



Off-Campus Speech and the Constitution

By Megan Fromm, PHD, and Jeff Kocur, teacher, Hopkins High School (MN)
For the JEA Constitution Day Committee, 2011

Objective: For students to understand the limits of a school's authority to punish for speech made off campus, and to also understand other possible consequences of their speech.

Lesson Time: Option 1--approx. 45 minutes (full lesson)

Option 2--approx. 30 minutes (skip part 1)

Note: for a shortened lesson, skip the first part on limits to the First Amendment. This is great background information for the extended discussion and for younger students, depending on your grade, but the rest of the lesson is not dependent on it.

Lesson Materials:

- This teacher's guide

Teacher prep:

- Write this quote on the board:
 - "It is every American's right and obligation to read and interpret the Constitution for himself." — Thomas Jefferson

Part 1

(5-10 minutes) *Intro to the idea of "interpreting" the Constitution. This part provides talking points for the class that might have little understanding of the Constitution, the courts, etc.*

Ask students: Thomas Jefferson felt every American should read and interpret the Constitution for himself/herself, with his/her own minds. If we did this--if every single person interpreted the Constitution in his or her own way--what would happen? Would we ever be able to agree on what was actually "Constitutional?" Why would our interpretations be different? Is this good or bad/right or wrong? *Allow students to respond and discuss, then redirect.*

We can probably assume Thomas Jefferson did not mean each of us gets to decide what parts of the Constitution apply to us and what parts don't based on our own preferences. So, who DOES decide how the Constitution is applied in our daily lives?

The courts, especially the Supreme Court.

How do they do this? What has to happen for a court to be able to interpret the way a law or the Constitution might apply in any given situation? *There has to be an argument about the way a law is applied to that situation, and the people involved go to court to argue their case. In this way, the court "interprets" what the Constitution must be saying about what is legal and what is not, and this interpretation is explained in the court's ruling on the case.*

One part of the Constitution often interpreted by the courts is the First Amendment. The 45 words of the First Amendment describe our rights to freedom of expression, including our rights to freedom of speech and the press (*might be worth writing the First Amendment on the board, and depending on timing or class level, consider giving some examples of what the FA doesn't protect, like "fire in a crowded theater"*). Sometimes, the courts have to decide whether or not you have the right, as a student, to say or do something outside of school if it might affect what happens in school.

Part 2:

(20-30 mins) Now, we are going to look at some of these cases where students have been punished for off-campus behavior and speech. We will see how the Court has interpreted your rights to free speech if it affects school in some/any way. We will look at three recent court cases regarding student speech and conduct off campus. Then, students will be broken into groups for a hypothetical case study activity. Teachers can follow-up with the post-class activity, assigned either as homework or a day-two exercise.

Case 1: T.V. v. Smith-Green Community School Corporation

What happened:

Volleyball students at a school in Northeast Indiana were suspended from the volleyball team and extracurricular activities after they posted pictures of themselves posing in sexual ways with Popsicles shaped like a male genitalia. These pictures were taken off-campus, outside of the school day, at a private home during a slumber party. The principal suspended the students with the claim that complaints about the photos caused a disruption and were dividing the team, causing a potential for a further disruption.

Ruling:

The Federal judge ruled the school was out of bounds to discipline these girls for speech that occurred off-campus. The *Bethel v. Fraser* precedent cannot be extended off campus.

Discussion:

1. Even though the students were protected from punishment from the school, what other social consequences might they face?

2. What would you do if you were one of these girls and you didn't expect that photo to be placed on Facebook?
3. Do you think the principal had a valid argument? Why or why not? If you are the student who took these photos, what is your argument that it is OK?

Case 2: Layshock v. Hermitage school district

What happened:

A high school student created a parody (or mock MySpace profile) of his principal online, outside of the school day on his grandma's computer. Many of the pieces of the profile used "Big" in a reference to the principal's weight. The student was suspended for 10 days, forced to complete the remainder of the school year in the alternative center and denied the opportunity to walk at graduation. The school did later allow him to rejoin his classmates at the high school.

Ruling:

The Federal Court (in a rare en banc ruling) ruled that this punishment was unconstitutional because it violated the student's First Amendment rights. The school did not have the constitutional authority to punish a student for speech that occurred off campus. (Teacher Note: a separate ruling in the same court (J.S. v. Blue Mountain School District) offered the opposite verdict in a nearly identical case. Depending on student response, you could discuss this case, too.)

Discussion:

1. Even though the court protected the student from punishment by the school, what other consequences might he face?
2. While the principal could not punish the student in school, could he retaliate in another way? Does he have any other legal recourse? (this question might not work for all classes but would be especially useful in journalism/publications classes as a basis to discuss libel)
3. Do you think students knew he was creating a parody? Do you think parody is protected speech under the First Amendment? How thin is the line between parody and defamation? (*Depending on your students' comfort level, explain that defamation is an intentionally false statement--written or spoken-- that harms a person's reputation*). In what instances would this speech be protected as parody?

Case 3: Kowalski v. Berkeley School District

What happened:

A student in West Virginia created a MySpace group called S.A.S.H (Students Against Sluts' Herpes) The group featured several statements insulting a student named Shay N., and some students even said the acronym stood for "Shay's herpes" instead of "Sluts' herpes." Shay N.'s parents brought this issue to the principal, who did not know about it. The creator of the website was suspended and removed from the cheerleading team. The principal determined the website was a "hate website" and therefore not allowed.

Ruling:

The Federal Court upheld the student's suspension citing Tinker. According to the court, even if the speech occurred off-campus, it violated or had the potential to violate someone else's right to an education and the victim's right to feel secure and be left alone while at school.

Discussion:

1. Based on this ruling, what other types of speech (made off-campus) might be restricted?
2. In this instance, someone else alerted the administration to this speech. Do you think the outcome have been different if the administration were trolling and discovered this themselves?
3. If an administrator does discover something he or she is concerned about online, what do you think should be the proper steps to take?

Now, students will break into four groups. Each will each consider one of the following hypothetical situations. For each situation, the group should read the summary aloud and answer the following questions. Then, each group should reach a consensus about what they think should happen. Students will then share their case and their ruling with the class.

Hypothetical 1

Summary: A group of football players at your school, including the captain and quarterback, published photos of themselves at an after-game party drinking what is clearly beer in beer cans and smoking cigarettes and other unidentifiable substances. The administration saw these photos after another staff member brought it to their attention, and the students were suspended from school for three days and kicked off the football team indefinitely. Each of the players has signed a contract indicating they would not engage in such behavior and that they understood they would lose the privilege to play and practice as a team member if they were caught.

Explain how you would rule on this case specifically considering the following questions:

- Does the fact that these pictures were taken and published off campus mean that they cannot be punished by the school?
- Has the school violated their right to privacy by looking at these photos on Facebook?
- Do you agree with the method of punishment? As a principal, would you have done something different?

Hypothetical 2

Summary: A student has created a fake Facebook page for a teacher at your school. The page used a real picture of the teacher taken by the student, and the student – acting as the teacher on Facebook – friended many students at the school. The page was created on a personal computer, off campus and outside of school hours. None of the friended students

were aware the page was fake. The student who created the fake page started posting inappropriate topics regarding sex, drugs and partying – all posts meant to harm the teacher's reputation. In addition, the student who created the fake page posted on several students' walls offering to buy them alcohol. The student was expelled from the school for violating the school's code of conduct.

Explain how you would rule on this case specifically considering the following questions.

- What grounds, if any, would the school have to punish the student?
- Would or could the punishment be any different if items like these were published in a school newspaper?
- What other consequences might the student face outside of school?

Hypothetical 3

Summary: A 15-year-old student is frustrated at school by a new policy about hallway passes at the school. To voice her frustration, she started a new blog on Blogspot called harleyhighstinks. In the blog she voiced her strong opposition to the policy and said the principal was hoping to be superintendent and trying to make a big splash with this policy. The principal suspended the student for three days and demanded she take down her blog. He said she was willfully and purposely defaming the school as his justification for the punishment.

Explain how you would rule on this case specifically considering the following questions.

- Is her speech protected by the First Amendment? What makes it protected?
- Is there any punishment the school could impose on her?
- What other consequences might she face?

Note: teachers, see <http://splc.org/knowyourrights/legalresearch.asp?id=27> for a legal discussion on libel and public figures. Would the principal count as a public figure?

Hypothetical 4

Summary: Four students start an underground, satirical newspaper at the school and distribute it on the sidewalk in front of the school (on school grounds) before school starts. The paper is produced completely out of school on private equipment and paid for by the students. The paper uses satire to make fun of several teachers and programs at the school and makes fun of several groups of students, but no one individually. The principal comes out and confiscates the newspaper from the students who are distributing it in front of the school and demands that all teachers rip up any copies they find on students or in their classes.

Explain how you would rule on this case specifically considering the following questions:

- Were these students' First Amendment rights violated? Do you think they had the right to do what they did?

- Would their speech be protected by the fact that it was satire? (assuming it was written well and did not defame anyone or use any malice)

Note: see <http://splc.org/knowyourrights/legalresearch.asp?id=27> for a legal discussion on libel as it relates to satire.

- Would the speech be protected because it was created without any school equipment or time and distributed before the start of the school day?
- Who should the students contact should they wish to see what their rights are?

Post-class activity (homework or day two exercise)

Students should draft (either individually as homework or together as a class the next day) a school policy regarding off-campus speech that they think best represents their rights as students and what is legally acceptable based on their knowledge of the cases reviewed. This policy should be no more than 2-3 paragraphs but should answer such questions as:

- Can students be punished for what happens off campus during non-school hours?
- Can students be punished for what is posted on Facebook or other social media if it creates an in-school disruption?
- Should students and teachers be able to communicate via social media like Facebook, email, gchat, etc?
- Should students be able to expressed negative remarks about the school on their personal social media pages? (blogs, Facebook, etc.)

After drafting the policy, students could consider submitting it for consideration to the administration (and depending on the disposition of the administration, perhaps someone would be willing to join the class on a discussion of the policy or provide a response?)