

**Slamming in Cyberspace: The Boundaries  
of Student First Amendment Rights.**

**By Thomas E. Wheeler, II**

With the advent of the Internet school administrators are increasingly required to face the complex problem of determining how and when to regulate student speech in cyberspace. This article examines the delicate balance between a school's obligation to protect students and staff from threatening or harassing behavior while at the same time trying to act within the parameters of the First Amendment.

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**“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>1</sup>**

On July 16, 1997, President Clinton, in response to the Supreme Court’s decision<sup>2</sup> three (3) weeks earlier striking down the Communications Decency Act of 1996 (CDA),<sup>3</sup> announced a strategy for making the Internet family friendly. In so doing he noted that “the Internet is a powerful educational tool for our children. All over America, students are using the Internet to follow the Pathfinder mission to Mars and conduct research using the Library of Congress.”<sup>4</sup>

Unfortunately all too frequently in the years since these statements were made students have found ways to use the Internet that are far less conducive to the educational process. While this has happened all across the Nation,<sup>5</sup> one of the most instructive recent examples occurred right here in Indiana in the Lake Central School Corporation. In December of 2002, a 7<sup>th</sup> grade student posted a discussion topic on a free website entitled “gRiMmEr SuCKS!” The site where the posting was made is known as a slam site where messages may be posted anonymously. The first posting on December 12, 2002, was: “Hey dudes and dudettes! Hope ya’ll brace your self for some mad s\*\*\*t!!! Hehe! Have funnn.” In order to publicize the site, the student who created it passed out handwritten slips at the Middle School advertising it.<sup>6</sup>

The first posting to the discussion forum occurred after school the next day by an individual who signed on as “Dark Jedi” and who was later identified as Nicholas Boney. Dark Jedi’s comments ran across the spectrum from personal attacks on special education children, and sexual references to other students, to helpful suggestions such as “us kids should be armed to the hilt with weaponry.” Following this posting several other students chimed in with attacks on teachers, the school, and inevitably one another. Comments about teachers included: “Omg did u no dat he checks out gurls! He is a f\*\*\*\*\* pervert!” Other comments included “Is mr. black gay or wut?? Hes wears those skin tight pants and those pink and purple shirts ewwww!” and “Mr. Green is gay. ... Someone should go up to him, and throw his gay ass tech log at his fat face and make him [a student’s] love slave;” “ok mr. yellow is a gay pervert.” Comments about fellow students included: “l.m. is f\*\*\*\*\* whor! ... Hook is SOOOO f\*\*\*\*\* gay ... he looks seriously like a faggit. ... Oh yeah and you said that you weren’t a virgin!!!! That made me laugh for a while ... yeah, you are b/c no one would wanna get wit you ... . K. is a f\*\*\*\*\* FAT ASS HO!!! ... personally I think she is a total and complete p\*\*\*\*\*-eating lesbian.”

One of the students that was the prime recipient of other students’ wrath was D.V.: “d.v. she a slut and all her slutty f\*\*\*\*\* paddid bras shes so damn flat.” “I don’t want ur s\*\*\* d.v. so shut up and grow some f\*\*\*\*\* boobs!!!!” Dark

Jedi, obviously a friend of D.V., responded: “I swear, if any of you f\*\*\* with her, or anything, I will f\*\*\* you up worse ... that is a promise ... .”

The School learned of the website the following Monday after a band concert over the weekend where it was a prime topic of discussion and the creator handed out more pre-printed slips of paper. Much like the attacks on Simon and Piggy in *Lord of the Flies*<sup>7</sup> the postings on the website became more vicious and more personal as students picked on the least popular of their classmates. After reviewing the website and learning that it may have been accessed on some school computers, school administrators contacted the ISP and had the website shut down. They also suspended those students involved in posting personal attacks on the website for between three and five days. The Indiana Civil Liberties Union, on behalf of Nicholas Boney aka Dark Jedi, sued the school contending that it violated his First Amendment rights by suspending him.

Cases like this present schools with a perplexing problem born out of recent expansions in the responsibility towards students in their care. For example, on June 27, 2003, the Indiana Supreme Court held that schools in Indiana could be liable for failing to protect students who are threatened and later assaulted by other students.<sup>8</sup> Similarly, the United States Supreme Court in Davis v. Monroe County Board of Education,<sup>9</sup> held that schools that are aware of peer sexual harassment and fail to adequately respond to it could be liable for that harassment.

With the imposition of increased responsibility to respond to harassment and threats comes the concomitant and inevitable attempt by schools to eliminate all forms of such harassment. Unfortunately if the speech is in cyberspace First Amendment considerations may drastically limit a school's options in responding. The purpose of this article is to propose a unified framework in light of these trends, that can be applied in student speech cases across the spectrum.

**I. The Tinker, Bethel, Hazelwood trilogy.**

Any examination of student free speech rights must necessarily start with the seminal Supreme Court case of Tinker v. Des Moines Independent Community School District.<sup>10</sup> In Tinker students wore black armbands to school in order to protest the Vietnam War. The school banned the armbands under its dress code and the students challenged the school's policy based upon its impact on their First Amendment rights. One of the key parts of the challenge was the fact that although the school banned black armbands, it did not ban other potentially disruptive symbols such as a black cross that evoked images of Nazi Germany.<sup>11</sup> In overturning the discipline the Supreme Court first found that wearing black armbands was expressive conduct protected by the First Amendment. Second it determined that absent a showing of a compelling interest, the school could not ban the armbands. In doing so the Supreme Court crafted a two-pronged test. First, it looks to whether the speech is protected under the First Amendment. In considering whether such speech is protected the court

considers whether the student intended to convey a particularized message. It then considers whether there is a reasonable likelihood that those who viewed it would understand this message. If both of these conditions are met then the speech is entitled to constitutional protection, and under the second prong of Tinker the speech may only be restricted if the school can demonstrate a sufficiently compelling interest.

Under the second prong of Tinker schools may discipline students for exercising free speech rights even if that speech is protected **if** the school can establish that “there were facts that reasonably led them to forecast substantial disruption of or material interference with school activities or if school officials can prove that the activity did in fact materially and substantially disrupt the school.”<sup>12</sup> In Tinker the Supreme Court found that the armbands were intended to and did in fact convey a particularized anti-Vietnam war message and thus constituted speech protected by the First Amendment. The Supreme Court then determined that the school failed to show that the mere wearing of armbands at school posed a serious threat of material and substantial interference with the operation of the school and as a consequence the suspensions were overturned.<sup>13</sup>

Seventeen years after Tinker the Supreme Court revisited the issue of student speech in Bethel School District v. Fraser.<sup>14</sup> In Bethel a student was disciplined for giving a nominating speech for a fellow senior that referred to the candidate in terms of “an elaborate, graphic and explicit sexual metaphor in front

of 600 students.”<sup>15</sup> The Supreme Court, while reaffirming the continuing validity of Tinker, nevertheless indicated that student expressive rights were not co-extensive with those of adults. It refused to protect student speech when it deemed that speech to intrude upon the work of the school. The court made it clear that vulgar, indecent or disruptive speech can be punished and prohibited in classrooms, assemblies, and other school-sponsored educational activities as such speech runs counter to the educational objectives of schools.<sup>16</sup>

The final case in the trilogy is Hazelwood School District v. Kuhlmeier.<sup>17</sup> The Hazelwood case poses a slightly different question. Unlike Tinker and Bethel where the issue was whether the school had to tolerate certain types of student speech, the question in Hazelwood was whether the school was forced to actively promote such speech with which it disagreed. The student newspaper sought to publish articles on sexual activities and birth control. However, upon review the principal removed the articles based upon the fact that he felt that the sexual references were inappropriate for younger students and because they contained some personally identifiable information. Amid cries of prior restraint and supported by the media, the students sued the school alleging that removing the articles violated their First Amendment rights. The Supreme Court disagreed distinguishing Tinker: “The question whether the First Amendment requires a school to tolerate particular student speech – the question we addressed in Tinker – is different from whether the First Amendment requires a school affirmatively

to promote particular speech.”<sup>18</sup> The Supreme Court decided that it did not: “[W]e conclude that the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. ... [E]ducators do not offend the First Amendment ... so long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>19</sup> Thus, although it is true that “students do not shed their constitutional rights at the school house gate,”<sup>20</sup> it is also true that the constitutional rights of students in public schools “are not automatically coextensive with the rights of adults in other settings and must be ‘applied in light of the special characteristics of the school environment.’”<sup>21</sup>

The high water mark for student free speech rights, not surprisingly, came during the Warren Court in the 1960’s. Since that time the Supreme Court has consistently viewed student First Amendment rights more critically through the prism of the unique needs of the Nation’s public school system.

## **II. The first prong of Tinker: Is the speech protected?**

The first prong of Tinker seems to fit well within the Internet context since it focuses the message to be communicated and does not vary with the mode of the speech. Whether a student writes “I am against the Vietnam War,” shouts it as a slogan at a protest, wears a black armband, or posts a website, the message remains the same and is either protected or not based on content, not mode of

communication.

A recent case from Pennsylvania, J.S. v. Bethlehem Area School District No. 415,<sup>22</sup> illustrated this point. A student created a website entitled "Teacher Sux" which described his math teacher in obscene terms, including pictures of her severed head dripping blood, her face morphing into Hitler, and a solicitation for funds to hire a hit man to kill her under the caption "Why Should She Die?"<sup>23</sup> In reviewing the propriety of the student's subsequent suspension the Pennsylvania Supreme Court stated: "However, while the freedom of speech is rightfully cherished, it is also clear that this right of free speech 'is not absolute at all times and under all circumstances.' For example, certain types of speech can be regulated if they are likely to inflict unacceptable harm. These narrow categories of unprotected speech include 'fighting words, speech that incites others to imminent lawless action, obscenity, certain types of defamatory speech, and true threats.'"<sup>24</sup>

The categories most likely applicable to student cyberspeech would be "obscenity, certain types of defamatory speech, and true threats." Of these, in this post-Columbine world, the most significant area of concern would be threats such as the one made by Dark Jedi: "I swear, if any of you f\*\*\* with her, or anything, I will f\*\*\* you up worse ... that is a promise ... ." The first case to address the true threat analysis in conjunction with a First Amendment challenge in the school context was the Ninth Circuit case of Lovell by Lovell v. Poway Unified School

District.<sup>25</sup> In that case a student threatened her guidance counselor stating that she would shoot her if her schedule was not changed. The student was expelled for threatening the counselor and challenged the expulsion. The Ninth Circuit found that the speech was not protected as it was a true threat. It noted that the hallmark of a true threat is whether the victim had reason to believe that the maker of the threat would follow through with it. In reviewing the context of the speech the Court found that the counselor did indeed have reason to believe the student might follow through with the threat and therefore it was not protected speech under the First Amendment.<sup>26</sup>

Notwithstanding the lenient standard adopted in Lovell, a number of recent decisions have clouded this inquiry. For example, in Doe v. Pulaski County Special School District<sup>27</sup> a student broke up with his girlfriend and wrote a “composition” at home where, “in the space of four handwritten pages, he used the f-word no fewer than ninety times, threatened four different times to kill his former girlfriend by lying in wait under her bed with a knife, and three times proclaimed that he would rape and sodomize her.”<sup>28</sup> The student never intended to give the letter to his ex-girlfriend, but a mutual friend took the letter and gave it to her and she passed it along to school authorities. The school expelled the writer for the entire year and he challenged the expulsion contending that his composition was protected by the First Amendment. The trial court and a panel of the Eighth Circuit agreed with the student based on the fact that he never

intended to carry out the threat.<sup>29</sup> On *rehearing en banc*, the full Eighth Circuit reversed the panel decision. The Court found that “there is no requirement that the speaker intended to carry out the threat, nor is there any requirement that the speaker was capable of carrying out the purported threat. However, the speaker must have intentionally or knowingly communicated the statement in question to someone before he or she may be punished or disciplined for it.” The Court also noted “a threat does not need to be logical or based in reality before the government may punish someone for making it.”<sup>30</sup> Thus to the extent that a student like Dark Jedi may argue that he did not really mean the statement as a threat or that he really was not capable of such a thing, the Doe decision would rebut that argument leaving the speech unprotected and the school free to discipline the student.<sup>31</sup>

The "true test" designation is not automatic for a school. For example in J.S. the Pennsylvania Supreme Court found that the website with the teacher's severed head and a solicitation for a hit man did not constitute a “true threat” because the website was not sent to the teacher and was designed specifically to preclude access by teachers and administrators. As a consequence the court noted, “we conclude that the statements made by J.S. did not constitute a true threat, in light of the totality of the circumstances present here. We believe that the web site, taken as a whole was a sophomoric, crude, highly offensive and

perhaps misguided attempt a humor or parody.”<sup>32</sup> J.S. notwithstanding, most courts have found such comments to constitute true threats.<sup>33</sup>

Under Tinker if the statement is a true threat, obscene, defamatory, fighting words<sup>34</sup> or insightful, then it is not protected free speech regardless of whether it is uttered in school, in a poem at home, or in cyberspace. Applying the first prong of Tinker to the statement by the middle school students in Boney, it would seem that much of what was said would not be protected.

### **III. The second prong of Tinker: If the speech is protected may the school still regulate it?**

Even if the cyberspeech is found to be protected under the first prong of Tinker, a school may still restrict that speech if it can show that the speech was likely to create a substantial or material disruption at school. One of the primary factors in addition to the content of the speech is the location of the speech. “A school need not tolerate student speech that is inconsistent with its ‘basic educational mission’ even though the government could not censor similar speech outside the school.”<sup>35</sup>

#### **A. On-Campus/Off-Campus Speech Component.**

The on-campus/off-campus distinction is important. If the speech has taken place off-campus it will usually lack a sufficient nexus with the school to permit regulation. The determination of where the speech has taken place is fairly straightforward and is based upon the point of receipt not necessarily

transmission. With oral speech it is fairly easy to apply since both transmission and receipt take place at the same time, as in the student assembly in Bethel. It becomes more complicated with written or cyberspeech. Thus a school could not ban an underground newspaper published and distributed off-campus, but if it is brought on-campus then the school may take action.<sup>36</sup> The problem with cyberspeech is that unlike the written or spoken word, cyberspeech is simply cast out into the ether with no primary locus. As a consequence, as with underground newspapers, courts have usually focused on where the website was accessed from rather than where it was created.

For example, in J.S. the Pennsylvania Supreme Court analyzed it this way: “We find there is a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus. While there is no dispute that the web site was created off campus, the record clearly reflects that the off-campus website was accessed by J.S. at school and was shown to a fellow student. ... Importantly, the web site was aimed not at a random audience, but at the specific audience of students and others connected with this particular School district; Mrs. Fulmer and Mr. Kartsotis were the subjects of the site. Thus, it was inevitable that the contents of the web site would pass from students to teachers, inspiring the circulation of the web page on school property. We hold that where speech that is aimed at a specific school and/or its personnel is brought onto school campus or accessed at school by its originator, the speech will be considered on-campus speech. n12. While the fact that J.S. personally accessed his website on school grounds is a strong factor in our assessment, we do not discount that one who posts school-targeted material in a manner known to be freely accessible from school grounds may run the risk of being deemed to have engaged in on-campus speech, where actual accessing by others in fact occurs, depending upon the totality of the circumstances involved.”<sup>37</sup>

The J.S. approach of focusing on the location of receipt rather than the location of creation is sensible and has the benefit of creating a bright-line test for administrators and students. If the website is accessed at school then the speech will be deemed to have taken place on-campus and the school will be able to regulate it. The danger this presents for students, acknowledged in the footnote, is that once a website is created and placed on the Internet the creator cannot control who accesses it. Thus even if the creator did not intend the website to be accessed at school and actually takes steps to prevent it, if indeed someone does access it at school then the student is at risk. In the Boney case, the fact that the website creator actually prepared materials publicizing the website and widely dispersed these materials to other students at school is enough, under J.S., to put her in jeopardy. Moreover, the fact that Dark Jedi may not have intended his comments to go to school, under this analysis his intent is of no moment because it was indeed accessed at school by other students albeit not of his volition.

B. Substantial Disruption Component.

Once a nexus with the school has been established, the second prong of Tinker requires that prior to regulation a school demonstrate actual or potential disruption to the educational process. This is based on the recognition that a school has a “compelling interest in having an undisrupted school session conducive to the students' learning.”<sup>38</sup> A school may therefore regulate student speech if they are “facts which might reasonably have led school authorities to

forecast substantial disruption of or material interference with school activities.”<sup>39</sup> Moreover, Tinker does not require school officials to wait until disruption actually occurs before they may act. “In fact, they have a duty to prevent the occurrence of disturbances. Forecasting disruption is unmistakably difficult to do. Tinker does not require certainty that disruption will occur, ‘but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.’”<sup>40</sup>

Recent litigation over student websites gives some guidance as to the degree of disruption that must be demonstrated by a school prior to regulation. At one end of the spectrum is Buessink v. Woodland R-IV.<sup>41</sup> In that case a student created an off-campus website that contained unflattering comments about the school’s principal. Although the website was created at home on the student’s own computer, a friend of his accessed it at school to show it to administrators. As a consequence the principal suspended the student for ten (10) days because he was upset about the contents of the website. The district court overturned the school’s actions finding that the speech was protected by the First Amendment and that the school had not demonstrated a compelling interest as there was no evidence that it disrupted the school: “Indeed it is provocative and challenging speech, like Buessink’s, which is in most need of the protections of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure. It is unpopular speech which needs the protection of

the First Amendment. The First Amendment was designed for this very purpose. Speech within the school that substantially interferes with school discipline may be limited. Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection. The public interest is not only served by allowing Beussink's message to be free from censure, but also by giving the students at Woodland High School an opportunity to see the protections of the United States Constitution and the Bill of Rights at work."<sup>42</sup>

A similar outcome occurred in Emmett v. Kent School District No. 415.<sup>43</sup> In that case the student created a website on his home computer entitled the "Unofficial Kentlake High Home Page." The website was highly critical of the school's administration and had two mock obituaries with visitors encouraged to vote for the next one to "die." The local media discovered the site and characterized it as a Columbine type "hit list." The student was suspended and sued. The school lost as the district court found that the speech took place entirely off of school grounds and the school was unable to provide any specific evidence of disruption caused by the site: "The defendant, however, has 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."<sup>44</sup>

At the other end of the spectrum is J.S. Although the Pennsylvania

Supreme Court found that the comments on the website did not constitute a “true threat” and therefore were protected speech, the court upheld the expulsion anyway because the school was able to successfully demonstrate that the website created a substantial disruption. “The web site posted by J.S. in this case disrupted the entire school community -- teachers, students and parents. The most significant disruption caused by the posting of the web site to the school environment was the direct and indirect impact of the emotional and physical injuries to Mrs. Fulmer. The direct effects on Mrs. Fulmer’s physical and mental health are noted above. Aside from the immediate effects of the site on Mrs. Fulmer, Mrs. Fulmer was unable to complete the school year and took a medical leave of absence for the next year. Mrs. Fulmer’s absence for over twenty days at the end of the school year necessitated the use of three substitute teachers that unquestionably disrupted the delivery of instruction to students and adversely impacted the education environment.”<sup>45</sup>

Taking these cases together, they create a useful framework for analyzing student cyberspeech claims. Returning to Boney, assuming that Dark Jedi's postings were protected and notwithstanding the fact that the speech took place off-campus, because it was referred to on-campus and was probably accessed through school computers it would fall within the second prong of Tinker. Applying this analysis the school could therefore regulate the speech if it were able to produce “facts which might reasonably have led school authorities to

forecast substantial disruption of or material interference with school activities” are present.<sup>46</sup> The problem for the school in Boney is that the school was unable to present evidence of disruption similar to that in J.S. and thus had no basis for regulating the speech. However, all is not lost for the school.

#### **IV. New Frontiers: Peer harassment as a basis for regulation.**

Although the school could not have regulated the cyberspeech in Boney because it was unable to demonstrate substantial disruption, there is another potential basis for regulating that speech that has not yet been addressed by the courts. As noted above, in Tinker the Supreme Court acknowledged that a school has a “compelling interest in having an undisrupted school session conducive to the students' learning.”<sup>47</sup> This raises the interesting question of what happens when students engage in off-campus speech that has the practical effect of precluding only one or a few students from receiving the benefits of a public education?

The 8<sup>th</sup> Circuit case of Doe v. Pulaski illustrates the issue. In that case the school became aware of a sexually explicit and threatening letter written by a female student's former boyfriend, which included a statement that he would lie in wait under her bed to rape and sodomize her. Not surprisingly the young lady was terrified and resorted to checking under her bed every night and sleeping with the light on. She also refused to come to school based upon the risk of meeting him there. Certainly the former boyfriend's speech directly precluded her from

receiving the benefits of a public education, but just as certainly it did not disrupt the school as a whole. Thus under the analysis previously set out in this article, assuming the composition is protected speech (and at least one panel on the Eighth Circuit so held), then the school would be barred from disciplining the former boyfriend based on the First Amendment. However, as noted earlier in this article, the Supreme Court in Davis v. Monroe County Board of Education<sup>48</sup> held that schools that are aware of peer sexual harassment and fail to adequately respond to it will be liable for that harassment. Thus once the school became aware of Doe's letter it faced potential civil liability if it failed to act. Yet in the absence of substantial disruption to the school as a whole the First Amendment bars it from acting. Indeed the American Civil Liberties Union and its Indiana affiliate have taken this precise position.<sup>49</sup> So what is a school to do? Damned if they do, damned if they don't.

Thus far no court has addressed this interesting and complicated issue. However, there would seem to be two potential solutions. First, Davis itself seems to provide some shelter for the school from civil liability: "[I]t would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims."<sup>50</sup> Thus if a school chooses to refrain from disciplining the miscreant based upon First Amendment implications, it is protected. However, what about the female student? A school doing this would certainly seem to be ducking its legal and indeed moral

obligations to provide a safe educational environment for her. The more palatable alternative would seem to be to carve out an exception similar to the "fighting words" exception for speech that rises to the level of actionable peer sexual harassment under Davis. The standard in Davis is sufficiently high that this alone would likely prevent abuse by schools while at the same time permitting discipline where warranted and in order to protect the student that is the target of the harassment.<sup>51</sup> Given the propensity for students to use the Internet in the fashion noted above, this is a situation that will only become more frequent and the proposals outlined above provide a useful common-sense approach to dealing with this ever-expanding problem.

### **III. Conclusion.**

It seems clear that contrary to the difficulties forecast by some commentators the Tinker/Bethel/Hazelwood trilogy has survived the leap into the cyberage and the multi-prong analysis is broad enough to provide a framework for regulating cyberspeech without unnecessarily restricting either student rights or endangering the educational function of the schools. With some slight additions, particularly in the area of sexual harassment, this framework is sufficient to meet the needs of schools and student alike. However, notwithstanding the fact that schools have the power to regulate such speech, administrators must not succumb to the temptation to overreach simply because they do not like what is said,

particularly about them as was done in Buessink. Schools must remember that “[w]ith great power, comes great responsibility.”<sup>52</sup>

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<sup>1</sup> United States Constitution, First Amendment.

<sup>2</sup> Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

<sup>3</sup> 47 U.S.C. § 223 *et seq.*

<sup>4</sup> [www.ed.gov/PressReleases/07-1997/970716a.html](http://www.ed.gov/PressReleases/07-1997/970716a.html).

<sup>5</sup> See e.g. Amy Benfer, *Cyber Slammed*, Salon.Com (July 3, 2001), at <http://www.salon.com/mwt/feature/2001/07/03/cyber<uscore>bullies/print.html>; Jim Fitzgerald, *Cops: Web Site Exploited Girls*, CNEWS (June 5, 2001), at [www.canoe.ca/CNEWS/TechNews/0106/05<uscore>boys-ap.html](http://www.canoe.ca/CNEWS/TechNews/0106/05<uscore>boys-ap.html).

<sup>6</sup> Boney v. Lake Central Schools, Cause No. 2:03-CV-7 RL (N.D.Ind. 2003).

<sup>7</sup> Golding, William, *LORD OF THE FLIES* (1954).

<sup>8</sup> King v. M.S.D. of Washington Township, --- N.E.2d ---, Cause No. 49S02-0104-CV-193 (Ind. 06/27/03).

<sup>9</sup> 526 U.S. 629, 640, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999).

<sup>10</sup> 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

<sup>11</sup> Tinker, 393 U.S. at 511.

<sup>12</sup> Tinker 393 U.S. at 505.

<sup>13</sup> *Id.*, 393 U.S. at 508.

<sup>14</sup> 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986).

<sup>15</sup> *Id.*, 478 U.S. at 678.

<sup>16</sup> *Id.*, 478 U.S. at 684 (“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 democratic political system’ disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the ‘work of the schools.’”)

<sup>17</sup> 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).

<sup>18</sup> *Id.*, 484 U.S. at 270-271.

<sup>19</sup> *Id.*, 484 U.S. at 272-273.

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<sup>20</sup> Tinker, 393 U.S. at 506.

<sup>21</sup> Hazelwood, 484 U.S. at 266.

<sup>22</sup> 807 A.2d 847 (Pa. 2002).

<sup>23</sup> *Id.*, 807 A.2d at 849.

<sup>24</sup> *Id.*, 807 A.2d at 854 (citations omitted).

<sup>25</sup> 90 F.3d 367 (9<sup>th</sup> Cir. 1996).

<sup>26</sup> *Id.*, 90 F.3d at 373.

<sup>27</sup> 306 F.3d 616 (8<sup>th</sup> Cir. 2002).

<sup>28</sup> *Id.*, 306 F.3d at 615-616.

<sup>29</sup> Doe v. Pulaski County Special School District, 263 F.3d 833 (8<sup>th</sup> Cir. 2001).

<sup>30</sup> Doe, 306 F.3d at 624-625.

<sup>31</sup> See also Lavine v. Blaine School District, 257 F.3d 981, 990 (9<sup>th</sup> Cir. 2002)(A student wrote a poem which described in graphic terms his killing of twenty-eight (28) fellow students and his intent to either commit suicide or kill more students. The student was expelled, challenged the decision under the First Amendment, and the Ninth Circuit, applying the “substantial disruption” standard of Tinker, noted that given the spate of recent school shootings “we cannot fault the school’s response.”)

<sup>32</sup> J.S., 807 A.2d at 859.

<sup>33</sup> Interest of A.S., 626 N.W.2d 712, 720 (Wis. 2001)(Thirteen-year-old student told other students at a local youth center that he “was going to kill everyone at the middle school” and provided graphic details of how he was going to “make people suffer” and rape a classmate. He challenged his conviction for disorderly conduct arguing that his speech was not a true threat, but was instead mere “trash talking” protected by the First Amendment. The Wisconsin Supreme Court rejected this argument finding that “[u]nder the totality of the circumstances, a reasonable speaker in the position of A.S. would foresee that reasonable listeners would interpret his statements as serious expressions of an intent to intimidate or inflict bodily harm.”); Jones v. State, 64 S.W.2d 728 (Ark. 2002)(Arkansas Supreme Court found that a rap song from one student to another that described the killing of the recipient and her family constituted a true threat); but see In Re: C.C.H., 651 N.W.2d 702 (S.D.2002)(South Dakota Supreme Court found that a student’s statement to a teacher that “he wanted to kill [B.C.]” was not a true threat. However, this case relied heavily on the original Doe v. Pulaski decision which was later reversed.); In re Douglas D., 626 N.W.2d 725 (Wis. 2001)(Wisconsin Supreme Court finding that story about a teacher’s head being cut off was not a true threat.).

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<sup>34</sup> The "fighting words" doctrine was recently explored by the Supreme Court in Virginia v. Black, --- U.S. ---, 123 S. Ct. 1536, 1547, 155 L. Ed. 2d 535, 552 (2003)(finding that burning a cross is the symbolic equivalent of fighting words as it is speech designed to elicit an immediate violent response.)

<sup>35</sup> Kuhlmeier, 484 U.S. at 266.

<sup>36</sup> This battle over the location of the speech is not particularly new. Thirty (30) years ago the same battle was fought, albeit under a "forum" analysis with underground student newspapers. See e.g. Thomas v. Board of Education, 607 F.2d 1043 (2d Cir. 1979); Sullivan v. Houston Independent School District, 475 F.2d 1071 (5<sup>th</sup> Cir. 1973); Shanley v. Northeast Independent School District, 462 F.2d 960 (5th Cir. 1972); Schwartz v. Schuker, 298 F. Supp. 238 (E.D.N.Y. 1969).

<sup>37</sup> J.S., 807 A.2d at 866.

<sup>38</sup> Grayned v. City of Rockford, 408 U.S. 104, 119, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)(citing Tinker, 393 U.S. at 513).

<sup>39</sup> Tinker, 393 U.S. at 514.

<sup>40</sup> Lavine, 257 F.3d at 989.

<sup>41</sup> 30 F.Supp.2d 1175 (E.D.Mo. 1998).

<sup>42</sup> *Id.*, 30 F.Supp2d at 1182.

<sup>43</sup> 92 F.Supp.2d 1088 (W.D.Wash. 2000).

<sup>44</sup> *Id.*, 92 F.Supp.2d at 1090. See also Killian v. Franklin Regional School District, 136 F.Supp.2d 446 (W.D.Pa. 2001)(Student published a top ten list about the school's athletic director and was suspended. The school lost because it could not show a substantial disruption since the list, although upsetting, was not threatening and the school waited a week before taking disciplinary action.); Coy v. Bd. of Educ. Of the North Canton City Schools, 205 F.Supp.2d 791, 799 (N.D.Ohio 2002)(Middle school student created a website for his skateboarding group that was maintained on his home computer. The website was not obscene *per se* but had some insulting sentences about several fellow students and was accessed at school causing the student to be suspended. The court refused to grant the school summary judgment on the student's First Amendment claims finding that it was not inappropriate for a student to visit his own website which was not clearly obscene.)

<sup>45</sup> J.S., 807 A.2d at 869.

<sup>46</sup> Tinker, 393 U.S. at 514.

<sup>47</sup> Grayned v. City of Rockford, 408 U.S. 104, 119, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)(citing Tinker, 393 U.S. at 513).

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<sup>48</sup> 526 U.S. 629, 640, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999).

<sup>49</sup> Caplin, A., PUBLIC SCHOOL DISCIPLINE FOR CREATING UNCENSORED ANONYMOUS INTERNET FORUMS, 39 Willamette L. Rev. 93, 193 (Winter, 2003).

<sup>50</sup> Davis, 526 U.S. at 629.

<sup>51</sup> *Id.*, 526 U.S. at 652-653 (Noting that the provision that the discrimination occur ‘under any education program or activity’ suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored.”)

<sup>52</sup> Uncle Ben imparting wisdom to Peter Parker in Spiderman (Columbia Pictures, 2002).