evans v. Bayer*, 684 F.Supp.2d 1365 (S.D. Fl. 2010) (holding, where student created fake and harassing Facebook profile of teacher, school districts may discipline off-campus speech only where such speech "raises on-campus concerns").

[FN26] *See J.S.*, 593 F.3d at 298 n.6 ("Electronic communication allows students to cause a substantial disruption to a school's learning environment even without being physically present. We decline to say that simply because the disruption to the learning environment originates from a computer off-campus, the school should be left powerless to discipline the student.").

[FN27] The District also noted that several other appellate courts have held that online speech created by a student at their home computer constitutes "student speech" for First Amendment purposes. *See, e.g.*, J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002); Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007); Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008). In each of those cases, the speech at issue was created at the students' home outside the physical presence of the schools they attended.

[FN28] *See J.S.*, 593 F.3d at 318 n.23 (explaining that Pennsylvania state law clearly intended *Bethel* to apply only to in-school speech).

[FN29] Shannon P. Duffy, *3rd Circuit Mulls Student Suspensions for MySpace Postings*, Law.Com, June 4, 2010, *available at* http://www.law.com/jsp/article.jsp?id=1202459201824.

[FN30] "[B]oth the United States Supreme Court and this Court have held that a school district can act to restrict student speech based on a reasonable belief the speech would, in the foreseeable future, substantially disrupt or materially interfere with school activities. *See Tinker*, 393 U.S. at 514 ("the record does not demonstrate any facts which might *reasonably* have led school authorities to forecast substantial disruption of or material interference with school activities") (emphasis added); *Morse*, 551 U.S. at 403 ("*Tinker* held that student expression may not be suppressed unless school officials *reasonably* conclude that it will materially and substantially disrupt the work and discipline of the school") (emphasis added) (internal quotations omitted).

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