

Student Speech Online: Too Young To Exercise the Right to Free Speech?

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Abstract: American kids are people, too, entitled to the same rights as American adults, right? In a year when the U. S. Supreme Court issued a resounding reaffirmation of the political speech rights of non-human actors, i.e., corporations, why must there even be a discussion about the rights of minors to speak freely—whether on the Internet or elsewhere?¹ New technologies have made it easier to speak out than ever before. While some might say that such ease of communication necessitates the need for special restrictions on minors who have not learned the restraint that comes with maturity, others might argue that encouraging more speech is inherently better than restricting speech. Any restriction specifically aimed at curbing the speech rights of minors in the new electronic forum is a step in the wrong direction and not in keeping with the ideals of our constitutional framework.

This Article will examine the scope of speech restrictions impacting young people in their online activities, focusing in particular on social networking. It will examine and

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¹ *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

evaluate the online threats posed by sex offenders and the phenomena of cyberbullying and sexting. The Article will analyze whether these threats form an adequate basis for speech restrictions on minors. It will also offer an assessment of courts' likely treatment of controversial online student speech in the future based, oddly enough, on a recent Supreme Court opinion dealing not with online speech, but rather with traditional offline student rebelliousness.²

I. FEDERAL RESTRICTIONS OF ONLINE COMMUNICATIONS

Since the dawn of the Internet age, government has followed its best “Big Brother” instincts and has regularly attempted to impose a prudish, yet politically appealing, morality standard on American youth.³ Sometimes it is in the name of “protecting kids.”⁴ Sometimes it is a not-so-ill-disguised effort to keep naturally inquisitive adolescents from doing what they have done for generations—figuring out about sex, drugs, personal freedom, or politics.⁵ Such activities have always made the older generation nervous—and it is easy for politicians to play on that emotion and propose laws that give the sense that government can control all the unknowns involved in raising a child—and maybe build up a little bona fides with the family values constituency.⁶ It is not dissimilar to efforts to remove certain

² *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007).

³ *See, e.g.*, Sean Piccoli, *Internet Bill Targets Harassment, Porn; Foes Tell Congress to Keep Hands Off*, WASH. TIMES, Mar. 6, 1995, at A1 (discussing Communications Decency Act of 1995).

⁴ *See, e.g.*, Claire Heining, *Laws Sought to Protect Kids on Internet*, STAR-LEDGER, July 11, 2006, at 27 (discussing congressional subcommittee hearing in New Jersey regarding online exploitation of children).

⁵ *See* Joan E. Bertin, *Court's Idea of Protection at a Library More Like a Brick Wall*, MILWAUKEE J. SENTINEL, June 29, 2003, at 05J (criticizing library content filters and noting value of “sites that speak frankly about health and sexuality, relationships and other matters that teenagers are often reluctant to raise with their parents.”).

⁶ *See generally* Communications Decency Act of 1996, 47 U.S.C. §§ 230, 560–561 (2006); Child Online Protection Act, 47 U.S.C. § 231 (2006); Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506 (2006); Children's Internet Protection Act, Pub. L. No. 106-554, § 1(a)(4), 114 Stat. 2763, 2763A–335 (2000) (codified in scattered sections of U.S.C.).

books from library shelves;⁷ to impose curfews;⁸ to raise the drinking age or to ban certain drugs;⁹ to set different ages for permissible sexual activity depending on gender;¹⁰ to set school dress codes;¹¹ to edit student publications;¹² to impose zero tolerance policies in schools for fighting, drugs, smoking, or speech;¹³ and to increase police presence in schools to deal with issues that used to be handled between administrators and parents.¹⁴ If directed at them, adults would never consent to many, if not most, of such initiatives that merely impose a certain interest group's behavioral standards on youth. And yet adults in Congress seem all too willing to impose politically-opportunistic speech standards on that one portion of the population unable to retaliate at the ballot box: youth.

⁷ See, e.g., *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 858 (1982) (school board directed removal of nine books from library).

⁸ See, e.g., Andy Piper, *City to Impose Juvenile Curfew?*, TELEGRAPH HERALD, July 19, 2010, <http://www.thonline.com/article.cfm?id=289713> (Iowa town considers juvenile curfew).

⁹ See, e.g., National Minimum Drinking Age Act, 23 U.S.C. § 158 (2006) (mandating reduction in federal highway funds for states failing to enact and enforce minimum drinking age of 21).

¹⁰ See Steve James, Comment, *Romeo and Juliet Were Sex Offenders: An Analysis of the Age of Consent and a Call for Reform*, 78 U. MO. KAN. CITY L. REV. 241, 250 (2009) (“Statutory rape prosecutions are often markedly different based on gender and sexual preference.”).

¹¹ See, e.g., James C. McKinley, Jr., *Boy, 4, Chooses Long Locks and is Suspended from Class*, N.Y. TIMES, Jan. 13, 2010, at A19 (school board unanimously votes to enforce ban on “Beatles haircuts”).

¹² See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263–64 (1988) (principal orders teacher to publish issue of school newspaper without articles about pregnancy, divorce).

¹³ See Marilyn Elias, *At Schools, Less Tolerance for “Zero Tolerance”; Strict Policies May Actually Backfire*, USA TODAY, Aug. 10, 2006, at 6D (describing rise of and critiques of zero-tolerance policies).

¹⁴ See generally Catherine Y. Kim & I. India Geronimo, *Policing in Schools: Developing a Governance Document for School Resource Officers in K-12 Schools*, AM. CIV. LIBERTIES UNION, 24 (Aug. 2009), http://www.aclu.org/files/pdfs/racialjustice/whitepaper_policinginschools.pdf.

A. COMMUNICATIONS DECENCY ACT

With the rise of electronic communications since the mid-1990s, the trend to regulate online behavior—with the stated goal of protecting youth—flowered. The Communications Decency Act (CDA) attempted, among other things, to protect minors from harmful material on the Internet by criminalizing the knowing transmission of obscene or indecent messages to any minor recipient or the knowing sending or display of any message that depicts patently offensive activities.¹⁵ The CDA was added to the Telecommunications Act of 1996 on the floor of the Senate,¹⁶ and unlike the main bill, its provisions received no substantial public hearing.¹⁷

The Supreme Court struck down the CDA's anti-indecency provisions in 1997.¹⁸ Justice Stevens, writing for the majority, rejected the government's assertion that the important purpose of protecting children from sexually explicit materials somehow barred the Court from examining the validity of the provision under the First Amendment.¹⁹ While upholding the restrictions on obscenity, the Court said that the restrictions on indecent or patently offensive communications were unnecessarily broad and suppressed lawful online communications that adults had a right to receive and to share.²⁰ The government failed to demonstrate the absence of a less restrictive alternative that would be at least as effective.²¹ Importantly, the Court noted that the legislation could be saved simply by removing

¹⁵ Communications Decency Act of 1996, 47 U.S.C. §§ 230, 560–561 (2006). Section 230 of the CDA, which provides immunity to online providers for the content posted to the Internet by others using their facilities, remains in force and is outside the scope of this Article.

¹⁶ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of U.S.C.).

¹⁷ See S. 314 Legislative Record (104th Congress) (showing no hearings held on CDA), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:SN00314:@@L&summ2=m&>; H.R. 1004 Legislative Record (104th Congress) (showing no hearings held on CDA), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR01004:@@L&summ2=m&>.

¹⁸ *Reno v. ACLU*, 521 U.S. 844, 885 (1997).

¹⁹ *Id.* at 875–76.

²⁰ *Id.* at 874–79.

²¹ *Id.* at 878–79.

the indecency provisions and leaving only restrictions on obscenity, and it further noted that the restriction could be narrowed through the use of parental-controlled filtering mechanisms.²²

B. CHILD ONLINE PROTECTION ACT

After the Supreme Court struck down the CDA, Congress tried again by enacting the Child Online Protection Act (COPA), which provided for civil and criminal penalties for anyone who knowingly posted material on the web that is harmful to minors.²³ The legislation was billed by then-Senate Majority Leader Trent Lott as necessary to combat “this unbelievably gross pornography on the Internet.”²⁴

In proceedings that would ultimately last a decade from start to finish, Internet companies and civil liberties groups challenged COPA in a case that reached the Supreme Court twice before certiorari was denied on the third trip up. A federal district court in Pennsylvania granted a preliminary injunction, finding the law imposed an inappropriate burden on online speakers and publishers and thus chilled protected speech.²⁵ The Third Circuit affirmed on different grounds, noting the impossibility and unconstitutionality of imposing a single nationwide set of community standards for the purpose of determining whether material should be deemed “harmful to minors.”²⁶ An oddly-fractured Supreme Court reversed the Third Circuit, holding that COPA’s reliance on community standards in identifying material harmful to minors did not alone render that statute overbroad.²⁷ Nevertheless, the Court clearly left the door open

²² *Id.* at 879, 882–83.

²³ 47 U.S.C. § 231 (2006).

²⁴ Stephen Buel & Jim Puzanghera, *Republicans Succeed in Adding Strict Internet Barriers for Kids*, SAN JOSE MERCURY NEWS, Oct. 16, 1998, at 1A.

²⁵ *ACLU v. Reno*, 31 F. Supp. 2d 473, 493, 497 (E.D. Pa. 1999) (COPA unable to withstand strict scrutiny).

²⁶ *ACLU v. Reno*, 217 F.3d 162, 174, 179, 181 (3d Cir. 2000) (COPA unconstitutionally overbroad).

²⁷ *Aschcroft v. ACLU*, 535 U.S. 564, 585 (2002). Five Justices joined in three parts of the majority opinion. Four Justices joined a fourth part. Justice Kennedy, joined by two others, concurred in the judgment. Justice Stevens dissented. *See id.* at 565.

for the lower court on remand to find the statute unconstitutional on other or additional grounds.²⁸

On its subsequent reconsideration of the matter, the Third Circuit again affirmed the injunction, concluding that COPA was not the least restrictive means available to achieve the compelling interest of preventing minors from accessing harmful materials on the Internet.²⁹ This time, a less-fractured but still narrowly divided Supreme Court upheld the original trial court's injunction, concluding that less restrictive alternatives were available, particularly blocking and filtering software.³⁰ By using filters, the government could have avoided branding a category of speech as criminal, diminishing the chilling effect on speech.³¹

Having upheld the original injunction, the matter went back for trial on the merits, and the district court, not surprisingly, found that COPA was not narrowly tailored to the compelling interest of protecting minors, and was unconstitutionally vague and unconstitutionally overbroad.³² In particular, the court record went to great lengths to examine the use of filtering and blocking software that would be more effective in shielding children from the sexual materials while providing parents greater control over the decision-making involved.³³ The Third Circuit wholeheartedly affirmed the lower court's factual and legal findings as to vagueness, overbreadth, and particularly as to narrow tailoring under strict scrutiny analysis.³⁴ The Supreme Court declined without comment the offer to consider the case for yet a third time.³⁵

²⁸ *Id.* at 585–86.

²⁹ *ACLU v. Ashcroft*, 322 F.3d 240, 265–66 (3d Cir. 2003). The court also found the statute to be unconstitutionally overbroad. *Id.* at 266–71.

³⁰ *Ashcroft v. ACLU*, 542 U.S. 656, 666–67 (2004).

³¹ *Id.* at 667.

³² *See generally ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

³³ *Id.* at 789–95.

³⁴ *ACLU v. Mukasey*, 534 F.3d 181, 198–207 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009).

³⁵ *Mukasey v. ACLU*, 129 S. Ct. 1032 (2009) (denying certiorari).

C. OTHER FEDERAL LEGISLATIVE EFFORTS

Other federal legislative efforts to circumscribe online youth communications have been more successful than CDA or COPA. The Children's Online Privacy Protection Act (COPPA) protects children under thirteen from the collection of personally identifying information by operators of commercial websites or online services.³⁶ The Children's Internet Protection Act (CIPA) mandates that schools and libraries employ software filters to restrict access by minors to inappropriate material as a condition of receiving federal funds.³⁷

Some efforts, also focused on protecting youth, do so by restricting or monitoring those who might access the sites young people are presumed to favor. For example, federal and state legislative initiatives have attempted to impose restrictions, sometimes successfully, on sex offenders in their use of the Internet, even after completion of their sentences and even when their sentences did not contemplate such post-incarceration restrictions. For example, the Sex Offender Registration and Notification Act (SORNA), one section of the Adam Walsh Child Protection and Safety Act of 2006, expanded on a nationwide database of sex offender registrations.³⁸ States have also now begun to adopt laws barring sex offenders from using social networking websites.³⁹ While SORNA does not directly impinge the speech rights of youth, it is clearly directed at the paternalistic notion that the state has the authority to protect young people from unknown and hidden dangers lurking in cyberspace, even at the expense of speech rights of some of its citizens. Such laws contribute to the sense

³⁶ Children's Online Privacy Protection Act of 1998, Pub. L. 105-277, 112 Stat. 2681-728 (1998) (codified at 15 U.S.C. §§ 6501-6506).

³⁷ Children's Internet Protection Act, Pub. L. 106-554, 114 Stat. 2763A-335 (2000) (enacted as part of an omnibus spending bill and codified at various parts of Titles 20 and 47).

³⁸ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006). Full implementation of the database requirements by the states has now been delayed in part because the Department of Justice office responsible for overseeing implementation of the law has only certified four states to be in compliance. The remaining states have filed for extensions through July 27, 2011. *See* Newsroom, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, <http://www.ojp.usdoj.gov/smart/newsroom.htm> (last visited Feb. 15, 2011).

³⁹ *See, e.g.*, H.B. 1314, 96th Gen. Assemb., Reg. Sess. (Ill. 2009); 2008 N.Y. Laws 3012-15. Similar laws have been proposed in California and elsewhere. *See infra* Part II.B. (laws impacting sex offenders).

that government has a role to play in serving as the moral arbiter as to the propriety of communications involving youth.

II. NETWORKING RESTRICTIONS

As the Internet and web communications became pervasive and as new modes of interaction on the Internet have sprung up, so too have legislative responses to suppress things deemed harmful. Social networking sites seem to generate the most concern among those policymakers who perceive a moral decline in American society.⁴⁰ While gearing up for the 2006 elections, House Republicans introduced a bill they thought would win votes among suburban parents who believed claims that the Internet was exposing their children to sexual predators.⁴¹ The Deleting Online Predators Act (DOPA) would have amended CIPA by barring schools and libraries from allowing minors to access social networking sites from computers in their facilities.⁴² While the bill may have been intended to block websites like MySpace and popular chat rooms, the definition of off-limits websites was so broad the bill would have likely restricted thousands of commercial sites.⁴³ Lawmakers found this constitutional shortcoming irresistible and DOPA passed overwhelmingly in the House before eventually stalling in the Senate.⁴⁴

The most blatantly direct restrictions on social network use so far have come in the name of national security.⁴⁵ Government willingness

⁴⁰ Declan McCullagh, *Lawmakers Take Aim at Social-Networking Sites*, CNET NEWS, May 11, 2006, http://news.cnet.com/Congress-targets-social-network-sites/2100-1028_3-6071040.html?tag=mantle_skin%252525253bcontent.

⁴¹ *Id.*

⁴² Deleting Online Predators Act of 2006, H.R. 5319, 109th Cong. (2006).

⁴³ *Id.* § 2(3).

⁴⁴ U.S. House Roll Call Vote 405, July 26, 2006, 109th Cong. (2006), *available at* <http://clerk.house.gov/evs/2006/roll405.xml>.

⁴⁵ Most people are aware of the Chinese government's broad censorship efforts that have impacted the search engine Google, among others, but those efforts have also extended to social communication mechanisms like Twitter. See Cara Anna, *Dozens of Outspoken, Popular Blogs Shut in China*, ASSOCIATED PRESS, July 15, 2010, <http://abcnews.go.com/International/wireStory?id=11168628>. The British government banned soldiers from using sites like Facebook and MySpace. See Lucy Cockcroft, *Soldiers Banned from MySpace and Facebook*, TELEGRAPH, Feb. 16, 2009, <http://www.telegraph.co.uk/technology/facebook/4636962/Soldiers-banned-from-MySpace-and-Facebook.html>. The U.S. Department of Defense imposed a similar ban,

to impose outright bans on social networking in limited situations suggests that broader government-imposed restraints might be in our future. For now, most restrictions are more indirect, focused on students, and originate with schools. Local officials and state lawmakers are now leading the way on this score, and it is logical to assume that the push against social networking sites will continue to be aimed mostly at youth and young adults—perceived as the most frequent users of such sites.⁴⁶ Right now, school districts, in particular, seem most inclined to narrow the electronic speech rights of young people, but the existence of broad social networking restrictions suggests that others may get into the act.

A. SCHOOL-BASED ONLINE RESTRICTIONS

According to the National School Boards Association, in 2007:

- 84% of school districts have rules against online chatting in school
- 81% have rules against instant messaging in school
- 62% bar blogging or participating in online discussion boards at school
- 60% bar sending or receiving email in school

though the restriction was relaxed in early 2010. See Jaspreet Virk, *Pentagon Relaxes Restrictions on Social Networking Sites*, MONEY TIMES, Feb. 27, 2010, <http://www.themoneytimes.com/featured/20100227/pentagon-relaxes-restriction-social-networking-sites-id-10101853.html>. Restrictions are now finding their way into other parts of society as, for example, prominent businesses like the National Basketball Association impose limits on their players' use of services like Twitter. See Marc Stein, *Source: NBA to Unveil Policy This Week*, ESPN, Sept. 27, 2009, <http://sports.espn.go.com/nba/news/story?id=4508595>.

⁴⁶ For example, a 2009 bill in the California legislature, ultimately vetoed by the Governor, would have imposed restrictions on the use of pictures posted to social network sites. See A.B. 632, 2009-2010 Leg., Reg. Sess. (Cal. 2009), available at <http://ct2k2.capitoltrack.com/BillInfo.asp?inarchive=true&org=all&measure=AB 632>.

- 52% bar any social networking sites in school.⁴⁷

Restrictions aimed at youth speech often have a connection to school attendance and participation, logical in light of court precedent acknowledging a framework for such free speech limitations tied to disruption of the school mission. *Tinker v. Des Moines Independent Community School District* remains the landmark case on which all assertions of student speech rights rest; yet even that case—upholding Mary Beth Tinker’s right to protest the Vietnam War by wearing an armband to school—provides the framework for school officials to craft restrictions that pass constitutional muster.⁴⁸ The *Tinker* armbands were found not to have caused substantial disruption of the school’s activities, but subsequent cases show that courts are not unwilling to find disruption in activities arguably just as innocuous as Tinker’s war protest. School districts can significantly restrict the content of a student-written school newspaper, which the Supreme Court found not to be a public forum, declining the opportunity to apply strict scrutiny.⁴⁹ And the Court has gone even further in extending significant local control of the school environment. Schools can discipline students for patently offensive speech, even in the absence of substantial disruption of the school, and for speech at odds with a school’s general position opposing drug use.⁵⁰ In short, schools

⁴⁷ Nat’l Sch. Bds. Ass’n, *Creating & Connecting // Research and Guidelines on Online Social—and Educational—Networking*, 4 (July 2007), <http://www.nsba.org/SecondaryMenu/TLN/CreatingandConnecting.aspx>.

⁴⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁴⁹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988).

⁵⁰ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 692 (1986); *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (prelim. print). Professor Erwin Chemerinsky shares this fear based largely on the *Morse* decision, but casts a hopeful eye toward a limitation suggested by a concurrence filed in that case. Erwin Chemerinsky, *How Will Morse v. Frederick be Applied?*, 12 LEWIS & CLARK L. REV. 17, 21 (2008). In their concurrence, Justices Alito and Kennedy stated that their joinder of the 5-4 majority opinion of the Court was based on the understanding that the *Morse* decision went no further than to allow a school to restrict speech supporting illegal drug use and that the decision did not permit a ban on political or social commentary. *Morse*, 551 U.S. at 422 (Alito, J., concurring). The fault with such reasoning, however, lies in the fact that the right to the private possession and use of marijuana in Alaska under its state constitutional privacy clause has been a legitimate and unresolved policy issue before the state’s courts and Legislature for over thirty years. See *Ravin v. State*, 537 P.2d 494 (Alaska 1975). See also Phillip S. Smith, *Battle over Pot Possession in Alaska is Back in the Courts*, DRUG WAR CHRON. (Apr. 2, 2008), <http://www.alternet.org/drugs/81118/>. The Court jumped too quickly to the assumption that the “Bong Hits” at issue were, in fact, illegal under Alaska law.

have been led by courts to believe that they have less and less obligation to tolerate student speech inconsistent with basic educational messages and that it is permissible for schools to engage in teaching the boundaries of appropriate behavior.⁵¹

Therefore, even though we look back at *Tinker* as a great victory for student speech rights, it also represents a high water mark and subsequent cases firmly establish the concept that free speech does not mean the same thing for public school students as it does for adults.⁵² *Tinker* directed school administrators toward a path that has opened the door to formalized speech restrictions in schools. In the modern environment of Internet communications, such restrictions seem to be blooming as rapidly as the online habits of American society at large. These efforts can be categorized into several broad groupings.

Some laws and policies seem geared directly at the content of student speech. According to the Foundation for Individual Rights in Education (FIRE), colleges and universities are increasing their examination of students' online activities and profiles—both for criminal activity and for speech they deem inappropriate.⁵³ As often as not, campus administrators monitor student online speech in an attempt to vigorously enforce student speech codes and to identify taboo communications.⁵⁴

FIRE reports that speech codes—applied to all forms of communications including online—are in widespread usage on campus, despite a bevy of cases suggesting their unconstitutionality.⁵⁵ The State University of New York at Brockport, for example, bars all uses of email that harass, annoy, or otherwise inconvenience others.⁵⁶ That such a code exists at an institution that already repealed an

⁵¹ *Fraser*, 478 U.S. at 685–86; *Kuhlmeier*, 484 U.S. at 273.

⁵² 2 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM SPEECH §§ 17:1, 17:3 (1996).

⁵³ Greg Lukianoff & Will Creeley, *Facing Off over Facebook: Who's Looking at You, Kid?*, BOS. PHOENIX (Feb. 21, 2007), <http://www.thefire.org/article/7768.html>.

⁵⁴ *Id.*

⁵⁵ FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2010 6 (2009), available at <http://www.thefire.org/public/pdfs/9aed4643c95e93299724a350234a29d6.pdf?direct>.

⁵⁶ *Library, Information and Technology Services: Email & Network Policy*, THE COLLEGE AT BROCKPORT, STATE UNIVERSITY OF NEW YORK, <http://www.brockport.edu/its/email/epolicy.html> (last visited Oct. 22, 2010).

earlier code in response to a student suit demonstrates the staying power of school officials' efforts to keep a lid on student speech.⁵⁷ FIRE's website lists dozens of speech codes at public and private colleges and universities.⁵⁸ Recent appellate decisions in the Third Circuit appear to support the notion that schools will have a difficult time upholding or enforcing such speech codes.⁵⁹ Unfortunately, clear court guidance does not appear to be having an effect on the wildfire-like spread of such codes.

B. SITE-BASED ONLINE RESTRICTIONS

Of the many laws geared at minimizing access to or use of social network sites, most seem to be focused on guarding against sex predators online. While some of the bills are aimed more at youth online activities, others are aimed more at restricting known sex offenders. And some have the unfortunate impact of turning wholly unsuspecting youth into the designated sex offenders the laws are designed to protect them from.⁶⁰

- An Illinois law would require a parent's written permission before a minor could gain access to a social networking site and would require that the parent have complete access to the minor's page.⁶¹
- A New Jersey proposal would impose penalties on social network users who transmit harassing or sexually offensive communications. If

⁵⁷ *Speech Code of the Month: SUNY Brockport*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Dec. 3, 2009), <https://www.thefire.org/article/11344.html>. Patricia Simpson and Robert Wojick initiated the suit against the school for actions arising out of their activities with the college's Republican organization. See Complaint, *Simpson v. Yu*, No. 04-CV-6251CJS(Fr) (W.D.N.Y. June 2004), available at http://www.thefire.org/public/pdfs/5625_3833.pdf?direct.

⁵⁸ See generally *Speech Code of the Month*, *supra* note 57.

⁵⁹ See *McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

⁶⁰ See *infra* Part IV.A. (teens sending sexting messages charged as sex offenders).

⁶¹ H.B. 1314, 96th Gen. Assemb., Reg. Sess. (Ill. 2009).

passed, the bill would require social networking websites to display an icon or link that would allow users to report what they considered sexually offensive or abusive communication. The site would then investigate the comments and contact law enforcement if necessary. If the social network provider failed to take action, it could be sued for consumer fraud.⁶² Because the Communications Decency Act protects sites from lawsuits based on user's posts, it is unclear whether the state law will have any effect.⁶³

- A 2009 bill in the California legislature, ultimately vetoed by Governor Arnold Schwarzenegger, would have imposed restrictions on the use of pictures posted to social network sites.⁶⁴
- A Connecticut bill would require social networking sites to verify ages of those who post profiles or comments and require minors to get parental consent to join.⁶⁵ Attorney General Richard Blumenthal (since elected U. S. Senator in November 2010) proposed the bill after a twenty-three-year-old man was convicted of using MySpace to solicit an eleven-year-old girl. Although the bill was not enacted, the Attorney General led a group of state officials to push social networking sites to put the controls in place voluntarily.⁶⁶

⁶² S.326, 214th Leg., 2010 Sess. (N.J. 2010); A.2689, 214th Leg., 2010 Sess. (N.J. 2010).

⁶³ See Communications Decency Act of 1996, 47 U.S.C. § 230 (2006).

⁶⁴ A.B. 632, 2009-2010 Leg., Reg. Sess. (Cal. 2009), available at <http://ct2k2.capitoltrack.com/BillInfo.asp?inarchive=true&org=all&measure=AB 632>.

⁶⁵ H.B. 6981, 2007 Leg., Jan. Sess. (Conn. 2007).

⁶⁶ Brett Thomas, *Connecticut Proposes MySpace ID Bill*, BIT-TECH (Mar. 9, 2007), http://www.bit-tech.net/news/bits/2007/03/09/senator_proposes_myspace_ID_bill/1.

Perhaps in an effort to head off legislative restrictions in Connecticut and elsewhere, the social networking industry has taken steps to self-regulate. In 2006, attorneys general from forty-nine states and the District of Columbia joined forces to push social networks to adopt online protections for minors.⁶⁷ The Executive Committee leading the group represented Connecticut, North Carolina, Georgia, Idaho, Massachusetts, Mississippi, New Hampshire, Ohio, Pennsylvania, Virginia, and the District of Columbia.⁶⁸ In January 2008, MySpace agreed to a number of their requests, including considering an abuse reporting mechanism, strengthening software to identify underage users, retaining a contractor to better identify and expunge inappropriate images, and implementing changes making it harder for adults to contact children.⁶⁹ In May 2008, they reached a similar agreement with Facebook.⁷⁰

In many cases, however, sex offenders are the direct targets of state laws since popular belief would suggest they are the major threat on social networking sites.⁷¹

- Illinois has been tracking sex offenders' actions online for years. In 2007, it passed legislation that created the Illinois Cyber Crimes Location Database. The database collects and stores IP addresses from sex offenders upon registration and gives them to law enforcement in order to investigate potential child exploitation crimes.⁷² And in January 2010, Illinois passed a law

⁶⁷ Press Release, Connecticut Attorneys General's Office, Attorneys General of 49 States, DC Announce Agreement with MySpace Regarding Social Networking Safety (Jan. 14, 2008), available at <http://www.ct.gov/ag/cwp/view.asp?A=2795&Q=404000>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Gina M. Scott, *Facebook, Attorneys General Announce Agreement to Make Site Safer for Kids*, GOV'T TECH. (May 8, 2008), <http://www.govtech.com/security/Facebook-Attorneys-General-Announce-Agreement-to.html>.

⁷¹ K.C. Jones, *MySpace Harbored Nearly 100,000 Sex Offenders*, INFO. WEEK (Feb. 4, 2009), <http://www.informationweek.com/news/story/showArticle.jhtml?articleID=213001685>.

⁷² 730 ILL. COMP. STAT. ANN. 5/5-4-3.2 (West 2007).

making it a felony for a convicted sex offender to participate at all in online social networking.⁷³

- A 2009 New York law restricts paroled sex offenders from sites like Facebook and MySpace and demands registered sex offenders to report their e-mail addresses and online aliases to state authorities.⁷⁴ According to New York Attorney General Andrew Cuomo, the law has resulted in shutting down 2,782 Facebook accounts and 1,796 MySpace accounts in New York.⁷⁵
- Oklahoma passed a similar bill called the Electronic Security and Targeting Online Predators Act (E-STOP). The bill requires sex offenders to register with the state and provide their e-mail addresses, screen names, and all Internet identifiers. The state then provides this information to social networking sites so that they can remove them.⁷⁶

III. JUSTIFICATION FOR ONLINE SPEECH RESTRICTIONS

The efforts of states to limit sex offenders' activities on the Internet go on and on and each of these laws or proposed laws constitutes a restriction on speech or association. One important question is whether the restriction is warranted. In the broadest terms, a restraint on the right to free speech requires the existence of a compelling public purpose and narrow tailoring of the restriction so as

⁷³ 730 ILL. COMP. STAT. ANN. 5/3-3-7 (West 2007 & Supp. 2010); 720 ILL. COMP. STAT. ANN. 5/16D-2 (West 2003 & Supp. 2010).

⁷⁴ N.Y. CORRECT. LAW § 168-a (McKinney 2003 & Supp. 2010).

⁷⁵ Cat Mayin Koo, *New Law Banning Sex Offenders from Social Networks a Free Speech Flop?*, MEDILL REP. CHI. (Mar. 9, 2010), <http://news.medill.northwestern.edu/chicago/news.aspx?id=160834>.

⁷⁶ H.B. 2934, 52d Leg., 2d Sess. (Okla. 2010) (Electronic Security and Targeting Online Predators Act (E-STOP)).

to focus strictly on achieving that purpose.⁷⁷ No one can deny that keeping kids safe is a legitimate, even compelling, public purpose.⁷⁸ However, most discussions of such laws avoid at least three questions critical to determining the constitutionality of the restrictions: (1) Is the justification for the restriction – the asserted threat to kids posed by social network sites – real and substantive?; (2) Is the restriction effective in addressing that threat?; and (3) Is the speech restriction drawn in the narrowest manner possible to address the threat?

A. INTERNET SAFETY TECHNICAL TASK FORCE REPORT

Major research now shows that the online risk to young people from sexual predators has been overstated and independent sources question whether proposed solutions to the largely illusory threat themselves do more harm than good.⁷⁹ Following a lengthy and comprehensive review of the literature and research on the topic, the Final Report of the Internet Safety Technical Task Force to the Multi-State Working Group on Social Networking of State Attorneys General of the United States (hereinafter “State AG Report”) offered a skeptical assessment of legislative efforts to restrict online communications and questioned basic assumptions about the scope of the online threat to children.⁸⁰ The report organized around three forms of threats: sexual solicitation, online harassment, and problematic content.⁸¹

⁷⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992); *U.S. v. Playboy Entm’t Grp.*, 529 U.S. 803, 812–13 (2000).

⁷⁸ *Playboy*, 529 U.S. at 812–13; *Reno v. ACLU*, 521 U.S. 844, 869 (1997).

⁷⁹ See generally BERKMAN CTR. FOR INTERNET & SOC’Y, ENHANCING CHILD SAFETY & ONLINE TECHNOLOGIES: FINAL REPORT OF THE INTERNET SAFETY TECHNICAL TASK FORCE TO THE MULTI-STATE WORKING GROUP ON SOCIAL NETWORKING OF STATE ATTORNEYS GENERAL OF THE UNITED STATES (Dec. 31, 2008) [hereinafter STATE AG REPORT] (shows children less vulnerable to sex predators than feared and that legislative remedies not proven effective); see also Larry Magid, *Social-Networking Ban for Sex Offenders: Bad Call?*, CNET NEWS (Aug. 13, 2009), http://news.cnet.com/8301-19518_3-10309421-238.html (Illinois online sex offender ban will not make children safer and could inhibit rehabilitation of offenders); Larry Magid, *Net Threat to Minors Less Than Feared*, CNET NEWS (Jan. 13, 2009), http://news.cnet.com/8301-19518_3-10142096-238.html.

⁸⁰ See STATE AG REPORT, *supra* note 79, app. C at 1–81.

⁸¹ *Id.* at 5.

The Task Force found that the threat of sexual solicitation is exaggerated and rates of solicitation are declining.⁸² One noted social researcher who specializes in technology issues said that child abduction by a stranger is an extremely rare threat—twelve out of 300,000 in a year.⁸³ And despite dire warnings that 20% of children have been sexually solicited in chat rooms, by instant messenger or email, most who breathlessly provide such warnings leave out the fact that such solicitations overwhelmingly originate with other young people—96%—and that such solicitations are typically and easily ignored.⁸⁴

Online harassment also appears to be exaggerated, with cyberbullying occurring at lesser rates than offline bullying.⁸⁵ Interestingly, researchers noted a high overlap between victims and perpetrators of online bullying—suggesting that the remote nature of online communications may afford greater opportunity for retaliatory communications without physical confrontation.⁸⁶ Such commentary also highlights the problems associated with defining “bullying” and “cyberbullying.” While the two concepts are routinely considered side by side in policy discussions, is negative online communication comparable in any meaningful way to direct physical confrontation? Should there be some element of severity and repetition of online negative communication considered in examining cyberbullying and in comparing it to bullying? The State AG Report acknowledges such definitional problems and thereby casts further doubt on the reliability of conclusions that deem “cyberbullying” a significant societal problem.⁸⁷

Even in the case of exposure to problematic content, fears expressed in popular media and in legislative hearings appear to be exaggerated.⁸⁸ Rates of “unwanted” exposure to pornography were

⁸² *Id.* at 14–21.

⁸³ Wade Roush, *The Moral Panic over Social-Networking Sites*, TECH. REV. (Aug. 7, 2006), <http://www.technologyreview.com/infotech/17266/?a=f> (quoting [d]anah [b]oyd).

⁸⁴ *Id.*

⁸⁵ STATE AG REPORT, *supra* note 79, app. C at 22–23. The conclusions also highlight the problems associated with defining “bullying.”

⁸⁶ *Id.* app. C at 23–27.

⁸⁷ *Id.* app. C at 22–23.

⁸⁸ *Id.* app. C at 29–34.

very low among those under twelve, and such children were more likely to encounter adult material offline than online.⁸⁹ While online tools may make it easier for young people to access pornography and other forms of undesirable content, research shows that it is accessed largely by those who seek it out—males more often than females and older teenagers far, far more often than children.⁹⁰

With the best evidence suggesting that the threat of such material is, at best, overstated, why are we spending all this time and effort imposing all these restrictions when their impact by definition is likely to be marginal? Challenges to laws aimed at protecting children on the Internet have largely focused on whether the proscriptions could have been tailored more narrowly to achieve their purposes.⁹¹ Is it worthwhile to consider challenging the purported justification of such laws, rather than simply accepting that the protection of children is, per se, a compelling public purpose? Even if there is agreement that the threat is overstated, the consequence of taking no action could be horrific for at least some small number of victims. Is it unfair to ask if the prevention of great harm to a very few can serve as the basis for restricting many in the exercise of a fundamental right?

B. LEGISLATIVE STANDARD FOR REGULATING SPEECH

Legislative bodies have greater leeway to regulate speech when the speech involves obscenity or incitement to imminent criminal action.⁹² Even obscenity, however, has a narrowly prescribed definition, thereby making it an exceedingly rare form of speech and making its regulation difficult in practice.⁹³ When the attempted speech restriction is content-based, however, the law must be narrowly drawn to achieve a compelling public purpose.⁹⁴ Where the

⁸⁹ *Id.* app. C at 30–31.

⁹⁰ *Id.*

⁹¹ *Aschcroft v. ACLU*, 542 U.S. 656, 666–67 (2004); *Reno v. ACLU*, 521 U.S. 844, 877–78 (1997).

⁹² *Virginia v. Black*, 538 U.S. 343, 358–59 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992); *Cohen v. California*, 403 U.S. 15, 20 (1971).

⁹³ *Miller v. California*, 413 U.S. 15, 24–25 (1973). First Amendment advocates have routinely challenged statutes as Congress has tried to regulate beyond the bounds of pure obscenity. *See, e.g.*, *U.S. v. Stevens*, 130 S. Ct. 1577, 1582–83 (2010); *Reno*, 521 U.S. at 874.

⁹⁴ *Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989).

public purpose is wholly unrelated to suppression of speech, the Court is willing to accept reasonable time, place, and manner restrictions that incidentally encumber speech rights as long as the restrictions are no greater than needed to further the governmental interest in question.⁹⁵

While *per se* rules do not exist, the Supreme Court has provided some guidance about the kinds of public purposes that are sufficiently compelling to justify narrowly tailored speech regulation. Relevant to this discussion, protecting children is clearly a compelling public interest.⁹⁶ Courts have also accepted time, place, and manner restrictions to serve the compelling purpose of reducing crime.⁹⁷ Also, courts have accepted restrictions on student speech that disrupts the school's mission—with recent cases appearing to go further than needed in support of administrators' suppressive actions.⁹⁸

On the other hand, the Court has frowned on the mere anticipation of hostile crowd reaction as the basis for restricting speech.⁹⁹ Even more pertinent to our consideration of restrictions impacting kids online, courts have regularly opposed suppressive laws justified merely by the speculative apprehension of government officials.¹⁰⁰ Given the overwhelming research reported in the State AG Report, a reasonable argument can be made that the substantial harm needed to justify any restriction on student online communications has not yet been shown to exist.

Assuming advocates of student speech suppression ultimately succeed in demonstrating such harm, those who oppose will need to base any challenge on an assertion that the restrictive elements go beyond that necessary to achieve the stated purpose. The best

⁹⁵ *Id.* See also *The Tool Box v. Ogden City Corp.*, 355 F.3d 1236, 1240–41 (10th Cir. 2004).

⁹⁶ *Reno*, 521 U.S. at 875; *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 743 (1996).

⁹⁷ *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 435–36 (2002).

⁹⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007) (upholding disciplinary action for non-disruptive speech).

⁹⁹ *Va. State Bd. of Pharmacy v. Va. Citizens Conservation Council*, 425 U.S. 748, 772–73 (1976).

¹⁰⁰ *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224, 1228 (9th Cir. 1990); *U.S. Servicemen's Fund v. Shands*, 440 F.2d 44, 46 (4th Cir. 1971); *Sellers v. Johnson*, 163 F.2d 877, 881 (8th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

evidence so far suggests the existence of some threat, but that it is probably a marginal one and no worse—and probably much less—than the threat from face-to-face encounters. There is little to suggest that online speech restrictions on young people do anything to provide them greater security. And it seems to be the rule rather than the exception that student speech restrictions—whether in the form of federal law, state law, or local school board policy—go well beyond what is necessary to achieve the intended purpose.

IV. ASSESSING THE NEWEST RESTRICTIONS: CYBERBULLYING AND SEXTING

The latest social networking concerns arise out of the equally new practices of cyberbullying and sexting—using the online world to harass someone or titillate someone, respectively.¹⁰¹ Both of these phenomena are simply variations on the same theme—an individual, typically a young person, engaging in disfavored online communication. While cases of severe harm are rare, it's important to note they do exist.¹⁰² The response to the perceived threat by those policymakers who believe it is the government's role to play supreme protector and moral arbiter, even when the impact is extremely infrequent, has been swift and sweeping—with many proposals to ban online bullying and sexting at the federal and local levels. At the federal level alone, multiple bills have been introduced and numerous hearings held during the 111th Congress.

- The Megan Meier Cyberbullying Prevention Act received a hearing in September 2009 with primary sponsor Representative Loretta Sánchez testifying.¹⁰³ The bill was filed in

¹⁰¹ Richard Webster, *From Cyber Bullying to Sexting (Stats and Videos): What's on Your Kids' Cell?*, EXAMINER.COM (Jan. 29, 2010), <http://www.examiner.com/x-17574-Harford-County-Education-Headlines-Examiner~y2010m1d29-From-cyber-bullying-to-sexting-stats-and-videos-Whats-on-your-kids-cell>.

¹⁰² The compelling story of Megan Meier's suicide is viewed by many as the initial motivation behind many of today's efforts to restrict online communications. *Parents: Cyber Bullying Led to Teen's Suicide*, ABCNEWS.COM (Nov. 19, 2007), <http://abcnews.com/GMA/story?id=3882520&page=1>.

¹⁰³ *Cyberbullying and Other Online Safety Issues for Children: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security*, 111th Cong. 21–23 (2009). The ACLU submitted testimony opposing this bill. Letter from Michael W. Macleod-Ball, Acting Director, ACLU Washington Legislative Office, to Robert C. Scott, Chairman,

response to the case of the teenager who committed suicide after being harassed online by a woman who created a fake MySpace account. The Sánchez bill defines cyberbullying as “any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior” and would make it a federal crime, punishable by up to two years in prison.¹⁰⁴

- Representative Debbie Wasserman Schultz introduced two pieces of legislation in the 111th Congress that would work to inform children, parents, and educators about the risks and opportunities associated with online communications. One of the bills would direct grant funds to the development of Internet safety education programs and would provide training and tools to teachers and parents to help keep young people in a position to use the Internet safely.¹⁰⁵ The other bill is more focused on crime awareness than on pro-active education, thus running the risk of creating the impression of the Internet as a place of criminality and intimidation, rather than a vast, varied, and expanding resource with benefits that far outweigh its detriments.¹⁰⁶
- In the closing days of the 111th Congress, Senator Frank Lautenberg introduced the Higher Education Anti-Harassment Act of

Subcommittee on Crime, Terrorism, and Homeland Security (Sept. 30, 2009), *available at* http://www.aclu.org/files/images/asset_upload_file92_41198.pdf. A similar hearing was held in July 2010 before the Senate Subcommittee on Consumer Protection, Product Safety and Insurance.

¹⁰⁴ H.R. 1966, 111th Cong. § 3 (2009).

¹⁰⁵ H.R. 3222, 111th Cong. § 3 (2009).

¹⁰⁶ H.R. 3630, 111th Cong. § 2 (2009).

2010, a bill that would require schools to adopt policies barring harassing or intimidating student online speech based on the student victim's actual or perceived race, color, national origin, sex, disability, sexual orientation, gender identity, or religion.¹⁰⁷

- The Obama Administration has taken an interest in the issue of cyberbullying as well. In August 2010, the U.S. Department of Education held a summit featuring the Secretary of Education, the U.S. Surgeon General, an Associate Attorney General, and the head of the Health Resources and Services Administration to look into the effects of bullying in schools focusing largely on cyber bullying.¹⁰⁸

These federal policy initiatives remain largely inchoate, but efforts at the local level to impose online speech standards are further along in their development.

- In May 2009, a Beverly Hills school suspended a girl for posting a video on YouTube critical of a classmate. The suspension was overturned in court. The judge decided the school had gone too far, stating: "The court cannot uphold school discipline of student speech simply because young persons are unpredictable or immature, or because, in general, teenagers are emotionally fragile and may often fight over hurtful comments."¹⁰⁹

¹⁰⁷ S. 3960, 111th Cong. (2010). *See also* H.R. 6425, 111th Cong. (2010).

¹⁰⁸ Press Release, U.S. Department of Education, U.S. Department of Education Continues Work after First-Ever Federal Summit on Bullying (Aug. 16, 2010), *available at* <http://www.ed.gov/news/press-releases/us-department-education-continues-work-after-first-ever-federal-summit-bullying>.

¹⁰⁹ *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1122 (C.D. Cal. 2010).

- Some schools have attempted to impose disciplinary actions against students posting negative information about their teachers or professors on sites like RateMyProfessor.com or other social sites.¹¹⁰ In response to complaints from educators, some sites have set up a section, like the “Professors Talk Back” section of RateMyProfessor.com, where teachers can respond to accusations they believe are unjustified.¹¹¹
- In Missouri in 1998, a student was suspended for ten days for creating a website using his personal PC containing vulgar language critical of his school’s principal. The student was compelled to sue to overturn his suspension.¹¹²

Consider the case of Justin Layshock, a student in Pennsylvania’s Hermitage School District, who was punished for posting a parody profile lampooning his principal on MySpace from his home computer during non-school hours. Justin was suspended for ten days, placed in an alternative education program despite his high performance in regular classes, banned from participating in extracurricular activities including Academic Games and foreign language tutoring, and barred from attending graduation ceremonies. At the trial level, the court found no evidence of school disruption and ruled that the suspension violated Justin’s free speech rights. The court argued: “The mere fact that the internet may be accessed at school does not authorize school

¹¹⁰ See generally discussion *supra* and *infra*. See also Nicole Ferraro, *Student Lawsuit Tests Online Free Speech Rights*, INTERNET EVOLUTION (Feb. 9, 2009), http://www.internetevolution.com/author.asp?section_id=466&doc_id=171812; Caleb Daniloff, *Cyberbullying on the Rise, on Campus*, BU TODAY (Jan. 6, 2009), <http://www.bu.edu/today/world/2008/12/19/cyberbullying-rise-campus>; Karla Yeh, *Dangerous Minds*, STUDENT PRESS L. CENTER (2007), http://www.splc.org/news/report_detail.asp?id=1312&edition=41 (assistant principal sues students for libel); *Student Suspended for Web Site Wins Free-Speech Lawsuit against District*, STUDENT PRESS L. CENTER (2000), http://www.splc.org/news/report_detail.asp?id=448&edition=4.

¹¹¹ See generally discussion *supra* and *infra*. See also Ferraro, *supra* note 110; Daniloff, *supra* note 110.

¹¹² *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998).

officials to become censors of the world-wide web.”¹¹³ The school district, unwilling to concede its error, felt compelled to appeal and lost again in February 2010, but a full panel hearing was approved in April 2010, which remains pending at this writing.¹¹⁴

Consider also Katherine Evans of Florida. Katherine was suspended for three days for creating a Facebook page from her home computer that criticized a teacher. She removed the page a few days later. At first there was no suggestion of school discipline. A full two months later, Katherine was hauled into the principal’s office and suspended. Evans was an Advanced Placement (AP) student in her senior year. The disciplinary action caused Katherine’s removal from her AP classes and resulted in a diminishment of her academic standing. She has now moved on to the University of Florida, but the case to clear her name continues.¹¹⁵

Sexting is another phenomenon that has experienced a wave of attention, if not popularity.¹¹⁶ One in seven American teens reports having received sexually suggestive photos by text message, and school districts are now attempting to regulate the practice.¹¹⁷ The Houston Independent School District, for example—with 200,000 students—has a policy in place that bars use of a personal communication device to send or possess text or email messages containing images reasonably interpreted as indecent or sexually suggestive while at school or a school-related function.¹¹⁸ Such policies are typical across the country.

¹¹³ *Layshock v. Hermitage Sch. Dist.*, 496 F. Supp. 2d 587, 597 (W.D. Pa. 2007).

¹¹⁴ *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249 (3d Cir. 2010). Compare the *Layshock* case to a similar set of facts in which a different panel of the same court reached a different conclusion, both of which cases are now due to be heard before the full circuit bench. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 290–91, 307–08 (3d Cir. 2010).

¹¹⁵ *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010).

¹¹⁶ Liz Gnau, “Sexting” Charges Overblown, NEWS REC., Feb. 24, 2009, <http://www.newsrecord.org/sections/opinion/sexting-charges-overblown-1.1571744>.

¹¹⁷ Donna St. George, *Sexting Hasn’t Reached Most Young Teens, Poll Finds*, WASH. POST, Dec. 16, 2009, at A12.

¹¹⁸ Ericka Mellon, *Houston ISD to Students: No Sexting, or Else*, HOUS. CHRON., Jul. 14, 2009, <http://www.chron.com/disp/story.mpl/metropolitan/6527710.html>.

- A school in Indiana had never experienced an issue with sexting, yet recently adopted a policy, as a preventive action, that could permanently expel students for sexting.¹¹⁹
- At a school in Illinois, officials will confiscate a student's phone for the day, notify his or her parents, and suspend the student if he or she is found to engage in sexting—even though the school has never experienced an instance of the practice.¹²⁰
- In July 2010, the school board in Omaha, Nebraska, adopted a policy requiring school officials to report to law enforcement any incident of sexting involving students in grades four through twelve, thereby exposing the student not only to school suspension or expulsion, but also to criminal sanctions.¹²¹

A. UNINTENDED CONSEQUENCES?

In implementing such policies, school administrators, typical for this day and age, too often defer to law enforcement—thus raising the stakes on such behaviors beyond what is necessary. Students have been charged under child pornography laws for actions over which, in some cases, they have absolutely no control and which are usually just typical teenage behavior. Now, schools are putting students at risk of being labeled “sex offenders” for a lifetime.

¹¹⁹ *Sexting Condemned with New Policy*, WANE.COM (May 29, 2009), http://www.wane.com/dpp/video/crime/local_wane_kendallville_school_sexting_condemned_with_new_policy_200905291551_rev1.

¹²⁰ Stephanie Overmier, *The Dangers of Sexting: New Policies at Uni*, ONLINE GARGOYLE (Sept. 25, 2009), <http://www.uni.illinois.edu/og/news/2009/09/dangers-sexting-policies-uni>.

¹²¹ Michaela Saunders, *Sexting: OPS Looks at Tough Policy*, OMAHA WORLD-HERALD, June 4, 2010, <http://www.omaha.com/article/20100604/NEWS01/706049895>; Michaela Saunders, *Sexting Ban Added to OPS Code*, OMAHA WORLD-HERALD, Jul. 8, 2010, <http://www.omaha.com/article/20100708/NEWS01/707089795/1017>.

The first case to challenge the prosecution of teenagers for sexting was in Pennsylvania when, in October 2008, high school officials confiscated cell phones used during school hours by male students and discovered pictures of scantily clad, semi-nude and nude teenage girls, some of whom were enrolled in the school district.¹²² School officials turned the phones over to the local District Attorney, who threatened prosecution of twenty students on child pornography charges unless they agreed to a re-education program and six months of probation and drug testing.¹²³ To their credit, three of the female students refused and the local ACLU argued that the administration violated the students' free speech rights and that the forced re-education program violated the parents' right to raise their children as they saw fit.¹²⁴ While administrators might have been within their rights to confiscate the cell phones in question, they had no similar right to browse through their contents. Moreover, the school authorities took the egregious step of bringing in law enforcement even though there was no connection between the photos and the school, and the prosecutors took the even harsher step of threatening to charge the girls with child pornography offenses even though it was the boys, not the girls, found in possession of the photos.¹²⁵ On appeal, the Third Circuit ruled that probable cause to prosecute the girls did not then exist and that the decision to bring charges against the girls was in retaliation for their exercising their First Amendment right not to attend the mandatory re-education sessions.¹²⁶

- In Indiana, students were punished for posting sexually suggestive photos during their summer vacation. The photos were posted without reference to their school and were posted with privacy controls in place. However, they somehow ended up in the hands of school officials, who punished the girls under the school's athletic code. They were barred from

¹²² *Miller v. Mitchell*, 598 F.3d 139, 143–45 (3d Cir. 2010).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 153–55.

extracurricular activities and then humiliated when forced to undergo counseling and apologize to an all-male coach's board. On behalf of the students, the ACLU argued that the school had violated the girls' constitutional rights to free expression because the photos were intended to be shared only with friends. The students demanded that the school district expunge all references to the incident from school records and were attempting to bar the school from taking similar action in the future.¹²⁷

- In Wisconsin, a fourteen-year-old high school freshman was found to have a number of nude photos of an underage classmate on his cell phone and iPod. Possession of child pornography is a felony regardless of the age of the accused, so the teenager was turned over to the authorities. He was charged with multiple felony counts and in January 2009 was sentenced to a year in prison.¹²⁸
- In March 2009, New Jersey officials arrested a fourteen-year-old girl for posting racy photos of herself on the MySpace website. She said the photos were just for her boyfriend to see, but she was charged with possession and distribution of child pornography. If convicted

¹²⁷ Charles Wilson, *Churubusco Girls Sue over Discipline*, NEWS-SENTINEL, Oct. 31, 2009, <http://www.news-sentinel.com/apps/pbcs.dll/article?AID=/SE/20091031/NEWS/910310335>.

¹²⁸ Reddin, Singer & Govin, LLP, *Sexting and Free Speech: States like Wisconsin Face Hard Legal Questions*, 24-7 Press Release (Feb. 27, 2010), <http://www.24-7pressrelease.com/press-release/sexting-and-free-speech-states-like-wisconsin-face-hard-legal-questions-139103.php>.

she would have to register as a sex offender and could face up to seventeen years in jail.¹²⁹

- In Arizona, the state legislature passed a bill that makes it a crime for a minor to use a personal communication device to transmit or possess “a visual depiction of a minor that depicts explicit sexual material.”¹³⁰

Given the rush to criminalization, it is remarkable when a state acts to moderate such laws. Vermont passed legislation easing its laws on sexting to avoid doling out such severe punishments to minors. Under the previous law, anyone convicted of a crime involving child pornography was required to be listed as a sex offender for life. Recognizing the severity of such punishment for a young person who, in his or her still-developing mind, is essentially flirting, legislators passed a bill creating an exemption from prosecution for child pornography for minors sending or receiving sexting messages as long as the sender is doing so voluntarily.¹³¹

But the more typical emphasis on new and harsher policies, practices, and laws are just additional examples of a long term national trend of criminalizing certain student behavior that used to be handled in school and without the involvement of the justice system.¹³² More and more schools employ school resource officers—police officers—in their hallways and students are far more likely to be arrested now than in the past, typically for non-violent offenses.¹³³ Zero tolerance policies, which allow administrators to ignore problems and hand them off to police, are actually counterproductive and lead to more misconduct.¹³⁴

¹²⁹ Beth DeFalco, *14-Year-Old Girl Arrested After Posting Nude Pics*, ASSOCIATED PRESS, Mar. 27, 2009, http://www.netlingo.com/more/Girl_arrested.pdf.

¹³⁰ S.B. 1266, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

¹³¹ VT. STAT. ANN. tit. 13. § 2802b (2009).

¹³² Kim & Geronimo, *supra* note 14, at 8.

¹³³ *Education on Lockdown: Schoolhouse to Jailhouse Track*, ADVANCEMENT PROJECT, 15 (Mar. 2005), <http://www.advancementproject.org/sites/default/files/publications/FINALEOLrep.pdf>.

¹³⁴ *Id.* at 16; Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, NEW DIRECTIONS FOR YOUTH DEV., Fall 2003, at 11.

Cases of alleged cyberbullying or sexting might appear trivial to some, but criminal and/or morally repugnant to others, thus highlighting how difficult it can be for public officials to draw a line of “acceptable” student speech. Merely designating speech as trivial or repugnant necessitates drawing a conclusion about the content of the speech in question. In some instances, especially those relating to criticism of teachers or administrators, the incidents are akin to political speech—a student taking advantage of a public forum to complain about official action or policy. As such, they deserve the most heightened level of protection of our free speech laws. Instead, the trend in schools is to punish such actions—sometimes criminally. Such a response reveals a hypersensitive standard and in some cases a narrow moral judgment, creates the likelihood of marking a teenager with a stain that will change his or her life permanently for the worse, and is contrary to the spirit of tolerance embodied within the First Amendment.

V. BONG HITS FOR JESUS: THE NEW STANDARD FOR ONLINE SPEECH?

Most judicial analyses of school discipline disputes rely on the “disruption” standard set forth in *Tinker* and subsequent cases. That standard has eroded significantly since the days of the Vietnam War. Most recently, the “Bong Hits 4 Jesus” case teaches us that the Supreme Court is willing to set aside a lower court’s factual determination on the disruption issue and find even off-campus speech within the power of school administrators to regulate.¹³⁵ Though the facts of the case do not deal with electronic communications or the Internet, the decision can give us some guidance about how the Court might treat some of these online networking cases. In that case, Joe Frederick, a student at Juneau High School, held a sign on public property across the street from the school while students were outside observing the passing of the Olympic Torch along the street outside the school.¹³⁶ The sign, reading “Bong Hits 4 Jesus,” was ripped from his hands by the principal, who then suspended Joe for a week.¹³⁷ According to Frederick, when he mentioned Thomas Jefferson and free speech

¹³⁵ *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007).

¹³⁶ *Frederick v. Morse*, 439 F.3d 1114, 1115 (9th Cir. 2006).

¹³⁷ *Id.* at 1115–16. See also *Frederick v. Morse*, No. J 02-008 (CV)JWS, 2003 WL 25274689, at *1 (D. Alaska 2003).

rights, Principal Morse doubled his suspension to ten days.¹³⁸ The Supreme Court reversed the Ninth Circuit and upheld the suspension, saying that the principal's actions in protecting the legitimate educational goal of opposing messages promoting illegal drug use served as adequate justification for her suppressive actions.¹³⁹

Can this opinion suggest anything about the new phenomena of sexting and online criticism of school officials? First, the court will not be deterred by the fact that speech is off-campus. In *Morse v. Frederick*, the offending sign was physically off-campus, but observable on-campus.¹⁴⁰ The Court treated this set of facts as if they had occurred at school.¹⁴¹ While analogous to the posting of online content observable on-campus, the legal arguments are theoretically endless. Is there a policy against viewing online content during school hours or from on-campus locations? If not, are there filters in place to restrict access to certain sites? What is the narrowest restriction that can be used to achieve the legitimate public purpose?

Second, a court may be swayed by the content of the student speech or the student's intent in speaking in a particular manner. Joe Frederick sought to be provocative in his statement outside Juneau High School. He had a history of disputes with school administrators and had little use for rules he deemed to be unfair or without purpose. He knew people from school would see his sign and he wanted to tweak administrators' collective nose.¹⁴² The Court said that the speech could be reasonably seen as promoting drug use, and, despite Alaska's longstanding state constitutional protections for private marijuana use, the court said that such messages could be regulated by school officials.¹⁴³

Similarly, today's typical online conflict triggering speech restrictions arise out of harassment or sexually provocative content. It is not far-fetched to think that a court would deem it reasonable to

¹³⁸ *Frederick*, 439 F.3d at 1116.

¹³⁹ *Morse*, 551 U.S. at 409–10.

¹⁴⁰ *Id.* at 397–98.

¹⁴¹ *Id.* at 400–01.

¹⁴² *Frederick*, 439 F.3d at 1115–16.

¹⁴³ *Morse*, 551 U.S. at 409–10. See also *Frederick*, 439 F.3d at 1117 n.4 (acknowledging Alaska constitutional privacy protections for private possession and use of small amounts of marijuana in home).

allow school administrators to regulate sexual content—especially if there is reason to believe that the one who posted such content intended it to be viewed on campus. It is as if such controversial material is a substitute for the disruption standard from the *Tinker* Court. And that means that students operating in an online world must be very careful in their online communications—much more so than their adult counterparts. In essence, today’s online world is a wholly unpredictable space for students. They need to be able to discern what might rub their teachers or school administrators the wrong way, remain aware that the law is uncertain in this area, and keep attuned to the possible consequences of their actions.

At least one recent case suggests courts are moving in just such a direction. In a Pennsylvania case, a three judge Third Circuit panel upheld the suspension of a middle school student who posted a vulgar profile of the school principal from a home computer.¹⁴⁴ *Blue Mountain*’s result would appear to conflict with the separate ruling in the *Layshock* matter.¹⁴⁵ With both matters pending before the full Third Circuit, that court will either need to reconcile the legal rulings or, alternatively, distinguish the facts of the cases in a meaningful way. Regardless, the decisions will be instructive in our understanding of permissible online speech by students.

The current state of the law regarding student free speech as expressed in *Morse* and online student speech in the *Blue Mountain* case does not reflect a First Amendment that truly protects a young person’s right to free expression. Dialogue on controversial topics should be encouraged, not discouraged. Approving official censure of such speech does not help young people become assimilated into adult society and teaches that voices outside the mainstream are to be shunned. Speech that is not controversial but merely provocative ought to be viewed with tolerance rather than with an eye to putting a student in his or her place. We need to chill out a little bit and accept some of the controversy and shock that goes along with a free-wheeling marketplace of ideas—even in school. Today’s drift away from full First Amendment protections for youth outside school (online or offline) and away from a narrowly defined *Tinker* standard within school facilities is nothing more than a drift toward the substitution of a government-approved speech standard for one established by the young person under the guidance of his or her

¹⁴⁴ J.S. *ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 290–91, 307–08 (3d Cir. 2010).

¹⁴⁵ See *supra* text accompanying notes 113–14.

parent. And until the Court gets to that place of tolerance for students located adjacent to the place it has reached for corporations after *Citizens United*, young people beware! The next online quip you make could lead straight to the suspension list—or worse.