Tinkering with Cyberspace

On-Campus punishment for Off-Campus expression: A High School Case Study

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> *"The Fourteenth Amendment . . . protects the citizen against the state and all of its creatures – Boards of Education not excepted . . . That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."*
>
> – *Justice Robert Jackson* (West Virginia, 637)

Justice Jackson wrote those words in the midst of the most horrific war in human experience, a war fought to preserve those constitutional liberties he spoke of so eloquently. And yet, over half a century later, his wisdom and advice are still lost on many, if not most, school districts, boards of education, teachers, administrators, and more than a few parents. And perhaps even the present Supreme Court (West Virginia, 624).

Carbon County Vocational-Technical High School (CCVTHS) is located in Jim Thorpe, Pennsylvania. Philadelphia is about 90 minutes to the south.[1] Nestled in the coal mining foothills of the Pocono Mountains, was an unlikely location for a flashpoint in a high-tech, online world. This paper examined where CCVTHS, the Internet, and on-campus punishment for off-campus behavior intersected.

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[1] Mauch Chunk was founded in 1816 and split into two towns: East Mauch Chunk and Mauch Chunk. It was an industrial and coal mining center during the 19th Century and the area was known as the Switzerland of America, second only to Niagara Falls as a honeymoon destination. The Depression hit the area hard and by the 1950s, when legendary athlete Jim Thorpe died in Philadelphia, the two towns were in dire straits, though civic-minded citizens were attempting an economic comeback. Mrs. Thorpe tried to induce Oklahoma to build a memorial to her husband, but it declined. Hearing of Mauch Chunk and East Mauch Chunk's efforts at a renaissance, Mrs. Thorpe visited the communities. In the wake of her visit, the towns voted to merge and name the new city after Jim Thorpe. His body was brought to his namesake town in 1954 and interred in a mausoleum on the city's edge. The town of around 5,000 has transformed itself into antique shopping and tourist center.

The Babbitt newspaper in 2002[2] was produced entirely off-campus without any school resources.[3] Its Web address was www.thebabbitt.com and was professionally designed and presented.[4] Next to the dateline, where newspaper slogans have traditionally been emblazoned, *The Babbitt* pledged, "Today the Internet, Tomorrow the World!" It had a five-member staff of mainly high school students, headed by founders James Curry and Conrad Flynn. Staff members were not from any lunatic fringe. At the time, Curry intended to go to journalism school and pursue a career in broadcast journalism, Flynn planned a career in international corporate law, Katharine Marks hoped to earn a degree in architectural design and education, and Eric Zuber was already attending Wilkes University. *The Babbitt* covered six high schools in the Carbon County area: Jim Thorpe, Lehighton, Palmerton, Panther Valley, Weatherly and its main focus, Carbon County Vocational-Technical High School (The Babbitt, 2/26/2002).

Beyond the news of the day

A number of features adorned *The Babbitt* beyond the "news of the day." There was a timeline, detailing the online newspaper's history, a free subscription form to receive the paper by e-mail, an archive (under construction in early 2002), and a message board/discussion forum linked to each article. There was a special section devoted to student rights of due process, freedom of speech, right to privacy, right to keep school records private, and rights of equality in education, all provided by the American Civil Liberties

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[2] As of 2005, the newspaper was off-line.

[2] *The Babbitt* was named after a character in a Sinclair Lewis novel of the same name. Lewis was a social reformer and critic. Babbitt was a "materialistic and complacent businessman," according to *The New Shorter Oxford English Dictionary*, Vol. 1, 162 (1993).

[4] For the sake of clarity and consistency, www.thebabbitt.com and *The Babbitt* will be used interchangeably and referred to as a newspaper or an online newspaper. Considerable historical baggage is associated with the word newspaper, but there is nothing in the term that limits it to a publication created with ink and paper by a large, expensive mechanical printing press.

Union's Department of Public Education. There was even a banner advertisement heading the top of the discussion forum (The Babbitt, 2/26/02).

The Babbitt had a rocky history. Founded by Flynn and Curry in April 2000, it produced its premiere edition on May 28, 2000. On June 6, Panther High School served staff members with documents threatening legal action, prompting a temporary hiatus in the newspaper's activities (Curry, "Staff Faced," 2/26/02). Two months later, after consulting lawyers and the Student Press Law Center (SPLC), *The Babbitt* was back in business, although at CCVTHS where the students had transferred. In October, Curry left the staff, prompting the newspaper to shut down until late January 2001, when the online newspaper was revived and reorganized with Curry back on board. On April 4, a "rip-off publication" was published and, just like a mainstream publication, *The Babbitt* took "immediate action," although it did not specify what that meant (Curry, "Staff Faced," 2/26/02).

If success is judged by the amount of controversy generated, then *The Babbitt* was a winner. According to *The Morning Call* of nearby Allentown, Pennsylvania, *The Babbitt* was mining territory traditional high school newspapers eschew (Parker, 1/22/02). In fact, the online newspaper had done work that earned accolades and professional awards for traditional media.

In one story, *The Babbitt* blew the whistle on an alleged dumpsite at CCVTHS, prompting the Environmental Protection Agency to force a clean-up. It opposed a Catholic priest saying prayers at a school assembly, concerned about the separation of church and state. The online newspaper published photographs proving that the bathroom stalls at the school were missing their doors, potentially exposing users to casual observation (On-Line

Newspaper in Pa.). According to the SPLC Web site, an article in *The Babbitt* alleged cigarette smoking on a field trip by members of a group called Students Against Destructive Decisions. That group complained to CCVTHS Principal Paul Caputo, prompting a verbal shrug from Flynn. "That may be a waste of his time . . . that's not a reflection on me," he replied, as quoted by the SPLC (On-Line Newspaper in Pa.).

Argumentation

In the fall of 2001, *The Babbitt* posted a story about a teacher, alleging that she lied about an argument involving Curry. Before a disciplinary committee, Flynn and two other witnesses, unconnected with *The Babbitt*, corroborated Curry's version of the incident. Nonetheless, the disciplinary committee and the principal sided with the teacher, imposing a three-day in-school suspension on Curry. An administrative director later overturned the suspension, according to school officials. Curry, Marks, and Flynn were subsequently transferred from that classroom (On-Line Newspaper in Pa.).

According to Flynn, quoted on the SPLC Web site, the teacher was allegedly "infuriated" that the situation had been made public. A local television station aired a story describing what caused the furor: "[the teacher's] alleged in-class use of the phrase 'vo-tech style' to refer to" what some felt was the school's "watered down" curriculum, according to the SPLC posting and *The Morning Call* (On-Line Newspaper in Pa.).

School officials were becoming increasingly angry. Once the story concerning the teacher's comments appeared in *The Morning Call,* and concerned about *The Babbitt*'s repeated use of profanities, Principal Caputo acted. In late January 2002, he blocked school computers from accessing thebabbit.com. Speaking to *The Morning Call*, Caputo said he

"felt the language and the content was not appropriate for school viewing . . . They weren't responding to my requests to be fair and balanced and accurate." Curry claimed his stories were based on audiotapes and documents and told *The Morning Call* that "Caputo is afraid of the truth and . . . doesn't like it when he has it shoved in his face . . . He isn't used to students being so involved and willing to take the time and effort we put in on our publication" (Parker, 1/22/02).

That article appeared in the *Morning Call* on January 22, 2002. Thirteen days later, on February 3, Caputo sent registered letters to all of *The Babbitt* staff's parents threatening their children with expulsion for causing a "disturbance" (a constitutional hot button term discussed later) on-campus by "encouraging students and faculty to read the local newspaper [*The Morning Call]*," according to an article in *The Babbitt*'s February 26 edition (The Babbitt, 2/26/02).[5] *The Morning Call* quoted an attorney at SPLC saying that *The Babbitt* was on "solid legal ground." Perhaps proving that the only thing more effective than the power of the press is a mother protecting her child, Caputo allegedly backed down after a telephone conversation with Curry's mother, Margaret (The Babbitt, 2/26/02).

The expulsion threat did not deter *The Babbitt*. In that same edition detailing the letter from Caputo (with the current edition still online), Curry wrote a story about the "mysterious" resignation of the industrial electricity instructor who declined to say much on-the-record, but did agree with a *Babbitt* story headlined, "Teacher to Principal, School Leader to Liar," claiming that administrators and board members did not care about students (Curry, "Teacher to Principal," 2/26/02). At least two other teachers, *The Babbitt* reported, had been "placing bets" on how long it would be before the teacher was fired. Another story

[5] Emphasis added.

took the CCVTHS to task for canceling a field trip (Curry, "New Director," 2/26/02). An editorial opposed several bills pending in the Pennsylvania legislature to allow censorship of student, on-campus publications to make them more "wholesome." In one concession, though, *The Babbitt* did agree to avoid profanity (Curry & Flynn, "The Babbit Says NO," 2/26/02).

While *The Babbitt* was grappling with CCVTHS over separation of church and state, a school dump, bathroom stall doors, cigarette smoking, and the First Amendment, traditional school newspapers in the same county, according to *The Morning Call,* were running stories about computer upgrades, the homecoming dance, a new picture of Jim Thorpe on boxes of Wheaties®, and a local animal shelter (Parker, 1/22/02). The salutary difference is that *The Babbitt* is produced off-campus by independent student journalists and the others are produced on-campus by students subject to administrative censorship and pressure. It is, perhaps, a powerful object lesson in the advantages of a free press.

Case law

The line between a Web site and an online newspaper seems to be blurry. The U.S. Supreme Court in *Reno v. ACLU* conferred on the Internet at least as much First Amendment protection as that enjoyed by newspapers (Reno v. ACLU). Political speech, as that engaged in by *The Babbitt*, may be just the sort of expressive activity envisioned by the framers of the Constitution and defended repeatedly, if sometimes fitfully, by the Supreme Court.

In *Tinker v. Des Moines School District,* Justice Abe Fortas, writing the majority opinion, emphasized that "state-operated schools may not be enclaves of totalitarianism"

(Tinker, 511). Justice Fortas stressed that school officials do not "possess absolute authority over their students" who are considered "'persons' under our Constitution," possessing "fundamental rights which the State must respect" (Tinker, 511). Justice Fortas thundered that, "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (Tinker, 736). The case involved students wearing armbands to school in a 1965 protest against the Vietnam War. The case did not "relate to regulations of the length of skirts," but "direct, primary First Amendment rights akin to 'pure speech'" (Tinker, 737). The Court did leave the door slightly ajar to regulating speech, stating that "substantial disruption or material interference with school activities" might be considered legitimate grounds to restrict free expression, as might "disturbances or disorders on the school premises" (Tinker, 514).

Those terms (substantial disruption, material interference, disturbances, and disorders) have proved problematic and troublesome for students since schools invariably justify their actions by citing them. CCVTHS officials pointedly deployed those terms. Concurring, Justice Stewart disagreed with the Court's holding that "First Amendment rights of children are co-extensive with those of adults" (Tinker, 515), citing *Ginsberg v. New York* the previous year, which stated that a "child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees" (Ginsberg, 649-650). The Court in *Bethel v. Fraser* (1986) found that a student's sexually suggestive speech at a school assembly could bring in-school punishment. Justice William

Brennan, in a concurring opinion, suggested that the circumstances of the case would not have been grounds for punishment if outside the school setting (Bethel v. Fraser).[6]

Hazelwood

Hazelwood School District v. Kuhlmeier is the only Supreme Court case directly dealing with a student newspaper, in this case an on-campus, non-internet newspaper produced by a journalism class at Hazelwood East High School in St. Louis County, Missouri (Hazelwood v. Kuhlmeier). It was a defeat for student journalists. In a conference paper, Nadia Watts, summarizing the views of several authors, posited that *Hazelwood* was "influenced by the fundamental differences between adults and minors and thereby deprived the minor students of their rightful First Amendment freedoms" (Watts). It is the level of maturity – or, rather, immaturity – of the students that was the decisive factor in the Court's opinion. Writing for the majority, Justice Byron White said, "public schools should weigh the emotional maturity of an intended audience when deciding when to publish speech on sensitive issues" (Hazelwood, 272). He added that the maturity of the student editors and reporters was also a crucial factor.

In an implausible coupling, Justice White suggested those sensitive issues "might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting" (Hazelwood, 272) The Court ruled that student First Amendment rights in public schools are "not automatically coextensive with the rights of adults in other settings," echoing *Ginsberg* (Hazelwood, 574-575). Schools can legitimately restrict student speech that is "inconsistent with its basic educational mission,

[6] Emphasis added.

even though the government could not censor similar speech outside the school," Justice White continued (Hazelwood, 260).[7]

S. Elizabeth Wilborn analyzed the factors "subsequent to and influenced by *Hazelwood*" and found that courts considered,

> . . . the compulsive nature of attendance at primary and secondary schools, the fact that students in a classroom are a captive audience, the maturity level of the students, the schools' duty to provide a safe environment conducive to learning, and the educational goal of inculcating the social, moral, and political values of society (Wilborn, 120).

In a rhetorical flourish, Wilborn charged that Federal courts "have not considered students' speech interest in the same way they consider other students rights, and thus, 'a commercial for Hostess Twinkies® receives greater protection under the First Amendment than does a student's political speech'" (Wilborn, 122).

Hazelwood applied only to public schools and not private ones since "state action" is required to trigger the First Amendment. The high school principal in *Hazelwood* deleted articles from the school's student newspaper on teenage pregnancy, sexual conduct, and the divorce circumstances of one of the school's students. The Court suggested a standard for punishing student expression that by happenstance and incidentally occurs on school premises (Hazelwood, 565).

On-campus punishment

The question at issue in this paper is whether expressive speech generated in online newspapers produced off-campus without using school resources can incur on-campus punishments. The Supreme Court did not rule on that specifically in *Hazelwood, Bethel*, or

[7] Emphasis added.

Tinker. In a summer 2001 article in the *Boston University Journal of Science and Technology Law,* Clay Calvert contended that the issue of how and whether off-campus speech was brought onto school premises is pivotal (Calvert).

If a student personally and deliberately downloaded her/his off-campus Web site "while in school and/or encouraged other students to view it while in school," this would be similar to bringing an underground newspaper onto school property and subject to the school's control (Calvert, 265). Calvert believed that schools would have more authority to regulate the Web site and punish its authors if they were able to prove it interfered with the schools in a disruptive and disorderly fashion. School attorneys pay attention to Supreme Court cases as well and always contend a student's actions are disruptive and interfere with teaching and the learning environment. "When a teacher or principal hears about a student's off-campus-created Web site and then downloads it to a school computer for review," Calvert wrote, "this act does not constitute the intentional downloading of the site in school by the student. The student has not brought the speech on campus" (Calvert, 266).[8] If the student does not introduce the expression onto campus, Calvert observed, then it should not be subject to school regulation and the student not subject to school discipline. "Schools overstep both their educational mission and authority when they attempt to punish off-campus speech," he stressed (Calvert, 266).

Thomas

In 1979, in *Thomas v. Board of Education, Granville Central School District,* the Court of Appeals for the Second Circuit ruled that school officials could not punish students for an underground newspaper that was "conceived, executed, and distributed outside the

[8] Emphasis added.

school" (Thomas, 1045) The school board involved appealed the case to the U.S. Supreme Court, which declined to hear the case.[9] Pointedly, nine years later, the Supreme Court did not mention *Thomas* in *Hazelwood*. In a post-*Tinker,* pre-*Hazelwood* Federal District Court case in Texas, *Sullivan v. Houston Independent School District*, the court held that school officials should not have "jurisdiction over (a student's) acts on a public street corner" and that it made "little sense to extend the influence of school administration to off-campus activity" (Sullivan, 1346).

In *Thomas,* the Second Circuit claimed there was due process difficulty with in-school punishment for off-campus speech. "A school official acts as both prosecutor and judge when he moves against student expression," the Court determined, adding that it is unlikely that the school official would be impartial due to a "vested interest in suppressing controversy" (Thomas 1048). Without the impartiality of an independent decision maker, "the punishments imposed . . . cannot withstand the proscription of the First Amendment" (Thomas, 1043). The Court also held that it was willing to grant school officials "substantial autonomy" within the confines of "the metes and bounds of the school itself" (Thomas 1043).

Rankling the principal

Brandon Beussink in February 1998, created a Web site at his home using his own equipment, rankling his principal at Woodland High School in Bollinger County, Missouri (Beussink v. Woodland). "Vulgar language" was used regarding teachers, the principal, and the school's home page (Beussink, 1175). After the school gave him a 10-day suspension as

[9] Justices insist nothing should be read into a decision not to consider a case. However, when the Court agrees to hear a case, it overturns the lower court roughly 70 per cent of the time.

a result, Beussink filed for an injunction in Federal District Court. The Federal Court for the Eastern District of Missouri ruled in the high school junior's favor in *Beussink v. Woodland R-IV School District*. Interestingly, as part of its rationale, the court cited the substantial interference and disruption standard of *Tinker*. "Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection," the court ruled (Beussink, 1182).

In a ringing passage, the court added that this sort of situation gave Woodland High School students the "opportunity to see the protections of the United States Constitution and the Bill of Rights at work" (Beussink, 1182). Furthermore, the court explained, "unpopular speech . . . invites censure . . . (and) needs the protection of the First Amendment . . . (which) was designed for this very purpose" (Beussink, 1183). In *Tinker*, the students brought the speech onto school ground (the armbands), while in *Beussink* the student did not (it was brought onto campus by someone else). By deploying the substantial interference and disruption standard to a new and different situation, the district court broke new legal ground.

In another case involving student expressive conduct in an off-campus setting, *Klein v. Smith*, student Jason Klein gave his teacher "the finger" (an obscene hand gesture) in a restaurant parking lot off school property and received a 10-day suspension as reward (Klein v. Smith). Klein alleged in Federal District Court that this school-imposed penalty for his off-campus action violated his First Amendment right of free speech. The Federal Court for the District of Maine agreed. Calvert claimed that the *Klein* decision is "analogous to many of the Web-based cases that arise today" and that students on the Internet are metaphorically

giving the "middle finger" to teachers and administrators (Calvert, 273). "The Klein case . . . should not be ignored by school districts contemplating in-school discipline for off-campus speech that is offensive and disparaging," the court declared (Klein, 1142). *Klein* demonstrated that students, when off-campus, are normal citizens, since the First Amendment does not subdivide Americans into students and nonstudents, adults and children.

Elsewhere

The Supreme Court ruled in *New Jersey v. T.L.O.* that Fourth Amendment rights of students are diminished in school settings and that school officials "need not obtain a warrant before searching a student who is under their authority" (New Jersey v. T.L.O.). However, when students are "elsewhere" (the Court's word), school officials have no jurisdiction over them (New Jersey, 334). The Fourth Amendment uses the words "people" and "persons" and does not differentiate between ages or classes of people and persons. In this instance, the Court refused to draw a distinction between adults and minors outside the school setting. Calvert took this further, "The bottom line is that minors' Fourth Amendment rights are only diminished when they are acting in the role of student in a school setting. The same should be true of First Amendment rights of minors" as well, he maintained (Calvert, 280). The First Amendment also does not distinguish between minors and adults. Calvert added that courts should consider this Fourth Amendment analogy when deciding the "current wave" of off-campus cyber cases by students (and minors) (Calvert, 280).

School officials and teachers seem to forget that all the normal avenues of legal remedies exist in the off-campus world to provide avenues of redress. The civil, criminal, and juvenile justice systems are in place to determine whether students have committed intrusion, defamation, or libel and punish them if necessary. As Calvert wrote, "if a student is arrested for making a Web-based threat and serves time in an adult or juvenile detention facility, there is no need for school suspension. It is hard to attend class from a holding cell . . . Sufficient remedies and redress . . . already exist for off-campus expression that causes harm" (Calvert, 245). He further stated that lessons learned in the "'real world' justice systems surely [are] far more powerful . . . than in-school punishment" (Calvert, 246).

Without a clear Supreme Court decision, various state legislatures are stepping into the vacuum. In Illinois, for instance, the General Assembly passed a bill limiting high school journalists' rights and strengthening school censorship powers. The institutional press's lobbying organization, the Illinois Press Association, only grudgingly opposed the General Assembly's action (Terry, memo).

Conclusion

Since the tragedy at Columbine High School in Colorado and the attacks on September 11, school administrators are jittery and parents are worried and wary about student use of the Internet. It is only logical – and even understandable – that these concerns would manifest themselves in sometimes heavy-handed and harsh punishments. Many parents see no reason why children should have any rights of free expression if that makes the school environment safer for their children, or at least *seem* so. School boards,

principals, and administrators are only too glad to oblige by overreacting. Not only does this take parents and worried community members off their backs, it also makes it easier to manage their schools.

It is in difficult times just like these that our constitutional rights need protecting the most and when it is the most challenging to do so. School administrators have latched onto the substantial disruption and disorder test articulated by the U.S. Supreme Court and use it in virtually every case that comes before them dealing with on-campus punishment of off-campus expressive speech.[10] That the Constitution does not differentiate between minors and adults in the Fourth Amendment and the First Amendment is not bothersome to them. The Supreme Court has not specifically addressed what free speech rights students have off-campus when it comes to being punished on-campus. In one "digital" case, a Federal District Court in *Klein* did rule that an obscene hand gesture was protected speech off-campus and could not be punished on-campus.

Calvert contended that if students do not use any school facilities and do not themselves introduce their off-campus publication onto school property, then schools have no right to punish them with suspensions or expulsions just because they disagree with the speech or are discomfited by it. Flynn, Curry, and the others scrupulously avoided "bringing" *The Babbitt* on-campus. Whether principals, such as Caputo, have the right to bar access to off-campus Web sites protected by the First Amendment and endorsed by the Supreme Court in *Reno* is beyond the scope of this paper.

Teachers and administrators had all the remedies they needed under existing law to punish students or adults if their actions or speech step over legal bounds. The sort of

[10] Expressive "speech" includes behavior as well as written or oral commentary.

speech and journalism *The Babbitt* engaged in was precisely the sort of expressive conduct the First Amendment was designed to foster and protect. Bringing the EPA in full cry down on CCVTHS and forcing it to clean-up a dumpsite is an example of enterprise journalism. While traditional school newspapers were hamstrung by the censorship of their schools and produced puff pieces on homecoming and Wheaties®, *The Babbitt* was pursuing investigative journalism of a high order and doing so in the face of official harassment.

There seems to be some, however halting, movement toward expanding student journalism rights, both judicially and legislatively. The future momentum is by no means assured in a post-Columbine, post-September 11 America. The U.S. Supreme Court has hinted, while hedging its bets, that students have *some* constitutional rights and by extension, it would seem, those must include First Amendment expression to some degree.

As long as there are nervous school boards and until there is a definitive Supreme Court decision, school officials are going to take advantage of some of the uncertainties and gray areas in existing case law. In addition, they will rely on the intimidation factor inherent in an unequal power arrangement in which schools seem to hold all the cards and students have no leverage. Not all high school journalists will demonstrate the backbone of *The Babbitt* staff, and not all parents will support their children in what seems to be a lopsided struggle.

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