Do students & teachers have a constitutional right to express themselves through social media outside the school day?

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Social media has created 3 major problems for schools:

- Bullying and harassment of classmates through online attacks on Facebook, YouTube, Myspace, etc.
- Sophomoric, disrespectful, an sometimes libelous insults of school teachers and administrators that undermine morale and school officials' authority
- Sexting—which has sometimes causes student victims to become so distraught that they have committed suicide


Ugly
Skank
Hoe
Whore
Gross
Stupid
Idiot
Fat

Sexting

Phoebe Prince, 15-year old high school student, hanged herself in January 2010 in response to cyberbullying

6 teenagers charged with criminal offenses, including felony violation of civil rights with bodily injury.

- School district accused of not responding forcibly enough to harassment.
- Two students pled guilty to misdemeanors and received probation.

Beussink v. Woodland R-IV School District (E.D. Mo. 1998)

- Brandon Beussink created homepage that was highly critical of the administration at Woodland High School. He used vulgar language to convey his opinion regarding the teachers, the principal and the school's own homepage.
- Beussink's homepage also invited readers to contact the school principal and communicate their opinions regarding Woodland High School. Beussink's homepage also contained a hyper-link that allowed a reader to access the school's homepage from Beussink's homepage.

Beussink case: Friend shows home page to computer teacher

- Beussink allowed a friend, Amanda Brown, to use his home **computer**. While using Beussink's home **computer**, Brown saw Beussink's homepage.
- Ms. Brown later had an argument with Beussink. Ms. Brown testified that she wanted to retaliate against Beussink because she was angry with him.
- On February 17, 1998 Amanda Brown, purposefully accessed Beussink's homepage during the second hour of school and showed it to Delma Ferrell, the **computer** teacher at Woodland High School.

Beussink case: Principal Yancey Poorman responds

Yancey Poorman

- Poorman suspends Beussink for 5 days.
- Then raises suspension to 10 days.
- Beussink already failing 2 of his classes and he had 8.5 days of unexcused absences.
- Missed days caused Beussink to flunk all his classes. (One letter grade drop for each unexcused absence after 10.)

Beussink case: Court grants injunction

- Beussink sought an injunction to prevent the 10-day suspension, and the court granted it.
- "Beussink's homepage **did not materially and substantially interfere with school discipline**. Further, there was no evidence to support a particularized reasonable fear of such interference. Beussink was disciplined for engaging in speech that this Court believes may be constitutionally protected speech."
- "At first blush it may seem that the public's interest in orderly schools is best served by allowing the Woodland School District to discipline Beussink in whatever manner the school district deems appropriate. Further inquiry into the purpose of the First Amendment however, shows otherwise."
- One of the core functions of free speech is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging.
- Indeed, it is provocative and challenging speech, like Beussink's, which is most in need of the protections of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure. It is unpopular speech which needs the protection of the First Amendment. The First Amendment was designed for this very purpose.

Beussink: Court comes down on side of free speech

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Doe v. Pulaski County Special Sch. Dist. (8th Cir. 2002)

- Doe, an 8th grader, wrote a letter, which he showed to a friend, describing how he would rape, sodomize, and murder K.G., his former girl friend.
- Without Doe's knowledge, his friend obtained the letter and showed it to K.G. A friend notified school authorities and Doe was expelled.
- He sued, alleging a violation of his First Amendment rights, and a trial court reinstated him, finding that the letter did not constitute a "true threat."

J.C. v. Beverly Hills Unified Sch. Dist. (C.D. Cal. 201)

- J.C. created video recording her friends making disparaging remarks about C.C., a classmate, calling her a "slut," "spoiled," and "the ugliest piece of shit I've ever seen in my whole life."
- J.C. posts the video ofYouTube and it is viewed by about 15 people and about 90 hits. J.C. tells C.C. learns about the video. C.C.'s mother conveyed to her daughter that the site should be left onYouTube so it could be shown to school authorities.

J.C. v. Beverly Hills Unified Sch. Dist. (C.D. Cal. 2010)

- J.C. had a prior history of videotaping teachers at the School. In fact, J.C. was suspended for secretly videotaping her teachers, and was told not to make further videotapes on campus.
- After conducing an investigation, the school suspends J.C. for 2 days, and she sues.
- J.C. argued that school had no authority to discipline her for off-campus speech, but the court disagrees.
- Under *Tinker* and lower court rulings, schools can censor student speech that occurs off campus if it creates a substantial disruption to the school environment or school authorities reasonably perceive that the speech will disrupt the school environment.

J.C. v. Beverly Hills Unified Sch. Dist. (C.D. Cal. 2010)

- Court ruled that *Bethel* doesn't apply. Although J.C.s YouTube video was profane, schools cannot regulate a student's off-campus speech just because it is profane or vulgar.
- Regarding *Tinker's* substantial disruption test, the court said that the fact that students discussed J.C.'s video on campus does not constitute a disruption.
- Court considered disruption to be *de minimis*. School had to address the concerns of an upset parent and a student who temporarily refused to go to class, and five students missed some undetermined portion of their classes due to investigation. This does not rise to the level of a substantial disruption.
- J.C.'s video was not violent or threatening.

J.C. v. Beverly Hills Unified Sch. Dist. (C.D. Cal. 2010)

- School authorities "repeatedly stress that C.C. and her classmates were only 13 years old, and that their emotional maturity is clearly limited. [T]hey contend that it is not unusual for thirteen-year-olds to "form cliques, nor for disagreements between such cliques to erupt in violence."Thus, the School contends that it should be accorded some deference to decide how best to protect the emotional well-being of its young students. The Court in large part agrees. Indeed, no one could seriously challenge that thirteen-year-olds often say mean-spirited things about one another, or that a teenager likely will weather a verbal attack less ably than an adult. The Court accepts that C.C. was upset, even hysterical, about the YouTube video, and that the School's only goal was to console C.C. and to resolve the situation as quickly as possible.

J.C. v. Beverly Hills Unified Sch. Dist. (C.D. Cal. 2010)

- Unfortunately for the School, good intentions do not suffice here. Defendants have failed to present sufficient evidence that the YouTube video caused a substantial disruption to school activity on May 28, 2008. Further, Defendants' fear that a substantial disruption was likely to occur simply is not supported by the facts. 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.

Layshock v. Hermitage Sch. Dist. (3d Cir. 2011)

- Justin Layshock, age 17, created parody profile of school principal on MySpace using grandmother's computer. Answered profile questions as follows:
- Birthday: too drunk to remember
- Are you a health freak: big steroid freak
- In the past month have you smoked: big blunt[3]
- In the past month have you been on pills: big pills
- In the past month have you gone Skinny Dipping: big lake, not big dick
- In the past month have you Stolen Anything: big keg
- Ever been drunk: big number of times
- Ever been called a Tease: big whore
- Ever been Beaten up: big fag
- Ever Shoplifted: big bag of kmart
- Number of Drugs I have taken: big

Layshock v. Hermitage Sch. Dist.

- Received 10-day suspension and placed in alternative education setting for remainder of the school year; Also banned from all extracurricular activities and was not allowed to participate in his graduation ceremony.
- Layshock apologized. Was one of 4 students who created similar profiles of the principal. Only student to apologize. Only student punished.
- Third Circuit, sitting en banc, ruled that school violated Lay shock's First Amendment rights. School could not punish Layshock under Bethel for vulgarity since expression took place off school grounds.

Layshock v. Hermitage Sch. Dist. (3d Cir. 2011)

- "It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent, and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.

Snyder v. Blue Mountain Sch. Dist. (3d Cir. 2011)

- J.S., an 8th grader, created MySpace profile of principal. Used principal's photo but not his name.
- "The profile was presented as a self-portrayal of a bisexual Alabama middle school principal named "M–Hoe."The profile contained crude content and vulgar language, ranging from nonsense and juvenile humor to profanity and shameful personal attacks aimed at the principal and his family." For instance, the profile lists M–Hoe's general interests as including "hitting on students and their parents."

Snyder v. Blue Mountain Sch. Dist. (3d Cir. 2011)

- "The profile was so outrageous that no one could have taken it seriously, and no one did. Thus, it was clearly not reasonably foreseeable that J.S.'s speech would create a substantial disruption or material interference in school . . ."
- "J.S. did not . . .intend for the speech to reach the school—in fact, she took specific steps to make the profile "private" so that only her friends could access it."
- "Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school."

Sagehorn v. Indep. Sch. Dist. No. 728 (D. Minn. 2015)

- In January, 2014, someone posted anonymous message on a website entitled "Roger Confession": "did @R_Sagehorn3 actually make out with [name of female teacher at Rogers High School]?" Sagehorn, a high-school senior, by posting "actually yes."
- For this offense, school authorities suspended Sagehorn, and allegedly threatened him with expulsion. Fearing an expulsion would cause North Dakota State University to rescind its admission offer, Sagehorn withdrew from school. School officials referred the incident to the local police; and the police chief reputedly said publicly that Sagehorn's brief post might constitute a crime.

Sagehorn v. Indep. Sch. Dist. No. 728 (D.Minn.2015)

- Sagehorn sued, alleging violation of his First Amendment rights and right to due process.
- Court rejected school's argument that 1)text was obscene and thus not protected, 2) that it was vulgar and could be censored under *Bethel*, and that 3) the text could lead to substantial disruption at school, and could be censored under *Tinker*.
- Court ruled that Sagehorn's constitutional right to text "actually yes" was well established.

Kowalski v. Berkeley County Sch. Dist. (4th Cir. 2011)

- Kowalski, a senior, created a discussion group webpage on MySpace.com with the heading "S.A.S.H." Under the webpage's title, she posted the statement, "No No Herpes, We don't want no herpes." She claimed that "S.A.S.H." was an acronym for "Students Against Sluts Herpes," but a classmate stated that it was an acronym for "Students Against Shay's Herpes," referring to another student. Webpage was widely viewed by other students.
- Another student (named Parsons) uploaded a photo of himself and friend holding their noses while displaying a sign that read, "Shay Has Herpes," referring to Shay N. He also uploaded to the "S.A.S.H." webpage two additional photographs of Shay N., which he edited. In the first, he had drawn red dots on Shay N.'s face to simulate herpes and added a sign near her pelvic region, that read, "Warning: Enter at your own risk." In the second photograph, he captioned Shay N.'s face with a sign that read, "portrait of a whore."

Kowalski v. Berkeley County Sch. Dist. (4th Cir. 2011)

- Shay's parents filed harassment complaint with school and provided printout of offensive website.
- School investigated and concluded Kowalski had created a "hate website." Officials suspended her for 5 days, gave her 90-day social suspension, and removed her from cheerleading squad for remainder of year.

Kowalski v. Berkeley County Sch. Dist. (4th Cir. 2011)

- School Policy defined "Bullying, Harassment and/or Intimidation" as "any intentional gesture, or any intentional written, verbal or physical act that"

  1. A reasonable person under the circumstances should know will have the effect of:

  a. Harming a student or staff member;. . .

  2. Is sufficiently inappropriate, severe, persistent, or pervasive that it creates an intimidating, threatening or abusive educational environment for a student.

- Policy also said: "All students enrolled in Berkeley County public schools shall behave in a safe manner that promotes a school environment that is nurturing, orderly, safe, and conducive to learning and personal-social development." It also committed students to "help create an atmosphere free from bullying, intimidation and harassment" and to "treat others with respect" and "demonstrate compassion and caring."

Kowalski v. Berkeley County Sch. Dist. (4th Cir. 2011)

- "We are confident that Kowalski's speech caused the interference and disruption described in ***Tinker*** as being immune from First Amendment protection. The "S.A.S.H." webpage functioned as a platform for Kowalski and her friends to direct verbal attacks towards [her]classmate . . . . This is not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about "habits and manners of civility" or the "fundamental values necessary to the maintenance of a democratic political system." (internal quotation marks and citations omitted).

Kowalski v. Berkeley County Sch. Dist. (4th Cir. 2011)

- "Speech materially and substantially disruptive in that it "interfer[ed] … with the schools' work [and] colli[ded] with the rights of other students to be secure and to be let alone."
- "Given the targeted, defamatory nature of Kowalski's speech, aimed at a fellow classmate, it created "actual or nascent" substantial disorder and disruption in the school. First, the creation of the "S.A.S.H." group forced Shay N. to miss school in order to avoid further abuse. Moreover, had the school not intervened, the potential for continuing and more serious harassment of Shay N. as well as other students was real. Experience suggests that unpunished misbehavior can have a snowballing effect, in some cases resulting in "copycat" efforts by other students or in retaliation for the initial harassment."
- "[A]t bottom, the conduct was indisputably harassing and bullying, in violation of [the school's] regulations prohibiting such conduct."

Kowalski v. Berkeley County Sch. Dist. (4th Cir. 2011)

- "Rather than respond constructively to the school's efforts to bring order and provide a lesson following the incident, Kowalski has rejected those efforts and sued school authorities for damages and other relief. Regretfully, she yet fails to see that such harassment and bullying is inappropriate and hurtful and that it must be taken seriously by school administrators in order to preserve an appropriate pedagogical environment. Indeed, school administrators *are* becoming increasingly alarmed by the phenomenon, and the events in this case are but one example of such bullying and school administrators' efforts to contain it. Suffice it to hold here that, where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem."

Bell v. Itawamba County Sch. Bd. (5th Cir. 2015)

- Bell, high school senior. posted rap recording on Facebook that accused two high school coaches of having sexual affairs with student.
- Recording contained threats against the coaches:
  --"I'm going to hit you with my rueger"
  --"going to get a pistol down your mouth"
- School authorities confront him about the rap recording. He then posts the recording on YouTube
- He's given a 7-day suspension, placed in alternative school for remainder of grading term (about 6 weeks) and banned from participating in school functions.

Bell v. Itawamba County Sch. Bd. (5th Cir. 2015)

- Bell sues and federal trial court rules for school board. Court ruled rap song constituted threat and intimidation of teachers and created "substantial disruption" at school under *Tinker* standard
- On appeal, 3-judge panel of 5th Circuit reversed.
- On *en banc* review, 5th Circuit (15 judges)upheld the trial court, ruling that rap recording created a substantial disruption, making it unnecessary whether song constituted "true threat."

Bell v. Itawamba County Sch. Bd. (5th Cir. 2015)

- "It . . . goes without saying that threatening, harassing, and intimidating a teacher impedes, if not destroys, the ability to educate. It disrupts, if not destroys, the discipline necessary for an environment in which education can take place. In addition, it encourages and incites other students to engage in similar disruptive conduct. Moreover, it can even cause a teacher to leave that profession. In sum, it disrupts, if not destroys, the very mission for which schools exist—to educate."
- "[S]chool board reasonably could have forecast a substantial disruption at school based on threatening, intimidating, and harassing language in Bell's rap recording."

Teachers and Social Media

- ***Craig v. Rich Township High School District 227***, 736 F.3d 1110 (7th Cir. 2013).
- "[W]e can easily see how female students may feel uncomfortable seeking advice from Craig given his professed inability to refrain from sexualizing females. . . . Knowing Craig's tendency to objectify women, [the school board] could reasonably anticipate that some female students would feel uncomfortable reaching out to Craig for advice. Indeed, some students may forego receiving the school's counseling services entirely rather than take the risk that Craig would not view them as a person but instead as an object." (p. 1120)

Craig v. Rich Township High School District 227 (continued)

- In summary, the court ruled, the school district's interests "in protecting the integrity of counseling services at Rich Central dwarfed Craig's interest in publishing 'It's Her Fault.'" Craig's speech interest was entitled to only minimal weight when compared to the school board's interest "in preventing a likely disruption of their guidance counseling services" (p. 1121). Thus, the school board's decision to terminate Craig's employment did not offend the First Amendment.

San Diego Unified Sch. Dist. v. Commission on Professional Competence (Cal. Ct. App. 2011) (the Lampedusa case).

- Craigslist ad titled: "Horned up all weekend and need release."
- "While Lampedusa's conduct may not have been blameworthy in the sense he was seeking a date, "it was extremely blameworthy in the pornographic and obscene manner that he did so."
- California appellate court concluded, "The public posting on a Web site of pornographic photos and obscene text constitute immoral conduct in that it evidences 'indecency' and 'moral indifference'" (p. 329).
- The appellate court instructed the lower court to order the Commission to render a decision finding that Lampedusa's conduct constituted grounds for dismissal based on "evident unfitness to teach" and "immoral conduct" (p. 329).

Zellner v. Herrick (7th Cir. 2011)

- Teacher briefly accessed pornography on his work computer on a weekend. School fires him, and he claims retaliation for union activities.
- "Zellner violated the District's Policy by viewing pornographic images on his school computer, the violation had nothing to do with his union activities, and the School Board found that this violation should result in termination."
- Teacher admitted that he had violated school policy, and school board showed it would have fired him for this infraction even if he had not been involved in union activities.

Teachers off-campus use of social media

- Constitutional analysis under the *Pickering* balancing test
- Application of standards of professionalism to teacher's social-media communications.
- Few cases so far have involved teacher's use of social media to communicate a serious social or political issue.
- So far, school boards have won most of the lawsuits involving discipline of teachers for inappropriate use of social media.

Conclusions

- School can't punish students for offensive speech on social media that takes place away from school unless speech creates substantial disruption in school under *Tinker* standard or is a "true threat."
- *Bethel* does not permit school to punish students for off-campus speech delivered on social media simply because the speech is vulgar.
- Private lawsuits for defamation are likely to fail.
- Schools should respond to social media that rises to level of cyberbullying or harassment of a student since such behavior interferes with victim's ability to learn and is disruptive to the learning process as set forth in *Kowalski*. Under *Bell v. Itawamba County School Board*, schools can discipline students for speech on social media that threatens a school employee and that school officials reasonably believe will cause a substantial disruption at school.
- Teachers' social media communications are judged under *Pickering* or traditional professional conduct standards.