OFF-CAMPUS THREATENING SPEECH IN THE UNITED STATES OF AMERICA: TO WHAT EXTENT CAN PUBLIC SCHOOLS RESTRICT THEIR STUDENTS' SPEECH IN THE FACEBOOK ERA?

Manuel Triano López*

Abstract

This paper seeks to clarify the extent to which public-school officials in the United States can discipline their students for their off-campus expressions, with an emphasis on allegedly threatening language. The United States Supreme Court –the nation's highest judicial body– has held that officials can restrict on-campus student speech that disrupts or interferes materially and substantially with school activities. However, the Court has not ruled on the limits of student speech originating off-campus, an important issue due to the prevalence of networking platforms –such as Facebook– in the students' lives. Furthermore, the issue is compounded by the Court's insufficient guidance on how to review allegedly threatening language. As a result, lower courts are grappling with the difficult task of establishing a standard to cover the many contextual variables surrounding student speech in the Facebook era. Predictably, courts have differed over which standard to apply –if any– to off-campus speech that schools deem as threatening. The paper analyzes these approaches so that officials may continue training the nation's youth without abridging their right to free speech.

Keywords: United States of America; Constitutional law; free speech; public education.

L'ÚS D'UN LLENGUATGE AMENAÇADOR FORA DEL CAMPUS ALS EUA: FINS A QUIN PUNT PODEN LES ESCOLES PÚBLIQUES RESTRINGIR LA PARLA DELS SEUS ESTUDIANTS EN L'ERA DE FACEBOOK?

Resum

Aquesta monografia pretén aclarir en quina mesura els funcionaris de les escoles públiques dels Estats Units poden disciplinar els seus alumnes pel seu ús de la paraula fora del campus. El Tribunal Suprem dels Estats Units –la instància més alta de la judicatura— ha resolt que els funcionaris escolars poden restringir una expressió estudiantil realitzada al campus que interrompi o pertorbi considerable i substancialment les activitats escolars. Tanmateix, el Tribunal no ha dictaminat sobre els límits de l'expressió estudiantil que s'origini fora del campus, tema que ha cobrat importància a causa de la prevalença de plataformes de networking –tals com Facebook– en les vides dels alumnes. La manca de directrius orientatives per part del Tribunal sobre com examinar una expressió suposadament amenaçadora no fa sinó complicar la qüestió encara més. Com a conseqüència, els tribunals de menor instància s'enfronten a la difícil tasca d'establir una norma que cobreixi les moltes variables contextuals que giren entorn de la llibertat d'expressió estudiantil en l'era de Facebook. Com era de preveure, els tribunals han diferit respecte de la norma a aplicar –si és que cal aplicar alguna norma— respecte a l'expressió fora del campus que les escoles considerin amenaçadora. Aquest treball analitza aquests plantejaments, a fi que els funcionaris puguin continuar formant els joves de la nació, sense coartar el seu dret a la llibertat d'expressió.

Paraules clau: Estats Units; dret constitucional; llibertat d'expressió; educació pública.

* Manuel Triano López, Associate Professor of Spanish in the Department of Foreign Languages at Sam Houston State University.

Article received: 19.01.2016. Review: 12.04.2016. Final version accepted: 26.04.2016.

Recommended citation: Triano López, Manuel. «Off-campus Threatening Speech in the United States of America: to what Extent can Public Schools Restrict their Students' Speech in the Facebook Era?», *Revista de Llengua i Dret*, *Journal of Language and Law*, núm. 66, 2016, p. 226-238. DOI: 10.2436/rld.i66.2016.2779.

Summary

1 Introduction

Global estimates by the International Telecommunication Union (ITU), the United Nations agency for information and communication technologies, put the proportion of households with Internet access in 2015 at 46%, a significant increase from the 18% mark in 2005 (International Telecommunication Union, 2015). Internet users, however, are not constrained by the confines of their households. In fact, the share of adults in the United States who use a smartphone to access the Internet, but do not have broadband service at home rose to 13% in 2015 (Horrigan & Duggan, 2015, December 21). Aided by the ubiquity of these mobile devices, teens (ages 13 to 17) have become one of the most active groups of Internet users in the United States. In a 2015 survey, 92% of teens reported going online daily; 24% claimed they checked in almost constantly; and 56% said they went online several times a day (Lenhart, 2015, April 9). Navigating through social media sites like Facebook, LinkedIn, Pinterest, Instagram, and Twitter has become the preferred online activity. In 2015, 65% of adults in the United States used social networking sites, a ninefold increase over the last decade (Perrin, 2015, October 8). The percentages are even higher among younger users: 90% of young adults, – those aged 18 to 29– used social media in 2015 (Perrin, 2015, October 8), whereas 81% of online teens reported using some form of social media in September 2012 ("Teens fact sheet," n.d.). In addition to social media, teens in the United States use text and instant messaging for networking purposes: in 2015, 55% of teens reported texting their friends daily, whereas 27 % of them used instant messaging for those daily interactions (Lenhart, 2015, August 6).

The remote networking capabilities of these platforms allow vast numbers of users physically separated from one other to exchange, instantaneously, large amounts of information through texts, images, videos, and audio files. This benefit, however, can also turn into a serious drawback when these platforms become the means for sending abusive content. These communications –which, in their most virulent manifestations, include mean-spirited insults, and even threats of violence– may lead to potentially deleterious effects on the physical and mental health of the intended recipients. In extreme cases, recipients who have not been able to cope with the content of these electronic communications have taken their own lives (Belnap, 2011, pp. 501-502). The pervasiveness of these injurious communications, and the physical and the emotional tolls that they can exact on recipients have prompted legislatures across the United States to pass regulations. As of July 2015, 47 of the nation's 50 states had enacted legislation against electronic harassment, and –in 22 of those 47 states– against cyberbullying, i.e., bullying via electronic communication devices (Hinduja & Patchin, 2015). These statutes tend to require local school districts to adopt policies against these social ills, given the important role of schools in instilling "the habits and manners of civility" (*Bethel School District No. 403 v. Fraser*, 1986, p. 681), and the students' widespread adoption of digital devices for remote networking. Furthermore, the recurrent mass shootings against school communities – Columbine, Santee, and Newtown, among others– are forcing schools to be vigilant not only about bullying, harassment, and intimidation posted off-campus, but also about potential threats of violence by their students (*Bell v. Itawamba County School Board*, 2015, p. 393; *Wynar v. Douglas County School District*, 2013, p. 1064).

These laws and school policies, however, must clear some constitutional hurdles to survive (Hanks, 2012, p. 2). For example, failure to define concepts such as "harassment" or "cyberbullying" precisely enough may result in the law or school policy being struck down for vagueness or overbreadth. In other words, the law or policy will be held unconstitutional if it either forces people to guess at its meaning or proscribes more speech or activity than necessary. For instance, the court in *Saxe v. State College Area School District* (2001) invalidated a school district anti-harassment policy due to vagueness and overbreadth. The policy, for example, defined "religious harassment" as "unwelcome verbal, written or physical conduct directed at the characteristics of a person's religion." In striking down the policy, the court (2001, p. 215) noted the overbreadth incurred in prohibiting speech simply because someone might be offended by its content.

Other legal challenges arise not from the wording of the policies, but from the reach of the newer means of electronic communication. Specifically, public-school students –through their parents– have argued in courts that their right to free speech prevents school officials from regulating student communications made off-campus outside of school hours at events unrelated to school. Compounding the problem, lower courts have diverged on how evaluate alleged threats and on-campus student speech due to insufficient guidance from the Supreme Court. Drawing on pertinent court decisions and scholarly literature, this paper seeks to

clarify the constitutional contours of these student expressions in the United States to help public-school officials exercise their authority without violating the students' right to free speech. Due to space limitations, the discussion will center on alleged threats that students direct towards members of the school community (fellow classmates, officials, faculty, etc.). The analysis begins with a summary of the governing piece of legislation protecting free speech in the United States: the First Amendment to the federal Constitution.

2 Constitutional limits on threats

The Free-Speech Clause of the First-Amendment forbids the government from passing laws abridging the people' freedom of speech. As interpreted by the U.S. Supreme Court –the nation's highest judicial authority–, the Amendment ensures that the government not curtail speech simply because society finds it "offensive or disagreeable" (*Texas v. Johnson*, 1989, p. 414), or because that speech "may embarrass others or coerce them into action" (*NAACP v. Claiborne Hardware Company*, 1982, p. 910). The broad scope of the Amendment protects even symbolic speech –i.e., conduct imbued with expressive elements–, such as burning the U.S. flag to express disapproval of the government (*Texas v. Johnson,* 1989). This freedom, however, has boundaries. Accordingly, the government, under certain conditions, may punish people for their speech without violating the First Amendment. For example, the First-Amendment does not protect certain types of inflammatory speech "if they are likely to inflict unacceptable harm" (*J.S. ex rel. H.S. v. Bethlehem Area School District*, 2002, p. 651). Accordingly, the Supreme Court has excluded fighting words, i.e., face-to-face insults (*Cohen v. California*, 1971, p. 20), which, by their very utterance, provoke violence (*Chaplinsky v. New Hampshire*, 1942, p. 572). And in *Brandenburg v. Ohio* (1969), the Court held that the Amendment protects mere advocacy of "the use of force or of law violation," but not advocacy that is aimed at "inciting or producing imminent lawless action and is likely to incite or produce such action"[1] (pp. 447-448).

The Court has invoked the *Brandenburg* standard very infrequently (Rohr, 2002, p. 10). Nevertheless, since its *Watts v. United States* (1969) decision, the Court has included the content-based category of "true threats" of physical violence as one of the forms of inflammatory speech outside of First-Amendment protection. In proscribing this speech category, the Court has reasoned that even political threats cannot prevail over the government's interest in "protecting individuals from three evils: "the fear of violence, . . . the disruption that fear engenders, and . . . the possibility that the threatened violence will occur." (*R.A.V. v. City of St. Paul*, 1992, p. 388). In *Watts*, the defendant had announced at a public anti-Vietnam War protest that if the government ever made him carry a rifle, he would first train it on then-President Lyndon B. Johnson. After considering the context, the conditional nature of the statement, and the amused reaction of the listeners, the Supreme Court (1969, p. 708) reversed the conviction, holding that the statement did not constitute a true threat, but rather a "very crude[,] offensive method of stating a political opposition to the President."

Despite the ruling, the Court fell short of defining "true threats" for the lower courts (Schauer, 2003, p. 211). Predictably, *Watts*'s unsatisfying decision led to inconsistent rulings, even within the same court system (e.g., *United States v. Cassel*, 2005, pp. 628-630). The Supreme Court's subsequent decision in *Virginia v. Black* (2003) missed the opportunity to solve the inconsistency. The case focused on a Virginia statute that punished cross burning with intent to intimidate. Unlike *Watts*, the *Black* court defined true threats: "statements where the speaker means to communicate . . . an intent to commit an act of unlawful violence to a particular individual or individuals." (p. 359). Despite this definition, the federal circuit courts have continued diverging over how to adjudicate alleged threats (Fuller, 2015, p. 37), thus reinforcing a "chaotic jurisprudence where . . . similar cases are decided dissimilarly" (Strasser, 2011, p. 386).

The confusion centers on which of the two approaches available applies to alleged true threats. The objective approach begins by an inquiry into whether the speaker "intentionally or knowingly" *communicated* the alleged threat, either directly to the victim or to a third party (*Doe v. Pulaski*, 2002, p. 624). This is the only intent requirement for a true threat under an objective analysis. In other words, the analysis could convict the speaker even if s/he did not intend to carry out the threat or had any capacity to do so (*Planned Parenthood v. American Coalition of Life Activists*, 2002, p. 1075). If the defendant did intend to communicate the

1 For instance, in *Hess v.* Indiana (1973, p. 108), the Court held that the Amendment protected a speak who loudly said "We'll take the fucking street later" during an antiwar demonstration because that speech amounted to non-imminent "advocacy of illegal action" (*Hess v. Indiana,* 1973, p. 108).

alleged threat, the government must then prove that a reasonable observer considers the speech a true threat, regardless of whether the speaker meant for the speech "to be so understood" (*United States v. Cassel*, 2005, p. 628). For example, in *United States v. Himelwright* (1994), the defendant had phoned two Post Office hotlines because he was concerned that a hurricane was going to strike the area where his two daughters lived. Some of his remarks in those calls included, "They worry about shootings in the Post Office, they should worry about me if anything happens to my children because of the hurricane" (p. 781). The defendant was then charged with having transmitted a wire communication with the intent to injure another. The Third Circuit (1994, p. 782) held that to establish the violation, the government had to prove only that the defendant acted "knowingly and willfully" when he *made* the calls, and –if he did– that his remarks "were reasonably perceived as threatening bodily injury." In other words, the government did not have to prove that the defendant had intended the calls to be threatening or that he was able to carry out his threats at the time.

Conversely, the Ninth and Tenth Circuits are the only appellate courts that favor the stricter subjective-intent standard. In *United States v. Magleby* (2005, p. 1139) the Tenth Circuit held that the First Amendment does not protect a speaker when s/he *intends* to place a victim in fear of bodily harm or death, regardless of whether s/he intends to carry out the threat. For its part, the Ninth Circuit ruled in *United States v. Cassel* (2005, p. 633) that the speaker will be convicted "only upon proof that [… s/he] subjectively intended the speech as a threat." Therefore, because this standard focuses on the speaker's mental state, the Government must meet a more onerous burden of proof when seeking a conviction under a threat statute.

In its most recent decision, *Elonis v. United States* (2015), the Supreme Court failed to take advantage of yet another opportunity for guidance. In this case, the Court considered, for the first time, the boundaries of free speech on social media (Larson, 2015, p. 84). The case focused on Anthony Elonis's postings on Facebook, some of which the Court described as "crude, degrading, and violent" references about his estranged wife (2015, p. 2005). For example, one of the postings read, "There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts" (2015, p. 2016). The district court had instructed the jury that the Government needed to prove *only* that a reasonable person would perceive the Facebook posts as threats. Declining to address whether the postings constituted a "true threat," the Supreme Court (2015, p. 2012) vacated Elonis's conviction and remanded the case because the statue required proof that he must have intended to issue the threat.

To sum up, the Supreme Court's decisions on threatening speech have failed to bring uniformity across the federal circuit courts (Fuller, 2015, pp. 37-38). As a result, these lower courts remain divided over which criterion to apply: (1) whether a reasonable person would consider the expression a true threat; or (2) whether the speaker intended to threaten the hearer. The issue becomes more complicated in the educational environment. To fulfill their "legitimate interest in maintaining order . . . and protecting the well-being and educational rights of its students," (*Kowalski v. Berkeley County Schools*, 2011, p. 571), school districts have joined the deterrence campaign against electronic harassment and bullying by implementing policies that often incorporate the terms "threat" and "threatening" (Murrhee, 2010, p. 325). However, as the next section will show, the implementation of these measures needs to be reconciled with the off-campus origin of some non-school-sponsored communications, and the easiness with which electronic communications can reach school property.

3 Student speech originating on school premises or during a school-sponsored activity

As Justice Alito argued in his concurrence in *Morse v. Frederick* (2007, p, 424), when public-school officials regulate student speech, "they act as agents of the State." For this reason, their speech regulations are subject to First-Amendment review. The Supreme Court has held that public-school students do not relinquish their First-Amendment right to free speech once they enter school premises (*Tinker v. Des Moines Independent Community School District*, p. 1969, p. 506). At the same time, however, the Court has recognized that this right must be tempered by "the special characteristics of the school environment." (*Hazelwood School District v. Kuhlmeier,* 1988, p. 266). In other words, because public schools are entrusted with "molding [the nation's] children into responsible and knowledgeable citizens" (*J.S. ex rel. H.S. v. Bethlehem Area School District*, 2002, p. 651), officials may punish students for speech that would be constitutionally protected if expressed by adults outside of the school environment.

The Supreme Court has decided four main cases on the constitutional limits of student speech, but these cases have dealt with non-threatening speech expressed at a public school or at a school-sponsored event (*D.J.M. ex rel. D.M. v. Hannibal Public School Dist. No. 60*, 2011, p. 760). The Court's jurisprudence begins with *Tinker v. Des Moines Independent Community School District* (1969). *Tinker* focused on three public-school students who had been suspended for wearing black armbands to class as a form of protest against the U.S. military intervention in Vietnam. The Court held that the wearing of black armbands amounted to protected symbolic speech –i.e., behavior conjoined with expression–, and that no disruption ensued because of the armbands. According to *Tinker*'s standard, a public-school student may express his/her views on controversial subjects while on school premises as long as the speech meets certain conditions: it (a) does not disrupt or interfere "materially and substantially" with school activities; (a) does not lead school authorities to foresee such substantial disruption or material interference; and (c) does not invade the rights of others (pp. 509, 514). In other words, *Tinker* required school authorities to show "substantial disruption, foreseeability of a substantial disruption, or an invasion of the rights of others" to justify their punishment of student speech (Wirmani, 2013, p. 770). The Supreme Court still has not clarified the extent of the infringement-upon-the-rights-of-others prong established in *Tinker* (*Saxe v. State College Area School District*, 2001, p. 217). Although the decision (1969, p. 508) did mention "the rights of other students to be secure and to be let alone," lower courts applying *Tinker* tend to pass over this prong when reviewing demeaning and threatening speech by students, choosing instead the substantial-disruption prong.[2]

Seventeen years after *Tinker*, the Supreme Court refined its ruling by permitting school officials to punish even nondisruptive student speech under certain conditions. *Bethel School District No. 403 v. Fraser* (1986) focused on a sexually suggestive speech that a high school student had given before a school assembly. Although no disruption ensued, the Court found for the school. In its analysis, the Court distinguished the student's lewd speech from the political message of the armbands in *Tinker* by reiterating the stronger protection accorded political speech in First-Amendment jurisprudence (p. 680). The Court held that school officials may punish lewd and indecent student speech that undermines the school's primary duty to "inculcate the habits and manners of civility" (pp. 681, 685).

Finally, in *Hazelwood School District v. Kuhlmeier (*1988), the Court continued broadening the school official's powers to regulate student speech. The case focused on a teacher-supervised newspaper that was part of a journalism class taught for credit during school hours. The administration had ordered a section to be excised from the pre-publication copy partly because it considered the references to sexual activity and birth control "inappropriate for some of the younger students" (p. 263). In the Court's view, the case focused on expressive activities–such as publications, and theatrical productions–that could be reasonably perceived to bear the school's imprimatur, i.e., activities that a reasonable observer would consider as the school's own speech (*Saxe v. State College Area School District*, 2001, p. 214). With these school-sponsored activities, the Court continued, legitimate pedagogical concerns dictate that audience members not be exposed to inappropriate material, and that the speaker's views not be mistaken for the school's. Applying this new standard, the Court held that the discussion on sexual activity and birth control in the newspaper could have been reasonably construed as being "inappropriate in a school-sponsored publication distributed to 14-year-old freshmen" (p. 274).

To summarize the areas of student speech covered by these three Supreme Court cases: *Hazelwood* governs school-sponsored speech; *Fraser* governs lewd, vulgar or profane speech; and *Tinker* governs all other speech (*Chandler v. McMinnville School District,* 1992, p. 529). *Morse v. Frederick* (2007), the Court's fourth and last student-speech case, expanded the school officials' authority by allowing them to punish a narrow subset of student communications occurring off-campus. Specifically, *Morse* dealt with a suspension imposed on a student for waving a banner bearing the phrase "BONG HiTS 4 JESUS" at an off-campus, school-approved event. Noting the reference to marijuana smoking in the expression "bong hits," and the important interest that the government has in deterring drug use among schoolchildren, the Court (2007, p. 397) held that schools may fulfill their responsibility of safeguarding those under their tutelage by restricting student speech that can reasonably be viewed as advocating illegal drug use. Joined by Justice Kennedy,

2 In a case involving a student wearing an anti-homosexuality T-shirt, *Harper v. Poway Unified School District* (2006), the appellate court construed the "rights of others" prong in *Tinker* as encompassing the right to be free from emotional injury. However, the ruling lacks precedential value –i.e., legal force to be followed by other courts– because the Supreme Court vacated it as moot.

Justice Alito (2007, p. 425) reasoned in his concurrence that "illegal drug use presents a grave and . . .unique threat to the physical safety of students."

Despite the reference to threats, lower courts do not tend to use *Morse* to review threatening speech originating on campus. Specifically, lower courts have been analyzing these on-campus expressions under *Tinker*, *Hazelwood*, or *Watts*. For instance, in *Boman v. Bluestem Unified School District No. 205* (2000), a high-school student had created –while at school– an unsigned poster that she then hung on a door in a school hallway. The poster contained sentences written in circles, such as "I'll kill you if you don't tell me who killed my dog" (p. 1). Referencing *Tinker* and *Hazelwood*, the district court (2000, pp. 3-4), the court hypothesized that if the student had either intended to convey a true threat or made other students think that the poster was a true threat, the school could have appropriately punished her. However, based on the investigation conducted by the school itself –which concluded that the student had not had a dog killed; that she had used the artistic concept of "derangement" in her art work before; and that no students had complained about the poster– the court found no justification for requiring the student to undergo a psychological evaluation.

A different approach to allegedly threatening speech originating on campus was used in *Lovell v. ex rel. Lovell v. Poway Unified School District* (1996). In that case, a high-school student challenged her suspension for having allegedly threatened to shoot a school guidance counselor. Frustrated at the possible denial of her requested class schedule, the student had allegedly said to the counselor in the latter's office, "If you don't give me this schedule change, I'm going to shoot you!" (p. 369). Following its own decision in *United States v. Orozco–Santillan* (1990), the Ninth Court applied the true-threat doctrine from an objective perspective. Therefore, the analysis centered on whether a "reasonable person" in the student's position would foresee that the counselor would interpret the statement as "as a serious expression of intent to harm or assault" (p. 372). The court concluded that the First Amendment did not protect the student's statement because any person could reasonably consider it "unequivocal and specific enough to convey a true threat," especially against the backdrop of pervasive violence in public schools at the time (p. 372).

In sum, lacking more precise Supreme Court guidance, lower courts have varied in their approach to allegedly threatening language expressed by public-school students while on school premises. The next section will show that this inconsistency is extended to student speech made off-campus. Specifically, lower courts have usually reviewed alleged off-campus threats made by students through either *Tinke*r's substantial-disruption standard or the objective approach to *Watts*' true-threat standard.

Non-school-sponsored student speech originating *off* school premises

With the exception of *Morse*'s narrow applicability to advocacy of illegal drug use, *Tinker* and its progeny apply only to on-campus student speech, leaving lower courts the task of grappling with manifestations occurring outside the school gates, including demeaning speech and alleged threats expressed by students through electronic means. Predictably, these lower courts have not agreed on the standard to apply in these situations (Dranoff, 2013, p. 652). Of the six appellate courts that have addressed speech that originates off-campus, five have held that *Tinker* applies, whereas the remaining court –the Third Circuit– remains split (*Bell v. Itawamba County School Board*, 2015, p. 393). The other appellate courts (the First, Sixth, Seventh, Tenth, Eleventh, and District of Columbia Circuits) still have not addressed this issue.

The choice of *Tinker* as one of the favored approaches to the detriment of *Fraser*, *Hazelwood*, and *Morse* reflects the typical circumstances surrounding a school's disciplining of a student for derogatory or threatening comments originating off-campus. For example, the state court reviewing *J.S. ex rel. H.S. v. Bethlehem Area School District* (2002) applied *Tinker* to the expulsion of a middle-school student for derogatory posts about a teacher and a principal on a website that he had compiled from home on his own time. Despite the "lewd, vulgar and offensive" references in the speech, the court (2002, pp. 668-669) applied *Tinker* because the student's website was neither part of a school project nor sponsored by the school. Likewise, a strict read of *Morse* does not lend itself to the analysis of demeaning or threatening speech occurring off-campus because such expressions do not tend to advocate illegal drug use.[3]

3 *Ponce v. Socorro Independent School District* (2007) is one of the very few cases in which a court has extended *Morse*'s narrow ruling on illegal drug use to certain threats of school violence. The case revolved around a first-person notebook diary in which the author –a high-school student– had detailed a plan for a mass shooting at the school. The student shared the contents of the notebook

Nevertheless, some appellate courts that have agreed on applying *Tinker* to off-campus speech have advocated different approaches (*Bell v. Itawamba County School Board*, 2015, p. 395). The Third Circuit Court of Appeals, in particular, reflects most vividly the judicial inconsistency about the reach of school officials when it comes to student speech in the era of the Internet, smartphones, and digital social media. In two cases decided on the same day, the court differed on its approach to the same question: whether the First-Amendment allows school officials to discipline students for their off-campus speech. First, in *J.S. ex rel. Snyder v. Blue Mountain School District* (2011) focused on the expulsion of a middle school student for creating, outside of school hours and on her home computer, a fake MySpace profile which included a picture of her principal, and vulgar insinuations –without identifying the principal– that he was engaging in sexual misconduct. The student did not send the profile to any school employees, but made it available to some classmates. Although school officials admitted that the student's speech –that is, the fake profile– did not result in a substantial disruption, they contended that the speech might reasonably have led them to forecast such disruption (p. 928). In holding that the expulsion violated the student's First-Amendment rights, the majority (2011, p. 926) assumed –without deciding– that *Tinker*'s substantial-disruption test applies to off-campus speech. Applying *Tinker*, the majority (2011, pp. 929, 931) concluded that the school could not have reasonably foreseen substantial disruption of or material interference with school operations as a result of a profile so nonsensical that no reasonable person could have taken its content seriously. However, in the second case, *Layshock v. Hermitage School District* (2011, p. 220), the same court indicated the opposite, i.e., that *Tinker*'s disruption standard does not apply to off-campus Internet speech. In that case, a public high-school student had typed "vulgar and offensive" language while building a fake profile of his principal on the social-networking website MySpace (p. 210). The student had created the profile using her grandmother's computer at her house during non-school hours. Even though the speech did not disrupt school operation, the student was suspended. The Third Circuit ruled that school officials may not overextend the reach of their authority into a student's grandmother's home after school hours (p. 216).

Compounding the judicial inconsistency, some appellate courts have applied *Tinker* to student speech originating off-campus only after the speech passes a threshold test (*Wynar v. Douglas County School District*, 2013, p. 1068, summarizing this approach by the Second, Fourth, and Eighth Circuits). For instance, *Thomas v*. *Board* of Education, *Granville Central School District*, (1979, p. 1046) focused on the suspension of a group of high-school students for publishing an allegedly "morally offensive, indecent, and obscene" newspaper lampooning some school figures. In preparing the publication, the students had mostly worked off-campus and after school hours. The final copy –which the students published and distributed to their peers off-campus– contained a disclaimer for any copies found on school grounds. In its decision, the Second Circuit (1979, p. 1050) held that the suspension violated the students' First-Amendment rights because school officials exercised their authority "out of the school yard and into the general community," where the Amendment shields speakers at its most strongly from governmental regulations. In its decision, however, the Second Circuit did not establish that school officials may never discipline off-campus student speech. In fact, the court (1979, p. 1052, n.17) admitted the possibility of legitimatizing school discipline for student expression originating "from some remote locale" when it causes "material and substantial disruption within the school." That possibility materialized in *Doninger v. Niehoff* (2008). In that case, the court concluded that a public high school was entitled to discipline a student for posting derogatory language against school administrators on her public blog. Despite the off-campus origin of the speech, the court found it to qualify as on-campus speech for *Tinker* purposes because of its school-related content, and because it was reasonably foreseeable that fellow students would have viewed the blog and that school administrators would have become aware of it.

In *Kowalski v. Berkeley County Schools* (2011, p. 573), the Fourth Circuit partly relied on *Doninger*'s foreseeability test, while also introducing its own "nexus" threshold before applying *Tinker* to off-campus student speech. The case focused on whether the First Amendment allowed a public school to suspend a

with a fellow student, who, in turn, informed one of the teachers. As a result, the school transferred the student to an alternative education program. The Fifth Circuit (2007, p. 766) held that the First Amendment did not protect the student's threating language because it posed "a direct threat to the physical safety of the school population." Therefore, by this standard, school officials would not need to show actual or reasonably foreseeable disruption of the learning environment to justify a disciplinary action as a result of the speech (2007, p. 769). However, commentators such as Calvert (2008, p. 5), and McDonough (2103, p. 643) criticize this ruling for extending *Morse*'s narrow ruling farther than intended.

student named Kara Kowalski for creating from her home computer a webpage ridiculing a fellow female student. Citing the Second Circuit's decision in *Doninger* (2008), the court (2011, p. 574) held that it was foreseeable that Kowalski's webpage would reach the school through electronic devices, given that the posters and the ridiculed student attended the school. Furthermore, the court (2011, p. 572) reasoned that *Tinker*'s substantial-disruption standard allows a public school to regulate student speech that interferes with the school's mission of providing "a safe school environment conducive to learning," including protecting students from harassment and bullying. In its analysis, the court (2011, p. 576) noted that Kowalski had encouraged other students to contribute to her "mean-spirited and hateful" attack, knowing that the defamatory accusations and edited pictures posted to the webpage would impair the ridiculed student's ability to have "a suitable learning experience." In other words, the court (2011, p. 577) had found a nexus between Kowalski's speech and the school's legitimate interests in preserving an appropriate pedagogical environment.

This judicial inconsistency also surfaces when the abusive speech rises to the level of potential threat of violence. In *Wisniewski v. Board of Education of Weedsport Central School District (*2007, p. 38), the Second Circuit held that school authorities have "broader authority to sanction student speech" than *Watts*'s true-threat standard allows. For this reason, the court used only *Tinker*'s standard to evaluate the alleged threat. The case focused on the suspension of a middle-school student for sending from his parents' home computer an instant-message icon to friends and classmates suggesting that a named teacher should be shot and killed. Applying *Tinker*, the court (2007, p. 40) considered the foreseeability of both communication to school authorities and the teacher, and the risk of substantial disruption of work and discipline at the school as a result of the icon. The court concluded that due to the extensive distribution of the icon (over a three-week period) and the intended recipients, a reasonable person would foresee that school officials and the teacher would learn of the icon, and that the icon would pose "a risk of substantial disruption within the school environment" (2007, p. 40).

The Fifth Circuit has declined to adopt a threshold rule, applying *Tinker* according to the particular circumstances of each case. In *Bell v. Itawamba County School Board* (2015, p. 396), the court applied *Tinker*'s substantial-disruption standard because the student had intentionally directed at the school community speech that officials would reasonably have interpreted as threatening, harassing, and intimidating, even when the student produced and disseminated such speech outside school premises without school resources. Specifically, the case focused on a rap recording that a high-school senior had made off-campus, and then posted on his Facebook page and YouTube. The recording contained "threatening, harassing, and intimidating language" directed at two teachers-coaches, such as "I'm going to hit you with my [Ruger pistol]" (2015, p. 384). As a result, the school suspended him and transferred the student to an alternative high school. Having held that *Tinker* applied in these circumstances, the court addressed whether the recording caused either an actual disruption or a reasonably forecast disruption. The court (2015, pp. 398-399) found that the recording met the second prong because the possible consequences included the death of two teachers: "[t]he speech pertained directly to events occurring at school, identified the two teachers by name, and was understood by . . . neutral, third parties as threatening."

Likewise, the Ninth Circuit clarified in *Wynar v. Douglas County School District* (p. 2013, p. 1069) that it has opted for not imposing "a one-size fits all approach" –i.e., *Tinker*– to off-campus student speech due to the many variables involved. For example, the court (2013, p. 1068) reasoned that it had applied *Tinker* in its previous decision in *LaVine v. Blaine School District* (2001) because the speaker had brought the speech the school. *LaVine* focused on the expulsion of a high school student for showing a teacher a first-person poem that he had written off-campus. In the poem the student had mentioned suicidal thoughts, and the shooting of fellow students (p. 990). The Ninth Circuit (2001, p. 989) first established that the poem was subject to *Tinker* because its content fell outside of *Frazer* and *Hazelwood*. In other words, the poem was neither vulgar, lewd, obscene or offensive; nor was it an assignment or a publication that a reasonable observer could have interpreted as bearing the school's approval. Applying *Tinker*, the Ninth Circuit considered *all* the relevant facts that might have reasonably led school officials to forecast substantial disruption of or material interference with school activities. The Court concluded that the officials did not violate the student's First-Amendment rights because a combination of factors "gave them a reasonable basis" for the expulsion (p. 989), chiefly the student's history of disciplinary problems; the suicidal ideations that he had shared with a school counselor; the domestic dispute that led him to move out of his family home, and press charges

against his father; and the actual shootings that had occurred at other schools around the time of the incident. School officials, therefore, could have reasonably "forecast substantial disruption of or material interference with school activities," namely that the student was intending to injure himself or others (2001, p. 990).

Not all courts have assessed alleged threats made off-campus through *Tinker*. Some have evaluated student speech about the killing of a school official or fellow student by extending *Watts*'s true-threat standard into the school environment (*Wisniewski v. Board of Education of Weedsport Central School District,* 2007, p. 38, briefly discussing this approach before applying *Tinker* instead.) Often, courts using *Watts* opt for the objective approach, i.e., they focus on how a reasonable person would interpret the allegedly threatening speech (Wirmani, 2013, p. 775). For example, the Eighth Circuit's decision in *Doe v. Pulaski* (2002) did not focus on electronic communications, but the court's rationale helps understand how the court would most likely analyze such non-school-sponsored communications when they are initiated off-campus. In *Pulaski*, the parents of an eighth-grade student claimed a violation of his First-Amendment rights as a result of his expulsion for having written a letter at home describing how he would rape and murder a female classmate. Applying the objective approach to *Watts*, the court (2002, p. 624) first set out to determine whether the student had "intentionally or knowingly" *communicated* the content of the letter to either the female classmate (the object of the alleged threat) or to a third party. The court (2002, p. 624) concluded that the speech satisfied this requirement because the student had allowed his best friend –a third party– to read the latter. The court then addressed whether a reasonable person would foresee that the female student –the ultimate recipient of the student's letter– would interpret the content of the letter "as a serious expression" of an intent to harm or injure her (2002 p. 624). The court (2002, p. 625) concluded that most, if not all, normal thirteen-year-old girls would fear for their physical well-being if they had received a letter describing her "as a 'bitch,' 'slut,' 'ass,' and a 'whore' over 80 times in only four pages," and alerting her not to go to sleep because the male student would be "under her bed waiting to kill her with a knife."

Finally, courts may end up deciding the same case on *Tinker*'s substantial-disruption and *Watts*' true-threat standards. For example, in *D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60* (2011), a public high school student had sent, from his home computer, instant messages to some friends in which he expressed his "desire" to shoot some classmates. One of these friends relayed these messages to school authorities, who then suspended the student. The Eighth Circuit held that the student's out-of-school statements were not protected because they did not pass either the true-threat analysis or *Tinker*'s substantial disruption threshold. Concerning *Watts*' true-threat analysis, the court followed its earlier decision in *Doe v. Pulaski County Special School District* (2002, p. 622) by analyzing the alleged threat "from the viewpoint of a reasonable recipient." In the court's opinion, the alarm of school authorities was justified by the student's comment that certain classmates "would be the first to die," and that he could borrow a handgun. Concerning *Tinker*, the court (2011, p. 766) held that it was "reasonably foreseeable" that the student's messages "would be brought to the attention of school authorities." Furthermore, the court (2011, p. 766) found that the messages had "substantially disrupted" the school operations because authorities spent "considerable time" ensuring that suitable safety measures were implemented. The district court in *Mahaffey v. Aldrich* (2002) also analyzed an off-campus website under *Tinker* and *Watts*. The case revolved around a student's suspension for posting to an Internet website a list of people he wished to die. Applying *Tinker*, the court (2002, p. 784) assumed without holding that the list had been partly created on school computers, and then concluded that the website neither interfered with the work of the school nor impinged on other student's rights. Applying the reasonable-observer approach to *Watts*, the court concluded (2002, p. 786) that the statements on the website did not constitute true threats because even though other students saw those statements, the student did not communicate the existence of the website to anyone.

4 Conclusions

The ubiquity of electronic devices, digital social media, and the Internet in the students' lives has blurred the on-campus/-off campus distinction that seemed clear-cut with *Tinker* and its progeny (*Bell v. Itawamba County School Board*, 2015, pp. 392, 395-396). With the aid of these technological advances, students are now able to disseminate and access in real time a large number of communications about members of the school community from off-campus locations. Despite their off-campus origin, these electronic communications

can easily cross the physical boundaries of the school and reach a large number of intended and unintended students and educators, some of whom may react with alarm at the demeaning and violent overtones of some of the messages.

Given the potential of these communications for either disrupting the learning environment or exacting a psychological and physical toll on their victims, courts must allow school officials some breathing room to address a threat of physical violence – as well as harassment and bullying– against members of the school community without worrying about being ensnared in protracted and costly litigation with the students' parents (*Ponce v. Socorro Independent School District*, 2007, p. 772). Courts, therefore, must give school officials some regulatory powers so that they may fulfill their "paramount need" to protect the school community "from threats, intimidation, and harassment" (*Bell v. Itawamba County School Board*, 2015, p. 393).

At the same time, school officials should not be empowered so much as to usurp the role of parents in bringing up their children –not to mention inhibit student speech otherwise protected by the First Amendment– by punishing students for off-campus speech that never makes its way onto campus (*Thomas v. Board of Education Granville Central School District* (1979, p. 1051). Furthermore, not every instance of off-campus student speech that ends up on school premises should be treated either as proscribable on-campus speech under *Tinker* or as a true threat under *Watts*. For example, in *Porter v. Ascension Parish School Board* (2004, p. 615), the Fifth Circuit held that the First Amendment protected a student who had drawn from his home a violent school siege. The drawing did not constitute on-campus speech under *Tinker* because the student had stored the drawing at his home for two years until his brother inadvertently brought it to campus.

Understandably, in the absence of more precise guidance by the Supreme Court, lower courts are facing great difficulties establishing a general standard for "a myriad of circumstances" surrounding student speech expressed off-campus (*Wynar v. Douglas County School District*, 2013, p. 1069). Some courts apply *Tinker*'s substantial-disruption prong under different guises; some apply *Watts*' true-threat standard; some apply both standards; and some –like the Fifth and Ninth Circuits– decline to provide a general rule for the courts under their jurisdiction, opting instead for guidance tailored to the particular circumstances of the case. This last *ad-hoc* approach sounds preferable because it saves courts from making clear-cut pronouncements only to overturn them soon after as a result of the rapidly evolving nature of electronic communications. Regardless of the validity of each judicial approach, school officials are advised to follow closely the rulings of the courts under their respective jurisdiction so that school policies and disciplinary actions help them train the "nation's youth to become responsible participants in a self-governing society" (*Thomas v. Board of Education Granville Central School District* (1979, p. 1044) without violating these students' right to free speech.

Bibliography

Belnap, A. (2011). *Tinker* at a breaking point: Why the specter of cyberbullying cannot excuse impermissible public school regulation of off-campus student speech. *Brigham Young University Law Review*, *2011*, 501-533.

Calvert, C. (2008). Misuse and abuse of *Morse v. Frederick* by lower courts: Stretching the high court's ruling too far to censor student expression. *Seattle University Law Review*, 32, 1-34.

Dranof, S. (2013). Tinker-ing with speech categories: Solving the off-campus student speech problem with a categorical approach and a comprehensive framework. *William & Mary Law Review*, *55*, 649-686.

Fuller, P. B. (2015). Evaluating intent in true threats cases: The importance of context in analyzing threatening Internet messages. *Hastings Communications and Entertainment Law Journal*, *37*, 37-77.

Hanks, J. C. (2012). *School bullying: How long is the arm of the law?* Chicago: American Bar Association.

Hinduja, S. & Patchin, J. (2015). State cyberbullying laws: A brief review of state cyberbullying laws and policies. *Cyberbullying Research Center*. Retrieved from http://goo.gl/JTeCiM

Horrigan, J. B. & Duggan, M. (2015, December 21). Home Broadband 2015. *Pew Research Center*. Retrieved from http://goo.gl/QyVNso

International Telecommunication Union. (2015). ICT Facts and Figures: The World in 2015. *International Telecommunication Union*. Retrieved from http://goo.gl/JJON6X

Lenhart, A. (2015, April 9). Teens, Social Media & Technology Overview 2015. *Pew Research Center*. Retrieved from http://goo.gl/AJIpnk

Lenhart, A. (2015, August 6). Teens, technology and friendships. *Pew Research Center*. Retrieved from http://goo.gl/dGwBen

McDonough, P. E. (2013). Where good intentions go bad: redrafting the Massachusetts cyberbullying statute to protect student speech. *Suffolk University Law Review, 46*, 627-672.

Murrhee, K. C. (2010). Squelching student speech in Florida?: Cyberbullying and the First Amendment. *University of Florida Journal of Law & Public Policy*, *21*, 307-330.

Perrin, A. (2015, October 8). Social media usage: 2005-2015. *Pew Research Center*. Retrieved from http://goo.gl/8k2Mjr

Rohr, M. (2002). Grand illusion?: The *Brandenburg* test and speech that encourages or facilitates criminal acts. *Willamette Law Review*, *38*, 1-92.

Schauer. F. (2003). *Intentions, conventions, and the First Amendment: The case of cross-burning*. *Supreme Court Review*, *55*, 197-230.

Strasser, M. (2011). Advocacy, true threats, and the First Amendment. *Hastings Constitutional Law Quarterly*, *38*, 339-386.

"Teens fact sheet" (n.d.). *Pew Research Center*. Retrieved from http://goo.gl/BTyPVL

Wirmani. T. (2013). *Tinker* takes on *Tatro*: The Minnesota Supreme Court's missed opportunity. *Oklahoma Law Review 65*, 769-793.

Cases cited

Bell v. Itawamba County School Board, 799 F.3d 379 (5th Cir. 2015).

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).

Boman v. Bluestem Unified School District No. 205, 2000 WL 297167.

Brandenburg v. Ohio, 395 U.S. 444 (1969).

Chandler v. McMinnville School District, 978 F.2d 524 (9th Cir.1992).

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Cohen v. California, 403 U.S. 15 (1971).

D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60, 647 F.3d 754 (8th Cir. 2011).

Doe v. Pulaski County Special School District, 306 F.3d 616 (8th Cir. 2002).

Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).

Elonis v. United States, 135 S.Ct. 2001 (2015).

Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir.2006), *vacated as moot,* 549 U.S. 1262 (2007).

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

Hess v. Indiana, 414 U.S. 105 (1973).

J.S. ex rel. H.S. v. Bethlehem Area School District, 569 Pa. 638 (2002).

J.S. ex rel. Snyder v. Blue Mountain School District, 650 F.3d 915 (3d Cir.2011).

Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011).

LaVine v. Blaine School District, 257 F.3d 981 (9th Cir. 2001).

Layshock v. Hermitage School District, 650 F.3d 205 (3d Cir. 2011).

Lovell v. ex rel. Lovell v. Poway Unified School District, 90 F.3d 367 (9th Cir. 1996).

Mahaffey v. Aldrich, 236 F.Supp.2d 779, 783–86 (E.D.Mich.2002).

Morse v. Frederick, 551 U.S. 393 (2007).

NAACP v. Claiborne Hardware Company, 458 U. S. 886 (1982).

Nixon v. Northern Local School District Board of Education, 383 F.Supp.2d 965 (S.D. Ohio 2005).

Planned Parenthood of the *Columbia/Willamette*, *Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

Ponce v. Socorro Independent School District, 508 F.3d 765, 771–72 (5th Cir. 2007).

Porter v. Ascension Parish School Board, 393 F.3d 608 (5th Cir. 2004).

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

Saxe v. State College Area School District, 240 F.3d 200 (3rd Cir. 2001).

S.J.W. v. Lee's Summit R–7 School District, 696 F.3d 771 (8th Cir. 2012)

Texas v. Johnson, 491 U.S. 397 (1989).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Thomas v. Board of Education Granville Central School District, 607 F.2d 1043 (2nd Cir. 1979).

United States v. Cassel, 408 F.3d 622 (9th Cir. 2005).

United States v. Himelwright, 42 F.3d 777 (3d Cir. 1994).

United States v. Magleby, 420 F.3d 1136 (10th Cir. 2005).

Virginia v. Black, 538 U.S. 343 (2003).

Watts v. United States, 394 U.S. 705 (1969).

Wisniewski v. Board of Education of Weedsport Central School District, 494 F.3d 34 (2nd Cir. 2007).

Wynar v. Douglas County School District, 728 F.3d 1062 (9th Cir. 2013).