Minutes*

Academic Freedom and Tenure Committee
Friday, November 22, 2013
10:00 – 12:00
238A Morrill Hall

Present: Carl Flink, Karen Miksch (co-chairs), David Born, Jerry Cohen, William Craig, Barbara Elliott, Teresa Kimberley, Gary Peter, Scott Petty, Nicole Scott, Nathan Shippee

Absent: Phil Buhlmann, Arlene Carney, Brad Karkkinen, Jessica Larson, Paula Rabinowitz

Guests: Professor Amy Sanders (School of Journalism and Mass Communication)

[In these minutes: (1) social media issues in higher education; (2) draft shield law for research protection]

1. Social Media Issues in Higher Education

Professor Flink convened the meeting at 10:00 and welcomed Professor Sanders to the meeting to discuss social media issues in higher education.

Professor Sanders began by reporting on her background and predilections: she had a professional life in the newspaper business but is also an attorney who offers pro bono assistance to student journalists in Missouri and Florida on First Amendment issues. Her research is on freedom of expression and adapting laws to new technologies. Her comments today, she related, are a condensation of a longer presentation she gave at the University of Northern Iowa—and she cautioned that she is NOT giving legal advice to anyone with her remarks (she is not licensed to practice in Minnesota), nor is she advising on University policies.

What is most important is that people be aware of the issues and talk about social media and its role in society, Professor Sanders said. There are social media issues that relate to students, issues that relate to hiring faculty and staff, and issues related to faculty and staff as employees.

What are social media? Professor Sanders cited media scholar Danah Boyd to define them as "web-based services that allow individuals to construct a public or semi-public profile within a bounded system, articulate a list of other users with whom they share a connection, and view and traverse their list of connections and made by others within the system." One usually thinks of Facebook, Twitter, and so on, but there are hundreds of networks, some to maintain connections, some to engage strangers, that have various capabilities.

People often think that others use social media the same way they do, which is not true, Professor Sanders said. In terms of who's using social media, the Pew Research Center's Internet & American Life Project did a survey in late 2012; it shows that "young adults are more likely than others to use social media. At the same time, other groups are interested in different sites and services." Of adult Internet users, 67% use some form of social media, and they are most appealing to adults age 18-29 and to

* These minutes reflect discussion and debate at a meeting of a committee of the University of Minnesota Senate; none of the comments, conclusions, or actions reported in these minutes represents the views of, nor are they binding on, the Senate, the Administration, or the Board of Regents.

women. Of the Internet users, 67% use Facebook (appeals primarily to women and adults 18-29), 16% use Twitter (adults 18-29, African-Americans, urban residents), 15% use Pinterest (women, adults under 50, whites, those with some college education), 13% use Instagram (adults 18-29, African-Americans, Latinos, women, urban residents), and 6% use Tumblr (adults 18-29). As a particular social medium becomes more popular with older users, the younger generation gravitates toward a newer replacement.

Mr. Petty asked what it means to "get on" Facebook. It is almost impossible to remove your profile from Facebook. Professor Sanders agreed, and said that as students are learning that employers are using Facebook and other social media, they shift away from them.

In terms of college students, technology, and social media, in general institutions need to know how college students use them, Professor Sanders said. In some ways college students are more advanced than their non-college peers; in other ways they are not. More than 90% of college students (graduate and undergraduate) report that they have broadband Internet access at home. Similar percentages report using wireless (mobile or laptop). In terms of cell phones, 96% of college students versus 89% of non-college students own one. School attendance is not related to social media use but there is a difference in technology owned. Interestingly, only 9% of college students own an e-book reader, so even while there is much talk about using e-books, few students own dedicated technology.

About 15% of Facebook users actually post status messages daily, while nearly one-fourth of users comment or like others' content. What this suggests, Professor Sanders said, is that on most days there is more watching than posting. The millennials (ages 19-34) have on average 318 Facebook friends; the GenXers and Boomers have fewer than 200, which suggests that the two older groups are more discriminating.

Professor Sanders turned next to social media and the law. Social media are becoming powerful tools to gather and share information as well as to promote free speech and freedom of association. But at the same time there are negative effects from social media in higher education and in society, including conflicts between free speech and other values, such as fair trials, discipline within schools, efficiency within the workplace, and the rights of individuals to be free from defamation, harassment, or privacy invasions. There is much occurring that suggests the law needs to react, but technology is moving far more rapidly than the law. In the late 1990s and early 2000s, Congress attempted to regulate the Internet through legislation—largely targeted at indecency and pornography—but the federal courts struck down many of those laws as unconstitutional violations of the First Amendment. Some cases involving Facebook, Twitter, and other social media are beginning to percolate through the lower courts, but many have not progressed far enough to provide meaningful precedent.

Students often do not think about what they are writing on social media sites, Professor Sanders said. The law on taking action against students for off-campus activity is blurry; there is no clear Supreme Court ruling dealing with college students and off-campus speech. The courts draw distinctions in the law between college student and their non-college peers. First, 18-year-olds outside of college have full First Amendment rights; college students have somewhat fewer rights because of the need to maintain decorum in the educational process, so universities have the authority to take action on campus. What about off campus? Courts generally favor student off-campus speech; the big exception is the Minnesota Supreme Court decision in the Tatro case (comments about a cadaver and wishing to stab someone). Many saw the comments about stabbing someone as a true threat, which is an area of unprotected speech. (Adults in or outside of higher education have no constitutional right to make true threats, Professor

Sanders observed.) The court in this case, however, ruled that the comments were a violation of the mortuary science student code of conduct and issued a very narrow ruling. It should not, in Professor Sanders' opinion, be read to stand for the proposition that universities can always take action against student speech that occurs off-campus—but they may be able to do so in established professions with well-drafted codes of conduct.

Professor Born asked if a professional code of conduct must specify social media or if it can contain general standards. Professor Sanders said she did not believe such codes must specifically mention social media. It might be wise, however, for such codes to include social media.

Professor Flink asked if the court looked at the constitutionality of the code of conduct. Professor Sanders said the court reached no judgment about the University's Student Code of Conduct; it looked at the code specific to mortuary science and concluded that University sanctions for violating the code were permissible. The key take-away from the *Tatro* decision can be found in Associate Justice Helen Meyer's opinion for the Court: "Tying the legal rule to established professional conduct standards limits a university's restriction on Facebook use to students in professional programs and other disciplines where student conduct is government by established professional conduct standards. And by requiring that the restrictions be narrowly tailored and directly related to established professional conduct standards, we limit the potential for a university to create overbroad restrictions that would impermissibly reach into a university student's personal life outside of an unrelated to the program."

In addition to the *Tatro* exception, Professor Sanders said, there are two other cases when the courts are likely to side with educational institutions: the threat of violence or in cases where the speech would cause material disruption in the classroom. Generally in First Amendment law there are other areas where a university could take action, such as defamatory remarks, obscene material (that meets the constitutional definition of obscenity, which is a small fraction of material), true threats (based on the constitutional definition of a true threat—not merely a layman's idea of a threat), release of private materials (e.g., HIPPA, FERPA), and violation of copyright.

Professor Sanders said, on a side note, that one thing institutions need to think about is the issue of ethics and professionalism when using social media: Faculty and graduate students posting about things that happen in the classroom (even without naming specific students) or selecting humorous or embarrassing examples from student work and posting about it. Though much of the conduct may not technically be against the law, universities and departments should consider talking to faculty, staff, and graduate students about the issues. Professor Cohen pointed out that instructors are to return student work in a confidential way, so shouldn't be putting it on a social media site.

Professor Miksch said that she has heard, about advising students for admission, that admissions counselors may make disparaging comments about students. She said she did not know if such individuals should be fired but the conduct is clearly unprofessional and people should not engage in it. People need training so they understand that what they think is private is not—and that it is unprofessional. People should be disciplined if they talk about individual students or their work.

In terms of social media and hiring, they are playing a large role in recruiting and hiring, Professor Sanders said. In a 2012 survey, 92% of employers admitted they use social media in some form as a screening or recruiting tool; she said she did not know if that is official or unofficial use. As the chair

of a search committee, she told the search committee members *not* to look at applicants' profiles on social media (which are commonly used by academics in her field).

What about a blog for which one is known, Professor Kimberley asked? Professor Sanders observed that both the federal government and the State of Minnesota identify a number of characteristics on which employers may not discriminate, many of which can be learned from social media (e.g., gender, ethnicity, etc.). It is not a problem to learn those characteristics—but it is a problem to use them in the hiring decision. Once a search committee or hiring authority learns about the characteristics, how will they argue that they have an independent basis for their decision? If they know about the characteristics but do not hire the person, and that person sues, the hiring authority must document the independent basis of the decision and that the characteristic(s) did not affect the hiring decision.

Professor Cohen said that is an unsatisfactory explanation because if one interviews a candidate for a job, the interviewer can see how old the person looks, the ethnic background, and so on. Professor Sanders agreed that when someone comes to campus, they reveal information to the interviewer. Many factors on which one may not discriminate are revealed during an interview, Professor Cohen said. Moreover, one can look at a faculty candidate's papers (listed on a CV) on PubMed or other places—there are tools one can use that are not outside the pale in terms of checking on people. Professor Sanders said it is not illegal to do so but doing so may open the door for possible lawsuits. The question is the misuse of information, Professor Cohen said. Having knowledge and reading content on social network pages does not mean one is engaged in a discriminatory practice when all is open. If one uses social media, where does it stop? Researchgate is social media that scientists use. Professor Sanders said she told search committee members that they asked for a CV, a cover letter, and reference letters, and those are the materials that should be used to decide whether to bring someone to campus for a visit. Professor Cohen said that if someone has plagiarized, the search committee is not doing due diligence. Professor Miksch said that one can look at what is on a CV.

Professor Sanders said that the goal is not to say that search committees or others should not do a thorough review of applicants, the goal is be aware that there is the potential for litigation and to attempt to minimize that risk. It is extremely important to document why someone was not selected. Accessing social media profiles can open a hiring authority to charges of invasion of privacy if they use illegal means to gain access to the sites. A number of states are passing laws that, for example, prohibit employers from asking for social media logins or passwords; it is better simply not to look at the sites. The issue is awareness: if a company wants to make a decision based on values, it should separate social media screening from the hiring decision.

Once someone is hired, it is very difficult to constrain employees, especially at public institutions, Professor Sanders said, and writing conduct codes that are lawful is very difficult. The NLRB has cracked down on employers who broad social media codes against employees who speak about protected activities (e.g., wages, union activities, working conditions).

Professor Born asked if there is overlap between use of University computers and web access and, for instance, posting obscene pictures. Professor Sanders said a 2010 Supreme Court decision suggests that public employees have no reasonable expectation of privacy when using employer-provided technology. Employers in general have a lot of leeway in monitoring activity when employees use its technology and network.

What about students using a university's network, Professor Born asked? Students may have a greater expectation of privacy when using the university network, depending on user agreements; if they also use university equipment, the institution likely has more authority to monitor. Because courts often inquire about whether the monitoring is a matter of routine business activity, it is best to have formal policies related to employee use of employer-provided technology. This ensures employees have notice about any employer-initiated monitoring that might occur.

The takeaway point, Professor Sanders said, is that it is extremely difficult to constitutionally restrict what someone can do on social media sites, either for students or for faculty off campus. What is key is educating people about what happens on social media; people do not think about what they post or they don't know that it is wrong. It is surprising, she said, that the University has no social media training for employees and graduate students (e.g., for FERPA requirements). It should embrace best practices.

She emphasizes training, training, training, Professor Sanders told the Committee. Education is best, including talk about consequences. The guide she gives to students encourages best practices:

-- be aware of reflection on an institution when you make your identity/affiliation known (what you do reflects on the University whether you intend it or not)
-- exercise caution when connecting with unknowns
-- be aware when advocating positions in social media (and how doing so can affect other parts of your life)
-- exercise caution when sharing information that might be protected by law (FERPA, HIPPA, etc.), because you could be open to a lawsuit
-- think carefully before re-tweeting or re-posting (you can be held liable for the information)
-- avoid posting copyrighted information without permission (you can be held liable)
-- avoid breaking news about important events on unofficial channels first (e.g., from a publisher, which could violate copyright agreements)
-- observe the same ethical standards on social media as you do in your professional life (e.g., act as an attorney/doctor/journalist on social media)
-- consider all social media posts to be available to the public (even if a site is locked down, assume anything you post will be public—if you send *anything* electronically, it could be made public)

Mr. Peter asked about instructors who require the use of social media in a course (e.g., a Twitter feed, like a discussion forum); that poses access issues for students without access. What is the instructor's role to monitor the work (e.g., when there could be defamation)? There is much going on in this area, Professor Sanders said, and she required students to use Tumblr; she told them they could keep it private and set it so Google could not search it. Her view is that when faculty members require students to use social media, they are obligated to talk with the students about the implications (such as that they can be sued if they libel someone).

If an instructor has a private Moodle site, it is likely safer because it can be limited access and the instructor can police it, Professor Sanders said. But when an exercise is created in a Twitter account and students must tweet publicly, students must be careful about what they write. Although the instructor would probably not be liable for anything written, the students could be.

Professor Sanders agreed that access is an issue whenever use of technology is assigned. She has had students say that their family does not have access to the Internet or home computers, and federal funding for education does not cover Internet access. Instructors must keep an eye on this problem.

Much of this is a line drawn at a particular point in time, Professor Cohen said. He represents the University at the National Academy of Science and has been urging that the federal government use technology to reduce burdens on faculty members. He would like to see information on the Internet so that when someone submits a proposal, it contains links to needed material. That brings up many issues, including that faculty must load information in public places and crosses the line between social networks and professional activity and what is put on there. Now one must provide a CV; if it were on the web, it would not have to be provided. This will all become immensely more complicated in the future.

Professor Sanders said there are numerous private organizations advocating against massive sharing of data online because of the privacy implications. Many organizations, including universities, gather enormous amounts of data that they then have an obligation to protect. She told Professor Cohen that she could learn a great deal about him if he would provide his CV, including potentially about his bank accounts, homes and mortgages, cars and license plate information, and so on. She said she uses technology a lot—but does so very cautiously. Data privacy is the next big issue coming, she said.

This is an onion that keeps opening in terms of something to talk about, Professor Flink observed. He suggested the Committee pick up the topic again later. Professor Miksch said that what she takes from the discussion is the need to consider training employees (it has already talked about the need to educate students). That is something the Committee should focus on because there are implications for employees if data privacy considerations dissuade them from doing work they should be doing.

Professor Sanders related that she is writing an article on blogging when faculty members are pre-tenure and the implications for academic freedom as well as the implications for public versus private universities. She said she would be glad to return to the Committee for additional discussion. Professor Flink thanked her for joining the meeting.

2. Draft Shield Law for Research Protection

Professor Miksch provided copies of proposed language for the Committee to consider recommending to the Faculty Consultative Committee and the Faculty Senate for a change in Minnesota law governing data privacy:

Preamble:

> Faculty at the University of Minnesota support transparency and accountability in government and recognize as public employees that much of the work we do at the University is open and available to the public if they make a request via the Minnesota Data Practices Act. In addition, faculty want to ensure that the public are getting access to research and creative works that are responsibly ready for dissemination. That is, work that has gone through the appropriate rigorous review. We are thus concerned that recent attempts to target faculty members unfinished work may lead to incomplete and misleading information, stifle creativity, and even dissuade faculty from pursuing important, yet potentially controversial, topics. For example, recent efforts to obtain the emails of Michigan and Wisconsin public university professors by the Wisconsin

Republican Party and the Mackinac Center for Public Policy were denounced by the American Association of University Professors (AAUP) as likely to chill academic freedom. In other states, a variety of research has been subject to open records requests, including: research notes, email communication between co-authors, manuscripts in progress, and confidential information collected pursuant to an Institutional Review Board (IRB) approved human subjects proposal. While reaffirming faculty, staff, and administration commitment to openness, those of us who teach and conduct research at the University of Minnesota are concerned that if these types of requests were granted in Minnesota, it would have a chilling effect on creative and cutting edge scholarship and teaching at the University. Several states, including New Jersey, Ohio, and Utah shield unfinished creative and scholarly research. We request that the Minnesota Data Practices Act be amended to shield human subject information protected by an IRB approved protocol, as well as unfinished research, creative works, and scholarly communications. Our intent is to balance the public right to know with academic freedom in the classroom, human subjects protection, and scholarly integrity.

Draft of proposed language to amend the Minnesota Data Practices Act:

The following data of an institution within the state system of higher education, which have been developed, discovered, created, disclosed to, or received by or on behalf of faculty, staff, employees, or students of the institution are shielded:

(i) unpublished notes, data, and information relating to research, including, but not limited to, confidential information subject to an approved Institutional Review Board (IRB) protocol;
(ii) unpublished notes, data or information related to a sponsor or sponsored research;
(iii) confidential information contained in research proposals, including unfunded grant proposals;
(iv) creative works in progress;
(v) unpublished manuscripts; and
(vi) scholarly correspondence.

Professor Shippee had posed questions for Committee consideration. The list is obviously key; is seems exhaustive, depending on how one defines one or two items (like scholarly correspondence). Is that the goal? Are there certain circumstances when even the shielding might not apply? That would actually be reassuring, because in cases of dubious research ethics, for instance, some of these should be fair game. Would reviews of ethics or certain other problems happen internally, or at least under a process that wouldn't require the data practices act? If so, then concerns regarding when some of these items *shouldn't* be shielded is less an issue. Depending on how the Committee answers those questions, it might also consider what the purposes are that underlie the specific items (human subjects protection, proper representation of scholarly work, and intellectual property), and also to think about how each item fits into those purposes. Does the Committee want publication to be the bar, or is there a stage before that that it wants to get to (in press, submitted, etc.)? Finally, what makes it scholarly versus something else?

Professor Miksch reported that she had visited with the Senate Research Committee, which urged that the statement not be defensive and that it be clear about why the University would want the amendment (i.e., work has not gone through peer review or received juried feedback, and so on, and the point is to provide the public access to best effort, not drafts). It also suggested that the Committee make clear it is not trying to hide anything.

Committee members offered a variety of comments about the proposal and the draft language.

-- Making public unfinished work can be misleading. It would be undesirable to affect public debate and decision-making with information that turns out to be wrong or inaccurate.

-- There is a need to balance openness with the need to ensure that faculty members do not shy away from research they believe they should do because it might trigger a data request (such as in potentially controversial areas or cutting-edge research—exactly the issues in which faculty members should be engaged in research).

-- The goal is to (1) protect the integrity of scholarship, protect human subjects, and protect academic freedom, and (2) protect the need for openness in government.

-- The goal is not simply to protect everything the faculty do; the list provides the idea for the main function of the amendment to the law, while not over-reaching.

-- The language is drawn from the Utah statute, which is seen as the best practice in this arena; the main modification is the explicit stipulation about research approved by an IRB. The Committee agreed, following considerable discussion, that the language in this section should be made more general because while IRB protocols are critical in the health sciences, there are other kinds of research (animal, biological) that are also subject to several levels of approval and that could come under illegitimate scrutiny by those with nefarious intentions.

-- Even if someone files a data practices act request, the University does not automatically release everything; the request goes to the Office of the General Counsel for review, and the University has never released human-subjects research data.

-- Even with a shield in place, it is reassuring to know that there are other ways that information can be obtained (for example, in case of questions of research ethics). Nor would the law shield anyone from misappropriating funds, discrimination, and so on. Anyone can go to court to seek private data; if the court agreed, the individual must either disclose the information to the court or go to jail. The concern the amendment addresses is the "fishing expedition," where data practices act requests are intended to harass a researcher or to shut down a line of research.

-- It is possible to write research protocols that are immoral or unethical or illegal (without intending them to be any of those things) and then to run them by colleagues and learn what is wrong. Such proposals should not be followed up on because they are never approved. A postdoc could write a proposal that would never make it through the review process. The idea of protecting scholarly material before it is final and approved should be part of the academic process, not making half-baked ideas public.

-- A reporter should be able to ask if a researcher has an IRB-approved protocol for research. Committee members deliberated over the word "confidential" in item (i). The point is not to deny that research is being conducted; it is to protect the information in the research. People should also be able to submit a request to the IRB (or other University oversight bodies) to inquire if research is being conducted.

It was agreed that Professors Miksch and Shippee would work with the General Counsel's office to be sure the language of the proposal is crafted in such a way that it protects what the Committee intends be protected, but no more. After a revised proposal has been prepared, Professor Miksch reported, the Senate Research Committee has asked to see it one more time.

It was also agreed that the Committee would aim to have something ready for action by the May Faculty Senate meeting.

Professor Flink adjourned the meeting at 11:55.

-- Gary Engstrand

University of Minnesota