

The Internet, Free Speech, and Schools

Why the courts have it wrong and why parents and schools need to get it right

by Michael Blacher & Roger Weaver

On the morning of December 16, 1965, in Des Moines, Iowa, a 13-year-old junior high school student named Beth Tinker got dressed and went to school. She wore a black armband to protest the war in Vietnam. The school promptly suspended her for wearing a symbol of political dissent. So began one of the nation's most celebrated cases involving student free speech, commonly known as *Tinker*.¹ Four years later, the United States Supreme Court famously declared that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”² Schools could no longer discipline students for expressing their opinion unless it involved a “substantial disruption” or met other, limited restrictions.

Though independent schools are typically not bound by the constraints of the First Amendment (California private secondary schools are the notable exception³), *Tinker* and its progeny still resonate. The desire of students to express their political and personal views is universal, and most independent school educators would agree that classrooms should be a “marketplace of ideas.”⁴ Nevertheless, independent schools must set appropriate boundaries when it comes to students expressing their views, particularly negative characterizations of other members of the school community.

The problem today, in a landscape where outlets for student expression are constant and varied, is that the “schoolhouse gate” has become an anachronism. The Internet has created great fluidity between on- and off-campus expression. The challenge for educators is to determine when student speech — whether physically spoken within the schoolhouse walls or delivered through some form of social media — should result in disciplinary action.

Tinker's standards must be reinterpreted in a 21st-century context. The varied and rapidly evolving forms of electronic communication do not lend themselves to 1960s notions of “substantial disruption.” Courts today have turned that standard into a smoke screen that obscures schools' obligations to address the fundamental social responsibilities of civil discourse in a democratic society, which is a primary purpose of education. Worse yet, courts — and, thus, many schools and parents — have excused and dismissed personal responsibility on the part of children and adolescents. And when challenged in court, many parents and their attorneys wrap vicious, vindictive, mean-spirited, and totally fabricated vilification of others in

the flag of free speech. Recent cases, and the reluctance of some schools to reach beyond the confines of their physical campus to address student misconduct in the broader physical and cyber communities, make clear that it is time to reconsider student speech rights, to jettison the outmoded concept of a “schoolhouse gate,” and to reinvigorate standards of civil discourse.

The Internet and social media have changed the educational and legal landscape of student speech. Much of student communication through electronic social media is harmless, but a steady flow of it comes with deliberately hard, sharp, and, most of all, permanent edges. Even spontaneous diatribes frequently propagate in their original form well beyond their intended or imagined audiences. The targets of online vilification and bullying now find that an eternal record documenting their humiliation could reach an enormously wide audience. The disruption of school communities caused by online statements, as well as the disruption of the rights of individuals, is therefore qualitatively different from other forms of expression — and that difference needs to be taken into account by parents, schools, and the courts.

SUBSTANTIAL DISRUPTION IN THE DIGITAL AGE

Courts apparently do not know much about a “substantial disruption” in a school community, particularly in the digital age. It no longer typically involves marches, demonstrations, walkouts, or other over-the-top events that overtly disrupt school business and consume school resources. Some of the most substantial disruptions that take place in schools today, even when they involve significant numbers of students, are almost entirely silent, invisible, and shrouded in pretext and façade.

When attacked through social media, adolescents will go to great lengths to hide the tremendous anxiety, pain, self-doubt, and personal turmoil they feel. No adolescent wants to admit to these feelings, much less have them on public display. When that turmoil involves a student and his or her friends and classmates, it may not be immediately apparent, but classroom learning is profoundly disrupted, if not completely submerged. And then there is the significant disruption of the social fabric of the school as experienced by students involved in or even simply observing pointed, fabricated, online attacks. Even the most adept teachers and administrators are hard pressed to manage or

ameliorate that kind of social upheaval and disruption in school, but they will all verify that it is powerful and palpable in a school culture and directly impacts learning.

In addition, courts frequently misapply the “substantial disruption” test. In the world of education, permitting students to vilify others and impugn their characters is not just an attack on individuals; it is also an assault on civil society. This type of behavior is anathema to the notion of teaching respect, safety, reasonableness, and responsibility. Applying the “marketplace of ideas” protection to personal attacks teaches the student volumes about the mask of “loophole legitimacy.” Students are being taught that they are free to harm others without consequence. Surely, that is an insidious form of substantial disruption.

A 2010 California federal court case that found in favor of an abusive student is an excellent example of the courts applying an outdated, historical view of the “substantial disruption” and “schoolhouse gate” concepts. In a case from Beverly Hills, California, a student, J.C., went to a local restaurant with other students and recorded a four-minute, thirty-six second video of her friends talking. The subject of their conversation was a fellow student named C.C. During the conversation, C.C. was called a “slut” and “spoiled” among other things, and “the ugliest piece of shit I’ve ever seen in my whole life.”⁵ J.C. posted the video on YouTube and informed fellow students, including C.C., that it could be viewed. School administrators investigated the situation and disciplined J.C. She responded that administrators could not discipline her because the speech was consistent with the First Amendment, and emphasized that the speech had taken place off campus.”

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The U.S. District Court agreed. Following an exhaustive and thorough review of case law, including *Tinker*, Judge Stephen Wilson held that applying the *Tinker* rule, the school district could not discipline J.C. The court held that the “substantial disruption” standard was not met.⁶ As to actual disruption, it reasoned “what the Defendants contend was an actual disruption is entirely too *de minimis* as a matter of law to constitute a substantial disruption. Interpreting the facts in the most favorable light for Defendants, at most, the record shows that the School had to address the concerns of an upset parent and a student who temporarily refused to go to class, and that five students missed some undetermined portion of their classes on May 28, 2008.

This does not rise to the level of a substantial disruption.”⁷ For the victim, the perpetrators, and their inevitably overlapping circle of friends, all their families, and the school administrators who had to deal with this eruption, it must have added insult to injury to hear the court opine that the disruption in their school community, in their classrooms, in their families, and in their personal lives was *de minimis* and insubstantial.

Protecting free speech is one of the cornerstones of our democracy. It is one mechanism to help control and prevent the arbitrary exercise of power and authority and to ensure that, in America, everyone has a voice in spite of the power of what that voice may be opposing or criticizing. It is unlikely that any educator in the country would dispute that. When courts apply it to online attacks by students, however, it is a blunt instrument being applied to a tremendously nuanced issue. More is required of parents, attorneys, and the courts. We need a much more appropriately focused mechanism that takes into account the responsibility of parents and schools both to preserve freedoms and to teach social responsibility and personal accountability.

Schools, public or private, should be free to respond in an educationally appropriate way to vicious personal attacks on students, teachers, or administrators. One primary tenet of education law is that courts give a high degree of deference to schools to make their own academic decisions, including, for example, decisions on whether to retain students or to award degrees.⁸ “There is a widely accepted rule of judicial

nonintervention into the academic affairs of schools.”⁹ Courts uphold schools’ academic decisions “unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”¹⁰

That same principle of deference to academic affairs should be accorded to schools in behavioral matters that occur in person or online, regardless of where the keyboard was used to launch the attack. In these cases, the nexus of relationship of those affected by online attacks is the school, and it plays out disruptively in the school community both on and beyond the physical boundaries of the campus.

A NEW APPROACH

The problem of defining permissible student speech is certainly not going away. Indeed, cases in this area continue to proliferate. Recently, the American Civil Liberties Union took up the case of three Indiana middle school students expelled for the school year after joking on Facebook about which classmates they wanted to kill. The case is already being widely reported in the media.¹² A “public concern” requirement would serve to narrow the type of claims at issue in student speech cases and meets the test of common sense in these matters. It would allow schools to take appropriate disciplinary action when students have engaged in conduct that is simply derogatory and serves no public purpose.

Third, courts should revisit *Tinker*’s definition of “substantial disruption” and further develop the legal understanding of what encompasses individual and institutional harm. Courts appear to treat the “substantial disruption” standard as requiring essentially

a riotous reaction from students, an immediate and significant call upon district resources, or even some kind of threat of physical harm or property damage. This totally misconstrues the actual effects of the kinds of online speech we are considering here.

Fourth, courts should revisit the U.S. Supreme Court's affirmation in the Tinker case that speech that invades the rights of others is not protected. The court wrote, "Conduct by the student, in class or out of it, which for any reason... involves [the] invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."¹³ Courts seldom identify this "rights of others" language as a basis for finding the Tinker test satisfied. It stands apart from the "substantial disruption" test. In other words, it constitutes an independent means to satisfy the standards of Tinker and provide support for student discipline in the context of bullying. The entire basis for prohibiting bullying is to protect individuals who, through the act of being bullied, are isolated and forced to suffer individualized injury.

Fifth, courts should affirm a school's ability to discipline students for speech, whether on- or off-campus, that, in the words of the Supreme Court, is inconsistent with the "fundamental values of 'habits and manners of civility,'"¹⁴ and to insist "that certain modes of expression are inappropriate and subject to sanctions."¹⁵ These standards allow a school to discipline students for engaging in harsh juvenile ridicule directed at a particular individual, ganging up on a target with inappropriate harsh comments, and communicating in a mode that violates "habits and manners of civility."

Courts are looking in the rearview mirror. Parents and schools must live in the present with a clear eye to the future of the young people in their care. The courts are not an effective or useful parenting resource or a reliably instructive teaching tool. Parental guidance of children and the ability of schools to respond appropriately to student misconduct — whatever the form — are crucial. Schools themselves need to be willing to take a stand when students breach the community standards and social values to which they are committed. If schools take an explicit, clearly articulated, and ethical approach to this issue, the courts will catch up.

For the sake of every school, family, and student, let us hope that happens soon.

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NOTES

1. Tinker v. Des Moines Independent Community School Dist. (1969) 393 U.S. 503, 89 S.Ct. 733.
2. Tinker at 506.
3. California Education Code § 48950.
4. Tinker at 512.
5. J.C. ex rel. R.C. v. Beverly Hills Unified School Dist., 711 F. Supp. 2d 1094, 1098 (C.D. Cal. 2010).
6. Id. at 1117.
7. Id.
8. Banks v. Dominican College, 35 Cal. App. 4th 1545, 1551 (1995).
9. Id. at 1551 (quoting Paulsen v. Golden Gate University, 25 Cal. 3d 803, 808 (1979)).
10. Regents of University of Michigan v. Ewing, 474 U.S. 214, 225 (1985).
11. S.M., et al. v. Griffith Public Schools, Case No. 2:12-cv-00160-JD-APR.
12. See generally Connick v. Myers, 461 U.S. 138 (1983).
13. Tinker at 513.
14. Bethel School District No. 403 v. Fraser, 478 U.S. 675, 681 (1986).
15. Id. at 683.