

Do students have a constitutional right to express themselves on social media outside the school day? “Actually yes.”

**Richard Fossey**

**Paul Burdin Endowed Professor of Education**

**University of Louisiana at Lafayette**

# Social media has created 3 major problems for schools:

- Bullying and harassment of classmates through online attacks on Facebook, YouTube, Myspace, etc.
- Sophomoric, disrespectful, and sometimes libelous insults of school teachers and administrators that undermine morale and school officials' authority
- Sexting—which has sometimes causes student victims to become so distraught that they have committed suicide



# 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.

# *Beussink* case: Friend shows home page to computer teacher

- Beussink allowed a friend, Amanda Brown, to use his home **computer**. While using Beussink's home **computer**, Brown saw Beussink's homepage.
- Ms. Brown later had an argument with Beussink. Ms. Brown testified that she wanted to retaliate against Beussink because she was angry with him.
- On February 17, 1998 Amanda Brown, purposefully accessed Beussink's homepage during the second hour of school and showed it to Delma Ferrell, the **computer** teacher at Woodland High 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* case: Court grants injunction

- Beussink sought an injunction to prevent the 10-day suspension, and the court granted it.
- “Beussink's homepage did not materially and substantially interfere with school discipline. Further, there was no evidence to support a particularized reasonable fear of such interference. Beussink was disciplined for engaging in speech that this Court believes may be constitutionally protected speech.”
- “At first blush it may seem that the public's interest in orderly schools is best served by allowing the Woodland School District to discipline Beussink in whatever manner the school district deems appropriate. Further inquiry into the purpose of the First Amendment however, shows otherwise.”
- 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.

## ***J.S. v. Bethlehem Area Sch. Dist. (Pa. 2000)***

- J.S., middle-school student, created a web-site on his home computer and on his own time. The web-site, titled “Teacher Sux” made derogatory comments about J.S.’s algebra teacher, Mrs. Fulmer, and school principal, Mr. Kartsois.
- Site alleges that principal is having an affair with a teacher.
- Site solicits money to hire a hitman to kill Mrs. Fulmer. She is portrayed with her head cut off.
- Principal learns of web site from “undisclosed source” notifies police and FBI.
- J.S. is expelled, and he sues alleging violation of his First Amendment rights.

# ***Beussink*: Court comes down on side of free speech**

- “At first blush it may seem that the public's interest in orderly schools is best served by allowing the Woodland School District to discipline Beussink in whatever manner the school district deems appropriate. Further inquiry into the purpose of the First Amendment however, shows otherwise.”
- 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.

## JS. V. Bethlehem Area Sch. Dist. (Pa. 2000)

- "Student morphed her likeness into one of Adolph Hitler, called her a "fat bitch," and showed a picture of her severed head dripping with blood. Student also accused Mr. Kartsothis of engaging in an extra-marital affair. Student solicited money for a hit man, and whether or not it was mere hyperbole, he crossed that line of conduct that we, as a society, find acceptable.
- Ms. Fulmer takes medical leave of absence and goes on medication. Testifies that she has short-term memory loss. Principal testified to negative effect of site to morale of school.

## ***JS. V. Bethlehem Area Sch. Dist. (Pa. 2000)***

- “Regrettably, in this day and age where school violence is becoming more commonplace, school officials are justified in taking very seriously threats against faculty and other students. We emphatically reject [student’s] attempt to dismiss the reactions of the targeted faculty members as merely subjective. Given the contents of Student’s web-site and the effect it had upon Mr. Kartsois, Mrs. Fulmer and the school community, we conclude that the trial court properly determined that the School District did not violate Student’s rights under the First Amendment.”

## ***Doe v. Pulaski County Special Sch. Dist. (8th Cir. 2002)***

- Doe, an 8<sup>th</sup> 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 to K.G. 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, 8<sup>th</sup> 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. J.M. 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.<sup>3</sup> 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 of YouTube 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 on YouTube 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 conducting 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<sup>3</sup>
- 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 Layshock'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 8<sup>th</sup> 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.”

## ***Snyder v. Blue Mountain Sch. Dist.* (3d Cir. 2011)**

- “The profile was so outrageous that no one could have taken it seriously, and no one did. Thus, it was clearly not reasonably foreseeable that J.S.’s speech would create a substantial disruption or material interference in school . . .”
- “J.S. did not . . . intend for the speech to reach the school—in fact, she took specific steps to make the profile “private” so that only her friends could access it.”
- “Neither the Supreme Court nor this Court has ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school.”

## Sagehorn v. Indep. Sch. Dist. No. 728 (D. Minn. 2015)

- In January, 2014, someone posted an anonymous message on a website entitled “Roger Confession”: “did @R\_Sagehorn3 actually make out with [name of female teacher at Rogers High School]?” Sagehorn, a high-school senior, by posting “actually yes.”
- For this offense, school authorities suspended Sagehorn, and allegedly threatened him with expulsion. Fearing an expulsion would cause North Dakota State University to rescind its admission offer, Sagehorn withdrew from school. School officials referred the incident to the local police; and the police chief reputedly said publicly that Sagehorn’s brief post might constitute a crime.

## Sagehorn v. Indep. Sch. Dist. No. 728 (D.Minn.2015)

- Sagehorn sued, alleging violation of his First Amendment rights and right to due process.
- School argued that 1) text was obscene and thus not protected, 2) that it was vulgar and could be censored under *Tinker*, and that 3) the text could lead to substantial disruption at school, and could be censored under *Tinker*.
- Court ruled that Sagehorn's constitutional right to text "actually yes" was well established.

## Kowalski v. Berkeley County Sch. Dist. (4<sup>th</sup> 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. (4<sup>th</sup> 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. (4<sup>th</sup> 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. (4<sup>th</sup> 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. (4<sup>th</sup> 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. (4<sup>th</sup> 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 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.



**INTERVIEWER:** Did your mom? Isn't that a bit odd?

**FALWELL:** I don't see it. Looks don't mean that much to me in a woman.

**INTERVIEWER:** Go on.

**FALWELL:** Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda...that's called a Five and Dimes...at the time. And Mom looked better than a Baptist whore with a

box of tissues. But not in the outback. Between Mom and the whif, she knew she had much to lose.

**INTERVIEWER:** He means the Campari?

**FALWELL:** Oh, yeah. I always get stonier before I go out to the public. You don't think I could be drunk at the hottest spots, do you?

© 1997 Campari Company  
Campari is a registered trademark of Campari Company.



**FALWELL:** My first time was in an outback outside Lumburg, Virginia.

**INTERVIEWER:** Isn't it a little weird?

**FALWELL:** Not when I know the girl out.

**INTERVIEWER:** I see. You must tell me all about it.

**FALWELL:** I never really stopped to make it with Mom, but then after she showed all the silver-gays in town such a good time, I figured, "What the hell!"

**\$100 donation.**

**INTERVIEWER:** Campari is the leader with Mom... Now what's going on with you?

**FALWELL:** The Campari was great, but Mom passed out before I could come.

**INTERVIEWER:** Do you ever try it again?

**FALWELL:** Sure.

Campari first time was made in the 1950s in front of a stone building with a sign that said "Campari". It was the first time anyone ever had a drink with a woman. That was the first time anyone ever had a drink with a woman. That was the first time anyone ever had a drink with a woman. That was the first time anyone ever had a drink with a woman.

**CAMPARI** You'll never forget your first time.

© 1997 Campari Company

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

- In 2011, Bell, high school senior, posted rap recording on Facebook that accused two high school coaches of having sexual affairs with 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 alternative school for remainder of 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 5<sup>th</sup> Circuit reversed.
- On *en banc* review, 5<sup>th</sup> 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.”



# 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."
- *Bethel* does not permit school to punish students for off-campus speech delivered on social media simply because the speech is vulgar.
- Private lawsuits for defamation are likely to fail.
- 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 and is disruptive to the learning process as set forth in *Kowalski*. Under *Bell v. Itawamba County School Board*, schools can discipline students for speech on social media that threatens a school employee and that school officials reasonably believe will cause a substantial disruption at school.