Do students have a constitutional right to free speech when they are off campus?

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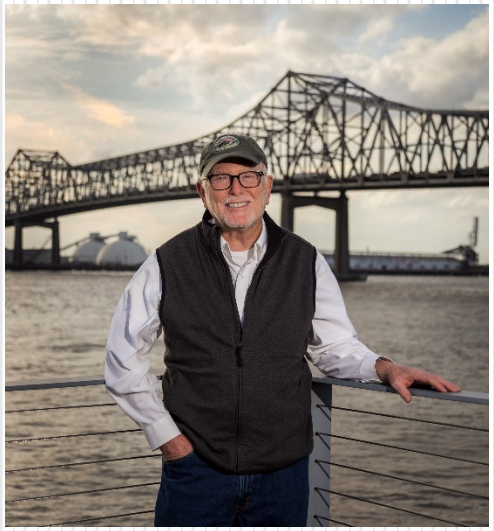

Social media has created 3 major problems for schools:

- Bullying and harassment of classmates through online attacks on Facebook, YouTube, Myspace, Snapchat, TikTok, etc.
- Sophomoric, disrespectful, and sometimes libelous insults of school teachers and administrators that undermine morale and school officials' authority
- Sexting—which has sometimes caused 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.
- Student called attention to website while at 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: Court comes down on side of free speech

- 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.

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 ex-girlfriend. 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. [Doe] 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."

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."

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.

Hustler Magazine v. Falwell (U.S. 1988)

- Hustler published parody of a liquor ad that suggested that Falwell had had sex with his mother. Falwell sued for defamation and intentional infliction of emotional distress.
- Jury found the parody to be satire that no reasonable person would believe to be true. Thus, Falwell could not recover for defamation. The jury awarded Falwell $150,000 for emotional distress.
- On appeal, the Supreme Court ruled that Falwell was a public figure who could not recover for emotional distress unless he could should show that Hustler had made a false statement about him with malice. Since jury ruled the ad was not defamatory, Falwell could not prevail. The advertisement, although reprehensible was protected speech.

Jerry Falwell talks about his first time.

CAMPARI You'll never forget your first time.

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

- In 201, Bell, high school senior. posted rap recording on Facebook that accused two high school coaches of having sexual affairs with a 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 an alternative school for the remainder of the 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."

B.L. v. Mahanoy S.D (U.S. 2021)

- Brandi Levy was not selected for Varsity Cheerleading Squad.
- She posted an image on Snapchat showing her with middle finger raised & this caption:
- F-ck school, fuck softball f-ck cheer f-ck everything

B.L. v. Mahanoy School District

- **"After discussing the matter with the school principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules. As a result, the coaches suspended B. L. from the junior varsity cheerleading squad for the upcoming year."**
- **"B. L.'s subsequent apologies did not move school officials. The school's athletic director, principal, superintendent, and school board, all affirmed B. L.'s suspension from the team. In response, B. L., together with her parents, filed this lawsuit in Federal District Court."**
- **Brandi sued and District court issued an injunction against the school district, which the Third Circuit upheld.**
- **"Because B. L.'s speech took place off campus, the panel concluded that the *Tinker* standard did not apply and the school consequently could not discipline B. L. for engaging in a form of pure speech.**

B.L. v. Mahanoy School District

- **“Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances. The parties’ briefs, and those of *amici*, list several types of off-campus behavior that may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.”**

B.L. v. Mahanoy S.D.

- **Thus, we do not now set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.**

Schools seldom stand in loco parentis when kids are out of school

First, a school, in relation to off-campus speech, will rarely stand *in loco parentis*. The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.

Courts are skeptical of regulating students' off-campus speech—which has the potential to censure all of a student's speech.

Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all.

Schools are nurseries of democracy

- *Third*, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. **America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it."**

In Loco Parentis will seldom justify censoring a student's off-campus speech

"*First*, a school, in relation to off-campus speech, will rarely stand *in loco parentis*. The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility."

B.L.: Vulgarity did not justify discipline

- ***First*, we consider the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community. . . . The strength of this anti-vulgarity interest is weakened considerably by the fact that B. L. spoke outside the school on her own time.** Moreover, the vulgarity in B. L.'s posts encompassed a message, an expression of B. L.'s irritation with, and criticism of, the school and cheerleading communities. Further, the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom. **Together, these facts convince us that the school's interest in teaching good manners is not sufficient, in this case, to overcome B. L.'s interest in free expression.**

Brandi's speech was not disruptive

- *Second*, the school argues that it was trying to prevent disruption, if not within the classroom, then within the bounds of a school-sponsored extracurricular activity. **But we can find no evidence in the record of the sort of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action.**

Damage to morale doesn't justify censoring Brandi's speech

Third, the school presented some evidence that expresses (at least indirectly) a concern for team morale . . . It might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary. . . ."We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated."

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."
- The *Bethel* decision does not justify school authorities in punishing students for off-campus vulgar speech delivered on social media.
- School authorities who file private lawsuits for defamation against a student for off-campus posting on so ial media are not likely to prevail in court.
- 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*.
- Punishment must be reasonable and not unduly harsh.