THE FIRST AMENDMENT AND STUDENTS ON AND OFF CAMPUS: Rights, Responsibilities, and Repercussions

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Congress shall make no law respecting an establishment of religion,
or prohibiting the free exercise thereof; or **abridging the freedom of speech**,
or of the press; or the right of the people peaceably to assemble,
and to petition the government for a redress of grievances.

~ FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

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

At a public high school in Des Moines, Iowa, students wore black armbands as a silent protest against the Vietnam War. The school district suspended the students, claiming that they feared the protest would cause a disruption at school. However, the school district could point to no concrete evidence that such a disruption would occur, or ever had occurred, as a result of similar protests. The students' parents sued the school for violating their children's right to free speech.

Des Moines, Iowa, students Mary Beth Tinker and her brother, John display two black armbands in protest of the Vietnam War. Bettmann—Getty Images

The Supreme Court ruled that "neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." In declaring the suspension unconstitutional, the Court stated: "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." In order to justify suppression of speech, school officials must be able to prove that the conduct in question would "materially and substantially interfere" with the operation of the school or the rights of other students. Justice Potter Stewart agreed with this outcome, but wrote a separate, concurring opinion stating that children are not necessarily guaranteed the full extent of First Amendment rights.

Other Cases to Consider:

> *Burnside v. Byars,* 363 F.2d 744 (5th Cir. 1966)

Three years before the Supreme Court decided *Tinker*, students at the all-Black Booker T. Washington High School in Mississippi began wearing buttons, proclaiming "One Man One Vote," to protest racial discrimination in voting and other aspects of public life. The high school principal banned the buttons, saying they had no relevance to the students' education and "would cause commotion." Three parents sued the school.

The Fifth Circuit Court unanimously ruled in favor of the students, holding that school officials "cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

> *Guiles v. Marineau,* 461 F.3d 320 (2d Cir. 2006)

A 13-year old student was disciplined for wearing a T-shirt with images depicting President George W. Bush as a chicken-hawk president who had previously used alcohol and cocaine.

The Second Circuit Court of Appeals found that absent any evidence of disruption, school officials violated the student's free speech rights under the *Tinker* standard.

> *Nuxoll v. Indian Prairie School District 204* (2007)

The Gay/Straight Alliance, a student club at Neuqua Valley High School, hosts a "Day of Silence," intended to draw attention to the harassment of gay people. It is part of a national event sponsored by the Gay, Lesbian and Straight Education Network. In response, the Alliance Defence Fund (ADF), a conservative Christian legal organization, promotes a "Day of Truth'' to be held on the school day following the "Day of Silence."

Heidi Zamecnik, one of the students who disapproved of homosexuality, honored the "Day of Truth" by wearing a t-shirt that read: "Be Happy, Not Gay" on the back. School officials asked Zamecnik to ink out the phrase "Not Gay" because it violated a school policy forbidding "derogatory comments" referring to sexual orientation, among other characteristics.

The following year, Zamecnik, now joined by fellow student Alexander Nuxoll, again wanted to wear the shirt on the Day of Truth. This time, school officials suggested alternatives, including the slogan, "Be Happy, Be Straight" and an ADF-produced "Day of Truth" shirt saying "The Truth Cannot Be Silenced." Zamecnik and Nuxoll refused those options and, with the help of the Alliance Defence Fund, filed a lawsuit challenging the actions of the school officials.

The Seventh Circuit Court of Appeals upheld a lower court ruling that students have a First Amendment right to wear shirts stating "Be Happy, Not Gay." The Court said that the school had not demonstrated that wearing the shirts would cause "substantial disruption, finding the slogan "Be Happy, Not Gay" to be "only tepidly negative." "A school that permits advocacy of the rights of homosexual students cannot be allowed to stifle criticism of homosexuality," Seventh Circuit Judge

Richard Posner wrote. “People in our society do not have a legal right to prevent criticism of their beliefs or even their way of life.”

See also:

- *Harper v. Poway Unified School* (9th Cir. 2007).
- *Chambers v. Babbitt* (D. Minn. 2001)

> *Dariano v. Morgan Hills* U.S.D. (9th Cir. 2014)

A group of Caucasian students attended their school’s annual Cinco de Mayo celebration, wearing American flag T-shirts. The school had a “history of violence among students, some gang-related and some drawn along racial lines.” Several students, including some of Mexican descent, expressed concerns to the Assistant Principal that the shirts would lead to a physical altercation. The Assistant Principal directed the students either to turn their shirts inside out or take them off, explaining that he was concerned for their safety. The students refused, and the Assistant Principal sent them home for the day with an excused absence. The students sued, alleging violations of their federal and California constitutional rights to freedom of expression.

The Court held the students' freedom of expression claims failed because it was reasonable for officials to proceed as though the threat of a potentially violent disturbance was real, and the officials' actions were tailored to avert violence and focused on student safety.

> *Barnes v. Liberty High School (2018*)

Barnes, an Oregon high school student, came to a politics class discussion about immigration wearing a T-shirt that said “Donald J. Trump Border Wall Construction Co.,” and “The Wall Just Got 10 Feet Taller.” An assistant principal told Barnes that he needed to cover the shirt because a student and a teacher said it offended them. Barnes refused and was removed from the class and suspended, although the suspension was later rescinded. Barnes sued.

The District Court sided with Barnes’ defense: “School officials may not suppress student speech based on the ‘mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint’ or ‘an urgent wish to avoid the controversy which might result from the expression.’” The School District settled the suit, agreeing to pay $25,000 for Barnes’ legal fees and to have the principal write him an apology.

The pro-Trump T-shirt that led to Barnes’ suspension. U.S. District Court Exhibit.

Bethel School District No. 403 v. Fraser (1986)

Matthew Fraser, 18 Feb 1988, Spanaway, Washington, Image by © Bettmann/CORBIS

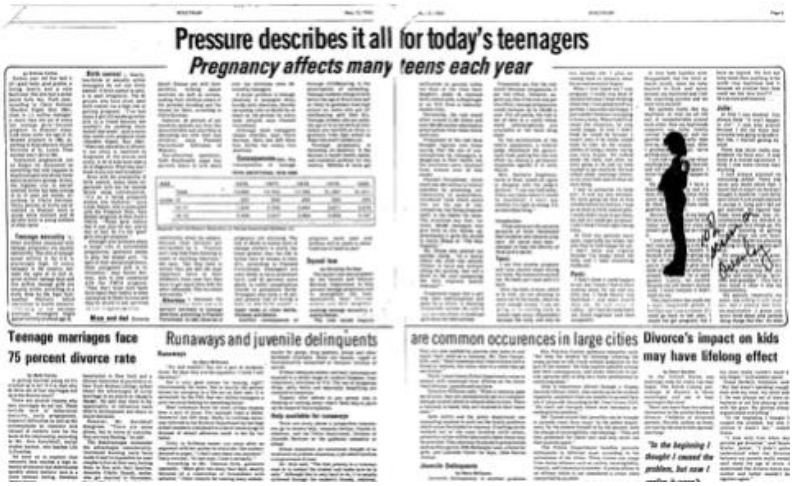
Bethel High School's disciplinary code included a rule prohibiting conduct which "substantially interferes with the educational process . . . including the use of obscene, profane language or gestures." At a school assembly with 600 of his fellow students, Matthew Fraser nominated his friend for school vice president with a speech full of sexual innuendos (a speech he had run past teachers who cautioned him about it, but did not tell him violated school policy). During Fraser's speech, some students hooted, yelled, and acted out certain parts. Fraser was suspended from school for two days. Fraser sued over the suspension, alleging a violation of his First Amendment rights. His case ultimately made it to the Supreme Court.

The Supreme Court upheld the suspension and found that it was appropriate for the school to prohibit the use of vulgar and offensive language. The Court found Fraser's lewd speech inconsistent with the "fundamental values of public school education," and in that way, distinguished it from the political speech the Court previously had protected in Tinker.

"The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy."

"The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students — indeed, to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality."

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



Pressure describes it all for today's teenagers

Pregnancy affects many teens each year

Teenage marriages face 75 percent divorce rate

Runaways and juvenile delinquents

are common occurences in large cities

Divorce's impact on kids may have lifelong effect

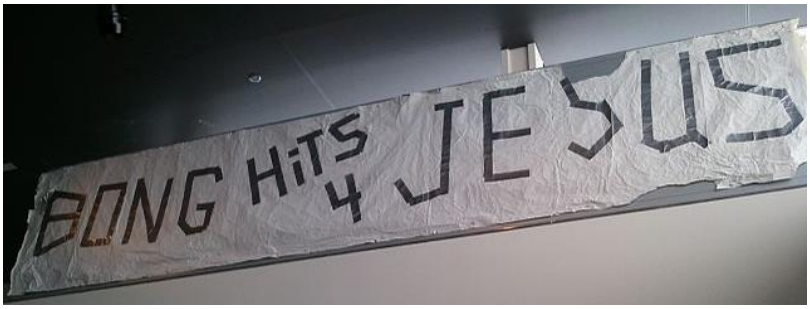
Censored pages from the May 13, 1983 issue of the Hazelwood East High School Spectrum.

Hazelwood East High School's newspaper was written and edited by students in the journalism class. Under the school's practice, before the paper was published, the journalism teacher submitted page proofs to the school's principal. The principal objected to two stories: one that described school students' experiences with pregnancy and another article discussing the impact of divorce on students at the school.

The principal was concerned that the unnamed students in the pregnancy story might still be identified from the text, and also that the article's references to sexual activity and birth control were inappropriate for some of the younger students. The principal objected to the divorce article, which included complaints by a student about her father's conduct, because the parents had not been given an opportunity to respond to the remarks or to consent to their publication.

In a 5-to-3 decision, the Supreme Court held that schools must be able to set high standards for student speech disseminated under their auspices, and that schools retained the right to refuse to sponsor speech that was "inconsistent with 'the shared values of a civilized social order,'" and so the principal did not offend the First Amendment by exercising editorial control over the content of student speech because his actions were "reasonably related to legitimate pedagogical concerns."

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



Original banner now hanging in the Newseum in Washington, DC

At a school-sponsored, off-campus event, a high school student held up a banner with the message "BONG HiTS 4 JESUS," a slang reference to smoking marijuana. The Principal took the banner away and suspended the student for ten days, citing the school's policy against the display of material that promotes the illegal use of drugs. The student sued, alleging a violation of his First Amendment rights.

Determining that it could "discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion," the Supreme Court (reversing the Ninth Circuit) held that public high schools may "restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." In so doing, the Court affirmed that the speech rights of public school students are not as extensive as those adults normally enjoy, and that the protective standards set by *Tinker* would not always be applied.

Mahanoy Area School Dist. v. B.L., 594 U.S. ___ (2021)

A public high school student tried out for and failed to make her school's varsity cheerleading team, instead only making the junior varsity team. Over the weekend and away from school, the student posted a picture of herself with her middle finger raised on Snapchat with the caption "F**k school f**k softball f**k cheer f**k everything." The photo was visible to about 250 people, many of whom were fellow high school students and some of whom were cheerleaders. Several students who saw the captioned photo approached the coach and expressed concern that the snap was inappropriate. The coaches decided the student's snap violated team and school rules, which the student had acknowledged before joining the team, and she was suspended from the junior varsity team for a year. The student sued the school, alleging her suspension violated the First Amendment.

In its decision, the Supreme Court held that the First Amendment limits but does not entirely prohibit regulation of off-campus student speech by public school officials. The Court acknowledged that schools could have a substantial interest in regulating certain kinds of off-campus conduct. But the decision sets out three features of free speech protections for public school students and boundaries for public school officials online or off campus, as opposed to on campus.

"First, a school will rarely stand in *loco parentis* when a student speaks off campus." (The phrase in loco parentis means in the place of a student's parents or legal guardians.)

"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."

Finally, "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus, because America's public schools are the nurseries of democracy."

The Court found the student's off-campus speech was protected by the First Amendment, and therefore the school district's decision to suspend B.L. from the cheerleading team was unconstitutional. Specifically, the Court held that the circumstances of the student's speech were the responsibility of her parents; and that her speech did not cause "substantial disruption" or threaten harm to the rights of others.

"It might be tempting to dismiss [the student] 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."

Other Cases to Consider:

> Doninger v. Niehoff, 642 F.3d 334 (2d Cir. 2011)

A high school junior brought suit alleging that her First Amendment rights were violated when the district barred her from running for senior class secretary after she posted a derogatory blog on an independent website stating that the "d*****bags in central office" had canceled a school event and urged students and parents to call complaints into the district to "piss off" the superintendent. The Second Circuit Court of Appeals ruled for the school district given the disruptive impact of the speech.

> J.S. v. Blue Mountain School District, 650 F.3d. 915 (2011)

In 2007, J.S. a student at Blue Mountain Middle School in Pennsylvania, was suspended for ten days, for making a parody MySpace profile for her principal, portraying him as a sex addict who hit on students and parents. Her family sued, arguing that the school could not discipline her for her off-campus speech. In September 2008, a federal judge ruled that the school officials did not violate J.S. 's free-speech rights, stating that school officials have the authority to punish "lewd and vulgar speech" about the school or officials, even if the speech occurs outside of school.

In February 2010, a panel of the Third Circuit Court of Appeals also ruled in favor of the school district. The same day, another panel of the Third Circuit ruled in favor of Justin Layshock, a student who had also been punished for creating an online parody of his principal. The full Third Circuit Court of Appeals heard arguments in this case on June 3, 2010, and a year later it ruled in favor of J.S. and Layshock. The Supreme Court declined to hear the case, leaving the Circuit court ruling in favor of the students' free speech rights to stand.

> Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011)

A student set up a MySpace webpage primarily dedicated to ridiculing a fellow student. In response to the student's harassment complaint, the school investigated and determined that Kowalski had created a "hate website," in violation of the school's policy against "harassment, bullying, and intimidation." The school imposed suspensions on Kowalski.

Kowalski sued, alleging that the suspension violated her First Amendment and Due Process rights, and argued that hers was "private out-of-school speech." The court found that the sanctions had been permissible as Kowalski had used the Internet to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment as to implicate the school's recognized authority to discipline speech which "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school and collid[ed] with the rights of others."

> Bell v. Itawamba County School Board, (5th Cir. 2015)

A high school student created and posted a rap song on Facebook and YouTube that criticized two Caucasian high school football coaches for allegedly sexually inappropriate comments toward African-American female students. One of the coaches reported the song and the school suspended the student and placed him in an alternative school for the remainder of the grading period.

The student sued alleging school officials violated his First Amendment free-speech rights. The District court sided with the school; the Court of Appeals sided with Bell, but then the case went to a rehearing by the full Fifth Circuit Court. The full Fifth Circuit was divided but the majority ruled that the song,

which featured profanity and arguably threatening language, could be considered substantially disruptive to the school environment.

See other similar cases:

- *M.L. v. San Benito Independent Consolidated School District (5th Cir.)*
- *D.J.M. v. Hannibal Public School District (8th Cir.)*
- *Wynar v. Douglas County Schools (9th Cir.)*

FOR MORE INFORMATION:

- Tinker v. Des Moines | United States Courts
- Hazelwood v. Kuhlmeier | United States Courts
- Morse v. Frederick | United States Courts
- Digging into Mahanoy v. B.L. with New York Times Supreme Court Legal Correspondent Adam Liptak, program co-hosted by the American Bar Public Education Division and Sacramento Federal Judicial Library and Learning Center Foundation.