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# CONSTITUTIONAL IMPLICATIONS OF SCHOOL PUNISHMENT FOR CYBER BULLYING

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## FREE SPEECH IN SCHOOLS

Bullying has probably existed for as long as children and schools have existed. More recently however, in the United States we have experienced a spate of bullying, as well as the subset known as cyber bullying[1]—bullying via electronic means—that has led to tragic consequences for the children involved. This has motivated lawmakers and regulators to pay attention to the issue and attempt to address it.[2] Forty-nine of the fifty states have some sort of bullying legislation on the books, and many include provisions aimed at addressing cyber bullying.[3]

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[1] Unless otherwise stated in this article, the term "bullying" is intended to include the subcategory of "cyber bullying."

[2] *See* Raúl R. Calvoz, Bradley W. Davis & Mark A. Gooden, *Cyber Bullying and Free Speech: Striking an Age Appropriate Balance*, 61 CLEV. ST. L. REV. 357, 359 n.1 (2013) (listing incidents of violence and suicide related to bullying).

[3] ALA. CODE § 16-28B-4 (LexisNexis 2012); ALASKA STAT. § 14.33.200 (2013); ARIZ. REV. STAT. § 15-341 (LexisNexis 2012); ARK. CODE ANN. § 5-71-217 (2012) (declaring that cyber bullying is punishable as a Class B misdemeanor); CAL. EDUC. CODE § 48900(r) (Deering 2012); COLO. REV. STAT. § 22-32-109.1 (2012); CONN. GEN. STAT. § 10-222d (2012); DEL. CODE ANN. tit. 14, § 4112D (2013); D.C. CODE § 5-B2502.3 (LexisNexis 2012); FLA. STAT. ANN. § 1006.147 (LexisNexis 2013); GA. CODE ANN. § 20-2-751.4 (2012); HAW. REV. STAT. ANN. §§ 8-19-2, 8-19-6 (LexisNexis 2012); IDAHO CODE ANN. § 18-917A (2012) (declaring bullying criminal); 105 ILL. COMP. STAT. ANN. 5/27-23.7 (LexisNexis 2012); IND. CODE ANN. §§ 20-33-8-0.2, 20-33-8-13.5 (LexisNexis 2012); IOWA CODE ANN. § 280.28 (West 2013); KAN. STAT. ANN. §72-8256 (West 2012); KY. REV. STAT. ANN. § 525.080 (LexisNexis 2012) (proscribing harassing communications as a Class B misdemeanor); LA. REV. STAT. ANN. §14:40.7 (2013) (criminally sanctioning cyberbullying but relegating offenders under age of seventeen to Title VII of Children's Code for disposition); ME. REV. STAT. tit. 20-A, § 1001(15)(H) (2012); MD. CODE ANN., EDUC. § 7-424.3 (LexisNexis 2012); MASS. ANN. LAWS ch. 71, § 37O (LexisNexis 2012); MICH. COMP. LAWS SERV. § 380.1310b (LexisNexis 2012); MINN. STAT. ANN. § 121A.0695 (West 2013); MISS. CODE ANN. § 37-11-67 (2012); MO. ANN. STAT. § 160.775 (West 2012); NEB. REV. STAT. ANN. §§ 79-267, 79-2,137 (LexisNexis 2012); NEV. REV. STAT. ANN. §§ 388.122, 388.123, 388.135 (LexisNexis 2012); N.H. REV. STAT. ANN. §§ 193-F:3, 193-F:4 (LexisNexis 2012); N.J. STAT. ANN. §§ 18A:37-15, 18A:37-15.1 (West 2012); N.M. STAT. ANN. § 22-2-21 (LexisNexis 2012); N.Y. EDUC. LAW §§ 11(7), 12 (Consol. 2013); N.C. GEN. STAT. § 14-458.1 (2013) (declaring cyber bullying criminal); N.D. CENT. CODE §§ 15.1-19-17, 15.1-19-18 (2013); OHIO REV. CODE ANN. §§ 3301.22, 3313.666 (LexisNexis 2012); OKLA. STAT. ANN. tit. 70, § 24-100.4 (West 2012); OR. REV. STAT. ANN. §§ 339.351, 399.356 (West 2012); 24 PA. STAT. ANN. § 13-1303.1-A (West 2012); R.I. GEN. LAWS 16-21-34 (2012); S.C. CODE ANN. §§ 59-63-120, 59-63-130 (2013); S.D. CODIFIED LAWS §§ 13-32-15, 13-32-16, 13-32-18 (2012); TENN. CODE ANN. §§ 49-6-1015, 49-6-1016 (2013); TEX. EDUC. CODE ANN. § 37.0832 (West 2011); UTAH CODE ANN. §§ 53A-11a-102, 53A-11a-102-201 (LexisNexis 2012); VT. STAT. ANN. tit. 16, §§ 11(a)(32) (2012); VA. CODE ANN. § 22.1-279.6 (2012); WASH. REV. CODE. ANN. § 28A.300.285 (LexisNexis 2012); W. VA. CODE ANN. §§ 18-2C-2, 18-2C-3 (LexisNexis 2012); WIS. STAT. § 118.46 (2012); WYO. STAT. ANN. §§ 21-4-312, 21-4-313 (2012); *see also* Sameer Hinduja & Justin W. Patchin, CYBERBULLYING RESEARCH CTR. (Jan. 2013), *State Cyber-Bullying Laws: A Brief Review of State Cyber-Bullying Laws and Policies*, *available at* http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf (cataloging cyber bullying statutes by state). The only state currently lacking bullying legislation is the state of Montana. Although no "bullying" law exists, the Montana Department of Justice makes it clear that bullying and cyber bullying activity is prohibited under many existing laws. *For Teens*

The federal government has also gotten involved. The United States Department of Education, through the Office for Civil Rights ("OCR"), deals with bullying and cyber bullying under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act of 1990.[4]

At the grassroots level, for school administrators, the issue is a practical one: How does one protect students and the school environment from bullying behavior? The issue becomes more complicated when cyber bullying is involved as, by its nature, cyber bullying involves the use of technology. This is not surprising as technology is ubiquitous amongst teens, with over 78 percent possessing mobile phones, 74 percent having mobile access to the internet, and a full 93 percent of teens owning or having access to a computer at home.[5] When bullying involves technology—i.e. when it is cyber bullying—the bullying "act" is often in the form of written words, thus implicating students' right to free speech. Moreover, because of the nature of technology, actions taken by students using technology off campus can make their way on campus, thus raising the additional issue of whether school administrators have jurisdiction to regulate off-campus behavior.

In this article, we address the scope of student free speech rights as it relates to cyber bullying. We provide a review of legal theories under which school administrators can address cyber bullying while still respecting student free speech rights and the First Amendment. Additionally, we address the jurisdiction of administrators to deal with off-campus bullying conduct.

## THE BASICS

The fundamental standard in addressing student rights to free speech was defined by the Supreme Court in *Tinker v. Des Moines*.[6] In *Tinker*, school officials learned that students planned to wear black armbands protesting the Vietnam War.[7] In response, the school

*& Tweens: Cyberbullying*, MONT. DEP'T OF JUST., https://doj.mt.gov/safeinyourspace/for-teens-tweens-cyberbullying/ (last visited Mar. 22, 2013) (defining cyber bullying and citing numerous Montana criminal provisions potentially implicated by wrongful conduct).

4 Russlynn Ali, Assistant Secretary for Civil Rights, to Colleague (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf. OCR also points out that the Department of Justice retains jurisdiction over bullying acts that implicate Title IV of the Civil Rights Act of 1964. *Id.* at 1.

5 MARY MADDEN, PEW RESEARCH CENTER, TEENS AND TECHNOLOGY 2013 4–5 (2013).

6 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972 (S.D. Iowa 1966), *rev'd*, 393 U.S. 503 (1969).

7 *Id.*

prohibited wearing of armbands on school grounds, a prohibition the students violated and for which they were suspended.[8] The Supreme Court found that the conduct was speech, and that the school could not regulate it without some justification. In addressing that justification, the Court created what is now known as the "substantial disruption test" or the *Tinker* test.

The Supreme Court held that school administrators may regulate student speech if the regulation aims at preventing a foreseeable: (1) material or substantial disruption in the school environment; or (2) invasion of the rights of others.[9] Thus, to begin with, administrators may regulate student speech without violating the Constitution if they foresee that the speech will disrupt school, or invade the rights of others. Bullying or cyber bullying conduct which falls into either of these categories may be prohibited and punished by administrators without violating the First Amendment.

While *Tinker* is a starting point, the Supreme Court has been clear that the "substantial relationship test" is not the only basis for regulating free speech in schools. It is a starting point, but not the only tool available to administrators. [10]

## OFF-CAMPUS SPEECH

Because cyber bullying often involves use of electronic media, cyber bullying speech can originate off campus but intrude onto campus. Can administrators deal with such off-campus speech? We have found two lines of cases dealing with the issue.[11] The majority of cases apply the *Tinker* test regardless where the speech originated,[12]

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[8] *Id.*

[9] *See* Calvoz, Davis & Gooden, *supra* note 2 (citing Saxe *ex rel.* Saxe v. State Coll. Area. Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001), stating that a school may regulate speech under *Tinker* if it reasonably believes "that speech will cause actual, material disruption").

[10] Morse v. Frederick, 551 U.S. 393, 404-05 (2007).

[11] J.C. ex rel. R.C. v. Beverly Hills provides an exhaustive analysis of court decisions addressing this issue. J.C. ex rel. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1102-08 (C.D. Cal. 2010).

[12] *See* Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 970-71 (5th Cir. 1972) (applying *Tinker* to a student-published underground newspaper which made its way onto campus); Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (applying Tinker to a derogatory top-ten list distributed off-campus and via email which was brought to campus by one recipient); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (finding *Tinker* applied to a website created off-campus containing mock obituaries of students); Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (applying *Tinker* where an off-campus website containing criticism of school officials was accessed by a student at school); O.Z. v. Bd. of Trs., No. CV 08-5671 ODW, 2008 WL 4396895, at *4 (C.D. Cal., Sept. 9, 2008) (applying *Tinker* to a student disciplined for video created off-campus and posted to the internet that depicted the murder of a teacher); Pangle ex rel. Pangle v. Bend-Lapine Sch. Dist., 10 P.3d 275, 285-86 (Or. Ct. App. 2000) (applying *Tinker* to a student-

holding that as long as the speech foreseeably causes actual or potential disruption on campus, *Tinker* is satisfied.[13] The second, minority line of cases look to establish a "nexus" between off-campus speech and on-campus effect before applying *Tinker*.[14] Yet, even these cases hold that *Tinker* applies if off-campus speech can, with reasonably foreseeability, intrude on campus.[15] Thus, under both lines of cases, if there is reasonable potential for a disruption on campus, *Tinker* applies regardless of the fact that speech originated off campus.

## THE *FRASER* FUNDAMENTAL VALUES STANDARD

The Supreme Court has used other approaches to deal with student free speech issues besides the *Tinker* test. In *Fraser*,[16] which was the next student free speech case decided by the Court after *Tinker*, the Court did not apply the *Tinker* test.[17] *Fraser* involved an allegedly offensive speech[18] given by a student in school for which he was suspended.[19] The student sued claiming violation of his First Amendment right to free speech.[20] Instead of applying *Tinker*, the Supreme Court emphasized:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a

written underground newspaper disseminated on campus).

13 *See* cases cited *supra* note 12.

14 Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008); Wisniewski v. Bd. of Educ., 494 F.3d 34, 38-40 (2d Cir. 2007); J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002).

15 *Doninger*, 527 F.3d at 50; *Wisniewski*, 494 F.3d at 39-40; *see also* Laura Pavlik Raatjes, *School Discipline of Cyber-Bullies: A Proposed Threshold That Respects Constitutional Rights*, 45 J. MARSHALL L. REV. 85, 92-93 (2011) (stating that most courts will apply Tinker if it is likely that disruption will occur on campus).

16 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 675 (1986).

17 James A. O'Shaughnessy, *Is Cyber-Bullying the Next "Columbine": Can New Hampshire Schools Prevent Cyber-Bullying and Avoid Liability?*, 52 N.H.B.J. 42, 44 (2011) (citing Doninger v. Niehoff, 594 F. Supp. 2d 211, 223 (D. Conn 2009), aff'd in part, rev'd in part, 642 F.3d 334 (2d Cir. 2011), noting that the Court did not apply the *Tinker* standard in *Fraser*).

18 Justice Brennan's Concurrence sets out the speech in full:

> I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A. S. B. vice-president—he'll never come between you and the best our high school can be.

*Id.* at 687.

19 *Id.* at 678.

20 *Id.* at 679.

> democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others . . . . The inculcation of these values is truly the "work of the schools." The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.[21]

In other words, the Court allowed regulation of this type of speech as a part of the school's obligation to teach fundamental values that "disfavor the use of highly offensive or highly threatening" language.[22]

This concept has been applied by the Seventh Circuit Court of Appeals as follows:

> In a public forum, the Christian can tell the Jew he is going to hell, or the Jew can tell the Christian he is not one of God's chosen, no matter how that may hurt. But it makes no sense to say that the overly zealous Christian or Jewish child in an elementary school can say the same thing to his classmate, no matter the impact. Racist and other hateful views can be expressed in a public forum. But an elementary school under its custodial responsibilities may restrict such speech that could crush a child's sense of self-worth.[23]

Courts have applied *Fraser* to prohibit other kinds of speech which, while constitutionally protected outside of schools, were found to be properly prohibited in the school setting. One court held that display of confederate flags on campus could be regulated.[24] Another held that prohibition of Marilyn Manson t-shirts in school was legal.[25] These forms of speech clearly could not be prohibited constitutionally off campus. But, the *Fraser* standard, or "fundamental values standard," is a more flexible analysis that seeks to balance the right of the student to "advocate unpopular and controversial views against the school's interest in teaching students the boundaries of socially appropriate behavior."[26] One court has in fact applied this standard in a cyber

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[21] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

[22] *Id.*

[23] Muller *ex rel.* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1540 (7th Cir. 1996).

[24] *Denno*, 218 F.3d at 1275–76 (using *Fraser* precedent to bar display of confederate flag in school even absent potential disruption); West ex rel. T.W. v. Derby Unified Sch. Dist. No. 260, 23 F. Supp. 2d 1223, 1233-34 (D. Kan. 1998) (applying *Fraser* to hold that drawing and display of confederate flag be prohibited and such conduct disciplined), *aff'd*, 206 F.3d 1358 (10th Cir. 2000).

[25] Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 469 (6th Cir. 2000) (holding that under *Fraser*, a high school could prohibit wearing of offensive though not obscene Marilyn Manson t-shirt).

[26] *Denno*, 218 F.3d at 1273–74; *see* Christine Metteer Lorillard, *When Children's Rights "Collide": Free Speech vs. The Right to be Let Alone in the Context of Off-Campus "Cyber-Bullying,"* 81 Miss. L.J. 189, 192 (2011) (arguing that the doctrine established in *Fraser* provides the best precedent for resolving cyber bullying cases); *J.S.*, 807 A.2d at 868 (finding that if the court solely applied *Fraser*, there would be "little difficulty in upholding the School District's discipline").

bullying situation to hold that a student website, built off campus, containing profane and threatening language directed at a teacher could be prohibited and punished under *Fraser*.[27]

## FIGHTING WORDS

The First Amendment only applies to "protected" speech."[28] Types of speech not entitled to First Amendment protection include: child pornography,[29] obscenity,[30] inciting imminent lawless action (the example often given is of shouting "fire" in a theater),[31] defamation, and fighting words.[32] The "fighting words doctrine" can in certain situations apply to cyber bullying. Fighting words are defined as follows:

> The test is what [a person] of common intelligence would understand would be words likely to cause an average addressee to fight . . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile . . . . Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.[33]

The test looks to both the content of the words as well as their context, and evaluates the addressee's reaction to the words based on a reasonable person standard—how would a reasonable person respond.[34]

This doctrine has been applied in bullying cases, holding that bullying words between children were unprotected fighting words. In *Svedberg v. Stamness*,[35] a fourteen year-old child and his friends teased the plaintiff, calling him "Dumbo," building snowmen with big ears in the neighborhood, and at one point told Svedberg: "You had better watch it Dumbo or I will kill you."[36] The Supreme Court of North Dakota reviewed claims that a restraining order issued against the fourteen year-old violated his right to free speech. The court applied the

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27 *J.S.*, 807 A.2d at 868–69.

28 Nevada Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347 (2011) (determining that the voting of a legislator is not speech); *see, e.g.*, Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is not speech).

29 New York v. Ferber, 458 U.S. 747, 765 (1982).

30 *See Roth*, 354 U.S. at 476.

31 Schenck v. United States, 249 U.S. 47, 51-53 (1919).

32 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Beauharnais v. Illinois, 343 U.S. 250, 253 (1952).

33 *Chaplinsky*, 315 U.S. at 573.

34 *Id.*

35 Svedberg v. Stamness, 525 N.W.2d 678 (N.D. 1994).

36 *Id.* at 679–80.

fighting words doctrine,[37] stating that, in considering how a reasonable person would respond, it was appropriate to consider the age of the children.[38] As the court stated:

> No one would argue that a different reaction is likely if a thirteen-year-old boy and a seventy-five-year-old man are confronted with identical fighting words. Accordingly, we hold that to determine what constitutes fighting words, a court must consider both the content and the context of the expression, including the age of the participants.[39]

Taken in this context, the court held that the verbal attacks were fighting words and were not protected speech.[40]

While *Svedberg* did not involve internet communications, the court's analysis is equally applicable to cyberbullying cases. If words are such that they would cause an average addressee to fight, they are not protected speech. Given the court's consideration of the age of the parties above, it is reasonable to expect that what constitutes fighting words differs in terms of the age of the children involved—fighting words for second graders may be different from high school children.[41]

## CONCLUSION

Bullying is not a new phenomenon. But, like other aspects of our lives, its reach and potential effects can be enhanced by technology. This raises new issues for school administrators. It is easier to bully when there is distance and perhaps anonymity associated with bullying via technology, which may increase bullying activity. Compounding the problem, the reach and potential impact of cyber bullying is greater as the audience is larger, and the words published can have greater permanence than simple utterances. Confronting cyberbullying in the courtroom therefore requires adapting old doctrine to new technological realities.

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37 *Id.* at 683.

38 *Id.* at 684.

39 *Id.*

40 *Id.*

41 *Svedberg*, 525 N.W.2d at 684 (citing obvious difference in reactions between a seventy-five year old man and a teenager); *compare* Papish v. University of Mo. Bd. of Curators, 410 U.S. 667, 671 n.6 (1973) (per curiam) (holding that expelling a graduate student for distributing newspaper containing "indecent" political speech was unconstitutional), *with* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that a high school could censor newspaper articles by students without infringing constitution); *see also* Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 674 (7th Cir. 2008) (drawing a distinction between adult debates on social issues versus debates among children); *cf.* City of Houston v. Hill, 482 U.S. 451, 462 (1987) (holding that a trained police officer must exercise a higher degree of restraint than the average citizen in the face of fighting words).

Thankfully, the Constitution is nothing if not flexible. As we have shown above, there is clearly room for administrators to deal with off-campus activity that comes on campus. The Constitution and caselaw provide several distinct approaches for addressing cyber bullying behavior. And, while the Supreme Court has yet to address cyber bullying, its most recent ruling on student speech is instructive. In that case, *Morse v. Frederick*,[42] the Court emphasized two key points from its prior student free speech precedent: (1) The "rights of students in public school are not coextensive with the rights of adults in other settings;" and (2) "*Tinker* is not the only basis for restricting student free speech."[43]

Under *Tinker*, school administrators have authority to deal with cyber bullying incidences that foreseeably cause disruption on campus—regardless of whether that activity originates off campus or on campus. But, beyond *Tinker*, cyber bullying that constitutes fighting words arguably falls entirely outside the scope of the First Amendment as it is not protected speech and may be prohibited. Finally, as the foregoing section suggests, there is a strong argument to be made that speech or conduct which impedes the inculcation of fundamental values by schools may be constitutionally regulated as well.

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42 Morse v. Frederick, 551 U.S. 393 (2007).

43 *Id*. at 404–05.