A REVIEW AND ANALYSIS OF U.S. LAW CONCERNING THE FIRST AMENDMENT, STUDENTS, AND THE INTERNET

by

JAMES DUANE EMBRY

(Under the Direction of John Dayton)

ABSTRACT

The desire for freedom, especially in the realm of speech, is ancient and generally thought of as a prerequisite to many other human liberties. The understanding of what the government can regulate with relation to free speech has generally been a perplexing question. This is especially true in the public school setting where students, while they do not shed their constitutional rights at the schoolhouse gate, do have restrictions placed on them that limit some freedoms that would otherwise be unacceptable for adults.

This study found that speech, especially in the public school setting, cannot be regulated unless it can be shown to create a substantial disruption to the functions of the school environment or will substantially disrupt the educational purpose of the institution. Even though the Court determined in *Reno v. ACLU (1996)* that the Internet is a unique mode of communication and is afforded more freedom of speech protection than other mediums, the basic ideas established in *Tinker v. Des Moines School District (1968)*, *Bethel School District No. 403 v. Fraser (1986)*, and *Hazelwood School District v. Kuhlmeier (1988)* still apply.

INDEX WORDS: First Amendment, Free Speech, Internet

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DEDICATION

I dedicate this dissertation to my wife, Kim, and my children (Stephen, Sarah, Nathan, Rebakah, and Daniel). Without their continued patience and encouragement, I would have never completed this project. Kim has been especially understanding and loving throughout this process, even when I was most discouraged with the work.

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CHAPTER 1

OVERVIEW OF THE STUDY

Introduction

The desire for freedom, especially in the realm of speech, is ancient and generally thought of as a prerequisite to many other human liberties (Acton, 1877). The ancient Athenians, noted for their early form of a democratic government, “tolerated considerable variety of opinion and great licence (sic) of speech” (p. 11).

Freedom of expression played an important role in the framing of our country, specifically in relation to forming our Constitution (1787) and the Bill of Rights (1791). While an important part of the founding documents, there was, nevertheless, much controversy surrounding the exact interpretation of what this concept of freedom of expression really meant – to whom and in what circumstances does it apply? Rodney Smolla argued that the First Amendment goes beyond "a negative restraint on government ... [for] beneath the surface lies a more vexing voice, one that affirmatively encourages Americans to speak, to take stands, to demand to be heard, to demand to participate" (Somolla, 1992, p. 11).

Evolving circumstances brought new challenges such as world wars, cold wars, and an increased ability to publish ideas quickly, cheaply, and extensively. As if to punctuate this movement, the Internet burst onto the scene, creating “a unique and wholly new medium of worldwide human communication” (Reno v. ACLU, 1997, p. 844). This new medium created an entirely new set of freedom of speech issues, both for the public as well as for schools. Before the Internet “virtually every means of communicating ideas in … mass society require[d] the expenditure of money" (Buckley v. Valeo, 1976,

p. 19). Now, however, because of the uniqueness and accessibility of the Internet the Court has noted that "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox" (Reno v. ACLU, 1997, p. 845). As the Internet becomes more and more commonplace in the school setting, the challenges continue to grow.

One challenge facing school administrators is how to categorize speech, or the free expression thereof. Where is the line between punishable speech and expression of an opinion, whether it is vulgar, obscene, or threatening? What if the speech is created off-campus but presented in some fashion on-campus? While educators wrestled with these questions before the advent of the Internet, the ease of distribution and seemingly unabridged availability of the "offensive" content has risen to such a level as to essentially create an entirely new paradigm with respect to these issues.

The apparent concern created by the negative possibilities of the Internet was brought to the forefront in the Telecommunications Act of 1996, signed into law by President Clinton. The Communications Decency Act (CDA) portion of the Telecommunications Act went so far as to provide criminal penalties for specific types of communications, especially as they related to the Internet. The most controversial portions of the CDA were arguably in §§ 223(a) and 223(d):

> § 223(a) – [A]ny person in interstate or foreign communications who, "by means of a telecommunications device," "knowingly … makes, creates, or solicits" and "initiates the transmission" of "any comment, request, suggestion, proposal, image, or other communication which is obscene or *indecent*, knowing that the

recipient of the communication is under 18 years of age," "shall be criminally fined or imprisoned."

§ 223(d) – [M]akes it a crime to use an "interactive computer service" to "send" or "display in a manner available" to a person under age 18, "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication."

In the educational setting the challenges have also grown. Whereas in the past forums for expressing discontent with authority figures such as teachers and administrators in a school were laborious and usually localized, the advent of the Internet made such expressions of dissatisfaction universally accessible and the dissemination of said material easy and available worldwide instantly at almost no cost to the student. In essence, a student could publish disagreeable content in less than one hour to anyone with an internet connection.

This study examined court cases related to the Free Speech Clause of the First Amendment, especially as they pertain to public schools. As of this writing, no major Supreme Court cases involving the Internet and free speech in the public school arena have been heard. However, three court cases that bear particular importance to understanding the development of the Court's views concerning freedom of expression in the school setting are *Tinker v. Des Moines (1969), Bethel v. Frazier (1986),* and *Hazelwood v. Kuhlmeier (1988).* These and other cases were examined to determine the

current status of the law in this area, as well as to find evidence concerning the possible future direction of the law regarding the internet and student free speech rights.

Problem Statement

Throughout the centuries many methods of communication have been developed. Each of these methods expanded the ability of humankind to share ideas and thoughts. One of the first and most important advances, from verbal to written communication, improved the longevity as well as distribution of ideas, opinions, and history. Since this advancement mankind has expanded his ability in these areas with such notable contributions as paper, the printing press, and even electronic communications such as radio and television. Along with these advances came increased questioning and descent from the general public. For example, the arrival of the printing press in the 16th century called into question the reliability of Biblical texts and facilitated the spread of heresies like the protestant Reformation (Eisenstein, 1980).

While all of these advances are impressive in their own right, they were all relatively linear in scope compared to the advent of the Internet. The Internet created a new and much broader and more participatory form of communication than had ever been seen before. In fact, one of the findings of fact presented in *Reno v. ACLU* (1997) was that "the Internet is a unique and wholly new medium of worldwide human communication" (Reno v. ACLU, 1997, p. 844).

Considering the uniqueness of this new medium and the doggedness with which Americans defend their free speech rights, it is unlikely that even a Supreme Court decision passed down to fill the current void in this area will address the full scope of this issue and definitively answer all concerns. It is thus in the best interest of educators to

understand the history and continuing evolution of free speech law as it applies to the various mediums employed in communication to enable consistent and viable solutions to controversies that have and will certainly arise.

Research Questions

This study investigated the following research questions:

1. What is the historical development of the law concerning free speech, especially as it pertains to public schools in the United States?
2. What is the current status of the law as it relates to legal limitations for students exercising their free speech rights using the Internet?

Research Procedures

This study employed legal research methodology. Research included an extensive search for relevant sources of law, including federal and state constitutional provisions, legislation, regulations, case law, scholarly commentary, and other relevant documents using the University of Georgia's main and law libraries, Internet searches of "Findlaw.com," "Thomas.gov," "Lexis-Nexis.com," and "Google.com." The University System of Georgia's "Galileo" website was also used. Microfiche searches were made through the UMI Dissertation Services, as well as the ERIC database. The resulting federal and state constitutional provisions, legislation, regulations, case law and scholarly commentary, and other relevant documents were reviewed, analyzed, and synthesized to construct an accurate historical perspective on the law concerning student freedom of speech.

The literature review is arranged in chronological order to provide the reader with a perspective of the historical development of the law and other litigation concerning this issue.

Chapter One includes an introduction to free speech law issues, research procedures and limitations, and research questions.

Chapter Two provides a review of literature concerning the development of free speech law. Presented in chronological order, this chapter seeks to develop a timeline of the development of free speech law. Each court case will be briefly summarized and include relevant statements from written opinions.

Chapter Three is an analysis of the current law pertaining to student cyber-speech. Included is a more detailed analysis of the *Reno v. ACLU* as well as an exploration of trends found in lower court cases dealing with student cyber-speech. These findings, coupled with an examination of past Supreme Court decisions will form an amalgamated view of free speech law concerning American public schools.

Chapter Four concludes this study with findings and conclusions relevant to educational leaders concerned about compliance with free speech laws.

Limitations of the Study

This study was designed to provide current and accurate information concerning student free speech rights as they relate to the Internet (cyber-speech). The research was limited to a review of published documents and cases related to student free speech rights. Due to the fluid nature of the law and constitutional interpretation, this study is only current as of the completion date of the dissertation and is not intended as legal advice.

CHAPTER 2

REVIEW OF THE LITERATURE

This chapter reviews selected documents that may have influenced the progression of thoughts and ideas related to freedom of speech. It also presents a chronological account of the development of freedom of speech rights in the United States as found in various court cases.

Part one explores documents and writings from *Magna Carta* to the Virginia Declaration of Rights and extracts many of the ideas contained therein that had a sometimes subtle and other times overt influence on the development of free speech thought in the United States.

Part two summarizes relevant U.S. Supreme Court rulings that deal with free speech issues. This section is intended to give a comprehensive view of free speech legislation developed outside the public school setting.

Part three summarizes the three main court cases dealing with freedom of expression in the public school setting – *Tinker v. Des Moines School District (1969), Bethel School District No. 403 v. Fraser (1986),* and *Hazelwood School District v. Kuhlmeier (1988),* as well as other relevant cases dealing with free speech and public schools.

Historical Documents that Shaped Thoughts on Freedom of Speech

To fully understand any concept it is generally important for one to understand the underlying history accompanying said concept. This is especially true the more complex the topic. Such is the case with freedom of expression.

The playwright Euripides (480 -406 BC) defended the true liberty of freeborn men; the right to speak freely, and he added diplomatically: "Who neither can nor will may hold his peace. What can be more just in a State than this?" (Newth, 2001, ¶2).

The ancient Greeks, in sentencing Socrates to drink poison in 399 BC for his corruption of youth and acknowledgement of unorthodox divinities, gained the distinction of being the first recorded instance of someone being punished for expressing his views, though it is unlikely he was actually the first.

While there are countless other historical examples of the human struggle for freedom of expression, there are a handful of documents that provide crucial insight into the development of thought on this subject.

One of the first documents intimated as the catalyst for the modern concept of human rights is *Magna Carta*. While there is no direct mention of freedom of speech in this document, it is significant as the first documented concept of limited sovereign power, thought by many to be the foundation of modern ideas of liberty. A study of the document reveals that it was written quickly and was focused on very specific, long-standing issues between king John of England and the nobles of the time rather than general principles of law and freedom. From the British Library web site we read:

> As might be expected, the text of Magna Carta of 1215 bears many traces of haste, and is clearly the product of much bargaining and many hands. Some of the grievances are self-explanatory: others can be understood only in the context of the feudal society in which they arose. Of a few clauses, the precise meaning is still a matter of argument. (Treasures in Full, n.d., ¶1)

Magna Carta is generally thought of as the corner-stone of liberty even though it is specific to a single time and place. The power and importance of this document do not come from the specific wording of the concessions between the king and noblemen of the time. The significance of Magna Carta lies in its historicity in being the first instance where a written document limited the power of a ruler.

Despite this narrowness of scope, Magna Carta did have general overtones found in the current U.S. Bill of Rights. For example, the concept that people could petition those in power for redress of grievances aligns itself closely with the tenor of the First Amendment. Implicit in the option to petition the government is the implication that some form of freedom of speech is necessary. While Magna Carta applied specifically to the nobles and barons (the rich and powerful of the time), the concept is similar, even when applied to all members of a society.

Another modern provision from this document stemmed from Clauses 14 and 61. These clauses called for a council comprised of the most powerful men in the country who in some respects were similar to the current parliament of England. Their rights and responsibilities are listed below in the text of Clause 61:

> (61) SINCE WE HAVE GRANTED ALL THESE THINGS for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security:

The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.

If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us - or in our absence from the kingdom to the chief justice - to declare it and claim immediate redress. If we, or in our absence abroad the chief justice, make no redress within forty days, reckoning from the day on which the offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distain upon and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress, they may then resume their normal obedience to us.

Any man who so desires may take an oath to obey the commands of the twenty-five barons for the achievement of these ends, and to join with them in assailing us to the utmost of his power. We give public and free permission to take this oath to any man who so desires, and at no time will we prohibit any man from taking it. Indeed, we will compel any of our subjects who are unwilling to take it to swear it at our command.

> If-one of the twenty-five barons dies or leaves the country, or is prevented in any other way from discharging his duties, the rest of them shall choose another baron in his place, at their discretion, who shall be duly sworn in as they were.
>
> In the event of disagreement among the twenty-five barons on any matter referred to them for decision, the verdict of the majority present shall have the same validity as a unanimous verdict of the whole twenty-five, whether these were all present or some of those summoned were unwilling or unable to appear.
>
> The twenty-five barons shall swear to obey all the above articles faithfully, and shall cause them to be obeyed by others to the best of their power.
>
> We will not seek to procure from anyone, either by our own efforts or those of a third party, anything by which any part of these concessions or liberties might be revoked or diminished. Should such a thing be procured, it shall be null and void and we will at no time make use of it, either ourselves or through a third party. (¶¶ 64-71)

This group, while supporting the king under normal circumstances, was also allowed to "renounce their oath of allegiance to the king in pressing circumstances and to pledge allegiance to the council and not to the king in certain instances" (Magna Carta, n.d., ¶ 39).

Further interpretations and perceptions of Magna Carta moved the elusive document to political bible status. Edward Coke in the 1600s stated that "Magna Carta is such a fellow, that he will have no sovereign" and in the trial of Archbishop Laud, part of

the evidence against him for attempting to subvert the laws of England was his writing a condemnation of Magna Carta (¶ 48). During this same time period another group known as the Levellers believed that anyone who "trod Magna Carta…under their feet deserved to be attacked at all levels, and that anyone of any status attempting to do the same should be treated in the same way" (¶ 57).

In 1700, Samuel Johnson spoke of Magna Carta being 'born with a grey beard', "referring to the belief that the liberties set out in The Charter harkened back to the Golden Age and time immemorial" (¶ 65). Later in the same century, American colonists lamented their taxation without representation campaign, often quoting Magna Carta "as precedent although there is absolutely nothing in that document which provides for a representative Parliament" (¶ 67).

Sometime after the creation of the Bill of Rights in the Unites States, the effects of Magna Carta could be seen in events such as the monument erected by the American Bar Association in 1957 at Runnymede, the location for the signing of Magna Carta. Rudyard Kipling captured the significance of the event with a poem dedicated to the signing of Magna Carta:

> At Runnymede, at Runnymede,
> What say the reeds at Runnymede?
> The lissom reeds that give and take,
> That bend so far, but never break,
> They keep the sleepy Thames awake
> With tales of John at Runnymede.
>
> At Runnymede, at Runnymede,
> Oh, hear the reeds at Runnymede:
> 'You musn't sell, delay, deny,
> A freeman's right or liberty.
> It wakes the stubborn Englishry,
> We saw 'em roused at Runnymede!

When through our ranks the Barons came,
With little thought of praise or blame,
But resolute to play the game,
They lumbered up to Runnymede;
And there they launched in solid line
The first attack on Right Divine,
The curt uncompromising "Sign!'
They settled John at Runnymede.

At Runnymede, at Runnymede,
Your rights were won at Runnymede!
No freeman shall be fined or bound,
Or dispossessed of freehold ground,
Except by lawful judgment found
And passed upon him by his peers.
Forget not, after all these years,
The Charter signed at Runnymede.'

And still when mob or Monarch lays
Too rude a hand on English ways,
The whisper wakes, the shudder plays,
Across the reeds at Runnymede.
And Thames, that knows the moods of kings,
And crowds and priests and suchlike things,
Rolls deep and dreadful as he brings
Their warning down from Runnymede!
(*The Reeds of Runnymede*, R. Kipling, 1865-1936)

Another document that shaped thoughts on freedom of expression was John Milton's *Areopagitica*. In a commentary prelude to the actual text of *Areopagitica*, the editor of the Gutenberg Press Online explained that:

> [t]he title of the work derives from ancient Greece and Isocrates plea from atop Areopagus (Hill of Ares) to the Athenian High Court from the rescinding of the imposed general censorship in Greek civilization. For Milton, the suppression of certain writings … was equal to the suppression of truths" (Areopagitica, n.d., ¶ 9).

In 1640, King Charles I established the Long Parliament. One of the first actions of this parliament was to abolish the system of licensing of the time, the Court of Star Chamber. This resulted in a relative explosion of ideas and thought in England. It also weakened the king's and the parliament's control of expression.

In 1643, the fear of civil war in addition to a desire to reinstate governmental control over printing prompted the English Parliament to enact the Order Of The Long Parliament For The Regulating Of Printing, commonly known as the Licensing Order of 1643. One of the provisions of this order stated that:

> [No] Book, Pamphlet, paper, nor part of any such Book, Pamphlet, or paper, shall from henceforth be printed, bound, stitched or put to sale by any person or persons whatsoever, unless the same be first approved of and licensed under the hands of such person… appoint[ed] for the licensing of the same. (¶ 9)

In addition to the requirement of being licensed, materials also had to be entered into the *Register Book of the Company of Stationers* (Areopagitica, n.d.).

In response to this order, John Milton published *Areopagitica* – an address to the Parliament that, although written, was more in the form of an oration. While his publication had little effect on the decision of the English Parliament it outlasted the restrictive decree.

Milton argued that the restrictions put on publications and the thoughts contained therein would "be primely to the discouragement of all learning, and the stop of truth, not only by the disexercising and blunting our abilities in what we know already, but by hindering and cropping the discovery that might be yet further made both in religious and

civil wisdom" (Milton, 1644, ¶ 9). He went on to argue that "where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making" (¶ 11).

While Milton recognized that some means of accountability was necessary to ensure that libelous or other illegal works were kept under control, he felt that the Licensing Order was no more than an excuse for state control of thought. At one point in the oration Milton stated that "[He] who kills a man kills a reasonable creature, God's image; but he who destroys a good book, kills reason itself" (¶ 12). The legal responsibility of authors and publishers, not the censorship of their materials, was Milton's answer. At one point Milton made it clear that freedom of expression is the most important liberty afforded to man, stating "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties" (¶ 15).

Almost a century later John Trenchard and Thomas Gordon, writing in the American colonies under the pseudonym Cato, wrote a number of essays on the nature of freedom. These essays were issued as Cato's Letters and were not only popular in the American colonies but also influential in shaping many of the thoughts of the day regarding the relationship between the colonies and England (Robbins, 1961). Of particular relevance was letter number fifteen, entitled "Of Freedom of Speech: That the Same Is Inseparable from Publik Liberty."

The full text of Trenchard's and Gordon's essay would need to be included in this study to fully appreciate its power in championing freedom of expression. However, a number of citations are especially applicable. To begin, freedom of thought is the precursor and catalyst of wisdom:

> Without freedom of thought, there can be no such thing as wisdom; and no such thing as publick liberty, without freedom of speech: Which is the right of every man, as far as by it he does not hurt and control the right of another; and this is the only check which it ought to suffer, the only bounds which it ought to know. (Gordon & Trenchard, 1720, ¶ 1)

Second, Trenchard and Gordon argued that "freedom of speech is the great bulwark of liberty … [and is] of such infinite importance to the preservation of liberty … [that] everyone who loves liberty ought to encourage freedom of speech" (¶ 14).

Care was also taken in explaining that any responsible leadership should allow the freedom of expression since the "[f]reedom of speech is ever the symptom, as well as the effect, of good government" (¶ 6). Those who would suppress this freedom do so because of fear and guilt – "Guilt only dreads liberty of speech, which drags it out of its lurking holes, and exposes its deformity and horror to day-light" (¶ 7).

Finally, Trenchard and Gordon stated that freedom of speech not only should be regarded as one of the most important liberties afforded to man, but the lack thereof in any society would ultimately lead to its downfall:

> [I]n those wretched countries where a man can not call his tongue his own, he can scarce call anything else his own. Whoever would overthrow the liberty of the nation, must begin by subduing the freedom of speech; a thing terrible to publick traitors. (¶ 2)

In 1735, a German immigrant named John Peter Zenger made his living as a commercial printer. Much like the internet today, the regularly printed periodical was a relatively new medium in the early 18th century (Caplan, 2003). In the course of his work

Zenger published a newspaper called the New York Weekly Journal that was edited by a group of local aristocrats opposed to the newly-appointed Royal Governor William Cosby. As the content of the newspaper began to contain attacks against Cosby and his group, Governor Cosby asked the local hangman to confiscate and burn all issues of the journal, but he refused (Glendon, 1996). Twice a grand jury declined to indict Zenger so the Governor decided to commence criminal proceedings by information (Glendon, 1996).

Zenger was arrested and held on exorbitant bail for eight months while awaiting trial (Dwyer, 2002). After his first two lawyers were disbarred for their too-vigorous defense, William Hamilton was recruited to represent Zenger (Dwyer, 2002). Hamilton challenged the constitutionality of the crime of seditious libel which his client was being prosecuted for, one of the first times in American history where a lawyer challenged the law rather than argued the innocence of his client (Dwyer, 2002).

The jury found Zinger not guilty of printing the Journal, even though his name appeared on every issue. Zinger later stated that "No nation, ancient or modern, ever lost the liberty of speaking freely, writing, or publishing their sentiments, but forthwith lost their liberty in general and became slaves" (Zenger, 1736, p. 54).

In 1776, just months before the American Declaration of Independence was adopted by the colonist, Thomas Paine penned a document he entitled *Common Sense*. The main objective of this document was to extol the virtues of making a clean break from England and forming an entirely new government as opposed to a simple reconciliation with Great Brittan. Such a suggestion was difficult for Americans to

fathom at the time because it removed a safety net that, while oppressive in many respects, was nevertheless comforting. States Paine:

> I have heard it asserted by some, that as America hath flourished under her former connection with Great Britain, that the same connection is necessary towards her future happiness, and will always have the same effect. Nothing can be more fallacious than this kind of argument. We may as well assert, that because a child has thrived upon milk, that it is never to have meat; or that the first twenty years of our lives is to become a precedent for the next twenty. But even this is admitting more than is true, for I answer roundly, that America would have flourished as much, and probably much more, had no European power had anything to do with her. The commerce by which she hath enriched herself are the necessaries of life, and will always have a market while eating is the custom of Europe. (Paine, 1776, ¶ 6)

Paine continued to reflect on the absurdity of England as the controlling body of America by discussing the fact that "[s]mall islands not capable of protecting themselves are the proper objects for kingdoms to take under their care; but there is something very absurd, in supposing a continent to be perpetually governed by an island" (¶ 29).

The discussion was taken a step further by reviewing what should be done in moving towards "fram[ing] a CONTINENTAL CHARTER, or Charter of the United Colonies; (answering to what is called the Magna Charta of England)" (¶ 47). Paine reminds his audience to always remember "that our strength is continental, not

provincial" (¶ 47), thus emphasizing the need for universal rights and freedoms as a new nation, not multiple individual states.

As this discussion is more suggestive then prescriptive, Paine was careful to avoid specifics and exactness in the steps that should be taken in this venture. However, in one area he was precise, stating that the responsibility of said charter should be for "securing freedom and property to all men, and above all things the free exercise of religion, according to the dictates of conscience; with such other matter as is necessary for a charter to contain" (¶ 47).

While no specific mention is made of freedom of speech or expression, the entire document and what it represents is the embodiment of the right to express political distain and suggest change. Like Magna Carta, the power of this document is not found in its specific reference to freedom of speech but in its challenge to the status quo and insistence that the leaders of the day think outside the box.

Another document during this time period that had a profound affect on what we know today as the Bill of Rights was the Virginia Declaration of Rights. George Mason, sometimes considered the father of the American Bill of Rights, was well respected by many of his contemporaries, including Thomas Jefferson, James Madison, and George Washington. While debate raged about what the Constitution should look like in America, Mason was one of the few voices that insisted that some provision be included that defined the specific rights of individuals. While "others were only interested in the concentration of powers in a super government, Mason…[was] determined to preserve the integrity of the states and the liberty and dignity of men" (Pittman, 1953, ¶ 43).

It was from Mason's document that Thomas Jefferson received inspiration for our current Declaration of Independence. Mason's "all Men are by Nature equally free and independent" became Jefferson's "all men are created equal." Mason's "all Men…have certain inherent Rights;...namely, the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety" became Jefferson's "all men are created equal, [and] they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Many, if not most of the original state constitutions closely resembled the Virginia Declaration of Rights.

Section 12 of the Virginia Declaration of Rights most closely addressed the freedom of expression concept when it stated "[t]hat the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments" (Mason, 1776, ¶ 13). While the Bill of Rights takes this a step further to include religion, speech, and the press, the concept is similar.

James Madison understood the tenuousness of the situation with relation to creating rights that were both restrictive in nature and at the same time liberating. In a letter from James Madison to Thomas Jefferson, Madison expressed his concerns relating to this matter:

> It has been remarked that there is a tendency in all Governments to an augmentation of power at the expense of liberty. But the remark as usually understood does not appear to me well founded. Power when it has attained a certain degree of energy and independence goes on generally to further degrees. But when below that degree, the direct

> tendency is to further degrees of relaxation, until the abuses of liberty beget a sudden transition to an undue degree of power. With this explanation the remark may be true; and in the latter sense only, is it in my opinion applicable to the Governments in America. It is a melancholy reflection that liberty should be equally exposed to danger whether the Government have too much or too little power, and that the line which divides these extremes should be so inaccurately defined by experience. (Letters, 1774-1789, ¶ 25)

Mason argued to the end that it was dangerous to ignore the rights of the people, stating in the Virginia Declaration of Rights that "liberty…can never be restrained but by despotic governments" (Mason, 1776, ¶ 15).

Case Law Development of Freedom of Speech

One of the first court instances where freedom of speech was curtailed because it could harm another person can be found in the 1897 decision of *Robertson v. Baldwin* (1897). The petitioners claimed they were "unlawfully restrained of their liberty" (p. 276) in the county jail of Alameda county and thus deprived of their fifth amendment rights to not be deprived of life, liberty, or property, without due process of law (U.S. Constitution, Amendment 5). The court dismissed the claim of involuntary servitude presented in this case because the men involved had voluntarily signed up for the job.

While this case is not directly related to free speech issues, Justice Brown made an observation with regard to the amendments to the constitution, specifically the first ten amendments more commonly know as the Bill of Rights. Justice Brown stated that the

broad language of the amendments was still subject to the “necessities of the case” and cited examples of such exceptions. In delivering the court opinion, Brown stated:

> The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press … does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms … is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy … does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion; nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment. Nor does the provision that an accused person shall be confronted with the witnesses

against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial. (pp. 281-282)

The next case, *Fox v. Washington* (1915), involved a group that called themselves the Homeites, a group that "came out into the woods to escape the polluted atmosphere of priest-ridden, conventional society" (p. 276). Four of the members of this group, which was essentially a nudist colony, were arrested for indecent exposure and later two of them were imprisoned. In response the defendant Jay Fox printed an article entitled 'The Nude and the Prudes', claiming that the arrests and incarcerations violated the 14th Amendment rights of those arrested and imprisoned and that the statute allowing the arrests was unconstitutional.

In the article, Mr. Fox stated that "[t]he first step in the way of subjecting the community to all the persecution of the outside has been taken. If this was let go without resistance the progress of the prudes would be easy" (p. 276). He further stated that "'The boycott will be pushed until these invaders will come to see the brutal mistake of their action and so inform the people" (pp. 276-277). The court decided that "[t]hus by indirection, but unmistakably, the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure" (p. 277).

The court overruled the defendant and he was tried and convicted. The limitation on free speech contained within this ruling is found in the statute of the state of Washington which was upheld fully by the U.S. Supreme Court. It read:

Every person who shall willfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or

> having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor. (pp. 275-276)

In the Court opinion Justice Holmes stated:

> [T]he argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail. It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. (p. 277)

The next court decision, *Abrams v. U.S.* (1919), came at the end of World War I. The five defendants, born in Russia, were brought to trial for printing and distributing circulars that contained "disloyal, scurrilous and abusive language about the form of government of the Unites States," as well as language "intended to incite, provoke and encourage resistance to the United States in [World War I]" (p. 617). Four of the defendants testified that "they were 'rebels', 'revolutionists', 'anarchists', that they did not believe in government in any form, and … that they had no interest whatever in the government of the Unites States" (pp. 617-618). The defendants admitted to printing and distributing the circulars.

While the Supreme Court upheld the lower court's decision, Justice Holmes wrote a strong dissenting opinion. In it he agreed that "the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that will bring about forthwith certain substantive evils that the United States constitutionally

may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times" (pp. 627-628). He continued by stating that "as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned" (p. 628). According to Holmes the circulars in question did not rise to this standard.

Holmes continued by stating that "the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out" (p. 629). He concluded by saying that "[o]nly the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech'" (pp. 630-631).

A third case, *Schenck v. U.S.* (1919), was brought to the courts this same year that dealt with war-time freedom of expression. Schenck, the defendant, said that he was the general secretary of the Socialist party and had charge of the Socialist headquarters from which documents had been sent that were said to have caused insubordination and obstruction among men who had recently been called and accepted for military service.

The Court in this case upheld the decision of the lower court. Justice Holmes delivered the majority opinion which contained three significant concepts. The first concept introduced was that of reasonable time, place, and manner:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. (p. 52)

Some years later, Justice Marshall clarified this idea by stating that "laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether" (Linmark Associates, Inc. v. Willingboro, 1977, p. 92).

The standard of clear and present danger was acknowledged when Justice Holmes stated, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (Schenck, p. 52).

Justice Holmes reinforced the idea that the intent behind actions is just as liable as the act itself. He also suggested that the form of media involved was irrelevant:

> If the act … its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. Indeed that case might be said to dispose of the present contention if the precedent covers all media concludendi. (p. 52)

A fourth case this same year, *Frohwerk v. U.S.* (1919), addressed a similar issue. Once again the Court reaffirmed limitations on free speech, stating:

> [T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language … We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech. (p. 206)

The court further explored the idea of intent to break the law as expressed in some form of speech – ill intent in the form of conspiracy, with or without specific means to carry out the plan, qualified it as unprotected free speech: "[A] conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the intent. It is enough if the parties agreed to set to work for that common purpose" (p. 209). Justice McKenna, in a decision rendered in *Gilbert v. State of Minnesota* (1920), reiterated limitations on free speech when he stated that free speech "is natural and inherent, but it is not absolute; it is subject to restriction and limitation" (Gilbert v. State of Minnesota, 1920, p. 332).

Once again in 1920 the Court heard another case that dealt with free speech in *Schaefer v. U.S.* (1920). Justice McKenna, in delivering the court opinion, explained how difficult it can be to both define and understand a concept such as free speech:

> Free speech is not an absolute right, and when it or any right becomes wrong by excess is somewhat elusive of definition. However, some admissions may be made. That freedom of speech and of the press are elements of liberty all will acclaim. Indeed, they are so intimate to liberty in every one's convictions – we may say feelings – that there is an instinctive and instant revolt from any limitation of them, either by law or a charge under the law, and judgment must be summoned against the impulse that might condemn a limitation without consideration of its propriety. (pp. 474-475)

In the dissenting opinion, Justice Brandeis agreed in part with the findings of the Court but cautioned that common sense and good judgment can sometimes be forgotten when dealing with difficult and complex concepts:

> [Free speech] is a rule of reason. Correctly applied, it will preserve the right of free speech both from suppression by tyrannous, well-meaning majorities, and from abuse by irresponsible, fanatical minorities. Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment; and to the exercise of good judgment calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty. (pp. 482-483)

The next case historically is *Gitlow v. People of State of New York* (1925). In this case Benjamin Gitlow was charged with criminal anarchy. According to the lower courts "the defendant had advocated, advised and taught the duty, necessity and propriety of

overthrowing and overturning organized government by force, violence and unlawful means, by certain writings therein set forth entitled 'The Left Wing Manifesto'" (p. 655).

While the afore mentioned publication and the subsequent paper called 'The Revolutionary Age', both published by the defendant, were provocative and included such suggestions as "accomplishing the 'Communist Revolution' by a militant and 'revolutionary Socialsm,'... through mass industrial revolts developing into mass political strikes and 'revolutionary mass action,' for the purpose of conquering and destroying the parliamentary state and establishing in its place, through a 'revolutionary dictatorship of the proletariat,' the system of Communist Socialism" (pp. 657-658), it was argued that "there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result" (p. 664). In addition the defendant claimed that he was punished for "mere utterance ... of doctrine ... without regard either to the circumstances of its utterance or the likelihood of unlawful sequences" (p. 664). The Court, in turn, argued that:

> The [New York] statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. (pp. 664-665)

The Court continued by stating that "The Manifesto, plainly, is neither the statement of abstract doctrine nor … mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government" (p. 665).

The Court then reinforced the concept that the freedom of speech can be limited by recounting that this freedom "does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom" (p. 666).

This case is most significant in the concrete detail supplied by the Court as to what categories or types of free speech are not protected:

> That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question ... a State may punish publications advocating and encouraging a breach of its criminal laws; ... and that a State may punish utterances teaching or advocating that its citizens should not assist the United States in prosecuting or carrying on war with its public enemies ... and a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means ...

> Freedom of speech and press ... does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties ... It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the state ... And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means ... In short this freedom does not deprive a State of the primary and essential right of self preservation; which, so long as human governments endure, they cannot be denied. (pp. 667-668)

The Court then drew on another case to justify the protection of the government and emphasize the colloquialism of 'not biting the hand that feeds you' when it quoted *Toledo Newspaper Co. v. United States* (1918) as stating "The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and cannot be held to include the right virtually to destroy such institutions" (p. 668).

While the Court opinion focused on the specific intent of the defendant to promote real and immediate actions against the State, Justice Holmes, in his dissenting opinion, argued that there was in fact “no present danger of an attempt to overthrow the government by force” (p. 673) by the defendant or the relatively small group that shared

his ideas. He then took issue with limiting the free speech rights of an individual because the speech is considered an incitement, arguing that:

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. (p. 673)

He then continued to introduce and clarify the difference between intent to induce immediate action verses action at some indefinite time in the future, arguing that immediate action would warrant limitations while action too remote from possible consequences would not.

Thornhill v. State of Alabama (1940) was the next case. It involved a man, Mr. Thornhill, who was accused of "Loitering and Picketing … with the intent or purpose of influencing others to adopt one of enumerated courses of conduct" (p. 92). Mr. Thornhill argued that this deprived him of "the right of peaceful assemblage, the right of freedom of speech, and the right to petition for redress" (p. 93). Both the Circuit Court and the Court of Appeals found Mr. Thornhill guilty as charged. The Supreme Court, however, reversed.

The Court discovered that all the activities of Mr. Thronhill that were deemed unlawful by the lower courts were in fact done peaceably and without threats (p. 95). Their rulings, the Supreme Court expressed, violated the First Amendment rights of Mr. Thronhill:

> The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state … The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. (p. 95)

The Court continued by stating that "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment … Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" (pp. 101-102).

The next significant case involved a citizen and a police officer. Some local citizens of Rochester, NY, complained that Mr. Chaplinsky, who was distributing the

literature of his sect on the streets of Rochester, was denouncing all religion as a 'racket'. The City Marshal, Bowering, both informed the citizenry that Mr. Chaplinsky was within the law as well as warned Mr. Chaplinsky that the crowd was restless. Sometime later a disturbance occurred and Marshal Bowering hurried to the scene, being advised that a riot was underway. Bowering repeated his earlier warning to Mr. Chaplinsky and at this point Mr. Chaplinsky responded with a verbal assault on Marshal Bowering.

Mr. Chaplinsky was convicted for violation of the following New Hampshire statue:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.
>
> (Chaplinsky v. State of New Hampshire, 1942, p. 569)

While Mr. Chaplinsky argued that the statute violated all three freedoms of speech, press, and worship, the Court determined that only the question of the violation of free speech warranted consideration.

The court again emphasized that "free speech is not absolute at all times under all circumstances" (p. 571) and that there are narrowly limited classes of speech that do not receive Constitutional protection, namely speech that is "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breech of the peace" (p. 572). Stated further by the Court:

> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument. (p. 572)

The state court indicated that the purpose of the statute was to "preserve the public peace" (p. 573) and as such, only words that would tend to cause acts of violence were prohibited.

Applying the logic of "ordinary men" to words that would "likely … cause a fight," it was determined that the comments in question fit the scope of the statute (p. 573). In an attempt to clarify, the Court stated that "[a] statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law" (p. 574).

In the closing remarks of the Court Justice Murphy stated that "[a]rgument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace" (p. 574).

In *Terminiello v. City of Chicago* (1949) the Court again emphasized that while freedom of speech is most difficult to allow when it conflicts with an individual's sensibilities, it is in these very situations when freedom of speech deserves the most protection:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. (p. 4)

In *Butler v. Michigan* (1957) Mr. Butler was convicted for selling a book that contained obscenity to a police officer. This was in direct violation to section 343 of the Michigan Penal Code that made it a misdemeanor to sell or make available to the general reading public any book containing obscene language "tending to the corruption of the morals of youth" (p. 380). The Supreme Court reversed. In the Court opinion, Mr. Frankfurter stated:

> The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig … The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the

> Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. (pp. 383-384)

Later this same year another case involving obscenity, *Roth v. United States* (1957), was heard. The Court claimed that it was "the first time the question [of obscenity] has been squarely presented to this Court" (p. 481). As a lesson in history, the Court stated:

> The guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. As early as 1712, Massachusetts made it criminal to publish "any filthy, obscene, or profane song, pamphlet, libel or mock sermon" in imitation or mimicking of religious services … In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. (pp. 482-483)

Justice Brennan continued later by stating:

> The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly

> closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. (p. 488)

In *Cox v. Louisiana* (1965) the Court dealt with the rights of citizens to assemble on a public street and exercise their free speech rights. The Court stated:

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. (p. 554)

In 1968 a case that dealt with symbolic speech was argued before the Supreme Court – *United States v. O'Brien* (1968). In this case David O'Brien, along with three other men, burned their Selective Service registration certificates. O'Brien was tried and convicted on the charge that he "willfully and knowingly did mutilate, destroy, and change by burning … [his] Registration Certificate" (p. 370). O'Brien argued that the above stated charge, resulting from Title 50, App., United States Code, Section 462 (b), was unconstitutional because it was both enacted to abridge free speech as well as that "it served no legitimate legislative purpose" (p. 370).

The Court of Appeals reversed the original decision, stating that the Amendment must have been "directed at public as distinguished from private destruction," and as such, singled out persons engaged in protests for special treatment (p. 371).

The Supreme Court outlined the importance of the registration certificates and the legitimate legal purposes they served. They also reminded the defendant that the 1965 Amendment contained provisions for criminal liability for anyone who "forges, alters, or in any manner changes" as well as one who "knowingly destroys, [or] knowingly mutilates" a certificate (p. 375). The Amendment was also shown not to distinguish between public and private destruction. In clarification, Justice Warren stated:

> A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records. (p. 375)

Warren further clarified that there are limitations on symbolic speech, stating that "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea" (p. 376). At the same time, the Court drew a boundary for deciding cases that contained both speech and "nonspeech" elements, stating that when those two "elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the 'nonspeech' element can justify incidental limitations on First Amendment freedoms" (p. 376). The court also stated that such limitations should be inspired by "compelling; substantial; subordinating; paramount; cogent; [and] strong" reasons (p. 375). While acknowledging that these terms may be imprecise, the Court put forth that government regulation is justified:

> …if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental

> interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. (p. 377)

Later this same year Robert Cohen wore a jacket into a courthouse in Los Angeles, California, that strongly denounced the Vietnam War by way of offensive language printed on the back of his jacket. This was found by the lower courts to be in direct violation of California Penal Code 415 which prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct" (Cohen v. California, 1965, p. 16). The court acknowledged that Cohen did not threaten to commit any act of violence and actually did not say anything before he was arrested (p. 18). In addition, no evidence was given that the speech was intended to incite disobedience to or disruption of the draft (p. 18).

While the Court, when hearing the case in 1971, agreed that the language on the jacket could be deemed offensive by some, it argued that it neither met the criteria of “fighting words” nor was it directed at any one individual or specific group (p. 20). Additionally, Justice Harlan emphasized that, while the government may in many instances prohibit distasteful intrusions into the privacy of one’s home, it is far less likely to do so in a public setting unless there is a compelling reason other than one’s sensibilities:

> The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being

> invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections. (p.21)

The ability to avoid the speech in this situation was also discussed in relation to other situations where avoidance would be more difficult. Simply averting the eyes, according to the Court, would be a sufficient exercise in this case to avoid the discomfort of the speech, as opposed to verbal speech that cannot be as easily avoided (p. 22).

In addition, the Court, employing wording from *Tinker v. Des Moines Independent Community School District* (1969), held that the lower courts acted out of an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression" (p. 22). While the Court acknowledged that this does not mean a state can never punish "public utterances of this unseemly explicative" (p. 24), it does clarify that some outcomes of this type of speech do not rise to the standard of earning punishment:

> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. (pp. 24-25)

The Court in this case also drew a distinction between the emotional verses the intellectual power of speech and in turn argued that either or both may be the intent of an expression and thus both must receive protection (p. 26).

Justice Harlan, referring back to *Baumgartner v. United States* (1944), reiterated that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures - and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation" (p. 26).

During this same year the Court ruled in *Watts v. Unites States* (1969) that true threats receive no First Amendment protection (p. 707). In doing so, however, no clear standard was set for determining what types of speech constituted a true threat.

In 1978, a radio station played an afternoon broadcast of a satiric monologue entitled "Filthy Words." The ensuing case, *FCC v. Pacifica Foundation* (1978), addressed both language that was "patently offensive," though not necessarily obscene, as well as time, place, and manner. In delivering the Court opinion, Justice Stevens stated:

> Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content - or even to the fact that it satirized contemporary attitudes about four-letter words - First Amendment protection might be required. But that is simply

> not this case. These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (pp. 745-746)

The Court also found that of all forms of communication, broadcasting had the most limited First Amendment protection (p. 727). In defending time, place, and manner, Justice Stevens stated that a "nuisance may be merely a right thing in the wrong place, -like a pig in the parlor instead of the barnyard … We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene" (pp. 750-751).

Moving to 1988, a controversial case made its way to the Supreme Court. In *Hustler Magazine v. Falwell* (1988) Mr. Falwell sued Hustler Magazine and its publisher, Larry Flynt, "to recover damages for invasion of privacy, libel, and intentional infliction of emotional distress" (pp. 48-49). In the November 1983 issue of the magazine a parody of an advertisement for Campari Liqueur contained the name and picture of Mr. Falwell and represented Mr. Falwell in a negative light. At the bottom of the ad was a disclaimer that stated "ad parody – not to be taken seriously" (p. 49). The magazine's table of contents also listed the ad as "Fiction; Ad and Personality Parody" (p. 49). In the opening statements of the case the Court stated:

> We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most. Respondent would have us find that a State's interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved. This we decline to do. (p. 50)

In so declining, the Court recognized that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern" (p. 50). In addition Justice Rehnquist stated that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures. Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to vehement, caustic, and sometimes unpleasantly sharp attacks" (p. 51).

This was not to say that public figures could never hold a speaker liable for damage to reputation; however, the Court emphasized that a disparaging statement must be made "with knowledge that it was false or with reckless disregard of whether it was false or not" (p. 52). In other words, a public figure could recover damages for libel or defamation "only when they can prove both that the statement was false and that the statement was made with the requisite level of culpability" (p. 52). This standard, the

Court argued, is necessary to "give adequate breathing space to the freedoms protected by the First Amendment" (p. 56).

As an example the Court compared this speech to political cartoons, and while they acknowledged that "the caricature of [the] respondent ... is at best a distant cousin of the political cartoons," it nevertheless loosely followed the "caustic nature" of many political cartoons that caricatured numerous political and public persons in unflattering ways (p. 55).

Another case that received a good bit of publicity, *Texas v. Johnson* (1989), clarified somewhat the term 'speech'. In this case Mr. Johnson, in response to disagreements with the Regan administration, burned an American flag in Dallas, Texas. While no one was physically injured or threatened with injury, many witnesses claimed that they were offended by the flag burning. While the lower courts convicted Johnson of "desecration of a venerated object in violation of a Texas statute," the Texas Court of Criminal Appeals reversed, arguing that the flag burning was "expressive conduct protected by the First Amendment" (p. 397). The court also reiterated that "[e]xpression may not be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace, since the government cannot assume that every expression of a provocative idea will incite a riot but must look to the actual circumstances surrounding the expression" (p. 398).

Additional issues centered on the state of Texas not creating a statute that was narrow enough to include only flag burnings that may have resulted in serious disturbances of the peace. Additionally, Texas had another statute, Texas Penal Code

Ann. 42.01 (1989), that prohibited breaches of the peace, making this code redundant and thus unconstitutional as it applied to Mr. Johnson.

The Supreme Court in a close decision affirmed the ruling of the court of appeals. In providing more clarification for further cases, the Court stated that "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it" (p. 404).

A number of cases were cited giving examples of recognized symbolic speech, including: the wearing of black armbands to protest American military involvement in Vietnam (*Tinker v. DesMoines,* 1969); a sit-in by blacks in a "whites only" area to protest segregation (*Brown v. Louisiana,* 1966); hanging a flag upside-down and attaching a peace sign to the flag (*Spence v. Washington,* 1974); refusing to salute the flag (*West Virginia State Board of Education v. Barnette,* 1943); and a case where pants were worn that had a small flag sewn into their seat (*Smith v. Goguen,* 1974).

The Court also pointed out that "careful consideration of the actual circumstances surrounding … expressions" is as important as the speech itself (p. 409). To say that a certain expression of speech would always possess the potential for a breach of the peace would nullify other findings of the Court. The Court thus ruled that "the State's interest in maintaining order [was] not implicated on [the] facts" (p. 410). Further clarifying symbolic speech, the Court stated:

> The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national

> unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message… . (p. 410)

It was also noted that flag burning was the preferred method of disposing of flags that were in disrepair (p. 412). This reinforced the idea that the statute did not protect the flag itself but rather the sensibilities of others who might take serious offense to its treatment in certain circumstances. The Court stated, "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" (p. 414). In clarification the Court cited a few examples, demonstrating the difficulty that would present itself if the Court were to designate some symbols as off-limits (i.e., state flags, copies of the Presidential seal, copies of the Constitution, etc. – p. 417). The power behind the First Amendment is its tolerance for disagreement, even to the extreme, as long as it does not infringe on the rights of others (p. 419).

In making this judgment, the Court was careful to differentiate between approving of the desecration of a symbol and criminally punishing a person for doing so (p. 418). Justice Kennedy, in his concurring remarks, powerfully expressed both his agreement with the decision as well as his dislike for the decision: "We make [these decisions] because they are right, right in the sense that the law and the Constitution, as we see them, compel the result" (pp. 421-422). The Court was also diligent in reiterating that the way to combat speech deemed uninformed or incorrect is with more speech. Quoting *Whitney v. California* (1927), Justice Brennan stated:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. (p. 377)

The next case occurred in 1992. After burning a cross in a black family's lawn, petitioner R.A.V. was charged under the St. Paul, Minnesota bias-motivated ordinance, Legislative Code 292.02 (1990). This code stated:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor. (R.A.V. v. City of St. Paul, 1992, p. 380)

R.A.V. asked that the case be dismissed because the ordinance was "overbroad and impermissibly content based" (p. 380). While the trial court agreed, the Minnesota Supreme Court reversed. The U.S. Supreme Court ultimately determined that the ordinance was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses" (p. 381). The Court gave numerous examples of speech that was either allowed or disallowed by the Court via past

cases, most of which have already been discussed. Justice Scalia continued by stating that "the First Amendment imposes not an 'under inclusiveness' limitation, but a 'content discrimination' limitation, upon a State's prohibition of proscribable speech" (p. 387).

Speaking of the traditional areas of speech that are generally considered to be outside the area of constitutionally protected speech (obscenity, defamation, and fighting words), Justice Scalia stated:

> We have sometimes said that … the protection of the First Amendment does not extend to [these areas of speech] … Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity as not being speech at all. What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.) - not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. (pp. 383-384)

The distinction was drawn between the intent of a limiting ordinance and the act that the ordinance is designed to protect or disallow. In referring to *Texas v. Johnson*, Justice Scalia explained that "nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses - so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag could not be punishable (p. 386). In addition, the Court reiterated that time, place, and manner restrictions are

permissible as long as they are "justified without reference to the content of the regulated speech" (p. 386).

In the concurring statements following the Court's decision, Justice White expressed concern with the findings, stating that the "case could easily be decided within the contours of established First Amendment law by holding, as petitioner argues, that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment" (p. 397). Instead, he argued, "the Court holds the ordinance facially unconstitutional on a ground that was never presented to the Minnesota Supreme Court, a ground that has not been briefed by the parties before this Court, a ground that requires serious departures from the teaching of prior cases and is inconsistent with the plurality opinion in *Burson v. Freeman* (1992), which was joined by two of the five Justices in the majority in the present case" (pp. 397-398).

Justice White argued that there are at least two established free speech ideas that allow for 'content discrimination'. First, there is an established approach providing "a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need" (p. 400) and secondly, that the ordinance was "necessary to serve a compelling state interest and is narrowly drawn to achieve that end" (p. 403).

Case Law Development of Freedom of Expression in Public Schools

Students possessed very few First Amendment free-expression rights until the mid to late 20th century. Some early lower court cases rejected the claims of students for free

speech protection. For example, the Wisconsin Supreme Court ruled in 1908 that school officials could suspend two students for ridiculing the principal in a poem published by a local news paper. The Court wrote that "such power is essential to the preservation of order, decency, decorum, and good government in the public schools" (State v. District Board of Sch. Dist. No. 1, 1908, p. 232).

The first U.S. Supreme Court case to recognize student free speech rights was *West Virginia State Board of Education v. Barnette* (1943). This case dealt with a group of Jehovah's Witnesses who refused to both salute the flag and recite the pledge of allegiance due to religious convictions.

The Court acknowledged that the actions of the students in question did not "bring them into collision with rights asserted by any other individual" (p. 630). Additionally, the Court observed that the behavior exhibited by the students was peaceable and orderly and that the "sole conflict is between authority and the rights of the individual" (p. 630).

Symbols as form of speech was addressed when the Court stated that "[s]ymbolism is a primitive but effective way of communicating ideas … [a] person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn" (pp. 632-633). Justice Jackson also stated that "the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression" (p. 634).

Justice Jackson made the following statement with regard to the overall purpose of the Bill of Rights:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. (p. 638)

He continued:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us (p. 642).

The next and possibly most well known case dealing with students' free speech rights was *Tinker v. Des Moines School District* (1969). This case involved three students that were suspended from school for wearing black armbands in protest of the Vietnam War. Justice Fortas delivered the opinion of the Court.

The Court established that students shared rights generally ascribed only to adults: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (p. 506). Without this acknowledgement the Court feared, as it did

in *Barnette*, that to ignore established principles in the schools would send the wrong message to students. Citing *West Virginia v. Barnette* (1943), the Court emphasized:

> The … Amendment[s], as now applied to the States, protect the citizen against the State itself and all of its creatures - Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. (Barnett, p. 637)

The problem, as the Court saw it, was the collision of First Amendment rights with the rules of school authorities (Tinker, p. 507). As such, the Court clarified that this case dealt with "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" (p. 508) – thus the case did not concern speech or action that would interfere with the rights of other students.

While the District Court found that the action of the school leadership was appropriate because of their fear of a disturbance, Justice Fortas disagreed, stating:

> [U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another

> person may start an argument or cause a disturbance. But our Constitution says we must take this risk … and our history says that it is this sort of hazardous freedom - this kind of openness - that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society. (pp. 508-509)

He continued:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. (p. 509)

The Court also pointed out that the black armbands in question were singled out – that other symbols such as political campaign buttons as well as the Iron Cross were not prohibited (p. 510). In establishing more rights for students than had been recognized in the past Justice Fortas stated that “School officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just

as they themselves must respect their obligations to the State" (p. 511). In addition, the Court stated:

> [S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views … school officials cannot suppress "expressions of feelings with which they do not wish to contend." (p. 511)

To clarify what would be punishable without offending First Amendment rights, the Court stated that "conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech" (p. 513). At question was the exact meaning of "materially disrupts classwork," a distinction that Justice Black, in his dissenting remarks, took issue with (p. 517). Justice Black stated that this decision compelled "the teachers, parents, and elected school officials to surrender control of the American public school system to public school students" (p. 526). In a further lesson on free speech, Justice Fortas explained:

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for

> crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom. (p. 513)

Ultimately the Court determined that there was no demonstration of any facts "which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred" (p. 514).

Justice Stewart, in his concurring remarks, reminded the Court of an earlier decision in *Ginsberg v. New York* (1968), in which he stated:

> I think a State may permissibly determine that, at least in some precisely delineated areas, a child - like someone in a captive audience - is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights - the right to marry, for example, or the right to vote - deprivations that would be constitutionally intolerable for adults. (p. 649)

The next case, *Pickering v. Board of Education* (1968), dealt with teacher free speech rights, but the concept applies to students as well. In this case a high school science teacher wrote a letter to the editor of a community newspaper criticizing the

board of education's allocation of funds between academics and athletics. The board fired the teacher, stating that the letter contained false statements that "unjustifiably impugned the 'motives, honesty, integrity, truthfulness, responsibility and competence' of both the Board and the school administration" (p. 567). The teacher sued, claiming that the board violated his First Amendment rights by terminating him for exercising his right to freedom of speech.

The Illinois Supreme Court upheld the decision of the lower courts and rejected the claim that Pickering's letter was protected by the First Amendment, stating that "his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools 'which in the absence of such position he would have an undoubted right to engage in'" (p. 567). Pickering argued that the test applicable to defamatory statements directed against public officials must be made "with knowledge that [they were] … false or with reckless disregard of whether [they were] … false or not" (New York Times Co. v. Sullivan, 1964, p. 280).

Since Pickering's comments were not directed at any one person the Supreme Court concluded there was no "question of maintaining either discipline by immediate superiors or harmony among coworkers" (Pickering, p. 570). The problem in this case, as the Court saw it, was "to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" (p. 568).

In reversing the previous lower court decisions, the Court determined that the false statements made by Pickering "are neither shown nor can be presumed to have in

any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally" (p. 572-573).

Another case involving students and one that essentially clarified and limited the findings in *Tinker* was *Bethel School District v. Fraser* (1986). In this case, Matthew N. Fraser, a student at Bethel High School, delivered a speech to an assembly of roughly 600 students. This political speech utilized repeated graphic and sexual metaphors. Teachers who had seen the speech before the assembly advised him that the speech was "inappropriate and that he probably should not deliver it" (p. 678).

The Court of Appeals determined that the speech was "indistinguishable from the protest armband in Tinker" (p. 679). The Court of Appeals also rejected the idea that the school had a responsibility to protect a captive audience of minors from "lewd and indecent language in a setting sponsored by the school" (p. 680). The Supreme Court reversed.

Justice Burger, in delivering the court opinion, stated that in the lower court decision no distinction was made between the political message of the armbands and the sexual content of Fraser's speech (p. 680). Focusing on this important difference, he explained:

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities

> of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences. (p. 681)

While the Court stated in *Tinker* that students do not shed their free speech rights at the schoolhouse gate (Tinker, p. 506), the Court in *Fraser* did distinguish between some adult situations and children in public schools, pointing out the distinction between Tinker's armband and Cohen's jacket and stating that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings … it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse" (Fraser, p. 683). The determination of what manner of speech would be inappropriate in either the classroom or assembly was also delegated to the school board (p. 683).

The Court also pointed to an earlier case, *Board of Education v. Pico* (1982), in demonstrating that even as vulgar books could be removed from a library, so too could vulgar speech be removed from an assembly (p. 684).

In solidifying the distinction between the armbands of Tinker and the speech content of Fraser, the Court stated:

> Unlike the sanctions imposed on the students wearing armbands in Tinker, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials

> from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. (p. 685)

Justice Brennan, in his concurring remarks, pointed out that this decision only concerned the authority of school officials to regulate speech given at an event such as an assembly, and not unqualified permission to ban all speech (p. 689).

Aaron Caplan, in commenting on this case, found some irregularities between the Court's decisions and established practices, stating:

> Among Bethel's oddities is its willingness to use state power to teach students that society disapproves of vulgarity, even though society itself may only punish vulgar speech through social disapproval, not the application of state power. Bethel may also be the only case to approve the deprivation of liberty and property as a method for the government to "dissociate itself" from a private actor's speech. Ordinarily, public agencies with an obligation to dissociate themselves from private speech do so through a suitable disclaimer. (Caplan, 2003, p. 133)

The next case, *New Jersey v. T.L.O.* (1985), does not deal directly with free speech but does address the general limitation of rights with respect to students in the public school setting.

A teacher at a New Jersey high school discovered T.L.O. and friends smoking in the school bathroom. Because this was a violation of school rules, the students were taken to the principal's office. When T.L.O. denied that she had been smoking, the principal demanded to see her purse and subsequently found a pack of cigarettes. When

he took the cigarettes out he also noticed a package of cigarette rolling papers that, in his experience, were commonly used with marijuana. Because of this observation he thoroughly searched the purse and also found some marijuana, a pipe, a fairly substantial amount of money, an index card containing a list of students who owed T.L.O. money, and two letters that implicated her in marijuana dealing.

The defendant in this case argued that her Fourth Amendment right against unreasonable searches and seizures had been violated. The Juvenile Court as well as the Appellate Division of the New Jersey Superior Court held that, while the Fourth Amendment applied to searches by school officials, the search in this case was a reasonable one. The New Jersey Supreme Court, however, reversed, holding that the search of the purse was unreasonable. The U.S. Supreme Court, in turn, reversed the decision of the New Jersey Supreme Court, holding that the search was reasonable in that there were reasonable grounds for suspecting that the search would turn up evidence.

In reinforcing the concept that students enjoy the protections afforded by the Amendments to the U.S. Constitution, Justice White stated:

> We have held school officials subject to the commands of the First Amendment and the Due Process Clause of the Fourteenth Amendment. If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with

> compulsory education laws." (Ingraham v. Wright, 430 U.S. 651, 662 (1977)). Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment. (pp. 336-337)

The Court then continued by examining the limitations that can be placed on students in the school setting, especially as it relates to disorder or substantial disruption:

> Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." (Goss v. Lopez, 419 U.S. 565, at 580). Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship. (pp. 339-340)

The next major case involving student free speech rights was *Hazelwood School District v. Kuhlmeier* (1988). In *Hazelwood*, three students of Hazelwood East High School's newspaper staff argued that their First Amendment rights were violated when two pages of articles written by the students were deleted by school officials from a publication. The District Court supported the school in their decision; the Court of Appeals reversed. The Supreme Court in turn reversed and agreed with the original finding of the District Court.

The Court in this case determined that the school publication could only have been considered a public forum if the school had opened its facilities "for indiscriminate use by the general public" or by some segment of the public, such as student organizations (p. 267).

The Court also concluded that in the case of school sponsored materials, educators have a wide berth or regulatory privileges:

> Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself" not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students" but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased

> or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices - standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world - and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order" or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." (pp. 271-271)

Justice White concluded that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (p. 273).

CHAPTER 3

CURRENT STATUS OF THE LAW CONCERNING FREE SPEECH IN THE SCHOOLS

Most free speech cases concerning students are categorized or decided using the findings and conclusions in the *Tinker, Frasier,* and *Hazelwood* cases. Briefly, these findings limit speech where the speech:

1. Materially and substantially interferes with the requirements of appropriate discipline in the operation of the schools (*Tinker*).
2. Invades or collides with the rights of others (*Tinker*).
3. Is vulgar, lewd, obscene, or plainly offensive (*Fraser*).
4. Is school-sponsored and inappropriate (*Fraser and Hazelwood*).
5. Creates legitimate pedagogical concerns (*Hazelwood*).

Although no additional Supreme Court cases have been decided to date with relation to the exercise of free speech rights in the school setting since the Hazelwood decision in 1988, a major advance has occurred in the arena of speech and communication, namely electronic communications and more specifically, the Internet.

The ubiquitous accessibility of the Internet tends to blur the lines between on- and off-campus speech. In addition, content created off campus can be inadvertently brought on campus by non-connected or disinterested parties, further blurring the lines. Louis Seminski has stated that "the Internet is a new medium and should be treated as such. Applying old standards to such an interactive medium is improper; what is necessary is some new constitutional standard, not merely a new way in which current standards are portrayed" (Seminski, 2001, p. 182).

Student speech transmitted through the Internet can happen in a number of different ways, including, but not limited to:

1. Public discussion group messages;
2. E-mail, both school-owned and private;
3. Postings on district- and school-sponsored web sites;
4. Postings on private and non-school sponsored web sites.

In *Reno v. American Civil Liberties Union* (1997) the court stated that the Internet was the "most participatory form of mass speech yet developed" and that it "deserves the highest protection from governmental intrusion" (p. 868). The Internet revolutionized communication, allowing people to communicate at relatively low costs and with a relatively unlimited and unrestricted audience.

With this new tool came new issues. Generally the tests discussed earlier applied to student speech rights on campus and left off-campus infractions in the hands of parents and civil authorities. Whereas before it was relatively easy to determine what was on and off campus and apply the rules and tests of court rulings appropriately, the Internet not only introduced a new medium of speech but in the process has also blurred the line between what is considered on- and off-campus speech.

Even though the Court acknowledged that this new "worldwide medium that is the Internet … presents unique issues relating to the application of First Amendment jurisprudence and due process requirements to this new and evolving method of communication" (p. 830), it has not provided guidance in this matter:

> Unfortunately, the United States Supreme Court has not revisited this area [students' First Amendment rights] for fifteen years. Thus, the breadth and contour of these cases and their application to differing circumstances continues to evolve. Moreover, the advent of the Internet has complicated analysis of restrictions on speech. (J.S. v. Bethlehem Area School District, 2002, p. 850)

While no current court cases deal directly with the internet and schools as pertaining to student free speech rights, *Reno v. ACLU* (1997), in addition to a number of acts by presidents and Congress, have addressed the issue of free speech and the internet at large and are pertinent to this discussion.

In 1996 President Clinton signed into law the Telecommunications Act of 1996, similar in scope to section 343 of the Michigan Penal Code discussed in *Butler v. Michigan (1957).* The most controversial part of the act was the Communications Decency Act (CDA) (47 U.S.C. § 223(a)-(h) (1996)):

> § 223(a) – [A]ny person in interstate or foreign communications who, "by means of a telecommunications device," "knowingly … makes, creates, or solicits" and "initiates the transmission" of "any comment, request, suggestion, proposal, image, or other communication which is obscene or *indecent*, knowing that the recipient of the communication is under 18 years of age," "shall be criminally fined or imprisoned."
>
> § 223(d) – [M]akes it a crime to use an "interactive computer service" to "send" or "display in a manner available" to a person under age 18, "any comment, request, suggestion, proposal, image, or other communication

> that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication."

The CDA provided for criminal penalties for certain types of communications and almost immediately drew criticisms from many individuals and organizations, including the American Civil Liberties Union (ACLU). Both the ACLU (ACLU v. Reno, 1996) and an editor of an Internet newspaper (Shea v. Reno, 1996) brought their challenges to court and in both cases the CDA was declared unconstitutional. The Government appealed in both cases and, noting probable jurisdiction, the U.S. Supreme Court consolidated the two cases into *Reno v. ACLU* (Dayton, et.al., 2006).

With Justice Stevens delivering the opinion, the Court was unanimous in deciding that the CDA was unconstitutional and infringed on First Amendment free speech rights (Reno v. ACLU, 1997, p. 866). Stevens stated that "Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree with the three judge District Court that the statute abridges 'the freedom of speech' protected by the First Amendment" (p. 849).

In delivering its opinion, the Court noted a number of items pertaining to this new medium of communication, the Internet, giving a brief history of its origins from the military program called ARPANET and concluding with demonstrating its extraordinary growth (p. 850). Considering all of the methods of communication contained within the vehicle of the Internet, the Court stated that "these tools constitute a unique

medium…located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet" (p. 870).

Because of the uniqueness and accessibility of the Internet the Court noted that "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox" (p. 870). Because of this universal access the Court also noted that it was "no exaggeration to conclude that the content on the Internet is as diverse as human thought" (p. 851). Equally perplexing was the fact that no one individual or organization could claim control of the Internet:

> Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web. (p. 853)

This universal access and lack of centralized control allowed unprecedented freedom of expression that both troubled some members of Congress while at the same time was viewed as a great strength by others (Dayton, 2006). The trail court in *ACLU v. Reno* noted that:

> True it is that many find some of the speech on the Internet to be offensive, and amid the din of cyberspace many hear discordant voices that they regard as indecent. The absence of governmental regulation of

> Internet content has unquestionably produced a kind of chaos, but as one of plaintiffs' experts put it with such resonance at the hearing: “What achieved success was the very chaos that the Internet is. The strength of the Internet is that chaos.” Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects. (929 F.Supp. 824, 833 (E.E.Pa.1996))

Relying on the factual findings of the trial court, the Court determined that the worst of internet speech, especially in the realm of sexually explicit material, was rarely encountered by accident. In addition the Court noted that accessing information on the Internet was a participatory endeavor that seldom happened by chance:

> Though such material is widely available, users seldom encounter such content accidentally. "A document's title or a description of the document will usually appear before the document itself . . . and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content." For that reason, the "odds are slim" that a user would enter a sexually explicit site by accident. Unlike communications received by radio or television, "the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended." (p. 855)

The Court cited examples of earlier cases that demonstrated a willingness to justify regulating broadcast media under special circumstances, including governmental regulation of broadcasting *(Red Lion Broadcasting Co. v. FCC,* pp. 399-400), the scarcity of available frequencies at its inception (*Turner Broadcasting System, Inc. v. FCC,* pp. 637-638), and its invasive nature (*Sable Communications of Cal., Inc. v. FCC,* p. 128). However, the situations present in these cases were not considered present in "cyberspace" (Reno v. ACLU, p. 869), especially the scarcity of resources – "the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low cost capacity for communication of all kinds" (p. 870). As such these cases provided no basis for "qualifying the level of First Amendment scrutiny that should be applied to [the Internet]" (p. 870).

The Court ultimately argued that the CDA, while possessing a compelling interest component in protecting minors from indecent and patently offensive speech, did not meet the narrowly tailored requirement. The Court stated:

> We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve. In evaluating the free speech rights of adults, we have made it perfectly clear that "[s]exual expression which is indecent but not

> obscene is protected by the First Amendment."…"[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." Indeed…"the fact that society may find speech offensive is not a sufficient reason for suppressing it" … It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials … But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not "reduc[e] the adult population . . . to . . . only what is fit for children."…"[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."…[T]he mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity … that inquiry embodies an "over arching commitment" to make sure that Congress has designed its statute to accomplish its purpose "without imposing an unnecessarily great restriction on speech." (p. 875)

The Court ended by stating that "the growth of the Internet has been and continues to be phenomenal … we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship" (p. 885).

Other acts followed that were aimed at protecting children online. In 1996 the Child Pornography Prevention Act (CPPA) was signed into law but later found unconstitutional in *Ashcroft v. Free Speech Coalition* (2002), in part because it went beyond the legitimate governmental interests of protecting children from exploitation and instead imposed criminal penalties on protected speech:

> The First Amendment commands, "Congress shall make no law… abridging the freedom of speech." The government may violate this mandate in many ways … but a law imposing criminal penalties on protected speech is a stark example of speech suppression. The CPPA's penalties are indeed severe … While even minor punishments can chill protected speech … this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression. (p. 244)

In 2000, Congress enacted the Children's Internet Protection Act (CIPA), aimed at restricting access to inappropriate material for people of all ages who utilized the Internet in locations that were at least partially funded by federal funds. Generally this meant access to the internet in public schools or public libraries. The Court in *United*

States v. American Library Association (2003) determined that CIPA's required safety policies, which included electronic blocking devices, were valid in that they addressed legitimate governmental interests in protecting minors, stating that "There are substantial Government interests at stake here: The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree" (p. 196). The Court also stated that:

> Internet terminals are not acquired by a library in order to create a public forum for Web publishers to express themselves. Rather, a library provides such access for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality … [B]ecause of the vast quantity of material on the Internet and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not. While a library could limit its Internet collection to just those sites it found worthwhile, it could do so only at the cost of excluding an enormous amount of valuable information that it lacks the capacity to review. Given that tradeoff, it is entirely reasonable for public libraries to reject that approach and instead exclude certain categories of content, without making individualized judgments that everything made available has requisite and appropriate quality. (p. 195-196)

Congress, in response to the decision in *Reno v. ACLU*, passed the Child Online Protection Act (COPA). In *Ashcroft v. ACLU* (2004) the Court upheld an injunction against enforcement of the COPA because it was probable that the statute violated free speech provisions in the First Amendment (p. 656). The Court stated that:

> Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid … and that the Government bear the burden of showing their constitutionality … This is true even when Congress twice has attempted to find a constitutional means to restrict, and punish, the speech in question … The Government has failed, at this point, to rebut the plaintiffs' contention that there are plausible less restrictive alternatives to the statute. (p. 660)

In 2006, the United States House of Representatives voted on a new bill entitled Deleting Online Predators Act of 2006 (DOPA) . If enacted this bill would require schools and libraries that receive E-rate funding to protect minors from harmful material on the Internet, including child pornography, material that is obscene or harmful to minors, or "commercial social networking website[s] or chat room[s] unless used for an educational purpose with adult supervision … by enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access" (H.R. 5319). This bill was passed in the House by a margin of 410-15.

DOPA was recently reintroduce under H.R. 1120 in February of 2007 and is currently referred to as Deleting Online Predators Act of 2007. It will most likely have difficulty getting past the court cases generated by its language that will surely come if the United States Senate adopts a similar measure. Since CIPA, upheld in *United States v. American Library Association* (2003), required public schools and libraries to adopt an Internet safety policy that protected minors from online obscenity, child pornography, and other material harmful to minors, DOPA has the potential to be found less flexible and redundant.

Current Case Law

Below is a discussion of some lower court cases that address off-campus speech as well as the Internet and attempt to apply the above rules and tests as best they can. It should be noted here that these rulings are only binding on those who reside within the jurisdictions of the specified lower courts.

In *Thomas v. Granville Central School District* (1979), four high school students published an underground newspaper with their own money and distributed it off-campus before and after school. The students had asked occasional questions of an English teacher and typed a few of the articles on school typewriters. The students were suspended for five days, had to write essays on the harm their speech caused and had suspension letters included in their permanent files (p. 1046). While the school said the students' speech caused a disturbance on campus and that their paper was obscene, the Court found no evidence of either (p. 1052). Despite the use of school typewriters, the Court found that the students were essentially operating off campus, noting that no school funds were used to produce the paper and that the students had included in their paper a

notice that disclaimed any connection with the school. In ruling for the students, the Court stated that "[T]he First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon" (p. 1045). The Court found that as members of the public, students were subject to the same laws as any other citizen and therefore school regulations were unnecessary. School officials, the court said, were not empowered to assume the role of parens patriae [surrogate parent] (p.1051).

In 1986, Jason Klein was in a parked car outside of a restaurant that was off-campus. When a teacher from his school pulled up beside him, the student extended his middle finger at the teacher. The student was subsequently suspended for vulgar or extremely inappropriate language or conduct directed toward a staff member. The court prevented the school from suspending the student and held that "any possible connection between the student's act to a person who happened to be one of his teachers and the proper and orderly operation of the school's activity was far too attenuated to support discipline" (Klein v. Smith, 1986, p. 1440). The Court then stated that "the First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us" (p. 1441). The Court opinion, however, made it clear that if they had found that the off-campus expression had materially disrupted activities at the school, they would have upheld the suspension (p. 1441).

In 1998, Sean O'Brien, while a sixteen-year-old junior at Westlake High School, created a website that ridiculed his band teacher, Raymond Walczuk. His web page "raymondsucks.org" contained several unflattering comments about Walczuk. O'Brien

contended that school officials did not have the authority to regulate students' non-threatening speech that was created off campus. "It would be different if the plaintiff hurled obscenities at his teacher face-to-face on school grounds in front of other students. But here, defendants are punishing the plaintiff because he criticized his teacher off-campus and the teacher found out about it" (O'Brien v. Westlake City School Board, 1998, p. 18). In this case the Westlake City Schools Board of Education settled for $30,000.

Again in 1998, another case involving the internet and a student was brought before the lower courts, *Beussink v. Woodland R-IV School District* (1998). Brandon Beussink, a high school student at Woodland High School in Marble Hill, Missouri, created a personal website using his own personal computer and no school facilities or resources. There he made non-defamatory but highly critical remarks of administrators and their actions at Woodland High School, using vulgar language "to convey his opinion regarding the teachers, the principal and the school's own homepage" (p. 1177). A student who had accessed the site during school hours, with the intention of getting Beussink in trouble, showed it to a member of Woodland's faculty. The criticism upset the teacher and consequently the principal of the school was informed. Woodland's principal suspended Brandon for five days, citing the 'offensive nature' of Beussink's site as the rationale (p. 1178). After five days had elapsed, the principal extended Beussink's suspension to fifteen days. Because of the school's unauthorized absence policy, a 15-day suspension resulted in his grades being dropped by 8.5 grade levels.

The presiding judge, Rodney W. Sippel, ruled that the high school officials did not show that the suspension was caused by something more than a mere desire to avoid

the discomfort and unpleasantness that always accompany an unpopular viewpoint. Sippel also stated, "Disliking or being upset by the content of a student's speech is not an acceptable justification for limiting student speech under Tinker" (p. 1180).

In *Boucher v. The School Board of the School District of Greenfield* (1998), a student published an article in an underground newspaper containing information enabling classmates to disrupt the school's computer system. This paper, identified as not the official school newspaper, was developed off campus and distributed in bathrooms, locker rooms, and the cafeteria at Greenfield. When the student responsible for the article was identified, he was suspended and recommended for expulsion by the school administration. The school board heard the case and expelled him for one school year.

The Court determined that the article advocated on-campus activity, thus permitting the district to discipline the student without violating the student's First Amendment rights. In addition the Court found that the information provided to students on how to hack into the school's computer system would "substantially and materially disrupt the school environment" (p. 835).

In *Emmett v. Kent School District No. 415* (2000), an eighteen-year-old honor student posted a web page on the Internet from his home entitled the "Unofficial Kentlake High Home Page." The site included a disclaimer that the site was not sponsored by the school and was for entertainment purposes only. Nick Emmett's home page contained mock "obituaries" of two of his friends. The obituaries became the topic of discussion at school among students, faculty, and administrators. The site also allowed web page visitors to vote on who would die next. The controversy came after an evening

television news story depicted his site as containing a "hit list" of people to be killed. Even though Emmett immediately removed his site from the Internet, the principal placed him on emergency expulsion for harassment, intimidation, disruption to the educational environment, and copyright violations. The expulsion was later modified to a five-day suspension. Emmett sued in federal court, contending that the suspension violated his First Amendment free-expression rights.

The Court in this case determined that the website was not produced in connection with any class or school project. Additionally, "[a]lthough the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school's supervision or control" (p. 1090). The Court determined that school officials failed to present any "evidence that the mock obituaries and voting on this website were intended to threaten anyone, . . . or manifested any violent tendencies whatsoever" (p. 1090).

In *Beidler v. North Thurston School District No. 3* (2000), Karl Beidler created a web page in January 1999, while he was a junior at Timberline High School in Thurston County, Washington. His site, entitled "Lehnis Web", parodied Dave Lehnis, the assistant principal of his school. The site showed Lehnis participating in a Nazi book burning, drinking beer, and spray painting graffiti on a wall. In late January 1999 the school principal placed Beidler on "emergency expulsion". According to Beidler, the principal told him some teachers said they felt uncomfortable about having Beidler in their classes due to the content of his website. The principal also testified that he found the website "personally appalling" and "real inappropriate".

The Court in this case ruled in favor of the student. According to the Court, the speech, although inappropriate, did not cause a substantial disruption under the Tinker standard. In referencing *Hazelwood* the court determined that the speech was not school-sponsored and thus did not fall under the related test. Finally, the Court stated that the case did not resemble the circumstances surrounding the *Fraser* case in that the speech was off-campus, and thus no test from *Fraser* could be applied.

In a similar case this same year, a court seemingly ruled differently. In *Commonwealth Court of Pennsylvania v. Bethlehem Area School District* (2000), the court held in favor of a school district which disciplined a student for a personal website. The middle school student's home website, entitled "Teacher Sux", contained threatening and derogatory comments about a teacher and a principal. It included a picture of the teacher's severed head dripping with blood, a picture of the teacher's face morphing into Adolph Hilter, and requested funds to cover the cost of a hit man. The student was permanently expelled. The Court held that the student's First Amendment rights were not violated. After viewing the website, the teacher was unable to complete the school year and took a medical leave of absence for the following year. The student's statements also had a negative impact on other students who were invited to add their own derogatory comments onto the website.

The Court in this case found that the student's speech materially disrupted the class and invaded the rights of others. The difference between *Beidler* and *Commonwealth* was the aftermath that resulted from the posting. While the principal in *Beidler* was appalled, he was still able to complete his duties and did not require an extended leave of absence. Additionally, the speech represented in Commonwealth was

arguably much more graphic and disconcerting while also directly advocating violence on school grounds in the request for a hit man. It also directly contributed to the medical leave of absence taken by the teacher, thus causing a substantial disruption in the classroom. The Court further noted that "[r]egrettably, in this day and age where school violence is becoming more commonplace, school officials are justified in taking very seriously threats against faculty and other students" (p. 6).

In *Killion v. Franklin Regional School District* (2001), Zachariah Paul, a student at Franklin Regional High School, published a “top ten” list at home on his computer about the athletic director which included statements regarding the director’s appearance and sexual proclivity. This list was e-mailed to several of Paul’s friends from his home computer. Several weeks later the list found its way into the Franklin Regional High School teachers’ lounge. An undisclosed student had reformatted Paul’s original e-mail and distributed it on school grounds. Paul was subsequently suspended for ten days for “verbal/written abuse of a staff member” (p. 448). Mrs. Killion, Paul’s mother, quickly filed suit seeking his reinstatement, stating that the suspension violated Paul’s First Amendment free speech rights because the school had no business disciplining his home activities.

The Court found that the speech was non-threatening and did not cause any faculty member to take a leave of absence. In addition, the Court determined that the site was created out of school, that Paul was not responsible for bringing the list to school, and that no substantial disruption resulted from the site. The Court also decided that the board policy that allowed them to suspend Paul for “verbal/written abuse of a staff member” was unconstitutionally vague and overbroad.

The next case is *Mahaffey v. Aldrich* (2002). In this case student Joshua Mahaffey was suspended for co-creating a Web site entitled “Satan’s web page”. The site contained a list of “people I wish would die”, “music I hate”, and “movies that rock” (p. 779). The site also contained a paragraph entitled “Satan’s Mission For You This”. School officials learned of the Web site from the local police who were contacted by the parent of another student. When Joshua admitted to school officials that he helped create the site, they suspended him and later brought expulsion proceedings against him. Joshua stated that he created the site “for laughs” (p. 782).

Applying the *Tinker* standard, a federal district court sided with Joshua on his First Amendment claim because “there is no evidence that the website interfered with the work of the school or that any other student’s rights were impinged” (p. 784). The Court concluded that “Defendant’s regulation of Plaintiff’s speech on the website without any proof of disruption to the school or on campus activity in the creation of the website was a violation of Plaintiff’s First Amendment rights” (p. 785). The Court also rejected any notion that the web site was a true threat, citing a disclaimer on the site that said, “PS: Now That You’ve read my Web page please don’t go killing people and stuff then blaming it on me. OK?” (p. 785).

Another case this same year, *J.S. v. Bethlehem Area School District* (2002), involved an eight-grade student at Nitschmann Middle School in Bethlehem, PA, who created a web page on his home computer that made numerous derogatory comments about his algebra teacher, the school principal, and others. The page contained derogatory comments as well as other statements such as "Why Should She Die?" and "Take a look at the diagram and the reasons I gave, then give me $20.00 to help pay for

the hitman" (p. 416). Considering some of the material on the website to be threats, the school principal and teacher called law enforcement officials, including the F.B.I. The student voluntarily removed the website one week after the principal learned of the website. One teacher towards whom the above remarks were directed was said to suffer from headaches, fright, stress, and anxiety, forced to take anti-anxiety and anti-depression medications, and ultimately applied for a medical sabbatical for the next year (pp. 416-417).

In considering off-campus speech, the Court stated that "it is evident that the courts have allowed school officials to discipline students for conduct occurring off of school premises where it is established that the conduct materially and substantially interferes with the educational process" (p. 421). The Court then determined the speech to be on-campus speech because the student accessed the site at school, showed it to a fellow student, and informed other students of the site, stating that "We hold that where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech" (p. 425). Additionally, the Court stated that "where speech that is aimed at a specific school and/or its personnel is brought to the school campus will be considered on-campus speech" (p. 426). Here the Court suggested that speech could be considered on-campus because it was meant to be read by people who were at the school.

While J.S. did put a disclaimer on his site, he did not limit access to the site and did not inform the viewer of its offensive nature. The Court concluded that "the disclaimer does not create a contract between Student and the viewer and does not create any rights thereunder that could be renounced (p. 425).

In response to *J.S. v. Bethlehem Area School District* (2002), one commentator has suggested that off-campus civil law remedies such as libel are available for teachers and principals "who feel defamed by student speech that originates off campus" (Calvert, 2001, p.245). Calvert also suggests that "sufficient remedies and redress in the civil, criminal, and juvenile justice system already exist for off-campus expression that causes harm" (Calvert, 2001, pp. 245-246). This sentiment seemingly echoed the findings of an earlier case from the federal district court in Texas:

> It makes little sense to extend the influence of school administration to off-campus activity under the theory that such activity might interfere with the function of education. School officials may not judge a student's behavior while he is in his home with his family nor does it seem to this court that they should have jurisdiction over his acts on a public street corner. A student is subject to the same criminal laws and owes the same civil duties as other citizens, and his status as a student should not alter his obligations during his private life away from the campus. (Sullivan v. Houston Indep. School Dist., 1969, pp. 1340-1341).

A case involving off-campus speech, *Doe v. Pulaski County Special School District* (2002), also came into play in 2002. In this case a young boy who had recently broken up with his girlfriend drafted two letters that were violent and obscenity-laden, expressing his desire to molest, rape, and murder the girl. Although he prepared both letters at home and never delivered them, a friend acquired the letters and took them to school, reading them to the girlfriend and other students during gym class. The district expelled the student for the entire school year. While he was subsequently reinstated by

the District Court for the Eastern District of Arkansas, the U.S. Court of Appeals for the 8th Circuit overruled.

First, the Court explained that, although Doe did not specifically give the letter to his ex-girlfriend nor did he ask his friend to give it to her, he did allow his friend to read the letter, knowing that there was a good possibility that she would tell his ex-girlfriend because they were friends. This, in the Court's mind, established intent. In addition, while the district court stated that the wording in the letters were only arguably threatening, the court of appeals "disagree[d] entirely" (p. 12). After explaining in some detail the contents of the letter the court stated, "Most, if not all, normal thirteen-year-old girls (and probably most reasonable adults) would be frightened by the message and tone of [Doe's] letter and would fear for their physical well-being if they received the same letter" (pp. 12-13).

The Court did conclude that there may have been different solutions to the issue that were not as harsh as expulsion. However, citing *Wood v. Strickland* (1975), the court stated, "[it] is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion" (p. 326).

The next court case discussed here is *Coy v. Board of Education of the North Canton City Schools* (2002). In this case Jon Coy created a website on his home computer and on his own time – no part of the website was created using school equipment or during school hours. The website contained pictures and biographical information of Coy and his friends, quotes attributed to Coy and his friends, and a section entitled "losers". The "loser" section contained the pictures of three boys who attended

North Canton Middle School. Most objectionable was a sentence describing one boy as being sexually aroused by his mother. A teacher in the building was told by several other students about the website. When the website was viewed by the teacher, he decided to report this to the principal. It was determined that Coy had accessed his own, unauthorized website from the school computer lab. Coy was suspended for four days for violation of the student conduct code dealing with obscenity, disobedience, and inappropriate action or behavior. School officials stated that they had the right, under the *Fraser* decision, to punish the student for his vulgar and lewd speech. The suspension letter also mentioned that Coy was being referred to the Superintendent for expulsion. While Coy accessed his website at school, at the time that Coy was expelled there was no evidence that he had displayed the information contained on the website to any other student.

The court used the *Tinker* test, stating that it was appropriate to regulate "silent, passive expression of opinion" only when the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" (p. 796).

Finally, a discussion of the most recent free speech case related to students is appropriate. *Frederick v. Morse* (2006) involved a student that was suspended from his Alaska high school for displaying a banner with the words "Bong Hits 4 Jesus" across the street from his school during the Winter Olympics Torch Relay in 2002.

In January 2002, students were released from Juneau-Douglas High School to watch the Olympic torch pass in front of the school. Frederick, who had not officially made it to school yet because his car got stuck in his driveway, joined some friends on

the sidewalk across from the high school. Frederick and his friends waited for the television cameras then unfurl a banner that read "Bong Hits 4 Jesus." When they displayed the banner, the principal, Deborah Morse, ran across the street and seized the banner.

Morse initially suspended Frederick for five days for violating the school district's anti-drug policy, stating that:

> Display of the banner would be construed by many, including students, district personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use which is inconsistent with the district's basic educational mission to promote a healthy, drug-free life style. Failure to react to the display would appear to give the district's imprimatur to that message and would be inconsistent with the district's responsibility to teach students the boundaries of socially appropriate behavior. (Frederick v. Morse, 2006, p. 1115)

Morse increased the suspension to 10 days after Frederick refused to give the names of his fellow participants and quoted Thomas Jefferson on free speech. Frederick eventually filed a §1983 lawsuit against Morse and the school board in the United States District Court for the District of Alaska claiming they violated his federal and state constitutional rights to free speech. The District Court ruled in favor of the principal – the 9th US Circuit Court of Appeals reversed.

One issue argued in this case was whether or not the speech could be considered on-campus speech. In addition, questions were raised with relation to the *Tinker* substantial disruption test. The defense argued that there was no disruption to the school

setting, while petitioners argued that the phrase would reasonably be interpreted by most as an endorsement of drug use which was inconsistent with the district's educational mission and thus disruptive to that mission.

Justice Kleinfeld, in delivering the Court's opinion, stated that "the question comes down to whether a school may, in the absence of concern about disruption of educational activities, punish and censor non-disruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school. The answer under controlling, long-existing precedent is plainly "No" (p. 1116).

Justice Kleinfeld revisited *Tinker*, explaining that the government policy of the time was to support the war and yet the arm bands symbolized legitimate opposition for supporting the Vietnam War (p. 1116). In moving away from *Fraser* he stated that "'Bong Hits 4 Jeusu' may be funny, stupid, or insulting … but it is not 'plainly offensive' in the way sexual innuendo is (p. 1118). In summary Judge Kleinfeld stated that "the question is how far Tinker goes to protect such student speech as Frederick's, and how far Fraser goes to protect school authority to censor and punish student speech that would undermine the school's basic educational mission" (p. 1119). Further clarifying educational missions, Judge Kleinfeld stated:

> All sorts of missions are undermined by legitimate and protected speech – a school's anti-gun mission would be undermined by a student passing around copies of John R. Lott's book, *More Guns, Less Crime*; a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than

> teetotalers; and a school's traffic safety mission would be undermined by a student circulating copies of articles showing that traffic cameras and automatic ticketing systems for cars that run red lights increase accidents. (p. 1120)

Judge Kleinfeld referenced a number of lower court cases that supported the free speech rights of students then referenced a few cases that upheld the school's ability to censor specific content, but pointed out that this case was "distinguishable in one key respect … Boroff sought to wear his T-shirt in the classroom, where its message would be more likely to interfere with the school's core educational mission. Frederick's banner … was displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials. It most certainly did not interfere with the school's basic educational mission" (p. 1122).

Judge Kleinfeld concluded by stating that "[t]he law of *Tinker*, *Fraser*, *Hazlewood* … is so clear and well-settled that no reasonable government official could have believed the censorship and punishment of Frederick's speech to be lawful" (p. 1125). This is significant since Frederick filed a damages suit against Principal Morse. In essence the Court determined that Frederick's rights were so clearly established that Principal Morse did not merit qualified immunity and could thus be liable.

Frederick v. Morse is additionally significant because it was argued before the U.S. Supreme Court as *Morse v. Frederick* on March 19, 2007. While the Court findings are still forthcoming, comments from the oral arguments of the case are instructive. Kenneth Starr, lawyer for Deborah Morse, stated that "this case is ultimately about drugs and other illegal substances" (Morse v. Frederick, No. 06-278, 2007, oral arguments, p.

5). Douglas Mertz, lawyer for Joseph Frederick, argued that this was "a case about free speech – it is not a case about drugs (p. 29). Justice Roberts stated that "it's a case about money" and that "there's a broader issue of whether principals and teachers around the country have to fear that they're going to have to pay out of their personal pocket whenever they take actions pursuant to established board policies that they think are necessary to promote the school's educational mission (pp. 29-30).

Mr. Mertz continued Judge Kleinfeld's argument that Principal Morse should have known because of her background and the council she received from others that her actions were unlawful, to which Justice Scalia respond "as it is to us?" and Justice Souter added that after 50 minutes of debate they were no closer to a clear understanding (p. 49). Kenneth Star concluded the oral arguments with the following statement:

> To promote drugs is utterly inconsistent with the educational mission of the school. The court has spoken more broadly with respect to the need to defer to school officials in identifying the educational mission. We know that there are constitutional limits (to lawful political expression). Those limits are captured in Tinker. A passive pure political speech that reflects on the part of the school board a standardless discretionary effort to squelch any kind of controversial discussion, that casts a pall of orthodoxy over the class room: we are light years away from that. (p. 59)

Rodney Somolla, commenting on the necessity of free speech, stated that "if societies are not to explode from festering tensions, there must be valves through which citizens may blow off steam. Openness fosters resiliency; peaceful protest displaces more violence than it triggers; free debate dissipates more hate than it stirs (Smolla, 1992,

p. 13). Such seems to be the case with students and their personal web pages. In light of many of the recent violent tragedies involving schools and students, some have suggested that we should be thankful students use speech and not a gun to express their emotions (Calvert, 2001).

Most of the lower court cases cited tended to side with the student. Most often this was due to either the failure of school officials to show substantial disruption to the school environment or the actual lack of justification for such claims. Those cases that sided with the school either showed substantial disruption to the school environment or the existence of threatening speech.

In many of the cases discussed schools have erred not in reacting but rather in over-reacting. Michael Welch described some of these reactions as moral panic and listed five indicators of such panic as: (1) concern ("a heightened concern over the behavior of others and the perceived consequences of such conduct on society"; (2) hostility ("hositility toward an identifiable group or category of people who, in turn, are vilified as outcasts"; (3) consensus ("a wide spread [but not necessarily universal] belief that the problem at hand is real, it poses a threat to society, and something should be done to correct it"; (4) disproportionality ("the perceived danger is greater than the potential harm"; and (5) volatility ("moral panic erupts suddenly even though the issue may have existed for some time [but] interest in the putative threat is subject to rapid decline" (Welch, 2000, pp. 102-109).

In keeping with the theme of panics, one commentator has suggested that there are two moral panics generally attached to student-created web sites – Internet

technology and rampaging youth. In most cases the nexus between these two panics and the resulting violence or forecast of violence is non-existent (Caplan, 2003).

In summarizing *J.S. v. Bethlehem Area School District* (2002) and related cases surrounding this case, Robert Simpson suggested that the areas to consider when evaluating a student web page were (a) disruptive expression, (b) threatening expression, (c) offensive and vulgar expression, (d) equal protection, (e) disclaimers, and (f) privacy (Simpson, 2001). He concluded that in both disruptive and threatening expressions there must be evidence of material disruption or a reasonable forecast of such before the school can be involved (Simpson, 2001). However, Simpson suggested that offensive and vulgar expressions are not protected if they are "accessed significantly at school, regardless of proof of material disruption" (Simpson, 2001, p. 200).

Clay Calvert suggested that there is a five-factored process for analyzing student-created Web sites, namely (a) the student's place of enrollment, (b) the place of origin of the speech, (c) the place of download of the speech, (d) the content of the speech, and (e) the presence or absence of a site disclaimer/warning (Calvert, 2001, p. 262). While Simpson argued that a disclaimer will not protect the creator from discipline because it created no rights (Simpson, 2001, p. 202), Calvert suggested that disclaimers should at least be considered because they may demonstrate that the content of a given site should not be taken seriously (Calvert, 2001, p. 268).

Calvert also disagreed with the final ruling in *J.S. v. Bethlehem Area School District* (2001) that found the impact on the teacher that applied for a medical sabbatical "hindered the educational process" (J.S. v. Bethlehem Area School District, 2001, p.

421), stating:

> This is an incredibly problematic conclusion … not only because the speech that allegedly hindered the educational process originated off-campus and never called for disruptions on campus, but because it suggests that a single teacher's arguably thin-skull, personal reaction to commentary posted on an outside Web site dictates and controls what constitutes a disruption of the educational process inside a school. This is tantamount to a heckler's veto – the speaker's rights were trampled by the audience's reaction. (Calvert, 2001, p. 249)

Calvert concluded that "there are very few circumstances in which school administrators are ever justified … for punishing students for their off-campus expression. It is only when students deliberately bring their expression on campus – when they download their personal Web sites on school computers during school hours or encourage other students to do so – that schools may properly redress and punish the speech" (Calvert, 2001, pp. 252-253). He further concluded that "schools overstep both their educational mission and authority when they attempt to punish off-campus speech" (Calvert, 2001, p. 266). Aaron Caplan stated that "the right of public school students to speak freely in public and private places off-campus should not be limited because they are subject to compulsory attendance laws for part of the week … Judges would never find speakers in summary contempt of court for disrespectful statements made outside the courtroom … In the same way, enforcing school rules off-campus exceeds a school principal's jurisdiction" (Caplan, 2003, pp. 140, 143).

The Internet and its pervasiveness tend to cloud the issue of on- and off-campus speech. Because the Internet is uncontrolled and unregulated, it also tends to engender heightened concern in administrators and teachers. However, some have suggested that "the fears of a new technology – a technology about which students quite often know more than their teachers – cannot dictate administrators' responses" to students and the web (Calvert, 2001, p. 254).

The advent of the Internet has muddied the waters related to standards previously established in cases such as *Tinker*, *Fraser*, and *Hazlewood*. Many have called for a new standard passed down from the Supreme Court related to the Internet and student free speech (Caplan, 2003; Seminski, 2001; Simpson, 2001; Swartz, 2000). Seminski summed it up as follows:

> The Court's ignorance concerning the vastness of the Internet, coupled with poor analysis, misclassification of the medium, and erroneous application of an improper standard of review have led to a line of superfluous decisions. Considering the interactive nature of the Internet and its inherently transcendental qualities, along with the Court's recognition of the lessened protections afforded students in the … educational environment, it is time for the courts to land a clear Internet related speech precedent. (Seminski, 2001, p. 184)

CHAPTER 4

FINDINGS AND CONCLUSIONS

Findings

Chapter Four provides a summary of this study's findings and conclusions. After a thorough review of the historical issues related to freedom of speech in the school setting as well as a detailed analysis of relevant Supreme Court cases, this study found that the U.S. Supreme Court has held:

1. While the amendments to the U.S. Constitution did not introduce any novel principles of government, they did embody certain guaranties that were also subject to exceptions that arise from the necessities of the situation [Robertson v. Baldwin (1897)].
2. Any person that created in any way a publication in any form that encouraged the commission of any crime would be guilty of a crime [Abrams v. United States (1919); Fox v. Washington(1915)]
3. The power to punish speech that produces or is intended to produce clear and imminent danger is greater during a time of war [Abrams v. United States (1919); Schenck v. U.S. (1919)].
4. Truth in speech is best determined by allowing it to survive competition in the marketplace [Abrams v. United States (1919)].
5. Free Speech rights apply regardless of the form of media involved [Abrams v. United States (1919); Schenck v. U.S. (1919)].
6. The First Amendment, while prohibiting legislation against free speech, was not intended to protect all forms of speech [Frohwerk v. U.S. (1919); Gilbert v.

State of Minnesota (1920); Gitlow v. People of State of New York (1925); Chaplinsky v. State of New Hampshire (1942); R.A.V. v. City of St. Paul (1992)].

7. Criminal speech can be punished even without specifics for carrying out the plan [Frohwerk v. U.S. (1919)].

8. Freedom of speech does not deprive a State of the right of self-preservation [Gitlow v. People of State of New York (1925); Toledo Newspaper Co. v. United States (1918)].

9. Protected speech cannot be limited unless it would induce immediate and disruptive or criminal actions [Gitlow v. People of State of New York (1925); Terminiello v. City of Chicago (1949); Tinker v. Des Moines School District (1968); West Virginia State Board of Education v. Barnette (1943)].

10. Lewd, obscene, profane, libelous, and fighting words are not protected by the First Amendment [Bethel School District No. 403 v. Fraser (1986); Chaplinsky v. New Hampshire (1942); FCC v. Pacifica Foundation (1978)].

11. Speech can be limited due to reasonable time, place, and manner restrictions [Bethel School District No. 403 v. Fraser (1986); Cox v. Louisiana (1965); FCC v. Pacifica Foundation (1978); Hazelwood School District v. Kuhlmeier (1988); Tinker v. Des Moines School District (1969)].

12. Freedom of speech extends to more than just verbal or written expressions and can include symbols and other non-speech expressions designed to express ideas or viewpoints [Brown v. Louisiana (1966); Smith v. Goguen (1974); Spence v. Washington (1974); Texas v. Johnson (1989); Tinker v. Des Moines

School District (1969); United States v. O'Brien (1968); West Virginia State Board of Education v. Barnette (1943)].

13. Both the emotional and intellectual power of speech must be protected [Cohen v. California (1968)].

14. Nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses [R.A.V. v. City of St. Paul (1992); Texas v. Johnson (1989)].

15. True threats do not receive First Amendment protection [Watts v. United States (1969)].

16. Students may express political speech so long as it does not substantially disrupt the school environment or invade the rights of others [Tinker v. Des Moines School District (1969)].

17. Although schools constitute a more restrictive environment with respect to First Amendment rights, students do not completely shed their constitutional rights at school [Tinker v. Des Moines School District (1969)].

18. Children do not possess the full capacity for individual choice afforded by the First Amendment [Bethel School District No. 403 v. Fraser (1986); Ginsberg v. New York (1968)].

19. There must be a balance between a student's freedom of expression and society's interest in teaching students the boundaries of socially appropriate behavior [Bethel School District No. 403 v. Fraser (1986)].

20. Educators may limit student speech that is either school sponsored or is perceived to be directly linked to the school so long as the limitations are related to legitimate pedagogical interests [Hazelwood School District v. Kuhlmeier (1988)].

21. The emotional distress of public figures does not warrant a denial of First Amendment protection of speech [Hustler Magazine v. Falwell (1988)].

22. Circumstances surrounding expressions are as important as the speech itself [Texas v. Johnson (1989)].

23. The Internet is the most participatory form of mass speech yet developed and deserves the highest protection from governmental intrusion [Reno v. ACLU (1997)].

24. Inappropriate material on the Internet is seldom encountered accidently [Reno v. ACLU (1997)].

25. Regulations on broadcast media are appropriate under certain circumstances and that standards can vary based on the different medium of communication [Red Lion Broadcasting Co. v. FCC (1969); Reno v. ACLU (1997); Sable Communications of Cal., Inc. v. FCC (1989); Turner Broadcasting System, Inc. v. FCC (1994)].

26. While the government has an interest in protecting children from harmful materials, it cannot enact broad suppressions of speech that also affect adults [Reno v. ACLU (1997)].

Conclusions

This study concluded that:

1. Schools and administrators do not have complete control over student speech on campus. Speech may generally only be limited by establishing that those limitations are necessary to a compelling interest and narrowly tailored to achieve that interest.
2. True threats, even when posted on the internet and away from the school setting, do not receive First Amendment protection.
3. While no Supreme Court guidance has been given as to what a true threat is, many lower courts decisions ask whether an objective, rational recipient of the statement would reasonably believe it to be a threat.
4. Threats made on web sites must reflect a serious expression of intent to inflict harm and not simply be sophomoric, crude, or even highly offensive, to warrant administrative action.
5. While some lower court decisions indicate that off-campus speech is "entirely outside of the school's supervision or control" (Emmett v. Kent School District No. 415, 2000), many other cases have indicated that schools can exercise discipline for off-campus activities as long as both a nexus to the school can be established as well as a substantial disruption to the educational process can be shown.

6. Administrators have more leeway to monitor the content of student created web pages if they are created as school projects or bear the imprimatur of the school, so long as the restrictions are attached to legitimate educational reasons.

7. Students in general cannot be punished simply for expressing themselves on web pages in ways that are unpleasant to administrators and teachers, even if this involves criticism of teachers or administrators, especially since *Reno v. ACLU* determined that the Internet deserves the highest protection from governmental intrusion.

8. Students can be disciplined for the results or the substantial prediction of results of their speech, not the content of their speech, except in cases that meet the *Fraser* or *Hazelwood* tests. Thus, students can be disciplined for writing on a bathroom wall, not necessarily because of the content of the message but because it is vandalism. On the internet, however, the speech is not vandalistic and the web site cannot be considered a virtual bathroom wall, unless the site is directly connected to the school.

9. Schools may consider cyber speech as on-campus speech even if it is created off-campus if they can establish that there is a sufficient nexus between the web site and the school campus.

10. Harassment and bullying, which differ from true threats, do not receive protection under the First Amendment. Schools may be held responsible for not pursuing harassment in the school setting even if the harassment was initiated away from school on a web site or in emails but then accessed school.

11. Administrators must meet a higher standard of proof in relation to substantial disruption or reasonable educational purposes the more off-campus the speech is considered.

12. Web sites that encourage criminal or disruptive acts such as hacking into the school's computer system are likely to meet the substantial disruption test of *Tinker* even if the information is not accessed on-campus if the information is deemed credible and potentially harmful.

13. Speech of a political or religious nature generally receives the most protection, followed by commercial speech. Obscenity falls outside the protections of the First Amendment.

14. Students that create web sites that advocate disruption or criminal acts may be susceptible to discipline even if there are no specifics for how those plans are to be carried out, so long as the plans exist.

15. Significant access of web sites on school property by students can generally be seen as willful access and not random or accidental.

16. Courts may give more deference to time, place, and manner restrictions in public schools because students do not possess the same level of rights as adults in a public forum. However, the time, place, and manner regulations should still be reasonable.

17. Schools can generally restrict student speech in the name of safety if they can reasonably forecast substantial disruption and the student expression is a true threat.

18. Web sites that are created by students for the purpose of parody are generally protected by the First Amendment, especially if the web page indicates that this is the purpose of the page or site.

In most instances schools and administrators found themselves in difficult situations because they overreacted to the free speech exercised by the students. While schools are charged with teaching manners of civility to the students and helping them understand the proper methods of debate and disagreement, students' sophomoric attempts that run afoul of commonly accepted manners of civility do not generally warrant extended suspensions or expulsions. Students should be taught correct principles, even disciplined for inappropriate content on web pages, especially if it substantially disrupt the classroom environment, but the discipline should be commensurate with both the content and intent of the web site in questions. In addition, administrators should take care to objectively review student web sites and determine the seriousness of the content, whether it is a parody or serious. To restate Justice Brandeis' comment in *Schaefer v. U.S.* (1920), "[Free speech] is a rule of reason … Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment; and to the exercise of good judgment calmness is, in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty" (pp. 482-483).

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