PUBLIC SCHOOL DISCIPLINE FOR CREATING UNCENSORED ANONYMOUS INTERNET FORUMS

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* As a staff attorney for the American Civil Liberties Union of Washington, the author had the pleasure of representing as clients the Internet users Karl Beidler, Nick Emmett, NoGuano, and the Eastlake Phantom. The views expressed in this Article are not necessarily those of his employer, but both agree with Justice Brandeis when he said the remedy for speech one dislikes is “more speech, not enforced silence.” Whitney v. Cal., 274 U.S. 357, 377 (1927).
I. INTRODUCTION

Three high school students from the suburbs of Seattle created their own little marketplace of ideas: a website on the Internet where friends and classmates could post messages on an electronic bulletin board and chat room, sharing with each other—and the world—their thoughts, opinions, wishes, speculations, and fears. This uncensored forum featured discussions of school work, extracurricular activities, politics, popular culture, and teenage angst, along with forays into gossip, coarse language, insults, and boasts about alcohol, drugs, and sex. School administrators became alarmed by the website, which they considered both offensive and a distraction from coursework. The student webmasters shut down their creation after an unknown person in the chat room intimated that the next day would be “doomsday,” prompting the Administration to close the building as a precaution. Instead of rewarding the student webmasters for their cooperation, the school initially decided to suspend them. Operating an uncensored marketplace of ideas on the Internet was, the school believed, a form of misconduct.
The three students—known here by their collective name, “The Eastlake Phantom”—were not the only high school students to face school discipline for creating online forums for their peers. In the spring of 2001, two high school seniors from Horace Greeley High School in Chappaqua, New York sponsored a website where participants posted sexual gossip about classmates. The school Administration suspended them for five days without a hearing and the local police charged them with second-degree harassment, even though they limited access to the website with a password they distributed only to friends.\(^1\) This phenomenon is likely to continue into the future, given the ease with which such sites can be assembled, even by users with little programming ability. At the simplest level, users can add their own topics of discussion to the lists available on commercial services like slambook.com or freevote.com.\(^2\) Users wishing to customize their interface can establish a website of their own design that includes chat room or bulletin board features obtained from one of many no-cost providers easily found on the Internet.\(^3\)

The Phantom and his counterparts at other districts are hardly the first people to find themselves facing threats to their liberty and property\(^4\) for facilitating the anonymous speech of others. Their most famous precursor is John Peter Zenger, the 18th-century publisher whose trial for seditious libel in 1735 had a profound influence on political thought in the British colonies of North America.\(^5\) Zenger is remembered chiefly as an early beneficiary of jury nullification, be-

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2. Some New York students made headlines when they used the freevote.com service to vote on who was the “biggest ho” in their school system. See Benfer, supra note 1.

3. The names and locations of student-run Internet forums are fluid and the sites themselves are often short-lived. Currently available examples include http://www.lhstudents.com (Lake Highlands High School, Dallas TX) and http://www.highschoolnation.com (Lowell High School, San Francisco, CA). The creator of highschoolnation.com was temporarily suspended for creating his forum. See http://www.highschoolnation.com/editorials/thetruth.php.

4. Attendance at public school is a liberty or property interest that cannot be deprived without due process of law. Goss v. Lopez, 419 U.S. 565, 584 (1975).

cause a sympathetic panel found him not guilty to avoid punishing him under an unjust sedition law.\(^6\) Less often remembered is that Zenger was not the author of the seditious statements for which he was tried: like the Eastlake Phantom, he provided technology to disseminate the writings of others, who chose to remain anonymous.

Zenger was a financially struggling German immigrant in New York who made his living as a commercial printer. Like the Internet today, the regularly printed periodical was a relatively new medium in the early 18th century. Written political discourse was primarily carried out through posters, leaflets, or tracts prepared as needed.\(^7\) Zenger was delighted to have the regular income when in 1733 a group of local aristocrats opposed to newly-appointed Royal Governor William Cosby hired Zenger to print an opposition newspaper called the New York Weekly Journal.\(^8\) The editors began filling the Journal with unsigned articles attacking the Governor and his retinue as “petty-fogging knaves [who] deny us the rights of Englishmen.”\(^9\) One Cosby lackey was described as a dog “lately strayed from his kennel,” and a Cosby sheriff as a monkey “lately broke from his chain.”\(^10\) One stinging article lamented, “I think the law itself is at an end; we see . . . men’s deeds destroyed, juries arbitrarily displaced, new Courts erected without consent of the Legislature, . . . by which it seems to me, trials by juries are taken away when a Governor pleases.”\(^11\) The articles themselves were unsigned, but Zenger’s name appeared as printer.

Irritated with the attacks, Governor Cosby asked the local hangman to confiscate and burn all issues of the Journal, but the hangman refused.\(^12\) A grand jury twice declined to indict Zenger, and the Governor was forced to commence criminal proceedings by information.\(^13\) Zenger was arrested and held on exorbitant bail for eight months

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6. See supra note 5.
7. Glendon, supra note 5, at 49.
8. Sutherland, supra note 5, at 787. Glendon suggests Zenger had launched the Journal independently, but his financial backers quickly took over the writing and editing. Glendon, supra note 5, at 49.
9. DWYER, supra note 5, at 63.
10. DWYER, supra note 5, at 63.
11. Glendon, supra note 5, at 50.
12. Glendon, supra note 5, at 50. DWYER, supra note 5, at 64. In Sutherland’s version, Cosby’s seizure order was effectuated. Sutherland, supra note 5, at 787.
13. Glendon, supra note 5, at 50.
while awaiting trial. Zenger’s benefactors recruited William Hamilton of Philadelphia to represent Zenger after the court disbarred his first two lawyers for their too-vigorous defense. Hamilton was regarded as one of the best lawyers in the colonies, and his defense of Zenger cemented his reputation.

At the time, truth was not a defense to a charge of seditious libel. Any publication directed against the government or public officials could be deemed a criminal threat to public order. The libelous nature of a publication was for the court to decide, and the only question for the jury was whether the defendant had published it. Hamilton’s impassioned argument to the jury was a precursor to Dickens’ admonishment that “if the law supposes that, the law is a ass.” The jury agreed, finding Zenger not guilty of printing the Journal, even though his name appeared on every issue. The verdict gained great fame throughout the colonies, and Zenger became a folk hero. Gouverneur Morris, one of the Framers of the Constitution, called the Zenger trial “the morning star of liberty” in the colonies. Later commentators consider it “[o]ne of the most significant events to shape American thinking on freedom of speech. . . .”

Like Zenger’s New York Weekly Journal, the Eastlake Phantom website mixed serious-minded social and political commentary with cheerfully vulgar insults. But unlike Zenger, the Phantom had no advance knowledge of what others would use his technology to express. This Article explores whether school administrators—even ones with far better motives than Governor Cosby—should be allowed to punish students for creating an uncensored Internet forum for student speech in a society that congratulates itself for its commitment to freedom of expression. Part II describes what happened at Eastlake High School during the fall semester of 1999, with an eye toward the social context of moral panic over teenage Internet use. Part III explores the still-evolving constitutional limits on public school administrators’ ability to punish students for speech at school, while Part IV questions whether the standards for punishment of on-campus speech should

14. Dwyer, supra note 5, at 64.
15. Dwyer, supra note 5, at 64.
16. Dwyer, supra note 5, at 64.
17. Glendon, supra note 5, at 48.
18. Glendon, supra note 5, at 48.
19. Charles Dickens, Oliver Twist 520 (Dodd, Mead & Co. 1941) (1838).
20. Dwyer, supra note 5, at 69.
21. Smolla, supra note 5, § 1:3.
apply to student speech on the Internet. Since the Phantom was disciplined not for his own speech, but for facilitating speech by others, Part V discusses liability for Internet services that host other people’s content. Part VI considers anonymity on the Internet, both for adults and high school students.

II. THE STORY OF THE EASTLAKE PHANTOM

Redmond, Washington, is the home of the Microsoft Corporation and Eastlake High School. The general affluence of this Seattle suburb and the high profile of its local software manufacturer mean that many of Eastlake’s students are experienced computer users with access to the Internet at home. The Lake Washington School District, of which Eastlake is a part, encourages this computer literacy. The District’s extensive and frequently updated website prominently features an image on its home page of a teacher and student at a computer. All District staff are expected to master basic computer skills within two years of hiring. The District’s slogan—”Students as well


educated as any in the world—alldes to its belief in educational computing as a necessary part of a 21st-century education.

A. The Eastlake Phantom Web Page

The Eastlake Phantom was an online persona created by three college-bound honor students with no disciplinary history. The Phantom’s website, which began operations in September 1999, used the services of a number of Internet service providers (ISPs) to create an integrated interface combining several different modes of Internet communication: a series of hyperlinked web pages containing content authored by the Phantom; a chat service where users could join real-time written conversations; and a bulletin board where users could post messages.

The Phantom did all of necessary writing, programming, and website management on his home computer, not on any school computer. He never viewed or otherwise accessed the website from school computers, although some of his readers did. All content found on the site was stored on servers owned by the various ISPs, allowing the Phantom to use other peoples’ equipment to create a forum to present yet other peoples’ writing. It was as if John Peter Zenger had printed the New York Weekly Journal on a rented printing press.

School officials later indicated that there was nothing in the Phantom’s own content—consisting mostly of gentle mockery of school administrators and school-sponsored events—to merit school discipline. For example, the Phantom had a low opinion of a pep assembly:

Where do I begin. I don’t want to be too negative, but come on. Those dancers were butchering beautiful songs. That “You Sexy Thing” song was one of my all time favorites, but now whenever I hear it all I see is a bunch of people in random motion. At least count time when you dance.

25. See supra note 23.

26. All of these features could be accessed free of charge through various service providers. Typing the phrase “free web space,” “free chat room,” or “free bulletin board” into a search engine will reveal dozens of sources. Some are also collected at sites like http://www.freewebspace.net.

27. See supra note 22.
Another student website known as “The Corruptor” arose later that harshly criticized the Phantom as a mealy-mouthed do-gooder. What true critic of the school power structure would be giving advice on how to improve pep rallies? The Corrupter suggested that the Phantom was in actuality a faculty member, or—horrors!—a girl. (The accusation belies the bromide that there is no gender in cyber-space; the Internet can take a user into an online world, but it can’t take the offline world out of the user.)

The Phantom website rapidly became a favored topic of real-world conversation at Eastlake. According to one home room teacher, the Phantom website was becoming “an obsession” among the students. Although some readers sent e-mail to the Phantom congratulating him on his prose, the bulletin board entries written by others were the feature that most seized students’ imaginations. Unlike a chat room, a bulletin board allows users to post comments whenever they like, contributing to a conversation without the necessity of having all participants logged on simultaneously. The Phantom was especially pleased to see threads develop with serious discussion of social stratification within the school, movie and book reviews, eating disorders, sexuality, religion, alcohol and drugs, and other topics of concern to teenagers. The excitement of the participants was palpable. They had been public school students for over ten years, and knew how that worked; this was something new. The website allowed them to discuss taboo topics without fear of reprisal. Whatever they contributed was commented on by other users with the same attention ordinarily reserved for pronouncements from adults. Bulletin board users felt the thrill of experimenting in a grand collaboration with new-found peers who would otherwise have remained forever hidden by the school’s existing cliques and social structure. It was, as has been said about the do-it-yourself punk rock scene of London in the mid-1970s, “the sound . . . of people discovering their own power.”

Just like punk, it could sound awful to those not involved in its


29. See supra note 22.

creation. The bulletin boards contained no shortage of vulgar locker-
room talk, idle boasting about strength and sexual prowess, scatologi-
cal insults, and gossip about teachers or other students. Many of the
threads presented a view of teenage life that many adults prefer not to
acknowledge, like the following chat room exchange filled with cas-
ual sexism and praise of alcohol:31

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<SnoopDob> zima citrus wasn't bad. . .but plain zima sucked ass
<sinji> there are different kinds? how the hell do they sell
that stuff?
<SnoopDob> dude girls drink it thats why
<SnoopDob> tgirls are pussies and cant drink beer
<SnoopDob> fucking I hate girls at parties . . . they dont
know there limits then they always puke
<sinji> they can do dishes though
<DR.EVIL354> lol [laugh out loud]32
```

Not all of the sexist and homophobic comments were so heartily
received. They often elicited responses that identified and opposed
their bigotry, while others played along. For example, some readers
objected to the bulletin board thread titled “Homosexual Teachers:”

<table>
<thead>
<tr>
<th></th>
<th>There are eight homosexual teachers at Eastlake High School. Can you guess who they are?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kay Os</td>
<td>Oct. 21st 10:32 p.m.</td>
</tr>
<tr>
<td>Brenden</td>
<td>Oct. 21st 10:36 p.m.</td>
</tr>
</tbody>
</table>

31. My quotations from the Phantom chat rooms and bulletin boards delete some over-
lapping strands of dialogue for ease of reading. Original spellings and punctuation are re-
tained.

32. See supra note 22.
The only surviving examples of student-contributed material from the Phantom’s site are the ones printed by the School District for use in disciplinary proceedings. These contained the material that most offended school administrators, but as the previous excerpt shows, even the pages selected for their vulgarity nonetheless showed a strong vein of serious discussion. Students themselves offered various opinions about the appropriateness of online gossip, debating the social codes that should govern both online and offline communications.

33. See supra note 22.
<table>
<thead>
<tr>
<th>Author</th>
<th>Date</th>
<th>Time</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chelsea</td>
<td>Oct. 29th</td>
<td>8:42 p.m.</td>
<td>NO ONE LIKES HIM SOREN! AND IF SOMEONE DOES, THEY NEED TO GET THEIR FUCKING HEAD CHECKED! IM NOT TRYING TO START SOME SHIT, BUT A GUY THAT PRETENDS TO BE A PIMP, DESERVES TO GET RIPPPED ON! <del><em>Chels</em></del></td>
</tr>
<tr>
<td>ATMO</td>
<td>Oct. 29th</td>
<td>8:55 p.m.</td>
<td>That guy really is the biggest faggot I know. Today I asked him if he likes girls. He answered yes and I told him that his heterosexual Halloween costume was pretty realistic. [Student X], if your’re reading this then you should know that Soren and I are gonna kick your ass by the end of the school year you greasy butt-fucker.</td>
</tr>
<tr>
<td>Brenden</td>
<td>Oct. 29th</td>
<td>9:09 p.m.</td>
<td>I hate him and anyone who sticks up for him is obvisloy doing it because he fucks them up the ass!</td>
</tr>
<tr>
<td>Julie</td>
<td>Oct. 30th</td>
<td>1:22 a.m.</td>
<td>sorry, he doesn’t fuck me up the ass. in fact, he hasn’t even banged me. what a shock, huh? oh, by the way, he’s a sweetheart to people that actually give him the time of day; you, I guess, don’t fit in that category.</td>
</tr>
<tr>
<td>Archer</td>
<td>Oct. 30th</td>
<td>1:55 a.m.</td>
<td>I’m was one of [Student X]’s friends but whenever I talked to him he would always pick me up (literally) or piss me off. He’s very immature and shallow. Lately I avoid him.</td>
</tr>
<tr>
<td>Soren</td>
<td>Oct. 30th</td>
<td>2:08 a.m.</td>
<td>[Student X] got a 19% in humanities in 9th grade, (I think he also failed summer school)</td>
</tr>
<tr>
<td>ryan</td>
<td>Oct. 30th</td>
<td>2:33 a.m.</td>
<td>you people are all fucked up, don’t you have anything better to do than talk shit about some guy to make him feel bad about himself?</td>
</tr>
<tr>
<td>Author</td>
<td>Date</td>
<td>Time</td>
<td>Comment</td>
</tr>
<tr>
<td>-----------------</td>
<td>------------</td>
<td>----------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>ATMO</td>
<td>Oct. 30th</td>
<td>12:43 p.m.</td>
<td>Soren really is a nice guy and you and the other few people are in the minority when you try to stand up for [Student X]. He is incredibly ignorant and all he does is piss the fuck out of people. This is the only time that I’ve been dissing a person and it’s because [Student X] needs to realize what an anus face he is.</td>
</tr>
<tr>
<td>Anthony Crayonz</td>
<td>Oct. 30th</td>
<td>9:06 p.m.</td>
<td>LOL! I don’t even know this kid but he doesn’t sound to nice! LOL</td>
</tr>
<tr>
<td>Ally</td>
<td>Oct. 31st</td>
<td>1:18 a.m.</td>
<td>I’m sorry. Everyone knows I’m [Student X]’s friend. What’s sad is he can’t fucking stand up for himself because he doesn’t have the fucking internet you jackass. I thought you were a really nice guy Soren. Please, just STOP, for god sake. This isn’t fair. If you want to insult him, do it to his face. Don’t be a little chicken shit that says stuff and doesn’t give him a way to respond.</td>
</tr>
</tbody>
</table>

The Phantom shared the student body’s mixed feelings about some uses of the bulletin boards, so he attempted various strategies to alter the level of discourse. For example, he created a separate bulletin board that was to be used exclusively for compliments, which could be reached via the “compliment button.” (Of course, nothing in the original design of the bulletin board prevented compliments from being posted elsewhere, and in fact they frequently were.) The Phantom also posted a directive that read: “This web site is for satirical purposes only. I will not tolerate any slanderous, or defamatory remarks. However there is always room for a good joke. If you find something on this site personally offensive, notify me, and it’ll be fixed.” True to his word, the Phantom occasionally would delete bulletin board postings he found particularly offensive. However, he did not want to create an impression among users that the bulletin boards were moderated, nor did he have time to review all messages.

34. See supra note 22.
35. See supra note 22.
36. See supra note 22.
Postings would be left in place if later speakers came to the defense of the person originally insulted, or if unrebutted insults were directed solely to a pseudonym and therefore could not result in reputational injury in the offline world.

B. The School’s Initial Response to the Phantom Website

School staff discovered the Phantom site in early October. The Administration became alarmed by the vulgarity of speech on the bulletin boards and the insults directed at staff and students. As the website became increasingly popular, a third perceived problem arose: students were spending much of their spare school time talking about the website and accessing it from school computers when administrators thought they should be doing their schoolwork. The site was determined to be a menace. School District staff contacted the ISP that hosted the Phantom’s website (homepage.com) and asked that it be shut down. On October 6, 1999, the Phantom received an e-mail from homepage.com saying that the site was terminated as a result of unspecified violations of the company’s terms of service.

Since other web hosting services were readily available, and the Phantom was never told why the first site had been disconnected, he reopened the website later in the week using a different ISP, fortune-city.com. The new masthead proclaimed: “We’re back and better than ever despite the man’s attempts to keep us down!”37 The site’s popularity was soon spurred on by two pieces of school-sponsored publicity. First, the student newspaper ran an article about the website containing an interview (conducted via e-mail) with the Phantom.38 Second, the senior skit at the homecoming assembly spoofed the school’s efforts to determine the Phantom’s true identity. The vice principal provided the punch line to the skit when he walked on stage and revealed himself to be the Phantom. This caused the Phantom to comment: “OK, it’s true, I am a bald heavyset bitter old man.”39

Some faculty acknowledged the reality that the website was, at least for the moment, an important facet of students’ lives that should be seized for maximum educational value. An emergency staff meet-

37. See supra note 22.
38. Unless a school designates it as a limited public forum, a student newspaper affiliated with a journalism class will be treated as school-sponsored speech. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988).
39. See supra note 22.
ing was held in mid-October where homeroom teachers were instructed to discuss the website with their students the next day. Each teacher emphasized slightly different combinations of issues, but the general tenor was a warning of the ills of coarse, vulgar, or sexist language, the risks of defamation suits for online speech, the need to take responsibility for one’s words, the lack of accountability that may accompany anonymous or pseudonymous speech, and the (legally inaccurate) notion that mentioning the name of the school on an unofficial website violated intellectual property laws.

Unlike the demand made to homepage.com, these homeroom sessions followed the time-honored and constitutionally preferred approach of countering disagreeable speech with more speech, rather than censorship. Of course, participants in the marketplace of ideas run the risk that their ideas will not find takers. To the extent the message of the homeroom advisories was “stay away from this website,” the students’ continued use of the site showed that they vastly preferred the Phantom’s pro-speech message. As the Phantom noted:

I found it hard to control myself during the advisory lecture, I had to fight the urge to yell “First Amendment baby!” . . . However I would like to thank the man for the free publicity. Ya, lets talk about it in advisory and hope after hearing about it kids don’t check it out for themselves. What a great prevention method.40

Despite the Phantom’s teasing, the homeroom discussions did influence students’ online debates, which began to explore the ethics of contributing to the bulletin boards, and of creating them in the first place.

40. See supra note 22.
Brent  
Oct. 26th  
11:32 p.m.  
Has anyone noticed how this web site is effecting our school. This site was good in concept, however it lets people be able to say things behind peoples backs. This is making a lot of people angry, a lot of good people suffer a reputation attack and it is causeing just the stupidest stuff to be said be people that don’t have a life. Phantom, I don’t know who you are, but you[r] plan to let voices be heard didn’t help. This is just stuff that people only wanted to be seen by everyone and anonmyous. We need to stop the influence that this site has.

wolves3352  
Oct. 26th  
1:50 p.m.  
Tru dat! I agree! We need to stop insulting people, this is sooo stupid, we’re better than that, we’re more mature than that here at eastlake.

dan  
Oct. 27th  
7:41 p.m  
I agree with you but this site helps us face issues and other problems. I not sure but it seems as if soon people may get tired ripping on each other and become more friendly and cool about things Later

skatenerd  
Oct. 27th  
8:29 p.m.  
Have you noticed that whenever someone gets dissed on this site everyone of their friends rush to stand up for them and the posted message has a reverse effect. Instead of dissing the person their friends just say how cool they are. It really makes you think.

Brent  
Oct. 28th  
9:25 a.m.  
If a person gets dissed they still get hurt. even if they know they have friends and it would take more of a friend to stand up in person.
Aurelius  
Oct. 28th  
7:09 p.m.  

Brent – Yeah, crap gets said on this website, about almost everyone (frankly, I don’t know whether to be surprised, insulted or sorry that my name has not come up somewhere yet). But still, look at the up side. Amongst all the shit on this site, you get some serious, open conversation and the ability to find other people who might have the same problems as you.

When thinking about free speech and intelligent conversation, just take a look at the “Atheism” and “Gays in EHS” strings. People share how they really feel with each other. . .something that doesn’t happen in our school because of, what, call them ‘caste’ differences.

Plus, take a look at the “Eating Disorders” string. People who feel alone can log on, share their situation and, for almost anything, someone or very likely several people will pitch in, and share how they have the same problem. Whether or no a solution is proferred, at least there is the comfort of knowing you’re not alone. And everyone has times when they need to know that.

Frankly, I think that if one person has been helped by this site, it is worth all the garbage that has been posted. Because garbage is just that – garbage, meaning nothing. Nobody should be offended by something some coward, afraid to reveal their name, said, unless they have a self-image problem. . .though, I admit, alot of people at Eaztlake probably have a problem like that.

Anyway, peace out.41

41. See supra note 22.
The slow and uncertain process of changing opinions and behaviors through dialogue and example was not the only path pursued by the school: it continued its efforts to have the Phantom’s website dismantled. In late October, District staff asked the Phantom’s new ISP, fortunecity.com, and its bulletin board provider, bravenet.com, to shut down the services, citing a lengthy list of penis and testicle jokes from the bulletin board that the school considered offensive. Bravenet.com complied (forcing the webmasters to find a substitute bulletin board from echelon.com), but fortunecity.com—which unbeknownst to the Phantom was based in Britain—replied that “[m]uch of the language [complained of] is within the frame that would be found in the average student bar on a Friday night.”

This behind-the-scenes stalemate went unresolved until the Phantom shut down the site for unexpected reasons.

C. Halloween in the Chat Room

By late October some school employees were sitting in on chat room sessions. What they saw around 10:00 p.m. on Friday, October 29, 1999 alarmed them. A participant using the name “phantom” (who was not in fact the Eastlake Phantom, but another person using the pseudonym without the real Phantom’s permission) made what read like a threat to kill people the following Monday. In the portion of the conversation that was printed, the faux “phantom” asked each new chat room participant to be informed.

42 See supra note 22.
After “phantom” left the chat room, the remaining participants debated whether he was serious. Some argued that he was a joker and not to be believed; others said they were unsure and would stay home on Monday just in case. A user once again logging in as “phantom” repeated the threat in the early morning hours of Sunday, which happened to be Halloween.

The laughter from “sinji” evidently judged the “phantom” statements as a Halloween prank, but others said they would not risk going to school the next day. As it happened, they didn’t have to: the school notified all parents on Sunday night that school would be closed on Monday due to a “very serious” threat of violence. A bomb squad searched the building, finding no explosives or weapons.

The Phantom, learning on Sunday night about the threat and the impending school closure, contacted the principal and offered help in identifying the source of the threat. He posted a denunciation of the threat and vowed, “I want to find you as bad as the administration does.”45 Other students posted their own condemnations of the threat.

43. See supra note 22.
44. See supra note 22.
45. See supra note 22.
on the Phantom’s bulletin boards, and launched discussions about school violence and why one should not say stupid things online. Many contributors mused that the Administration would use the event as an excuse to shut down the website, not knowing that attempts to close the site had already been underway for weeks. By the end of the day, the Phantom regretfully decided to take down his content and the associated forums.

Meanwhile, the author of the threatening words came forward: a freshman at Arizona State University who had learned about the chat room from a roommate’s girlfriend whose younger brother attended Eastlake. The Arizona student was reported to be “mortified” that his chat room contributions, which he intended as a macabre joke, were taken seriously. He offered apologies to the school community, but was nonetheless charged with felony harassment by the county prosecutor.

D. School Discipline for the Phantom

To the surprise of the Phantom and his family, the principal proposed to punish him with a three-day suspension and a fine in partial restitution for the expenses caused by the day of school closure. The principal relied on the general school rule against any misconduct that substantially disrupts the educational process, and a rule allowing the school to charge a student for the cost of replacing materials or property lost or damaged due to negligence. Since the principal acknowledged that the web content actually written by the Phantom had not caused substantial disruption, all of the discipline ultimately relied on a negligence-type theory: the Phantom had failed to supervise others’ use of his computer forums, and this failure led to substantial disruption of the school. The failure to supervise was said to be particularly wrongful because the Phantom had the ability to remove messages and occasionally did so, in effect ratifying those that remained. As aggravating factors, the principal pointed to the cat-and-mouse game during September and October, where the Administration was attempting to signal its disapproval of the anonymous web.

46. Vinh, Prankster Suspected in School Threat, supra note 22.
47. See State v. Thomas, No. 99-1-09900-8 (King County Super. Ct. 1999). The defendant entered into a deferred sentence plea agreement whereby the charges were dismissed after the defendant performed 240 hours of community service. Id.
48. There were actually two co-principals at Eastlake, but this Article combines them into a single figure, as it does for the Phantom.
forums while the Phantom kept operating them as before, either oblivious to or dismissive of the school’s concern. Students should know, the principal argued, that anonymous speech is dangerous. The principal finally argued that some form of discipline was necessary to ensure that the events would be a true learning experience.

The Phantom and his family argued that the school had no authority to impose school discipline for off-campus speech, and that it could not hold the Phantom vicariously responsible for the disruptive speech of others. The Phantom challenged whether his conduct fell within the letter or spirit of the school policies he had allegedly violated, arguing among other things that the negligence policy dealt with the loss of tangible property only, and that he had not been negligent in any event. He also argued that facilitating uncensored speech cannot be considered negligent, and anonymous speech is not necessarily harmful. He disputed that the school had ever informed him that the website was a rule violation or that he was aware of any genuine emotional distress on the part of teachers or students. As for the learning experience, the Phantom and his parents strongly believed that as basically responsible and conscientious people, they had learned a great deal by living through the events, so that imposition of punishments was not necessary for education to take place.

A hearing examiner initially upheld the discipline against the students, but the School Board reversed. In so doing, the Board did not agree with the Phantom’s position that the District lacked authority to discipline students for off-campus speech or for creating an uncensored forum. Instead, the Board ruled that discipline was not warranted in light of the personalities, history, and likely future behavior of the students involved.

E. Moral Panic Over Teenage Internet Use

The Phantom’s story has eerie parallels to the story of John Peter Zenger. Both experimented with new communications media. Both made their technology available to others who, according to the relevant authority figures, abused the medium by publishing libels and otherwise disrupting the social order. Governor Cosby’s request for the hangman to seize and destroy Zenger’s Journal is echoed in the school’s request for ISPs to cease hosting the Phantom’s website.49

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49. This Article does not examine the propriety of a government agency pressuring an ISP to delete content, other than to note that a serious First Amendment question arises in such cases of informal prior restraint. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Am.
The hangman’s refusal to moonlight as a censor pairs with the refusal of fortunecity.com to yank the Phantom’s website (or if one believes the historians who claim the hangman did confiscate Zenger’s papers, his actions are matched by the quick acquiescence of homepage.com and Bravenet.com). The grand jury’s refusal to indict finds a parallel in the vice principal’s collaboration in the senior class skit celebrating the Phantom’s website. And while the analogy is far from precise, the elected School Board, as representatives of the community, acted like the nullifying jury, straining to find a factual ground to reject a punishment that an eager prosecutor wanted them to ratify.\( ^{50} \) (Of course, there were numerous differences between the cases, too. Eastlake’s principal was not acting to avenge perceived slights to her own dignity or reputation, but to deal with the fallout from insulting speech aimed at students and staff, an unwanted distraction, and an apparent threat of violence. The taunts on the Phantom’s website were not aimed exclusively at powerful public figures like teachers and principals, but also against comparatively powerless high school students—although none of them were powerless to respond in writing to the same audience that would have seen the attacks.)\( ^{51} \)

With all these similarities, why is Zenger an American hero, while the Phantom was a behavior problem? It is commonly remarked that threats to liberty are greatest during times of perceived danger.\( ^{52} \) The Phantom’s website arose at a time when perceived dangers from adolescent Internet use—and adolescents themselves—were magnified out of proportion through the phenomenon sociologists call moral panic. As defined by Stanley Cohen, moral panic follows a predictable pattern:

A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereo-typical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears,
submerges or deteriorates and becomes more visible. Sometimes the object of the panic is quite novel and at other times it is something which has been in existence long enough, but suddenly appears in the limelight. Sometimes the panic is passed over and is forgotten, except in folklore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way society conceives itself.53

Others have identified five prominent indicators of a moral panic: (1) concern (“a heightened concern over the behavior of others and the perceived consequences of such conduct on society”);54 (2) hostility (“hostility toward an identifiable group or category of people who, in turn, are vilified as outcasts”);55 (3) consensus (“a widespread [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”);56 (4) disproportionality (“the perceived danger is greater than the potential harm” that could actually flow from the challenged threat); 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”).57 By no coincidence, moral panics reaffirm social hierarchies, giving additional authority to law enforcement and providing the public with extra ammunition against groups already disfavored by virtue of class, race, age, gender, or sexuality.

The rhetoric of moral panic is marked by righteous indignation and obliviousness to the historical precedents of the action being condemned. A sense of history is not really required, though, because the nominal subject matter of the moral panic is often a mere symbol for the unspoken fears that generate the disproportionate panic response. The furor over American flag burning in the late 1980s and early 1990s is typical in this regard. Since the number of public flag burnings in any given year could be counted on one hand, rampant flag desecration was not a real problem, but it provided an easily-described and -condemned symbol for other evils. One proponent of

55. Id. at 103.
56. Id. at 105.
57. Id. at 107.
58. Id. at 109.
a constitutional amendment to outlaw flag desecration admitted as much: “Maybe we can’t stop the glorification of homosexuality. Maybe we can’t stop the deterioration of families. But . . . we can draw a line and stand up for one thing in our country, and that is the flag of this country.”

Habits adopted by young people are frequently the targets of moral panic, with each generation of the middle-aged lamenting the downfall of the nation’s teenagers and the perceived deviation from a better past. In 1954—a time that many early 21st-century Americans associate with a somnolent conformity—a social critic wrote, “The brute fact of today is that our youth is no longer in rebellion, but in a condition of downright active and hostile mutiny. Within the memory of every living adult, a profound and terrifying change has overtaken adolescence.” The desire to stamp out these worrisome perceived changes leads to sporadic attacks on artifacts of popular culture. For example, the early 1950s saw a vigorous condemnation of crime and horror comic books, which were branded a cause of juvenile delinquency. Some jurisdictions passed laws against comic books, or limited their distribution to minors. Congressional hearings were held on the subject, featuring testimony from Fredric Wertham, author of the pseudo-scientific anti-comic book expose Seduction of the Innocent, who argued that Superman comics should be kept from children because they generated “phantasies of sadistic joy in seeing other people punished . . . while you yourself remain immune.” The hearings resulted in an industry self-censorship code that put most of the crime and horror publishers out of business. New objects of moral panic were soon found to replace them. Beginning in 1964, the FBI devoted over thirty months to investigating whether the Kingsmens’ recording of “Louie Louie” concealed obscene lyrics audible if the 45-RPM record was played at 33-1/3. It was said that the Bureau ultimately concluded that the record was “unintelligible at any speed,” but not before the matter was also duly investigated by the Federal

59. Id. at 127 (quoting Rep. Bob Barr).
60. Maria Reidelbach, Completely Mad 178 (1991) (citing Robert M. Linder, Rebel Without a Cause (1954)).
62. Id.
63. Id.
Communications Commission and the Post Office, and the Governor of Indiana urged that the record not be broadcast by any radio station in the state. Tipper Gore’s crusade against metal and rap music in the mid-1980s and Joseph Lieberman’s finger-wagging at Hollywood movie makers in the 2000 presidential campaign are all cut from this same cloth.

Two moral panics were especially germane to the Phantom’s experience. The first relates to Internet technology itself, which has been linked to any number of social ills. For example, when Mark Barton of Atlanta went on a rampage in the summer of 1999, killing his former co-workers at a stock brokerage, what many newspapers considered important about the story was his day trading of securities over the Internet, not his history of domestic violence and suspicions that he had once murdered an ex-wife (facts that tell us more about Barton’s propensity for violence than his Internet use does).

Some technologies do have the ability to change how we see ourselves and order our society, and these changes can entail no small amount of discomfort. The arrival of the written word to medieval Iceland contributed to an abandonment of the existing Norse religion in favor of the advances of literate Christianity. Similarly, 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. But there is no necessary correlation between the fervency of the jeremiads against a new technology and the actual ills it might produce. In the intellectual debates over the introduction of the potato to Europe from the Western hemisphere in the 1500s, for example, an anti-potato faction fervently argued that the plant’s ease of cultivation would ruin the peasants’ work ethic.

65. Id. at 116. Many years later, the governor denied that he had sought to have the record banned from the Indiana airwaves, only that “I suggested . . . that it might be simpler all around if it wasn’t played.” Id. at 125. Unconvinced, Marsh wrote, “If a record isn’t played at the suggestion of the state’s chief executive, it has been banned.” Id. at 125.


The Internet might well have far-reaching effects on society, but neither those who see it as a harbinger of apocalypse nor those who consider it a gateway to utopia are wholly correct.70

The second moral panic in full lather when the Phantom created his website involved school violence. The horrific massacre at Columbine High School in Littleton, Colorado had closed out the 1998-1999 school year and was a staple of media coverage and conversation over the summer. The period that followed the murders was marked by a string of suspensions, expulsions, and even criminal charges against students who were deemed to have been engaged in threats. A Missouri student who said he could imagine a similar tragedy happening at his school (without any suggestion that he would be behind it) was suspended for ten days.71 A North Carolina student was suspended from school for a year and convicted of criminal charges for typing “The End Is Near” on a school computer screen.72

The clampdown by schools on youthful speech that dealt with violence was both intense and pervasive in 1999,73 but perceptions of youth running amuck had been building for years. Actual school safety statistics indicated that schools were getting safer during the 1990s, but those facts were lost in the drumbeat of warnings over moody adolescent killers.74 School violence is but part of a large complex of distrustful attitudes towards adolescents.75 Fear of juvenile delinquents and misapplied adolescent sexual energy is a persistent strain in moral panics from comic books to gangsta rap, and will no doubt feature in the panics of the future.

The two panics—Internet technology and rampaging youth—


73. See generally Calvert, Free Speech, supra note 71; David Hudson, Censorship of Student Internet Speech: The Effect of Diminishing Student Rights, Fear of the Internet, and Columbine, 2000 L. REV. MICH. ST. U. DET. C.L. 199 (2000); Strossen, supra note 72.


melded seamlessly together in the late 1990s. For reasons that are far from clear, public perception of the Columbine massacre is that it had something to do with the Internet. 76 The unexamined subconscious conjunction of “computer” and “school murder” is revealed in Emmett v. Kent High School District No. 415. 77 Nick Emmett, a starter for the basketball team with a 3.95 grade point average, constructed a website from his home. 78 Inspired by an earlier assignment in English class that called for students to write their own obituaries, Nick posted some mock obituaries of his friends. 79 One died from sexually transmitted diseases contracted in an Amsterdam brothel, another in a bizarre weightlifting accident. 80 Spurred by the favorable comments that he received from classmates and teachers, Nick added a feature to his webpage that would allow viewers to vote for whose bogus obituary would appear next. 81 All the nominees were friends of the webmaster, and their names appeared by permission. All was well until a local TV news crew did a story about the website, luridly portraying it as a “hit list.” 82 The next day, the principal suspended Nick for a week for, among other things, intimidation, harassment, and disruption to the educational process. 83

A federal district court overturned the discipline, noting that the school “presented no evidence that the mock obituaries and voting on this website were intended to threaten anyone, did actually threaten anyone, or manifested any violent tendencies whatsoever.” 84 Despite the inoffensiveness of Nick’s web content, the mere mention of death—when it was raised over the Internet by a male teenager—immediately caused the school administrators, and the court itself, to muse about Columbine. “The defendant argues, persuasively, that school administrators are in an acutely difficult position after recent school shootings in Colorado, Oregon, and other places. Websites can be an early indication of a student’s violent inclinations, and can

76. Rodman, supra note 28, at 12-15
77. 92 F. Supp. 2d 1088 (W.D. Wash. 2000).
78. Id. at 1089.
79. Id.
81. 92 F. Supp. 2d at 1089.
82. Id.
83. Id.
84. Emmett, 92 F. Supp. 2d at 1090.
spread those beliefs quickly to like-minded or susceptible people.’”

As with the TV coverage of Nick Emmett’s mock obituaries, the local press coverage of the Eastlake Phantom story also dabbled in moral denunciation of teenage Internet users. Rather than describe the Phantom website as a forum for free speech on any topic the users desired, it was described as “a forum for students to vent their frustrations toward teachers and to post rumors about their classmates.” Ignoring the site’s serious discussions of social class, tolerance, and methods to improve the school environment, another paper said, “Classmates who visited the site gossiped, talked about drinking and sex and gave lewd descriptions of genitalia. Individual students and faculty were mocked by name on the Web page and inflammatory ‘top 10’ lists were compiled.” Unable to resist temptation, one article mentioned for no discernible reason that students at Eastlake “are mostly white and upper class, similar demographically to those at Columbine.” Such sensationalist coverage caused some readers to consider abolishing the offending technology altogether. As one worried parent said, “Nobody should have access to terrorize this many people.”

Lawmakers are not immune from the distorted perceptions engendered by moral panic. The moral panic response occasionally reveals itself in statutes and court decisions, although identification and opposition to moral panic can also be seen. It will emerge at various points throughout this Article, just as it bubbles forth periodically in society at large.

III. FREE SPEECH RIGHTS OF STUDENTS AT PUBLIC SCHOOLS

Lawyers and judges routinely cite Tinker v. Des Moines Independent Community School District when considering public school discipline based on a student’s speech. The reflex is generally healthy since Tinker sets forth two dominant principles that remain in force.

85. Id.
87. Stiffler, Eastlake Death Threat Traced to Arizona Student, supra note 22.
88. Burkitt, supra note 22.
89. Vinh, Prankster Suspected in School Threat, supra note 22.
First, the case removed any lingering question about whether school discipline was completely free of constitutional limits. In its most frequently quoted sentence, Tinker announced, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”92 Second, the case held that discipline for a student’s on-campus speech is permissible only if it would materially and substantially disrupt the work and discipline of the school or if it constitutes an “invasion of the rights of others.”93 An “undifferentiated fear or apprehension of disturbance” does not suffice.94 Part IV of this Article argues that not all speech uttered by public school students should be governed by what has come to be known as the Tinker standard,” but a thorough understanding of Tinker is necessary to understand why.

A. Understanding Tinker

The Supreme Court majority opinion authored by Justice Abe Fortas95 has become famous for its stirring language, but the facts, while famous in general outline, are better understood by examining Justice Hugo Black’s dissent96 and the trial court’s opinion.97 With the full support of their parents, a group of public school students in Des Moines, Iowa decided to wear black armbands to school from Thursday, December 16 to the end of the semester “to mourn those who had died in the Vietnam War and to support Senator Robert F. Kennedy’s proposal that the truce proposed for Christmas Day, 1965, be extended indefinitely.”98 The School Board learned of the plan, however, and on Tuesday, December 14 implemented a new rule specifically forbidding the wearing of armbands at Des Moines schools.99 Students wearing armbands would be suspended until they removed

92. Tinker, 393 U.S. at 506.
93. Id. at 513.
94. Id. at 508. For this reason, school rules defining certain types of on-campus speech as disruptive per se were found invalid under Tinker until the court’s opinion in Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986). E.g., Scoville v. Bd. of Educ. of Joliet Township High Sch. Dist., 425 F.2d 10 (7th Cir. 1970).
95. Tinker, 393 U.S. at 503.
96. Id. at 515-24.
99. Tinker, 393 U.S. at 504.
Accepting the principle of civil disobedience that one must endure the punishment imposed for violating an unjust rule, the students stayed out of school for the days they had planned for their protest, returning without armbands only at the beginning of the next semester in January 1966. They brought suit under 42 U.S.C. § 1983, seeking nominal damages and an injunction against the no-armbands rule.

Like the Eastlake Phantom episode, Tinker arose at a time of rising moral panic over the direction of the country’s youth. The trial court judge devoted as much space in his opinion to events outside the school as to events inside it.

The Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the arm band regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities. A protest march against the war had been recently held in Washington, D.C. A wave of draft card burning incidents protesting the war had swept the country. At that time two highly publicized draft card burning cases were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing their views. This was demonstrated during the school board’s hearing on the arm band regulation. At this hearing, the school board voted in support of the rule prohibiting the wearing of arm bands on school premises. It is against this background that the Court must review the reasonableness of the regulation.

The district court did not discuss any similar facts of unrest inside the school, but Justice Black’s dissent pointed to facts in the record indicating that the armbands were, at the very least, a source of contention among students.

Detailed testimony by some [witnesses] shows [plaintiffs’] armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically “wrecked” chiefly by disputes with Mary Beth Tinker, who wore her armband for her “demonstration.” Even a casual reading of the record shows that this armband did divert students’ minds

100. Id.
101. Id.
102. Id.
from their regular lessons, and that talk, comments, etc., made John Tinker “self-conscious” in attending school with his armband. . . . I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students’ minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war.¹⁰⁴

The trial court was not interested in this level of evidentiary detail, however; under its view of the law, school officials “not only have a right, they have an obligation to prevent anything which might be disruptive” of a “scholarly, disciplined atmosphere within the classroom.”¹⁰⁵ Rejecting a standard adopted by the Fifth Circuit, the trial court concluded that “actions of school officials in this realm should not be limited to those instances where there is a material or substantial interference with school discipline,” and instead would be upheld if they were “reasonable” (i.e., there was any reasoned basis to argue that the students’ speech would be disruptive to any degree).¹⁰⁶ A ban on anti-war armbands was reasonable here, the court believed, because “while the armbands themselves may not be disruptive, the reactions and comments from other students as a result of the armbands would be likely to disturb the disciplined atmosphere required for any classroom.”¹⁰⁷

The Eighth Circuit affirmed the decision without opinion on a 4-4 vote.¹⁰⁸ The Supreme Court agreed to take the case on a 5-4 vote, with Justice Fortas—the eventual author of the majority opinion—voting against review.¹⁰⁹

The Supreme Court’s constitutional analysis begins with what has become a mantra: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹¹⁰ That principle did not decide the case—even the trial court had not questioned whether the First Amendment applied, only whether it demanded a ruling in favor of

¹⁰⁴. Tinker, 393 U.S. at 517-18 (Black, J., dissenting).
¹⁰⁵. Tinker, 258 F. Supp. at 972 (emphasis added).
¹⁰⁶. Tinker, 258 F. Supp. at 973 (declining to follow Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) and Blackwell v. Essaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966)).
¹⁰⁷. Id. at 973.
¹⁰⁹. JOHNSON, supra note 97, at 128-30.
¹¹⁰. Tinker, 393 U.S. at 506.
the students. It might not, in light of cases finding that the constitutional rights of minors may differ from the comparable rights of adults. Another more pragmatic concern was how to ensure the state’s ability to effectively perform an affirmative enterprise like running a school, as opposed to pursuing its role as regulator of private behavior. Shortly before Tinker, the court had ruled that a public employer (a school district, as it happened) had a legitimate interest in running its enterprise that could, in certain limited cases, justify firing a public employee over speech that rendered him unsuitable for the work assigned. Would the enterprise of running a school allow the state to stringently regulate student speech?

On this question, the Supreme Court concluded that public schools must allow freedom of expression on campus “even on controversial subjects like the conflict in Vietnam” as long as students pursue that expression “without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.” In another often-quoted passage, the Court noted that the Constitution frowns upon the preservation of an arid order that could not brook the slightest disruption.

In our system, state-operated schools may not be enclaves of totalitarianism. 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. In our system, students 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. Instead, expression that forces deviations from the planned agenda was to be both expected and valued.

Any departure from absolute regimentation may cause trouble.

111. Speech acts may be “covered” by the First Amendment even if they are not “protected” against state sanction thereunder. Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 VAND. L. REV. 265, 267-82 (1981).
114. Tinker, 393 U.S. at 513.
115. Id. at 511. See also Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (striking down a vagrancy law that risked enveloping the public streets in a “hushed, suffocating silence”).
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.\textsuperscript{116}

\textit{Tinker} recognized frankly that its rule of decision inevitably will result in days when on-campus speech by students will cause life at school to deviate from its ordinary course. This ruling need not have been made if the Court had truly believed its frequent statements that the Des Moines armbands caused “no disturbances or disorders” on the school premises at all.\textsuperscript{117} In light of the evidence in the record that the armbands had caused controversy and contention,\textsuperscript{118} the majority’s factual statements that “no disruption” occurred must be understood as saying that the act of wearing the armband was not itself disruptive, that any disruption was caused by other persons and not the armband wearers, or that any resulting disruption could not be described as material or substantial.

This was only one of the many locations where the majority could have decided the case on narrower grounds. Justice Fortas mentions, but does not dwell upon, the fact that the alleged disruption at the Des Moines schools was caused by other students’ reactions to the armbands, and not the armbands themselves. The decision could therefore have been based on the “heckler’s veto” doctrine, holding that the state may not defuse a potentially volatile crowd by silencing the speaker the mob seeks to shout down.\textsuperscript{119} Or, relying on the related doctrine of incitement, the Court could have relied on a finding that the students’ armbands were not intended to provoke, and were not likely to result in, imminent rule-breaking by other students.\textsuperscript{120} Just-

\begin{footnotes}
\item[116] \textit{Tinker}, 393 U.S. at 508-09 (citation omitted).
\item[117] \textit{Id.} at 514.
\item[118] \textit{Id.} at 517 (Black, J., dissenting).
\item[120] Incitement is proscribable only where it “is directed to inciting or producing imminent lawless action and is likely to induce or produce such action.” Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (Klansman did not incite imminent lawless action when he urged travel to Washington DC to take “revengeance”). \textit{See also} Hess v. Indiana, 414 U.S. 105, 107-09 (1973) (antiwar demonstrator did not incite imminent lawless action when he said, “We’ll take
tice Fortas mentions, but does not dwell upon, the fact that “a particular symbol—black armbands worn to exhibit opposition to this Nation’s involvement in Vietnam—was singled out for prohibition” while students were permitted to wear other controversial political buttons or symbols in school. Thus, the decision could have been based on the principle of viewpoint neutrality. Justice Fortas mentions with approval that the black armbands were a serious political statement about a matter of great societal import. Therefore, he could have limited the decision to on-campus student speech on topics of public importance. Instead, Justice Fortas, in ringing language, ruled that American governments must tolerate an unavoidable background level of messy, aggravating social disorder.

One may speculate that the majority’s sweeping First Amendment language may have been motivated by Justice Fortas’s realization that he would soon be leaving the Court and this was likely to be

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121. Tinker, 393 U.S. at 510-11.
122. See generally R.A.V. v. St. Paul, 505 U.S. 377 (1992); Texas v. Johnson, 491 U.S. 397 (1989). Had the Court grounded its argument in the viewpoint neutrality theory, Justice Harlan would still have dissented. He argued that a school’s ban on anti-war speech should be considered content neutral, because it had a “good faith” motivation. Tinker, 393 U.S. at 526 (Harlan, J., dissenting). He did not specify the good-faith motive, but appears to have agreed that it was the school’s “urgent wish to avoid . . . controversy.” Tinker, 393 U.S. at 510 (Harlan, J., dissenting). Later cases have also latched onto the unfriendly notion that a governmental decision to excise material based on its ability to provoke “controversy” is somehow neutral as to content or viewpoint. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272, 276 (1985) (school newspaper may eliminate “controversial material”); Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist., 941 F.2d 817 (9th Cir. 1991) (en banc); Clark v. Burleigh, 841 P.2d 975 (Cal. 1992) (state may eliminate references to one’s opponent in voter pamphlet). But see Hopper v. Pasco, 241 F.3d 1067 (9th Cir. 2001) (city may not eliminate public art on vague apprehensions of “controversy”).
123. Tinker, 393 U.S. at 514.
125. Tinker, 393 U.S. at 513.
his last opinion.\textsuperscript{126} Or perhaps it was the general tendency for opinions dealing with the rights of youth to bring out the pedagogue in a judge, since the readership will consist not only of lawyers but also teachers and students.\textsuperscript{127} The majority’s more sweeping approach was proper because it provided a more durable basis for deciding future cases, it addressed a split of authorities below, and it responded to Justice Black’s heated dissent, which presented not only a differing view on the correct outcome of the case, but also fundamentally different visions about the proper organization of society. These competing visions continue to be subjects of judicial debate.

1. Competing Visions of the Judicial Role

Like almost any social or political question worth serious consideration, \textit{Tinker} was partly about formulating the correct rule and partly about who gets to formulate it. In that sense, it resembles \textit{Marbury v. Madison},\textsuperscript{128} which is remembered for announcing the principle of judicial review of legislation,\textsuperscript{129} and not the forgettable context of the proper method of appointing justices of the peace for Washington County. Under the United States Constitution, the question “who decides?” is in most instances answered, “elected legislatures.”\textsuperscript{130} For those areas of public life governed by the Bill of Rights, however, the constitutional answer to “who decides?” is “nobody” (or, in a sense, “everybody”). Freedom of speech and freedom of conscience are not to be regulated by the government. What to say and what to believe is left up to each individual. The choices made will have social ramifications; but in principle anyway, they should not have legal ones. For the \textit{Tinker} students, the social costs of their armbands may have been fewer friends and more scorn from their enemies. But the majority concluded that they should not face the legal costs that the Des Moines School District sought to impose (deprivation of their right to

\begin{itemize}
\item \textsuperscript{126} A few months after \textit{Tinker} was decided, Justice Fortas resigned from the Court amidst criticism over alleged financial improprieties. \textit{Johnson}, supra note 97, at 151.
\item \textsuperscript{127} A dispute over the pledge of allegiance gave rise to the famous statement, “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.” \textit{W. Va. State Bd. of Educ. v. Barnette}, 319 U.S. 624, 642 (1943).
\item \textsuperscript{128} \textit{5 U.S.} 137 (1803).
\item \textsuperscript{129} \textit{Id.} at 180 (“[A] law repugnant to the constitution is void, and . . . courts, as well as other departments, are bound by that instrument.”).
\item \textsuperscript{130} \textit{U.S. Const.}, art. I. States are similarly required to provide a republican form of government. \textit{U.S. Const.}, art. IV, § 4.
\end{itemize}
attend public school.

Justice Black approached the allocation of power question quite differently. In his eyes, a ruling against the School District would not represent a grant of decision-making power to the students, but a grant of power to the judiciary. His very first sentence complained that “[t]he Court’s holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected officials of state supported public schools in the United States is in ultimate effect transferred to the Supreme Court.”

He inveighed against the evils of *Lochner*-era substantive due process doctrine and scorned any judicial attempt to strike down laws on the basis of imprecise tests like “shocking to the conscience” or “contrary to fundamental decency,” because this turns judges into super-legislators with “power to strike down any law they do not like.”

Justice Black was alone in his belief that it would exceed the Court’s judicial authority to enforce the First Amendment against local school districts. This misplaced concern with the limits of federal judicial power would have the (vaguely passive-aggressive) result of cementing power wherever it happens to currently reside, even if the Constitution declares that the power should rest elsewhere. It also misconstrues a power struggle between teacher and student as a power struggle between teacher and judge.

What strikes the modern reader as most odd in Justice Black’s dissent is the contention that enforcing First Amendment free speech rights is as precarious a practice as divining previously unrecognized rights under the substantive due process doctrine. A few years earlier, Justice Black clearly understood the difference, writing that “[f]ree speech, free press, free exercise of religion . . . are above and beyond the police power; they are not subject to regulation in the manner of factories, slums, apartment houses, production of oil, and the like.”

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131. *Tinker*, 393 U.S. at 515 (Black, J., dissenting) (internal punctuation omitted). This concern was prefigured by Justice Black’s concurring opinion in *Epperson v. Arkansas*, 393 U.S. 97, 111-12 (1968).


133. Even the other dissenter, Justice Harlan, would find some minor First Amendment constraint on school discipline. *Tinker*, 393 U.S. at 526 (Harlan, J., dissenting).

134. See, e.g., *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 684-85 (Kennedy, J., dissenting) (chiding the majority for failing to recognize that “[i]n the final analysis, this case is about federalism” and not about the duty under Title IX to prevent sex discrimination).

facts of *Tinker* must have prompted this wholesale revision of Justice Black’s customary understanding of federalism and separation of powers.

2. Competing Visions of Youth and Family

Enter the recurrent moral panic over youth run amuck, this time in its flower-power 1960s version. Like the trial court, Justice Black was more concerned about young people other than those described in the record.

We cannot close our eyes to the fact that some of the country’s greatest problems are crimes committed by the youth, too many of school age. . . . Groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get. Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials.136

Justice Black was describing the contemporary conduct of some university students, not the junior high and high school students in *Tinker*. But as is frequently the case when moral panic is invoked, the fear-provoking behavior of some members of an out-group are imputed to all. Justice Black was quite willing to acknowledge that he did not care in the slightest that his horror scenario of “break-ins, sit-ins, lie-ins, and smash-ins” had nothing to do with the facts before him: “It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures.”137 His warning, in essence, was never to trust anyone under thirty.

137. *Id.* at 525 (Black, J., dissenting).
the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court’s expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.\textsuperscript{138}

The final sentence quoted above assumes that a student’s control over her own speech (up to the point where it causes substantial and material disruption or infringes the rights of others) is tantamount to “control of the American public school system.”\textsuperscript{139} History has proved wrong the fears expressed shortly after \textit{Tinker} was decided that if school principals could not ban black armbands, then they could not prevent fornication in the halls, either.\textsuperscript{140} Justice Black’s dissent also posits an opposition between students and parents when, in fact, the parents of the \textit{Tinker} plaintiffs fully supported the armbands. Having begun his dissent by inaccurately describing the case’s central power allocation question as between schools and courts, Justice Black ended by inaccurately describing it as between students and parents. By removing authority over speech from government actors who were never intended to wield it, \textit{Tinker} is actually a pro-parent decision.

3. Competing Visions of Education

The majority and dissenting opinions in \textit{Tinker} reveal different visions of public education.\textsuperscript{141} Justice Black views schools as locations for transmission of curricular information. Speech on extraneous topics is an impediment to transmission. Indeed, anything that generates thought on extraneous topics is an impediment. Students must not “defy and flout orders of school officials to keep their minds on their own schoolwork.”\textsuperscript{142} Discipline is also valuable for its own

\begin{footnotesize}
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\item \textsuperscript{138} \textit{Id.} at 525-26 (Black, J., dissenting).
\item \textsuperscript{139} \textit{Id.} at 526 (Black, J., dissenting).
\item \textsuperscript{140} Johnston, \textit{supra} note 91, at 525.
\item \textsuperscript{142} \textit{Tinker}, 393 U.S. at 518 (Black, J., dissenting) (emphasis added). Justice Black elsewhere states that armbands “took the students’ minds off their classwork.” \textit{Id.} (emphasis
\end{itemize}
\end{footnotesize}
sake. “School discipline, like parental discipline, is an integral and
important part of training our children to be good citizens—to be bet-
ter citizens.” Justice Fortas had a different view of citizenship, and
a correspondingly different view of schools. He believed that a
principal goal of public education is to allow “personal intercommu-
nication among the students” on topics of their own choice. “This
is not only an inevitable part of the process of attending school; it is
also an important part of the educational process.” Schools are not
like hospitals or jails, which exist chiefly for the staff to perform their
functions on a passive population. Indeed, Justice Fortas rejected
the notion that public schools should “foster a homogeneous people,”
comparing that method of education unflatteringly to ancient Sparta
(and, sub silentio, Nazi Germany).

For each of these competing visions, the majority of the Court
sided firmly with Justice Fortas. But this hardly meant that Justice
Black’s visions were banished from judicial thought. The subsequent
development of post-\textit{Tinker} law shows the continuing devotion of
some schools and courts to the Spartan model.

\textbf{B. Tinker from Shield to Sword}

In later cases involving free speech rights of public school stu-
dents, \textit{Bethel School District v. Fraser} and \textit{Hazelwood School Dis-
trict v. Kuhlmeier}, the Supreme Court has chosen not to expand
\textit{Tinker}’s breadth. There has been no shortage of legal commentary

\begin{itemize}
\item[143.] \textit{Tinker}, 393 U.S. at 524 (Black, J., dissenting).
\item[144.] Both Fortas and Black agreed that the purpose of public education is to prepare
the young for citizenship. See \textit{id}. at 507, 522. Identifying this as the abstract goal does not deter-
mine what means are lawful to achieve it. For example, the majority in \textit{Ambach v. Norwick},
441 U.S. 68 (1979), stated that the fundamental purpose of public education was to “incul-
cat[e] fundamental values,” \textit{id}. at 77, and “promote civic virtues,” \textit{id}. at 80, but this did not
prevent a 5-4 split over whether it was reasonable for New York to pursue these goals through
a rule that only U.S. citizens or aliens intending to become U.S. citizens could act as teachers.
\item[145.] \textit{Tinker}, 393 U.S. at 512.
\item[146.] \textit{id}.
\item[147.] \textit{id}. at 512 n.6.
\item[148.] \textit{id}. at 511. The antebellum South, whose educational traditions revolved around
the Spartan ideal of the military academy, also has been likened to a totalitarian society. Akhil
Reed Amar, \textit{A Tale of Three Wars: Tinker in Constitutional Context}, 48 \textit{DRAKE L. REV.} 507,
516 (2000).
\item[149.] 478 U.S. 675 (1986).
\item[150.] 484 U.S. 260 (1988).
\item[151.] I do not consider here the cases dealing with other rights of high school students, or
\end{itemize}
lamenting the trend, bearing mournful titles like “What’s Left of Tinker?” and “Tinker Tailored.” I share these authors’ belief that the Court missed important opportunities and engaged in dubious reasoning in Bethel and Hazelwood, but I also share the views of those commentators who note that the holdings of these decisions do not call Tinker’s holding into question. Nonetheless, lower court cases have misapplied the Tinker standard regularly, endangering its ability to generate appropriate constitutional results.

The retrenchment owes something to changed societal beliefs about youth and education, but it also involves inevitable processes that occur whenever a court decision articulates a new and highly visible legal standard. Once a standard is pronounced, parties to litigation know what language to use in future arguments. This means that school disruption that might have been described without modifiers in briefs submitted before Tinker will be described in post-Tinker briefs as “material and substantial,” accompanied by declarations from staff containing the necessary magic words. Any legal rule can find itself transformed from shield to sword. The leading exemplar of the pattern is the Biblical injunction of “an eye for an eye.”


154. Yudof, supra note 141.


revenge—a life for an eye, for example—the rule when new served as "a warning to let the response go no further than the provocation."\textsuperscript{157} However, the expression is often used today to set the floor for revenge, not the ceiling.

1. Bethel, Hazelwood, and Company

Like an M.C. Escher painting, the architecture of \textit{Bethel} makes it difficult to tell the floor from the ceiling. Matthew Fraser gave a speech at a mandatory school assembly to nominate a classmate for student body vice president. The motif of his speech was the male ejaculation: the nominee, said Fraser, "is firm," he "takes his point and pounds it in," he "doesn’t attack things in spurts" and will "go to the very end—even the climax."\textsuperscript{158} Not consulting their dictionaries, the Supreme Court majority considered the speech to be a "graphic and explicit sexual metaphor,"\textsuperscript{159} fully deserving the five-day suspension the school imposed on Fraser for delivering it. Society has an interest "in teaching students the boundaries of socially appropriate behavior,"\textsuperscript{160} the majority reasoned.

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. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.\textsuperscript{161}

Among \textit{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.\textsuperscript{162} \textit{Bethel} may also be the only case to approve the deprivation of liberty and property as a method for the

\textsuperscript{157} Dwyer, supra note 5, at 13.
\textsuperscript{158} Bethel Sch. Dist., 478 U.S. at 687.
\textsuperscript{159} Id. at 678.
\textsuperscript{160} Id. at 681.
\textsuperscript{161} Id. at 685-86.
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.163

Whether or not Bethel was rightly decided, it should not be read as an abandonment of the Tinker requirement of a factual basis of material and substantial disruption. As Justice Brennan’s concurrence noted, the majority opinion recognized that vulgar speech to a captive audience at a school-sponsored event may properly be viewed as a substantial disruption to the school’s educational mission.

[T]he Court holds that under certain circumstances, high school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school’s educational mission. Respondent’s speech may well have been protected had he given it in school but under different circumstances, where the school’s legitimate interests in teaching and maintaining civil public discourse were less weighty.164

Shortly after Bethel, the Court ruled in Hazelwood that a school principal did not violate the First Amendment by censoring articles from a student newspaper that was part of the curriculum, as long as the school had not designated the newspaper a limited public forum and the editorial decision was “reasonably related to legitimate pedagogical concerns.”165 Although the dissent may have had the better of the argument as to whether the Hazelwood newspaper had been designated a public forum, once that factual finding is accepted, the decision has less to do with student speech rights than it does with the right of a government agency to control the content of its own speech.166 “Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist.”168

164. Bethel Sch. Dist., 478 U.S. at 688-89 (Brennan, J., concurring). But see Chandler v. McMinnville Sch. Dist., 978 F.2d 524 (9th Cir. 1992) (suggesting that Bethel creates a per se rule permitting discipline for vulgar on-campus speech); Heller v. Hodgin, 928 F. Supp. 789 (S.D. Ind. 1996) (approving a per se rule against using “the f-word” on campus, whether or not at an assembly).
166. Id. at 277 (Brennan, J., dissenting).
168. Downs v. Los Angeles Sch. Dist., 228 F.3d 1003, 1013 (9th Cir. 2000).
While the holdings of these major cases are reconcilable with *Tinker*, their language and attitude toward the facts differ greatly.169 *Bethel* went so far as to quote with approval the frosty statement from Justice Black’s *Tinker* dissent that the Constitution does not “surrender control of the American public school system to public school students”170 (although to the *Bethel* majority’s credit, the sentiment better comports with a case involving an off-color speech at a mandatory assembly than it ever did to the silent wearing of an armband). Justice Fortas in *Tinker* saw public schools as laboratories of democracy171 where students learn that they have freedom of thought, belief, and speech. Justice Burger in *Bethel* saw schools as laboratories of autocracy, where students learn not to use their freedom in socially disfavored ways.

When courts accept that a major purpose of school is to teach students to be quiet, they will be more inclined to agree with school administrators who see material and substantial disruption on relatively benign facts. *Poling v. Murphy*172 upheld the discipline of a student for a speech to an assembly that was not sexually suggestive, but criticized school administrators as authoritarian. The court reasoned that “discourteous” and “rude” speech was akin to the off-color speech found sanctionable in *Bethel*.173 *Gano v. School District No. 411 of Twin Falls County*174 also interpreted *Bethel* to find a legitimate school interest in teaching students not to criticize authority figures (a far different proposition than the one found in *Bethel*, which found a legitimate interest in teaching students about respecting one’s audience by avoiding unnecessary sexual innuendo).175 *Gano* was untroubled by a student’s two-day suspension from school for merely planning to wear a t-shirt with a cartoon of school administrators drinking alcohol.176 *Boroff v. Van Wert City Board of Education*177

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171. *Tinker*, 393 U.S. at 513; *see also* *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).
172. 872 F.2d 757 (6th Cir. 1989).
173. *Id.*
175. *See Bethel Sch. Dist.*, 478 U.S. at 681, 685-86.
176. *Id.*
177. 220 F.3d 465 (6th Cir. 2000).
found no First Amendment violation when a school banned t-shirts bearing the picture of popular singer Marilyn Manson “because they contain symbols and words that promote values that are . . . patently contrary to the school’s educational mission.” 178 Two other courts found that the war on risque t-shirts had no exception for the war on drugs, and therefore upheld school discipline for one t-shirt saying “Drugs Suck”179 and another discouraging drunk driving with the slogan “Don’t Be a Dick.”180 Sadly, many courts and school district attorneys use the phrase “the Tinker standard” in reference to Tinker’s narrow exception (discipline may be imposed when a student’s speech causes substantial disruption) instead of its broad rule (discipline may not be imposed for most student speech).

This would not have to be so. Judges could avoid eroding the principle by giving serious consideration to the level of disturbance that Justice Black identified but that Judge Fortas deemed inconsequential in Tinker. It is possible for judges to do this even when they prefer the law were otherwise. In Karp v. Becken,181 the Ninth Circuit held that a school could not suspend a student for displaying signs that protested the firing of an English teacher. It reached this conclusion even though Judge Wallace, in dicta, indicated that he much preferred Justice Black’s view of the world.182


A vivid recent example of Tinker’s transformation from student shield to school sword appears in LaVine v. Blaine School District.183 In that case, high school junior James LaVine wrote a poem at home entitled “Last Words,” in which the fictional first-person narrator kills

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178. Id. at 470. Amazingly enough, the dissent also said, “I have little doubt that school administrators may reasonably decide that certain rock performers are so closely identified with illegal drug use or other unlawful activities that the T-shirts bearing their images are unacceptable for high school students to wear in school.” Id. at 472. Adults may encourage others to break the law. Hess v. Indiana, 414 U.S. 105 (1973); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); United States v. Noto, 367 U.S. 290, 298 (1961). Students in the Sixth Circuit may not even discuss adults who do so.


181. 477 F.2d 171 (9th Cir. 1973).

182. Id. at 174.

183. 257 F.3d 981 (9th Cir. 2001), reh’g denied, 279 F.3d 719 (2002), cert. denied, 122 S. Ct. 2663 (June 28, 2002).
himself out of remorse over a prior school shooting rampage. After James showed the poem to an English teacher who had encouraged students to submit their independent work for comments, the principal expelled him from school indefinitely. The parties told strikingly different stories about the basis for the expulsion. The school administrators argued that the poem, combined with other troubling background information about James’ behavior and mental condition, made them worry that he was a proverbial ticking time bomb. They removed him from school solely to protect everyone’s safety, they said, not as a punishment for writing a threatening poem. By contrast, James pointed to school officials’ contemporaneous statements and deposition testimony indicating that the school considered the poem itself to be a harassing threat in violation of school rules, and that they would have punished any student who dared to write it, without regard to the asserted background factors. If believed, James’ evidence would mean that the safety rationale was a mere pretext, and the school improperly punished him for constitutionally protected, nonthreatening speech along the lines of “I Shot the Sheriff” or “Tom Dooley” (that is, a poem where a fictional narrator describes his feelings about an earlier murder).

The parties filed cross-motions for summary judgment, and given the contested factual record, the proper resolution should have been to deny them both. When a plaintiff makes a prima facie case that a state actor retaliated against him on the basis of his constitutionally protected speech, *Mt. Healthy Board of Education v. Doyle* explains that the burden shifts to the state to show that it would have taken the same action even if the speech had never been uttered.

184. *Id.* at 983.
185. *Id.* at 985-86.
186. *Id.*
187. *Id.* at 990-91.
188. James’ poem could not have supported a criminal prosecution under a threats statute because artworks are too inherently ambiguous and subjective to satisfy the concreteness requirements of the true threat doctrine. *See People v. Ryan D.*, 123 Cal. Rptr.2d 193 (Cal. Ct. App. 2002) (holding that a student’s violent painting submitted to high school art teacher not a true threat as a matter of law; “the criminal law does not, and can not, implement a zero-tolerance policy concerning the expressive depiction of violence”).
189. *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132 (9th Cir. 2001).
191. *Id.* at 283-84. *See also* Soranno’s Gasco, Inc. v. Morgan, 874 F.2d 1310 (9th Cir. 1989).
The defendants’ motivation is ordinarily a question for trial, as is the existence of a true threat. A panel of the Ninth Circuit concluded that the trier of fact did not have to decide whether James’ poem was a true threat, and also implied (by ignoring James’ Mt. Healthy argument) that there was no need to decide whether the school’s safety rationale was a pretext. It avoided these standard questions by misconstruing Tinker. “At the time the school officials made their determination to emergency expel James,” said the LaVine panel, “they had facts which might reasonably have led them to forecast a substantial disruption of or material interference with school activities.”

As an opinion dissenting from the denial of rehearing put it, “[t]hat reads Tinker through a mirror.” In Tinker, Justice Fortas wrote that “the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.” This comment on the Tinker facts does not mean that in a different case, a school may punish a student for constitutionally protected speech if facts exist that might have—but in fact did not—lead to a forecast of disruption. Such an interpretation would transform Tinker into a green light for any punishment of student speech that could be disguised by a suitable pretext. LaVine’s misapplication of Tinker therefore generated a misapplication of Mt. Healthy, effectively denying its procedural protections to public school students. If public school teachers (like the plaintiff in Mt. Healthy) are entitled to a factual finding on whether they suffered retaliation for their speech, then public school students (who are subject to state supervision as a result of compulsory attendance laws and not voluntary employment choices) should have the same opportunity.

Why would LaVine trip over so many long-accepted legal doctrines just to avoid the possibility that James might prevail at a trial?

193. United States v. Merrill, 746 F.2d 458, 463 (9th Cir. 1984).
194. LaVine v. Blaine Sch. Dist., 257 F.3d 981, 993 (9th Cir. 2000).
195. LaVine reh’g denied, 279 F.3d 719, 726 (2000) (Kleinfeld, J., dissenting from denial of rehearing en banc).
196. Tinker, 393 U.S. at 514.
197. This principle animated denial of the cross-motions for summary judgment in Coy, 205 F. Supp. 2d at 800.
As with Justice Black’s confusion of First Amendment and substantive due process principles in *Tinker*, I believe some of the blame rests on moral panic. The *LaVine* opinion referred frequently to the Columbine shootings, even though they occurred months after James LaVine was expelled from school.

We live in a time when school violence is an unfortunate reality that educators must confront on an all too frequent basis. The recent spate of school shootings have put our nation on edge and have focused attention on what school officials, law enforcement and others can do or could have done to prevent these kinds of tragedies. After Columbine, Thurston, Santee and other school shootings, questions have been asked about how teachers or administrators could have missed telltale “warning signs,” why something was not done earlier and what should be done to prevent such tragedies from happening again.¹⁹⁸

The panel acknowledged that this “backdrop of tragic school shootings, occurring both before and after the events at issue here,”¹⁹⁹ colored its thinking. The resulting decision came perilously close to announcing a new and troublesome principle, decried by the dissent from rehearing:

[W]here school officials perceive a major social concern about school safety, they may punish school children whose speech gives rise to a concern that they may be dangerous to themselves or others, even though the speech is not a threat, disruptive, defamatory, sexual, or otherwise within any previously recognized category of constitutionally unprotected speech.²⁰⁰

The panel opinion contained enough qualifying language to avoid so blunt and wrong a holding, at times begging later courts to limit it to its facts.²⁰¹ Such a limitation may well be appropriate in light of some procedural peculiarities of the case as well: there might not have been appellate jurisdiction,²⁰² and for reasons that are far

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¹⁹⁸. *LaVine*, 257 F.3d at 987.
¹⁹⁹. *Id.* at 983.
²⁰⁰. *LaVine reh’g denied*, 279 F.3d at 724 (Kleinfeld, J., dissenting from denial of rehearing en banc). *See also id.* at 721 (“If a teacher, administrator, or student finds their art disturbing, they can be punished, even though they say nothing disruptive, defamatory or indecent and do not intend to threaten or harm anyone.”).
²⁰¹. *LaVine*, 257 F.3d at 989 (“In applying *Tinker*, we look to the totality of the relevant facts.”); *id.* at 783 (“[T]his is a close case in retrospect.”); *id.* at 991 (school may have overreacted); *id.* at 987 (“[S]chools cannot expel students just because they are ‘loners,’ wear black and play video games.”).
²⁰². *LaVine reh’g denied*, 279 F.3d at 723 n.4 (Kleinfeld, J., dissenting from denial of rehearing en banc).
from clear, the panel found that expelling James from school did not violate the First Amendment, but keeping accurate records about the expulsion did. A final reason to consider LaVine of little consequence for later cases involving Tinker is that its entire Tinker discussion was superfluous in light of the disposition of the appeal. If the LaVine panel is taken at its word, it found undisputed evidence that James was not punished for his speech, but instead was removed for safety reasons. But if that is true, the panel did not need to discuss Tinker at all because Tinker dealt exclusively with the standards for schools punishing students for their speech.

For a learned Ninth Circuit panel to read Tinker backwards—in a case that, under the court’s own logic, should not have discussed Tinker at all—indicates that the Tinker standard has fallen on hard times in the lower courts. Given its current misunderstood state, it is worthwhile to consider whether Tinker should apply to some student discipline situations at all.

IV. PUBLIC HIGH SCHOOLS LACK AUTHORITY TO DISCIPLINE STUDENTS FOR MOST OFF-CAMPUS AND INTERNET SPEECH

Courts may differ over whether a given set of facts constitutes an unacceptable disruption to the ideal school day, but there is no question that Tinker allows government agents much more control over speech at school than the First Amendment allows in other circumstances. Ordinarily, the Constitution allows people to utter words that risk a great deal of substantial and material disruption to daily life. They can hurt each others’ feelings, impugn their motives, misquote them, level mistaken allegations of fact against them, even advocate breaking the law or overthrowing the government. 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

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203. LaVine, 257 F.3d at 992.
compulsory attendance laws for part of the week.

A. Tinker Stopped Itself at the Schoolhouse Gate

When *Tinker* said that students do not shed their First Amendment rights at the schoolhouse gate,\(^{210}\) it necessarily implied that they have the ordinary complement of First Amendment rights outside those gates. Otherwise, they would have nothing to shed (or not shed). The clarity of this principle is sometimes diluted by those who would quote the italicized language from the following paragraph in *Tinker* out of context to suggest that schools have far-reaching authority to punish student conduct “in class or out of it.”

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others. *But 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.*\(^{211}\)

This passage discusses the difference between speech in a classroom and speech in other parts of the school grounds. Its reference to student conduct “out of class” does not mean “out of school” because the entire discussion deals with student conduct “on the campus during the authorized hours.”\(^{212}\) The paragraph may have appeared in the opinion because some Justices, during oral argument and in deliberations, pondered whether the armband ban would have been acceptable had it been limited to the classroom, allowing armbands in other areas

\(^{210}\) *Tinker*, 393 U.S. at 506.

\(^{211}\) *Tinker*, 393 U.S. at 512-13 (emphasis added; internal punctuation and citations omitted).

\(^{212}\) *Id.*
of the school. The majority concluded that this was not a valid solution, so the relatively speech-protective substantial disruption rule applies to the playground, cafeteria, and classroom. Along the same lines, the Court rejected another proposal floated at oral argument—namely, that discussion of the Vietnam War at school might be limited to classroom discussion moderated and supervised by a teacher:

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.... [W]e 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.

Read in this context, Tinker’s “in class or out of it” language hardly suggests that school administrators may apply the same level of control to students in the world at large as they do within school grounds.

Numerous later decisions make clear that the Tinker standard does not apply to students’ off-campus lives. A decision issued a few months after Tinker explained:

[I]t 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.

Matthew Fraser’s suggestive speech would not be punishable had it been delivered away from school. Students may extend their middle fingers to teachers off-campus and answer only to the civil

213. JOHNSON, supra note 97, at 154; Johnston, supra note 91, at 522-23.
law (and the social consequences). Even cases that are willing to uphold a school principal’s prior restraint over student literature distributed on campus acknowledge that the rule could not possibly apply off-campus.

Only distribution “on school property” is at issue here. The school district asserts no authority to govern or punish what students say, write, or publish to each other or to the public at any location outside the school buildings and grounds. If school authorities were to claim such a power, quite different issues would be raised, and the burden of the authorities to justify their policy under the First Amendment would be much greater, perhaps even insurmountable.

As a result, student literature created and distributed off-campus enjoys full First Amendment protections.

B. Objections to School Authority Over Off-Campus Conduct

Many reasons explain why school disciplinary authority should not extend to students’ off-campus conduct. While interconnected, they sound three rough themes. One set involves jurisdiction and allocation of power. Another set considers the consequences of allowing school discipline to be imposed for off-campus conduct. The third set notes the absence of those factors that have been found to justify control over student speech within the school environment.

1. Jurisdiction

Americans are masters at navigating overlapping jurisdictions. There are separations between state and national governments, and within each there is a separation of powers between one or more houses of the legislature, the executive, and the judiciary. As Justice


219. See, e.g., Thomas v. Granville Sch. Dist., 607 F.2d 1043 (2d Cir. 1979); Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972); Hatter v. Los Angeles City High Sch. Dist., 452 F.2d 673 (9th Cir. 1971).
Kennedy put it, “the Framers split the atom of sovereignty.” 220 Judges would never find speakers in summary contempt of court for disrespectful statements made outside the courtroom; that would exceed the court’s jurisdiction. 221 In the same way, enforcing school rules off-campus exceeds a school principal’s jurisdiction. Discipline for off-campus events makes public school students the subjects of too many sovereigns once they leave school: they answer to local law enforcement and to school administrators. Similarly, they would face two sets of punishments: liability in court for civil or criminal violations and school discipline. 222

2. Parental Rights

If the off-campus behavior of students is not within the jurisdiction of the school, it is largely within the jurisdiction of parents. The freedom to raise one’s children without unnecessary governmental interference has been recognized as a fundamental liberty interest. 223 Many parents take great offense at the notion that the school principal should decide the punishment for misconduct that occurs under a parent’s roof. 224 A caustic discussion of this theme comes from the opening paragraph of Shanley v. Northeast Independent School District, 225 which overturned a set of three-day suspensions for creating and distributing an underground newspaper.

It should have come as a shock to the parents of five high school seniors in the Northeast Independent School District of San Anto-


221. See, e.g., WASH. REV. CODE § 7.21.050 (1992) (summary contempt power applies only to contempt “within the courtroom”).

222. Calvert, Off-Campus, supra note 217, at 275-76. For a recent example of a student facing both criminal and scholastic punishments, see Janet Burkitt, School Expels Robbery Suspects, SEATTLE TIMES (Apr. 19, 2002), available at http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=robbery19modate=20020419.


225. 462 F.2d 960, 964 (5th Cir. 1972).
nio, Texas, that their elected school board had assumed suzerainty over their children before and after school, off school grounds, and with regard to their children’s rights of expressing their thoughts. We trust that it will come as no shock whatsoever to the school board that their assumption of authority is an unconstitutional usurpation of the First Amendment.226

Shanley further lamented the School Board’s “transmogrification into Super-Parent.”227

3. Institutional Competence

“The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members.”228 They are “accorded substantial discretion to oversee properly their myriad responsibilities” in the belief that “the schoolmaster [has] expertise in administering school discipline.”229 School districts are presumed, for example, to be more competent than federal courts at interpreting their own governing policies.

Even if educational professionals have unique competence and expertise in operating a school, they have no corresponding competence at controlling all conduct of all youth in their community. The Supreme Court noted in Bellotti v Baird,231

We have believed in this country that this process [of teaching, guiding, and inspiring young people by precept and example], in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State not to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice.232

Where child-rearing is concerned, the Justices “do not pretend any special wisdom on this subject.”233 School boards, no less than

226. Id.
227. Id. at 966. See also Thomas v. Granville Sch. Dist., 607 F.2d 1043 (2d Cir. 1979) (discipline not allowed when students write and distribute satirical newspaper).
229. Thomas, 607 F.2d at 1044.
232. Id. at 638.
233. Id.
the state legislators or federal courts considered in *Bellotti*, are “impersonal political institutions” that cannot be expected to exercise judgment superior to that of parents regarding students’ off-campus conduct.

4. *Due Process*

Limits to a school principal’s jurisdiction are particularly important in light of the heightened powers afforded within it. For example, a short-term suspension of ten days or less need be accompanied only by what the Supreme Court has termed “rudimentary” due process: the student “must be told what he is accused of doing and what the basis of the accusation is,” after which he must have “an opportunity to present his side of the story.”\(^{234}\) This abbreviated process may occur after the imposition of suspension in cases of emergency.\(^ {235}\) Some minimal procedure is necessary because wrongful imposition of punishment can occur when, for example, a disciplinarian decides that a student is guilty and selects the punishment before ever speaking to the student,\(^{236}\) or if a school suspends a student “pending further investigation.”\(^ {237}\) Nonetheless, the procedural protections against wrongful school discipline are far less rigorous than those found in the proceedings that fix punishment for unlawful behavior in non-school settings.

Due process explains why *Grayned v. City of Rockford*\(^ {238}\) should not be used to defend disciplinary action for off-campus conduct. The case involved a local ordinance that forbade the willful “making of any noise or diversion” on property “adjacent” to any school building if it disturbs “the peace or good order of such school session or class.”\(^ {239}\) The Court upheld this portion of the ordinance,\(^ {240}\) finding


\(^{235}\) *Id.* at 582-83.


\(^{238}\) 408 U.S. 104 (1972).

\(^{239}\) *Id.* at 107.

\(^{240}\) The Court struck down a portion of the Rockford ordinance granting special exceptions for labor unions. *Grayned*, 408 U.S. at 107, citing Police Dep’t of Chicago v. Mosley, 408 U.S. 92 (1972).
that the City’s legitimate government interest in maintaining orderly schools outweighed any incidental limitation on boisterous speech at that location.\footnote{Grayned, 408 U.S. at 119.} Grayned does not mean that a school’s disciplinary powers extend beyond school-owned property; it was not a school discipline case. It involved the City’s police power to regulate all persons’ conduct on public or private property, not the school administrator’s power to discipline students. Mr. Grayned himself was not a student at the school, and enjoyed all of the due process protections that attach to any criminal conviction. School discipline has no comparable level of process.

5. Search and Seizure

A public school student’s protection against unreasonable search and seizure is also less stringent in school than in the world at large. \textit{New Jersey v. T.L.O.}\footnote{469 U.S. 325 (1985).} held that a school principal could search a student’s purse without probable cause or a warrant. Considering the “legitimate need to maintain an environment in which learning can take place,”\footnote{Id. at 340.} the Court set a lower level of reasonableness for searches by school personnel.

Under ordinary circumstances, a search of a student by a teacher or other school official will be “justified at its inception” when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.\footnote{Id. at 341-42.}

The “ordinary circumstances” contemplated by \textit{T.L.O.} are limited to on-campus or school-sponsored events.\footnote{Id. at 342-43.} If school rules could be violated at remote locations, then warrantless searches at those locations would become a genuine possibility.\footnote{See generally Calvert, \textit{Off-Campus, supra} note 217, at 279-80.}

6. Content Neutrality

“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.\textsuperscript{247} We must tolerate unpleasant speech such as flag burning,\textsuperscript{248} computer-generated child pornography,\textsuperscript{249} or the memoirs of murderers\textsuperscript{250} because allowing the government to pick and choose between opinions would “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”\textsuperscript{251} The neutrality principle applies even to those categories of speech that, under some circumstances, might be banned outright.\textsuperscript{252}

By contrast, school discipline (under Tinker as interpreted by Bethel) may be content-based: Matthew Fraser’s choice of words at the school assembly led to his suspension. Some schools and courts have concluded that the viewpoint expressed by symbols of racial intolerance (like the Confederate flag) substantially and materially interferes with the schools’ educational mission, justifying rules against them.\textsuperscript{253} Allowing such content-based speech restrictions off-campus would strip public school students of their “bedrock” constitutional protection against viewpoint discrimination. The noise ordinance from Grayned is once again a useful comparison. Although they are often plagued by vagueness problems, properly written noise ordinances are treated as reasonable time, place, and manner restrictions.\textsuperscript{254} Only content-neutral restrictions may be applied to students—and others—who disturb school from off-campus locations.

\textsuperscript{249} See Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002).
\textsuperscript{253} Castorina v. Madison County Sch. Dist., 246 F.3d 536 (6th Cir. 2001); West v. Derby Unified Sch. Dist., 206 F.3d 1358 (10th Cir. 2000); Denno v. Sch. Bd. of Volusia County, 235 F.3d 1347 (11th Cir. 2000). While content-based proscriptions of particular words or symbols at school have been upheld, a speech code that is so vague that students cannot predict which of their beliefs would get them into disciplinary trouble violates the First Amendment. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001). Overbroad speech codes are also impermissible. Sypniewski v. Warren Hills Reg’l Bd. of Educ., 307 F.3d 243 (3d Cir. 2002) (public school anti-harrassment policy may forbid Confederate flags and “racially divisive” material following history of racial disturbances, but ban on material that “creates ill will” is overbroad).
7. Chilling Effect

The First Amendment recognizes a danger in governmental action having a chilling effect on speech because it gives rise to self-censorship and diminishment of the marketplace of ideas. Free speech needs breathing room to serve its purpose.\(^{255}\) Public school students subject to school discipline for off-campus speech will find themselves constantly monitoring their thoughts and statements. Students would have to watch their words when in traditional public forums like parks or sidewalks, when publishing in newspapers or on the Internet, and when speaking to friends in the privacy of their own homes. As a dissent to LaVine lamented, if James could be punished for showing his violent poem to a teacher, “members of the black trench coat clique in high schools in the western United States will have to hide their art work.”\(^{256}\) They had better hide it well. The plaintiff in Doe v. Pulaski\(^{257}\) was an eighth-grader who wrote a violent fantasy at home, kept it at home, and never discussed it with anyone on school grounds. A friend purloined the letter from the plaintiff’s basement and delivered it to the principal, who had the author expelled from the School District.\(^{258}\)

8. No Likelihood of Substantial Disruption

Tinker allows schools extra governmental authority over on-campus speech because of the importance of avoiding disruption of the educational process. Off-campus speech will rarely if ever pose a genuine threat of disruption. Recall again the black armbands of Tinker or the pro-union buttons of Chandler: unlike a verbal outburst during class, these silent expressions did not themselves impact the educational process. The disruption, if any, arose only from the reac-


\(^{257}\) Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002) (en banc).

\(^{258}\) A panel of the Eighth Circuit ruled 2-1 that Doe’s letter was not a true threat and therefore could not be a source of school punishment. 263 F.3d 833 (8th Cir. 2001). The full court sitting en banc ruled 6-4 that “the letter amounted to a true threat, and the school’s administrators and the school board did not violate [Doe’s] First Amendment rights by initiating disciplinary action based on the letter’s threatening content.” 306 F.3d at 626-27. The majority opinion did not consider or discuss the validity of imposing discipline for writing a threatening document off-campus, although one dissenter noted the problem. \textit{id.} at 636 (McMillian, J., dissenting).
tions of others to the views expressed by the nondisruptive students. In the Phantom’s case, like most student website cases, the alleged disruption was other students’ excited gossip about the website, or the hurt feelings of the staff. Off-campus speech that does not pose a serious likelihood of the sort of disruption that Tinker sought to prevent cannot justify an extension of school authority beyond its accustomed bounds.

9. No Institutional Imprimatur

Hazelwood granted school administrators the power to control the editorial content of a student newspaper operated as part of the curriculum because “students, parents, and members of the public might reasonably perceive [it] to bear the imprimatur of the school.” Bethel was also motivated by the school’s ability to convey its chosen educational message about the inappropriateness of vulgar speech to captive audiences. By forcefully “disassociating itself” from speech it did not endorse, the school ensured that its imprimatur was not misused. Public employment cases upholding termination of senior employees who depart from the agency line are animated by a similar concern that the public could view the pronouncements of such employees as official statements of agency policy. This concern sometimes surfaces in student Internet cases. In a telling choice of words, some newspaper coverage of the Eastlake Phantom episode referred to his webpage as “unsanctioned,” which implies that it lacked the school’s sanction (i.e., license or approval) and that it was in need of sanction (i.e., punishment) as a result.

This concern for the integrity of the school’s imprimatur should not arise with off-campus speech by students. In recent Establishment Clause cases, the Supreme Court has held that school buildings themselves do not lend the imprimatur of state sponsorship to religious groups that meet on the premises after the close of business. Certainly a student who has left the building should not have her speech regulated for fear that it will be mistaken for the school’s mes-

262. Ith, Student Fights Felony in Web Threat, supra note 22.
sage. The school has sufficient capacity for expressing its own views without enforcing its students’ silence. Schools have no substantial interest in regulating “communications which no one could associate with school sponsorship or endorsement.”

10. No Liability for Harassment

Public schools have a duty under Title IX not to be deliberately indifferent to student-on-student sexual harassment. This doctrine arises from the right to be free from sex discrimination in the form of a hostile educational environment. Harassing conduct by students off-campus, while reprehensible, does not render the educational environment hostile. Fear of Title IX liability that cannot arise is not a realistic basis for schools to punish students’ off-campus speech.

C. Does Internet Speech Occur Off-Campus?

As with any legal distinction, there will be borderline cases where it becomes difficult to categorize student conduct as on-campus or off-campus. Which category best describes material posted on the Internet? The rapidly emerging consensus among courts and commentators is that Internet speech should be treated as if it occurs off-campus. If Matthew Fraser had posted his suggestive nomination speech on a privately operated website instead of delivering it at a school assembly, he would not have been subject to school disci-
pline. No other conclusion could be reached after *Reno v. American Civil Liberties Union*,\(^\text{269}\) the landmark Supreme Court decision holding that the Internet should be treated as a public forum for robust discourse, just like newspapers, books, streets, and parks. The Court explained that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium,”\(^\text{270}\) so the most speech-protective rules apply.

In this section, “Internet speech” means Internet content that students prepare and disseminate from off-campus locations (typically creating and accessing the information from personal computers in the students’ own homes, and hosting it on servers owned by private companies unrelated to the school district). Some commentators have argued that schools may legitimately punish students for Internet speech that proves disruptive if the school’s computers provided the Internet access.\(^\text{271}\) The use of school equipment is relevant, but not quite so simple. Just as schools may place reasonable controls over the use of their own sporting gear or metal shop tools, they may control use of their own computers. Most do so by requiring students to abide by “Acceptable Use Policies” as a condition of access to school computer equipment. Typical Acceptable Use Policies state that students must not intentionally damage the school’s hardware or software, and must use the equipment for schoolwork and not for goofing off (through activities like watching webcasts of basketball games, bidding on online auctions, or downloading pornography). A student who violates a school’s Acceptable Use Policy may be subject to whatever forms of discipline are specified for that infraction, which typically begin with loss of school computer privileges and advance to detentions or suspensions for repeated misconduct.

The enforceability of an Acceptable Use Policy for a school’s own computers does not mean that a student’s otherwise independent website becomes subject to school discipline if as little as one keystroke is contributed from school-owned terminal. For example, if Matthew Fraser had posted the text of suggestive speech on a website on a private server, he would not suddenly be subject to school discipline over its content because he used a school computer during his lunch hour to fix a typo. Indeed, I would characterize the entire text as off-campus expression, even if Fraser had composed the entire text

\(^{269}\) 521 U.S. 844 (1997).

\(^{270}\) Id.

\(^{271}\) Calvert, *Off-Campus*, supra note 217, at 264-65.
on a school computer. Cases involving student-created underground newspapers or fanzines make clear that use of school typewriters in preparation of the material may be considered de minimis, so the resulting publication is not subject to school control.\textsuperscript{272} The mere act of typing at a school computer does not cause any more material or substantial disruption than the mere wearing of an armband in \textit{Tinker}, nor does it force any captive school audience to endure vulgarity or lewdness. In a case like this, Fraser might be disciplined for violating the school’s Acceptable Use Policy (depending on its terms), but he could not be disciplined for the reason he was punished in the actual case: namely, saying things at school that he should not have said.\textsuperscript{273}

\textbf{1. Case Law on Students’ Internet Speech}

The first published case to discuss public school discipline for an off-campus website was \textit{Beussink v. Woodland R-IV School District}.\textsuperscript{274} The opinion does not reveal much about the content of Beussink’s homepage other than to note that it “was highly critical of the Administration at Woodland High School [and] used vulgar language to convey his opinion regarding the teachers, the principal and the school’s own homepage.”\textsuperscript{275} The court found no evidence that the website caused substantial disruption because at most the evidence suggested that a few students viewed the homepage at school, the computer science teacher asked them to exit the page, and they did.\textsuperscript{276} The teacher and the principal becoming “upset” by Beussink’s homepage was not proof of cognizable disruption.\textsuperscript{277} Although the limits to school disciplinary power are not discussed in the body of the opinion, the court enjoined the school “from restricting Beussink’s use of his home computer.”\textsuperscript{278}

\textit{Emmett v. Kent School District No. 415}\textsuperscript{279} (the mock obituary

\begin{itemize}
\item \textsuperscript{272} See \textit{Thomas v. Granville Sch. Dist.}, 607 F.2d 1043 (2d Cir. 1979).
\item \textsuperscript{273} Typing at a school computer could be considered a substantial disruption if the keystrokes consisted of matters that could legitimately be the subject of discipline if they occurred at an off-site computer, such as computer fraud or unauthorized hacking into the school’s system. See \textit{Boucher v. Sch. Dist. of Greenfield}, 134 F.3d 821 (7th Cir. 1998) and discussion \textit{infra} pp. 648-49.
\item \textsuperscript{274} 30 F. Supp. 2d 1175 (E.D. Mo. 1998).
\item \textsuperscript{275} \textit{Id.} at 1177.
\item \textsuperscript{276} \textit{Id.} at 1179.
\item \textsuperscript{277} \textit{Id.} at 1178.
\item \textsuperscript{278} \textit{Id.} at 1182.
\item \textsuperscript{279} 92 F. Supp. 2d 1088 (W.D. Wash. 2001). The facts are described above at the end of Part I.
\end{itemize}
case) relied explicitly on the limits of school authority as a basis for issuing a temporary restraining order that barred the school from imposing a short-term suspension on a student based on his website:

In the present case, Plaintiff’s speech was not at a school assembly, as in Fraser, and was not in a school-sponsored newspaper, as in Kuhlmeier. It was not produced in connection with any class or school project. Although the intended audience was undoubtedly connected to Kentlake High School, the speech was entirely outside of the school’s supervision or control.280

In Beidler v. North Thurston School District,281 high school junior Karl Beidler created a website dedicated to mockery of the school’s vice principal. Its opening page featured a lengthy disclaimer and the website’s slogan: “Making every day seem like a trip to the principal’s office!” Much of the website contained obviously doctored photos like a mock vacation photo album with the caption: “[The vice principal] goes to Germany in 1939 and burns some books!” Viewers who did not heed the disclaimer to “forfeit all rights to take offense” may have considered some pages of the website to be offensive, juvenile, or in poor taste. These include the page featuring the vice principal as a spokesman for an impotence drug, claiming: “The day I bought Viagra was the day I said goodbye to erectile dysfunction!” and the page featuring the vice principal’s head superimposed over a picture of the cartoon characters Homer and Marge Simpson having sex.282 Karl was suspended from school for the second half of his junior year.

In the damages action that followed, the court found that preexisting student speech principles applied equally to Internet speech.

Today the First Amendment protects students’ speech to the same extent as in 1979 [when the Second Circuit decided Thomas v. Granville] or 1969, when the U.S. Supreme Court decided Tinker. Even with the vastly increased opportunity to speak and be heard created by the Internet, the exceptions to First Amendment protection for student speech remain narrowly drawn even for immature and foolishly defiant students such as Mr. Beidler. Schools can and will adjust to the new challenges created by such students and

280. Id. at 1090. Like Beussink, Emmett noted the absence of disruption of the educational process, substantial or otherwise. Id.


the internet, but not at the expense of the First Amendment.\textsuperscript{283}

The court rejected the School District’s argument that the website should be treated as on-campus speech. To establish analogous circumstances and therefore come within the purview of Fraser, defendants assert that Beidler’s speech was an on-campus activity. But the record, viewed using the summary judgment standard, establishes only that Beidler’s on-campus activities concerning the . . . website were \textit{de minimus}. They consisted of discussing with some other students what information he should put on the site and telling others of its existence.\textsuperscript{284}

By describing Karl’s actions as having primarily occurred off-campus, the court rejected the School District’s argument that Internet speech, by virtue of its ability to be viewed at school, should fall within the school’s authority.\textsuperscript{285}

\textit{Coy v. Board of Education of North Canton City Schools}\textsuperscript{286} involved a middle school student’s off-campus creation of a website that contained, among other things, some insults directed at classmates, some profanity, and “a depressingly high number of spelling and grammatical errors.”\textsuperscript{287} While the website was “somewhat crude and juvenile,” the court found that it contained “no material that could remotely be considered obscene.”\textsuperscript{288} Nonetheless, the School Board expelled Coy for over eighty days. The school insisted that the severe punishment had nothing to do with the content of the site, but was related only to Coy having violated the school’s Acceptable Use Policy when he furtively viewed the website in the school’s computer lab while he was supposed to be doing other work.\textsuperscript{289}

While not ruling in Coy’s favor on summary judgment, the court expressed skepticism about the School District’s position. The sum total of Coy’s allegedly improper on-campus activity was limited to a single class period where he “occasionally accessed his website in a manner designed to draw as little attention as possible to what he was viewing.”\textsuperscript{290} The correct standard was not Fraser’s rule for bawdy

\textsuperscript{284} \textit{Id.}
\textsuperscript{285} Plaintiff’s Motion for Partial Summary Judgment, \textit{Beidler}, available at http://www.aclu-wa.org/legal/Beidler-Motion.3.1.00.html.
\textsuperscript{286} 205 F. Supp.2d 791 (N.D. Ohio 2002).
\textsuperscript{287} \textit{Id.} at 795.
\textsuperscript{288} \textit{Id.}
\textsuperscript{289} \textit{Id.} at 795-96.
\textsuperscript{290} \textit{Id.} at 800.
speech to a captive audience during a school-sponsored activity, but instead was Tinker’s substantial disruption standard. That standard could not be met because “no evidence suggests that Coy’s acts in accessing the website had any effect upon the School District’s ability to maintain discipline in the school.” The school’s motivation for the discipline was a factual issue to be resolved at trial and not on summary judgment, but the court noted that the school’s claim that the discipline was based solely on Coy’s accessing an unapproved website was “implausible.” Since the law was clearly established, the individual defendants could not claim qualified immunity.

The only reported exception to the trend is J.S. v. Bethlehem Area School District, which upheld an expulsion based on a student’s website, created wholly off-campus, that mocked teachers and school administrators. As described in the opinion, the website in J.S. was typical of the lower end of the genre (comparing a teacher to Hitler, speculating on the sexual proclivities of the principal, offering $20 to hire a paid assassin); but the case was atypical because one of the teachers J.S. mocked possessed what tort professors would call “an eggshell skull”: the childish screed on the website caused the teacher an emotional collapse and serious health problems. She sued J.S. for defamation and intentional infliction of emotional distress, and a jury awarded her $500,000. Before that verdict, however, the school suspended J.S. for three days, which was lengthened to ten days, and then to total expulsion from the District. The Pennsylvania Court of Appeals upheld the discipline on a divided vote, with the majority reasoning that “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.” In reaching this

291. Id. at 799-800.
292. Id. at 801.
293. Id. at 800.
294. Id. at 806.
296. Id. at 416.
298. J.S., 757 A.2d at 415.
299. Id. at 421. The Pennsylvania Supreme Court ruled more narrowly, holding that a student’s website should be treated as on-campus speech “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.” 807 A.2d at 865. Two concurring justices objected that this formulation was
conclusion, the J.S. majority relied on three cases, of which it misinterpreted two. Donovan v. Ritchie\textsuperscript{300} was a due process case where the students did not raise any First Amendment arguments. Donovan nowhere said that punishment for off-campus speech was allowed, and indeed cited a state law prohibiting discipline for student conduct outside of school-sponsored activities.\textsuperscript{301} Beussink, described above, was cited in J.S. as authority for school discipline for home-built websites, even though the court in that case forbade the school from regulating a student’s use of his home computer. The one case J.S. analyzed correctly (Fenton v. Stear)\textsuperscript{302} upheld discipline against a student who, in a public place over the weekend, referred to his teacher in a loud voice as a “prick.”\textsuperscript{303} In light of the great weight of case law to the contrary,\textsuperscript{304} Fenton should have been viewed as an anomaly, rather than as the sole case on point supporting the expulsion.

Another Pennsylvania case, Killion v. Franklin Regional School District,\textsuperscript{305} was unpersuaded by J.S. The student in Killion wrote a scathing “Top Ten” list criticizing the school’s athletic director, and e-mailed it from his home computer to the home computers of some friends. A hard copy was later found on campus, prompting the school to suspend the author for ten days. The court concluded that a lewd or vulgar off-campus speech could not be punished under the Bethel reasoning,\textsuperscript{306} and found it unnecessary to consider whether Tinker applied off-campus because there was no evidence that the Top Ten list caused any substantial or material disruption.\textsuperscript{307}

“overly broad and unnecessary to the resolution of this case.” Id. at 870 (Zappala, J., concurring). They would find that J.S. engaged in disruptive speech on campus through the combined conduct of “accessing the web site on a school computer in a classroom, showing the site to another student, and . . . informing other students at school of the existence of the web site.” Id., quoting the majority at 865.

\textsuperscript{300} 68 F.3d 14 (1st Cir. 1995).
\textsuperscript{301} Id. at 19.
\textsuperscript{303} The Pennsylvania state court in J.S. may have been unduly swayed by the fact that Fenton was a federal case from the Western District of Pennsylvania. Other courts would find it less persuasive authority, particularly in light of Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986) (no discipline for student extending middle finger to teacher off-campus).
\textsuperscript{304} Thomas v. Granville Sch. Dist., 607 F.2d 1043 (2d Cir. 1979); Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972); Hatter v. Los Angeles City High Sch. Dist., 452 F.2d 673 (9th Cir. 1971); Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986).
\textsuperscript{305} 136 F. Supp. 2d 446 (W.D. Pa. 2001).
\textsuperscript{306} Id. at 456-58.
\textsuperscript{307} Id. at 454-56.
2. Arguments for Subjecting Internet Speech to School Supervision Are Not Persuasive

Schools have offered three main rationales for the power to punish students for Internet speech: the student’s speech was visible from school, was about school, or had an effect on school.

a. Internet Speech Visible from School

Certain forms of Internet speech (most commonly, world wide web pages that lack password protection) may be viewed from any Internet-connected computer. Because the subject matter of student websites is likely to be of interest to other students, the creators might intend, or at least reasonably anticipate, that their sites will be read on screens located at the school. But Internet technology is not unique in its ability to penetrate school walls. Imagine a student who writes a letter to the editor of the local newspaper, criticizing the principal in language sufficiently vulgar to justify punishment under *Bethel* if the letter had been read aloud at a school assembly. The school could not punish the student for expressing her views in the free press. This would be true even if the school library subscribes to the paper, the student knows about the subscription, and she tells friends where to find it in the school library’s copy. Other examples with different technologies are easily constructed. A student might have a vulgar outgoing message on an answering machine that would be audible to anyone who used a school telephone to call the student’s home. A student might wear a denim jacket emblazoned with the words “Fuck the Draft” to the local courthouse, and be filmed by a local news crew who televise the image during a broadcast the next day that is receivable during school hours. Even though it has been said that students in school have a First Amendment right to wear Tinker’s armband, but not Cohen’s jacket, the student could not be punished for wearing Cohen’s jacket outside of school in circumstances where it might be seen in school. The mere ability to access texts, sounds, or images from within a school does not transform them into on-campus speech.

Nonetheless, many people believe that the ease with which com-

308. Sable Communications v. FCC, 492 U.S. 115 (1989) (Congress may not ban “indecent” content on dial-a-porn services accessed over the telephone).
puters can access the Internet creates the impression that Internet-accessible images “invade” one’s computer. One would have to leave the house to purchase a copy of *Fanny Hill* or *Ulysses*, but the Internet makes it so much easier to access similar content that one could devise various scenarios where a person might encounter offending material accidentally. Before the age of digital radio tuning, for example, it was argued that a child traveling up the dial from one wholesome station to another might encounter an unwholesome one in between. The Supreme Court accepted this reasoning in *FCC v. Pacifica Foundation*, which approved content regulation of the broadcast spectrum because it would prevent “invasion” of the home by unwanted and offensive content. The notion that broadcasting should be censored because of its ease of access was incorrect at the outset; but for present discussion, what matters is that the Supreme Court has definitively held that the home invasion model does not apply to the Internet. Online content does not appear on one’s computer unbidden. One needs to seek out the information and draw it onto one’s screen. In this way, a student-created website is far less visually intrusive than graffiti written on a chalkboard or spray-painted on a wall.

Other metaphors for invasion of the school environment by intrusive outside forces are sometimes applied to the Internet by those who advocate filtering software for school Internet terminals. An unfiltered Internet station is like a pipe spewing filth into the school library, or like a librarian who orders pornography from a publisher to place on the shelves. A more fitting set of metaphors does not involve bringing information into the school building, but taking students out of it. We speak of “cyberspace” or “surfing the net,” analogizing digital expression to a physical place, separate from one’s real-world surroundings. A Microsoft advertising campaign asked, “Where do you want to go today?”, indicating that Internet technology can be experienced by the user as virtual transportation: a means for Mohammed to go to the mountain, rather than the mountain coming to Mohammed. With this understanding, the filtering question

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311. 438 U.S. 726 (1978) (the “seven dirty words” case).
312. HEINS, supra note 61, at 106 (“[R]adio and TV do not exactly invade the home.”).
becomes not “What material should schools inflict on a captive student audience?” but “May schools make their students captives during their cyberspace travels in off-campus cyberspace?”

To risk another metaphor, the Internet-connected school computer is like a window allowing students to see activity outside the building. Unquestionably, there are limits to how far a school may go in controlling the external world to ensure that the portion of it seen outside the school’s windows is fit for consumption within. Some municipalities have taken steps to sanitize the areas immediately surrounding their schools, whether through noise ordinances as in Grayned, zoning rules that prohibit taverns or gambling casinos within certain distances from schools, or laws adding extra penalties for drug or weapons violations near schools. There are limits to how far the Constitution allows a municipality to go in rendering the world at large as safe for school children as the school itself (however safety may be defined). When Massachusetts forbade display of tobacco advertising within 1,000 yards of a school or playground, it eliminated approximately ninety percent of the potential advertising space in Boston, Worcester, and Springfield. “In some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers.” The Supreme Court invalidated this restraint as an unwarranted intrusion on speech. Regulating Internet speech visible from school would have much the same effect as the Massachusetts tobacco advertising restrictions: it would “reduce the adult population to reading only what is fit for children.” Punishing a high school student for Internet speech does not eliminate all adult content from the Internet, but it will through its direct regulatory effect—and even more through its chilling effect—prevent high school students from expressing their views to the world at large in a medium suitable for adults.

316. 408 U.S. 104 (1972).
318. Id. at 562.
319. Id. at 566.
b. Internet Speech About School

Since a large portion of students’ waking hours are spent on school or school-related activities, it is not surprising that a great many student websites are filled with talk about school. The choice of topic does not itself make the students’ speech subject to school discipline. If talk about school is treated as talk in school, there is no logical stopping point. Even discussions around the family dinner table could become subject to school discipline. There is no need to consider Internet technology to see this. In Karl Beidler’s case, for example, the principal testified that even if Karl had painted his criticism of the vice principal on the side of a barn, rather than posting it on the Internet, he still would have been expelled.\(^{321}\)

It is worthy of note that the off-campus speech most likely to result in on-campus discipline is criticism of school officials. Schools that punish students for wearing Marilyn Manson t-shirts or waving confederate flags at school do not attempt to discipline students for doing so off-campus, yet off-campus criticism of school authority is far more likely to result in academic punishment.\(^{322}\) The School District in \textit{Beidler} was particularly aggressive in arguing that punishment was especially necessary because Karl’s website made fun of the school’s “front line disciplinarian,” and failure to squelch the mockery could lead to students no longer fearing him.\(^{323}\) Of course, this argument ignores that in our system, public officials with responsibility for law enforcement have a special obligation to accept criticism with grace.\(^{324}\) Beidler’s school also submitted declarations from teachers who stated that they felt “uncomfortable” having Karl in

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\item \textsuperscript{321} Plaintiff’s Motion for Partial Summary Judgment, \textit{Beidler}, available at http://www.aclu-wa.org/legal/Beidler-Motion.3.1.00.html.
\item \textsuperscript{323} Plaintiff’s Motion for Partial Summary Judgment, \textit{Beidler}, available at http://www.aclu-wa.org/legal/Beidler-Motion.3.1.00.html; see also Gano, 674 F. Supp. at 798 (“[T]he administrators are role models . . . and their position would be severely compromised if this t-shirt was circulated among the students.”).
\item \textsuperscript{324} Houston v. Hill, 482 U.S. 451, 463-64 (1987); Duran v. City of Douglas, 904 F.2d 1372, 1377 (9th Cir. 1990). In addition, rules against “insulting” or “abusing” school teachers are constitutionally suspect for their vagueness and overbreadth. \textit{Killion}, 136 F. Supp. 2d at 458-59; State v. Reyes, 700 P.2d 1155 (Wash. 1985).
\end{itemize}
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their classrooms because they worried that he might criticize them online.325 Even if one disregards the obvious problem that expelling Karl from school gives him an extra eight hours a day to expand his website, the alleged discomfort of teachers around a student who exercises his free speech rights off-campus should be the school’s problem, not the student’s. Many of the teachers at the formerly all-white Little Rock High School may have been “uncomfortable” when nine African-American students joined their classes in 1957, but this self-imposed discomfort would not have justified expelling the students. A student who actually defames or threatens a teacher outside of school may be subject to civil or criminal penalties. But where the student’s speech is devoted to questioning authority, schools should be specially vigilant to ensure that the understandable human tendency to react badly to criticism does not become a source of governmental deprivation of rights.

There is one category of student speech about school that could be a legitimate basis for school discipline even if it occurs off-campus: speech that furthers cheating or other academic misconduct. A student who finds the answers to an upcoming test should not distribute them to classmates in advance, whether this is done over the Internet or at the school. A student who copies last year’s book report from an older sibling and hands it in as her own can be punished for plagiarism, even though the plagiarism relied on an off-campus exchange of information that otherwise would be constitutionally protected.326 Homework is part of the curriculum, and off-campus cheating will also be aimed at the ultimate goal of presenting fraudulent work in the classroom. Speech that constitutes academic misconduct may be treated as if it occurred on campus, although the rules regarding academic misconduct would apply, not the amorphous general rule against disruption of the educational process.

c. Internet Speech Affecting School

Schools sometimes argue that a student’s Internet speech should be disciplined because it adversely affected the educational process within the school. The most common adverse effect is that the web-

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site becomes a favorite topic of gossip and snickering among students, distracting them from their studies. This argument proves too much, since there are any number of off-campus activities a student might undertake that lead to gossip and distraction (getting one’s picture in the paper, winning a gold medal at the Olympics, having a nasty break-up with one’s boyfriend or girlfriend). A more fundamental problem is that of vicarious responsibility. If students are gossiping loudly about another student’s off-campus activities instead of paying attention in class, the gossipers should be disciplined, not the subject of the gossip. Tinker rejected the notion that other students’ discussions about the armbands counted towards satisfying the school’s burden of proof.327

The issue of students reading the website of a fellow student from school computers should be analyzed the same way. The readers might be violating a school’s Acceptable Use Policy by visiting the site from school computers, but this is no basis for finding that the author of the off-campus content should be disciplined. In Beussink, the record revealed that the website had been viewed by students at school, but this did not equate to disruption under Tinker. “It was clear from the testimony at the preliminary injunction hearing that even though several students saw the homepage, no significant disruption to school discipline occurred. Principal Poorman testified that even though he heard students discussing the incident in the halls, there was no disruption caused by the discussions.”328 The First Amendment forbids school district policies aimed at curtailing “communication among students which is not part of the educational program.”329

An exception to the rule against treating off-campus speech that affects school as if it occurred on-campus may exist for conduct that is directed exclusively at the school (as opposed to the world at large), that is maliciously intended for the purpose of disrupting school, and that has a high likelihood of succeeding in its purpose. Directing threatening phone calls, letters, or e-mails to the school, conspiring to bomb the school, or releasing a computer virus designed to attack the school’s system all would fall within this category. Thus, the Seventh Circuit upheld expulsion of a student who wrote an article explaining

327. 393 U.S. at 514.
328. Beussink, 30 F. Supp. 2d at 1181.
how other students could hack into the school’s computers. In the case of the Eastlake Phantom, the Halloween threat in the chat room fell within this sphere, and the author of the threat was referred to the prosecutor. Had the author been a student, school-based discipline would also have been constitutional if the statement constituted a true threat (bearing in mind that not all statements relating to violence are true threats), but the better practice is to refer truly criminal activity affecting school to the justice system, rather than to double up the punishments.

V. LIABILITY FOR CREATORS OF INTERNET BULLETIN BOARDS

The preceding discussion would resolve cases like Beussink, Beidler, Emmett, Killion, Coy, and J.S., where discipline is based on a student’s own Internet speech. The Eastlake Phantom was not punished for his own Internet speech, but for creating an online forum where others posted objectionable content. During the disciplinary hearings, the school argued that because the Phantom had the power to remove offensive material from the bulletin board, he acted wrongly by failing to do so as often as the school would have preferred. This section examines whether a school can punish a student for creating an uncensored marketplace of ideas. With regard to the Internet, a recent act of Congress appears to forbid such punishments, although it reaches that conclusion through an intriguing collection of paradoxes. Whatever the correct result under the statute, it is inconsistent with basic free speech principles for the government to declare it negligent for a person to operate an uncensored forum.

A. Liability for Disseminating Speech of Third Parties

1. Common-Law Categories in Defamation Law

The common-law rules relating to speech intermediaries arose chiefly from the law of defamation, which makes it unlawful to publish untruthful information about another. Under blackletter defamation law, “to publish” is a term of art, meaning to communicate in any form a statement to a person other than the subject of the com-

331. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996).
332. See supra note 22.
333. RESTATEMENT (SECOND) OF TORTS § 575 (1976);
munication (i.e., “A” “publishes” when she tells “B” something about “C”). A defamatory publication is a “slander” when it employs spoken words or transitory gestures; it is a “libel” when it is in writing or communicated by other media with the same potential as writing for wide dissemination. Once a defamatory statement is published through some technology, it may be possible for other parties (such as printers, booksellers, broadcasters, or Internet service providers) to be involved in further spreading the statement. These intermediaries have been grouped into three categories.

- A “publisher” is an intermediary who exercises some quantum of editorial control over the speech of others, by editing it or choosing which of it will be reproduced. Newspaper and magazine companies are quintessential publishers, who select and present expression of their own as well as that of freelancers, advertisers, and readers who send letters to the editor. Traditional television and radio broadcasters also fall within this category. At common law, this category of “publishers” was as liable for defamatory statements contained in their publications as the original author was.

- A “distributor” is an intermediary who makes available the works of a large number of publishers without necessarily having knowledge of their contents. Bookstores, news vendors, and libraries are the quintessential distributors. Distributors cannot be held liable for defamatory statements

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334. RESTATEMENT, supra note 333, § 577; ROBERT D. SACK, SACK ON DEFAMATION § 2.5.1 (3d ed. 2002); RODNEY A. SMOLLA, LAW OF DEFAMATION §§ 4.77, 4.78 (2d ed. 2001) [hereinafter SMOLLA, LAW OF DEFAMATION].

335. RESTATEMENT, supra note 333, § 568. Radio and television broadcasting is considered akin to writing for purposes of distinguishing libel and slander. RESTATEMENT, supra note 333, § 568A. The distinction between the two is questionable, and its only surviving significance involves damages, which may be assumed for a libel but must be proven for a slander. RESTATEMENT, supra note 333, §§ 568 cmt. b., 569, 570. See generally SMOLLA, LAW OF DEFAMATION, supra note 334, §§ 1.11–1.13.


337. Id. at 588-89.

338. Id. at 581(2) cmt. g.

339. Freiwald, supra note 336, at 588.

340. Freiwald, supra note 336, at 590.

341. The Restatement does not employ the term “distributor,” but speaks instead of “those who only deliver or transmit defamation published by a third person.” RESTATEMENT, supra note 333, §§ 578, 581.
contained in the materials they distribute unless they have knowledge of the defamatory statements. A “common carrier” is an intermediary such as a telephone company or postal service obligated to transmit messages without interference and without any control over their contents. They are akin to “one who merely makes available to another equipment or facilities that he may use himself for general communication purposes” such as a person who supplies typewriters or loudspeakers. Common carriers are not liable for statements transmitted through their system.

The Phantom’s editorial policy was to remove posts from the bulletin board if they fell below his personal standards. He also offered to remove posts on the request of any third party who considered them unfair, but no one ever asked him to do so. If the Phantom were a common carrier, he had no fear of defamation liability, regardless of what others posted through his services. If the Phantom were a distributor, these editorial practices generally would shield him from liability for republishing a defamation (except in cases where it could be shown that the Phantom had actual knowledge that a post was defamatory and left it up regardless). If the Phantom were a publisher, which is ordinarily the result when one exercises editorial control over content, there would be liability on the same basis as if the Phantom had written the third-party messages himself. Paradoxically, the steps the Phantom took to avoid distributor liability put him at risk of more onerous publisher liability.

The Phantom was not the first computer-service operator to face this dilemma. Early Internet service providers had been found to be either distributors or publishers depending on the facts of the case. In Cubby, Inc. v. CompuServe, the ISP had a contract to host an online newsletter called “Rumorville,” dedicated to entertainment industry gossip. CompuServe had no editorial control over Rumorville, automatically loading the content onto its servers for access by Compu-

343. Freiwald, supra note 336, at 589.
344. Restatement, supra note 333, § 581 cmts. b, f.
345. Restatement, supra note 333, § 581 cmt. b; see also Freiwald, supra note 336, at 589.
serve subscribers. The plaintiff, Cubby, was the developer of a competing service called “Skuttlebut,” who took umbrage at Rumorville publishing the sort of industry gossip about Skuttlebut that Skuttlebut sought to publish about others. Cubby sued CompuServe as the publisher of alleged defamations originated by the authors of Rumorville. The court found that CompuServe was properly viewed as a distributor, not a publisher. By contrast, the ISP in *Stratton Oakmont, Inc. v. Prodigy Services Corp.* boasted that it edited its content to make it suitable for all members of the family, explicitly likening itself to a newspaper that “chooses the type of advertising it publishes, the letters it prints, [and] the degree of nudity and unsupported gossip its editors tolerate.” When Prodigy failed to remove the comments of an anonymous user on a financial bulletin board that accused the Stratton Oakmont company of securities fraud, the court held Prodigy to the standards of the publisher it claimed to be.

2. Section 230 of the Communications Decency Act

When *Stratton Oakmont* was announced in 1995, Congress was working on a massive deregulation of the Nation’s broadcasting and communications laws that culminated in the Telecommunications Act of 1996. In response to a contemporary moral panic over the availability of sexually explicit material on the Internet, Congress considered proposals for the first-ever federal system of Internet content regulation. One proposal was offered by Senators James Exon and Dan Coats, whose bill made it a federal crime to make “indecent” material available on the Internet. A rival to the Exon proposal was the Family Empowerment Amendment offered by Representatives Chris Cox and Ron Wyden. This bill drew on the industry argu-

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347. *Id.* at 140.
348. *Id.* at 138.
349. *Id.* at 135.
351. *Id.* at *2.
352. *Id.* at *4. In a later case involving an e-mail system over which Prodigy exercised no editorial control, the court found the Prodigy was not a publisher and could rely on the same common-law privileges that apply to telegraph operators. See *Lunney v. Prodigy Serv. Co.*, 683 N.Y.S.2d 557 (1998).
354. See generally Robert Cannon, *The Legislative History Of Senator Exon’s Communications Decency Act: Regulating Barbarians On The Information Superhighway*, 49 FED. COMM. L.J. 51 (1996); see also HEINS, supra note 61, at 158.
ment that under *Stratton Oakmont*, an ISP that filtered its content for pornography would face greatly expanded liability for defamation and related torts such as invasion of privacy or intentional infliction of emotional distress. The only sensible business strategy would be to forgo all editing: a rule of law whose sole choices were total control and total anarchy would result in the less costly alternative— anarchy—prevailing. 356 The resulting bill was intended to encourage Internet companies to censor themselves, by removing any possibility that they could face liability for removing “unsuitable” material from their offerings. The industry, which greatly preferred private censorship to government-imposed censorship, eagerly supported this proposal. Congress ultimately decided that the two approaches could coexist just fine, so the resulting Communications Decency Act (CDA) included both the Exon/Coats mandatory-censorship proposal and the Cox/Wyden incentives-to-voluntary-censorship proposal, the latter codified as 47 U.S.C. § 230. 357 The sweeping censorship mandate of Exon/Coats was subsequently found unconstitutional in *Reno v. ACLU*. 358

The surviving § 230 of the CDA was introduced by sections of congressional findings and policy statements that belie its history as a censorship initiative. Congress declared that the Internet represented “an extraordinary advance in the availability of educational and informational resources to our citizens” and “a forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” 359 Tipping its hat to the deregulatory purpose of the Telecommunications Act as a whole (if not the highly regulatory purpose of the CDA), Congress further found that the Internet has “flourished, to the benefit of all Americans, with a minimum of government regulation” 360 and declared it to be the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered


360. Id. § 230(a)(4).
by Federal or State regulation.”\(^{361}\) The preamble sections also indicate a goal “to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material.”\(^{362}\)

The operative portion of § 230 is titled “Protection for ‘Good Samaritan’ Blocking and Screening of Offensive Material.” Statutory headings cannot limit the plain meaning of the text, however,\(^{363}\) and in this case, the “Good Samaritan” heading only accurately describes § 230(c)(2), which states:

**Civil Liability.** No provider or user of an interactive computer service shall be held liable on account of... any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.\(^{364}\)

The notion of protecting Good Samaritans would appeal to any lawmaker. The gesture was pointless, however, because it is difficult to imagine any set of circumstances under pre-CDA law where a private ISP\(^{365}\) could ever be found liable for filtering obscene or “otherwise objectionable” material.\(^{366}\) What the ISPs really needed if the statute was to benefit them was language to eliminate the kinds of liability they actually faced, which resulted not from too much editing, but from too little. This language is found in § 230(c)(1), which by its plain language has nothing to do with filtering or censorship:

**Treatment of Publisher or Speaker.** No provider or user of an in-

\(^{361}\) Id. § 230(b)(2).

\(^{362}\) Id. § 230(b)(4).


\(^{366}\) The only possibility that comes to mind is breach of contract, and most ISPs protect themselves by including language in their contracts allowing them to delete posted material. It is currently an open question whether an ISP’s breach of a service contract would ever be “in good faith” for purposes of § 230(c)(2)(A) immunity.
Interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.\textsuperscript{367}

The Committee report for the statute reported that “[o]ne of the specific purposes of this section is to overrule \textit{Stratton Oakmont v. Prodigy} and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”\textsuperscript{368}

Under the new statute, ISPs would be free to edit or filter the content they hosted, without fear that less-than-perfect editing would paradoxically subject them to more liability than the competitor who did no editing at all. The common-law paradox was substituted for another: Congress made the world safe for private censorship by enhancing freedom of speech.

Private censorship is not always antithetical to free expression. A necessary component of the Free Press Clause is the right not to publish what one does not wish to publish.\textsuperscript{369} When market conditions result in a monopoly or oligopoly (as with the current movie rating system), concerted private effort to eliminate certain types of speech becomes far more problematic. Because the Internet presently is not characterized by this level of concentration, it cannot fairly be said that § 230, by removing disincentives to private censorship, is somehow unconstitutional.

\textbf{B. The Reach of Section 230}

Courts have held, consistent with § 230(c)’s broad language, that ISPs are not liable for content prepared by others, even in situations where aggrieved parties argue facts indicating that the ISP knows about the offending speech.\textsuperscript{370} This has been the result even in situa-


tions where the provider chooses not to take up Congress on its incentive to censor. In *Kathleen R. v. City of Livermore*, the plaintiff sued a public library that had chosen to allow unfiltered Internet access on all of its computer terminals. The structure of § 230(c) ruled out the plaintiff’s argument that only “Good Samaritans” engaging in voluntary censorship enjoy liability. Subsection (c)(2)(A) expressly conditions avoidance of liability on “action voluntarily taken in good faith to restrict access,” but there is no similar condition on subsection (c)(1), which decrees that in all cases, “[i]no provider or user . . . shall be treated as the publisher or speaker.” Subsection (c)(1) gives immunity for what is left intact, and subsection (c)(2) gives immunity for what is taken down. Congress could have imposed the same threshold requirement for restricting access in subsection (c)(1), but when a statute uses different words, it is presumed to mean different things. Even if the statutory language were not so plain, it would be a trivial matter for a provider to develop a narrow list of material to be filtered in order to enjoy the statute’s protections. For example, a bulletin board service could choose to filter out one single four-letter word and let all others through, or construct a filter based on the idea that misspellings and words typed in all capital letters are “otherwise objectionable.”

Several commentators have argued that Congress intended in § 230(c)(1) to eliminate only the risk of common-law publisher liability, but not distributor liability. The cases interpreting § 230 have unanimously held otherwise, concluding that an ISP will never be liable for hosting content created by someone else. The leading case of *Zeran v. America Online, Inc.* arose out of a cruel prank: an unknown person placed an advertisement on America Online (AOL) for t-shirts bearing tasteless jokes about the Oklahoma City bombing, directing interested buyers to contact the plaintiff Kenneth Zeran for more details. Zeran was indeed contacted, by dozens of people out-

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373. 129 F.3d 327 (4th Cir. 1997).
374. Id. at 329.
raged by the t-shirts, some of whom threatened to kill him. When AOL failed to remove the hoax from its service after repeated requests, Zeran sued for negligence, arguing that § 230(c) may have eliminated liability for publishers, but not for those who fell below the standards the common law places on distributors. The Fourth Circuit disagreed, holding that § 230(c)(1) meant that ISPs were to be treated in effect as common carriers.

Zeran’s critics argue that the decision went beyond what Congress intended, since the statute chose the terms “speaker” and “publisher,” but not “distributor.” The position is not wholly without merit, since Congress stated its intent to overrule the publisher liability of Stratton Oakmont but was silent regarding the distributor liability of Cubby. Reading the statute as a whole, however, Zeran and its progeny appear to have gotten it right, for several reasons.

1. Congressional Findings

Zeran correctly recognized that it had to give effect to the “Findings” and “Policy” subsections in § 230(a) and (b) that extolled the virtues of the Internet and Congress’s commitment to keeping it “unfettered by Federal or State regulation.” Even if these statements were a fig leaf for censorship, they were nonetheless an Act of Congress that the court could not ignore. Zeran dutifully gave meaning to the words Congress chose.

Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. . . . Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.

Less enamored of Congress’s choice, another court called the statute “some sort of tacit quid pro quo arrangement with the service provider community.” The arrangement is rational, and also protective of speech. If an ISP could become liable for hosted content

375. Id.
376. Id. at 329-30.
377. Id. at 335.
378. See articles cited supra note 372.
upon knowledge of an objection to it, the incentive favors caving in to all complaints, well-founded or not. This would especially be true after § 230(c)(2) eliminated liability for bowing to the pressure. The resulting “censor first, ask questions later” regime would mean that the American portions of the Internet would be subject to a de facto heckler’s veto.

2. Not Limited to Defamation Actions

The argument against Zeran assumes that § 230(c)(1) uses the terms “speaker” and “publisher” in the same way the common law of defamation does. But the Act says nothing about defamation, referring instead to a congressional desire to remove “Federal and State regulation” generally. The Stratton Oakmont decision that Congress wished to overrule involved ten different claims, only some of which sounded in defamation. The different legal theories that have been applied against Internet providers for tolerating the speech of others have included tortious interference with business expectancy, waste of public funds, nuisance, premises liability, child pornography, infliction of emotional distress, and variations of consumer protection, unfair competition, and state law copyright infringement. Many of these causes of action do not use “speaker” or “publisher” as terms of art, so it is unreasonable to interpret those terms solely by reference to their meaning within defamation law.

388. Id.
389. Id.
394. Id.
395. Id.
3. Application to “Speakers”

Even within the law of defamation, Congress’s choice of language for § 230(c)(1) is not consistent with common-law definitions. The first problem is whether “publisher” refers to the general Restatement formulation (anyone who communicates a defamatory statement to another not the subject of the statement), or only to intermediary publishers like newspaper and magazine editors. Strictly speaking, everyone who might be accused of defamation is a “publisher,” even if the words are their own authorship. Congress could not have intended this meaning for “publisher” in § 230(c)(1) without making the term “speaker” redundant and making the concept of publishing “information provided by another information content provider” nonsensical. But if “publisher” means only an intermediary publisher, then what is a “speaker”? Ordinarily, one refers to the “author” of a libel and the “speaker” of a slander. An act dealing with Internet regulation would have little concern over “speakers” of slander, since Internet communication will almost always be considered libel (it exists in written form and is widely disseminated). The only way to make sense of the terms in their context is to abandon the notion that they correlate directly to the definitions found in the common law of defamation by intermediaries.

4. Preemption Clause

The preemption provisions of § 230(e) further support the notion that the CDA intended to eliminate distributor liability for Internet service providers. Section 230(e)(1) states that Congress does not intend to eliminate criminal laws (such as the since-invalidated “indecency” provision of the CDA). Section 230(e)(2) states that “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property.” But where state law like

396. RESTATEMENT, supra note 333, § 577 cmt. b.
397. RESTATEMENT, supra note 333, § 578 cmt. c.
398. See, e.g., RESTATEMENT, supra note 333, § 578 cmt. c.
399. The only forms of Internet communication that might be classified as slander would be Internet technology that mimics the telephone, or perhaps chat rooms that display but do not store written communications. The latter would be an inversion of the usual rule that any written defamation is a libel. RESTATEMENT, supra note 333, § 568.
400. To the extent the California laws regarding sound recordings are laws pertaining to intellectual property, Stoner v. eBay, 2000 WL 1705637 (Cal. Super. Ct. Nov. 1, 2000), erred in ruling that § 230(c) provided immunity to eBay for permitting users to sell alleged bootleg recordings.
that involved in *Stratton Oakmont* is concerned, § 230(e)(3) offers a tautology:

*State Law.* Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.\(^\text{401}\)

The contrast between subsections (e)(2) and (e)(3) is significant.\(^\text{402}\) The Online Copyright Infringement Liability Limitation Act (OCILLA)\(^\text{403}\) is one of the intellectual property statutes that § 230(e)(2) leaves intact. OCILLA exempts ISPs from copyright liability if they post infringements at the behest of others, but that immunity evaporates if the ISP exercises editorial control over the infringing material, has knowledge that information on its system is an infringement, receives notice from a third party about the infringement, or earns money from the infringement. OCILLA shows that Congress is capable of defining distributor liability, but it chose not to do so in § 230(e)(3). Instead, Congress chose language sufficiently broad to sweep away any state laws inconsistent with its purpose.

C. Application of Section 230 to School Discipline

Congress’s determination that the Internet should be viewed as a common carrier like the telephone has obvious implications for school districts that would punish students for creating Internet forums to convey the speech of others. The telephone company is not punished when someone uses its service to make a prank call, so the Phantom should not be punished when someone uses his bulletin board or chat room to post a prank message.

Whether § 230 protects against school discipline depends on the meanings of a set of statutory definitions. Congress granted protection to the “provider or user” of an “interactive computer service.”\(^\text{404}\) The terms “provider” and “user” are not defined in the statute, but amateur webmasters like the Phantom could plausibly be described as either one, or an amalgam of the two. The statute defines an “interactive computer service” to mean “any information service [or] system . . . that provides or enables computer access by multiple users to

\(^\text{402}\) See generally Ku, supra note 383, at 77-78.
a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”  This definition “includes specifically” ISPs like AOL that sell their customers access to the Internet, but it is not limited to that group; if it was, some of the biggest presences on the Internet—like Amazon.com—would be unprotected. As the Washington Court of Appeals noted in finding that Amazon.com fell within § 230, “We can discern no difference between website operators and ISPs.”  The Phantom, as a website operator like Amazon.com, constructed an interface that enabled access by multiple users to a computer server (or servers) that hosted the content. The statute does not require that the server be owned or wholly operated by the provider; it covers subletters or subproviders of Internet services, not an uncommon arrangement in the industry. If the Phantom is not a provider, he certainly was a “user,” since he used web-hosting and bulletin board services provided by commercial businesses to construct his site. Looking by analogy to the definition of “interactive computer service,” the term “user” presumably includes facilities like libraries and schools that should not be subjected to liability for every piece of tortious material found on the Internet. But again, the term is not limited only to users meeting that definition.

As a provider or user protected by § 230(c)(1), the Phantom may not be “treated” as the publisher or speaker of any information provided by another “information content provider,” a term defined to mean “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” The bulletin board and chat room contributions written by parties other than the Phantom clearly fall within this definition. The school therefore “treated” the Phantom as if he were a speaker or publisher when it suspended him for three days and sought to recover the costs associated with the death threat that were posted by another information content provider.

A final definitional question involves the scope of preemption.

405. Id. § 230(f)(2).
The only state or local laws that the second sentence of § 230(e)(3) expressly preempts are those that create “causes of action” or “liability” inconsistent with the remainder of the section. Public school discipline is not a cause of action, and it is debatable whether it is a form of “liability.” This means that school discipline is not specifically ruled out by the second sentence of § 230(e)(3), but at the same time it is not authorized by the preceding sentence, which announced Congress’s intent not to “prevent any State from enforcing any State law that is consistent with this section.”

Imposing discipline on a student is undoubtedly “enforcement” of state law, but it cannot be “consistent” with the remainder of § 230 if it treats providers and users of interactive service providers as if they were speakers or publishers of other people’s content. Since the preemption provision neither specifically allows nor specifically forbids the action contemplated by Eastlake’s principal, one must consider whether the substantive provision of section 230(c)(1) has independent preemptive effect. State action may be preempted by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment. Here, the first and third types of preemption, and arguably the second, all apply to state action that would treat the Phantom as the publisher or speaker of content other people posted on his bulletin board or chat room.

With all this being said, I do not believe that Congress formed an intention for § 230 of the CDA to prohibit school discipline of the sort visited on the Eastlake Phantom, since Congress never contemplated the question. The plain meaning of the language it chose, however, rules out other interpretations, and so does the underlying policy behind the statute. Congress wanted to eliminate vicarious responsibility for Internet speech in order to enhance the vibrancy of the medium. A school that instructs or coerces its students to take down their bulletin boards directly contradicts that purpose.

D. Is It Negligent to Create an Uncensored Forum?

Common-law rules and statutes aside, was it wrong for the Phantom to facilitate online speech of others? The School District never argued that the Phantom intended for his website to be used for death

409. Id. § 230(e)(3).
threats, since his denunciation of the threat and subsequent dismantling of the website made his disapproval clear. Without some level of shared enterprise or other intent to post threats or defamatory statements, there could be no analogy to accomplice liability or aiding and abetting. Instead, the problem articulated by the school Administration in disciplinary hearings was that the Phantom operated the forum negligently.\footnote{See supra note 22.} The Phantom’s behavior, the school said, was akin to negligent conduct for which parents and schools routinely punish children: inviting the entire school to a party while the parents are out of town, leaving the car keys in the ignition, or leaving a water balloon in the cafeteria.\footnote{See supra note 22.}

Our Constitution generally resists the notion of penalizing negligent speech. Instead of sanctioning wrongheaded expression with executive or judicial punishments, we rely on public scrutiny to determine which ideas are worthy and which should be rejected.\footnote{State ex rel. Public Disclosure Comm’n v. 119 Vote No! Comm., 957 P.2d 691, 695 (Wash. 1998) (“[T]he First Amendment operates to insure the public decides what is true and false with respect to governance.”).} For example, public figures must show that the speaker of a falsehood was more than merely negligent.\footnote{See generally New York Times Co. v. Sullivan, 376 U.S. 254 (1964).} It would be extremely difficult to prove that individual student speech about school staff on a bulletin board is so negligent as to be unlawful.\footnote{In light of Ambach v. Norwich, 441 U.S. 68 (1979), which held that teachers are so closely linked to governmental mission to justify citizenship requirement, public school teachers and principals are best considered to be public officers, public figures, or limited public figures, subjecting them to the actual malice rule. See, e.g., Johnson v. Robbinsdale Indep. Sch. Dist., 827 F. Supp. 1439, 1443-43 (D. Minn. 1993) (public high school principal is a public figure); Sewell v. Brookbank, 581 P.2d 267, 270 (Ariz. Ct. App. 1978) (high school teacher); Basarich v. Rodeghero, 321 N.E.2d 739, 742 (Ill. App. Ct. 1974) (high school teachers and coaches); Palmer v. Bennington Sch. Dist., 615 A.2d 498, 501-02 (Vt. 1992) (elementary school principal). See generally Peter S. Cane, Defamation of Teachers: Behind the Times?, 56 FORDHAM L. REV. 1191 (1988).} It would be even more difficult to prove that the creators of the bulletin board were negligent for creating the space. Although the Phantom did not contribute to the bulletin board discussion, he nonetheless did express a message by creating the forum: that online speech unmoderated by school officials was a good thing. Uttering that message is not a substantial disruption of the educational process. It is paradoxical indeed for a school administration to punish its students for creating an uncensored forum when the Constitution requires school buildings them-
VI. SPECIAL CONSIDERATIONS REGARDING ANONYMOUS SPEECH

One feature of the Phantom’s website that bothered school administrators was its anonymity. The creator of the website was known only as “The Phantom.” Posts in the bulletin board and chat room appeared under a variety of nicknames and pseudonyms. The unknown speakers claimed to be students, and their messages indicated an in-depth knowledge of the school; but in some cases, their written words revealed different personalities than were on display during the school day. For some faculty, the presence of the anonymous website made it feel as though inside every Eastlake student lurked a marauder scheming to get out.

Bulletin boards, chat rooms, e-mail addresses, and other forms of Internet communication allow users to choose their own on-screen identifiers that need not be their real-world names. The Eastlake administrators found this anonymous speech particularly troubling because they believed it contributed to online incivility. In face-to-face discourse, or even written discourse where the author is known, social pressures can be brought to bear against those who use vulgar or uncivil language. The boor is not invited to parties and does not get the big promotion at the office. Anonymous speech allows the boor to escape these disincentives and act ever more boorishly while online. In light of this dynamic, did the Phantom do something that merited punishment when he provided a forum for anonymous speech?

A. Constitutional Protection for Anonymous Speech

One need look no further than John Peter Zenger for the antecedents of legal protection for anonymous speech. The criticisms of
Governor Cosby appeared in a newspaper bearing Zenger’s name as printer, but the articles themselves were written by his anonymous patrons. As Zenger’s eight months in prison proved, the authors’ anonymity was a wise precaution, often taken by dissidents when they challenge entrenched power or popular sentiment. For example, Thomas Paine’s *Common Sense* originally appeared as a pamphlet “written by an Englishman.” Fear of the state was not the only impetus for anonymity. In Colonial times, anonymous publishing was customary, just as unsigned newspaper editorials are customary today. The Zenger situation became famous in part because of published exchanges in 1737 between “Anglo-Americanus” and “Indus-Britannicus,” who supported the Governor’s position in the *Barbados Gazette*, and a Zenger proponent identifying himself as “X” in Benjamin Franklin’s *Pennsylvania Gazette*. The *Federalist Papers* were signed “Publius,” even though Hamilton, Madison, and Jay did not risk incarceration for urging ratification of the Constitution and their identities were no great secret. Pseudonyms could add to the revolutionary cachet of political writing, or help ensure that the message would be evaluated without preconceptions.

The Colonial experience demonstrates the two main justifications for protecting anonymous speech. First, involuntary identification causes a chilling effect that leads to self-censorship. This self-censorship was no doubt a goal of McCarthy-era laws that required so-called “Communist-action” organizations to register the names of members with the Subversive Activities Control Board; mandatory disclosure of identity would reduce the total volume of pro-communist speech. Second, requiring disclosure of the author’s identity as part of the message tampers with its content. Just as linking a message to its speaker may communicate something important (as when a person places a political sign in her front yard), so also might a choice to unlink the message from its speaker. For these rea-

421. Dwyer, *supra* note 5, at 64-68.
sons, the Supreme Court generally strikes down laws that require speakers to identify themselves as part of their message. *Talley v. California*\(^{427}\) ruled in favor of a civil rights advocate who was subjected to a $10 fine for failing to list his name on a leaflet urging a boycott of a racially discriminatory business. In *McIntyre v. Ohio Elections Commission*,\(^{428}\) another lone leafleter was successful in striking down a fine imposed under a state election law.

[A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.\(^{429}\)

The First Amendment protects anonymity in other contexts where disclosure of identity would likely impede the exercise of free speech or free association to the detriment of the marketplace of ideas. In civil proceedings, journalists enjoy a qualified privilege against disclosing the identity of confidential news sources in order to promote their ability to disseminate information to the general readership.\(^{430}\) Politically unpopular organizations subject to threats and reprisals (like the Socialist Workers Party\(^{431}\) or the NAACP in the South during the mid-20th century\(^{432}\)) cannot be required to disclose membership lists to the government as a prerequisite to doing business in a state.\(^{433}\) The protection applies wherever an identity-disclosure law

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\(^{429}\). *Id.* at 341-42.


\(^{433}\). See also *Familias Unidas v. Briscoe*, 619 F.2d 391, 394-95 (5th Cir. 1980) (striking down law “which empowers a Texas county judge to exact public disclosure of the membership of any organization within his county that he considers to be engaged in activities de-
would inhibit the exercise of constitutional rights, such as a law requiring registration by abortion providers.\textsuperscript{434} Depending on what information the government demands be disclosed, a law-breaching anonymity may also violate the Fifth Amendment right against self-incrimination.\textsuperscript{435}

The privileges protecting anonymity are not absolute. On an appropriate showing of need, a civil or criminal litigant can pierce the journalists’ privilege to obtain crucial information.\textsuperscript{436} Different courts have articulated the standard in different ways,\textsuperscript{437} but a formulation that applies well to a variety of different situations was announced in \textit{Snedigar v. Hodderson},\textsuperscript{438} a breach of contract case in which a creditor of the Freedom Socialist Party sought the Party’s membership records in discovery. Once the party opposing discovery shows “some probability” that a discovery request will harm its constitutional rights, the party seeking discovery must first “establish the relevancy and materiality of the information sought,” and “make a showing that reasonable efforts to obtain the information by other means have been unsuccessful.”\textsuperscript{439} Mere relevance—defined as information that may lead to the discovery to admissible evidence\textsuperscript{440}—is not enough. For example, when a California hospital brought defamation claims against the anonymous members of a group known as “Concerned Citizens of Downey,” it subpoenaed a newspaper to reveal the identities of the authors of a series of nondefamatory “advertorials” signed by a group named “Save Our Hospital.”\textsuperscript{441} The court considered the identities of the second group insufficiently relevant to overcome the right to anonymous publication.\textsuperscript{442} “This highly attenuated relationship between the advertorials and the defamatory writings does not

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\item \textsuperscript{435} Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965).
\item \textsuperscript{436} E.g., Branzburg v. Hayes, 92 U.S. 2646 (1972).
\item \textsuperscript{438} 786 P.2d 781 (1990).
\item \textsuperscript{439} \textit{Snedigar}, 786 P.2d at 783-84.
\item \textsuperscript{440} FED. R. CIV. P. 26.
\item \textsuperscript{441} Rancho Publ’ns v. Superior Court, 81 Cal. Rptr. 2d 274 (Cal. Ct. App. 1999).
\item \textsuperscript{442} Id. at 275.
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If the information sought is truly material and cannot be obtained through other means, the second step is to balance the need for the information against the claim of privilege. If the information is not sufficiently important. For example, in *Quad Graphics, Inc. v. Southern Adirondack Library System*, a New York employer had valid reason to believe that its employees were goofing off at work by using the company’s computers to access the Internet for personal purposes. The workers, evidencing a level of ingenuity they saw no need to waste on their jobs, evaded the company’s Internet-blocking software by routing calls to the local public library by way of corporate headquarters in Wisconsin. Under the state’s freedom of information act, the employer sought access to library records that would identify the employees. Libraries and bookstores jealously guard their users’ records, motivated by the First Amendment right to receive information freely. The New York court decided that the company’s desire to unmask insubordinate employees was simply not important enough to breach the privacy of library records, even though there was no substitute for the library data that could serve the employer’s legitimate (but insufficiently weighty) interests.

It is far from certain how the right to anonymous political activity squares with campaign finance laws requiring public disclosure of contributions to candidates. No reliable test has yet been enunci-
ated to determine exactly how unpopular a political party needs to be to escape campaign finance laws. *Buckley v. American Constitutional Law Foundation* revealed some of the perhaps unavoidable uncertainty in the area when it struck down a state law requiring persons gathering petition signatures to wear name tags, while also upholding (in dicta) a requirement that the gatherers reveal their names and addresses when submitting the completed signature sheets to the secretary of state. Thus, the right to speak anonymously enjoys some constitutional protection, but its exact contours are not fully defined. At the least, the Nation has come to agree with the dissenters in the Cold War cases who, examining registration laws for allegedly subversive political organizations, said that “exposure purely for the sake of exposure” is an insufficient basis to overcome constitutional rights.

**B. Anonymous Speech on the Internet**

As the *Zenger* situation demonstrates, the Internet was hardly the first technology to facilitate anonymous speech. Any system of literacy will do, since it permits words to be recorded in media that can be separated from their authors’ bodies. Even though anonymous speech is nothing new, the introduction of any new medium—the printing press, telegraph, audio recording, broadcasting, and the Internet—may be accompanied by concerns over how anonymous speakers could use it in unwelcome ways. Carolyn Marvin examined the late 19th-century social reactions to the telephone and telegraph, new electric communications media that allowed instantaneous communication to occur outside of a face-to-face conversation. Many people expressed displeasure over the anonymity provided by these media, and how that anonymity violated social expectations.

Asymmetries of dress, manner, and class that identified outsiders and were immediately obvious in face-to-face exchange were disturbingly invisible by telephone and telegraph, and therefore problematic and dangerous. Reliable cues for anchoring others to a social framework where familiar rules of transaction were organized around the relative status of the participants were subject to the tricks of concealment that new media made possible. Lower
classes could crash barriers otherwise closed to them, and privileged classes could go slumming unobserved.\footnote{Carolyn Marvin, When Old Technologies Were New: Thinking About Electric Communication in the Late Nineteenth Century 86 (1988).}

As with the Internet today, an early worry regarding the perceived anonymity of telephone communication was that it would quickly degenerate into vulgarity. A specific problem, linked closely to the maintenance of gender roles, was that men might use curse words over the telephone, heedless that ladies may be listening.

An Ohio telephone company enforced its rules against “improper or vulgar” language in phone communications by removing the instruments of subscribers who did not observe the rule of social presence. When a subscriber took the company to court on the issue, the judge ruled: “The telephone reaches into many family circles. . . . All communications should be in proper language. Moreover, in many cases the operators in the exchanges are refined ladies, and, even beyond this, all operators should be protected from insult.”\footnote{Id. at 89.}

Over time, the belief that telephone speech was essentially public shifted to our current understanding that it is essentially private. This shift is reflected in the Nation’s evolving wiretap laws. The 1928 decision in \textit{Olmstead v. United States}\footnote{277 U.S. 438 (1928).} perceived no trespass (and hence no search for Fourth Amendment purposes) when federal agents attached listening devices to phone wires in the basement of a commercial office building in order to listen to the conversations of a bootlegger who rented space there. \textit{Olmstead} was overruled in 1967 by \textit{Katz v. United States},\footnote{389 U.S. 347 (1967).} in which the Court determined that a search occurred when agents placed a wiretap on a pay phone used by a bookie. The change reflected both an evolution in legal understanding (with \textit{Katz} announcing that “the Fourth Amendment protects people, not places”)\footnote{Id. at 351.} and an evolution in our relationship to telephone technology. \textit{Katz} could not have extended the possibility of constitutional protection to “what [a person] seeks to preserve as private, even in an area accessible to the public,”\footnote{Id.} if it was not considered technologically possible to preserve a telephone conversation as a private thing. The current discomfiture many people feel over the use of cell
phones in public places shows that the new wireless technology has not (yet, at least) worked a change in our expectation that phone calls are private.

As with the cell phone, our social perceptions of Internet technology are far too young, and the technology itself still changes far too rapidly, for there to be a legal consensus on whether cyberspace is best understood as public or private. So far, it appears that courts are affording it the best elements of both. As a platform for exhibiting one’s speech, it is to be treated with the same “hands off” approach as traditional public forums such as streets, sidewalks, and parks.460 Within this generally unregulated, publicly accessible frontier, individuals can carve out areas of private control, where the government can no more tell them what information to post than it could tell a newspaper what editorials to run461 or which reporters to hire.462 Courts are also quickly recognizing that the right to anonymity in cyberspace enjoys protection comparable to anonymity in other media. For example, a court struck down a Georgia statute that made it a crime to use a name “to falsely identify the person” speaking on the Internet because the law infringed on the constitutional right to communicate anonymously and through pseudonyms.463

To date, the biggest threat to a person’s ability to speak anonymously on the Internet has not been mandatory disclosure statutes of the sort found in Talley or McIntyre, but subpoena power in the hands of individuals who wish to learn the identity of Internet speakers, especially critics. Sending an e-mail or visiting a website leaves behind an electronic footprint that, if saved, can provide the beginning of a path that can be followed back to the original sender.464 Thus, anybody with enough time, resources, and interest, if coupled with the courts’ power to compel disclosure of information, can snoop on communications to learn who is saying what to whom. The ISP that provides Internet access to online speakers almost always will have some additional information about them, just as John Peter Zenger had more information than his readers did about the authors whose dissident work he printed. A well-placed subpoena to an ISP can re-

veal information that the speaker would have preferred to keep private.

The dominant scenario for obtaining subpoena power is to file a defamation lawsuit against “John Doe,” identified in the complaint as the currently unknown author of an allegedly tortious statement on the Internet. Once the complaint is filed, the plaintiff’s counsel may rely on court rules to issue subpoenas under the court’s authority, but without the court’s prior review. Where the goal of the suit is not to obtain redress but to silence a critic, the result is analogous to a SLAPP suit—Strategic Litigation Against Public Participation. In one notorious case, Raytheon filed suit against twenty-one John Does for allegedly revealing confidential information in online postings. As soon as the ISP revealed the identities of the posters, Raytheon voluntarily dismissed the suit—and fired the four Does who were Raytheon employees. It was later revealed that Raytheon had already publicly disclosed much of the allegedly confidential information, all of which suggests that the suit was filed to obtain discovery power, not to pursue actual legal grievances. Subpoenas of this sort have become a significant burden on ISPs. America Online reported that it had to respond to 475 such subpoenas in the year 2000, more than one per business day, forcing it to devote significant staff time to this mindless work that is wholly unproductive for the company.

Courts are recognizing that “people who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court’s order to discover their identities.” The risk extends beyond the harassment or embarrassment that comes from a typical SLAPP suit. In Doe v. 2themart.com,
Inc., investors sued the officers of a startup company for securities fraud. The defendants argued that they had not lied to drive the stock price artificially higher, but that anonymous short-sellers had lied to drive the stock price artificially lower. Defendants therefore attempted to obtain the true identities of these speakers, hoping to offer them up to the jury as a diversion. As is typical for civil discovery, the subpoena reached broadly—in this case to nonsensical extremes. One of the requested identities was a bulletin board speaker using the nickname “NoGuano” who had never said anything about the defendant company. NoGuano sought to quash the subpoena, since he valued his privacy and the reputational capital he had invested in his online pseudonym (and because he had better things to do than be sucked into the vortex of securities litigation).

The trial court refused to sacrifice NoGuano’s First Amendment right to speak anonymously merely to advance an untenable defense theory. The statements on the financial bulletin board in question were hyperbolic expressions of opinion—“Look out below!!!! This stock has had it!”—not statements of material fact that the law presumes will have an effect on stock price in an efficiently traded market. As another decision noted,

The statements were posted anonymously in the general cacophony of an Internet chat-room in which about 1,000 messages a week are posted about GTMI. The postings at issue were anonymous as are all the other postings in the chat-room. They were part of an on-going, free-wheeling and highly animated exchange about GTMI and its turbulent history... Importantly, the postings are full of hyperbole, invective, short-hand phrases and language not generally found in fact-based documents, such as corporate press releases or SEC filings.

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473. 2themart.com, Inc., 140F. Supp. 2d at 1095.
474. See id.
475. Id. at 1096.
476. See id.
477. Id. at 1097.
478. Id. at 1090.
Furthermore, even if statements like “Look out below!!!!” did affect 2themart.com’s stock price, they did so while the authors were still anonymous. The identities of the speakers would not add any explanatory power to the defense theory of the case.\textsuperscript{481} For NoGuano, who faced no civil or criminal liability as a result of his Internet postings, the only loss of liberty at stake was the liberty to speak anonymously. The court nonetheless found that liberty worth protecting through an evidentiary privilege.\textsuperscript{482}

\textbf{C. Anonymous Speech for Public High School Students}

Is the right to anonymous speech one of the freedoms that should play out differently for minors than it does for adults? Adolescent users of Internet bulletin boards have certainly shown themselves to be adept at locker-room talk, and this feature of the bulletin boards has drawn much of the public attention to the syndrome. Most teenagers realize that their speech in the presence of teachers and parents is constantly monitored, giving rise to an urge to experiment with anonymous transgressions over the Internet. Empirical research will be necessary to learn if the speech on young people’s bulletin boards is noticeably more vulgar than what they say to each other orally when they think adults are not listening. But as the stock-trading bulletin boards in cases like 2themart and Global Telemedia indicate, adults online are not necessarily any more mature in their discourse than high school students.\textsuperscript{483} The school administrators in the Phantom’s case pointed to two specific consequences of anonymous speech by minors that troubled them: online insults might lead to violence or emotional injury.\textsuperscript{484}

\textit{1. Online Fighting Words}

The Eastlake principal was worried that much of the language on the bulletin board, if delivered in person, would be an invitation to a duel.\textsuperscript{485} Take this exchange, for example:

\begin{tabular}{|l|l|}
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\textbf{Zues} & \textbf{Anyone with half a brain would know that you are a huge ass pussy.} \\
\textbf{Oct. 27th} & \textbf{\textsuperscript{\textit{}}} \\
\hline
\end{tabular}

\textsuperscript{481} 2themart.com, Inc., 140 F. Supp. 2d at 1097.
\textsuperscript{482} Id.
\textsuperscript{483} See generally EMSHWILLER, supra note 480.
\textsuperscript{484} See supra note 22.
\textsuperscript{485} See supra note 22.
And you are scared to give out you’re real name, because you are afraid that everyone will know that you are a push over.

Once again you retarded fuck, you were the one who stepped up to me. You don’t have the balls to tell me who you are. You are scared that I may be bigger.

Zues and Conspiracy Theorist would only be able to progress from name-calling to an actual fistfight if they identified themselves to each other or if the community was sufficiently small to allow the users to be identified from other cues. This means that the true problem is too little anonymity, not too much. After the passage of a few days, Conspiracy Theorist realized as much.

Hmm. Upon thinking about whether I would really fight someone based on an Internet comment, I felt kinda dumb. Oh well.

Through this pseudonymous exchange, these teenagers learned something safely about angry rhetoric that might have generated real injury if they had tried it in the real world.

The exchange also shows why the “fighting words” doctrine has little application, if any, to cyberspace. Fighting words are those that, by their utterance in a tense face-to-face confrontation, tend to incite an immediate breach of the peace. The doctrine accepts as natural the debatable notion that people ought to breach the peace in response to certain words. The fighting words doctrine has found fewer and fewer applications as our society’s attitude to interpersonal violence has changed. Words that sound like prototypical fighting words are constitutionally protected if they are said to people who are expected to keep their composure under pressure, like police officers or park rangers. Even extremely offensive statements do not become fight-

486. See supra note 22.
487. See supra note 22.
489. Gulliford v. Pierce County, 136 F.3d 1345 (9th Cir. 1998); Duran v. City of Douglas, 904 F.2d 1372, 1377 (9th Cir. 1990).
490. United States v. Poocha, 259 F.3d 1077 (9th Cir. 2001).
ing words if they are uttered in a physical context where a fight cannot occur, as where a lout in a passing truck shouts “fuck you” and extends his middle finger to a pedestrian on the sidewalk.\footnote{Sandul v. Larion, 119 F.3d 1250, 1255 (6th Cir. 1997).} It is therefore hard to see how Internet speech could ever be proscribed as a form of fighting words, especially when the anonymous disputants do not know who or where the other one is and could not fight even if they wanted to.

As Eastlake’s principal correctly noted, on the bulletin board, “All you have is a printed word. You don’t have an age or voice. You don’t know whether they sound angry. The Internet gives you much less to go on.”\footnote{Nicole Brodeur, Internet and Its Connection to the World is a Mixed Blessing, SEATTLE TIMES (Nov. 7, 1999), available at http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slub=nbro&date=19991107.} This certainly can lead to misunderstanding, but this potential for miscommunication is not unique to the Internet. While the principal’s comment addressed the lack of audible information over the Internet, early telephone users complained about the lack of visual information:

“When a man tells you a story face to face,” said Horace C. DuVal, who is frequently annoyed by the telephone maniac, “he can see by the expression on your face, if he has the least knowledge of physiognomy, how the story strikes you, and it is an easy matter to cut a man off by a look or a gesture. But where are you when the story teller is 10 miles away? He has you cornered and you must listen.”\footnote{MARVIN, supra note 454, at 87.}

Standards of telephone etiquette rapidly developed to resolve DuVal’s valid but addressable concern. In a directly analogous process, “Netiquette” standards are currently being negotiated through trial and error in different Internet communities. Some, such as “emoticons” like the sideways smiley face— :-) —are rapidly gaining wide acceptance. To be sure, adolescents are not always known for their grasp of etiquette, but good manners can only come with practice of the sort the Phantom’s website provided.

2. Online Infliction of Emotional Distress

Of greater concern to Eastlake’s administrators was the emotional injury that could result when a student becomes the target of a cascade of anonymous online insults. Adolescents can be cliquish or
downright mean; so if the anonymity of an Internet forum removes the usual social disincentives to cruelty, the administrators worried, unpopular students could be further ostracized or driven into depression. The concern was legitimate. One student who suffered from health problems became a target of several ill-mannered put-downs on the Phantom’s bulletin board.494 Her parents were sufficiently worried about her resulting unhappiness that they warned the school that she might be suicidal.495

Although there is an undeniable risk of emotional injury from anonymous Internet speech, that risk should not be considered in isolation. When the allegedly suicidal student found out that her story was being used as justification for disciplining the Phantom, she wrote a letter to the School Board eloquently explaining why she preferred to have taunts made against her online, rather than in the real world:

I feel that the Eastlake web page served as a forum, or a continuation of what one hears in the halls of our school— with one pivotal difference: within the halls of Eastlake, slander is heard and goes unpunished (as well as undefended). On the web page, written slander (libel) was posted, and could be read by all. Some of those who read the libel came to the defense of the slandered person— in my case, literally dozens of people did so. In fact, in the designated “compliments” section, there was a page full of people (some I knew, some I didn’t) complimenting me. The same [unkind] things are said in the hall, but only on the web page have they been refuted.496

The Phantom believed that leaving up a thread of insults followed by rejoinders was, on the whole, far better than removing the thread altogether.497 Online personas developed as readers became familiar with the writerly voice behind each pseudonym, causing cyberspace forms of the usual social enforcement mechanisms to exert themselves. Thus, even if bulletin boards and chat rooms may pose emotional risks to those who take anonymous insults to heart, they can be a better arena for adolescents to experiment and learn the uses and abuses of language than in the offline world.

To be sure, cyberspace is not a completely safe and trouble-free environment and, if you venture online, it’s wise to be cautious

494. See supra note 22.
495. See supra note 22.
496. See supra note 22.
497. See supra note 22.
about what you believe, who you trust, how much you reveal about yourself, and (if you have them) where your children are. At the same time, such precautions don’t exactly reflect dangers that are unique to the Net: they’re pretty good advice for offline life as well.498

Students mature enough to speak online are also mature enough to speak anonymously online.

VII. CONCLUSION

The number of school discipline cases to reach the courts is a miniscule fraction of the total number of suspensions and expulsions issued by the Nation’s school districts. Nonetheless, establishing the right constitutional rules for these cases is important. Serious consequences can attach to disciplinary decisions. While we have progressed from the catastrophic impact of the discipline at the time of Barnette (where a student who refused to recite the Pledge of Allegiance could be expelled from school, declared delinquent, and his parents fined and jailed)499 to the indefinite suspension of Tinker500 to the three-day suspension in Bethel,501 unreasoned discipline can still affect whether a student obtains a diploma or can pursue desired job prospects as in LaVine.502 The rule is also important because most school districts, like the Lake Washington School District in the Phantom’s case—want to obey the law, and will do so if it is clearly presented to them.503

This Article argues that the law is indeed clear regarding discipline of public high school students who create or contribute to uncensored Internet forums. Any discipline based on a student’s on-campus speech must be supported by evidence of injury to the school that exceeds that described in Tinker. Except in limited circumstances, Internet speech occurs off-campus and beyond the jurisdictional reach of the school’s disciplinary authority. Creating an uncensored forum for Internet speech cannot be treated as misconduct, even where the speech that occurs there is anonymous. And as the editorial page of the Des Moines Register said when the Tinker decision was

498. Rodman, supra note 28, at 17.
502. LaVine v. Blaine Sch. Dist., 257 F.3d 981, 981 (9th Cir. 2002).
issued, “[S]chool officials [must realize] that panic is no substitute for calm judgment and common sense when free speech is at stake.”

504. JOHNSON, supra note 97, at 182.