Preface

When a person tweets on Twitter to his or her friends, that person takes the risk that the friend will turn the information over to the government, (Roasio v. Clark County School District, 2013, p. 6).

This is the first comprehensive book to address students’ constitutional rights to free speech while off-campus in an offline setting and an online setting. The book is legal scholarship that pertains to a practically very important issue – the scope of the censorship authority of school officials over student speech when students are off-campus. It tells the stories of the students whose off-campus speech was muzzled by their schools. In particular, it covers students who challenged the jurisdiction of schools to censor their speech under the First Amendment. It describes the current state of the law on off-campus student speech in the United States and in so doing reveals that the jurisprudence is unsettled with courts coming to differing conclusions. It is important to explore all available cases in the jurisprudence as we did in order to show the struggles courts face in deciding cases in the off-campus student speech jurisprudence. As noted in our discussions throughout the book, this uncertainty exists due to the United States Supreme Court’s failure to rule on off-campus student speech. Our goal for the book is to present the jurisprudence and to show that there are currently no conclusive and uniform answers for students and school officials on the issue of school censorship of off-campus student speech.

The book discusses the legal decisions in the various cases we found in our extensive research of off-campus speech jurisprudence using a variety of legal research databases. We have no access to documents on settled cases and judicial decisions that were not published in the legal research databases, so those are not included. The book uses legal research methodology – the significant examination of legal precedent (Russo, 2006). Legal research involves and demands investigation into case law in order to “locate authority that will govern the disposition of the question under investigation” (Russo, 2006, p. 7).

Our research of the case law reveals confusion in the lower courts regarding how to address school censorship of off-campus student speech. As West (2008) keenly observed, the power of schools to punish students for speech is fraught with uncertainty and the legal standard governing off-campus speech is unsettled. Questions remain as to whether schools can even muzzle student speech off-campus. Indeed, for both offline and online off-campus speech, “the lower courts are in complete disarray, handing down ad hoc decisions that, even when they reach an instinctively correct conclusion, lack consistent, controlling legal principles” (Pike, 2008, p. 990). Courts also find it challenging to distinguish between off-campus and on-campus speech when students communicate digitally; particularly because online speech is omnipresent even when the speech is created in the privacy of the student’s home. There is the
added challenge that online speakers lose control of their speech once they speak. Even when a student-speaker sends out an online message such as a tweet only to friends, with an expectation of privacy, there is a real risk that the message would be turned over to school officials without the knowledge or prodding of the speaker (Roasio v. Clark County School District, 2013). Since the speech is digital and therefore accessible by anyone on school grounds, there is a real possibility that the speech would get on school grounds. Courts disagree over whether digital off-campus student speech brought on-campus by someone other than the speaker mutates into on-campus speech. Courts also disagree over whether digital off-campus speech needs to be accessed on school grounds before it is censorable. School officials would become omnipotent over students and the First Amendment would be reduced to hokum if digital communications created in students’ bedrooms can be censored simply because of their digital and thus omnipresent nature.

We believe that there must be a limit to the reach of school-censorship authority, particularly when speech occurs outside the schoolhouse gate. As the United States Supreme Court has stated, “the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society” (Reno v. American Civil Liberties Union, 1997, quoting Ginsberg v. New York, 1968, p. 639). Even when students are not at home, school officials need to respect parental authority to direct and discipline their own children and to make choices about their permissible speech. To allow school officials, as agents of the state, to exercise coterminous authority with parents over students’ off-campus speech undercuts the parental authority so basic to our societal structure.

Some courts have advocated or limited the censorship authority of schools over off-campus speech. On the United States Court of Appeals for the Third Circuit, for instance, Judge Fisher advocates limiting school-censorship authority to speech that targets school officials and is reasonably forecast to cause material and substantial disruption at the school (J.S. ex rel. Snyder v. Blue Mountain School District, 2011, p. 939). In some other cases, courts such as the United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Eighth Circuit, require proof that the speech targeted a member of the school community and that the speech is reasonably foreseeable to reach the school (Kowalski v. Berkeley County Schools, 2011; S.J.W. v. Lee’s Summit R–7 School District, 2012). Unfortunately, despite these different limitations, the current off-campus student-speech jurisprudence has not clearly defined the gate separating off-campus speech from on-campus speech. It remains unresolved whether the off-campus versus on-campus distinction for student speech should “turn solely on where the speaker was sitting when the speech was originally uttered” (J.S. ex rel. Snyder v. Blue Mountain School District, p. 940). As the United States District Court for the District of Connecticut rightly observed, the unsettled nature of the current jurisprudence has created confusion for school officials:

*If courts and legal scholars cannot discern the contours of First Amendment protections for student internet speech, then it is certainly unreasonable to expect school administrators, such as Defendants, to predict where the line between on-and off-campus speech will be drawn in this new digital era (Doninger v. Niehoff, 2009, p. 224).*

Even the United States Supreme Court has acknowledged the uncertainty in the student free speech jurisprudence (Papandrea, 2008).

The United States Supreme Court has excluded certain categories of speech from First Amendment protection. These categories include obscenity, defamation, true threats and fighting words (R.A.V. v. City of St. Paul, 1992). Since the federal and state governments can censor adult and student speech
that falls under any of these categories, it stands to reason that school officials should be able to censor such speech as well. Our research shows, however, that only a few cases have analyzed off-campus student speech using these categories. This implies that courts do not necessarily view the off-campus rights of adults as coextensive with the off-campus rights of students. There is nothing in the Supreme Court’s student-speech jurisprudence endorsing such a view, however. Given that the Supreme Court has not considered student speech under any of the unprotected speech categories, there is uncertainty as to whether school officials can rely on those categories to censor off-campus student speech. Because students have no First Amendment recourse for unprotected speech, we believe that school officials can rely on these categories to censor off-campus speech. This book discusses the various categories of unprotected speech as possible avenues for valid school censorship of student speech.

While the Supreme Court has not yet accepted for review any case involving off-campus speech, it has decided cases involving students’ on-campus speech. These Supreme Court cases, discussed herein, are Tinker v. Des Moines Independent Community School District (1969); Bethel School District No. 403 v. Fraser (1986); Hazelwood v. Kuhlmeier (1988); and Morse v. Frederick (2007). In those cases, the Supreme Court created tests for determining when school officials can censor student speech. In Tinker v. Des Moines Independent Community School District, the Supreme Court created the material and substantial disruption test which authorizes censorship of student speech that materially and substantially disrupts the school. A few lower courts also believe that case created the infringement-of-rights test which allows school officials to censor speech that impinges on the rights of others. Since the Supreme Court has never applied the infringement-of-rights test, we cannot definitively confirm that it is a test that the Supreme Court actually recognizes. The Bethel School District No. 403 v. Fraser (1986) case authorized school officials to censor vulgar, lewd, plainly-offensive and obscene speech. Hazelwood v. Kuhlmeier (1988) empowered school officials to censor school-sponsored speech while Morse v. Frederick (2007) authorized school censorship of speech that advocates illegal drug use. Even though the language of these tests seems pretty straightforward, as will be seen in this book, their scope is not. Specifically, the lower courts are divided and uncertain as to whether these tests can be extended from their on-campus speech contexts to off-campus speech. Since the Supreme Court is the highest court in the land, other courts look to it for guidance on how to approach students’ constitutional rights. And without clarity from the Supreme Court, conflicting rulings will continue to emerge in the lower courts.

While the most applied of the Supreme Court tests to off-campus speech is the material and substantial disruption test, Judge Smith of the United States Court of Appeals for The Third Circuit cautions against such application because of the potential chilling effect on student speech:

Applying Tinker to off-campus speech would create a precedent with ominous implications. Doing so would empower schools to regulate students’ expressive activity no matter where it takes place, when it occurs, or what subject matter it involves—so long as it causes a substantial disruption at school. Tinker, for example, authorizes schools to suppress political speech—speech ‘at the core of what the First Amendment is designed to protect,’—if it substantially disrupts school activities. Suppose a high school student, while at home after school hours, were to write a blog entry defending gay marriage. Suppose further that several of the student’s classmates got wind of the entry, took issue with it, and caused a significant disturbance at school. While the school could clearly punish the students who acted disruptively, if Tinker were held to apply to off-campus speech, the school could also punish the student whose blog entry brought about the disruption. That cannot be, nor is it, the law (J.S. ex rel. Snyder v. Blue Mountain School District, 2011, p. 939, citing Morse v. Frederick, 2007, p. 403).
Judge Smith actually called it “absurd” to take the “antecedent step of extending Tinker beyond the public-school setting to which it is so firmly moored” when reviewing off-campus speech cases (J.S. ex rel. Snyder v. Blue Mountain School District, 2011, p. 940). As will be axiomatic in this book, however, a number of courts and judges do not agree with Judge Smith. Even on the United States Court of Appeals for The Third Circuit, there is no consensus about the reach of the material and substantial disruption test. This was evident in Layshock ex rel. Layshock v. Hermitage School District (2011), for instance, where Judge Jordan vigorously argued that the material and substantial disruption test applies to off-campus speech because property lines have become insignificant in the digital age:

_We cannot sidestep the central tension between good order and expressive rights by leaning on property lines. With the tools of modern technology, a student could, with malice aforethought, engineer egregiously disruptive events and, if the trouble-maker were savvy enough to tweet the organizing communications from his or her cellphone while standing one foot outside school property, the school administrators might succeed in heading off the actual disruption in the building but would be left powerless to discipline the student. Perhaps all of us participating in these en banc decisions would agree on that being problematic. It is, after all, a given that ‘[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic’ and no one supposes that the rule would be different if the man were standing outside the theater, shouting in. Thus it is hard to see how words that may cause pandemonium in a public school would be protected by the First Amendment simply because technology now allows the timing and distribution of a shout to be controlled by someone beyond the campus boundary. If it is accepted that the First Amendment would not protect such a deliberate disturbance, we should acknowledge that we are weighing competing interests and do so in the straightforward though sometimes challenging way directed by Tinker (Layshock ex rel. Layshock v. Hermitage School District, 2011, pp. 221-22, citing Schenck v. United States, 1919, p. 52)._ 

These opposing views of Judge Smith and Judge Jordan illustrate the ongoing division and uncertainty playing out in courts around the country over the scope of the Supreme Court’s student-speech precedents; and concomitantly the First Amendment rights of students to speak off-campus. This book seeks to reveal the uncertainty in the off-campus student-speech jurisprudence so that legal scholars and the judiciary will appreciate the importance of bringing clarity to the current state of the law. This is especially important because a jurisprudence with “inconsistent and conflicting standards will chill more speech than would a single, clear, and predictable national standard” (Rothman, 2001, p. 302). The book assesses the off-campus jurisprudence and concludes with guidance for students and schools on how to navigate the jurisprudence in compliance with the Free Speech Clause.

**ORGANIZATION OF THE BOOK**

The book is divided into five sections with a total of sixteen chapters. A brief description of each chapter follows:

Section 1 is titled “Context” and includes the first chapter of the book. This chapter is designed to provide some background and context for the book.
Preface

Section 2 is titled “Unprotected Speech” and includes Chapters 2 through 6. This section covers pertinent categories of speech that the United States Supreme Court has categorically excluded from First Amendment protection. We explore these categories because if students have rights outside the schoolhouse gate, as with adults, those rights should be protected for all speech except the categories of unprotected speech. As a federal district court noted, the analysis must start “with the basic rule that speech, whether written or oral, is protected under the First Amendment unless it falls within one of the exceptions delineated by the Supreme Court, in which case the speech may be limited by the respective governmental entity” (D.G. v. Independent School District No. 11 of Tulsa County, Oklahoma, 2000, p. 9). However, “[i]f the speech does not fall within one of the limited exceptions to the rule, it is protected speech and cannot be censored or punished” (p. 9).

Chapter 2 defines true threat and discusses true threat as unprotected speech. It also reviews the true-threat doctrine and the two perspectives used by the judiciary in true-threat analysis: reasonable-speaker perspective and the reasonable-listener perspective. The goal of the chapter is to describe true threat – one of the few categories of speech for which students, like adults, are not entitled to First Amendment protection.

Chapter 3 describes the fighting-words jurisprudence. It explains why fighting words are unprotected speech. It reviews the Chaplinsky v. New Hampshire (1942) case in which the Supreme Court first excluded fighting words from First Amendment protection. The chapter aims to show that, since fighting words are unprotected speech, school officials can censor such speech outside the schoolhouse gate without violating the First Amendment. However, school officials must establish that the speech qualifies as fighting words pursuant to Chaplinsky – a challenging task.

Chapter 4 examines defamatory speech. It describes the elements that must be established in order for speech to constitute defamation. It also discusses slander and libel – two forms of defamatory speech. We point out that defamatory speech by students off-campus is speech that school officials can censor with impunity under the First Amendment.

Chapter 5 focuses on obscene speech. The chapter reviews various cases on obscene speech. It sets forth the criteria that must be satisfied before speech will be classified as obscene. The chapter concludes that school officials can regulate the obscene speech of students created off-campus without violating the First Amendment.

Chapter 6 examines child pornography speech. We review Supreme Court precedent for determining when speech can be excluded from First Amendment protection as child pornography. We conclude that, under child pornography precedent, school officials can constitutionally censor student speech created off-campus if it features child pornography.

Section 3 is titled “Student Free Speech and the United States Supreme Court.” It encompasses Chapters 7 through 10. The section examines the United States Supreme Court’s decisions on student free speech. It discusses the various tests the Supreme Court has established for determining when student speech is protected. These tests constitute the jurisprudential and “historical framework of student First Amendment rights” (Roberts, 2008, p. 1179). The tests are important because they provide “an understanding of where the law began, where the law currently is, and where the law is moving” (p. 1179).

Chapter 7 focuses on the Tinker v. Des Moines Independent Community School District (1969) case – the first Supreme Court decision on student free speech. It examines the two tests established in Tinker for determining the scope of school authority over student speech. These tests are the “material and substantial disruption” test and the “infringement of rights” test. We analyze the Tinker case to determine if it authorizes school officials to censor off-campus student speech.
Chapter 8 reviews the Bethel School District No. 403 v. Fraser (1986) case—the second Supreme Court decision on student free speech. It discusses the test established in that case which empowers schools to punish students for speech that is vulgar, lewd, obscene or plainly offensive. The chapter explores this case in order to determine if school officials can find within this case authority to regulate off-campus student speech that is lewd, vulgar, plainly offensive or obscene.

Chapter 9 examines the United States Supreme Court’s decision in Hazelwood v. Kuhlmeier (1988). This case set the precedent for school regulation of school-sponsored speech. In this chapter, we analyze the Hazelwood case and explore whether school officials can censor student off-campus speech pursuant to Hazelwood.

Chapter 10 discusses the last Supreme Court case to rule on student free speech rights. That case—Morse v. Frederick (2007)—established that schools can regulate student speech that advocates illegal drug use. We examine the case to determine if it gives school officials any authority to regulate off-campus speech.

Section 4 focuses on lower court decisions about off-campus speech. This section encompasses Chapters 11 and 12. In this section, we tell the story of students whose speeches have been muzzled by schools across the country. The section also highlights the uncertainty in the lower courts about the authority of schools over student off-campus speech. As evident in the various cases covered in this section, there is dissensus in the lower courts about the application of the United States Supreme Court’s on-campus student-speech precedents to off-campus student speech.

Chapter 11 explores lower court cases on student speech that occurs off-campus but offline. The chapter discusses these cases in three categories: speech directed at or against school officials (including teachers and school administrators) or the school; speech directed at or against students; and finally, student speech directed at or against persons not affiliated with the school.

Chapter 12 explores lower court cases on student online off-campus speech. The lower court cases we found dealing with online off-campus student fall into two categories: speech directed at or against school officials or the school; and speech directed at or against students. We discuss the cases under each of these categories, highlighting the lack of uniformity in the lower courts about how to address offline off-campus student speech.

Section 5 presents our reflections on the student off-campus speech jurisprudence. This section encompasses Chapters 13 through 16.

Chapter 13 assesses the current state of the off-campus student free speech jurisprudence. As Tuneski (2003) rightly pointed out, “existing precedents provide little guidance to school officials faced with the challenge of determining whether their sanctions are constitutionally permissible” (p. 158). Without an understanding of the current state of the jurisprudence, “schools run the risk of abridging protected student speech that lies beyond the scope of their authority” (Tuneski, p. 158). In this chapter, we try to bring some clarity to the muddled jurisprudence.

Chapter 14 examines critical state and federal requirements for the development of acceptable use policies. It also reviews the role of acceptable use policies in shaping the approach of schools toward student off-campus speech. It highlights components that should be included in acceptable use policies. It also reveals that school districts are increasingly adopting responsible use policies in order to address the student use of personal electronic devices.


Chapter 15 explores the role of state anti-bullying statutes in censorship of student off-campus speech. These statutes were enacted to reduce bullying incidents in schools. However, they have been expanded to include off-campus speech. We examine the details of a representative and comprehensive anti-bullying statute. We also discuss the relationship of the law to off-campus speech.

Chapter 16 presents our conclusions to the book. It discusses ideas for the future of the off-campus student-speech jurisprudence. In this chapter, we also present recommendations for schools and students on how they should navigate the jurisprudence.

REFERENCES


