Slurred Speech:
Free Speech Rights and Social Media on the College Campus

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Introduction

In 1965, three public school students protested the Vietnam War by wearing black armbands in defiance of school policy. Their resulting odyssey through the American judicial system produced the landmark decision in *Tinker v. Des Moines Independent Community School District* (1969), in which the United States Supreme Court issued a sweeping defense of student speech rights. Nearly 50 years later, *Tinker* remains the litmus test for determining whether school disciplinary actions directed at core political speech violate the First Amendment.

Over the years, cases have emerged to narrow the scope of the *Tinker* standard. But *Tinker*'s central holding—that students retain their constitutionally protected rights to free speech in the public school setting—continues to provide the broadest expression of the scope of student speech rights and thus remains vital as one of the Supreme Court's watershed First Amendment decisions. Yet despite *Tinker*'s continuing validity, issues concerning its scope and application continue to bedevil American courts—especially as they grapple with student speech in the university setting.

We will explore freedom of expression on college campuses by undertaking a brief review of legal precedents, starting with the establishment of the *Tinker* standard and continuing through three subsequent, closely related cases. Then, I will provide a framework for examination of both higher education cases and public employment cases. This will include review of a recent, high profile case directly involving our central issues of freedom of speech, application of student conduct codes, and use of social media, *Tatro v. University of Minnesota* (2012), as well as a controversial public employment case that made universities take notice, *Garcetti v. Cabellos* (2006).

This thesis studies several aspects of the *Tinker* standard as it relates to higher education by providing historical background and offering answers to a series of central questions:

1. Is *Tinker* the appropriate standard to use in higher education?

Given the differences in educational and disciplinary goals between PK-12 education and higher education, is it appropriate to use the same standard in both settings? What have courts said about the application of *Tinker* in higher education? Do public employee speech rights have any bearing on freedom of expression in higher education? If not *Tinker*, what is the appropriate standard?

2. How do social media intersect with the law and conduct codes?

Many schools have struggled with behavior that takes place off school grounds and debate whether they have "jurisdiction" to impose discipline for off-school misbehavior. In the age of social media this concept has been turned on its head, and we bear witness to an unprecedented time of confusion regarding school authority over behaviors employing or simply involving social media. We will explore the definition of "off campus" in the age of social media, investigate the history of incidents on campuses involving free speech rights and social media, and examine the first litigated case to present all of these elements, *Tatro v. University of Minnesota* (2012).

3. Should higher education institutions monitor students' social media?

While virtually every institution already has a student conduct code, most have not yet used that code to discipline students for actions that take place on social media. Active monitoring of students' social media activities has occurred only in the PK-12

setting and in athletics programs. We are just starting to see challenges to these situations arise, so colleges and universities must deal with the question of monitoring social media.

4. Should higher education institutions discipline speech at all? Are there limits?

This is, perhaps, the biggest question of all. I find it paradoxical when institutions of higher education, which are, after all, places of teaching and learning, discipline anyone—either student or employee—for exercising the right to free speech. The apparent instinct of some universities toward censorship as a frontline response to unpopular speech undermines educational and democratic values. Institutions should instead adopt a "best practices" approach when it comes to handling the question of disciplining or limiting speech in the age of social media. The conclusion of this document includes such a model.

In the following pages, I will discuss cases such as *Tinker*, *Garcetti*, and *Tatro*—along with instances of disciplinary action on campuses across the country—to explore these questions. The goal of this thesis is to answer these increasingly important questions, provide institutions with the background to make sound and balanced decisions regarding students' free speech rights, and offer "best practices" guidelines for student conduct codes.

Tinker **and its Progeny**

To determine the propriety of applying the *Tinker* standard in higher education, we must first examine *Tinker* itself, as well as subsequent PK-12 cases. We will also explore similarities and differences between application in (1) PK-12 education and higher education, and (2) higher education and public employment legal precedents. This will allow us to address the question above and determine whether or not *Tinker* prevails as the appropriate standard to use in higher education.

Tinker v. Des Moines Independent Community School District

In December of 1965, three students in the Des Moines public school system attended a meeting in the home of one of the students. At this meeting, a group of adults and students decided to wear armbands to protest United States government policy regarding military action in Vietnam. Principals in the Des Moines public school system became aware of this plan and implemented a policy stating that students wearing armbands to school would first be asked to remove them and, if they did not, would be suspended. The three students involved knew about this policy.

On December 16, 1965, Mary Beth Tinker and Christopher Eckhardt, both high school students, wore the armbands to their respective schools. John Tinker (Mary Beth's younger brother) wore an armband to his junior high school the next day. All three students were sent home and suspended until they agreed to return without their armbands. The three students filed a complaint (through their parents) in United States District Court, which upheld the decision of the Des Moines school board (*Tinker*, 1966). The students appealed to the circuit court of appeals, but the appellate court justices were

tied in their votes, meaning the district court's decision would stand (*Tinker*, 1966/1967). The students sought and obtained review by the United States Supreme Court, which heard the case on November 12, 1968, nearly three years after the original incident.

In a sweeping defense of First Amendment rights, the Supreme Court ruled in favor of the students and found that schools could limit student political speech only when it would either (1) "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" (*Tinker*, 1969, p. 505) or (2) invade the rights of other students. The Court determined that wearing an armband did not meet this standard and therefore remained constitutionally protected.

In its decision, the Supreme Court wrote: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech and expression at the schoolhouse gate" (*Tinker*, 1969, p. 506). *Tinker* makes clear that school officials cannot limit student political expression simply because they do not agree with or like it. Instead, they must prove that the expression would result in a substantial disruption of school activities (*Tinker*, 1969).

Bethel School District v. Fraser

In 1986, the United States Supreme Court decided *Bethel School District v. Fraser*, in which Matthew Fraser was suspended for making what the school deemed a vulgar assembly speech that violated school policy prohibiting "obscene, profane language or gestures." Fraser sued in United States District Court and won. The school district appealed, and Fraser won again (*Fraser*, 1985). The school district then appealed to the United States Supreme Court.

In its opinion, the Court posited a balancing test of sorts, noting that "the freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior" (*Bethel*, 1986, p. 681). The Court discussed the purpose of public education as preparing students for citizenship, and teaching the "habits and manners of civility" as essential values to our society. While it did discuss our guarantee of "wide freedom" as related to the First Amendment, it added, "surely, it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse" (*Bethel*, 1986, p.683).

Ultimately, the Court ruled in favor of the school district, carving out an exception to the *Tinker* standard where "vulgar and lewd speech . . . would undermine the school's basic mission." The Court also determined that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings" (*Bethel School District v. Fraser*, 1986, p. 682).

Hazelwood School District v. Kuhlmeier

In the 1988 case, *Hazelwood School District v. Kuhlmeier*, the United States Supreme Court further limited the scope of *Tinker* by stating that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (*Hazelwood*, 1988, p. 273). The case involved the censorship of a high school student newspaper through the school principal's decision to remove two stories from the student publication. In the first story, the principal had concerns that the article might inadvertently identify students in the

school who had been pregnant, and that some of its content was inappropriate given the age of the school's younger students. In the second piece, he had concerns about protecting the identities of families referenced in the article, and felt that those families should have been allowed to review the content of the piece before publication.

The student editor and two student reporters filed suit and lost in federal district court. The court of appeals reversed, and the school district sought review by the United States Supreme Court. The case was argued in 1987 and decided in 1988.

In finding for the school district, the Court gave broad latitude to censor speech, "so long as their actions are reasonably related to legitimate pedagogical concerns" (*Hazelwood*, 1988, p. 273). The Court went on to permit an equally broad application of the decision, including "school-sponsored publications, theatrical productions, and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school . . . whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences" (*Hazelwood*, 1988, p. 271). Notably, the Court also deferred any decision as to the applicability of *Hazelwood* to universities, stating that it "need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level" (*Hazelwood*, 1988, p. 273).

Morse v. Frederick

Finally, we must examine *Morse v. Frederick* or—as it is more popularly known— the "BONG HiTS 4 JESUS" case. In *Morse*, the Supreme Court further

narrowed the *Tinker* standard, concluding that schools could limit or censor speech promoting illegal drug use.

Students attending Juneau-Douglas High School were dismissed from classes on January 23, 2002 to watch as the Olympic torch passed through Juneau, Alaska. Joseph Frederick, a student at the school, gathered with some friends across the street from the school. This group had a banner reading "BONG HiTS 4 JESUS" and they planned to unfurl it when television cameras filmed the torch. Upon seeing the banner, the school principal, Deborah Morse, confiscated it and subsequently suspended Frederick for violating school drug policies. Frederick appealed the suspension, first to the superintendent, then to the school board, and finally, upon receiving no relief from these parties, he filed a lawsuit in federal district court.

In its decision, the district court applied the limitations outlined in *Bethel*, finding that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings" (*Frederick*, 2003, p. 16). The case was overturned on appeal, with the Ninth Circuit concluding that neither *Bethel* nor *Hazelwood* was an appropriate test for this case, so *Tinker* remained the prevailing standard (*Frederick*, 2003/2006). The school board appealed to the Supreme Court, which heard the case in 2007. The Supreme Court determined that Principal Morse and the school district acted appropriately because it viewed the gathering as a school-sponsored event and because it determined that the banner was promoting illegal drug use, which violated school and district drug policies. Two justices wrote widely discussed concurrences in *Morse*. Justice Clarence Thomas authored perhaps the most unsettling concurrence in this case, arguing that *Tinker* was simply wrong and that students enrolled

in public schools should be afforded no expectation of free speech. In contrast, Justice Samuel Alito emphasized the limited scope of the Court's decision, stressing that Morse should not be seen as a retreat from *Tinker* (*Morse*, 2007).

Is *Tinker* the appropriate standard to use in higher education?

Tinker, *Bethel*, *Hazelwood*, and *Morse* were defining cases with respect to freedom of expression in the public PK-12 schools. But those of us in higher education must ask ourselves if these same standards are appropriate to colleges and universities. We stand charged with ensuring that student and faculty conduct codes accomplish their myriad goals, including protecting the reputation of the institution, while simultaneously guaranteeing the right to freedom of expression afforded to legal adults by the law. This determination necessitates examining the disparities between the two populations.

Differences between PK-12 education and higher education

Three fundamental differences distinguish the PK-12 public school system from higher education:

- the ages of the students involved,
- the fact that PK-12 education is mandatory, whereas higher education is optional, and
- that the two have differing disciplinary and educational goals and needs.

First and foremost is the age difference between the two populations. With PK-12 students, we have minors mainly in the care of adult parents/caregivers with the school acting "in loco parentis" (in the place of a parent). Policy formation at the PK-12 level is based on the concept that students remain in the "parental" care of the school for the duration of the school day, and so the school must have rules to keep children safe. Over the course of history, the scope of this doctrine has shifted, but the basic premise remains the same. In contrast, virtually all students at the college and university level are legal

adults, solely responsible for their actions. Policies at this level are not necessarily drafted out of concern for student safety, but rather from a standpoint of legal protection for the institution itself. The age of the student also dictates the services provided in that PK-12 school districts must be proactive in identifying potential academic, emotional, behavioral, and physical problems and challenges for their students, and then in advocating on behalf of those students. Colleges and universities have no such obligation. Their students are expected to identify their own needs in those areas, provide documentation of any need for any assistance, and be strong advocates for themselves.

Second, enormous differences exist between mandatory and optional education. With PK-12 compulsory schooling, students must attend school according to the laws of their state of residence. All states in the United States require attendance starting no later than age 8 and ending no earlier than age 16. In most states, students must start by age 6, and many require attendance through age 18 (Mikulecky, 2013). Public school remains compulsory and free, and often comes with added benefits for lower-income students such as free or subsidized breakfast and/or lunch programs. Higher education is entirely optional and generally engenders substantial costs for tuition, fees, and room and board. Thus, while students in PK-12 have no choice but to attend, those attending college enjoy a privilege they have chosen, not one to which they are automatically entitled.

Finally, PK-12 schooling and higher education have differing disciplinary and educational goals and needs. While discussion persists these days as to the goals of PK-12 education, at its core the system endures to educate students so they are properly prepared for work or higher education upon graduation, and to make them good citizens

of our country. As the United States is a republic, we adhere to the concept that we should not have a class system, so all of our citizens should be literate and educated to a certain minimum level of expectation. This is about the most basic premise on which we can virtually all agree before we become embroiled in a larger discussion of the overarching goals of public education. For PK-12 schools, this "basic" preparation has resulted in educating students across four broad categories: 1) physical growth, 2) intellectual advancement, 3) emotional maturity, and 4) social development. Teachers are held responsible not only for academic enlightenment, but also for developing character, creativity, a global worldview, personal responsibility, resiliency, entrepreneurial spirit, individualism, self-worth, and so on. In truth, the list of things we as a society hold PK-12 teachers responsible for seems nearly endless. Once our children leave their capable hands, they are ready to enter the workforce or our colleges and universities, where their academic development continues.

Historically, higher education sought to serve the elite class who could afford it, but more recently that concept has evolved. We now have a higher percentage of high school graduates attending colleges and universities, but it is in higher education where we seem to have the most confusion regarding development occurring outside the classroom walls (NCES, 2012). While virtually all colleges and universities go to great lengths to ensure that students and their parents understand that students enrolled in their institutions are now considered adults and must be responsible for their own actions, these same institutions have constructed complex student life/support networks. Colleges and universities spend enormous sums of money on housing and residence life programs,

advising programs, orientation programs, and student activities programs (Desrochers & Kirshstein, 2014).

Institutions are fond of phrases such as "teachable moment" when describing the "life lessons" they provide outside of the classroom setting; however, they remain just as fond of distancing themselves when students do something that might result in upsetting a donor, or potentially result in a lawsuit. Robert Shibley, Senior Vice President of the Foundation for Individual Rights in Education (FIRE), a non-profit organization dedicated to individual rights on campus, was quoted in a July 2014 article as saying that colleges and universities are "afraid of lawsuits and PR problems" and that they are "more worried about that than about ignoring their 1st Amendment responsibilities" (Watanabe, 2014). As we have already determined, the Supreme Court has been careful in its opinions at the PK-12 level to note that those same decisions may not apply in the higher education setting (*Hazelwood*, 1988).

Higher Education Freedom of Expression Court Cases

Starting with *Healy v. James,* the Supreme Court established a pattern of differentiating the regulation of speech at the PK-12 level from that in higher education. Through rulings in five cases, it made clear that it would not impose the same limitations on the two differing populations.

Healy v. James

In the 1972 case, *Healy v. James,* students at Central Connecticut State College were denied the right to form a recognized student chapter of "Students for a Democratic Society." As a recognized student organization, the chapter could have used college

facilities for meetings and would also have had access to the college newspaper. The president of the college denied the group because he feared potential "disruption and violence" on campus (*Healy*, 1972, p. 176). The students sued, and the case made its way through the legal system to the United States Supreme Court.

In its decision, the Court noted that the time period in which this case arose, 1969-1970, was one of "unrest" on college campuses, and observed that "there had been widespread civil disobedience" as well (*Healy*, 1972, p. 171). But the Court also pointed out that while "the causes of campus disruption were many and complex, one of the prime consequences of such activities was the denial of the lawful exercise of First Amendment rights to the majority of students by the few" (*Healy*, 1972, p. 171). The Court also stated, "many of the most cherished characteristics long associated with institutions of higher learning appeared to be endangered" (*Healy*, 1972, p. 171).

The Court ultimately ruled in favor of the students, noting that "state colleges and universities are not enclaves immune from the sweep of the First Amendment," and went on to say, "the precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large" (*Healy*, 1972, p. 180).

Papish v. Board of Curators of the University of Missouri

On the heels of its decision in *Healy*, another case emerged in 1973, in which the United States Supreme Court once again defended broad First Amendment protection on the college campus. The University of Missouri School of Journalism expelled a graduate student, Papish, for distributing a student newspaper containing "forms of indecent

speech" (*Papish*, 1973, p. 667) Papish sued in federal district court and lost, and then lost again in the Eighth Circuit (*Papish*, 1972).

The United States Supreme Court issued its decision—in favor of Papish—on March 19, 1973. In this decision, the Court expanded its earlier ruling in *Healy* by declaring that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech." The University of Missouri was ordered to reinstate Papish, barring any valid academic reason for her dismissal (*Papish*, 1973, p. 671).

Widmar v. Vincent

In the 1981 case, *Widmar v. Vincent*, the United States Supreme Court heard a case concerning use of campus facilities for the purpose of meetings of a registered religious student group. Ultimately, the Court found in favor of the students and—while noting that campuses do differ from more general public fora "such as streets or parks" (*Widmar*, 1981, p. 268) —upheld the notion "that students enjoy First Amendment rights of speech and association on the campus" (*Widmar*, 1981, p. 269) In an insightful footnote, the Court wrote: "University students are, of course, young adults. They are less impressionable than younger students . . ." (*Widmar*, 1981, p. 274).

Rosenberger v. Rector & Visitors of the University of Virginia

The 1995 case *Rosenberger v. Rector & Visitors of the University of Virginia* once again focused on the aspect of religious speech on campus, when a registered Christian student group at the University of Virginia was denied funding for printing costs because its magazine expressed particular religious beliefs. The case ultimately

came before the United States Supreme Court, which found in favor of the student group. The particulars of the case are not nearly as important to our discussion as the opinion of the Court, which wrote: "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. Discrimination against speech because of its message is presumed to be unconstitutional" (*Rosenberger*, 1995, p. 828). The Court went on to state:

> "Vital First Amendment speech principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that operates at the center of our intellectual and philosophic tradition. In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses." (*Rosenberger*, 1995, p. 835)

Board of Regents of the University of Wisconsin System v. Southworth

Again, in the 2000 case *Board of Regents of the University of Wisconsin System v. Southworth*, the details of the case are not as important as the opinion of the United States Supreme Court. The case involved students who had ideological objections to student groups that were the recipients of funds generated by mandatory student fees. While the lower courts sided with the three students who filed suit against the University of Wisconsin, the Supreme Court unanimously overturned the decision of the Seventh Circuit. In its decision, the Court wrote: "The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning" (*Board of Regents*, 2000, p. 232). Additionally, the Court noted in this case that it made "no distinction between campus activities and the off-campus expressive activities" of groups, specifically pointing out that "[u]niversities, like all of society, are finding that traditional conceptions of territorial boundaries are difficult to insist upon in an age marked by revolutionary changes in communications, information transfer, and the means of discourse" (*Board of Regents*, 2000, p. 234) The Court also observed that its "cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools . . . whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education" (*Board of Regents*, 2000, p. 239).

True Threat Doctrine

Tinker provides a foundation for thinking about the standard that should be used to judge free speech rights in higher education; however, in that context, another principle comes into play, the "true threat" doctrine established by the United States Supreme Court in *Watts v. United States* and then modified—or perhaps muddied—in its finding in *Virginia v. Black*. True threats are not protected by the Constitution, and we are just beginning to see more cases engaging this notion in educational settings. As we examine the proper speech standard for the higher education setting, it is imperative that we understand the difference between *Tinker* and its limitations as well as the precedent for those of us outside the PK-12 environment. After discussing these cases, I will present a brief history of public employee speech cases, as they are more applicable to public college and university faculty and students. These cases involve adults rather than minors, and they relate to voluntary employment as opposed to mandatory education.

Watts v. United States

In 1969, Robert Watts was charged with making comments threatening the life of President Lyndon Johnson. The eighteen-year-old was found guilty in federal court of "knowingly and willfully" (*Watts*, 1969, p. 705) threatening the life of the President, and a federal appellate court affirmed the conviction. The United States Supreme Court reversed it, stating that Watts's comments were a hyperbolic overstatement of frustration that did not constitute a "true threat" (*Watts*, 1969, p. 708).

Virginia v. Black

In *Virginia v. Black*, it is not the details of the case that concern us but rather, it is the opinion of Justice Sandra Day O'Connor: "[T]rue threats . . . encompass those

statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur" (*Virginia*, 2003, pp. 359-360).

Rather than bring precision to the issue, Justice O'Connor's opinion seems to give the lower courts considerable latitude in deciding whether a threat constitutes a "serious expression" of intent. In fact, in *Watts*, the defendant allegedly stated: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Some might argue—perhaps even convincingly—that this was a "serious expression of an intent to commit an act of unlawful violence to a particular individual" (*Virginia*, 2003, pp. 359).

Public Employee Cases

To understand a short history of freedom of speech for public employees, we will review three of the most important cases, *Pickering v. Board of Education*, *Connick v. Myers*, and *Garcetti v. Cabellos*.

Pickering v. Board of Education

In 1961, the Board of Education of the Township School District in Will County, Illinois, presented voters in its district with a bond issue. The district asked for approximately $5 million to build two new high schools. Voters approved the bond. The Board then presented proposals for additional tax revenues to support the two schools. Voters rejected the proposals. After the defeat, a teacher in the district, Marvin Pickering, wrote a letter to the editor of the local paper, charging that the district had not been

honest with voters about how money for the schools was being spent. Pickering claimed that the Board was spending more money on athletics than on education, and he also alleged that the Superintendent actively sought to prevent teachers in the district from speaking out about the referenda. Pickering signed the letter as "a citizen, taxpayer and voter, not as a teacher, since that freedom has been taken from the teachers by the administration" (*Pickering*, 1968, p. 578).

The district responded by firing Pickering. The Board claimed that his letter was "detrimental to the efficient operation and administration of the schools of the district" and stated that several of the allegations in the letter were false (*Pickering*, 1968, p. 564). Pickering sued the Board in state court and lost. He then appealed to the Illinois Supreme Court and again lost (*Pickering*, 1967). The Illinois Supreme Court wrote in its decision: "By choosing to teach in the public schools, plaintiff undertook the obligation to refrain from conduct which in the absence of such position he would have an undoubted right to engage in" (*Pickering*, 1967, p. 577). The majority stated further, "a teacher who displays disrespect toward the Board of Education, incites misunderstanding and distrust of its policies, and makes unsupported accusations against the officials is not promoting the best interests of his school, and the Board of Education does not abuse its discretion in dismissing him" (*Pickering*, 1967, p. 578).

Pickering appealed his case to the United States Supreme Court, and in June 1968, the Court issued its 8-1 decision in his favor. Writing for the majority, Justice Thurgood Marshall noted that the deciding factor was a "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs

through its employees" (*Pickering*, 1968, p. 568). The Court determined that Pickering's right to free speech as a citizen on issues of public interest or importance could not be diminished simply because he made comments that were viewed negatively by his employer. Furthermore, the Court noted that it was "apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech" (*Pickering*, 1968, p. 574).

Connick v. Myers

In the 1983 case of *Connick v. Myers*, the Supreme Court further established its position that public employees are protected when commenting on matters of public interest, but in doing so it muddied the definition of "public," creating confusion in the wake of its decision. Sheila Myers was an assistant district attorney working in the office of District Attorney Harry Connick, when her supervisor Chief Assistant District Attorney Dennis Waldron, informed her that she was being transferred to a different section of the criminal court. Upset by this news, Myers challenged the transfer and in addition informed Waldron of her displeasure with certain office procedures. Waldron responded that he did not believe that others in the office shared her opinion. Myers claimed that, at this point, she informed Waldron that she would research his assertion and collect information from others in the office. Myers drafted a questionnaire and distributed it to several other assistant district attorneys in the office. The survey included questions regarding the fairness of transfer policies, the handling of office grievances, office morale, the level of confidence inspired by specifically named co-workers, and whether employees felt pressure to work on political campaigns for candidates supported by the District Attorney's office.

Connick fired Myers, claiming that she had refused the transfer, and that the distribution of the questionnaire was an act of insubordination. Myers sued on the grounds that her actions were protected by the First Amendment and won in federal district court (*Myers*, 1981). Connick appealed to the Fifth Circuit, again losing (*Myers*, 1981). He then appealed to the United States Supreme Court, which delivered its decision on April 20, 1983. The Court found in favor of Connick on the grounds that the majority of the questions on Myers' survey were not matters of public concern and were threatening to the District Attorney's authority. In its decision, the Court noted that "the limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment" (*Connick*, 1983, p. 154).

In the dissent, Justice Brennan noted that, applying principles from other cases, this case did involve matters of public concern because the survey included questions regarding office morale, which would undoubtedly affect job performance. He also observed that "the Court's adoption of a far narrower conception of what subjects are of public concern" undermines the principle that citizens decide what is in the public interest (*Connick*, 1983, p. 163). Finally, the dissent outlined the chilling consequence of upholding the termination of an employee for criticizing her employer. Invoking its prior decision in *Pickering*, in which the Court found that "the threat of dismissal from public employment is . . . a potent means of inhibiting speech" (*Pickering*, 1968, p.574), Brennan emphasized the importance of the public to engage in free and open debate, particularly on issues of government. He concluded by observing that the Court's earlier

test in *Tinker* should have been utilized to determine whether the speech in question "materially and substantially" disrupted or interfered with the operations of the work environment, as opposed to merely finding it uncomfortable, unpleasant or annoying (*Connick*, 1983).

Garcetti v. Ceballos

Connick v. Myers set the stage for *Garcetti v. Ceballos*, the most distressing public employment case to date related to protection of free speech for public employees. Richard Ceballos was a deputy district attorney in Los Angeles, who was working for Gil Garcetti, the District Attorney at that time. Ceballos drafted a memo to his superiors in which he outlined serious reservations regarding the validity of a search warrant affidavit. He shared concerns that the information offered to procure the search warrant was inaccurate, and recommended dismissing the case. Ceballos met with his superiors and, ultimately, the District Attorney's office decided to pursue prosecution in the case. Ceballos subsequently opened a grievance, claiming there was retaliation against him for his memo. He asserted that he was reassigned to a new position, transferred to a different courthouse, and denied a promotion. The grievance was denied.

Ceballos sued in federal district court claiming that his First Amendment rights had been violated through retaliatory actions as a direct result of his memo (*Ceballos*, 2004). While his superiors denied those claims, the decision in the case was that Ceballos was not entitled to First Amendment protection in relation to a memo written in the course of executing his job duties. The Ninth Circuit reversed, holding that Ceballos wrote the memo "as a citizen upon matters of public concern."

In a bitterly divided 5-4 decision, the United States Supreme Court held that the test of rights in this case was whether Ceballos acted as a public employee or a private citizen in writing the memo. The majority held that Ceballos acted as a public employee and, therefore, remained subject to disciplinary action based on job performance. In essence, the Court was saying that public employees have no free speech protection when they make statements critical of their employers. This ruling applies to all government employees, and although the court did not specifically address implications for higher education in the ruling, Justice David Souter warned in his dissent that the decision could affect academic freedom. In response, Justice Kennedy wrote that the Court "need not . . . decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching" (*Garcetti*, 2006, p.425).

In fact, colleges and universities did take notice of the ruling and—recognizing this powerful threat—several took action. At the University of Minnesota, the Faculty Senate changed the Board of Regents policy on Academic Freedom and Responsibility in 2009 to define academic freedom as the "freedom, without institutional discipline or restraint, to discuss all relevant matters in the classroom . . . and to speak or write on matters related to professional duties and the functioning of the University" (UMBOR, 2014). The University of Wisconsin-Madison amended its *Faculty Policies and Procedures* to include specific language that "includes the right to speak or write—as a private citizen or within the context of one's activities as an employee of the university—without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties, the functioning of the university, and university positions and policies" (Secretary of the Faculty, 2014). Similar changes occurred at

institutions across the country, including in California, Delaware, Florida, and Pennsylvania (Clayton, 2014).

If not *Tinker*, what is the standard?

Whereas *Tinker* is too restrictive for higher education because it applies to minors in an environment where the school is acting in place of the parent, the "true threat" doctrine suggests a more appropriate standard because it offers adult students on campuses the same protections they would enjoy were they not enrolled in college. As the Supreme Court noted in *Papish*, "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech" (*Papish*, 1973, p. 671).

Based on all of the information cited above—the histories of *Tinker* and its closely related cases, the differences between PK-12 education and higher education, legal precedents for speech rights in the higher education context, and public employee speech rights—it is my determination that students in the higher education setting are entitled to the same freedom of expression as any other American citizen. Public employment cases do not apply in this context, as it is implausible that the general public would accept that a college student would be speaking as a "public employee" on behalf of a college or university. It is equally implausible that a single student's speech or online comments could "disrupt" the campus environment, "undermine" the institution's authority, or "destroy close working relationships" on campus.

While an argument certainly could be made that *Tinker* could apply as the standard if it were properly applied as written, and if none of its subsequent, related restrictions were employed, this seems a more laborious approach. The more direct way

of thinking about the issue is to recognize that higher education students enjoy the same rights to freedom of expression as any other citizen, but my determination relates only to the control of the content of speech—not to the ability of institutions to place reasonable time, place, and manner restrictions on speech. In my view, all legitimate disciplinary requirements in the college setting are either already addressed through the law itself, in the form of "true threat" and other legal limitations on speech, or can be addressed through these time, place, and manner restrictions.

Time, Place, and Manner Restrictions

The United States Supreme Court, through several court cases, has established time, place, and manner (TPM) restrictions. The purpose of TPM restrictions is to protect individual freedom of expression while also ensuring the safety of the public as a whole. The Court established four tests in *Ward v. Rock Against Racism* (1989) to safeguard the constitutionality of TPM restrictions:

- They must be content neutral,
- They must be narrowly tailored,
- They must serve a significant governmental interest, and
- They must leave open ample alternative channels of communication

Examples of TPM restrictions are:

- Time - No one may "insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech" (*Cox v. Louisiana*, 1965, p. 554).
- Place – The government may limit where individuals are free to express themselves, based on the forum for expression. There are three categories of fora: 1) traditional public, such as parks and sidewalks, 2) limited public, such as Capitol grounds, courthouses and grounds, and public universities, and 3) non-public, which is private property or public property dedicated to a primary mission other than individual expression, such as military bases or county jails.

The government has the most authority to limit expression on non-public property.

- Manner – These restrictions relate to the type of speech employed. A common example is flag burning, which is a form of symbolic speech protected under the law. An example of manner restriction comes from the 1984 case *Clark v. Community for Creative Non-Violence*. The Supreme Court found in favor of the National Park Service and denied protestors' request to sleep in parks not specifically designated for overnight camping, arguing that allowing such behavior would be "inimical" to the mission of keeping "the parks in the heart of the Capital in an attractive and intact condition" (*Clark*, 1984, p. 296).

Again, my arguments pertain only to the control of the content of speech, and not to permissible TPM restrictions on speech.

To be sure, a university must be able to control certain student speech. Students cannot, for example, be permitted to stand and recite poetry in the middle of a chemistry professor's lecture. Similarly, student protests must not prevent other students accessing their own classes. These sorts of concerns can be addressed through narrowly tailored—and constitutional—TPM restrictions.

How Do Social Media Intersect with the Law and Conduct Codes?

Having determined that *Tinker* is not the appropriate standard to apply in higher education, and that college and university students enjoy the same freedom of expression rights as all other American citizens, we will investigate now the history of incidents on campuses involving free speech rights and social media, and explore the current climate for these cases.

Across the country, there have been incidents involving the intersection of freedom of expression and conduct codes on campus, but the advent of social media has added a new dimension to the discussion. For example, a basic question would involve defining "off campus" and "on campus" in the context of social media. Before social media platforms, it was obvious when a student was "on campus" versus "off campus," as this determination involved the actual physical location of the person in question. Social media has changed that view for many people, raising questions about how conduct codes relate to "virtual" presence.

It is relatively easy to understand the concerns that arise with respect to the effects of social media on freedom of expression. Social media platforms such as Facebook and Twitter challenge our perceptions of speech, particularly as related to scope and influence, and endurance and permanence. Social media has the same immediacy factor as verbal speech; an individual can make a statement that enters the atmosphere instantly. But, unlike verbal speech, a posted or tweeted comment can be viewed by anyone with access, and the comment may linger forever on the chosen platform.

It is axiomatic that colleges and universities should remember that the First Amendment exists to prevent entities—including the government—from prohibiting

speech because they do not agree with the sentiment being expressed. Furthermore, while the Supreme Court has imposed limited restrictions on speech in the PK-12 public schools, it has stated explicitly in several opinions that academic freedom is paramount on the college campus, and that the balancing test for those institutions differs fundamentally from the PK-12 system. The Court has noted repeatedly that institutions do not have the same authority to govern off-campus speech that they do with on-campus speech. In both *Hazelwood* (1988) and *Morse* (2007), the Court wrote explicitly on this subject, noting that schools could not censor speech outside of the school context. The issue, of course, lies in the definition of "off-campus" when dealing with virtual speech.

The Disintegration of "Off Campus" in the PK-12 setting

Starting in 2007, with *Wisniewski v. Board of Education*, more cases have emerged to challenge the definition of "off-campus" as it relates to virtual speech, thereby allowing institutions to intrude into their students' off-campus, virtual lives. These cases have resulted in findings where speech that took place online was viewed as substantially disruptive to the school environment because of the specific nature of the speech. The following four cases are examples of this crumbling classification, each utilizing a different mode of social media.

Wisniewski v. Board of Education

In 2001, 8th-grader Aaron Wisniewski sent instant messages to his "buddies" on AOL. Like most social media platforms, AOL IM allows its users to create both a "screen name" and an "icon." According to the Second Circuit transcript: "Aaron's IM icon was a small drawing of a pistol firing a bullet at a person's head, above which were dots representing splattered blood. Beneath the drawing appeared the words 'Kill Mr.

VanderMolen.' Philip VanderMolen was Aaron's English teacher at the time" (*Wisniewski*, 2007, p. 36). Eventually, another student brought the icon to the attention of VanderMolen, who in turn reported it to school district principals. The principals informed the police, the superintendent of the district, and Aaron's parents. Aaron was suspended from school for five days, and Philip VanderMolen was reassigned to a different class.

Over the course of his suspension and after returning to school, Aaron was the subject of both a police investigation and a psychological evaluation. Both parties determined that Aaron's actions were intended as a joke and that he posed no real threat to VanderMolen. The criminal case against Aaron was closed. But Aaron remained subject to a hearing with the superintendent to discuss a possible long-term suspension. At that hearing, Aaron was charged with "endangering the health and welfare of other students and staff at the school" and suspended for one semester. Despite the fact that the speech took place off school grounds—and even with the findings of the police investigation and the psychological evaluation—the hearing officer found that Aaron's "intent [was] irrelevant."

Aaron's parents filed suit in federal district court on the grounds that Aaron's icon was protected by his First Amendment rights. Not only did the court find in favor of the hearing officer, but it also went one step further in determining that Aaron's icon constituted a "true threat," in contrast to the police investigation and the psychological evaluation results.

Aaron's parents appealed to the Second Circuit, which affirmed the finding of the district court. In its decision, the appellate court rejected the "true threat" argument, instead favoring application of *Tinker*. The Court stated that it seemed inevitable that Aaron's icon would come to the attention of school officials and would "materially and substantially disrupt the work and discipline of the school." Furthermore, the Court noted "the fact that Aaron's creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline" (*Wisniewski*, 2007, p. 39).

Doninger v. Niehoff

In 2007, Avery Doninger, a junior at Lewis Mills High School, had a dispute with her school principal over the postponement of a school event and emails sent by members of the Student Council directing concerned parties to contact the principal about that event. While the principal left their meeting with the impression that the matter was resolved, instead, later than evening, Avery posted to her livejournal.com blog about the situation, referring to "douchebags in central office" and encouraging people to continue contacting the principal's office in order to "piss her off more." The blog was accessible to the public, and several Lewis Mills students commented on it— including one comment characterizing the principal as a "dirty whore." The principal learned of the blog content several days later and disciplined Avery by refusing to allow her to run for senior class secretary, claiming that her behavior was not "appropriate" for a class officer.

Doninger's mother filed suit, and the case was eventually decided in the Second Circuit. Although the court noted that the United States Supreme Court had "yet to speak

on the scope of a school's authority to regulate expression that, like Avery's, does not occur on school grounds or at a school-sponsored event," it pointed out that *Wisniewski* allowed schools to employ *Tinker* to discipline students for speech occurring off campus when it "would foreseeably create a risk of substantial disruption within the school environment." Ultimately, the court determined that the school did not violate Avery's First Amendment rights (*Doninger*, 2011, p. 48).

Kowalski v. Berkeley County Schools

During her senior year of high school in 2005, Kara Kowalski created a MySpace page entitled "S.A.S.H." which, according to differing accounts, stood for either "Students Against Sluts Herpes" or "Students Against Shay's Herpes." Kowalski and Shay were fellow students and Shay was the primary subject of posts on the page. Roughly two-dozen schoolmates joined the page, and posted comments connecting Shay with sexually transmitted diseases. Within hours, Shay became aware of the page, and the following morning Shay's father filed a harassment complaint with the high school.

After consulting with the school board, Principal Ronald Stephens opened an investigation and interviewed students who had joined the page. Upon completing their inquiry, Stephens and Vice Principal Becky Harden determined that Kowalski had violated school policy prohibiting "harassment, bullying, and intimidation." They imposed several penalties, including: 1) a 10 day suspension, 2) a 90-day "social suspension," during which Kowalski was banned from attending school events in which she was not directly participating, and 3) her immediate removal from the cheerleading squad. The Superintendent reduced her school suspension to five days after an appeal by her father.

Kowalski sued in federal district court, which found in favor of the school district. She then appealed to the Fourth Circuit, which relied on *Tinker* in upholding the district court's ruling. The Fourth Circuit found that "there is surely a limit to the scope of a high school's interest in the order, safety, and well-being of its students when the speech at issue originates outside the schoolhouse gate. But we need not fully define that limit here, as we are satisfied that the speech . . . was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being" (*Kowalski*, 2011, p. 573).

D.J.M v. Hannibal Public School District

In the 2011 case *D.J.M v. Hannibal Public School District*, the parents of Dylan J. Mardis, identified as D.J.M., brought suit against the school district over a case involving instant messages. In 2006, as a 10th-grader, Dylan sent messages to a friend in which he discussed getting a gun and shooting students at their school. The friend shared this information with the school principal who in turn notified police. Dylan was suspended initially for ten days, but the suspension was later lengthened to the remainder of the school year. A federal district court judge found that Dylan's comments were both a "true threat" and a material and substantial disruption. Dylan appealed to the Eighth Circuit Court and lost. The court decided "it was reasonably foreseeable that D.J.M.'s threats about shooting specific students in school would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment" (*D.J.M.*, 2011, p. 766). Given the nature of this case, the court also observed: "The widespread use of instant messaging by students in and out of school presents new First Amendment challenges for school officials [and] . . . [s]chool officials cannot

constitutionally reach out to discover, monitor, or punish any type of out of school speech" (*D.J.M.*, 2011, p. 765).

Conduct Creep

While we may view these acts as distasteful, offensive, and even alarming, they mark the beginning of what I refer to as "conduct creep"—the gradual movement of school conduct codes into broader areas of students' lives. The prevalence of social media brings an entirely new aspect to already complex free speech cases, and its permanency and easy accessibility allows for a level of student scrutiny not previously possible.

While I have established that *Tinker* is not the appropriate standard for college campuses, even were that standard to be applied, many campus conduct codes and administrative actions taken on college campuses would fail the balancing test of "substantial disruption." If one stops to think of how much it would take to hinder the operations of a large and complex university, it quickly becomes clear that the vast majority of the posts we see regularly on Facebook, Twitter, and other social media sites could not accomplish that herculean task. More often, institutions are using their conduct codes to chill the free speech rights of students and employees posting about the school itself.

Perhaps my greatest fear regarding campus conduct creep and social media is that institutions will move toward a climate of privacy waivers. Currently, students are routinely asked to sign public relations waivers as part of their admissions packets, allowing colleges and universities to use pictures or videos taken of them in public venues as part of marketing materials. What if the next generation of admissions packets

included a "privacy waiver," asking students to sign on the dotted line and agree to the monitoring of their social media sites in accordance with the behavior standards set forth in a student conduct code? At first glance, this seems far-fetched; however, we have already seen this type of action at the PK-12 level with student random drug testing. There are districts across the country where student athletes must submit to this testing in order to participate in extra-curricular athletics. While this is not entirely analogous, as drug use is illegal, it makes the point that often we are asked to surrender our First Amendment rights to participate in voluntary activities. Perhaps more analogous were cases in which high school and college athletes were required to give social media passwords to their respective schools, or in which they were required to submit to a ban on all social media use (Bentley, 2012). Perhaps the privacy waiver is not so far-fetched an idea after all.

Campus disciplinary actions involving social media

Universities are just starting to alter conduct codes to include sections relating directly to social media use, some of which are so broad and vague in nature as to be almost unenforceable. While there are hundreds of cases to serve as examples, the cases outlined below utilize differing types of social media, including Facebook, Twitter, and YouTube.

University of Kansas

At the University of Kansas, the Kansas Board of Regents adopted a social media policy for faculty and staff that could be characterized as among the most restrictive in the country. The policy was initially discussed in response to a tweet by a KU professor

about the Washington Navy Yard shooting which quickly gained national attention:

- The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters. Shame on you. May God damn you.

Professor David Guth was suspended with pay for approximately seven months as a result of the controversial tweet (Lowe, 2014).

While the social media policy adopted by the Board includes an opening statement on the importance of academic freedom, it includes broad language (citing support of the United States Supreme Court as its basis) allowing disciplinary action for university employees who incite violence or breach peace through speech, or whose comments on social media are "contrary to the best interests of the employer." It further outlines that disciplinary action is appropriate in cases where the speech "impairs discipline by superiors or harmony among co-workers" or "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary." The policy does outline that determining action for such speech would be subject to the balancing test of "the employee's right as a citizen to speak on matters of public concern." In other words, the policy's authors have paid close attention to the types of cases outlined here and the associated consequences for public employees (Lowe, 2014).

In a May 14, 2014 article posted on the KCUR (Kansas City Public Media) webpage, Professor Ron Barrett-Gonzalez, head of the local chapter of the American Association of University Professors reported that "many professors no longer place their lectures on YouTube or Facebook" and that "they have toned down teaching on controversial subjects like politics, gun rights and abortion" (Lowe, 2014).

At this time, no such language has been added to the University of Kansas "Code of Student Rights and Responsibilities (Student Code)."

Montclair State University

In October 2012, a student at Montclair State University in New Jersey received a "University No Contact Order" after he posted what it deemed "offensive" comments on a YouTube page. The UNCO ordered Joseph Aziz not to have any contact with the student whose video he commented on and also not to post about that student on any other social media outlet. When Aziz subsequently posted comments referring to the student on a private Facebook page, the University suspended him and barred him from campus with the threat of arrest should he be discovered on university property. FIRE (Foundation for Individual Rights in Education) contacted MSU's President, Susan Cole, who referred the matter to University Counsel. At that point, the suspension was reversed (Montclair, 2013).

Syracuse University – Matthew Werenczak

In January 2012, Syracuse University disciplined Matthew Werenczak for a comment he posted on his Facebook page:

- Syracuse NAACP rep: 'we need to start hiring our teachers from historically black colleges.' Mind you two white tutors were in the room. I'll let you take your own inference from that. Because that sort of stuff matters.

Werenczak, a student in the School of Education, was tutoring in the public schools as part of his teaching program in the School of Education. After posting the comment, Werenczak received a letter informing him that he could be "administratively removed from the SOE," and offering him the options of withdrawing from the SOE or completing a series of requirements, including counseling for "anger management," taking an

additional course on cultural diversity, and writing a paper on his "personal growth" as a result of completing the counseling and the cultural diversity course. The letter stated that, after completion of these requirements, a committee would review his paper and then meet with him to ascertain his readiness to continue in the program. Werenczak completed all requirements, but experienced significant delays in his readmission assessment. He contacted FIRE, which sent a letter to Syracuse University Chancellor Nancy Cole, and upon receiving no response from the University by its requested deadline, proceeded to publish the details of the case on its website, thefire.org. FIRE states on its website that "within hours" of posting the case on its website, Matthew Werenczak was readmitted to his program (Syracuse, 2012).

Syracuse University – Len Audaer

Another case at Syracuse University involved Len Audaer, a law student who was informed by email on October 15, 2010, of an investigation into his possible violation of SU's Code of Student Conduct. A few days later, Audaer met with Associate Professor of Law Gregory Germain and Senior Assistant Dean for Student Life Tomás Gonzalez. During this meeting, Audaer was allegedly informed that he was being investigated for harassment, with a possible second inquiry related to the "use of electronic resources for the purposes of committing harassment." Audaer also claimed that Professor Germain stated outright that he was "strongly inclined to prosecute him" on these charges. The day after the meeting, Audaer emailed both parties, outlining his understanding of the meeting and requesting their confirmation of his account from each of them. While both responded, neither would confirm his report of the events of the meeting (Syracuse, 2010).

At issue were Audaer's anonymous contributions to a satirical blog at the SU entitled, "SOCULitis." The blog authors are not listed on the site, and there is a specific disclaimer noting that the blog is satirical in nature and similar to the satirical news journal, "The Onion."

Audaer turned to FIRE, which sent a letter to Syracuse University Chancellor Nancy Cole on October 25, 2010. FIRE received a response dated November 1, 2010, explaining that the College of Law had received "written complaints" that accused Audaer of a possible violation of the Code of Student Conduct and, in accordance with the policies of the College of Law, an investigation was being held to determine the veracity of those complaints. After approximately three months, Syracuse dropped its case against Audaer in February 2011 (Victory, 2011). During that three-month period, Syracuse was named by FIRE as "one of the worst universities in the nation for free speech" (Lukianoff, 2011).

St. Augustine's College

In April 2011, Roman Caple, a student at St. Augustine's College (known as St. Augustine's University since 2012) was informed that he was barred from participating in commencement as a result of a "negative social media exchange during the institution's recovery" from a tornado that had struck the campus earlier that month. The College maintained that Caple not only posted comments intended for the "sole purpose of inciting to react," but also indicated in an April 29, 2011, press release that "there were other incidents" that played a role in the decision that could not be discussed "because of FERPA (Family Educational Rights and Privacy Act) constraints." This is a particularly interesting example because SAC is a private institution, not bound by the First

Amendment. However, in a letter from FIRE Vice President of Programs, Adam Kissel, he quotes SAC's "Student Conduct Code and Student Judicial Manual" as stating at the time that "students enjoy the same basic rights and are bound by the same responsibilities to respect the rights of others, as are all citizens." (Since this case, SAC has changed substantially its Code of Conduct.) Caple was unable to find relief through SAC channels and filed suit on July 8, 2011. The case was settled out of court in December of that year (College, 2011; Stenovec, 2011).

Michigan State University

In 2008, Michigan State University student Kara Spencer was disciplined for allegedly violating the school's "spam" policy for email. Spencer sent an email to selected faculty on campus regarding a proposed change to the institution's academic calendar in response to which she received an email from Randall Hall, of the Michigan State University Network Acceptable Use Policy Compliance office, informing her that she was being investigated for a "possible violation of the AUP (Acceptable Use Policy)." A hearing was held, and Spencer was found guilty of violating MSU's "Guidelines Regarding Bulk E-mailing by Internal Users of MSUnet" and received a written warning in her student file. After this disciplinary action, an open letter of protest signed by thirteen civil liberties organizations was sent to University President Lou Anna K. Simon. Shortly thereafter, Spencer received a letter informing her that the complainant had dropped the charges and the University was therefore withdrawing all charges related to the incident (MSU, 2008).

Catawba Valley Community College

At Catawba Valley Community College in Hickory, North Carolina, student Marc Bechtol was suspended without a hearing for posting a message on Facebook criticizing the College's decision to partner with a financial institution in order to provide debit cards to students. Bechtol questioned the decision on his own Facebook page, and then posted the following message on the institution's Facebook page:

- Did anyone else get a bunch of credit card spam in their CVCC inbox today? So, did CVCC sell our names to banks, or did Higher One? I think we should register CVCC's address with every porn site known to man. Anyone know any good viruses to send them?
  OK, maybe that would be a slight overreaction.

Approximately one week after posting this message, Bechtol received a letter from Cynthia Coulter, the Executive Office of Student Services, informing him that he was in violation of the student conduct policy because his behavior in posting the message was "contrary to the best interest of the CVCC community." The letter indicated that Bechtol was suspended for the entire fall 2011 and spring 2012 semesters, and that he would be withdrawn from his fall courses effective immediately. He was also barred from all CVCC campuses for the entire period of the suspension. Bechtol appealed his suspension and contacted FIRE, which sent a letter to the CVCC President Garrett Hinshaw and issued a press release about the matter. Within two weeks of these actions, the suspension was lifted and Bechtol was allowed to finish his program at CVCC with the condition that he would continue his education with online classes, agree to be blocked from CVCC's social media network, and "publicly express regret" for his words (Marc Bechtol, 2011).

Murakowski v. University of Delaware

The 2008 case of *Murakowski v. University of Delaware* involved a student who posted violent, racist, and sexually explicit stories on a website he created using the University's server space. The narratives discussed murder, rape, and severe violence toward women, among other things. The website was public, and some female students who lived in the same residence hall as Murakowski became aware of it. One of them shared it with her brother, who in turn lodged a complaint with the University. Other complaints were registered, in which female students reported feeling very uncomfortable around Murakowski.

University officials contacted Murakowski's father, who worked on campus, requesting that he and his son report the next day to the office of Associate Vice President for Student Life Cynthia Cummings. At that meeting, Cummings presented her concerns to Murakowski, along with a letter outlining a series of disciplinary actions including:

- charges of violation of the University's "Responsible Computing Policy,"
- removal from classes and from the residence hall until a psychiatric assessment was completed,
- a letter from the mental health professional completing that assessment indicating that Murakowski posed no threat to himself or others, and
- a waiver granting Cummings permission to speak with said mental health professional about the conclusion and recommendations.

Over the next month, Murakowski underwent the psychiatric evaluation. He and the University then engaged in a series of hearings and appeals that ultimately resulted in his suspension from the University and his banishment from campus.

Murakowski sued in federal district court on the grounds of violation of his First and Fourteenth Amendment rights. The court found no Fourteenth Amendment due process violation. On the issue of First Amendment rights, the court noted prior decisions made in *Tinker* (1969), *Watts* (1969), *Healy* (1972), *Fraser* (1986), *Hazelwood* (1988), and *Morse* (2007), along with cases related to the "true threat" doctrine that are not covered in this paper. While the court noted that Murakowski's statements were not "conditional," in the sense that "he suggests that he intends to rape, kidnap and murder," it found that his writings did not constitute a "true threat" (*Murakowski*, 2008, p. 590). Furthermore, the court noted that the University was unable to prove that his postings caused a "material disruption," observing that there was "no evidence that his writings were of interest to other students or a topic of conversation on campus even in light of the events at Virginia Tech" (*Murakowski*, 2008, p. 592). In the end, the court found in favor of Murakowski on the First Amendment grounds, and in favor of the University on the Fourteenth Amendment grounds (*Murakowski*, 2008).

Professional Programs and the Law

Over the last five years, several legal cases arose in which students enrolled in "professional programs" such as nursing, education, and mortuary science, stood accused of violating the standards of those fields. Here, we will examine three of those cases, illustrating a synthesis of all of the elements discussed thus far.

Yoder v. University of Louisville

Nina Yoder was a student in the University of Louisville School of Nursing. In 2009, she began posting candid reactions to her experiences with a pregnant patient. As part of her studies, Yoder was required to find an expectant mother to follow through the

birthing process. After the patient gave birth, Yoder blogged about the entire experience on her MySpace page. Another student in the class brought the blog to the attention of the course instructor, who in turn contacted the Associate Dean of the School of Nursing. The Associate Dean reviewed the information with the Dean, and the two of them concluded that Yoder had violated the School of Nursing Honor Code, the individual course's "confidentiality statement," the course consent form signed by the birth mother, as well as the standards of the nursing profession.

The Associate Dean met with Yoder, who confirmed that she had written the blog posts in question. Yoder was then dismissed from the program. She unsuccessfully petitioned for an internal review of the dismissal. Yoder then filed suit in federal district court. The court ruled in her favor, but its decision was not made on constitutional grounds. In its decision, the court outlined its reasoning: "A fundamental rule of judicial restraint requires that federal courts, prior to reaching any constitutional questions, must first consider any nonconstitutional grounds for a decision" (*Yoder*, 2009, p. 14). The court viewed it as a contractual issue and determined that Yoder violated neither the Honor Code nor the Confidentiality Agreement. Additionally, the court noted that, while it found the blog posts to be "generally distasteful" and "objectively offensive," they were not vulgar by legal definition (*Yoder*, 2009, p. 17).

The University of Louisville appealed, and the Sixth Circuit overturned the district court's decision on the grounds that Yoder argued that her First Amendment rights were violated because the Honor Code and the Confidentiality Agreement were unconstitutional, and the district court should have ruled on that basis. In its decision, the

Sixth Circuit noted, "neither the Supreme Court nor a panel of our circuit has considered whether schools can regulate off-campus, online speech by students" (*Yoder*, 2013, p. 545). It also observed, "other circuits have come to conflicting conclusions and permitted schools to regulate off-campus, online speech" (*Yoder*, 2013, p. 545). It seems to me that the most important lessons to be learned from it are: 1) the status of First Amendment rights in higher education cases is confused and murky at best, and 2) the subject of waivers of personal rights by students—even for students enrolled in "professional" programs—deserves deeper exploration by our justice system (*Yoder*, 2013).

Snyder v. Millersville University

While the circumstances in *Snyder* are similar to those in *Yoder*, the outcome was quite different. Stacy Snyder was a student in the Millersville University School of Education when she posted about her experience as a student teacher on her MySpace page and included a picture of herself "wearing a pirate hat and holding a plastic cup," which she captioned "drunken pirate" (*Snyder*, 2008, p. 15). This incident occurred after Snyder had received evaluations in which concerns about her communications were noted and warnings about referencing cooperating students or teachers on social media sites. After an internal review process, the School of Education deemed Snyder "unsatisfactory" in the category of professionalism and informed her that she could not graduate with such a rating. She was informed that she would receive an English degree instead.

After a somewhat lengthy and confusing legal journey, Snyder filed suit in federal district court, where she lost. In this case, a deciding factor was whether Snyder was a "student" or an "employee," and whether *Tinker, Connick*, *Pickering*, or *Garcetti* was the

appropriate standard. The court noted that Snyder did not attend any classes during the student-teaching period, that she essentially acted as a full-time teacher, and that she followed the calendar of the school at which she was student teaching. Furthermore, the court observed that Snyder viewed herself as a teacher and not a student. Ultimately, the court determined that Snyder was akin to a public employee, and so her posts were not subject to the same protections as student speech (*Snyder*, 2008).

Tatro v. University of Minnesota

In 2012, a legal case emerged which forced the standards of *Tinker* and "true threat," and the issue of social media before the courts, *Amanda Tatro v. University of Minnesota*. For the first time, the courts seemingly had to grapple with these multiple issues in the context of higher education.

Amanda Tatro was a junior in the mortuary science program at the University of Minnesota – Twin Cities when she posted on Facebook about her experiences as a student. In these posts she shared information about the anatomy and embalming lab in which she had contact with donated human cadavers, and described having dark thoughts that involved violent acts. As a member of the mortuary science program, Tatro received information about program rules related to work with human cadavers, and she signed an "Anatomy Bequest Program Human Anatomy Access Orientation Disclosure Form" stating that she had received this information. As part of this orientation, students are apprised as to respectful treatment of cadavers and are also informed that "blogging" about the anatomy lab is prohibited. Tatro and her lab colleagues were notified that the term "blogging" also referred to the use of Facebook and Twitter.

As stated in the case opinion, "on December 11, 2009, Tatro's Facebook activity was brought to the attention of the Mortuary Science Program Director" (*Tatro*, 2012, p. 513). Of specific concern were four posts that she had made on Facebook:

- **Amanda Beth Tatro** Gets to play, I mean dissect, Bernie today. Let's see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve… (November 12, 2009)

- **Amanda Beth Tatro** Is looking forward to Monday's embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar. (December 6, 2009)

- **Amanda Beth Tatro** Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm…perhaps I will spend the evening updating my "Death List #5" and making friends with the crematory guy. I do know the code… (December 7, 2009)

- **Amanda Beth Tatro** Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang out with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket. (Undated)

Three days after the program's director became aware of these posts, he met with members of his staff to discuss them. In his testimony he stated that there "was a lot of fear" regarding the posts, specifically those about stabbing someone (*Tatro*, 2012, p. 513). At that point, the Director contacted University Police, and they met with Tatro. During this time, there seemed to be some confusion and miscommunication regarding Tatro's status in the program. She left the meeting under the impression that she was suspended, and set about contacting news media outlets. This generated public scrutiny of the program by family members of those who had donated their bodies to the program. Nevertheless, the Office of Student Conduct and Academic Integrity (OSCAI) advised Tatro that she could return to the program and complete her courses and final exams. After finals were completed, however, Tatro was informed that the instructor of her

anatomy lab had submitted a formal complaint to OSCAI charging that Tatro had violated the policies outlined in the "Anatomy Bequest Program Human Anatomy Access Orientation Disclosure Form" and orientation.

The Campus Committee on Student Behavior (CCSB) conducted a hearing and found a violation of the Student Conduct Code regarding threatening conduct, and also found violations of the SCC related to specific "departmental regulations that have been posted or publicized" (*Tatro*, 2012, p. 514). The CCSB imposed sanctions that included a failing grade for her anatomy course and required that she complete a directed study in ethics, write a letter to the faculty about respect within the program/profession, undergo a psychiatric evaluation and submit to any recommendation made as a result of that evaluation, and accept probationary student status for the remainder of her undergraduate career.

Tatro appealed the CCSB's decision to the Provost's Appeal Committee (PAC) on the basis that the University lacked authority to impede her right to free speech, but the PAC upheld the decision of the CCSB as well as the sanctions. Tatro then presented her case to the Minnesota Court of Appeals, which upheld the sanctions. In its finding, the court stated that the University had not violated Tatro's First Amendment rights.

In 2011, Tatro appealed her case to the Minnesota Supreme Court, and a three-judge panel heard the case. Four of the seven justices recused themselves, presumably because of personal connections to the University (Lymn, 2012). It is important to note that in her original petition, Tatro requested review of only one issue: "Whether a public university violates constitutional free speech rights by disciplining a student for Facebook posts that contain satirical commentary and violent fantasy about her school experience

but do not identify or threaten anyone." Based on this one issue, the Minnesota Supreme Court accepted the case. It was only later, in her brief on the merits, that Tatro raised additional issues regarding the University's jurisdiction, insufficient evidence to support violations, and whether the University had authority to alter a grade. As these issues, which related to the University of Minnesota Student Conduct Code were not part of the original petition, the court did not review them.

The Minnesota Supreme Court ultimately affirmed the decision of the court of appeals regarding free speech, claiming that "the University did not violate the free speech rights of Tatro by imposing sanctions for her Facebook posts that violated academic program rules where the academic program rules were narrowly tailored and directly related to established professional conduct standards" (*Tatro*, 2012, p. 511). The court also made clear that, because of its position in the decision, neither the *Tinker* standard nor the *Hazelwood* restriction applied in this case. It sidestepped the "true threat" precedents by claiming that the sanctions imposed were for the totality of Tatro's behaviors and not just for threatening speech (*Tatro*, 2012).

A New Standard for Speech?

According to Amanda Tatro's attorney, Jordan Kushner, her case was not appealed to the United States Supreme Court because of her unexpected death, which occurred just one week after the decision of the Minnesota Supreme Court (Simons, 2012). Since that time, there have been hundreds of blogs and articles discussing the *Tatro* case and positing it as a new standard in the realm of freedom of expression. I would argue that it is not, in fact, a new standard and moreover, that the University of Minnesota was wrong to take the actions it did against her. Viewed in the context of the

history of higher education cases involving freedom of expression, the *Tatro* case does not seem to have created an entirely new standard. Consider Justice Samuel Alito's concurrence in *Morse* (2007). While Justice Alito clearly agrees with the finding of the Court as far as restricting "speech that a reasonable observer would interpret as advocating illegal drug use," he goes on to argue that *Morse* does not sanction any other restrictions on speech aside from those already set by Supreme Court precedent (*Morse*, 2007, p. 422). Furthermore, he states, "the opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.' This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs" (*Morse*, 2007, p. 422). Justice Alito thus joined "the opinion of the Court with the understanding that the opinion does not endorse any further extension" (*Morse*, 2007, p. 425). Taken in conjunction with the strong statements by the Court in *Healy*, *Papish*, *Widmar*, *Rosenberger*, and *Southworth*, it seems doubtful that, had the Supreme Court heard *Tatro v. University of Minnesota*, it would have considered it a new standard in the history of freedom of expression cases.

Regarding the actions taken by the University of Minnesota, it is my opinion that the original sanctions imposed by the CCSB were unduly harsh and may have been at least partially the result of a generational misunderstanding regarding social media. Of the five sanctions imposed—a failing grade for her anatomy course, completion of a directed study in clinical ethics, requiring that Tatro write a letter to the faculty regarding respect within the program and profession, completion of a psychiatric evaluation and completion of any recommendation made as a result of that evaluation, and probationary

student status for the remainder of her undergraduate career—two of them strike me as overreactive in nature and, possibly, actionable.

First, for the University of Minnesota to change what was originally a passing grade of "C" to a failing grade of "F" where there is no scholastic dishonesty, such as cheating on an exam or plagiarism, seems arbitrary and capricious. Ideally, grades are assigned by instructors based on the work completed by the students in a fair environment where methods of evaluation are applied equally. In this case, the instructor plainly informed Ms. Tatro that her grade was changed due to behavior outside the context of the classroom on her Facebook page. In this regard, I believe a grade appeal was justified, as it would be based on an unjust and excessive action against an individual student and not on the basis of the instructor's grading standard.

Second, requiring a psychiatric evaluation and the completion of any recommendation made as a result of that evaluation because of four Facebook posts seems to me not only an excessive reaction, but one that is not actually in the purview of the CCSB, a body whose membership does not comprise mental health professionals. Again, while some might find her words upsetting, I wonder how often members of that very committee may have uttered the words, "I could have killed him or her" when referring to a stressful situation with a colleague or an argument with a significant other. These are phrases in our vernacular, and we tend not to think twice about them when they are spoken aloud. We certainly do not assume that every person who articulates frustration by employing a similar phrase actually intends to commit murder. Nor do we normally assume that the person has serious mental health issues. We infer from the

speaker a level of frustration to which we can typically relate, and we often laugh it off, never to think about it again. In this case, the difference is that Amanda Tatro wrote these things on a Facebook page, and many of us raised prior to the age of technology view the written word as different from the spoken word. That is not necessarily the case for current college students. For them, communication by text or on Facebook, Twitter, Instagram, and other types of social media is equivalent to speaking in person.

Should higher education institutions monitor students' social media?

There are a number of important questions to consider before we start sliding down the slippery slope of social media monitoring. For example, would it be reasonable for a college or university to monitor its students' phone conversations? Would it be reasonable to read their mail or eavesdrop on a shared in-person conversation? Many of us would scoff at these notions, claiming that these would all be intrusions into privacy and violations of free speech rights. Why, then, do so many colleges and universities view social media differently? I contend that there are two primary reasons: 1) there is currently a generation gap in the way social media is perceived, and 2) the ability of social media to reach large audiences scares most institutions.

Most of the college students with whom I have worked in my career view a "conversation" over Facebook, Twitter, or other social media platforms in the same manner as they view an in-person conversation. In my experience, they do not consider the permanency factor of social media sites. They cannot comprehend that comments stay there forever and may be accessed by anyone. For them, once that Snapchat is gone, it is gone, never to be seen again. In contrast, most of the colleagues with whom I work—staff members, faculty, and administrators—view the written word, in whatever form, as fundamentally different from verbal conversation. Those of us born in a time before home computers were the norm, before cell phones existed, before email was regularly used to communicate view the written word as lasting and permanent. When we were growing up, we interacted with our friends at school, or when we saw them over the weekend, or we talked on the phone. Today, a student can text friends whenever s/he likes, and even post a note to several friends at three o'clock in the morning.

Furthermore, students can easily compartmentalize those communications. One message can be posted to Facebook, especially if Mom, Dad, and grandma are Facebook "friends." An entirely different, and possibly more honest and revealing message, can be sent via Instagram or Twitter.

While older generations tend to be wary of "friending" people on Facebook if we do not actually know them in our "real" lives, the younger generation views online interactions with strangers as real and meaningful. It has fast become a primary platform for building relationships and developing intimacy with others (Kord & Wolf-Wendel, 2009). For example, in 2004 Facebook reported roughly 1 million users. By 2009, it reported 250 million users. As of 2014, it has crossed the 1 billion user mark (Facebook, 2014). And, while Facebook usage among younger students is declining, new platforms are discovered and utilized faster than institutions can track them. According to Pew Research, 90% of internet users between the ages of 18 and 29 use social media sites, as compared with 78% percent in the 30-49 age group, and only 65% in the 50-64 age group (Social Networking Fact Sheet, 2014).

What are the implications for perceptions of communication and First Amendment rights? Most administrators at colleges and universities—those making policy—are in the age groups utilizing social media less frequently. According to the American Council on Education, the average age of a college president in 2012 was 61, and more than half of all presidents were over the age of 60 (Cook, 2012). Can we reasonably expect those born in 1953—the year that color television was introduced—to quickly make the leap to recognizing and understanding fundamental differences in

perceptions of communication when they are among those using these new technologies the least? Furthermore, can we reasonably expect them to form good policies around the use of these technologies?

I am not suggesting that administrators over the age of 60 are incapable of formulating effective and appropriate social media policies, nor am I naïve to the reality that such policies are typically drawn up by committees or subordinates, not by college presidents themselves. However, I do think the graying of college campuses may be contributing to the fear that institutions seem to share when it comes to social media and conduct codes. It could be that older administrators and faculty are wary of social media and wish to contain its effects on campuses; however, it strikes me as just as likely that college presidents are fearful of the negative publicity that could result from a post or tweet deemed to be in "bad taste."

In terms of protecting the reputation of the institution, it is understandable that campuses would want to monitor students' (and employees') use of social media, to ensure that nothing potentially damaging is said. Considered against the framework of individual rights to expression and privacy, it becomes an extraordinarily difficult issue for many people.

PK-12 schools are already starting to deal with this challenging question. In 2013, a Los Angeles area school district hired an external company to monitor its students' social media activities for one year. It cost the district over $40,000 to receive reports on its roughly 14,000 middle and high school students. The CEO of the firm, Geo Listening, commented, "Parents and school district personnel -- they are not able to effectively

listen to the conversation where it's happening now. The notion about talking in class is about as old-fashioned as a Studebaker, no offense to the makers of the car" (Martinez, 2013).

There are strong arguments on both sides of the issue. On the one hand, this monitoring takes place on public sites, such as Facebook, so there is no reasonable expectation of privacy, and students are free to adjust privacy settings to avoid the monitoring of private conversations. On the other hand, as Lee Tien, senior staff attorney for the Electronic Frontier Foundation put it, "The question is what is the school doing? It's not stumbling into students—like a teacher running across a student on the street. This is the school sending someone to watch them" (Martinez, 2013).

Other schools have employed the services of CompuGuardian, a company that offers a wide array of services, including website tracking, instant message/chat tracking, keystroke captures, web search history, social media monitoring, and regular screenshot recording, all of which (and more) can be done in "stealth mode," so the user is not even aware. It allows schools to do remote monitoring in real time and offers the option to block programs or websites, lock an individual user's computer, block chatting, send messages to a user, and even log off or shut down a user's computer.

Daniel Domenech, executive director of the American Association of School Administrators admits that the legality of monitoring PK-12 students' social media activities is "very much up in the air," but also recommends "the best guideline we can give school districts is to always go back to the issue of the safety of the students uppermost. If the safety of a student's involved and you are not necessarily sure whether

the district has the authority to do it or not, well, you know what, go out on a limb at that point, because if you are talking about saving a student's life then you'd rather be safe than sorry" (Wallace, 2014).

Again, so far, most of the cases regarding active monitoring of social media involve PK-12 students, and the results are mixed. Each state approaches the law differently, resulting in vastly diverse outcomes. The consequence is no clear legal precedent when it comes to monitoring. The cases that do involve college and university students appear to be exclusive to athletics programs, as previously referenced, and I was unable to locate any legal challenges to those programs.

In my mind, there can be only one answer to the question of higher education institutions actively monitoring students' social media activities, and that answer is a resounding "no." Aside from the additional costs incurred, it sends a terrible message to a student body and, in my opinion, is diametrically opposed to the intent of the law.

Higher education already struggles with a poor image related to cost. Adding to rising tuition and fees by either hiring a company to do monitoring and reporting, or hiring additional internal staff to develop a software program to do it is unnecessary and wasteful, particularly since the legal landscape is currently confusing and convoluted (Van der Werf, 2007).

Given my own twenty years of experience working on college campuses, it is easy to imagine the kinds of riotous response an institution might encounter upon announcing active social media monitoring of its student body. Furthermore, it sends the message that speech is something to be monitored, reported on, and disciplined, all of which have a chilling effect on developing minds.

Finally, with all we have explored in this paper, reading the words of the United States Supreme Court describing institutions of higher education as "vital centers for the Nation's intellectual life," it is improbable to conceive that the Court could allow such monitoring of freedom of expression on our campuses. Given all of the legal precedent it seems likely that, presented with the opportunity, the Court would find such activity to be a violation of the First Amendment.

For these reasons, I believe that colleges and universities should not engage in active monitoring of students' social media.

Should higher education institutions discipline speech at all? Are there limits?

With all we have explored throughout this paper, my answer to this question may seem obvious. Yes, higher education institutions may discipline speech; however, those limits should be reached only where the need is absolutely necessary due to a true threat and where the law is the clear basis for the restriction. Colleges and universities need to be mindful of their rare place in our society as places of research and questioning, and must vigilantly protect and value that mission for the good of us all.

Just as faculty hold dear the principle of academic freedom for their work, so too must institutions instill in their students this same concept of open exploration of ideas, even those that are controversial and challenging. Without the ability to think critically and question openly, our history might be entirely different. Perhaps we would still operate under British rule; maybe Nazis would reign supreme; conceivably, women and African-Americans would not have the right to vote, nor to be thought of as equals in our society (at least, in theory).

While the notion of open dissent should be taught to our children from an early age, simple observation suggests that our PK-12 system largely encourages and values conformity as the supreme manner of being. The fact that our public school system groups children for grade placement largely by age, rather than intellectual ability, is the most overwhelming evidence. In a sense, we treat our public education system somewhat like a factory, so the concepts of conformity and linear thinking are not surprising, and the overall system does not lend itself to creative and diverse ways of thinking. "Creativity" and "diversity" have recently become very important in our educational

system, with endless articles published about companies craving both in their workforces. However, the evidence suggests that, even as businesses advertise for these ideas, they summarily reject them out of a sense of uncertainty (Mueller, Melwani & Goncalo, 2012).

In higher education, I would argue that this rejection of challenging thought has contributed to the concept of "campus conduct creep," to which I referred earlier. Not only have conduct codes reached beyond the physical campus, but they have also stretched far beyond the scope of what the law allows. Although they often refer to the ideal of "respecting the rights of others," their translation and application of this principle often seem to be, "do not say anything that possibly may be construed as even slightly offensive to any other person, regardless of your right to free speech." Here are just a few examples of this kind of vague and overbroad language, taken from current conduct codes around the country:

- refrain from behavior that impairs the University's reputation in the community
- any behavior which for any reason interferes with the class work of others
- in their off-campus lives, students are expected to conform to standards
- actions unreasonably disruptive of the University community/neighborhoods
- making any communication (including social media) to another person in any manner likely to cause alarm
- use of speech that threatens the well-being of any person(s)
- participating in a demonstration that disrupts the normal operations
- While many of the University's standards of conduct parallel the laws of society in general, University standards also may be set higher and more stringently than those found elsewhere in society. For these reasons, the University focuses

primarily on educating students about their behavior, but may impose sanctions up to and including suspension and expulsion in order to preserve a safe and healthy environment for the University community.

- acting always in a manner that enhances the well-being of others
- the University reserves the right to impose discipline based on any student conduct, regardless of location, when that conduct may adversely affect the University community
- actions or statements that intimidate another
- Recognizing off-campus behaviors often directly affect the educational environment or substantially interfere with the mission of the university, the university shall have the right to adjudicate any alleged violation of any provision of the Student Conduct Code, without regard for the geographic location of the alleged violation, at the discretion of the Dean of Students. This may include violations that occur partly or entirely through electronic means.

As I stated earlier, these are just a few examples of the type of ambiguous and open-ended language utilized in current conduct codes. Why institutions feel that they can somehow operate above the law or outside of the law escapes me, but the fact is that they do not have that right. There is no United States Supreme Court precedent to support that myth. In fact, given the Court's own words, there is every reason to believe that many of these conduct codes, if challenged in court, would not meet the significant burden the Court has upheld over the years.

In my opinion, higher education institutions would be wise to employ resources such as FIRE, the ACLU (American Civil Liberties Union), the SPLC (Southern Poverty Law Center), the AAUP (American Association of University Professors), and other organizations with strong backgrounds in legal protection of civil liberties when crafting conduct codes to ensure that individual rights remain a cornerstone of the final document.

Furthermore, I believe this is a case where simpler—as opposed to overly complex—may be a benefit. In my experience, policies are often drafted under the worst of circumstances, as the result of a single incident. Rather than craft policy from a position of reaction, conduct codes should be proactive documents, reviewed regularly within the context of the current legal standards.

I was unable to locate an institution with a student conduct code containing a separate and discrete section dedicated to social media use. (Obviously, this does not mean that one does not exist, as I did not complete an exhaustive search of the thousands of higher education institutions in the United States.) There were some student conduct codes that referenced both on-campus and off-campus speech and mentioned social media as included in those definitions, and there were some that simply stated that students were expected to adhere to the conduct code regardless of location (without making specific mention to the phrases on-campus and off-campus). There were a number of faculty and staff conduct codes, policies, or guidelines that contained specific social media sections or referenced social media use.

In considering "best practices" for colleges and universities, I was struck by part of the 2013-2014 General Information Catalog on the website for the University of Texas at Austin. This chapter, entitled, "Speech, Expression, and Assembly," begins with three basic tenets, abbreviated here:

- Freedoms of speech, expression, and assembly are fundamental rights, central to the mission of the University
- Students, faculty, and staff are free to express their views
- The University will not discriminate against students, faculty, or staff based on their views

In our society, turning eighteen marks the end of childhood and the beginning of our adult journey. We gain the right to vote, to serve in the armed forces, and to be independent from parental/guardian control. For many of us, this coincides with our passage from high school to college. We are empowered to participate fully as citizens of our surrounding society. While it is incumbent on us to know our rights—and exercise them—when it comes to freedom of expression, we should also be able to depend on our institutions of higher learning to follow the law and not attempt to abridge our freedom. Unfortunately, as established in this document, that is simply not the case. All too often, campus policies and programs serve to influence our thinking toward conformity and obedience, rather than welcoming us to a community of open thinking and expression.

Conclusion

I believe we must restore our college campuses to their once esteemed position in our culture as places of intellectual challenge, where fields of knowledge are advanced and art is elevated through research. In order to do this, we must allow space once again for dissent, discussion, and even argument. We must serve as examples of balance between rights and responsibilities, and teach those concepts, rather than force submission to policies that limit our most basic freedoms. In my opinion, this is where our best practices must start.

Best Practices for Student Conduct Codes in Colleges and Universities

- **Policies must respect the basic rights of freedom of speech and expression afforded by our Constitution**
- **Policies must adhere to legal precedent**
- **Policy language must be specific and precise**
- **Policies must relate to conduct, not mode nor medium**
- **Policies must protect personal physical safety**
- **Policies should reflect a commitment to educate and inform, not merely discipline**
- **Policies may (and should) address time, place, and manner restrictions in sufficient specificity to make to clear students what is permissible and what is not**
- **Colleges and universities must not actively monitor online activities**
- **Institutions should engage organizations with strong backgrounds in legal protection of civil liberties when crafting conduct codes (FIRE, ACLU, etc.)**

As I commenced research for this paper, I felt sure that the standard for higher education was a hybrid of *Tinker* and public employment legal precedent. Now, I am convinced that my conclusion aligns with that of the Supreme Court: "The First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech" (*Papish*, 1973, p. 671).

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