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DAVID L. HUDSON JR.*

Time for the Supreme Court to Address Off-Campus, Online Student Speech

Public school students and officials need to know the limits of officials' authority over off-campus, online speech. Right now, those limits are unclear. The arm of school authority appears quite broad, often extending to punish students for offensive online expression. So far, the U.S. Supreme Court has assiduously avoided several questions regarding student online speech, denying review in numerous cases.¹ This has resulted in a muddled legal landscape in which school officials don't know the extent of their authority.² Professor Clay Calvert refers to it as a "pervasive and pernicious First Amendment problem cropping up at schools across the country"³ and as a "profound muddle that is the body of jurisprudence surrounding the free speech rights of public school students in cyberspace."⁴

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¹ See, e.g., *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1095 (U.S. Jan. 17, 2012) (No. 11-461); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (U.S. Jan. 17, 2012) (No. 11-502); *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (U.S. Oct. 31, 2011) (No. 11-113).

² See generally DAVID L. HUDSON JR., *LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREE EXPRESSION IN AMERICAN SCHOOLS* 159-81 (2011).

³ Clay Calvert, *Punishing Public School Students for Bashing Principals, Teachers & Classmates in Cyberspace: The Speech Issue the Supreme Court Must Now Resolve*, 7 *FIRST AMENDMENT L. REV.* 210, 211 (2009) (footnote omitted).

⁴ Clay Calvert, *Qualified Immunity and the Trials and Tribulations of Online Student Speech: A Review of Cases and Controversies from 2009*, *FIRST AMENDMENT L. REV.* 86, 108 (2009).

For whatever reason, the Court has continued to avoid the question. It has ignored it, even though lower courts have reached very different results in these cases and applied differing legal standards.⁵ It has ignored the question even as more states pass anti-cyberbullying laws and the nation focuses more attention on problems attributed to online harassment.⁶

Some of these laws target any electronic student harassment that causes a substantial disruption at school. For example, Arkansas's law provides in pertinent part:

This section shall apply to an electronic act whether or not the electronic act originated on school property or with school equipment, if the electronic act is directed specifically at students or school personnel and maliciously intended for the purpose of disrupting school and has a high likelihood of succeeding in that purpose.⁷

Similarly, Louisiana law defines cyberbullying as:

[H]arassment, intimidation, or bullying of a student on school property by another student using a computer, mobile phone, or other interactive or digital technology or harassment, intimidation, or bullying of a student while off school property by another student using any such means when the action or actions are intended to have an effect on the student when the student is on school property.⁸

Legislators passed such statutes for a noble purpose: to protect kids from abusers and particularly from pervasive harassment that could cause a child to harm him or herself. It is difficult to argue that bullying or cyberbullying does not occur, especially when surveys of students show otherwise.⁹

But the standards must be clear, and the rules should not prohibit protected speech. After all, a most fundamental principle of free-speech jurisprudence is that offensive and disagreeable speech

⁵ David L. Hudson Jr., *Justices Leave Questions on Online Student Speech Unanswered*, FIRST AMENDMENT CENTER (Jan. 17, 2012), <http://www.firstamendmentcenter.org/justices-leave-questions-on-online-student-speech-unanswered>.

⁶ See Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies*, CYBERBULLYING RES. CENTER (July 2012), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf.

⁷ ARK. CODE ANN. § 6-18-514(e)(2)(B)(ii)(b) (West, Westlaw through 2012 Fiscal Sess.).

⁸ LA. REV. STAT. ANN. § 416.13(c)(2) (West, Westlaw through 2011 First Extraordinary and Reg. Sess.).

⁹ Nancy Willard, *School Response to Cyberbullying and Sexting: The Legal Challenges*, 2011 BYU EDUC. & L.J. 75, 80 (2011).

deserves protection. Justice William J. Brennan expressed it eloquently in the flag-burning decision *Texas v. Johnson*: “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁰

School officials may only prohibit student speech that they reasonably forecast will cause a substantial disruption of school activities. This is known as the *Tinker* standard from the celebrated decision *Tinker v. Des Moines Independent Community School District*.¹¹ When the Des Moines school district forbade students from wearing black armbands to protest the Vietnam War, the Court famously proclaimed that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹²

Most courts have applied the *Tinker* “substantial disruption” test to off-campus, online speech if they find there is a substantial nexus or connection between the online speech and school.¹³ Some have questioned this unyielding application of *Tinker* to online student expression. For example, legal commentator Justin Markey argues that *Tinker* should be applied only to off-campus, online speech cases when it is shown that the student had a clear intent to distribute or knew with certainty the online speech would be disseminated at school.¹⁴

The Third Circuit reflected a similar concern in *Layshock v. Hermitage Area School District*.¹⁵ In limiting school officials’ authority to discipline a high school student for writing unflattering things about his principal on his grandmother’s computer off campus, the court stated: “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

¹⁰ *Texas v. Johnson*, 491 U.S. 397, 414 (1989); see also David L. Hudson Jr., *5 Favorite First Amendment Passages*, FIRST AMENDMENT CENTER (Mar. 8, 2011), <http://www.firstamendmentcenter.org/5-favorite-first-amendment-passages>.

¹¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹² *Id.* at 506.

¹³ See, e.g., *J.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412 (Pa. Commw. Ct. 2000).

¹⁴ Justin P. Markey, *Enough Tinkering with Students’ Rights: The Need for an Enhanced First Amendment Standard to Protect Off-Campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 150 (2007).

¹⁵ *Layshock v. Hermitage Area Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011).

it can control that child when he/she participates in school sponsored activities.”¹⁶

Another concern with the *Tinker* test is the oft-forgotten part of the Supreme Court decision where Justice Abe Fortas, the author of the majority opinion, wrote that school officials could prohibit student expression that “collid[es] with the rights of others” or constitutes an “invasion of the rights of others.”¹⁷ The key question is: When does student speech invade the rights of other students or perhaps teachers?¹⁸ The U.S. Supreme Court has never addressed or fleshed out this prong of *Tinker*. One divided three-judge federal appeals court determined that a school district in California could prohibit a student from wearing religious-themed, anti-gay t-shirts because the language on the shirts invaded the rights of gay and lesbian students.¹⁹ The panel majority purported to limit its holding “to instances of derogatory and injurious remarks directed at students’ minority status such as race, religion, and sexual orientation.”²⁰ The dissent warned that school officials could be creating a right not to be offended, which would “effectively overrule *Tinker*.”²¹ Most courts simply never refer to the “invasion of the rights of others” part of *Tinker*.

The “invasion of the rights of others” prong could provide the justification for a broad application of anti-cyberbullying laws.²² The danger is that a student could be punished for simply uttering speech others find offensive. Perhaps if the Supreme Court examined an online student-speech case, it could also address this forgotten part of *Tinker*.

The U.S. Supreme Court itself has acknowledged the uncertainty of school official jurisdiction and when student speech is truly off-campus, noting: “There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents.”²³ That is an understatement. There are numerous unanswered questions regarding student online speech. Some of these questions include:

¹⁶ *Id.* at 216.

¹⁷ 393 U.S. at 513.

¹⁸ David L. Hudson Jr., *How Free is Student Speech?* FIRST AMENDMENT CENTER, (May 7, 2009), <http://www.firstamendmentcenter.org/how-free-is-student-speech>.

¹⁹ *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006).

²⁰ *Id.* at 1183.

²¹ *Id.* at 1198 (Kozinski, J., dissenting).

²² JAMES C. HANKS, *SCHOOL BULLYING: HOW LONG IS THE ARM OF THE LAW* 79 (2012).

²³ *Morse v. Frederick*, 551 U.S. 393, 401 (2007).

- Do school officials even have jurisdiction over purely off-campus expression?
- What is enough of a connection between an off-campus, online posting and school activities to trigger school jurisdiction?
- When does online, off-campus student speech create a reasonable forecast of substantial disruption of school activities?
- Can school officials discipline off-campus, online student speech because it invades the rights of other students?²⁴

Now, there are cases where school officials not only punish students for the content of online expression, but also demand that students release their digital passwords so they can search their Facebook or e-mail accounts.²⁵ With unfettered authority in this area, school officials' acts have been allowed to overrun the First Amendment and expand into Fourth Amendment search and seizure issues as well.

School officials desperately need guidance in the area of student online speech. The Supreme Court could provide that guidance. The Court should ensure that public school students not only retain their constitutional rights at the schoolhouse gate but also on computers, cell phones or other forms of electronic communication when they are out of school.

²⁴ Hudson Jr., *supra* note 5.

²⁵ See, e.g., R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist. No. 2149, Civ. No. 12-588 (MJD/LIB), 2012 WL 3870868 (D. Minn. Sept. 6, 2012).

