

# Social Media & The Law: First Amendment

McDonald Hopkins LLC  
Attorneys at Law

# welcome

**McDonald Hopkins** LLC  
Attorneys at Law



**Christopher Hopkins** is a trial and appellate lawyer at McDonald Hopkins, LLC.

- Data breach
- Defamation
- E-discovery and retention
- Internet crimes
- Privacy
- Social media discovery

[chopkins@mcdonaldhopkins.com](mailto:chopkins@mcdonaldhopkins.com)

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.

- **By the 14th Amendment, it also applies to the states**
- **Also applies to non-legislative branches (not just Congress), *Herbert v. Lando* (1979)**

**“...a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”**

***NYT v. Sullivan* (1964)**

**Which is how we get publications  
*like these....***





**And sometimes unusual results...**



**Law outlawing cross burning upheld when done with the intent to intimidate; OK if done as “a statement of ideology... a symbol of group solidarity... or in movies such as *Mississippi Burning*...”**

# And sometimes unusual results...



**No-disparagement provision in Trademark registration: “speech may not be banned on the ground that it expresses ideas that offend.”**

***Matal v. Tam* (2017)  
 (“The Slants” case)**

# Original Focus was on “Prior Restraint,” Now Subsequent Penalties & Outcomes

***Fox v. Hamptons at Metrowest Condo. Assoc.***  
(Fla. 5th DCA July 21, 2017)

**Fox allegedly violated HOA rules and harasses, intimidates, and threatens others.**

**Parties settle. Court enforces agreement and orders Fox to stop posting on websites, social media, or bogs.**

***“In public debate, our own citizens must tolerate **insulting, and even outrageous, speech** in order to provide breathing space to the freedoms protected by the First Amendment.”***



***“...insulting, and even outrageous, speech...”***



# **Original Focus was on “Prior Restraint,” Now Subsequent Penalties & Outcomes**

***Fox v. Hamptons at Metrowest Condo. Assoc.***  
**(Fla. 5th DCA July 21, 2017)**

**“Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context. [...]**

**A free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.”**

**(citations omitted)**

# Strict Scrutiny

**(content-based restrictions on fully protected speech):**

**“promote a compelling interest”**

**+**

**“least restrictive means to further the articulated interest”**

***Sable Comm. of Calif. v. FCC (1989)***

# Intermediate Scrutiny

**“significant... substantial... or important” government interest**

**+**






















**narrowly tailored restriction**

- **Non-content based restrictions (*e.g.*, time, place, or manner & incidental)**
- **Types of speech which Court accords less than full protection (*e.g.*, commercial, campaign)**
- **Content-based restriction that can be justified on other grounds**

**(*e.g.*, bans on nude dancing, zoning restrictions on pornography businesses -- laws are based on combating crimes & secondary effects)**

# What is NOT Protected?

- **Obscenity**
- **Fighting words**
- **Defamation (including libel and slander)**
- **Child pornography**
- **Perjury**
- **Blackmail**
- **Incitement to imminent lawless action**
- **True threats**
- **Solicitations to commit crimes / integral to criminal conduct**
- **Likely also: treason and plagiarism of copyrighted material**

TYPE OF SPEECH	CENSORSHIP						
	LESS						MORE
<b>HATE</b> Hate speech is speech that offends or attacks people on the basis of race, ethnicity, national origin, religion, gender, sexual orientation, disability, disease, or other traits. <a href="#">MORE ►</a>							
	<b>FIRST AMENDMENT:</b> <u>The First Amendment protects hate speech from government censorship unless that speech incites or is likely to incite imminent lawless action.</u>						
<b>OBSCENITY</b> Obscenity is famously hard to define, but in general refers to content that strongly offends the prevalent morality of the time. <a href="#">MORE ►</a>							
	<b>FIRST AMENDMENT:</b> <u>The First Amendment protects pornography from government censorship unless it's obscene. Whether something is obscene depends on contemporary community standards, and whether it has any literary, artistic, political, or scientific value — but nudity alone is not enough to make it obscene.</u>						
<b>HARASSMENT</b> Harassment refers to unwanted behavior that makes someone feel degraded, humiliated or offended. We do not define it to include true threats of violence, which are banned by all of the platforms below and are not protected by the First Amendment. <a href="#">MORE ►</a>							
	<b>FIRST AMENDMENT:</b> <u>The First Amendment does not protect true threats (serious expressions of intent to commit acts of unlawful violence) from government censorship. But some anti-bullying laws have been struck down for violating the First Amendment.</u>						



# Ways that laws are typically voided...

- **Vagueness**
- **Overbreadth**

**[typically: loyalty oaths, obscenity, indecency, restraint on public demonstrations]**

# Other than laws, how else Can government chill speech?

- **Reverse Engineering** – flood a website with mixed messages and re-directs the conversation (rather than simply deleting)
- **Single out** – attack people and companies by name, raising the “cost” of speaking about controversial issues



# **First Amendment & Social Media / Internet**

# State of the First Amendment

- 22%**     **1st A protections have gone too far!**  
[50% in 2002; spikes in 2013-2014]
- 34%**     **Their trust in news coming from social media has decreased in the past year**  
(9% say their trust has increased)
- 43%**     **Universities should have the right to ban speakers**
- 46%**     **Engaged in some form of political action in last year**  
(e.g., petition (35%), boycott, demonstrate, strike, other acts of protest)
- 51%**     **Conservatives who agree Muslims should be held to higher scrutiny**     (18% liberal; 33% moderate)
- 55%**     **Racist views on social media should not be allowed**

# The US Supreme Court Loooooves the Internet

**“vast democratic forums of the Internet...”**

**Internet allows topics “as diverse as human thought...”**

***Reno v. ALCU (1997)***



# Five Justices Write a Love Letter to Social Media

**“While in the past there may have been difficulty in identifying the most important places for the exchanges of views, today the answer is clear. It is cyberspace -- the ‘vast democratic forums of the Internet’ -- especially social media.”**

**“A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.”**

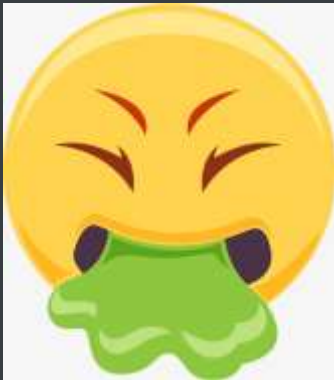
**“...we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts might be conscious that what they say today may be obsolete tomorrow.”**

***Packingham v. North Carolina (2017)***



# ... but Three Justices were nauseated by that...

**“[We] cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks.”**



***Packingham v. North Carolina (2017)***

**(Alito concurring (?) with Roberts  
and Thomas; Gorsuch did not participate)**

# **Elected Officials on Social Media**

# ***In Re Hon. Michelle Slaughter,*** **Special Court of Review of Texas, 9/30/15**



- **Rule:** “willful or persistent conduct that is clearly inconsistent with the proper performance of [her] duties or cast public discredit upon the judiciary”
- **CHARGE 1:** “used the trappings of judicial office to boost her message... cast reasonable doubt upon her impartiality...”
- **CHARGE 2:** she was removed from a case and subsequent judge ruled mistrial
- **CHARGE 3:** disregarding her own admonitions to jurors about using social media

***We never get to her second defense that canons violate her First Amendment***

# ***In Re Hon. Michelle Slaughter,*** **Special Court of Review of Texas, 9/30/15**



- **Facebook page: (wearing her robe) (photo of courthouse) (Judge... of the 405<sup>th</sup> Judicial District)**
- **“Social media is having a transformative effect on society as it revolutionizes the way we share information and ourselves.” John G Browning, U. Miami. L. Rev. 2014**
- **“... no rule, canon of eithics, or judicial ethics opinion in Texas prohibits Texas judge from using social media...”**
- **“Thus, our analysis of the allegations of misconduct... should not change simply because the communication occurred online...”**

# ***In Re Hon. Michelle Slaughter,*** **Special Court of Review of Texas, 9/30/15**



- **“WE HAVE A BIG CRIMINAL TRIAL STARTING MONDAY!” – “big” and exclamation mark are at issue. Defense counsel said he experienced none. Ad litem lawyer said it could be interpreted as biased. “The Commission did not present evidence that... statements would suggest... judge’s probable decision... impartial[ity]”**
- **“... the timing of the posts is troublesome... even calling attention to certain facts... may tend to give the public the impression that they are seeing into the deliberation process of the judge” (but this goes nowhere)**
- **Recusals happen even if no bias**
- **Disregard her own admonishment: but it was about receipt of information (this applied to her) and the disclosure of information (this did not apply to her).**
- **“...judges should be cautious... to avoid posting... regarding pending proceedings that may invite disparaging comments....”**

***“...may invite disparaging comments...”***



**IBI123** 1 hour ago

Jeri Muiou is one of the worst mayors any city can have . Frankel put her in office and you remember Digital Domain . All Muiou ever did was pee away 2 million dollars to stop state road 7 for her and her friends at Ibis. Homeless all over the place. Jeri I moved out of your city . Still in PBC . You are ILLEGAL friendly and watch it kick you in your old butt in Delray Lake Worth and Greenacres. You will have another Kate Steinle here one day! My homeowners insurance went down because of the crime in your chithole. All I did was move a mile away north. I could not get a jewelry binder because of the crime in your hole. You are the new Dade County. Just let them come in and take over. Don't pat yourself on the back you old beach you did nothing . Give the 2 million in lawyers fees back from the state rd 7 fight

**DELRAY RETIREE** 2 hours ago

This is clearly an Obama era problem. Trump will address this and fix it just as he has fixed everything else.

Perhaps if Washington addressed the issue, real change could happen. But with pathetic money grabbing, anti social program, republicans it is hard for cities to deal with these issues. The right does not support our citizens period.



***“...may invite disparaging comments...”***

Condo resident charged with arson in fire that caused about \$4M worth of damage, killed three cats



Dr Bubo — • 11 hour(s) ago

Cat's life matter! They should hang him!

0 👍 0 👎 • Reply • Promote • Actions ➤ • <



Socrates69 ➤ • 17 hour(s) ago

What a CATastrophe.



by Ernie D

# ***WHERE IS SHE NOW?***



Galveston District Judge Michelle Slaughter wins seat  
on Texas Court of Criminal Appeals

Comments comments

THEGOLDENHAMMER.NET

# ***Davison v Loudon County,*** **267 F.Supp. 3d 703 (ED Va. 2017)**

- **“This case raises important questions about the constitutional limitations applicable to social media accounts maintained by government officials.”**
- **“Chair Phyllis J. Randall” Facebook page**
- **Arguments it is not government speech:**
  - **Duties don’t require her to maintain**
  - **Set up day before sworn into office**
  - **Created “outside of official channels”**
  - **Updated on personal devices**
- **Arguments it IS government speech:**
  - **“About” section categorizes it as “Government Official”**
  - **Contact info, website link to government**
  - **Most posts about work**
  - **Official newsletter refers to Facebook page**
  - **She has a separate personal page**
  - **“I really want to hear from ANY Loudoun citizen on ANY issues, requests, criticism, compliemtn, or just your thoughts. [...] I really try to keep back and forth conversations on my county Facebook page or county email.”**

# ***Davison v Loudon County,*** **267 F.Supp. 3d 703 (ED Va. 2017)**

- **Plaintiff attends panel discussion with School Board and asks councilwoman about ethics pledge she had mentioned during her campaign.**
- **No one can remember exactly what Plaintiff later posted on her page**
- **“Probably not something I want to leave on Facebook page”**
- **“The Court finds that Defendant banned Plaintiff from her Facebook page because she was offended by his criticism...”**
- **Unbanned the next morning**
  
- **Question: When is a social media account maintained by a public official considered ‘governmental’ in nature and thus subject to constitutional constraints?**
  
- **Answer: Examine whether the public official acts under color of state law or undertakes state action in maintaining the social media account. This is a matter of normative judgment... there is no specific formula.**
- **Criticism of official conduct lies at the very heart of the First Amendment**
- **Government opens a forum by creating a website with a chat or bulletin board feature**
- **Nature of forum doesn’t matter (traditional, limited, non-public) since viewpoint discrimination is prohibited in all forums [think The Slants]**
- **She could “moderate” if neutral, comprehensive social media policy**

# ***So where does this leave us...?***



- **Elements from Davison v Loudoun County:**
  - **“About” section categorizes it as “Government Official”**
  - **Contact info, website link to government**
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# Students on Social Media



# **Bell v. Itawamba**

- **Students composes & records song off campus, posts on YouTube & FB on personal computer**
- **Off campus / non-school hours**
- **no substantial disruption of school work or reasonably forecasted**
- **Disciplinary hearing: coaches not show up, lawyer wrote, “threat to school... was vague”**
- **School board: student did “threaten, harass, and intimidate” (no additional reasons given)**
- **Injunction hearing: “adversely affected” teaching styles... reasonably foreseeable posting on YT/FB would cause material and substantial disruption...**

# **Bell v. Itawamba I (Dec 2014)**

- **Application of Tinker incorrect because no evidence of “material and substantial” disruption (or reasonably forecast)**
- **“proscription cannot be based on the officials’ mere expectation that speech will cause disruption”**
- **Rejected notion that this speech was akin to *Ponce* case where student threatened Columbine-like attack**
- **Dissent: “erroneously contends that ‘technological developments,’ especially the Internet, have rendered the distinction between on- and off-campus speech obsolete.”**

# Bell v. Itawamba II (Jan 2015)

- **4 instances of threatening, harassing, and intimidating language:**
  1. “betta watch your back / I’m a serve this nigga, like I serve the junkies with some crack”;
  2. “Run up on T–Bizzle / I’m going to hit you with my rueger”;
  3. “you fucking with the wrong one / going to get a pistol down your mouth / Boww”; and
  4. “middle fingers up if you want to cap that nigga / middle fingers up / he get no mercy nigga”.
- **“Anyone could listen.”**
- **“he did not think the coaches would hear the recording and did not intend it to be a threat, he knew students would listen...”**

# **Bell v. Itawamba II (Jan 2015)**

- **Policy says T, H, & I = severe disruption**
- **When Tinker was decided “the Internet, smartphones, and digital social media did not exist.”**
- **“Greatly affecting this landscape is the recent rise in... violence [in] school...”**
- **“In light of... concerns regarding school violence, it is necessary to establish the extent to which off-campus student speech may be restricted...”**
- **“Bell’s position... fails to account for evolving technological developments...”**

# **Bell v. Itawamba II (Jan 2015)**

- **“...Bell’s admittedly intentionally directing at the school community his rap recording...”**
- **“...speaker’s intention that his speech reach the school community, buttressed by his action in bringing about that consequence..”**
- **“...regardless of whether [statements] qualify as ‘true threats,’ they constitute T, H, I as a layperson would understand them.”**
- **Deference to school (did not make per se)**
- **School officials do not have “difficult burden... decisions will govern if they are within range where reasonable minds differ”**
- **Tinker allows schools to avoid Elonis**

# **...meanwhile, in Florida...**

***J.A.W. v. Florida*, (Fla. 2d DCA Sept. 28, 2016)**

- **“can’t wait to shoot up my school”**
- **“it’s time” [photo of gun being put in backpack]**
- **“school getting shot up on a Tuesday”**
- **“night fucking sucked, can’t wait to shoot up my school soon”**
- **Tweets were public**
- **Shared with @Duhssault, friends who often joked about being unfairly stereotyped as potentially violent based on their interest in rock music and violent video games.**
- **No evidence any of his followers were local**
- **Watchdog group called police**



# **...meanwhile, in Florida...**

***J.A.W. v. Florida*, (Fla. 2d DCA Sept. 28, 2016)**

- **F.S. 836.10 “any person who writes... and also sends... letter or communication... to any person containing a threat to kill or do bodily injury to the person to whom the letter or communication is sent... commits a felony...”**
- **What did the court rule?**
- **“The plain language of section 836.10 makes clear that it only applies where a threat is sent directly to a specific victim...”**
- **“Twitter cannot be considered a ‘form of delivery’ under the facts of this case because, even though he posted the tweets to a public forum, there is no evidence that JAW directed the threat to the potential victims aside from merely referencing ‘my school.’”**

## **...meanwhile, in Florida...**

***J.A.W. v. Florida*, (Fla. 2d DCA Sept. 28, 2016)**


- **“We emphasize, however, that the type of threats at issue in this case pose a serious problem. Social media is a relatively new and extraordinary popular form of communication.”**
- **“Because of these unique dynamics of... social media, any unprotected post can go viral... In this context, a threat of violence made publicly on social media is likely to reach its target and cause fear of bodily harm just like a traditional letter might.”**
- **“Accordingly, the legislature may wish to revisit section 836.10 to address the modern problem of threats issued and shared publicly on social media.”**

# ...meanwhile, in Florida: SB 310 & HB 165 (2018)

23           Section 1. Section 836.10, Florida Statutes, is amended to  
24 read:

25   836.10 Written threats to kill or do great bodily injury;  
26 punishment; exemption from liability.—

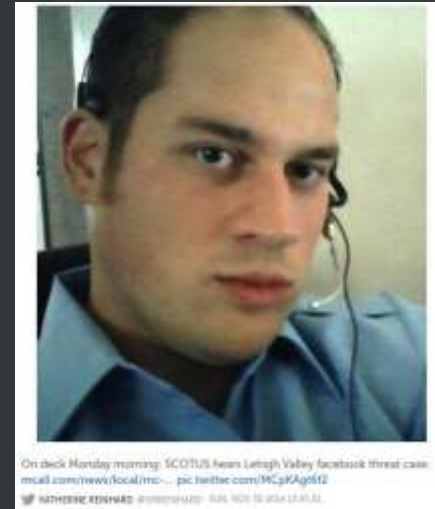
27           (1) A ~~Any~~ person who makes a threat in a writing or other  
28 record, including an electronic record, ~~writes or composes and~~  
29 ~~also sends or procures the sending of any letter, inscribed~~  
30 ~~communication, or electronic communication, whether such letter~~  
31 ~~or communication be signed or anonymous, to any person,~~  
32 ~~containing a threat~~ to kill or to do great bodily injury to  
33 another ~~the~~ person and posts or transmits the threat in any  
34 manner that would allow another person to view the threat to  
35 ~~whom such letter or communication is sent, or a threat to kill~~  
36 ~~or do bodily injury to any member of the family of the person to~~  
37 ~~whom such letter or communication is sent~~ commits a felony of  
38 the third ~~second~~ degree, punishable as provided in s. 775.082,  
775.083, or s. 775.084.



# **Elonis & “True Threats”**

## ROBERTS:

- **“any communication containing any threat.. to injure the person of another.”**
- **(nom de plume, Tone Dougie)  
(disclaimers) (adaptation of a comedy sketch) (link to “freedom of speech”)**
- **“Congress meant to proscribe a broad class of threats... but did not identify what mental state...”**
- **“when interpreting federal criminal statutes that are silent on required mental state, we read into the statute only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct.”**



# US v Elonis (3<sup>rd</sup> Cir. Oct 2016)

- **SCOTUS held jury instruction was insufficient. Third Cir. said harmless.**
- **Court did not reach “reckless” standard and Alito suggested on remand we consider.**
- **“If defendant transmits a communication [(a)] for purpose of issuing a threat or [(b)] with knowledge recipient will it it as a threat AND [(c)] a jury determines that communication is objectively threatening, then the defendant has violated...”**
- **“beyond a reasonable doubt the jury verdict would have been the same”**
- **Elonis never denied that he knew his posts would appear threatening (no one would believe him)**





# What happened to Mr. Elonis?

**SCOTUS denied second appeal**

**44-months in prison**





# **First Amendment Cases Pending Before SCOTUS in 2018**

# Pending Cases

## ***National Institute of Family and Life Advocates v. Becera* (9th Circuit)**

**State requires nonprofits that are licensed to provide medical services post notices to inform their patients that free or low-cost abortions are available and to provide the telephone number of the state agency that can put the patients in touch with providers of those abortions.**

- **Appellants lost at trial and on appeal**
- **Argument is it doesn't apply to abortion providers.**



# Pending Cases

## *Minnesota Voters Alliance v Mansky*

**Voting with a Tea Party T-shirt and a button that promoted efforts to require a photo ID to vote.**

**8th Circuit “effectively chills the free speech rights of millions of voters across the country by threatening criminal prosecution or civil penalties for voters who wear logoed t-shirts, caps, jackets, buttons, and other apparel in state-declared speech-free zones.”**

**(messy to draw the line)**



# Pending Cases

## *Masterpiece Cakeshop v Colorado Civil Rights Commission*

- **State public accommodation law**
- **Summary judgment case (very narrow facts)**
- **Masterpiece claims it was due to buyers' intended conduct as opposed to their identity (2 SCOTUS cases disfavor this argument)**
- **Colorado said cake-making is not sufficiently expressive**
- **All cakes are custom; but buyers never got to what they wanted – baker only knew they were gay**
- **Does a third party really believe the baker is speaking when a cake says, “Happy Birthday”?**



# Pending Cases

## ***Janus v. American Federation***

- **Do non-union government employees have to pay a “fair share” fee for union’s successful negotiation of contracts which benefit the employees? (this has been up to the Court several times, deadlocked after Scalia)**

## ***Lozman v. City of Riviera Beach***

- **Was there a First Amendment violation when resident was arrested at city council meeting for refusing to cease talking when his time elapsed? (jury found that police had probable cause to arrest, which may be influencing factor)**

# Thanks!

McDonald Hopkins LLC  
Attorneys at Law

[chopkins@mcdonaldhopkins.com](mailto:chopkins@mcdonaldhopkins.com)

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@cbhopkins