CYBERBULLYING:
A STATE PROBLEM, NOT A SCHOOL PROBLEM

“Congress shall make no law…abridging the freedom of speech”\(^1\). This statement does not apply merely to adults in a public forum, but to all individuals. However, the Supreme Court has limited in-school, student speech since its seminal decision in Tinker v. Des Moines, and expanded what kind of speech is effectively “in school”. However, in the evolving area of “cyberbullying”, it is difficult to determine when speech that occurs outside of the schoolhouse gates is “student speech” in that it substantially disrupts learning in school, and what speech is merely a minor’s free expression irrespective of their status as a student. The Supreme Court has addressed student speech issues in a variety of contexts, but in these close decisions, it is often the justice’s dissents and concurring opinions which shed light on what direction the law will go in the future in instances of harmful student speech.

BRIEF HISTORY OF SCHOOL SPEECH

In Tinker v. Des Moines, students planned to wear black armbands to school in peaceful opposition to U.S. conflict in Vietnam.\(^2\) School authorities preemptively created a policy prohibiting such “speech” in order to quash any potential conflict that the armbands would create.\(^3\) The students, by their parents, brought action, and the Supreme Court held that students who were passively expressing their first amendment rights in such a manner which did not harm or disrupt any other student were allowed to do so.\(^4\) Students are “persons” under the constitution, and “free speech is not a right that is given

\(^1\) U.S. Const. amend. I
\(^2\) Tinker v. Des Moines, 393 U.S. 503 at 504 (1969)
\(^3\) Id.
\(^4\) Tinker v. Des Moines at 512.
only to be circumscribed that it exists in principle but not in fact.”5 In his dissent, Justice Harlan suggested a rule that in such cases, the complainant would have to prove that the school’s policy was enacted for a reason besides a legitimate school concern, such as “a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.”6

Tinker held that a student’s non-disruptive speech was protected by the First Amendment. In Bethel School Dist. v. Fraser, only seven years later, the court slightly reeled in this notion. In Bethel, a high school student gave a lewd speech at a school assembly which was very disruptive and even disturbing to younger students.7 The court held that such speech was not protected by the First Amendment. Fraser established that Tinker’s mode of analysis isn’t absolute since the Fraser court did not conduct the “substantial disruption” analysis. However, while not expressly stated, speech which is lewd in a sexual nature was the basis for the decision in Bethel, not merely provocative speech. One of the distinctions between adults and children stressed by the Court was the legitimacy of protecting minors from exposure to vulgar language. Further, while a school must give reason for prohibited conduct, given the school’s need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.8 However, the Court did not hold that school rules could be devoid of any detail, just that they may be vague in anticipation of unknown future student conduct.

5 Id. at 513.
6 Id. at 526.
7 Bethel Sch. Dist. v. Fraser, 478 U.S. 260 (1988)
8 Fraser, 478 U.S. at 686.
A student’s personal speech was safe under Tinker. Bethel seemingly limited only speech which was lewd and disturbing, especially to younger students. However, In Hazelwood v. Kuhlmeier, the Court determined that a school sponsored newspaper was not a public forum, and because it bore the name of, and was partly funded by, the school, student’s articles were free to be censored at the school’s discretion. In Hazelwood, articles which discussed divorce and teenage pregnancy which thinly disguised the subject’s identities were cut from the draft of the student run newspaper by the principal before it was printed. The court distinguished this type of speech from that in Tinker. Tinker addressed “the ability to silence a student’s personal expression that happens to occur on the school premises.” This case concerned “educators’ authority over school-sponsored publications…that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” The Court held that school’s retain the discretion to censor school sponsored speech which may reasonably seem to promote or advocate anything outside of its values or mission, such as drug or alcohol use or irresponsible sexual behavior. In his dissent, Justice Brennan stated that this standard goes to far and that “free student expression undoubtedly sometimes interferes with the effectiveness of the school’s pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission.”

11 Id. at 271
12 Id.
13 Id. at 272.
14 Id. at 279.
Under these three decisions, school may regulate school sponsored speech on the basis of any legitimate pedagogical concern, and the speech need not be school sponsored if it is lewd and vulgar and spoken on school property. If the speech does not fit into either of these categories, the school may discipline a student only if it falls under the general rule of Tinker, that is, if it would substantially disrupt school operations or interfere with the rights of others. In Morse v. Frederick, a student’s speech was held to be school speech, even though he joined a school field trip without first reporting to school. While this decision determined that such speech was in fact “school speech”, it was the Justices concurrences and dissents which expressed where the court may be going on such issues in the future. Justice Thomas, in his concurrence, argued that if students or parents do not like or agree with the rules imposed by the schools, they have other avenues for ensuring their children aren’t subjected to those rules, such as electing different school board members or sending their children to private schools.\(^{15}\)

Furthermore, Justice Thomas denounced the Tinker opinion in that it took away the school’s ability to make its own mission.\(^{16}\) Finally, he said that “local school boards, not the courts, should determine what pedagogical interests are “legitimate” and what rules “reasonably relate” to those interests.”\(^{17}\) Justice Alito’s concurrence, in which Justice Kennedy joined, expressed the opposite view. He said that the “educational mission argument” would give public school officials a license to suppress political and social speech based on disagreement with the viewpoint expressed. Suppressing speech

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\(^{15}\) Morse v. Frederick 127 U.S. 2618 at 2635.

\(^{16}\) Id. at 2636.

\(^{17}\) Id.
based on the position expressed, rather than suppressing any disruptive speech, strikes at
the very heart of the First amendment.\textsuperscript{18}

Justice Stevens dissent, joined by Justices Souter and Ginsburg, is similar to
Justice Alito’s concurrence. He wrote, “The First amendment protects student speech if
the message itself neither violates a permissible rule nor expressly advocates conduct that
is illegal and harmful to students… the court does serious violence to the First
Amendment in upholding, indeed lauding, a school’s decision to punish Frederick for
expressing a view with which it disagreed.”\textsuperscript{19}

**NEW ERA OF STUDENT SPEECH**

Based on the idea that a school can have a mission statement, which is detailed
out in a handbook or code of conduct, and that out of school speech may in fact be school
speech if it effects the safety or disrupts the learning of students, the United States has
entered a gray area in the law with respect to a new phenomenon in schools:
cyberbullying. Cyberbullying involves students using any form of electronic media,
usually the internet, text, and picture messaging, to intimidate, harass, and generally bully
their peers. However, such actions rarely go so far as to be punishable criminally, and
outraged parents often look to the schools to handle these issues, even when such
“speech” occurs outside of school. However, while parents may feel that it is the school’s
responsibility to make their children feel safe at school, unless there is a “true threat”
there is very little that the school can do to punish children who make cruel statements to
others outside of the school context. While there is little repercussions for students who
create false website profiles which make fun of others, or for those who pass along cruel

\textsuperscript{18} Id. at 2638.

\textsuperscript{19} Id. at 2644.
text messages or private photos, such events effect most students throughout their school years. In a 2007 study, the Federal Probation Juvenile Department found that ninety percent of students had their feelings hurt online in some forum, while seventy-five percent had visited a website which made fun of another student. 20 While some states have passed initiatives or laws to combat bullying, the law is still far behind the technology in punishing cyber bullying. However, schools lack the authority to punish students for bullying which occurs outside of school.

In Emmet v. Kent School Dist. No. 415, a student made a website with fake obituaries of his fellow students, and allowed students to vote on which students should be written about in this way next. 21 The school found out about this website, which was created on the child’s personal computer and they attempted to suspend him. The court held that he school had presented no evidence that the mock obituaries and voting on this web site were intended to “threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.” The school was enjoined from enforcing the suspension. Although the speech was obviously intended for Kentlake High School students, the court held that it was “entirely out of the school’s supervision or control.”

In Killion v. Franklin Regional School Dist., a student created a list on his home computer which made fun of his teacher and track coach. 22 He then e-mailed it to fellow students but never brought it to school. The court held that such actions did not fall under the school speech prong, nor would they create such a substantial disruption to warrant punishment. While phrases in the list were lewd (referring to the teacher’s genitals),

21 Emmet v. Kent School Dist. No. 415, 92 F. Supp. 2d at 1090
22 Killion v. Franklin Regional School Dist., 136 F. Supp 2d 446 at 448
because they were not spoken in school and there was no reason to believe that younger students would be exposed to the list, it was not punishable under Bethel v. Fraser. In Fraser, the Court made clear that school officials may punish explicit, indecent, or lewd speech “to make the point to pupils that such speech is wholly inconsistent with the ‘fundamental values' of public education.”23 However, in a concurring opinion, Justice Brennan noted that, “[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”

In order to punish off campus speech which affects students while they are in school, the school has to find a "nexus" between student speech and the school's campus. 24 There is a loose test currently established which requires this nexus, and then the speech has to substantially and materially disrupt the learning environment. Another way the courts will uphold disciplinary actions is if there is a "true threat" from the internet speech. This standard has been applied differently by different courts, such as whether a reasonable person in the student’s position could foresee that the speech would be interpreted as a serious expression of harm.25 Other courts have interpreted the meaning of “true threat” as whether the threat was “unequivocal, unconditional, immediate and specific as to convey a gravity of purpose and immediate prospect of execution.” 26

When speech clearly does not represent a “true threat”, and is simply cruel or malicious, it is difficult for school officials to punish the students who create it when it is clear that it was not created on school grounds. In Donovan v. Ritchie, approximately 15

23 Bethel v. Fraser, 478 U.S. at 686-87
26 United States v. Kelner, 534 F.2d 1020 at 1027 (1976)
students made a list on the internet naming over a hundred students, by first initial and full last name, and made disparaging remarks about them.27 The school’s principal said that the list was a violation of the school's rules, as set forth in the school handbook, against harassment and obscenity. After the meeting, Ritchie met with appellant and his mother and said he was indefinitely suspended. The school’s handbook made it clear that certain behavior would not be tolerated. The handbook included the following: (1) the cover, which called for an end to name calling, harassment, “put downs;” (2) an opening statement proscribing “harassment of any kind;” (3) a section prohibiting violent behavior, vandalism, or violation of students' civil rights on school premises or at school-related events, carrying the sanction of indefinite suspension or expulsion; and (4) a section barring abusive or obscene language or materials.28 The court held that this suspension was valid. While the issue here was on one procedural due process, nowhere in the decision is the test for school speech discussed. However, his case goes against the others and uses the pedagogical message argument successfully. Because the child knew or should have known about the rules regarding harassment, he was put on notice and therefore could not claim he did not know the rule before violating it. Even so, because none of this conduct occurred on school grounds, nor was there a true threat made, or a risk of substantial disruption, it does not follow with the decisions of other circuits. While this may seem like the right answer to parents of children who are bullied in this fashion, this speech did not meet the standards for the child’s actions to be brought under the umbrella of the school’s authority.

27 Donovan v. Ritchie 68 F.3d 14 (1st Cir.1995)
28 Donovan v. Ritchie 68 F.3d 14 at 21
Cyber bullying is difficult to punish because of its general anonymity, and it can result in a greater impact to students because it is widely distributed and more public than traditional bullying. It is difficult to discipline these students because rarely do their actions meet a high enough standard to qualify as the type of school speech which leads to punishment. Further, outside of the school setting it is difficult to bring legal action against these children because the traditional venue of harassment has a high standard as well, which is rarely met by the actions of students creating web pages or sending along embarrassing text messages. The states need to enact litigation which would create an avenue for the state, not acting through the schools, to police this type of behavior. For example “cyberbullying” could be defined by legislature and punishable by expulsion from public school and mandatory enrollment in a school for children for behavioral problems. While this may not effect students to the degree that it would stop them from wanting to create such websites, informed parents would be more likely to monitor internet usage and ensure that their child is not threatening his academic future.

The only current legislation that Illinois has enacted with regards to internet usage by students is completely ineffective in counteracting cyberbullying. It states, “each school MAY adopt an age-appropriate curriculum for internet safety instruction for children in grades k-12, but they MUST incorporate a component of internet safety for all students in grade 3 and above.” Topics that are recommended are “recognizing and reporting online harassment and cyber-bullying.” While it a great to say that students are learning about internet safety and how to recognize cyberbullying, it is naïve to think that these students are going to take the high road and report one of their fellow students.

29 105 ILCS 5/27-13.3(c)
30 105 ILCS 5/27-13.3(c)(5)
While most of the cyber-bullying cases start with a child’s speech and end without harm to any student, teacher, or school administrator, the case of Megan Meier is tragically different. After her child had a conflict with Meier, Lori Drew, with two others, created a Myspace account portraying a teenage boy named Josh who was interested in Meier. They carried on this fictitious relationship until they had gained Meier’s trust, and then told Meier that she was worthless and that the world would be better without her. Meier hung herself in her closet that night. Drew was convicted on three misdemeanor counts of computer fraud, which was overruled in federal district court. Missouri prosecutors sought to charge Drew with a crime, but because there is no federal cyber-bullying statute, they had to settle for the computer fraud charges and intentional infliction of emotional distress. The jury found that there was not enough evidence to prove that Drew herself had caused Meier’s distress. While Drew was the subject of criminal litigation, it was her former employee, Ashley Grills, and Drew’s 13 year-old daughter Sarah who conceived the idea, according to testimony. If minors were held accountable for such actions, not in the school setting, but legally, perhaps this wouldn’t have happened. Drew’s actions in allowing this to happen are deplorable, and had she not been involved, her daughter may well have been held liable. However, these situations, as tragic as they may be, should not be under the school’s authority to discipline.

In the aftermath of this tragedy, the Megan Meier Cyberbullying Prevention Act was introduced in to the House of Representatives on April 2, 2009. While it has only been referred to committee, if passed, this Act could change the way that the state handles these issues. This law would make anyone who creates or transmits any material.

31 http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1966:
with the intent to harass, cause distress, or bully anyone could be fined or imprisoned up
to two years. While the language of the bill is relatively vague and would need more
polish, this bill could be the future, and end, of cyberbullying as we know it.

Cyberbullying is an increasing problem due to its unique, and relatively new,
nature. While its effects on those who are targeted can range from mere hurt feelings, to
actual distress, to suicide, it is difficult to punish. Schools are often powerless because the
speech does not fall under their jurisdiction, yet the conduct is rarely bad enough to
qualify for criminal sanctions. The new bill which addresses these issues may be a
turning point in the way these incidents are punished, but as we see in many problems
which involve the triangular relationship between child, parent, and state, when a parent
is reluctant to acknowledge his child’s behavior, and the state has no reasonable action,
the behavior will continue. However, as much as parents hope that these problems can
continue to be handled by the state in their capacity in the schools or through legal action,
when neither of these avenues will address the problem, it should fall on parents to ensure
that their children are not doing the bullying. Further, parents should hold themselves
accountable for their children’s internet usage, and perhaps even have dialogue at school
about what websites are age appropriate, and how to discipline their children when they
have become cyber bullies. Without parent involvement, this is a problem that will never
end.