

Student Internet Speech and the First Amendment in the Age of MySpace and Facebook

With the proliferation of social networking websites and their popularity among young adults, courts will have to determine the scope of administration and student rights as they pertain to these websites. This issue is becoming increasingly urgent, as demonstrated by research indicating that over half of students of middle and high school age visit social networking websites.¹ This paper will primarily discuss social networking websites as they apply to student freedom of speech and cyber bullying.

Freedom of Speech

Ever since the Supreme Court famously proclaimed that public school students do not “shed their constitutional rights to freedom of expression at the schoolhouse gate,” the Court has limited the scope of First Amendment protections available to these public school students.² Most recently, in *Morse v. Frederick*, the Supreme Court held that drug-related speech made outside of school but during a school-sponsored event could be banned by the school.³ Although the Court had an opportunity in *Morse* to decide whether schools could regulate student speech that occurred outside the school grounds, it chose not to do so. This is particularly relevant in the context of Internet speech, because the line between speech that occurs inside or outside of school – or even school-sponsored activities – is very blurry.

It is apparent from the Court’s jurisprudence that speech that occurs on school grounds or during a school-sanctioned event is not subject to full First Amendment

¹ Amanda Lenhart & Mary Madden, PEW Internet and American Life Project, Social Networking Website and Teens: An Overview 1 (Jan. 3, 2007).

² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

³ 551 U.S. 393 (2007).

protection.⁴ Therefore, much of the debate about Internet speech hinges on the question of whether Internet speech should be considered on-campus or off-campus speech.

Complicating matters is the fact that students have enjoyed an increasing ability to access the Internet from a variety of locations and on a variety of devices ranging from school-issued laptop computers to personal Blackberry cellular phones – both within and without the schoolhouse gate. Therefore, it is undoubtedly true that students are creating pages on these social networking websites at home and updating them at school – and vice versa. A debate that focuses on the locus of the speech’s origin misses the point.

Some aspects of the Court’s analysis of more traditional student speech still pertain; with one such example being the material and substantial interference test from *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*⁵ In *Tinker*, the Supreme Court held that where student speech “materially disrupts classwork or involves substantial disorder or invasion of the rights of other is...not immunized by the constitutional guarantee of freedom of speech.”⁶ The successor to *Tinker*, *Bethel Sch. Dist. v. Fraser*, held that offensive, lewd, or indecent speech is also not entitled to First Amendment protection.⁷ Finally, the *Hazelwood Sch. Dist. v. Kuhlmeier* Court held that a school administration could censor student speech if the speech “bears the imprimatur of the school” and if the censorship relates to a legitimate pedagogical concern.⁸

The *Tinker – Fraser – Hazelwood – Morse* line of cases indicates that the Court is marching toward an endorsement of a highly restrictive public school environment.

⁴ See generally, *Tinker*, 393 U.S. at 513; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

⁵ *Tinker*, 393 U.S. at 513.

⁶ *Id.*

⁷ 478 U.S. 675, 685 (1986).

⁸ 484 U.S. 260, 271 (1988).

There is no evidence as of yet to assume this attitude will change when the Court must decide how to treat student speech on the Internet. Interestingly, Internet speech issues touch on the holdings in each of these cases. The substantial disturbance test from *Tinker* can apply since some Internet speech can seriously disrupt the learning environment. *Fraser* may apply to vulgar or lewd Internet speech, which is presumably prevalent on teens' personal websites. Moreover, the *Hazelwood* analysis can apply if the student creates a website that resembles or holds itself out to be school-sponsored, and the *Morse* analysis will be relevant if a website the administration seeks to censor was created for or related to a school-sponsored project or was created on school grounds.

Choosing a framework to suggest to courts is exceedingly difficult. One commentator suggests that the *Tinker* analysis provides the best framework for schools to regulate student Internet speech, since when students intend their Internet speech to cause a substantial disruption on campus the administration has a clear right to restrict the speech.⁹ As intimated above, the *Morse* framework is less than ideal because of how pervasive the Internet has become for students. Additionally, administrators will likely find that the *Hazelwood* analysis ties their hands unnecessarily because students could simply act without any indication that the website is affiliated with the school and avoid censure. The *Fraser* framework would appeal to administrators because they could censor speech they object to, but adopting this framework to speech that does not necessarily intrude on school grounds or activities could violate the far more robust protection afforded to student speech that occurs outside of school.

⁹ Christopher E. Roberts, *Is MySpace Their Space?: Protecting Student Cyberspeech in a Post-Morse v. Frederick World*, 76 U.M.K.C. L. Rev. 1177 (Summer 2008)

Applying *Tinker* allows a favorable balancing between the need for administrators to punish students for inappropriate and potentially dangerous Internet speech and the First Amendment protections available to students who choose to express their opinions online. An example of a situation where a court found in favor of the student's First Amendment rights was *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*¹⁰ That case involved a challenge to a suspension stemming from a that student's webpage created at home that used vulgar language to express his displeasure with the faculty and administration at his high school. Beussink's page also linked to the official website of the school.¹¹ Focusing on the fact that the student's webpage did not cause any disruption – much less a substantial one – at school, the court stated that the “public's interest is best served by wide dissemination of ideas.”¹²

Another case where the court reached the same result facing a far more complicated factual situation occurred in *Emmett v. Kent Sch. Dist. No. 415*.¹³ Emmett's website was dubbed the “Unofficial Kentlake High Home Page,” (although it contained disclaimers stating that it was not sponsored by the school) and contained a section for “obituaries.”¹⁴ Although the obituary section of the site was apparently inspired by a creative writing assignment, the website did invite submissions for who would be the next to “die.”¹⁵ It is worth noting at this point that this case took place in the wake of the school shootings at Columbine High School and that the national sensitivity to incidents

¹⁰ 30 F. Supp. 2d 1175 (E.D. Mo. 1998)

¹¹ *Id.* at 1177.

¹² *Id.* at 1181.

¹³ 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

¹⁴ *Id.* at 1089.

¹⁵ *Id.*

like Columbine one was extremely high.¹⁶ Emmett was expelled for the content on the website after a television station reported that the website was a sort of hit list.¹⁷

The court distinguished several of the Supreme Court's student speech precedents, finding that Emmett's Internet speech was different from the situation in *Fraser* because there was no school assembly. The court also distinguished *Kuhlmeier* because there was no question that the website was unconnected to Kentlake High School – despite the webpage's name.¹⁸ Although the court did acknowledge that school administrators were in a difficult position in light of the Columbine incident, it ultimately held that there was no demonstrated intent to harm anyone and, without that, the First Amendment protections precluded punishing Emmett.¹⁹

However, the Second Circuit's *Wisniewski v. Bd. of Ed.* decision, held that a student outside of school sending Instant Messages to his friends that showed an icon of a gun firing at a head with words that advocated killing one of his teachers could be reprimanded by the administration.²⁰ The Second Circuit created a new test that was based on the Supreme Court's test in *Tinker*. In short, where there is a reasonably foreseeable risk of a substantial disruption occurring, the school can regulate the student speech.²¹

Because of the potential for administrations to prevent a violent Columbine-type incident, any general rule that the Supreme Court adopts to protect student Internet speech should include an exception modeled after the Second Circuit's decision in

¹⁶ See generally Dave Cullen, *Columbine*, Twelve (2009).

¹⁷ *Emmett*, 92 F. Supp. 2d at 1089.

¹⁸ *Id.* at 1090.

¹⁹ *Id.*

²⁰ 494 F.3d 34, 38 (2007)

²¹ *Id.*

Wisniewski. This exception needs to be narrowly drawn in order to prevent it from swallowing what should be broad protection to student speech on the Internet. Since cyber bullying and sexual harassment have become so prevalent among school-age children, however, there likely does need to be some latitude granted to administrators in order to prevent students from using the First Amendment as a sword instead of a shield.

Cyber Bullying

In the past few years, cyber bullying has become a serious problem in schools. Cyberbullying can be threatening speech between any two or more people, including teacher-to-teacher bullying, student-to-teacher bullying, or the most common student-to-student bullying. Like “traditional” bullying, a consensus definition of what constitutes cyberbullying is impossible to state. Examples of cyberbullying behavior range from things as mundane as sending an e-mail that upsets its recipient to posting threatening comments on one’s Facebook page.²² As pointed out by one commentator, it “reaches beyond the schoolyard as technology affords the bully a veil of anonymity with instantaneous 24/7 access to the victim before an unlimited Internet based audience of bystanders and supporters.”²³ Unlike physical bullying, the victims of cyber bullying cannot escape their tormentors by returning home. According to recent research, nearly 45 percent of students between grades six and eight have been victims of some form of cyberbullying.²⁴

²² Sameer Hinduja and Justin Patchin, *Bullying Beyond the Schoolyard: Preventing and Responding to Cyberbullying*, Sage Publications (2008); available at <http://www.cyberbullying.us/research.php>.

²³ Jill Myers and Gayle Carper, *Cyber Bullying: The Legal Challenge for Educators*, 238 Ed. Law Rep. 1, 1 (2008).

²⁴ *Supra* Note 22.

A number of states have taken steps to criminalize cyberbullying, with nearly every state having at least discussed such legislation.²⁵ Many states are also requiring their public schools to take preventative measures. Illinois, for example, passed a law in January requiring every student enrolled in grade 3 or higher to be taught Internet safety as a component of their curriculum.²⁶ Included in this legislation was a recommendation that there be lesson on recognizing and reporting cyberbullying.²⁷ Despite this legislation, neither Facebook nor MySpace has any prohibition on engaging in threatening or bullying behavior.

The role of the two main social networking websites play in this issue should not be underestimated. MySpace and Facebook allow anyone with an e-mail address to post their own page and gain access to the various networking tools these websites provide to their members. With very limited exceptions, these websites have no restriction on what users can post on them.²⁸ At their worst, these websites offer a forum for school-age children to bully and intimidate one another with relative anonymity and impunity, to post photos of a classmate without his or her permission, to spread rumors about students and faculty, and to sexually harass each other. At their best, these websites offer an environment for students to interact with each other, collaborate on school assignments, and get exposed to a diversity of opinions.

To date, courts have not had much occasion to review claims of cyberbullying. In one example case where a court did consider student Internet speech in a threatening

²⁵ Supra Note 23 at 5.

²⁶ 105 ILCS 5/27-13.3 (West 2009).

²⁷ Id.

²⁸ Stacy Chaffin, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 How. L.J. 773, 786 (2008).

context, the Commonwealth Court of Pennsylvania found expulsion for the speech did not violate the student's First Amendment rights.²⁹ The website in that case included a graphic portrayal of a beheaded teacher, a solicitation for donations to purchase a hit man, and ultimately caused the teacher to miss more than a year on medical leave.³⁰ Although the court made a point of acknowledging the seriousness of the student's First Amendment claims, it ultimately found that the foreseeable substantial disturbance and the seriousness of the threat of violence outweighed them.

In what has been called the first guilty verdict for cyberbullying, a Missouri woman named Lori Drew was convicted on three counts of computer fraud in November of 2008.³¹ The facts of this case grabbed headlines across the nation because they involved Ms. Drew and her teenaged daughter collaborating to create a MySpace account and profile of a fake teenaged boy that they used to torment the daughter's 13-year-old rival, Megan Meier.³² In 2006, after a few weeks of this fake relationship, Ms. Drew and her daughter, e-mailing from the fake boy's account, told Megan that the world would be better off without her. Soon thereafter, Megan hanged herself.³³ Although she has not yet been sentenced, the prosecution last week asked for the maximum sentence of three

²⁹ *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 421 (Pa. Cmwlth. Ct. 2000).

³⁰ *Id.*

³¹ Jennifer Steinhauer, *Verdict in MySpace Suicide Case*, N.Y. Times, Nov. 27, 2008, at A25.

³² *Id.*

³³ *Id.*

years for her role in the cyberbullying.³⁴ If nothing else, this case demonstrated to a skeptical public how serious the problem of cyberbullying can be.

Conclusion

Student speech on the Internet is posing a serious challenge to school officials, state and federal legislators, parents, and courts alike. Acting without any direct guidance from the Supreme Court, lower courts and legislatures must craft appropriate remedies for those victimized by cyberbullying that do not step too far into those realms protected by the First Amendment. Add to this mix the complicating reality that school violence appears to be an increasingly serious problem, and school administrators are operating either without a net or with a net with huge holes.

Suggestions abound as to what courses of action schools should take to stop Internet abuses while allowing students access to a technology that can greatly enhance learning. One of the most obvious steps for schools to take is restricting student access to websites they can use for cyberbullying and other forms of harassment. By blocking access to MySpace, Facebook, and other social networking websites, schools can take an important step to control what they can – student behavior on campus. Schools should also take steps to educate students about the dangers associated with the Internet, with an emphasis on the damage cyberbullying can cause. Whether a state legislature requires such teaching or not, given the role the Internet plays in the social and educational lives of young people, schools should be instructing children about its potential pitfalls from a young age.

³⁴ Kim Zetter, *Prosecutors Seek 3 Years in Prison for Lori Drew*, *Wired Magazine*, May 6, 2008, available at <http://www.wired.com/threatlevel/2009/05/prosecutors-seek-three-years-in-prison-for-lori-drew/>.

The more complicated question, however, is whether administrators can act to regulate student speech that occurs off-campus. It is fairly apparent that employing the Supreme Court's analysis in *Morse* will not prove helpful since speech on student webpages is unrelated to school-sponsored activities in an overwhelming majority of cases. It is also unlikely that the Court's holding in *Hazelwood* will be helpful since rarely do these websites bear anything close to the school's imprimatur.

On the other hand, *Fraser* and *Tinker* can provide some guidance for an appropriate legal standard for regulating or censoring student Internet speech. The Second Circuit did an admirable job of applying *Tinker*'s substantial disruption test to Internet speech by crafting a rule where an administration can act if there such a substantial disruption is reasonably foreseeable and caused by said speech. This rule offers some promise because it allows an administration to act where there is a likelihood of an on-campus disturbance and it requires the administration to respect the First Amendment rights of students off-campus.

With respect to *Fraser*, the MySpace suicide case should demonstrate that Internet speech that is offensive or lewd has repercussions just as serious as speeches given to an assembly of students. An argument could be made for using a combination of *Morse* and *Fraser* to allow administrators to regulate certain offensive, lewd, or harassing off-campus speech. If successful, however, such an argument would create a two-tiered First Amendment: heightened protection for out-of-school adults and practically no protection for those in school, adult or not. Such a precedent would have implications for colleges or post-graduate programs wanting to regulate such speech for adults, and could

open the door for professional associations and employers to require their employees to provide them access to their personal webpages.

Instead, any legislation, court decision, or policy regarding such Internet speech should contain two key components: an intent requirement and an actual harm requirement. Where the Internet speech is intended to harass, embarrass, or threaten school administrators should be able to act to reprimand the student. The demonstration of intent must be convincing, given the First Amendment concerns. The actual harm component should allow for psychological or physical harm, since cyberbullying results in more psychological than physical harm to its victims.

Sooner than later, the Supreme Court will be asked to rule on these very issues. Given its rapid march toward eliminating students' freedoms of speech and expression, it appears likely that the Court will lean toward allowing school administrations wide latitude in punishing students for content posted on private websites. Hopefully, the Court will at least pause long enough to realize the dangerous precedent this would be and the irreparable harm it would cause to the First Amendment protections it ostensibly holds so dear.