



Students' Rights to Free Speech – How Free?

Operation Protect & Defend – 2011 Program

The first ten amendments to the United States Constitution provide our country's citizens with certain rights. The very first amendment provides:

Congress shall make no law . . . abridging the freedom of speech, or of the press;

The Founding Fathers considered this Constitutional right central to maintaining democracy. According to George Washington: "If the freedom of speech is taken away, then dumb and silent we may be led, like sheep to the slaughter." The right to free speech prevents governments at all levels from "abridging" Americans' freedom of speech, allowing for a robust political debate. The United States Supreme Court has a long history of upholding free speech and striking down laws that interfere with people's right to speak freely. The Court's authority to review and overturn laws is one of the Constitution's "checks and balances" among the three branches of government (executive, legislative, judicial).

This Operation Protect & Defend program focuses on student "rights" to free speech, examining the scope of student rights and how other public interests may allow schools and the government to limit student speech. The Supreme Court has balanced student free speech interests with other school-related public interests. This program relies on two Supreme Court decisions that address student speech, two federal appellate court decisions regarding on fake *My Space* pages, and a state appellate court decision related to cyber-bullying. These cases balance students' free speech rights against other governmental interests:

- *Tinker v Des Moines* (1969) upheld the right of an 8th-grader to wear a black armband to school to protest the Vietnam War, after the principal suspended her.
- *Morse v Frederick* (2007) limited a student's right to hold a banner promoting illegal drug use at a school event – often referred to as the "Bong Hits for Jesus" decision.
- *Layshock v. Hermitage School District* (2010) upheld a student's right to post a "lewd, profane and sexually inappropriate" *MySpace* profile page about his high school principal, which the student had created outside the classroom.
- *J.S. Ex Rel. Snyder v. Blue Mountain School District* (2010) limited a student's right to post a fake a *MySpace* profile page created outside the classroom about a middle school principle because the profile threatened to cause a substantial disruption at school.
- *D.C. v. R.R.* (2010) allowed a cyber-bullying victim to sue the bully, despite the bully's claim of First Amendment protection, because the cyber-posts constituted "true threats."

These cases demonstrate that the rights that our Constitution ensures often come with responsibilities, requiring courts to balance protected public interests. The Court has allowed governments to regulate the "time, place and manner" of speech, to protect public interests such as public safety. While governments may not regulate the content of speech generally, such content regulation is allowed at school to prevent disruption of others' education. When there is no disruption, the Supreme Court may uphold students' free speech rights, such as Mary Beth Tinker's armband against the Vietnam War.

When the Supreme Court applies the right to free speech to students, other concerns may limit the speech of students both in and out of school. These concerns include preventing interference with other students' education and a school's rights to oppose illegal drug use. While the Supreme Court consistently acknowledges that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," exercise of their free speech rights may not "materially and substantially disrupt the work and discipline of the school." The Supreme Court considers each case based on its unique facts, applies the law and its previous decisions (called "precedents"), and often exercises its collective judgment in balancing free speech rights with other Constitutional or public interests.



Speech outside school and school activities may get more First Amendment protection. But what happens, in today's networked world, where outside speech affects school activities, such as cyber-bullying of school officials or between students on home computers? Students – with or without computers – may encounter similar consequences from what happens to their peers on *Facebook* or on campus. What is the proper role and responsibility for schools to protect their officials or their students from verbal bullying, regardless whether on-line or in-person? In some cases, student speech may be so threatening, dangerous or harmful that it may be treated as the basis for a civil lawsuit or even criminal sanctions, outside of school. Courts may then need to balance the speaker's free speech rights with the harm – or potential harm – to others.

Supreme Court decisions often reflect the debate over balancing competing public interests. While the Court appoints one member to write the official Court opinion, its adoption may depend on "conurrence" opinions that agree with the result but present different rationale for reaching that result. Other justices may disagree completely and write "dissent" opinions. Before the Court can consider and resolve disputes regarding free speech (or other constitutional rights), a plaintiff must challenge a government's action that the plaintiff thinks limits free speech at school. The challenge includes filing a lawsuit against the school and/or the official limiting speech.

When it comes to constitutional rights controversies in schools, the Supreme Court applies the rules set out in the Constitution – as interpreted by prior Court decisions, called legal "precedent." The Court often asks and answers this question in these school cases: Is the limitation on constitutional rights reasonable, given "the schools' custodial and tutelary responsibility" and their duty to educate? Courts must also ask whether the benefit derived from the free exchange of ideas is "clearly outweighed by the social interest in order and morality."

Web Resources

Wall Street Journal article regarding student speech at:

http://interactivo.wsj.com/article/SB122411642705338721.html?mod=todays_us_opinion

CA law protecting student speech on college campuses. Find information on AB 2581 (2006) at:

<http://www.leginfo.ca.gov>

Webpage Regarding Speech of Public School Students

<http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/studentspeech.htm>

Website for Finding All United States Supreme Court Decisions

<http://www.law.cornell.edu/supct/>

Vocabulary

- Abridge:
- Appeal:
- Bill of Rights/Constitutional Rights:
- Checks and Balances:
- Clear and Present Danger:
- Concurrence:
- Dissent:
- *En Banc* Rehearing:
- First Amendment:
- Fourth Amendment:
- *In Loco Parentis*:
- Legal Precedent:
- Public Figure:
- Symbolic Speech:
- Time, Place and Manner:

Student Speech: Political Cartoons



By David Horsey, Published April 29, 2004 in the *Seattle Post-Intelligencer*
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Note Regarding Cartoon: In 2004, a school superintendent reported a Prosser (WA) High School student, who had shown his artwork to his art teacher, to the Secret Service for threatening the President. One drawing "showed a man in what appeared to be Middle Eastern-style clothing, holding a rifle. He was also holding a stick with an oversize head of the President on it," Associated Press reported. "Another pencil-and-ink drawing portrayed Bush as a devil launching a missile, with a caption reading, 'End the war on terrorism.'"



Reprinted by Permission – *Sacramento Bee*

Note Regarding Cartoon: This cartoon responded to the Supreme Court decision in *Morse v Frederick* (below), in which the Supreme Court upheld a principal's right to discipline a student and take away his banner that she reasonably viewed as advocating illegal drug use against school policy.

CRITICAL THINKING QUESTIONS

1. What prior knowledge is needed to understand the cartoon?
2. What is the subject matter of the cartoon?
3. What is the perspective of the cartoonist on this subject?



How to Brief a Case

In preparing for class and the professor's questions, law students read court decisions and prepare a short summary – or brief – of the decisions. Briefing a case helps the student think through the case's key issues and decisions on those issues (*i.e.* "holdings"). Here's a simple way to summarize a case. In preparation for class, you need only give yourself reminders about these issues, and you do not need to write complete sentences.

State the procedure – Where did this case come from? Was the case previously heard in state or federal courts? What were the rulings of the lower courts? Who won? Who lost? The procedural history of a case is a quick statement about the path the case has taken in the courts.

Name the Parties – Who is the plaintiff? Who is the defendant?

State the Facts – Write down the facts of what happened to the parties. What is the story between them? Who did what to whom? What happened of legal significance, that is, what happened that is relevant to deciding legal issues?

State the Issue (or issues) – What are the legal/constitutional issues that the court must decide in order to arrive at a decision? What rights/amendments were allegedly violated?

State the Holding – What does the court hold or decide? How many justices are in the majority opinion? What is the “rule” that the court comes up with in answer to the legal issues posed?

State the Court’s Reasoning or Rationale – Why does the court decide the way it does? What is the logic or rationale of its holding? What is its analysis?

State the Dissent – If the decision was not unanimous, how many justices dissented and what was their reasoning for disagreeing with the majority opinion of the court? What future challenges might the court face as a result of the disagreement over the decision?

Note Regarding Court Decision "Citations"

You may notice, as you read court decisions, that numbers and letters follow names of court decisions. These are called "citations," which tell you how to find the decision in law books. The first number is the volume where the decision appears. The letters show which “reporter” – or law book series. (The Supreme Court's published decisions appear in several reporters, but usually are cited to the Court's own reports – "U.S.") The final number shows the page number where the decision starts. On the Internet, you can often find the case by doing a search with the case citation. You also may find these citations on the Internet, at the Supreme Court’s website for example (www.supremecourt.gov).



TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT

393 U.S. 503 (1969)

BACKGROUND OF THE CASE

John Tinker, his sister Mary Beth, and Christopher Eckhardt were all students in Des Moines, Iowa when they helped plan a protest against the United State’s involvement in Vietnam. John and Christopher attended a public high school at the time and Mary Beth a public junior high school. The students, their parents and others met in December 1965 to brainstorm ways to publicize their protest. It was decided that in addition to fasting, John, Mary Beth and Christopher would wear black armbands to school on December 16th and New Year’s Eve to communicate their support of a truce.

Having learned of the plan, school authorities announced on December 14th that any student wearing an armband to school would have to remove it or face suspension. Mary Beth and Christopher wore their armbands to school on December 16th and John wore his on the 17th. All three students were consequently suspended and could not return to school until they would come back without the armbands.

Through their parents, John, Mary Beth and Christopher filed a complaint in district court seeking an injunction to restrain the school authorities from disciplining the students and nominal monetary damages. Although no disruption of school was intended or took place, the district court dismissed the complaint following an evidentiary hearing, holding that the school authorities’ actions were reasonable based on their fear of disturbance of school discipline. After the ruling was affirmed by a higher appellate court, the U.S. Supreme Court agreed to hear the case on appeal, granting “certiorari.”



CONSTITUTIONAL ISSUE PRESENTED

Was the wearing of armbands to school as a political protest protected by the First Amendment's guarantee of freedom of speech?

THE COURT'S DECISION

In a 7 to 2 decision, the Court held that the students' form of expression was protected by the First Amendment. The Court began by recognizing that the wearing of armbands under these circumstances was closely related to "pure speech" as it was a silent, passive expression of opinion which did not interfere with the rights of other students or disrupt classes. While acknowledging school officials' authority to control conduct in schools, the Court held that the prohibition could not be justified without a showing that the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." Although school authorities had feared disorder on campus due to the societal controversy surrounding Vietnam, the Court was clear that a mere fear of disturbance "...is not enough to overcome the right to freedom of expression."

The Court also found it relevant that the school authorities did not prohibit the wearing of all political symbols, noting that students in some of the schools wore political buttons and some even wore traditional Nazi symbols. The selective prohibition of political or controversial symbols was also held to be unconstitutional.

Recognizing that students are "persons" under our Constitution, the Court directed that school officials "do not possess absolute authority over their students", and that unless there is a constitutionally valid reason to regulate their speech, "students are entitled to freedom of expression of their views."

CRITICAL THINKING QUESTIONS

- What if the school authorities had prohibited all political and/or controversial symbols – could they have then constitutionally banned the armbands?
- Would the decision have been different if school authorities could prove that students would be arguing in the hall ways if anyone wore a black armband to school? What if it would cause physical fights on campus?
- Does the *Tinker* decision mean that students can say anything they want to at school?



Mary Beth Tinker: The Real Story

Just before Christmas in 1965, a group of students in Des Moines Iowa, including my brothers and sisters and I, and a boy named Chris Eckhardt, wore black armbands to school to mourn the dead in Vietnam. I was thirteen and in eighth grade. For months, we had watched Vietnamese villages burn on the nightly news – the screams of children, soldiers in body bags. We wanted peace. We had no idea that our small action would lead us to the Supreme Court, or that the ruling in *Tinker v. Des Moines* would become a landmark for students' rights. But that is how history is made.

The year before, my mother and my father, who was a Methodist minister, went to Ruhlville, Mississippi for "Freedom Summer." When they returned, they told us stories about courageous people who were threatened, shot, even killed, for standing up for the right to vote. These people became my role models. I admired how they stood up for what they believed in, for what was right, for democracy. And I admired my parents for putting their Christian beliefs into action. I had seen so many who did not.

On the news, children in Birmingham and other cities were attacked with dogs and fire hoses just for wanting good schools, while I went roller skating with my friend, Connie, made fudge at her house, or had slumber parties. We wanted to do more, and would join protestors at the capital, picketing for racial justice and singing freedom songs. There was hope, like now.

But by Christmas of 1965, about 1000 soldiers had been killed in the Vietnam War. A lot of people thought it was patriotic to support the war, but some believed we should try peace. Senator Robert Kennedy proposed a Christmas truce. By then, my parents had joined the Quakers, and my brother and I attended a Unitarian youth group. We thought the country should try Senator Kennedy's Christmas truce.

Some of the older kids in our youth group got the idea of wearing black armbands to support the truce, and wrote an article about that in the Roosevelt High School newspaper. When the principals in Des Moines learned about our plan, they called an emergency meeting, deciding that any student wearing a black armband to school would be suspended.

After that, we weren't sure what to do. We had learned about the Bill of Rights and the First Amendment in school, and we felt free speech should apply to us, too. Plus, we had examples of brave people like the ones in Ruhlville and Birmingham. Some of us decided to go ahead and wear the armbands. About five of us were suspended.

That might have been the end of the story, if it were not for the American Civil Liberties Union, whose mission is to stand up for the Bill of Rights and the 13th, 14th, 15th and 19th Amendments. They provided a lawyer, Dan Johnston, who helped us win our case at the Supreme Court on February 24, 1969, by a vote of 7-2. It was a victory for all students.

I was scared the day I wore the armband to school, but I knew I had to speak up. The world seemed upside-down, but I had courageous role models to show me how to stand up for what I believe. If you look around, there are many others like that, whether in your home, your school, your neighborhood, your town or even across the world. You can join them to change the world, and, when you do, your life will be meaningful and very interesting. It certainly has been for me!

-Mary Beth Tinker, 1/28/09, Washington, DC



Your Notes: *Tinker*



(The banner at issue)

MORSE *et al.* v. FREDERICK

551 U.S. 393

Certiorari to the United States Court of Appeals for the Ninth Circuit

Argued March 19, 2007 – Decided June 25, 2007

BACKGROUND OF THE CASE

On January 24, 2002, students of Juneau-Douglas High School in Juneau, Alaska were allowed out of class to see the Olympic torch relay. Joseph Frederick, a student, joined friends off school grounds but across from the high school. Frederick and his friends waited for TV cameras covering the event, then displayed a banner reading "BONG HiTS 4 JESUS". The school's Principal, Deborah Morse, saw them, ran across the street, and took the sign after Frederick refused to remove it as ordered. Frederick was suspended for violating the school district's anti-drug policy. He appealed to the superintendent, who upheld the suspension with a reduction of time off from school. Frederick then appealed to the Juneau School Board, which also upheld the suspension.

Frederick sued Morse and the school board, claiming that they violated his federal and state constitutional free speech rights by taking down the sign and suspending him. The U.S. District Court for the District of Alaska, where the civil rights suit was brought, ruled that Morse and the school board had not violated Frederick's First Amendment rights. The 9th US Circuit Court of Appeals reversed the federal district court's decision, ruling that, despite occurrence during a school-supervised event, Morse taking the sign violated Frederick's free speech rights. The school board petitioned the United States Supreme Court to review the 9th Circuit's decision.

CONSTITUTIONAL ISSUES PRESENTED

Was the display of the banner school speech? If it was school speech, did the banner advocate or promote illegal drug use? Are schools allowed to take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use?

THE COURT'S DECISION

Chief Justice *Roberts* delivered the majority opinion of the Court. Justices *Scalia*, *Kennedy*, *Thomas*, and *Alito* joined. Justices *Thomas* and *Alito* filed separate concurring opinions. Justice *Breyer* concurred in part and dissented in part. Justice *Stevens* filed a dissenting opinion, in which Justices *Souter* and *Ginsburg* joined.



Chief Justice Roberts concluded that the school officials did not violate the First Amendment by confiscating the banner and suspending Frederick. The Court ruled that the banner was displayed during a school event, making this "school speech" as opposed to speech in public. It also concluded that, although the banner's message was "cryptic," the principal reasonably concluded that it promoted illegal drug use. The opinion discussed previous U.S. Supreme Court rulings that held the First Amendment rights of students in school are narrower than those of adults outside of the school environment.

The opinion cited the compelling interest of government (in particular, schools) to deter illegal drug use by students. The Court also noted "peer pressure is perhaps 'the single most important factor leading school children to take drugs.'" The Court found the banner to be a type of peer pressure and ruled that Principal Morse acted to address this concern. The majority opinion distinguished Morse's actions from that of school officials in *Tinker* when it stated that a failure to act against the banner:

would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. [The First Amendment] does not require schools to tolerate at school events student expression that contributes to those dangers.

CONCURRENCES

Justice Thomas concurred in the result but argued that students in public schools do not have a right to free speech and that *Tinker* should be overturned. Thomas cited the doctrine of *in loco parentis*, meaning "in the place of the parent", in his opinion. He opined that, because parents entrusted the care of their children to teachers, teachers have a right to act in the place of parents during school hours.

Justice Alito, joined by Justice Kennedy, agreed with the majority opinion but only to the extent that:

"(a) [I]t goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."

CONCURRENCE IN PART AND DISSENT IN PART

Justice Breyer concurred in part and dissented in part, arguing that the Court should not have addressed the First Amendment question because of "qualified immunity," which requires courts to enter judgment in favor of a government employees accused of violating individual rights unless the employee's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Breyer would have simply issued a narrow decision indicating that Morse had qualified immunity.

DISSENT

Justice Stevens, in a dissent joined by Justices Souter and Ginsburg, argued that "the Court does serious violence to the First Amendment in upholding—indeed, lauding—a school's decision to punish Frederick for expressing a view with which it disagreed." Stevens wrote:

"[T]he school's interest in protecting its students from exposure to speech "reasonably regarded as promoting illegal drug use" ... cannot justify disciplining Frederick for his attempt to make an



ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more.”

Stevens criticized the majority decision because it “trivializes the two cardinal principles upon which *Tinker* rests,” since it “upholds a punishment meted out on the basis of a listener’s disagreement with her understanding (or, more likely, misunderstanding) of the speaker’s viewpoint.” Stevens also challenged the majority’s finding that the banner was a serious call to drug use that would persuade students, labeling the finding “most implausible.”

CRITICAL THINKING QUESTIONS

- What if this had occurred on a day off from school?
- Would it make a difference if it was a day off, but on school property?
- Would the decision have been different if the sign asked “Would Jesus take a bong hit?”
- Does the *Morse* decision prevent students from expressing *any* opinions about drug use at school?

EPILOGUE

The Supreme Court decision did not address all of the causes of action in the suit. In November 2008, the school district paid Frederick \$45,000 to resolve the case, including state claims under Alaska’s Constitution.



The Socratic Seminar

Law students generally learn about the law through the "Socratic Method," which involves students reading a court decision and the professor asking questions that require students to think about and explain the rationale and conclusion of the court decision. This teach-by-questions method originated with the ancient Greek philosopher and teacher, Socrates.

"Socratic Method" – Guidelines for Students

1. Refer to the text when needed during the discussion. A seminar is not a test of memory. You are not "learning a subject." Your goal is to understand the ideas, issues, and values reflected in the text.
2. It's OK to "pass" when asked to contribute.
3. Do not participate if you are not prepared.
4. Do not stay confused. Ask for clarification.
5. Stick to the point currently under discussion. Make notes about ideas you want to come back to, for discussion.
6. Don't raise hands if possible...just take turns speaking.
7. Listen carefully.
8. Speak up so that all can hear you.
9. Talk to each other, not to the teacher.
10. Discuss ideas rather than each other's opinions.
11. You are responsible for the seminar, even if you don't know it or admit it.
12. It is not a "debate." You are not trying to "win" in this discussion. Just share ideas and broaden your thinking.



Layshock v. Hermitage School District

593 F.3d 249

United States Court of Appeals, Third Circuit

Argued December 10, 2008 -- Decided February 4, 2010

Rehearing en Banc Granted, Opinion Vacated April 9, 2010

J.S. *ex rel.* Snyder v. Blue Mountain School District

593 F.3d 286

United States Court of Appeals, Third Circuit

Argued June 9, 2009 -- Decided February 4, 2010

Rehearing en Banc Granted, Opinion Vacated April 9, 2010

OVERVIEW

Both the *Layshock* and *Blue Mountain* cases involve Pennsylvania students who were suspended for creating fake MySpace profiles on home computers during non-school hours to mock their school principals. The students and their parents sued their respective school districts in federal district court in Pennsylvania, claiming their punishments violated their First Amendment rights. The district courts issued conflicting rulings, with the court siding with the student in *Layshock* and with the school district in *Blue Mountain*. The losing parties appealed the decisions to the United States Court of Appeals for the Third Circuit. The three-judge appellate panels for each case affirmed the District Courts' rulings, leaving what appears to be a conflict in the law. The Third Circuit has now granted an "en banc" hearing in each case, which means that all judges on the Third Circuit (rather than a three-judge panel) will rehear the cases to address the apparent conflict.

FACTUAL BACKGROUND

***Layshock* and *Blue Mountain* shared many similar facts.** In both cases, the high school student made fun of the school principal by faking a *MySpace* profile with false information about the principal's drinking, drug use, and/or sexuality. The profiles used lewd and offensive language, and suggested illegal behavior. Both students invited other students to view the profiles. Other students viewed the profile at school, leading to some commotion in classrooms. Principals suspended both students for their creation of the fake profiles, and the parents sued the school for violation of their First Amendment rights.

The key factual issue distinguishing the two cases was disruption at school. In *Layshock*, the student accessed the profile from a computer in Spanish class and showed the profile to other classmates. The Spanish teacher was unaware of their activity. Once, a teacher saw students congregating and giggling in his computer lab class while looking at the profile, and the teacher told the students to shut it down. After teachers were directed to send all students who might have information about the profiles to the office, approximately 20 students were referred to the office because "they had made conversation, made a joke, made a disruption in class [about the profiles], that the teacher had to redirect."



In *Blue Mountain*, the school district argued that the profile disrupted school because: (1) two teachers had to spend a few minutes quieting their class while students talked about the profile; (2) one guidance counselor had to proctor a test so another administrator could sit in on the meetings between the principal and the students; and (3) two students decorated the students' lockers to welcome them back when they returned from their suspension, which led to a large gathering of students in the hallway. Also, the principal said he noticed a severe deterioration in discipline in the school, particularly among eighth graders, which he attributed to a new culture of students rallying against the administration.

CONSTITUTIONAL ISSUE PRESENTED

Did the schools' punishment of the students for their role in creating the MySpace profiles violate the free speech protection of the First Amendment?

THE DISTRICT COURTS' DECISIONS

The two federal District Court judges came to opposite conclusions as to the First Amendment protection afforded the students, based on the school disruption. In *Layshock*, the District Court held that the student's suspension violated his First Amendment rights because there was no evidence that Justin engaged in that speech while in school. While the profile was "lewd, profane, and sexually inappropriate," there was no "sufficient nexus between [the student's] speech and a substantial disruption or the school environment." "The actual disruption was rather minimal – no classes were cancelled, no widespread disorder occurred, there was no violence or student disciplinary action."

In contrast, in the *Blue Mountain* case, the District Court held that the school district did *not* violate the student's First Amendment rights by disciplining her. While the court acknowledged that the student created the profile at home, the school district acted appropriately "because the lewd and vulgar off-campus speech had an effect on-campus."

THE APPELLATE COURTS' DECISIONS

In both cases, the losing parties appealed to the Third Circuit Court of Appeals to challenge the district courts' rulings, and **the Third Circuit 3-judge panels upheld the different lower court decisions**. The *Layshock* court discussed the importance of 1st Amendment protections for student speech. It then concluded the school district had violated those rights because there was no school disruption, as the school district had failed to appeal the lower court's factual finding of no-disruption. Nevertheless, on the very same day, the three-judge panel for *Blue Mountain* affirmed that the school district had acted appropriately in punishing the student. That court concluded that, while the profile had not yet caused a substantial disruption at the school, it *threatened* to do so. Therefore the school district did not offend the student's First Amendment free speech rights under *Tinker* when it punished her.

Given the conflict between the two Third Circuit decisions, the Third Circuit vacated the decisions on April 9, 2010 and granted an "en banc" hearing, which means that all judges on the Third Circuit (rather than a three-judge panel) will rehear the cases to address the apparent conflict.



CRITICAL THINKING QUESTIONS

- Is there a way to distinguish the *Layshock* and *Blue Mountain* cases? The appellate court in *Blue Mountain* noted in a footnote that they are aware of the *Layshock* decision. But the court said the cases were distinguishable because the school district in *Layshock* failed to establish that there was a sufficient connection between the student’s speech and a substantial disruption of the school environment. Is this a proper distinction? Could other facts distinguish the two cases?
- Was the *Layshock* court correct in holding that there was no sufficient nexus between the fake MySpace profile and a substantial disruption of the school environment to permit the school district to regulate the student’s conduct? Was it correct for the *Blue Mountain* court to hold that punishment of the students was proper because the profiles *threatened* to cause a substantial disruption?
- Are these cases different from *Tinker*, in that *Tinker* involved political speech to make a statement about the students’ opposition to the Vietnam War and these cases involved no political, and therefore, no protected speech under the First Amendment? Arguably, the profiles did not contain critiques or disapproval of the principals’ performance and simply demeaned them for no apparent purpose.
- Could either of the principals sue the students and their parents for “defamation” or “libel” (*i.e.*, telling lies about someone)? That question raises other First Amendment issues: Are the principals “public figures” who cannot sue because they have chosen to be in the public spotlight and therefore must accept public criticism? Would a reader of the MySpace profiles understand that they were an attempt at humor and not asserted as truth?
- Is there any similarity between the banner in the “BONG HiTS 4 JESUS” case and the principal profile in the *Layshock* case, in that the profile could also be viewed as violating the campus policy by promoting illegal drug use?
- California just passed a law that makes impersonating another person on-line a criminal offense. Senate Bill 1411 (Simitian), Chapter 335 of the Statutes of 2010, provides:

528.5. (a) Notwithstanding any other provision of law, any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person is guilty of a public offense [subject to a fine of up to \$1000 and/or up to 1 year in jail].

The bill’s author, Senator Joe Simitian, indicated that the bill responded to the 2010 suicides by victims of cyber-bullying. Do you think this kind of cyber-bullying should be a criminal offense? (You can find more information about SB 1411 at www.leginfo.ca.gov.)



D.C v. R.R.

182 Cal. App. 4th 1190

Appeal to the Court of Appeal, Second District

April 8, 2010

BACKGROUND OF THE CASE

A 15-year-old high school student, D.C., was pursuing a career in entertainment and maintained a website for that purpose. The site allowed any member of the public to post comments in a “guestbook.”

Several students who attended the same private school as D.C., Harvard-Westlake School in Los Angeles, visited the site and posted comments on the “guestbook.” Approximately thirty-four comments contained threatening language and derogatory comments about D.C. Twenty-three of those comments falsely identified D.C. as a homosexual and made negative remarks relating to that identification. One 17-year-old student, R.R., wrote: “Hey [D.C.], I want to rip out your f*****g heart and feed it to you. I heard your song while driving my kid to school and from that moment on I’ve . . . wanted to kill you. If I ever see you I’m . . . going to pound your head with an ice pick. F**k you, you d**k-riding p***s lover. I hope you burn in hell.”

After D.C.’s father read the comments, he immediately informed Harvard-Westlake of the problem as well as the Los Angeles Police Department. On the advice of police, D.C. withdrew from Harvard-Westlake. D.C. and his family moved to Northern California and a different school.

On April 25, 2005, D.C., his father, and his mother sued the students who posted the negative comments, their parents, the school, the school’s board of directors, and three school employees.

R.R. and his parents moved to dismiss the charges, claiming that R.R.’s posted message was protected speech under the First Amendment. Specifically, R.R. asserted that while he had seen D.C. at school from a distance, he never had verbal or physical contact with him. A fellow student had told R.R. to “check out” D.C.’s website. R.R. viewed the comments by other members of the site, thought they were “funny,” and determined that it was a competition to see who could make the most outrageous comments. He explained that his motivations in sending the email “had nothing to do with any perception of [D.C.’s] sexual orientation, and certainly did not reflect a desire to do him physical harm.” Rather, he thought the message was “fanciful, hyperbolic, jocular, and taunting, and was motivated by [D.C.’s] pompous, self aggrandizing, and narcissistic website.” He also sought to win the “one-upmanship” contest that was taking place on the website. R.R. admitted that he later was ashamed of his comment. The trial court denied R.R.’s motion to strike the claims against him. R.R. and his parents appealed to the California Court of Appeal.

CONSTITUTIONAL ISSUE PRESENTED

Were the comments made by R.R. on the website protected by the First Amendment such that R.R. and his parents would not be liable for civil penalties? Or were the comments made by R.R. unprotected “true threats”?



THE COURT’S DECISION

The California Court of Appeal held that R.R.’s comments constituted true threats and were not protected by the First Amendment in order to prevent R.R. and his parents from civil liability.

The Court of Appeal first stated that the hallmark of the protection of free speech is to allow “free trade in ideas – even ideas that the overwhelming majority of people might find distasteful or discomforting.” However, the protection is not absolute, and the content of speech may be restricted in a few limited areas where “any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

One of these limited areas is where the speech at issue is a “true threat.” A “true threat” encompasses those statements where “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” The speaker does not need to actually intend to carry out the threat because the prohibition on “true threats” protects individuals from the fear of violence and from the disruption created by such fear. A true threat is a serious one, not uttered in jest, idle talk, or political argument.

The Court of Appeal also noted that cyber-bullying is a “big deal” that has resulted in violence and suicide. Instances of cyber-bullying have increased dramatically in recent years.

The Court of Appeal held that the comment by R.R. constituted a true threat because a reasonable person would foresee that the comment would be interpreted by D.C. and his parents as a serious expression of an intent to inflict bodily harm. The comment conveyed the intent to inflict physical harm on D.C. three times. The content of the message, which was a series of grammatically correct sentences composed over at least several minutes, showed deliberation on the part of the author. It did not matter that the author didn’t actually intend to kill or harm D.C.

The Court of Appeal also held that the content of the message demonstrated that R.R. intended to convey a threat because the comment described violent conduct R.R. wanted to commit, expressed feelings of anger and hatred, and indicated that R.R. would physically attack D.C. if he saw him. The Court of Appeal concluded that even if R.R. believed his comment was humorous, the Court could still conclude that he intended it as a threat. Even if an individual has a peculiar or distorted sense of humor, it “does not lessen the seriousness of the legal consequences of his acts.”

CRITICAL THINKING QUESTIONS

1. What is the role of the school in protecting students from cyber-bullying? Should the school have greater responsibility when the threat is against the principal (*e.g. Layshock*) or against a student?
2. Does it make a difference if the bullying comments arrive on the Internet, in writing, or in person? Should the type of communication affect its First Amendment protection?
3. When does a joke become a “true threat?” Is that determination based on the recipient’s understanding or the joker’s intent?