

**FREEDOM OF SPEECH:
THE FIRST AMENDMENT IN PUBLIC STUDENTS' USE OF MEDIA**

Phillip Lemen

plemen@unomaha.edu

This research paper was written for Communication Law & Policy class in the Fall of 2018. The author is a journalism and media communications undergraduate major in the College of Fine Arts and Media at the University of Nebraska at Omaha.

The First Amendment Practiced in Schools

With social media and the internet paving the way for the way we communicate, it is important to go back to our roots of how we began to communicate with one another on a wider spectrum, through print. But there's more to that since technology has come and evolved our way of interacting; one must include the online news platforms, since that's the way of the future. The First Amendment has given us the right to free speech. "Freedom of speech gives individuals the right to express themselves without interference from the government, as does freedom of the press" (Olson, 2018, p. 25).

The way social media is moving, anyone can be a journalist with the easy access to applications such as Twitter, Instagram, and Facebook. In today's world, there is a big controversy over "fake news" and Trump has been the one to start that train of accusations when he was elected US President, calling many news stories "fake" and some reporters as "the enemy of the American people" (Olson, 2018, p. 23). What are the laws behind student speech and how far does it extend? How can students effectively practice journalism in the student newspaper setting without stirring up controversy?

The purpose of this research is to examine the First Amendment rights from the student perspective, as it pertains to their use of media whether that be on social media accounts or through the traditional style, print. Students have a "limited public forum" in the public high school setting, and it is something that needs to be looked into. College students have more "wiggle room" if you will when it comes to saying what they want on campus. The main focus will be high school students, but some points about college level will be addressed.

Legal History of the First Amendment in the School Setting

“The U.S. Supreme Court has decided four cases that govern the First Amendment rights of public school students, within the last 50 years” (Kozlowski, 2017, p. 161). The main case of those four is a case that many are familiar with, *Tinker v. Des Moines Independent Community School District (1969)*. The court supported the student expression saying, “It can hardly be argued that either the students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (Kozlowski, 2017, p. 161). In this case, three students were suspended for wearing black arm bands in protest of the Vietnam war. The Court ruled in favor of the students, saying that their speech could not be punished unless it disrupted the other students ability to get work done. This case was basically one of the first cases that would act as a precedent for future cases involving students.

A more recent issue at hand is the issue of students posting content off of campus, and if they will still be held accountable, since they are not on school property when they engaged in their use of media. Another important case of the four is *Morse v. Frederick* from 2007. This was an exception to *Tinker*; which as stated before, set precedent for future cases involving student speech. The student, Frederick, held up a banner that said, “BONG HiTs 4 JESUS.” Although he was across the street from the school and off of school property, he was in fact participating in a “school-sanctioned and school-supervised” event (Kozlowski, 2017, p. 162). This brings up further examination of whether it is appropriate to suppress a student’s free speech when they’re off-campus. Ultimately, the court sided with the principal because Frederick was promoting illegal activity, and it was making the school look bad.

Something to address is asking if the conduct is expressive. “The conduct is expressive if there is an intent to express a message and if there is a likelihood the message will be understood. If there is either no intent or no likelihood of understanding, the conduct is not expressive, the First Amendment is not implicated, and the inquiry is over. If the conduct is expressive, however, the inquiry continues” (Hopkins, 2018, p. 47). As mentioned earlier, it is important to investigate not only the online platform, but in the print aspect as well when it comes to students. Students must learn that they cannot say whatever they want, because there are consequences for some of those spoken words. Age and maturity level are a couple of the main features of why certain rights are given to students in high school and students in college. College students have more independence, whereas high schoolers are controlled more in what they publish.

“Denial of access to crime statistics and disciplinary proceedings, among other information, has led to conflict with college administrators. Censorship has been more of a problem for the high school press, primarily because courts tend to give public officials latitude when protecting children from potentially harmful material, and administrators often interpret ‘harmful’ broadly” (Kozlowski and Goodman, 2018, p.119). It is clear to see that the college student press has more wiggle room when it comes to publishing information and using free speech because it is seen as a forum by many. College students are adults and are not as restricted by administrators compared to those who are underage, in the high school setting. There are three factors that have been central to court’s reasoning in cases on regulating student expression: the age of speaker and audience, where the speech occurs, and the educators’ responsibilities (Kozlowski and Goodman, 2018, pp. 123-124).

Recent Case Law

In *R.O. v. Ithaca City School District (2011)*, “The Tattler” is the name of the school newspaper that has been active since 1979, and approximately 3,000 copies are given out to the student body. A faculty advisor has always been present and approves everything before it is published and given to the rest of the school population. The high school attempted to regulate the sexually explicit content of the publications. In the complaint, plaintiffs (students) said: “defendants unlawfully required plaintiffs to submit articles to a Faculty Advisor before they could be published in the student newspaper, “*The Tattler*”; defendants unlawfully prohibited the publication of a sexually explicit stick-figure cartoon in the February 2005 issue of *The Tattler*; and defendants unlawfully prohibited on-campus distribution of an independent student newspaper, *The March Issue*, containing the same sexually explicit cartoon” (p. 535). The sexual cartoon was related to “How Is Sex Being Taught In Our Health Class” article, but it continued to be rejected by Vinch, the faculty advisor, and so R.O. the plaintiff brought it to the principal’s attention (p. 537). Ultimately, the court defined *The Tattler* as a “limited public forum” and was in favor of the defendants (p. 538).

In *Educ. Media Co. at Va. Tech, Inc. v. Insley (2013)*, 3 Va. Admin. Code § 5-20-40(A) (2) (2010) The Virginia Alcoholic Beverage Control Board (ABC) prohibited college student newspapers from printing alcohol advertisements (p. 294). The regulation was “unconstitutionally overbroad” under First Amendment because majority of readers, 64 percent, were age 21 and being given truthful information about a product that they could legally consume (p. 296). The newspaper challenged that this involved both content-based and speaker

based discrimination, and also that strict scrutiny applies. The college newspaper made an argument in relation to Central Hudson being violated. Under Central Hudson, (direct quote from the case), “A regulation of commercial speech will be upheld if: the regulated speech concerns lawful activity and is not misleading; the regulation is supported by a substantial government interest; the regulation directly advances that interest; and the regulation is not more extensive than necessary to serve the government's interest” (p. 298).

The ban on alcohol advertisement was reversed and remanded. The court decided that it was unconstitutional to ban this from being published because it kept the audience, majority of drinking age, from receiving truthful information about something that they could legally buy and consume under law. One of the big reasons why this was taken to court is because it was thought to have promoted drinking, which leads to accidents and even death. But in reality, it was just an informative motive by the student newspaper.

Another case we look at involving student speech, on the more digital aspect, is in *Sagehorn v. Independent School District (2015)*. A student was suspended in 2014 after an anonymous user posted on a site called “Rogers Confessions. On this site asked the question, “did @R_Sagehorn3 actually make out with [teacher]? Sagehorn, who was a senior at Rogers High School, replied “actually yeah” on Twitter (p. 1). He was suspended for five days for because he violated the school’s ban on “threatening, intimidating, or assault of a teacher, administrator, or other staff member (p. 2). The school officials tried to expel him, saying that his conduct, in addition, disrupted the school environment (p. 2). Sagehorn filed against the school, officials, and a police officer saying that they violated his right to free speech and “procedural due process” (p. 3).

His complaint was on First Amendment violations because he was not on school property and it did not cause a disruption at school. Also defamation was in play, and in the end, the courts were in favor of Sagehorn and his free speech rights. Generally, statements or posts made off-campus are protected by the First Amendment, and are not punishable unless they are threatening or posing a safety risk to the school. This was just a classic case of a student tweeting something without thinking. He had no intent of ruining a reputation, but thankfully this did not propose a major disruption to the learning environment, which is why the court sided with the student.

Bell v. Itawamba County School Board (2015) is an interesting case because it involved Taylor Bell, a student, who posted a rap recording involving two teachers and coaches with threatening lyrics. The school board then took disciplinary action against Bell (p. 389). Bell was suspended for harassment, intimidation and threats to the student and teacher population of the school. Referring back to the *Tinker v. Des Moines* case, the school cannot censor or punish the student's speech unless it causes disruption to the school's educational environment. The court was not in favor of Bell, because the lyrics were meant to be heard, and they had obscene lyrics, which had potential to do harm to the learning environment. Bottom line, students are allowed to express themselves, but there are some restrictions when it comes to the learning environment and safety of everyone.

Ultimately, the court was in favor of Bell, because his rap song constituted expressive speech which is protected by the First Amendment. The school board violated his rights under precedent cases. This is a great example of how students in the high school setting can have a questionable outcome when it comes to indecency and obscenity.

Law Review Analysis

Varel (2013) says the following on the subject of school authority over online posts:

“Two legal issues are raised when schools discipline students for off-campus internet activity. First Amendment freedom of speech issues are implicated since courts consider electronic messages sent over the internet to be speech. Additionally, the separate, but somewhat intertwined, issue regarding the scope of public school authority over students' off-campus activity is raised” (p. 425).

Varel talks about the two problems in the future for regulating students' off campus internet speech: the first involves school safety without extending administration authority unnecessarily beyond the school gates. The second being speech that does not pose a threat, but can be offensive, lewd, or vulgar to some people (p. 482). This is a big issue in today's growing social media world. Students feel that they have rights outside of the walls of school grounds, but how much freedom of speech is really given?

This next law review is rather interesting. Penrose (2014) dives into the issue of student collegiate athletes and their university restrictions or limitations placed on their use of social media. The Supreme Court has explained, "Reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid" (p. 479). Coaches are not trying to suppress the players' free speech rights, but rather, they are putting them on a social media schedule so-to-speak. During the season, players need to be focused on the team and winning, and not being distracted by social media. This is an area that needs to be explored and evaluated more, because it will become a growing issue. This is not just

an issue in the collegiate level, but also in the high school level. Can coaches on high school and college level sports control their players use of social media during the season? If so, where is the line drawn? It is a topic that will be explored in years to come, as technology continues to be used in every day life.

Conclusion

It is important to voice our opinions as students in our school environment, but also be mindful of what we say, because consequences could be present. Officials and others in administration should respect the rights of students, even if they are not fond of what is being published or said. The First Amendment is what this country was founded on and what has brought us to where we are today. At the end of the day, we all have the right to say what we want to an extent, and it's crucial to know what environment you are in, most of us in the college setting, in order to voice our opinions professionally.

Interpretation based on what cases and law reviews were looked at brings many questions about the future for students and their freedom of speech rights. The case laws addressed different forms of media used by students, and how their limited public forum is treated by faculty and the school board. All of the outcomes of the cases listed seem fair. The court has to take in to account all of the people affected by what is at stake.

Limitations for this topic and study would be students not being able to say whatever they want when they are at school. They have to understand that they are in an educational environment, and what they say can have an effect on those around them.

Some questions for future research on this topic would be: How does freedom of speech differ between private and public high schools, as well as private and public universities? Should off-campus free speech be punished the same as on-campus? Can internet-based posts be under authority of the school if the student is not on school grounds?

It is a curiosity to think of how much laws and policies will change over time for students. Students need to remember to voice their opinions and exercise their rights in a professional manner; but also need to be mindful of what they post, because it can have its consequences.

References

- Bell v. Itawamba County School Board.*, 799 F.3d 379 (2015)
- Buller, T. J. (2013) ARTICLE: The State Response to Hazelwood v. Kuhlmeier. *Maine Law Review*, 66, 89.
- Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F. 3d 291 (2013)
- Hopkins, W. W. (2018). Conduct and Speech. In W. Wat Hopkins, *Communication and the Law*. (2018 ed., pp. 37-48). Northport, AL: Vision Press.
- Jourdan, K. (2010, January 28). Student newspaper in Northern Nevada embroiled in First Amendment case. *Las Vegas Review-Journal (NV)*. Retrieved from <http://search.ebschost.direct=true&db=n5h&AN=2W6606746601&site=ehost-live&scope=site>
- Kozlowski, D. V. (2018). Regulating Student Expression. In W. Wat Hopkins, *Communication and the Law* (2018 ed., pp. 119-146). Northport, AL: Vision Press.
- Kozlowski, D. V. (2017). Student Speech. In Daxton R. Stewart, *Social Media and the Law: A Guidebook for Communication Students and Professors*. (2nd ed., pp. 160-181). New York, NY: Routledge.
- Olson, K. K. (2018). The First Amendment in Theory and Practice. In W. Wat Hopkins, *Communication and the Law*. (2018 ed., pp. 23-36). Northport, AL: Vision Press.
- Penrose, M. (2013) ARTICLE: Sharing Stupid *t With Friends and Followers: The First Amendment Rights of College Athletes to Use Social Media. *SMU Science and Technology Law Review*, 17, 449.

R.O. v. Ithaca City School District, 645 F.3d 533 (2015).

Sagehorn v. Indep. Sch. Dist. No. 728, 2015 U.S. Dist. LEXIS 105974 (2015).

Silver, D. (2017). Defamation. In Daxton R. Stewart, *Social Media and the Law: A Guidebook for Communication Students and Professors*. (2nd ed., pp. 30-57). New York, NY: Routledge.

Varel, S. (2013) ARTICLE: Limits on School Disciplinary Authority over Online Student Speech. *Northern Illinois University Law Review*, 33, 423.