

**Social Media and School Shootings:
Students' First Amendment Rights in the Digital Age**

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Appellate courts have issued conflicting decisions about whether school officials may discipline students over social media content posted outside school hours and off campus. However, recent school shootings have given rise to increasing demands that schools monitor social media to identify students who pose a threat to campus safety. How should we balance the potential benefits of such surveillance against the damage to students' rights, including the right to free speech?

Many of the responses to the Parkland shooting seem to be punitive, rather than preventive. A national School Safety Commission, for example, recommended doing away with 2014 guidelines from the Department of Education and the Justice Department urging schools to reduce the number of suspensions, based on findings that students of color were being disciplined more severely than their white counterparts for the same offenses. After Parkland, some parents in the district where the shooting happened demanded that Broward County public schools rethink a diversionary program aimed at reducing suspensions and increasing the graduation rates of African-American students in the district. One Parkland parent elected to the Broward County School Board in the wake of the shootings went so far as to move that the Board fire the African-American superintendent who had instituted the program, sparking a debate that seemed to divide largely along racial lines.

Monitoring social media or encouraging students to report disturbing social media postings by their classmates could be a useful tool in identifying students who are in crisis or in need of help. However, if such surveillance is merely a basis for discipline, including suspension or expulsion, it may only serve to make the problem of school violence worse. Moreover, the difficulty of identifying true threats and

distinguishing them from adolescent hyperbole makes it likely that cultural differences in an increasingly diverse student population may contribute to already serious disparities in discipline of students of color.

This presentation will enable symposium participants to summarize legal decisions about students' First Amendment rights on social media, to explain research on predicting future violence based on social media content, and to assess the benefits and drawbacks of allowing school officials to exercise control over student social media in preventing campus violence. It is based in part on an article by the same authors published in 2018 in the American Journal of Forensic Psychology.

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Cases

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)

In deciding whether a public school had violated students' First Amendment rights by suspending them for wearing black armbands to school in silent protest of the Vietnam war, the Supreme Court famously decreed that students “do not shed their Constitutional rights to freedom of speech and expression at the schoolhouse gate.” Fifty years later, this decision still stands as the foundation precedent on which other decisions involving student First Amendment rights are based.

The decision can be seen from one of two perspectives—as a case primarily about setting limits on student speech or as a case primarily about setting limits on school administrators' authority. As Justices Black and Harlan quite vehemently—and correctly--argued in their dissents in *Tinker*, the majority focused on the limits of administrators' authority. Justice Harlan would have started instead from the premise that school administrators have wide-reaching authority to set limits on student speech and “cast upon [the students] the burden of showing that a particular school measure was motivated by other than legitimate school concerns. . . .” However, Justice Fortas, writing for the majority, started from the premise that students have the right to engage in free speech and put the burden on the school district to prove “interference, actual or nascent, with the schools' work or collision with the rights of other students to be secure and to be let alone”

Justice Fortas, writing for the majority, took a broad view of the expressive rights of school children: “Students in school, as well as out of school, are ‘persons’ under our Constitution. They are possessed of fundamental rights which the state must respect.”

School officials may have “comprehensive authority. . . to prescribe and control *conduct* in the schools.” However, school officials who suspended students for “silent, passive expression of opinion,” had overstepped the bounds of their authority.

***Goss v. Lopez*, 419 U.S. 565 (1975)**

The Supreme Court has set the standards for due process in school disciplinary cases quite low: students must be given oral or written notice of the allegations against them, an explanation of the factual basis for the charges and of the evidence in support of the charges, and the opportunity to respond to the charges. However, unlike a criminal trial, students have no right to speak with an attorney, or even a parent, before responding to the charges. Disciplinary decisions often are made within minutes or hours of the students’ being given notice of the allegations.

***Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986)**

Chief Justice Warren Burger, writing for the majority, agreed that student Matthew Fraser could be suspended for giving what school officials characterized as a “lewd” nominating speech for a candidate in a student government election. Fraser had employed a double entendre to extol his candidate’s “firmness”: “He is a man who is firm, he’s firm in his pants, firm in his shirt, his character is firm—but most of all his belief in you, the students of Bethel, is firm.” The Supreme Court has ruled that the government may prohibit or punish obscene speech, but Fraser’s speech was not legally “obscene.” Fraser could never have been prohibited by government from using the same words in a stand-up comedy routine in a theater or nightclub. However, the Court in *Bethel* ruled that society has an interest in teaching students to use socially appropriate speech. Therefore, it was constitutional for public school officials to discipline this student for using “an elaborate, graphic, and explicit sexual metaphor” during a school assembly. The Court emphasized that “the constitutional rights of students *at public school* are not automatically coextensive with the rights of adults” (emphasis added). Even so, it was clear that the Court was talking about the right of school officials to discipline students for what they said *at school*—not after school hours or at other physical locations.

***Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)**

The Supreme Court held that school administrators did not violate students’ First Amendment rights by ordering that stories about divorce and teen pregnancies be removed from the school newspaper as inappropriate topics. If viewed simply as a case holding that school officials have the right to determine what will be taught in the curriculum, *Hazelwood School District v. Kuhlmeier* is not all that radical. The student newspaper was produced on campus, as part of a class, using school resources.

Viewed from this perspective, telling students they must write about a certain assigned subject, rather than about a topic of their own choosing, was hardly out of the ordinary. However, students in journalism classes are studying to be journalists in a free society that protects freedom of the press in the Bill of Rights. That means learning to work in an environment free of government censorship and prior restraint. Both *Bethel v. Fraser* and *Hazelwood* were steps back from *Tinker*. In neither case were students being disciplined for causing substantial and material disruption to school operations—but merely for expression that was deemed inappropriate in school. However, neither decision suggested that school officials could decide whether student speech was appropriate outside of school hours or off school grounds. The Court noted in *Hazelwood* that the rights of students were allowed to be restricted “in light of the special characteristics of the school environment.”

***Morse v. Frederick*, 551 U.S. 393 (2007)**

In its 2007 decision in *Morse v. Frederick* the Supreme Court allowed school officials to discipline a student for speech outside *Tinker’s* metaphorical schoolhouse gate. The Court held that school officials did not violate the First Amendment by suspending a student based on speech that occurred off the school grounds during what the school considered a “school-sanctioned and school-supervised” activity. Public high school students in Juneau, Alaska had been released from classes to watch the Olympic torch pass by. The torch run was not a school-sponsored activity, but teachers and administrators were on hand, standing outside the school. On the sidewalk across the street from school, 18-year-old senior Joseph Frederick and his friends unfurled a paper banner on which Frederick had fashioned in duct tape what he called an “absurdly funny” message: “BONG HiTS 4 JESUS.” When his principal crossed the street and ordered him to take down his banner, Frederick refused. The principal confiscated Frederick’s banner and later suspended him. The school superintendent and the school board upheld the suspension, saying that the banner appeared to advocate illegal drug use in violation of school policy.

Frederick denied that his message was intended to advocate smoking marijuana. He said he had copied it from a bumper sticker and had made the banner as a way to assert his right to free speech. However, the Supreme Court decided that his principal was justified in disciplining him for the drug reference and that, given the nature of the activity, standing across the street from school was no different from being at school.

The Court’s decision to uphold the school board’s disciplining a student for speech off campus that did not disrupt the school day was a major departure from *Tinker*, *Bethel* and *Hazelwood*.

***La Vine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001)**

Before the advent of social media, the Ninth Circuit Court of Appeals upheld the disciplinary action taken against this student who had written a first-person poem at home about a school shooting and suicide and later brought the poem to school himself

and showed it to his English teacher. The opinion called for a balanced approach in considering whether to discipline student speech against the backdrop of highly publicized school shootings: “Given the knowledge the shootings at Columbine, Thurston, and Santee high schools, among others, have imparted about the potential for school violence, we must take care when evaluating a student’s First Amendment right of free expression against school officials need to provide a safe school environment not to overact in favor of either.”

Wisniewski v. Board of Education of Weedsport Central School District, 494 F.3d 34 (2d Cir. 2007)

An eighth-grade student was suspended after he used his parents’ personal computer at home to send instant messages to some of his classmates. The messages contained imagery depicting violence against a teacher, including an image of a gun shooting someone’s head, blood, and the words “Kill Mr. VanderMolen.” One of the students’ classmates showed the messages to Mr. VanderMolen. The Second Circuit Court of Appeals upheld a lower court’s decision in favor of the school district, ruling that the suspension did not violate the student’s First Amendment rights because it was reasonably foreseeable that the student’s off-campus speech would reach the school and would create a substantial risk of disruption at school.

Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008)

The Second Circuit Court of Appeals upheld discipline imposed after a high school student used her personal website off campus to criticize school administrators’ handling of a “battle of the bands” she had helped to organize as junior class secretary. She posted a message stating that the event was “cancelled due to douchebags in the central office” and urged those who read the message to call the superintendent “to piss her off more.” As a consequence, the student was not allowed to run for senior class secretary. Even though the student had done nothing to threaten violence or injury to anyone at the school, the court found that the school board had not violated the student’s First Amendment rights because it was reasonably foreseeable that her off-campus speech would reach school property and create a risk of substantial disruption at school.

Layshock ex rel. Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (en banc)

Justin Layshock, a 17-year-old high school senior at Hickory High in Hermitage, Pennsylvania, used his grandmother’s computer to create a fake MySpace profile of his school principal. The profile contained vulgar language and a photograph of the principal cut and pasted from the school district’s website. Layshock gave bogus answers to survey questions taken from templates on the site to create a profile that characterized the principal as a drunk, a drug user and a shoplifter. He then allowed other students to access the profile by listing them as “friends” on MySpace. Other

students created profiles of the principal, too. The principal heard about the profiles from his daughter, who was also a student at Hickory High, and tracked Layshock down based on rumors that were circulating in the school. The principal called Layshock and his mother in for a meeting. The student admitted to having created the profile and apologized, both in person and in a follow-up letter. His parents grounded him and took away his computer privileges at home.

The principal, however, was not satisfied with an apology. He complained to the local police and explored pressing criminal charges against Layshock. He discussed whether the profile might be grounds for harassment charges. No criminal charges were ever filed, but the school district did act— notifying Layshock that he had violated the Hermitage School District Discipline Code for “disruption of normal school process; disrespect; harassment of a school administrator via computer/internet with remarks that have demeaning implications; gross misbehavior; obscene, vulgar and profane language.” He was also charged with computer policy violations for use of the principal’s school picture without authorization.

The district suspended Layshock for ten days and transferred him out of his honors classes and into an alternative high school for students who were deemed too disruptive to attend regular classes. He was banned from all extra-curricular activities, including volunteer work as a language tutor. The school refused to let him take part in his graduation ceremony. Layshock’s parents sued the principal and the school district for violating their son’s First Amendment rights. Layshock won at trial and again on appeal, where a unanimous appellate court, hearing the case en banc, concluded that the First Amendment protected the student against school officials’ extending their authority into a private home where a student used a private computer after school.

J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (en banc)

The decision in *J. S. v. Blue Mountain School District* was handed down by the Third Circuit on the same day as its decision in *Layshock*. Like *Layshock*, this case arose after J. S., a student at Blue Mountain Middle School in Pennsylvania, created a fake MySpace profile of her principal (like Layshock, using the principal’s photo from the school district’s website). An Honor Roll student with no previous disciplinary history, in the eighth grade J.S. had been twice disciplined by her principal for dress code violations. She retaliated by creating the profile over a March weekend in 2007, at her home and using her parents’ computer. She depicted the principal as a bisexual Alabama middle school principal named “M-Hoe” whose interests included “detention” and “hitting on students and their parents.” She made mean-spirited remarks about the principal’s wife and son. Because the school district’s computers blocked MySpace, no student was able to access the profile at school. The principal learned about the profile from another student, who at the principal’s request printed a copy of the profile at home, brought it to school the next day, and identified J. S. as its creator. The printout requested by the principal appears to have been the only copy of the profile ever brought to school. At the principal’s request, MySpace removed the profile, in keeping with the site’s policies prohibiting fake profiles, bullying and harassment. The principal

then confronted J. S., who admitted she had created the profile. Both J. S. and her mother apologized, and J. S. followed up with a letter of apology to the principal and his wife.

This principal also contacted the local police, who referred him to the state police to inquire about pressing criminal charges against J. S. The state police told him he could file charges for harassment but warned him that the charges would likely be dropped. The principal chose not to press charges. However, a police officer did complete a formal report and did summon J. S. and her mother to the state police station to discuss the incident. In addition, J. S. was suspended for ten days. Her parents responded by suing the school district.

The trial court granted summary judgment to the School District, relying on *Bethel School District v. Fraser* as precedent allowing the school to discipline students for “vulgar and offensive speech” even though it did not create substantial and material disruption. Moreover, the trial court relied on *Frederick v. Morse* as precedent for allowing punishment of off-campus speech. However, on appeal, the Third Circuit overturned the District Court’s summary judgment, finding that because J. S. was suspended for off-campus speech that caused no substantial disruption in school, the Blue Mountain School District had violated her First Amendment rights. In the Third Circuit’s opinion, *Bethel School District v. Fraser* could not be read as precedent that allows a school to punish students for lewd or vulgar remarks uttered *off-campus*, nor could *Frederick v. Morse* be taken as an invitation to punish *off-campus* speech that does not take place during a school-sponsored activity.

***Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011)**

The Fourth Circuit Court of Appeals upheld the suspension of a student who used a home computer “to ridicule and demean a fellow student.” The decision in *Kowalski v. Berkeley County Schools*, published just a month after the Third Circuit’s decisions in *Layshock* and *J. S. v. Blue Mountain School District*, acknowledged those decisions, but attempted to distinguish them. (Of course, the Fourth Circuit Court of Appeals was not bound by the decisions of the Third Circuit Court of Appeals.)

Kara Kowalski, a senior at Musselman High School in Berkeley County, West Virginia, had been disciplined for creating and posting to MySpace a webpage called “S.A.S.H.” (which Kowalski claimed stood for “Students Against Sluts Herpes,” but which another student said originally had been intended to mean “Student Against Shay’s Herpes.” Shay N. was another Musselman student).

In December 2005, Kowalski had come home from school and used her home computer to create the discussion group webpage. Under the title, “S.A.S.H.,” Kowalski had written, “No No Herpes. We don’t want no Herpes.” She had invited approximately 100 people on her MySpace friends list to join the group and to post text, comments and photos. Ultimately, about two dozen Musselman High students joined the group. One of the students, Ray Parsons, used a school computer to upload photographs of himself and a friend holding their noses while displaying a sign reading “Shay Has Herpes.” The same student later uploaded two more photographs, these of Shay N. herself. On

one he had drawn red dots on Shay N.'s face to simulate herpes. On the other, he had posted a sign near Shay N.'s pelvic area that read: "Warning. Enter at your own risk." He captioned one of the photos of Shay N. "portrait of a whore."

Other students posted comments on the site, most of them mocking Shay N. and praising Kowalski and Parsons for setting up the site and posting the photos. Within a few hours after the photos and comments had gone online, Shay N.'s father made an angry call to Parsons, who then called Kowalski, who then attempted to delete the group and to remove the photos. When she couldn't figure out how to delete the page, she renamed the group "Students Against Angry People."

The next morning, Shay N. and her very angry parents went to Musselman High and filed a harassment complaint with the vice principal, providing a printout of the webpage. Shay N. left the school with her parents after filing the complaint; she was too uncomfortable to attend classes with the students responsible for the postings. Musselman High's principal contacted the school board office to discuss an appropriate response and was told he could discipline the students responsible for the site. The principal and vice principal then conducted an investigation, which led them first to Parsons and ultimately to Kowalski.

School administrators decided that Kowalski had created a "hate website" in violation of the school policy against "harassment, bullying, and intimidation." Kowalski was suspended from school for 10 days and issued a 90-day social suspension preventing her from attending school events or from crowning the next "Queen of Charm." (Apparently, hard as it may be to believe, Kowalski had been the school's reigning "Queen of Charm" at the time she created S.A.S.H.) She was removed from the cheerleading squad. After Kowalski's father objected to the punishment, the school agreed to reduce Kowalski's out-of-school suspension to five days but insisted on keeping the 90-day social suspension in place.

The language of the policy under which Kowalski was disciplined prohibited sexual harassment, bullying or intimidation "during any school-related activity or during any education-sponsored event, whether in a building or other property owned, used or operated by the Berkeley Board of Education." When Kowalski sued school officials, the federal district court concluded that the school district had not violated Kowalski's First Amendment rights. Kowalski appealed, arguing that even under their own policy school officials should not be allowed to punish her for "off-campus, non-school related speech."

The Fourth Circuit Court of Appeals, however, cited *Bethel* as precedent for regulating student speech that is "vulgar and lewd" and *Morse* as precedent for regulating speech that encourages the use of drugs—focusing on the content of the student speech punished in both cases, but completely separating that content from the schoolhouse geography that was an essential element of *Bethel* or the "school-sanctioned and supervised activity" that was an essential element of *Morse*. Geography, context and content all were intertwined in the Supreme Court's decisions on student free speech. The Fourth Circuit chose to focus only on content and to allow the school district to discipline Kowalski based on the content of the speech, even though it had been created after school, off school property, and outside any school-sponsored,

sanctioned, or supervised activity. Because Kowalski's off-campus posts caused on-campus disruption, the court held, it did not qualify for First Amendment protection.

Wynar v. Douglas Cty. Sch. Dist., 728 F.3d 1062 (9th Cir. 2013)

Landon Wynar, a Nevada high school student, was temporarily expelled for sending instant messages that discussed plans for a school shooting. The school district won a summary judgment in a lawsuit brought by the student and his father claiming violation of his constitutional rights. The Ninth Circuit Court of Appeals upheld the district court's ruling, finding that the messages both interfered with other students' rights and made it reasonable for school officials to forecast substantial disruption of school activities.

Wynar sent his messages from home. The school was alerted to Wynar's "increasingly violent and threatening instant messages" by the concerned friends to whom he sent them. They were alarmed when Wynar bragged about his weapons, threatened to shoot specific classmates and to "take out" people at school on a specific date, and made reference to the mass shooting at Virginia Tech that had captured national headlines. Such messages, the appellate court held, "presented a real risk of significant disruption to school activities and interfered with the rights of other students." The opinion upholding the school's discipline for off-campus speech emphasized the difficulty school officials face in balancing student safety against student First Amendment rights, especially in light of changing technology:

With the advent of the Internet and in the wake of school shootings at Columbine, Santee, Newtown and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping students safe without impinging on their constitutional rights. It is a feat like tightrope balancing, where an error in judgment can lead to a tragic result. Courts have long dealt with the tension between students' First Amendment rights and "the special characteristics of the school environment. . . ." But the challenge for administrators is made all the more difficult because, *outside of the official school environment*, students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically, sometimes about subjects that threaten the safety of the school environment. At the same time, school officials must take care not to overreact and to take into account the creative juices and often startling writings of the students. (Emphasis added.)

Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015)

Mississippi student Taylor Bell was disciplined over rap lyrics he wrote "away from school or a school function and without using school resources" about two instructors/coaches at his high school. Bell heard that the coaches had sexually harassed female students. He decided to rap about it and, using the name T-Bizzle, to post his rap on Facebook because, as he later told school officials in a disciplinary

hearing, he didn't think if he reported it anything would have been done about it. One of the coaches heard about the Facebook posting from his wife and reported it to the principal. After Bell was questioned about the Facebook posting by the principal, the superintendent and a school board attorney, he was sent home for the rest of the day. The next day, school was closed due to bad weather. Despite knowing he was facing discipline for the Facebook posting, Bell used his time at home those two days to finalize his rap, record another video of it and post that video to YouTube. When he returned to school, Bell was removed from class and told he was suspended pending a disciplinary hearing. After the hearing, he was transferred to an alternative school for the remainder of the grading period and prohibited from attending any of his high school's functions.

Bell claimed that he had not intended to threaten the coaches and did not even expect that they would hear the recordings. In his suit against school officials, he called an expert witness who testified that Bell's lyrics were not threats, but "colorful language" used to entice listeners and reflective of the norm among rap artists." However, both coaches identified in the rap lyrics said the postings had definitely affected their work. One testified that the postings scared him because "you never know in today's society . . . what somebody means, [or] how they mean it."

The court noted that the "incredibly profane and vulgar rap recording" that Bell posted contained "at least four instances of threatening, harassing, and intimidating language against the two coaches," including references to guns and shootings. When Bell challenged the disciplinary action, the district court granted the school district summary judgment. On appeal, the school district initially was found to have violated Bell's constitutional rights. Ultimately, however, the Fifth Circuit Court of Appeals en banc upheld the decision of school officials to treat the student's lyrics as grounds for discipline.