PUBLIC SCHOOL DISCIPLINE FOR CREATING UNCENSORED ANONYMOUS INTERNET FORUMS

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I. INTRODUCTION

Three high school students from the suburbs of Seattle created their own little marketplace of ideas: a website on the Internet where friends and classmates could post messages on an electronic bulletin board and chat room, sharing with each other—and the world—their thoughts, opinions, wishes, speculations, and fears. This uncensored forum featured discussions of school work, extracurricular activities, politics, popular culture, and teenage angst, along with forays into gossip, coarse language, insults, and boasts about alcohol, drugs, and sex. School administrators became alarmed by the website, which they considered both offensive and a distraction from coursework. The student webmasters shut down their creation after an unknown person in the chat room intimated that the next day would be “doomsday,” prompting the Administration to close the building as a precaution. Instead of rewarding the student webmasters for their cooperation, the school initially decided to suspend them. Operating an uncensored marketplace of ideas on the Internet was, the school believed, a form of misconduct.

The three students—known here by their collective name, “The Eastlake Phantom”—were not the only high school students to face school discipline for creating online forums for their peers. In the spring of 2001, two high school seniors from Horace Greeley High School in Chappaqua, New York sponsored a website where participants posted sexual gossip about classmates. The school Administration suspended them for five days without a hearing and the local police charged them with second-degree harassment, even though they limited access to the website with a password they distributed only to friends.1 This phenomenon is likely to continue into the future, given the ease with which such sites can be assembled, even by users with little programming ability. At the simplest level, users can add their own topics of discussion to the lists available on commercial services like slambook.com or freevote.com.2 Users wishing to customize their interface can establish a website of their own design that includes chat room or bulletin board features obtained from one of many no-cost providers easily found on the Internet.3

The Phantom and his counterparts at other districts are hardly the first people to find themselves facing threats to their liberty and property4 for facilitating the anonymous speech of others. Their most famous precursor is John Peter Zenger, the 18th-century publisher whose trial for seditious libel in 1735 had a profound influence on political thought in the

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* As a staff attorney for the American Civil Liberties Union of Washington, the author had the pleasure of representing as clients the Internet users Karl Beidler, Nick Emmett, NoGuano, and the Eastlake Phantom. The views expressed in this Article are not necessarily those of his employer, but both agree with Justice Brandeis when he said the remedy for speech one dislikes is “more speech, not enforced silence.” Whitney v. Cal., 274 U.S. 357, 377 (1927).
2. Some New York students made headlines when they used the freevote.com service to vote on who was the “biggest ho” in their school system. See Benfer, supra note 1.
3. The names and locations of student-run Internet forums are fluid and the sites themselves are often short-lived. Currently available examples include http://www.lhstudents.com (Lake Highlands High School, Dallas TX) and http://www.highschoolnation.com (Lowell High School, San Francisco, CA). The creator of highschoolnation.com was temporarily suspended for creating his forum. See http://www.highschoolnation.com/editorials/thetruth.php.
4. Attendance at public school is a liberty or property interest that cannot be deprived without due process of law. Goss v. Lopez, 419 U.S. 565, 584 (1975).
British colonies of North America. Zenger is remembered chiefly as an early beneficiary of jury nullification, because a sympathetic panel found him not guilty to avoid punishing him under an unjust sedition law. Less often remembered is that Zenger was not the author of the seditious statements for which he was tried: like the Eastlake Phantom, he provided technology to disseminate the writings of others, who chose to remain anonymous.

Zenger was a financially struggling German immigrant in New York who made his living as a commercial printer. Like the Internet today, the regularly printed periodical was a relatively new medium in the early 18th century. Written political discourse was primarily carried out through posters, leaflets, or tracts prepared as needed. Zenger was delighted to have the regular income when in 1733 a group of local aristocrats opposed to newly-appointed Royal Governor William Cosby hired Zenger to print an opposition newspaper called the *New York Weekly Journal*. The editors began filling the *Journal* with unsigned articles attacking the Governor and his retinue as “petty-fogging knaves [who] deny us the rights of Englishmen.” One Cosby lackey was described as a dog “lately strayed from his kennel,” and a Cosby sheriff as a monkey “lately broke from his chain.” One stinging article lamented, “I think the law itself is at an end; we see . . . men’s deeds destroyed, juries arbitrarily displaced, new Courts erected without consent of the Legislature, . . . by which it seems to me, trials by juries are taken away when a Governor pleases.” The articles themselves were unsigned, but Zenger’s name appeared as printer.

Irritated with the attacks, Governor Cosby asked the local hangman to confiscate and burn all issues of the *Journal*, but the hangman refused. A grand jury twice declined to indict Zenger, and the Governor was forced to commence criminal proceedings by information. Zenger was arrested and held on exorbitant bail for eight months while awaiting trial. Zenger’s benefactors recruited William Hamilton of Philadelphia to represent Zenger after the court disbarred his first two lawyers for their too-vigorous defense. Hamilton was regarded as one of the best lawyers in the colonies, and his defense of Zenger cemented his reputation.

At the time, truth was not a defense to a charge of seditious libel. Any publication directed against the government or public officials could be deemed a criminal threat to public order. The libelous nature of a publication was for the court to decide, and the only question for the jury was whether the defendant had published it. Hamilton’s impassioned argument to the jury was a precursor to Dickens’ admonishment that “if the law supposes

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6. See supra note 5.
7. Glendon, supra note 5, at 49.
8. Sutherland, supra note 5, at 787. Glendon suggests Zenger had launched the *Journal* independently, but his financial backers quickly took over the writing and editing. Glendon, supra note 5, at 49.
9. DWYER, supra note 5, at 63.
10. DWYER, supra note 5, at 63.
11. Glendon, supra note 5, at 50.
12. Glendon, supra note 5, at 50; DWYER, supra note 5, at 64. In Sutherland’s version, Cosby’s seizure order was effectuated. Sutherland, supra note 5, at 787.
13. Glendon, supra note 5, at 50.
14. DWYER, supra note 5, at 64.
15. DWYER, supra note 5, at 64.
16. DWYER, supra note 5, at 64.
17. Glendon, supra note 5, at 48.
18. Glendon, supra note 5, at 48.
that, the law is a ass.”19 The jury agreed, finding Zenger not guilty of printing the Journal, even though his name appeared on every issue. The verdict gained great fame throughout the colonies, and Zenger became a folk hero. Gouverneur Morris, one of the Framers of the Constitution, called the Zenger trial “the morning star of liberty” in the colonies.20 Later commentators consider it “[o]ne of the most significant events to shape American thinking on freedom of speech. . . .”21

Like Zenger’s New York Weekly Journal, the Eastlake Phantom website mixed serious-minded social and political commentary with cheerfully vulgar insults. But unlike Zenger, the Phantom had no advance knowledge of what others would use his technology to express. This Article explores whether school administrators—even ones with far better motives than Governor Cosby—should be allowed to punish students for creating an uncensored Internet forum for student speech in a society that congratulates itself for its commitment to freedom of expression. Part II describes what happened at Eastlake High School during the fall semester of 1999, with an eye toward the social context of moral panic over teenage Internet use. Part III explores the still-evolving constitutional limits on public school administrators’ ability to punish students for speech at school, while Part IV questions whether the standards for punishment of on-campus speech should apply to student speech on the Internet. Since the Phantom was disciplined not for his own speech, but for facilitating speech by others, Part V discusses liability for Internet services that host other people’s content. Part VI considers anonymity on the Internet, both for adults and high school students.

19. CHARLES DICKENS, OLIVER TWIST 520 (Dodd, Mead & Co. 1941) (1838).
20. DWYER, supra note 5, at 69.
21. SMOLLA, supra note 5, § 1:3.