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

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Tinker v. Des Moines Indep. Community School District (1969)

- Students don't lose right to free speech at school house gate.
- School authorities can't deny students right to free speech out of "mere desire to avoid . . . unpleasantness"
- To ban student speech, authorities must reasonably anticipate "material & substantial disruption" or speech must "impinge on rights of other students"

Bethel School District v. Fraser (1986)

- Schools can insist on civil discourse
- Schools can ban student speech that is lewd, profane, indecent, offensive, vulgar, or sexually explicit
- School rules of conduct need not be as detailed as criminal code.

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

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, which contains negative references to school principal.
- 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."
- According to court: 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, court writes, 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.

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."

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

- On appeal, 8th Circuit, sitting en banc, reverses. Court defines "true threat" a statement that a reasonable recipient would interpret as a serious expression of an intent to harm or cause injury to another.
- Court concludes that Doe ***intended to communicate*** the threat to K.G. Doe allowed a friend to read the letter and he discussed the letter with K.G.
- K.G. reasonably interpreted the letter as a "true threat."

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

- The letter exhibited J.M.'s pronounced, contemptuous and depraved hate for K.G. J.M. referred to or described K.G. as a "bitch," "slut," . . . and a "whore" over 80 times in only four pages. He used the f-word no fewer than ninety times and spoke frequently in the letter of his wish to sodomize, rape, and kill K.G. Doe "expressed in unconditional terms, that K.G. should not go to sleep because he would be lying under her bed waiting to kill her with a knife.[3] Most, if not all, normal thirteen-year-old girls (and probably most reasonable adults) would be frightened by the message and tone of J.M.'s letter and would fear for their physical well-being if they received the same letter."

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 thes chool 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 Layshock'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.
- School argued that 1)text was obscene and thus not protected, 2) that it was vulgar and could be censored under Tinker, and that 3) the text could lead to substantial disruption at school, and could be censored under *Tinker*.
- Court ruled discipline could not be justified under *Tinker* or *Bethel* and that a reasonable school administrator would have known that.

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.

A.N. v. Upper Perkiomen Sch. Dist. (E.D. Pa. 2017)

- Student creates "mashup" video and posts on Instagram.
- Mixture of public service video inspired by Sandy Hook and rap song with violent message.

  You'd better run, out run my gun

  All other kids with pumped up kicks

  You'd better run, better run, faster tan my bullet

  All the other kids with the pumped up kicks

- A.N. created a private instagram account and posted the mash-up anonymously with an unknown child's picture instead of photo of himself.

A.N. v. Upper Perkiomen Sch. Dist. (E.D. Pa. 2017)

- Students expressed concern. One asked whether it was a "legi school shooting threat."
- Post remained up for 2 hours and was viewed 45 times before A.N. took it down.
- Parent contacted school principal, said not sure how to interpret the post. 'see you next year if you are still alive" and "see you tomorrow" messages cryptic.
- Parent called state police around 8:30 & police arrived at parent's home around midnight.
- Police called principal at 2 AM. Principal called superintendent.
- Superintendent was not able to identify person who made post and decided to close the school and cancelled bus service.
- Police went to A.N.'s house and confiscated cell phone and computer.

A.N. v. Upper Perkiomen Sch. Dist. (E.D. Pa. 2017)

- Police decided incident did not constitute a crime and closed case.
- School suspended A.N., banning him from school and school functions and became expulsion proceedings. A.N.'s parents filed suit and sought injunction to stop the suspension.

A.N. v. Upper Perkiomen Sch. Dist. (E.D. Pa. 2017)

- Court applied the Tinker test and cited 3rd Circuit decision ruling that school cannot punish student for off-campus expression unless causes an actual disruption or school authorities reasonably forecast substantial disruption.
- Court concludes that A.N.'s post caused an actual disruption in school environment. "Students, parents, and school officials reacted. Police became involved. ..The morning after the post, the school district was closed, buses in the school district were cancelled, and school officials messaged all schools and parents of School District students."
- Even if there hadn't been disruption, school officials reasonably forecast that the post would cause a disruption.

Levy v. Mahanoy Area Sch. Dist. (M.D. Pa. 2017)

- High school cheerleader kicked off squad for posting profane image and language on Snap.
- School had cheerleader policy that stated:

"Good sportsmanship will be enforced, this includes foul language and inappropriate gestures . . There will be toleration of any negative information regarding cheerleading, cheerleaders, or coaches placed on the internet."

Levy v. Mahanoy Area Sch. Dist. (M,D. Pa. 2017)

- Student posted Snapchat photo of herself and friend holding up their middle fingers with the text stating "f*ck scool f*ck softball f*ck cheer f*ck everything" superimposed on image. Post did not mention or mention the high school. Image taken at local convenience store on weekend. Snap shared by friends and not available to general public.

Levy v. Mahanoy Area Sch. Dist. (M,D. Pa. 2017)

- Court enjoins suspension from cheer squad:
- "[A] student's potentially lewd or profane speech created off-campus must not subject that student to punishment by a public school district."
- *Bethel* prohibition against lewd speech does not apply to off-campus speech.
- Court relied on 3rd Circuit's *Layshock* and *Blue Mountain* decisions.
- District unsuccessfully argued student had no constitutionally protected interest in being a cheerleader.

Bell v. Itawamba School Dist. (5th Cir. 2015)

- Student posted rap song on Facebook containing threatening language against two coaches and insinuating they were having sexual relations with students.
- School authorities confronted student about the rap message. Student then posted the rap song on Youtube.
- Student suspended for 7 days and then sent to alternative school for remainder of term. Also prohibited him from participating in extracurricular activities.
- Student sued. District prevailed on summary judgment motion at trial court. Student appealed to Fifth Circuit panel, which reversed trial court decision in divided opinion. Case then decided by Fifth Circuit sitting *en banc*, which upheld the trial court.

Bell v. Itawamba School Dist. (5th Cir. 2015)

- Fifth Circuit described rap song as "an incredibly profane and vulgar rap recording" and identified four passages of threatening language at 2 coaches:
- 1. "betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack";
- 2. "Run up on T–Bizzle / I'm going to hit you with my rueger";
- 3. "you fucking with the wrong one / going to get a pistol down your mouth / Boww"; and
- 4. "middle fingers up if you want to cap that nigga / middle fingers up / he get no mercy nigga".
- Court said Bell's use of "rueger" [sic] references a firearm manufactured by Sturm, Ruger & Co.; to "cap" someone is slang for "shoot".

Bell v. Itawamba School Dist. (5th Cir. 2015)

Court held that *Tinker* analysis applies to off-campus speech that causes a substantial disruption or that school officials reasonably forecast to cause a substantial disruption.

"[T]he manner in which [Bell] voiced his concern—with threatening, intimidating, and harassing language—must be taken seriously by school officials, and reasonably could be forecast by them to cause a substantial disruption."

Bell v. Itawamba School Dist. (5th Cir. 2015)

- **"It . . . goes without saying that threatening, harassing, and intimidating a teacher impedes, if not destroys, the ability to teach; it 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."**

Bell decision not in harmony with Third Circuit's *Snyder* and *Layshock* opinions.

- **Put succinctly, "with near-constant student access to social networking sites on and off campus, when offensive and malicious speech is directed at school officials and disseminated online to the student body, it is reasonable to anticipate an impact on the classroom environment" (citing dissent in *Snyder*).**

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 vulgar speech delivered on social media.
- Involve police if social media communication can reasonably be interpreted as a threat of violence.
- Discipline should be appropriate and restrained.
- 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 as set forth in *Kowalski*.
- Courts generally rule in favor of school districts have off-campus speech contains any suggestion of violence.