Cyber-Bullying: Freedom of Expression vs. Freedom from Harassment

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Introduction

The First Amendment of the U.S. Constitution guarantees freedom of expression. Freedom of expression has long been thought an essential freedom and the cornerstone of a free and democratic society. However, the Supreme Court has scaled back constitutional protections in certain situations. For instance, the Court has said students have a lesser expectation of certain constitutional guarantees when on school grounds.[1] Along those same lines, the Court has held that schools may regulate student expression if the expression is part of a school-sponsored activity, if the expression is lewd or vulgar, or if the expression substantially disrupts school operations and invades the rights of others.[2]

Recently, there has been an increasing trend of "cyber-bullying." "Cyber-bullying" entails the harassment of students using social media websites, text messages, emails, and other technology. "Cyber-bullying" presents several new and troubling problems for state government, the school systems, parents, and the courts. Most importantly, "cyber-bullying" can lead to dire consequences, such as grief-induced suicides. Sadly, this occurs frequently because "cyber-bullying" is often aimed at emotionally fragile adolescents. Clearly, such tragic consequences should be prevented. As the paper will discuss, the burden to prevent such tragedy should not fall squarely on schools. First, schools have limited authority to regulate or punish student expression that occurs outside of school. However, schools often become aware of harmful behavior first. When this is the case, they should intervene in an appropriate manner when

[1] *New Jersey v. T.L.O. 469 U.S. 325, 348 (1985)*
[2] See discussion of *Tinker*, *Bethel*, and *Hazelwood* supra

intervention is required. Second, online harassment rarely reaches a level of criminality. Therefore, states or the federal government should pass legislation that gives law enforcement agencies the power to punish offenders in certain extreme cases. Finally, parents need to supervise their children and their online activities. Parents are the first, and most effective, line of protection against online harassment. In sum, the prevention of "cyber-bullying" and the attendant tragedies requires the cooperation of parents, government, and school districts.

First Amendment Jurisprudence

In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* students decided to voice their opposition to the war in Vietnam by wearing black armbands to school.[3] Administrators in the Des Moines School District learned of this plan and preemptively adopted a policy prohibiting such expression.[4] Students who wore the armbands to school were sent home and suspended from school until they decided to return to school without the armband.[5] The students brought suit against the administrators, and the Supreme Court eventually held the First Amendment protected such passive expression.[6] The majority reasoned that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[7] The Court further elaborated, "Free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact."[8] This seminal decision set forth a two-pronged test to determine whether the First Amendment protects a student's expression. A student may express himself so long as he does so without

[3] *Tinker v. Des Moines Indep. Sch. Dist*., 393 U.S. 503, 504 (1969)
[4] *Id.*
[5] *Id.*
[6] *Id. at 513*
[7] *Id. at 506*
[8] *Id.* at 513

"materially or substantially" disrupting school operations or invading the rights of others.[9]

The Supreme Court was again confronted with this issue in *Bethel Sch. Dist. No. 403 v. Fraser* seventeen years later. In *Bethel*, a student gave a speech to roughly 600 students that was lewd, graphic, and sexually explicit.[10] The next day, the assistant principal decided the speech violated one of the school's disciplinary rules and suspended the student.[11] The Court held the School District acted within its permissible authority by suspending the student.[12] In reaching this conclusion, the Court reasoned that freedom of expression must be balanced against "society's countervailing interest in teaching students the boundaries of socially appropriate behavior."[13] Viewing the Court's holding in light of *Tinker*, it appears the Court felt the lewd speech violated the first prong of the *Tinker* test because it was "materially or substantially" disruptive.

Both decisions were important developments in the law relating to students' rights under the First Amendment while on school property. Yet, both decisions were fairly limited and slightly ambiguous. After *Tinker* and *Bethel*, two principles were known definitively. First, passive and symbolic (or "pure") expression was protected under the First Amendment so long as it did not substantially disrupt school operations or collide with the rights of others. Second, the First Amendment did not protect lewd speech at a school assembly because it was disruptive to school operations, and the school had a right to regulate and punish such expression.

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[9] *Id.*
[10] *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 678 (1986)
[11] *Id.*
[12] *Id.* at 685
[13] *Id. at 681*

Two years after *Bethel*, the Court was faced with an issue that fell somewhere in the gray area between *Tinker* and *Bethel*. In *Hazelwood Sch. Dist. v. Kuhlmeier*, the Court was faced with the question whether school officials may edit the contents of a student newspaper without violating the students' rights to freedom of expression.[14] The students in *Hazelwood* were staff members of the school newspaper, the Spectrum.[15] In one issue, school officials decided to delete two full pages of the Spectrum, because the articles on those pages detailed students' experiences with pregnancy and the effects of divorce.[16] Finding no First Amendment violation here, the Court distinguished *Hazelwood* from *Tinker*. The Court reasoned this was a different case than *Tinker* because the question was not whether a school must tolerate certain student speech, but rather, whether a school must promote particular student speech.[17] Educators have more authority to regulate speech in the second scenario, because such school-sponsored activities may be treated as part of the school curriculum when supervised by teachers and designed to teach students skills or particular knowledge.[18] In reaching this conclusion, the Court articulated a different standard than the one set forth in *Tinker*. The Court held educators may regulate student speech in school-sponsored activities "so long as their actions are reasonably related to legitimate pedagogical concerns."[19]

Reading these three cases together, a school may regulate expression in a "school-sponsored expressive activity" so long as the regulation is "reasonably related to legitimate pedagogical concerns."[20] Lewd speech can be regulated regardless of whether

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[14] *Hazelwood Sch. Dist.,* 484 U.S. 260, 262 (1988)
[15] *Id.*
[16] *Id.* at 263
[17] *Id.* at 270-71
[18] *Id.* at 271
[19] *Id.* at 273
[20] *Id.*

the speech is part of a school-sponsored activity and the regulation need not be related to legitimate pedagogical concerns.[21] Finally, if the expression is neither lewd nor part of a school-sponsored activity, it can only be regulated if it substantially disrupts school operations or impairs the rights of others.[22] However, these questions are exacerbated by the expansion and increasing pervasiveness of technology in our nation's schools. The growing popularity of social media websites such as Facebook, MySpace, and Twitter, and the increased presence of computers in the learning environment, has led to a number of problems. Some students use these sites to harass other students or insult teachers and school administrators. The fundamental question becomes, do schools have the right to regulate student expression on the Internet? How about student expression that originates on a home computer, but is accessed at school? Can schools do anything about the increasing problem of "cyber-bullying," or does this responsibility fall on parents and the respective states? The next section will address such questions.

What Can the Courts Do?

Every person that has ever attended middle school or high school knows that there is a level of bullying or harassment accompanied by school attendance. In a modern context, this bullying is exacerbated by technology. Students now harass other students via text message, email, or through the use of certain social media websites. Such harassment is often referred to as "cyber-bullying." "Cyber-bullying" is worse than traditional bullying in a number of ways. First, it severely affects an adolescent's already-fragile emotional state. Second, victims of "cyber-bullying" do not escape the harassment when they leave school; they are often subject to threats and harassment

[21] *Bethel* 478 U.S. at 685
[22] *Tinker* 393 U.S. at 513

around the clock. Finally, given the pervasiveness of the Internet, such threats and harassment are often more public than traditional bullying and can be viewed by other students attending the same school. "Cyber-bullying" is a serious problem, but how can schools regulate student activity online without violating the First Amendment?

Recently, several courts have been faced with the problem of school regulation of student conduct on the Internet. One such case was *Coy v. Bd. of Educ. of the North Canton City Sch.* In *Coy*, a student created a website on his home computer and on his own time.[23] The website contained mostly biographical information about himself and some of his friends.[24] However, there was a section titled "Losers," that contained the pictures of three boys who attended the same school as defendant.[25] Under each picture, there were derogatory statements about each boy.[26] When the website was brought to the attention of school officials, the superintendent originally suspended the defendant for four days, and then expelled him for eighty days because he did not approve of the website's content.[27] Defendant alleged the school administrators violated his rights under the First Amendment by disciplining him for the content of his website.[28]

The court decided to apply *Tinker*'s standard because there was no evidence that defendant brought his website to the attention of other students; therefore, it was a "silent, passive expression of opinion."[29] The court refused to grant summary judgment because it reasoned that material issues of fact existed as to the basis for the student's

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[23] *Coy v. Bd. of Educ. of the North Canton City Sch.*, 205 F. Supp. 2d 791, 795 (N.D. Ohio 2002)
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 794
[28] *Id. at 798*
[29] *Id.* at 800

punishment.[30] The school argued it punished the student for accessing an unauthorized website while on school grounds, and the content of the website was only considered for disciplinary purposes because it contained vulgar words.[31] However, the student presented evidence he was actually disciplined because of the content of the website.[32] The court ruled a material issue of fact existed as to which explanation was correct.[33] Moreover, the court said if the school did in fact punish the student for the content of his website, then the student would prevail because such punishment would be unconstitutional under the First Amendment.[34]

In another case, a student compiled a list of insults directed at a school official and emailed the list to several of his friends.[35] A fellow student eventually printed off the list and distributed it on school property.[36] The student who originally created the list was suspended ten days and eventually brought suit alleging that his rights under the First Amendment had been violated.[37] The court ruled in favor of the student and decided the suspension was indeed a violation of the First Amendment.[38] In reaching this decision, the court reasoned that school officials have less authority in regulating speech that occurs off school grounds, as the speech here did.[39] However, the court believed *Tinker* applied because the off-campus speech eventually made its way onto school grounds.[40]

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[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 448 (W.D. Pa. 2001)
[36] *Id.* at 449
[37] *Id.*
[38] *Id.* at 455
[39] *Id.* at 454
[40] *Id.*

The fact another student brought the list onto school grounds was immaterial.[41] Applying *Tinker*, the court decided the off-campus speech was protected because it did not cause a substantial disruption in school operations, nor was there any reason to anticipate it would cause a disruption in the future.[42]

From *Coy* and *Killion*, a number of conclusions can be drawn. First, it is very difficult for a school to regulate student expression that occurs outside of school. The student in *Coy* accessed his website while at school and apparently told other students about the website because it was other students that brought the website to the attention of administrators. Yet, the court applied *Tinker*, reasoning the website was a "silent expression of opinion."[43] This reasoning I find very troubling. How can a website be a "silent expression of opinion" when it is publicly accessible, and made known to other students? One would presume the students being insulted on the website had to know of its existence and were thus harmed by the website's continued existence. Given these decisions, schools are very limited in what they can do to regulate a student's online activity. A school would have to show the online speech substantially disrupted school operations, which would be a very difficult evidentiary burden. A student harassing another student online would not meet these criteria. So what's to be done? The next section will address why "cyber-bullying" is such a problem and why steps need to be taken to address it.

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[41] *Id.*
[42] *Id.* at 455
[43] *Coy* 205 F. Supp. 2d at 800

Cyber-bullying Often Leads to Tragedy

"Cyber-bullying" is very serious and action needs to be taken to prevent such harassment. Since schools are limited in their ability to regulate student speech online, regulation of "cyber-bullying" requires the cooperation of state government, schools, and most importantly, parents. Consider the case of Samantha Kelly from Huron Township, Michigan. Samantha was 14 years old and a freshman at Huron High School.[44] In September 2010, Samantha and her mother filed charges against a senior at her high school alleging statutory rape.[45] After the charges were filed, Samantha faced harassment and taunting at school and over Facebook. Two months later, on November 8, Samantha collapsed under the stress of the bullying and hung herself.[46] Shockingly, the bullying continued even after her death.[47] After Samantha committed suicide, her family set up a Facebook page in remembrance of her.[48] That Facebook page was defaced with horrifying images of her head in a noose and terrifyingly insensitive comments such as, "it's not rape if they're dead."[49] The most horrifying part of these events is that such atrocious conduct is becoming more and more prevalent.

Or, consider the case of Phoebe Prince. Phoebe was a fifteen-year-old freshman in Hadley, Massachusetts.[50] Phoebe moved to Massachusetts from Ireland with her

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[44] *Girl Kills Self After Being Bullied Over Rape Allegations*, AOL News, November 10, 2010, *available at*: http://www.aolnews.com/2010/11/10/girl-kills-self-after-being-bullied-over-rape-allegations/
[45] *Id.*
[46] *Samantha Kelly Bullied to Death: Mich. 14-Year-Old's Suicide Followed Harassment After Rape Claim*, CBS News, November 11, 2010, *available at*: http://www.cbsnews.com/8301-504083_162-20022556-504083.html
[47] *Samantha Kelly, 14, Cyberbullied Even After Suicide*, CBS News, November 12, 2010, *available at*: http://www.cbsnews.com/8301-504763_162-20022676-10391704.html
[48] *Id.*
[49] *Id.*
[50] De Nies, Yunji, *Mean Girls: Cyberbullying Blamed for Teen Suicides*, ABC News, January 28, 2010, *available at*: http://abcnews.go.com/GMA/Parenting/girls-teen-suicide-calls-attention-cyberbullying/story?id=9685026

family prior to entering high school.[51] When she started school, she began seeing an older football player and for this, she was the subject of hatred and contempt from some of the older girls at her school.[52] She received several threatening emails and online messages before eventually committing suicide.[53] One theme continues to reappear in these tragic stories: an adolescent is bullied at school and online, other students often have knowledge of such bullying, and little to nothing is done until after tragedy strikes.

Another tragic story is that of Megan Meier, a thirteen-year-old girl from Dardenne Prairie, Missouri.[54] The mother of one of Megan's former friends created a fake MySpace account pretending to be a sixteen-year-old boy named Josh.[55] "Josh" befriended Megan and they began flirting online.[56] Eventually, "Josh" began sending Megan insulting and hurtful messages that tormented her.[57] Megan, who had a history of depression, eventually took her own life when she received a message from "Josh" saying, "the world would be a better place without you."[58] Clearly, "cyber-bullying" has awful, sometimes horrendous, consequences for young adolescents. But the problem does not stop there, the same tragedies have occurred on college campuses as well.

Tyler Clementi was a freshman at Rutgers University.[59] Tyler's roommate at Rutgers allegedly set up several spy cameras in their dorm room.[60] One day Tyler was alone in his dorm room with a male acquaintance, and his roommate went to another

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[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] Maag, Christopher, *A Hoax Turned Fatal Draws Anger but No Charges*, New York Times, November 28, 2007, *available at*: http://www.nytimes.com/2007/11/28/us/28hoax.html
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Spaulding, Pam, *Why Did Tyler Clementi Die?*, CNN, September 30, 2010, *available at*: http://articles.cnn.com/2010-09-30/opinion/spaulding.rutgers.suicide_1_tyler-clementi-video-suicide-harassment-gay-students?_s=PM:OPINION
[60] *Id.*

freshman's room to watch a live feed from the cameras.[61] The roommate saw Tyler kissing the other boy and began to record the feed.[62] The recording was then distributed via the social media website, Twitter.[63] When Tyler found out about this, he was so humiliated and dejected that he took his own life.[64]

The tragedies of these young teenagers offer a horrifying perspective into human psychology and also illuminate the dangers of "cyber-bullying." Clearly, such behavior needs to be stopped or at least, regulated. However, there are a number of problems when it comes to protecting teens from such online harassment. First, the harassment can be anonymous. Like in the case of Megan Meier, a fellow student can set up a fake account on any number of social media websites and use that account to harass the victim. Second, "cyber-bullying," while vindictive and callous, rarely reaches a level of criminality. Therefore, even if a law were made in an attempt to prohibit such online harassment, it would be very difficult to formulate a statute to encompass the range of online activities that could lead to tragedy. Finally, schools are probably not the most effective entities to regulate such behavior because most "cyber-bullying" occurs outside the school. As discussed in the cases *infra*, the schools would have to show a nexus between the speech and a disruption at school, which would be very difficult to prove. Not to mention the difficulties and privacy issues associated with monitoring students' online activities. Consequently, the only effective way to regulate "cyber-bullying" is through a joint effort by states, schools, and parents. The government needs to enact a "cyber-bullying" statute, schools need to remain vigilant for evidence of "cyber-bullying"

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[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*

and act when intervention is necessary, and parents need to monitor their child's online activity and counsel them about the dangers of such online harassment.

Conclusion

Hopefully, the discussion to this point has highlighted that "cyber-bullying" is a very real problem and something must be done to prevent future tragedies. Currently, the state of Illinois mandates that schools have an Internet safety course incorporated into their school curriculum. The schools are to teach kids about several issues related to safety in online interactions, among them, "recognizing and reporting online harassment and cyber-bullying."[65] This statute is an important step in the right direction; however, I fear it is not enough. Illinois should require mandatory reporting in certain situations where the school finds out about "cyber-bullying" and believes it necessary to act in order to prevent significant threat of harm. Moreover, the state should enact a criminal statute that criminalizes conduct like the conduct in the story of Megan Meier. If someone creates a fake account on one of the many social media websites with the sole purpose of intentionally inflicting emotional distress on another person, that person should be held accountable for the consequences. Finally, and most importantly, parents need to take the responsibility of monitoring their children's online activity. They need to counsel their children about the dangers of "cyber-bullying" and they need to be vigilant in order to ensure their child is not being a "cyber-bully." Cooperation, communication, and education are essential to reduce this practice among our nation's adolescents and in our nation's schools. Hopefully, these affirmative steps can prevent future tragedies. One thing is for sure: something *needs* to be done.

[65] 105 ILCS 5/27-13.3(c)