Revisiting *Tinker vs. Des Moines School District*: How Technological Advances Change the Notion of "Disruption" within the Classroom

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Abstract

In 1969, *Tinker vs. Des Moines School District* set the standard for when schools may censor student expression and when they are in violation of a student's right to free speech as granted by the First Amendment. Under *Tinker,* students have the right to express themselves so long as doing so does not cause a "substantial disruption" to the school day. Stemming from a peaceful protest to the Vietnam War, *Tinker* has become the measuring stick for all forms of student expression – particularly electronic expression on social networking sites such as MySpace and Facebook. These electronic expressions in question are not peaceful protests, rather they are derogatory, demeaning statements about instructors. Because *Tinker* was decided in a world where cellular phones, personal computers, the Internet, and cyber bullying did not exist, revisiting its legal value is a necessity. Without a re-evaluation of *Tinker*, students will continue to use cyberspace as a place to harass and bully school officials with relative impunity.

Keywords: cyber bullying, Evans vs. Bayer, Tinker vs. Des Moines School District, Facebook, J.S. vs. Blue Mountain School District, ethics

1. Introduction

On November 9, 2007, high school senior Katherine Evans, using her personal computer at home, created a Facebook page titled "Ms. Sarah Phelps is the worst teacher I've ever met." The site had a picture of the instructor and the following statement: "Ms. Sarah Phelps is the worst teacher I've ever met! To those students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics: Here is a place to express your feelings of hatred."

Bullying has existed for centuries and is far from a new concept. However, cyber bullying is new. Where a school bully's victim could once escape some of the torment when the school bell rang at 3 p.m., victims of cyber bullying can find themselves constantly under siege via social networking sites, e-mails, text messages, and tweets. Social networking technologies in particular, such as Facebook, Twitter, and now Google+, have created a more invasive atmosphere, and privacy is no longer what it was (Dryden, 2010).

Social networking sites allow users to keep in touch with friends, relatives, and acquaintances regardless of distance or time; but these sites also allow bullies to reach through cyberspace and torment from afar. While cyber bullying in

middle and high school is well known and dealt with accordingly, cyber bullying from teenager to adult, particularly in the academic setting, often ends up being dismissed as "free speech."

2. Bullying, Social Networking Sites, and Legal Precedents

Evans' site received only three visitors who posted comments supporting her opinion. Other visitors supported Phelps. Evans removed the page after two days, and Phelps never saw the page. Two months later, when Principal Peter Bayer learned of the page, he suspended Evans, citing "Bullying/Cyber Bullying/Harassment towards a Staff Member" and "Disruptive Behavior." She was suspended for three days and removed from her Advanced Placement class. Evans, arguing that her activity was off-campus and was neither violent nor threatening, sued to have her suspension removed from her permanent academic record and to have the suspension revoked, *nunc pro tunc* (Tubis, 2010).

Evans won her case, in part, due to the court's use of the "Tinker Test." According to Magistrate Barry Garber of Florida, in a pretrial ruling, Evans' page was protected under the First Amendment because "it was an opinion of a student about a teacher, that was published off-campus, did not cause any disruption on-campus, and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior."

The "Tinker Test" comes from *Tinker vs. Des Moines School District* (1969). In December 1965, Christopher Echardt, and siblings John and Mary Beth Tinker, as part of a larger protest, decided to wear black armbands to school to signify their protest of the Vietnam War. The principals of the Des Moines School District, upon learning of the planned protest, ruled that students who wore the black armbands to school would be suspended until they agreed to stop wearing them. The students wore the armbands, and they were suspended. *Tinker vs. Des Moines School District* eventually went to the Supreme Court where it was ruled that, because the armbands were a peaceful protest and that the wearers did not impose themselves upon others, the students had the right to wear the armbands without sanction. In essence, so long as students who express their opinion do so without causing substantial disruption within the school, they are protected under the Free Speech Clause of the First Amendment. Since then, the "Tinker Test" has been used by courts to determine whether or not a student's actions are protected by the First Amendment.

Additional cases were used in to support the court's decision in *Evans vs. Bayer*; however, they too were subject to the "Tinker Test." For example, *J.S. vs. Blue Mountain School District*, No. 08-4138, 2010 WL 376186 (3rd Cir. Feb. 4, 2010), where two students were suspended for creating a fake MySpace profile for their principal James McGonigal. Here, because the fake page did not "create a substantial disruption" as per *Tinker*, the court determined that the school did not have the right to punish the students (Citizen Media Law Project, 2008). The page that the students created suggested that he was a pedophile and sex addict who preyed on students and their parents in his office. This decision was overturned, however, because the "lewd and vulgar off-campus speech had an effect on-campus" (National School Boards Association, 2008).

Another case cited in the *Evans* decision is *J.S. vs. Bethlehem School District,* 807 A.2d 847 (Pa. 2002). In this instance, students accessed a peer-created website entitled "Teacher Sux" while on campus. The court determined that the website created the necessary disruption to school, and thus the "Tinker Test" determined that the students who created the page did not have protection under the First Amendment. Given the nature of the site, the Commonwealth Court found that J.S. did not have protection under the First Amendment, and the student was expelled.

Other cases where students engaged in off-campus speech and were summarily disciplined on-campus were cited. In *Layshock vs. Hermitage School District* (2007), the Federal Court determined that the students responsible for creating a fake MySpace profile of the principal could not be disciplined because, despite the lewd content, per *Tinker* and *Bethel School District No. 403 v Frasier,* 478 U.S. 675 (1986)*,* which ruled that schools do not have the authority to punish off-campus speech. As part of the decision, it was noted that there were three additional fake MySpace profiles of the principal, none of which were involved in the case or involved disciplinary action.

In these cases, a forty-year-old ruling was used to argue the students' First Amendment rights

based on whether or not a disturbance was created within the school. The issues of appropriate behavior, of harassment, or of bullying are not part of the "Tinker Test."

In the *Evans'* decision, Magistrate Judge Barry L. Garber remarked that "the key is whether the school administrators have a well-founded belief that "substantial disruption will occur" (*Evans vs. Bayer,* p. 11). He cited *J.S. vs. Blue Mountain School District* and noted that the desire to avoid problems or discomfort is insufficient reason to sanction/censor a student's right to express him or herself.

In June 2011, the 3rd U.S. Court of Appeals ruled on appeals for two cases used in the *Evans* decision: *J.S. vs. Blue Mountain School District* and *Layshock vs. Hermitage School District*. In both cases, the court decided that lewd speech a student, if it originated off campus, was not punishable by the school, despite the fact that the target – in each case – was a school administrator and that the students' fake profiles contained lewd and defamatory material. The logic behind this, wrote Judge Michael A. Chagares in reference to *Blue Mountain*, "would vest school officials with dangerously overboard discretion" (Duffy, 2011). Similarly, *Layshock,* Chief Judge Theodore A. McKee wrote that allowing schools officials to "reach into a child's home and control his/her actions" was both "unseemly and dangerous" (Duffy, 2011).

3. Inadequacies of *Tinker*

Definitions for *cyber bullying* vary, but all agree on the fact that information and communication technologies (e.g. social networking systems, text messages, chat rooms, and web pages) are used to purposefully and repeatedly harass a person. The National Conference of State Legislature provides a definition that confines cyber bullying to behavior among minors (2011). According to the 2010 Florida Statute 1006.147, "bullying" can include public humiliation. The same statute notes that "harassment" can include using technology to insult or dehumanize a school employee – but only if the behavior can disrupt the school's daily operation.

In popular culture, cyber bullying is heard in reference to adolescent and teenage behavior. Schools are mobilizing and launching anti-bullying campaigns, and cable television stations such as Nickelodeon are offering public service announcements to help children learn how to handle bullying. A July 2011 Google search for *cyber bullying* yielded 6,920,000 results. The websites that appear are from organizations dedicated to stopping cyber bullying, to educating parents and teens, and to sharing stories of those victimized. Related links offered at the bottom of the search include phrases such as *cyber bully suicide* (107,000 results), *cyber harassment* (885,000 results), and *cyber bully definition* (32,600 results). The point being made is that cyber bullying and harassment rates millions of pages on the Internet and, as in any free enterprise system, where there is a demand there is a supply. In this case, there is a demand for information on cyber bullying.

The technologies that allow people to bully one another from a distance, throughout the day, and to reach a seemingly unlimited audience, did not exist in 1969. These same technologies allow students to access these pages without disrupting the school day in the same manner as would have occurred in 1969 – or even in 1990. Students no longer have to pass notes, gather in one location, or physically talk to one another to share information. Text messages via cell phones serve the same purpose.

The fact that the court used the "Tinker Test" as part of the main argument to determine that Evans was protected under the First Amendment means that it failed to consider two key points. First, it failed to consider the impact that technologies developed in the last 40 years change how students share information. In the 1960s, students did not have the ability to mobilize with Facebook pages or cell phone text message. Ruling that any web page, text, or tweet does not create a disruption within the school is short-sighted given the advances in technology since that time. Second, it failed to consider the second prong of *Tinker*, which states that schools may regulate speech when it "colli[des] with the rights of other students to be secure and to be let alone," 393 U.S. 513 (1969). According to Kellman (2009), "neither *Tinker* nor any other Supreme Court case" has provided guidance regarding this second prong and how it relates to a student's right to free speech (p.398).

Today, students can send messages to each other regardless of physical location and time of day. This means that a "substantial disruption" will not be as obvious as it once was. Tech-savvy students can send text messages back

and forth with little fear of being caught by their teachers, and – even if they are caught – the messages are not the same tangibles that notes written on paper are. Skilled texters can type while they hide their phones in their laps, and send messages without looking at their phone (though they do have to look to read the replies), making it easier to text with peers and to hide the behavior. The question we have is this: if the instructor is either ignoring the fact that students are communicating/surfing the web or unaware of the behavior, how can anyone determine whether or not a webpage is creating a "substantial disruption"? Students do not have to use the school's computers to access web pages, update their Facebook status, or send out tweets. They can use their cell phones, effectively working around any and all firewalls that schools may have in place to block social networking sites or e-mail sites. There is no way to know, without looking at every students' phone records, who accesses what during the course of the school day.

Regarding what Evans had on the Facebook page, we disagree with the court's decision to label a page that actively invites public criticism and the sharing of hatred of another person as an example of "free speech."

Citing cases that meet the *Tinker* guidelines as reasons for ruling for Evans seem to act as excuses (e.g. "Evans' page wasn't as bad as…" and "no one got hurt because of her page") rather than logic. While Evans did not physically threaten Phelps, she did engage in "worthless speech," as defined by *Chaplinsky vs. New Hampshire* (1942), which determined that obscenity, profane remarks, slander, and libel are not protected by the First Amendment. Defining what is or is not obscene, however, is another issue. There are issues such as time, place, and manners. What is obscene may be appropriate in one venue and inappropriate in another, as noted by Justice Ruth Bader Ginsburg in her dissenting opinion regarding the decision in the *FCC vs. Fox Television,* 07-582 (2009) when she wrote that what is "unpalatable to some may be commonplace for others."

Regardless of what is or is not common, seeking to defame another's character is not protected speech and, at the very least, opens Evans up to a lawsuit for defamation of character by Phelps.

Tinker does not protect the rights of students to commit slander or libel, to harass, or to engage in malicious behavior. It protects the rights of students to express themselves in a non-disruptive manner. Its original intent was to protect the right of students to engage in political protest in a non-disruptive manner. It was not designed to protect "worthless speech."

Evans' comments were labeled "opinion" (as opposed to "worthless speech") by the court, in spite of the fact that she invited others to share their hatred and there was no inherent value in her speech.

Just as students are known to cyber bully each other, it is increasingly common for them to turn to Facebook and MySpace to defame, harass, or embarrass teachers and principals. However, while cyber bullying as a behavior is defined as being a systematic effort (Hinduja & Patchin, 2010; National Conference of State Legislature, 2011; Florida Statute 1006.147), it does not include Internet behaviors by students – e.g. creating fake profiles that defame the person – towards school employees, leaving school districts fumbling for ways to handle behavior that, were it between students, would be managed based on what cyber bullying policies were in place.

Defining cyber bullying as systematic also means that a single event is not considered bullying, regardless of the content. However, at what point does a student's "opinion" become bullying and at what point does it remain simply disrespect? There does not appear to be a line yet drawn in the proverbial sand, meaning that students can call instructors names online and face little or no consequences – so long as the name-calling is a single incident.

Examples of current issues of student "opinion" include events where students threatened to attack teachers, called them names, and generally engaged in cyber bullying behaviors.

Along the same lines as Evans when it comes to sharing hatred, though not the same language, six middle school girls were arrested in January 2011 for using Facebook to advertise "Attack a Teacher Day." Whether or not the girls intended it as a joke or were serious, noted the arresting deputy, there was no guarantee that someone would not take it seriously and act on the invitation (Bains, 2011). As this is a relatively recent event, it remains to be seen how these girls will be disciplined and who has the right to met out that discipline. Given that five other

girls posted threats on the "Attack a Teacher" page, it can be argued that Evans' page (had it not been taken down), could have garnered similar responses.

Two seventh graders in Atlanta, GA, are currently facing expulsion for posting comments about their teacher on a Facebook page. These comments were more specific than Evans' in that they called the teacher a "pedophile," a "rapist," and accused him of being "bipolar." As reported in the March 10, 2011, *Atlanta-Journal Constitution,* the students' suspension ended with their return to school. The threat to send the three to an alternative school was dropped.

In February 2011, a California teenager, angry over the amount of homework he was assigned, updated his Facebook status to read that his teacher was a "fat ass who should stop eating fast food, and is a douche bag." He was suspended for one day for cyber bullying. His parents contacted the ACLU, who cited *Tinker* as reason to rescind the punishment and avoid a lawsuit. The district complied. The boy's mother was quoted as saying that "students will always talk about their teachers" (Toor, 2011). Evans did not limit her comments to calling Phelps names, as this boy did. She invited students to share their hatred. Using the "Tinker Test" to argue freedom of speech for an insult (calling a teacher a "fat ass"), creating a fake MySpace profile that defames the principal's character, and an invitation to share hatred suggests that, perhaps, the "Tinker Test" is being stretched to its limits.

As noted by Judge Michael D. Fisher in the dissenting opinion of the 3rd Circuit Court's decision regarding *Layshock,* the decision made to protect the student's right to free speech allowed "a student to target a school official and his family with malicious and unfounded accusations about their character in vulgar, obscene, and personal language" (Duffy, 2011). The result creates a situation, wrote Fisher, that leaves schools "defenseless" when it comes to defending themselves and their employees (Duffy, 2011). Had the students involved in *Blue Mountain* or *Layshock* targeted peers, it is likely that the victims would have had recourse and that the perpetrators would not enjoy the same "free speech" protection that they do when the targets are adults.

4. Advantages of Revisiting *Tinker*

Revisiting the use of Tinker to decide cases involving students' electronic "worthless speech" means that schools will have the ability to make consistent decisions regarding students' online behaviors.

Defining cyber bullying behavior to include intent may also be part of the solution. What was Evans' intent when she created her Facebook page and is it arguably different from the California teen's Facebook post calling his teacher names? Yes. Is Evans' page the same as the "Attack a Teacher" Facebook page, or the MySpace page calling the principal a pedophile? Probably not. However, intent needs to be considered, something that *Tinker* is not equipped to measure.

There are clear-cut cases of cyber bullying, and these are not protected as free speech. Posting anti-gay slurs on a 15-year-old boy's web site, for example, is not protected free speech. In this case, a teenage boy who created a web page to promote his entertainment career found his site peppered with slurs questioning his sexuality (Egelko, 2010). *Tinker* was not an issue, disruption to the school day was not an issue. Whether or not the bullying involved school computers was apparently not an issue. Here, the only issues were: the law regarding "worthless speech," precedents set in previous libel complaints, and the fact that there was reckless disregard of the facts (the young man was not a homosexual; though even if he was, it would not change the fact that he was electronically attacked).

Another incident of clear-cut bullying took place last year when two teenage girls in Florida created a fake Facebook page where they posted digitally altered photographs of a female classmate. They superimposed the victim's face onto nude photographs of other teenage girl because, as they said, "nobody liked her" (Toor, 2011). Again, whether or not the incident took place on school property became a non-issue as the behavior fit the cyber bullying definition.

When some bullying cases are obvious, such as the two incidents just discussed, others are not – such as the Evans case. Comparing Evans' case to other court cases can help put behaviors into perspective, but relying on *Tinker* as the main test skews that perspective as the issue moves away from intent and content and moves

toward whether or not there was a change in student behavior that day.

When schools know what they can and cannot discipline students for, they will be more effective in their actions because loopholes such as *Tinker* will not allow students who engage in bullying behavior towards instructors to hide behind the excuse that they did not create a disruption to the school day. Clear discipline guidelines and the ability to be consistent in applying them will return credibility to a school's administration and help discourage at least some of the students who are considering engaging in cyber bullying.

5. Conclusion

This is not an argument for complete oversight of student behavior. We do not believe that schools have the right to monitor students while they are not on campus or engaged in school-sponsored, off-campus, events; however, we do believe that school districts have the right and the responsibility to *not* tolerate malicious, disrespectful online behavior that is aimed at school district employees, regardless of whether or not the behavior originated on campus or off.

One of the problems with cyber bullying is that the bullies do not have to be present to see their victims' reactions (Hinduja & Patchin, 2010) – which makes it easier in certain respects to bully. The mother of the California teenager who insulted his teacher on Facebook was right in that students will always talk about their teachers. There is nothing inherently unnatural about expressing frustration. How the frustration is expressed, of course, is the issue.

When a student's expression of frustration becomes a web page, the game changes. Spoken words become hearsay and can be forgotten. Online words are, literally, eternal.
Today's technologies, such as social networking sites, have created a more invasive atmosphere, which require a new approach concerning such cases as *Evans* (Dryden, 2011). There is no expectation of privacy on the Internet; therefore, students who post derogatory comments about their instructors do not have a reasonable expectation of privacy. They do have the right to express their opinions, worthless or not, but it now needs to be noted that these opinions become a part of permanent electronic record.

Human nature cannot be fully legislated. And, with technology today, there will always be a way to create a fake page for the sake of humiliating, hurting, or harassing someone. However, sanctions for malicious behavior can be created. *Tinker vs. Des Moines School District* was in reference to students taking a stance against the Vietnam War, not bullying any one individual. Using this case to decide whether a student has the right to commit libel on a social networking site is, in the very least, a disservice to all involved.

To counter this disservice, several points must be addressed. The first point of discussion needs to be on what constitutes cyber bullying, an attempt at cyber bullying, and what is nothing more than student expressing frustration. The second point of discussion should look at the intent – when is the action committed with malice (as in creating a web site or Facebook page) and when is it committed in the heat of anger (as in an angry Facebook post). Once these issues (specifically: better defining cyber bullying and recognizing intent) are operationalized, they can be applied to cases and, as needed, challenged in the courts.

Better defining cyber bullying can eliminate some of the inconsistencies of courts and their use of "substantial disruption" as a litmus test for electronic "free speech." The subjectivity of what substantial disruption consists of has produced inconsistency in the outcomes of court cases using *Tinker* (Dryden, 2001), and we suspect that it will require a challenge within the court system to set a precedent regarding incidents where students design defamatory web pages off campus.

Crafting a clearer legal definition of "free speech" in reference to student web sites and school officials means – ideally – that instances of cyber bullying will be better managed and that schools will have recourse when students deliberately engage in malicious behaviors. At the very least, these instances will be dealt with using case precedent that is up-to-date regarding current technologies and that focuses on the behavior/intent rather than what happens during the school day.

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