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THE CHANGING WORLD OF STUDENT EXPRESSION:

A LEGAL ANALYSIS OF COLLEGE STUDENT ONLINE SPEECH ISSUES

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ABSTRACT

The internet plays an increasingly important role in the lives of contemporary college students. Use of social media and other forms of electronic communication have fundamentally changed the ways in which students interact with others. Often, students' online speech can lead to disciplinary action against them. This study considers the current state of the law as it relates to college student online speech. Specifically, it explores how courts interpret students' First Amendment rights in online context both within and outside of instructional settings, as well as the extent to which courts rely on concepts of academic freedom in defining student speech rights in online contexts. Twenty-five federal and state court opinions from twenty-one separate cases are thoroughly examined. They are then analyzed using reasoning by analogy. The results reveal five major themes. First, several sources of law shape the contours of student online speech rights. Second, clear policy language and consistent adherence to policies is essential to treating students fairly and withstanding legal challenge. Third, courts' treatment of student academic freedom is consistent with principles articulated by the AAUP and others. Fourth, there is uncertainty and debate related to the proper application of legal standards in assessing student online speech rights and corresponding institutional authority. Finally, institutional authority over student online speech is dependent upon the context in which the speech occurs. Given these conclusions, several implications for both theory and practice are discussed.

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CHAPTER 1: INTRODUCTION

Background Information

As online communication—from email to social media to use of online learning platforms like Blackboard—has become a common facet of everyday life for college students, higher education administrators and faculty routinely encounter situations in which they must respond to problematic online speech. Students sometimes use online media to offend, bully, and harass others or engage in speech that others find hurtful, offensive, or otherwise troubling. Such speech can besmirch the reputation of the institution and cause serious harm to other students. Furthermore, online speech incidents may serve as a basis to conclude that a student lacks the requisite professional disposition to continue in an academic program or to earn professional licensure. At times, the consequences of online incidents can be tragic. One particularly notorious example is the case of Tyler Clementi, a freshman at Rutgers University who committed suicide after being cyber-bullied by his roommate (Parker, 2012). Students' online speech has the potential to create disruptions on college campuses, and therefore, has become a genuine challenge for university administrators.

In responding to incidents involving online speech, college and university administrators must balance several different considerations in order to make decisions that comport with both the institution's values and the law. A key issue often facing administrators involves the applicable legal standards that define student speech rights and institutional authority to regulate speech. Legal ambiguities may leave administrators uncertain of how to deal with particular episodes and legal limits imposed on their authority in the student speech realm. For example, courts have generally ruled that the

First Amendment protects college students against regulation of their speech unless it interferes with curricular activities or constitutes a credible threat to specific individuals (Hutchens, 2012). What does and does not interfere with curricular activity, however, is not always entirely clear. Moreover, the term "curricular activity" itself has not been clearly defined. Similarly, determination of a threat in an online context can be difficult to ascertain.

Additionally, the ever-changing nature of the campus environment has complicated analysis of student speech issues. Generally, public institutions of higher education must afford students all freedoms guaranteed by the First Amendment (Kaplin & Lee, 2013). However, courts have been allowing the regulation of student speech by public institutions in cases where the speech interferes with curricular activities (Hutchens, 2012). In determining whether or not speech was related to curricular activity, courts historically considered the physical location in which the speech took place (Sun, Hutchens, & Breslin, 2013). If the speech occurred within the confines of the classroom, it was almost always considered to be curricular activity. The walls of the campus and the classroom are now blurred, however, as many classes move online. As a result, the courts can no longer rely on physical boundaries in determining what is and is not curricular activity.

Furthermore, the competing institutional values of supporting the free exchange of ideas and fostering civility may lead to a schizophrenic response to instances of problematic online speech. While institutions of higher education are historically committed to upholding constitutional freedoms, administrators are also committed to cultivating campus climates in which all students are respected. When students engage in

harmful, offensive, or harassing online speech, these values may clash and the institution's response may send mixed messages about which values take precedence.

A relatively recent example from Penn State University highlights the fact that there is often tension between the desires to honor free speech rights and create an inclusive, welcoming campus climate. In the fall of 2012, members of a sorority posted pictures of themselves at a Mexican themed social event wearing ponchos, sombreros, and fake mustaches (Ponter, 2012). Some sorority members held signs with culturally offensive phrases painted on them. In response to the incident, President Rodney Erickson released an open letter to the Penn State community in which he expressed both the University's support of the students' right to engage in this type of behavior and extreme disappointment in the students' "insensitivity or unawareness" (Erickson, 2012).

Finally, student online speech issues also bring the concept of student academic freedom to the forefront, especially in class-related situations. Prominent figures in the history of American higher education sought to ingrain the German principles of *Lernfreheit*—the freedom to learn—and *Lehrfreheit*—the freedom to teach—into the fabric of U.S. colleges and universities (Metzger, 1955). These principles have been upheld and defended by the American Association of University Professors since its inception (Fuchs, 1963). While faculty academic freedom seems to garner a great deal of attention in higher education literature, student academic freedom goes largely undiscussed.

Though it is an academic concept rather than a legal one, courts considering disputes between students and institutions are often called upon to make determinations about academic freedom. Some directly invoke academic freedom concerns in their

reasoning (e.g. *Snyder v. Millersville University,* 2008; *Healy v. James,* 1972), while others do so indirectly (e.g. *Murakowski v. University of Delaware,* 2008). Nevertheless, the relationship between college student speech and student academic freedom remains somewhat unclear, particularly in the legal realm. For administrators concerned with protecting academic freedom, this could be problematic.

Justification for Study

This study seeks to contribute to our understanding of how courts have applied and interpreted legal standards related to students' online speech and corresponding institutional authority to regulate such speech based on academic or student conduct grounds. Issues related to student online speech are often a source of disagreement (including legal challenges) and ambiguity. Even those well versed in the law cannot always agree on the best practices for dealing with problematic online speech (Stripling, 2011). Moreover, there is a dearth of research related to student academic freedom and how it is defined and treated in the legal realm—particularly in relation to student speech. Given that student academic freedom is a cornerstone of American higher education, it is essential to understand how courts treat this concept in resolving conflicts between students and institutions. This project will examine the present state of the law as it relates to students' online speech and identify sources and points of ambiguity. It will also explore the ways in which student academic freedom is treated by the courts in relation to student online speech.

Research Questions

Through legal analysis of several cases involving college student online speech, this study will seek to answer the following questions:

1. How are courts interpreting public college students' First Amendment rights in online contexts, specifically:
    a. In the instructional realm?
    b. Outside of instructional settings?
2. To what extent have courts relied on or referenced concepts of academic freedom, if at all, in defining student speech rights in online contexts?

Importance of the Study

Legal Terms and Concepts

As previously discussed, legal ambiguity can cause confusion for college administrators. Inquiries into the legality of regulating student online speech primarily find their answers in three sources of law: federal law (particularly the First Amendment of the Constitution), state laws, and contract law. Attempts to reconcile and comply with various legal standards resulting from federal, state, and contract law principles can cause confusion for college administrators.

Federal law. There are several laws passed by the federal government that influence higher education policies and procedures. Two of these laws—the U.S. Constitution and Title IX—can significantly impact reactions to problematic online speech.

The First Amendment. Public institutions, as governmental actors, are required to uphold the First Amendment right to free speech afforded by the Constitution (Kaplin & Lee, 2013). While private institutions are not required to provide First Amendment protections (as explored further in the literature review), many aspire to uphold

equivalent speech freedoms[1]. Nevertheless, there are certain types of speech that are not constitutionally protected: speech that is likely to bring about clear and present danger (*Schenck v. United States*, 1919), fighting words (*Chaplinsky v. State of New Hampshire*, 1942), slander and libel (*Curtis Publishing Co. v. Butts*, 1967), true threats (*Watts v. United States,* 1969) and obscenity (*Miller v. California,* 1973). If the speech in question falls into any of these categories, sanctioning the student does not violate the Constitution. It is when the speech falls outside of these categories, however, that decisions about whether or not punishment is appropriate become more complicated.

Title IX. Title IX of the Education Amendments Act of 1972 requires that no person be subjected to discrimination on the basis of sex under any education program that receives federal assistance (Ali, 2011). It has been determined that sexual harassment and sexual violence amount to discrimination on the basis of sex. As a result, institutions of higher education must prevent and take action against instances of sexual harassment. At times, the requirements of Title IX may conflict with the First Amendment. The Office of Civil Rights has a broad definition of sexual harassment, ranging from sexual violence (e.g. rape, sexual battery, sexual assault, and sexual coercion) to speech that makes an environment hostile (Lieberwitz et al., 2016). What does and does not make an environment hostile is primarily based on the subjective responses of a complainant. Theoretically, therefore, speech that would be protected by the First Amendment could be punishable under Title IX.

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[1] In California, for example, there is a law requiring all non-religious institutions of higher education to provide free speech protections similar to those provided by the First Amendment.

Consider, for example, an incident that took place at Michigan Technological University in 2015. A student comedy publication, *The Daily Bull,* was placed on probation for two years after publishing a satirical article related to sexual harassment and assault (DeWulf, 2016). The article, titled "Sexually Harassed Man Pretty Okay with Situation," was intended to be a comedic take on the fact that many people do not take male sexual assault seriously. Administrators at the school, however, were not amused. When asked about the actions taken against *the Daily Bull*, the school's Vice President for Student Affairs shared that the publication was punished because Title IX trumps the Constitution and its speech protections. As the Foundation for Individual Rights in Education pointed out, this interpretation of the law is inherently wrong. The Constitution is the "supreme law of the land," and it supersedes any federal laws that may violate it. This situation clearly exemplifies the confusion that may result when administrators are tasked with balancing conflicting sources of law.

Contract law. A contract is an agreement between two parties that creates mutual obligations (Kaplin & Lee, 2013). These obligations are enforceable by law. Contracts offer protection for both students and institutions. Students may rely on contract law principles to hold a school to promises made. Institutions, on the other hand, may also rely on contract law to regulate student behavior. Courts have held that an enforceable contract exists between institutions of higher education and their students (*Merrow v. Goldberg*, 1987). The terms of this contract are contained in the brochures, codes of conduct, course offering bulletins, and other official statements, policies, and publications of the institution. Contract standards can be applied to both public and private institutions. Many schools rely on contract law principles in seeking to regulate

undesirable student conduct (Burl, 2011). Several institutions have begun to implement social media policies--which constitute contracts between the students and the institution--to regulate students' online speech (Social Media Governance, 2014). Contracts can run afoul of the law, however, when they prohibit constitutionally protected speech.

Consider, for example, an incident that took place at the University of North Carolina. In 2010, a player was dismissed from the football team after he revealed on Twitter that he had received improper benefits in violation of NCAA rules (Seenauth, 2014). In response to the incident, the institution banned all football players from using Twitter. Use of Twitter was prohibited altogether, regardless of whether or not the speech fell into the categories of speech not protected by the First Amendment. Consequently, even constitutionally protected speech was restricted under this social media policy.

State laws. Institutions of higher education must also follow all applicable state laws, so long as they are in harmony with the federal Constitution (Hutchens, 2012). State laws now have a bigger impact on student online speech issues than ever before, as more and more states continue to pass campus speech laws. In the wake of Tyler Clementi's suicide, for example, the New Jersey legislature passed the Anti-Bullying Bill of Rights. This piece of legislation requires all public colleges and universities to add provisions to their codes of conduct that prohibit harassment, bullying, and intimidation—including harassment, bullying, and intimidation through electronic communication (Anti-Bullying Bill of Rights Act, 2010). This adds an additional component to the calculus administrators at institutions in New Jersey must engage in when determining how to manage students' online speech. The Anti-Bullying Bill of Rights is an example of the kind of state law administrators may have to consider when

crafting policies. Other states with speech laws include Virginia, California, Tennessee, New Hampshire, and Illinois.

In determining which actions are appropriate in response to students' problematic online speech, administrators must take federal, state, and contract law into account. The law in each of these areas is ever-evolving and far from settled. Given these realities, it may be unclear how to craft policies that do not run afoul of the law.

The Nature of the Legal System. In addition to the ambiguity that can result from trying to get a clear picture of the law from several different sources, college administrators must contend with the ambiguity that results from the judicial system's structure and practices. Often, policies established by higher appellate courts are unclear because they have been written to accommodate the opinions of an entire panel of judges (U.S. Department of State, 2004). Moreover, majority opinions from appellate courts are frequently accompanied by concurring opinions, written by justices who would have reached the same end result, but for different reasons. Finally, it can be difficult to distinguish between dicta—useful guidance provided by the court that does *not* contribute to the logic of the decision—and the actual holding—the binding precedent which must be followed.

Though not related to education, the case of *Furman vs. Georgia* (1972) is illustrative. In a 5-4 decision, the Supreme Court struck down the imposition of the death penalty in the three cases at issue. The justices advanced several different reasons for this decision, and because they could not agree, there was no controlling opinion. Justices Stewart, White, and Douglas felt that the death penalty was arbitrarily and discriminatorily applied under the existing laws, while Justices Brennan and Marshall

argued that imposition of the death penalty constituted cruel and unusual punishment in violation of the Eight Amendment. Given the differences in opinion among the justices, uncertainty abounded in the wake of the decision (U.S. Department of State, 2004). Lower-court judges were left without clear guidance, and decisions made by judges in different courts across the country were widely divergent. Many states passed an array of varied death penalty statutes, which lead to the filing of new lawsuits.

Competing Institutional Values

Postsecondary institutions often simultaneously pursue conflicting interests (Chang, 2000). Institutions of higher education, particularly public schools, have long been committed to the free exchange of ideas (Carnegie Foundation, 1990). Freedom of expression is essential to the mission of the university, and thus, the ideal university is one that both supports and encourages free speech. Supreme Court Justice Felix Frankfurter (once a university professor) remarked that "for society's good…inquiry…must be left as unfettered as possible" (O'Neil, 1997). This commitment to upholding First Amendment rights is deeply engrained in the fabric of America's colleges and universities.

Though freedom of expression is important to college and universities, civility is arguably equally important (Carnegie Foundation, 1990). Institutions that strive to build open communities committed to civility are most successful at cultivating campuses conducive to learning. In open communities, words are used to foster understanding, and not as weapons of assault. College administrators are concerned with developing an environment where all students feel supported and accepted. Lee Bollinger, former Dean of the University of Michigan's law school, has thusly summed up the dilemma faced by

institutions: “Should the university be the place in society where there is ultimate protection of free speech, or is it a place where you want to preserve civility and discourse? Those are two very different models, both with strong appeals” (Siegel, 1990, p. 1357). This inherent tension between the commitment to freedom of expression and the desire to encourage civility may leave college administrators uncertain of how to manage issues of harmful and negative speech, including speech that takes place online.

A historic commitment to both freedom of speech and civility was evident in the creation of Stanford University’s “Fundamental Standard.” The Fundamental Standard was articulated by the institution’s first president as the ideal standard of conduct for the university community (Stanford University, 2014). It requires all to respect the opinions of others—even those with which they may not agree—and to refrain from intimidating or using or threatening violence against other community members (Siegel, 1990).

Interestingly, in offering guidance on interpreting the Fundamental Standard, the school’s Student Conduct Legislation Council issued the following statement:

> Stanford is committed to the principles of free inquiry and free expression. Students have the right to hold and vigorously defend and promote their opinions, thus entering them into the life of the University, there to flourish or wither according to their merits. (Siegel, 1990, p. 1351)

Certainly, there may be instances in which the articulated Fundamental Standard and the articulated *interpretation* of the Fundamental Standard come into conflict. If a student chooses to use his or her freedom of expression—a freedom supported by the University—to belittle or harass another, it cannot be argued that the student is respecting others, as required by the Fundamental Standard. This example from Stanford University

clearly highlights the ways in which institutional values can clash and cause difficulties for institutions around the issue of student speech.

The tension between institutional values of free expression and civility is perhaps more evident now than ever before. With a particularly contentious political climate leading up to and following the 2016 presidential election, college administrators were frequently called upon to strike a balance between these two interests. At the University of California at Berkley, for example, students urged the administration to cancel an appearance by right-wing commentator Milo Yiannopoulos (Park & Lah, 2017). When it failed to do so, protests—and ultimately, riots—erupted on campus. In the end, Yiannopoulos' appearance was cancelled out of concern for public safety.

In 2017, prospective Harvard University students were punished for engaging in online speech that conflicted with institutional values (Kaufman, 2017). Administrators became aware that ten incoming freshmen students were sharing explicit, hateful memes about topics such as certain racial and ethnic groups, the Holocaust, and sexual assault. These messages were shared in a Facebook chat group that was an offshoot of the university affiliated "Harvard College Class of 2021" Facebook group. Upon learning of the content of the chat group, administrators rescinded the students' acceptance offers. As these recent events illustrate, student expression and other institutional values continue to collide and create problems for higher education administrators.

Key Terms[2]

In this piece, the term "speech" will refer to the rights of freedom of speech and expression afforded to individuals under the law. That is, it will not only refer to the written and spoken words students use to communicate online, but also to the ways in which they may choose to express themselves non-verbally through online media. This includes videos, pictures, and even the sharing of offensive content.

The term "problematic online speech" will be used to describe the type of speech that is of interest in this study. It is not a legal term, but is intended to encompass the many different types of online speech that may prove troublesome for institutions of higher education. For this study, the term is meant to include instances of online speech that have resulted in litigation based on an institution restricting or disciplining a student (either on academic or student conduct grounds or both) for their online speech. Examples include harassment, intimidation, cyber-bullying, hate speech, racial insensitivity, threats, speech that is offensive, and vulgarity. Problematic online speech ranges in severity from that which is clearly punishable according to the law (e.g. threats) to that which is not legally punishable (e.g. vulgarity). It should be emphasized that use of the term "problematic" is not intended to indicate a judgment about the content of the particular speech at issue in each case examined. Rather, it is simply used to signal that the speech, regardless of its merit, has caused a problem between the institution and the student.

"Online" speech refers to speech that occurs in all of the different online media students may use to communicate. First, this includes social media platforms such as

[2] A glossary of legal terms is provided in Appendix C.

Facebook, Twitter, MySpace, Google Plus, Instagram, and Snapchat. Second, it includes postings on websites of any sort, from comments on news websites to YouTube video posts. Third, communication in course management systems such as Blackboard and Moodle are considered online speech. Finally, online speech includes emails, instant messages, and text messages communicated through computers (e.g. iMessages).

Summary

Both modern and historical examples provided herein illustrate the difficulty institutions face in attempting to encourage freedom of expression while also developing a welcoming campus climate. These issues are further exacerbated by the increasing prominence of digital communication among college students. Higher education administrators turning to the legal system for guidance in solving problems related to problematic online speech are unlikely to easily find the answers they seek, given the ambiguous nature of the law. A comprehensive legal analysis of student online speech cases will help to illuminate the appropriate standards that should guide administrator response in these situations.

CHAPTER 2: LITERATURE REVIEW

Foundational Legal Concepts

For the purposes of this study, it will be necessary to establish a basic understanding of certain legal concepts. These concepts are outlined below.

The Public/Private Distinction

In considering which laws apply to an institution, a college administrator must take into account the distinction between public and private schools. Public schools are those that are run by the state or local government and supported by government tax money (Kaplin & Lee, 2013). This makes employees of the school, in any capacity, government actors. Private schools, on the other hand, receive most of their funding from tuition, endowment, and donations from alumni and other benefactors.

State governments have historically imposed regulations on private institutions far less than they have on public institutions (Kaplin & Lee, 2013). The federal government has typically applied its regulations similarly to both public and private schools, at times regulating private institutions more strictly and leaving the states to deal with public institutions. Therefore, private colleges and universities must comply with federal legislation such as the Americans with Disabilities Act and Title IX. This is not true, however, when it comes to the Federal Constitution. This piece of legislation was originally intended to limit the exercise of governmental power, and not that of private institutions or individuals. For this reason, it does not prohibit private colleges and

universities from curtailing fundamental freedoms. Private institutions, therefore, are legally permitted to limit students' free speech, free expression, and free assembly[3].

The First Amendment and its Implications

Consideration of student online speech issues requires a thorough examination of the First Amendment to the Constitution and the protections it affords. The First Amendment provides for freedoms of religion, press, assembly, and speech. These freedoms, however, are not absolute. There are certain reasons for which speech may be limited. If the speech is likely to create danger and the harm to be brought about by the speech is both severe and imminent, the speech can be prevented. This is known as the "clear and present danger" test, set forth in the case of *Schenck v. United States* (1919).

Another type of speech that is not protected by the First Amendment is "fighting words." Speech is considered fighting words if it is uttered in a face-to-face setting and has the potential to incite immediate violence (*Chaplinsky v. State of New Hampshire***,** 1942). In *Chaplinsky*, the Supreme Court stated that the "English language has a number of words and expressions which by general consent [are] 'fighting words' when said without a disarming smile. … Such words, as ordinary men know, are likely to cause a fight." Though this exception to free speech exists, courts have almost always refused to apply it since its creation.

Two more types of speech that may be limited by government actors are slander and libel. To slander another is to speak falsities about that individual. Libel is the written version of slander. Generally, libel and slander can only be prevented if the individual

[3] As previously mentioned (and discussed in later chapters), some state laws require private institutions to uphold constitutional freedoms.

against whom these acts are perpetrated is *not* a public figure. For the purposes of slander and libel, a public figure is any individual who has put himself into the public eye for any reason. Examples include university presidents, coaches of sports teams, and television stars (*Curtis Publishing Co. v. Butts*, 1967).

Public figures are not entirely without recourse, however. In *New York Times Co. v. Sullivan* (1964), the Supreme Court considered circumstances under which public figures may recover for damages to their reputation caused by the press. The court held that publication of defamatory statements about public figures, even those that are false, is protected unless it is proven that the media outlet or reporter knowingly published false statements or did so without making attempting to establish their veracity. That is, the public figure must establish that the press acted with "actual malice" in publishing false statements (*Sullivan*).

In the 1973 decision in *Miller v. California***,** the Supreme Court held in a 5-4 decision that obscene materials do not enjoy First Amendment protection. The court determined that three questions must be answered in order to determine whether or not speech is obscene. First, would the average person, hearing the speech in its entirety, find it to be obscene? Second, does the speech describe sexual conduct in a patently offensive way? Third, does the speech, as a whole, lack literary, artistic, political or scientific value? If all three of these questions can be answered affirmatively, the speech is considered obscenity, and therefore, can be regulated.

The final category of speech that is not protected by the First Amendment is true threats (*Watts v. United States,* 1969). In *Watts,* the Supreme Court determined that true threats must be distinguished from mere hyperbole. To determine speech whether

constitutes a true threat, one must consider the context in which the speech was delivered and the reaction of the listeners.

The strict scrutiny test. Restrictions of speech based on the criteria listed above are considered content-based. That is, the particular type of speech is being limited because of *what* the speaker is saying. Content-based restrictions are considered harsh, and therefore, must pass a strict scrutiny test in order to be upheld in court. The strict scrutiny test involves three parts. First, the restriction on speech must be put in place to protect a legitimate government interest. Second, the restriction must be narrowly tailored to achieve that interest. Third, the means used to curtail the speech must be no more restrictive than necessary to achieve the interest (*United States v. Carolene Products Company*, 1938).

The strict scrutiny test sets the bar very high for college administrators wishing to enact policies related to students' online speech. Problematic online speech could potentially fall under libel and slander, obscenity, true threats, and speech intended to create imminent danger. While there have been instances in which courts have upheld regulations curtailing these types of speech, college administrators seeking to regulate online speech must strive to ensure that the reason for limiting the speech is a compelling one, and that the way in which the speech is limited is narrowly tailored and not unnecessarily restrictive.

Content-based vs. content-neutral restrictions. As outlined in the next section, the courts have allowed some restriction of protected speech, so long as that restriction is content neutral (O'Neill, 2008). If the restriction is based on the content of the speech itself, it is presumptively unconstitutional. For example, if a township makes a rule that

no billboards featuring Bill Murray can be erected, that restriction would be considered content-based. If the restriction simply states that no billboards of any kind can be erected, that restriction is content-neutral. Since content-based restrictions limit speech based on its message, they can be used to suppress certain viewpoints of which the government does not approve. Consequently, they are presumed unconstitutional and subject to strict scrutiny by the courts. Content-neutral restrictions, on the other hand, apply to all speech equally regardless of its message. They do not have to pass the strict scrutiny test. Typically, content-neutral regulations are subject to a lesser standard known as "intermediate scrutiny."

Time, place, and manner restrictions. Though the First Amendment protects nearly all speech, the Supreme Court has repeatedly allowed government entities to enact content-neutral restrictions related to the time, place, and manner of speech, so long as those restrictions are reasonable (O'Neill, 2008). To pass judicial scrutiny, a time, place, or manner restriction must satisfy a three-prong test: 1). The restriction must be content-neutral, 2). It must be narrowly tailored to serve a significant government interest, and 3). It must leave open alternative channels for communication of the speaker's message (*Ward v. Rock Against Racism,* 1989). Some content-neutral regulations may negatively impact some messages or speakers more than others. This disparate impact, however, does not necessarily render the restriction impermissible. The regulation will be upheld as long as the government entity can justify the restriction as accomplishing a purpose entirely unrelated to the content of the speech.

Forum analysis. Courts have also given government entities more leeway in regulating speech in certain forums as opposed to others. For example, in public forums,

restrictions on speech are typically given heightened judicial review (Hutchens, Wilson, & Block, 2013). Traditional public forums are public spaces that have historically and legally been recognized as venues for free expression. Examples of public forums include sidewalks, parks, and town squares (Kaplin & Lee, 2013).

Other forums are considered designated public forums: the government has designated that space to serve the purposes of a public forum (Kaplin & Lee, 2013). Examples of designated public forums include bulletin boards and buildings that provide space for expressive activities. Designated public forums can limit speech activity to certain subject matters and certain classes of speakers, or it can allow all speech. If the government entity decides to limit the types of speech allowed in the designated public forum, it can only place content-neutral time, place, and manner restrictions on the class of speakers or speech it has chosen to allow in that forum.

Finally, there are non-public forums. Non-public forums allow access to certain individual speakers rather than general access for an entire class of speakers (Kaplin & Lee, 2013). In forums that have not typically been open to the public for expressive activities, the government has considerably more power to control speech. Restrictions in non-public forums will typically be upheld if they are content-neutral and reasonable.

In relation to student speech, where the student's speech takes place is an important element in deciding the permissibility of regulation. Forum designation in a particular legal challenge may turn on the school's policy or practice of either opening the space for public use or choosing not to do so (*Perry Education Association v. Perry Local Educators' Association,* 1983). Generally, classrooms have been found to be non-public forums (*Feine v. Parkland College Board of Trustees,* 2010).

Organization of the Court System

The United States legal system has several layers, and its organization is arguably more complicated than that of any other country (U.S. Department of State, 2004). First, there are federal courts. Federal courts have jurisdiction over cases involving the Constitution or other federal laws. Additionally, they hear cases arising from disputes between parties or entities from two or more different states or countries and cases in which the U.S. government is listed as a party. These matters may be criminal or civil in nature.

The federal court system is divided into three separate levels: trial courts, appellate courts, and the U.S. Supreme Court (U.S. Department of State, 2004). At the trial court level, the U.S. district courts are the first stop for any cases heard at the federal level. All cases, regardless of the significance of the issues involved or who the parties are, must first be heard in the district courts. Each state typically has at least one district court, with some states having multiple. The losing party at the district court level may appeal that court's decision to the U.S. Court of Appeals. These courts do not have original jurisdiction over any matters; that is, no case can be heard at the appellate level before it has been heard at the district court level. Federal appeals courts are organized into eleven circuits, with several federal judicial districts falling into each circuit. Finally, the highest level of the federal court system is the Supreme Court. Parties losing at the federal appellate level may choose to appeal their cases all the way to the Supreme Court. The Supreme Court has the power to choose which cases it will hear, and ultimately hears only a very limited number of cases each year.

The structure of the state court system is analogous to that of the federal courts in most states (U.S. Department of State, 2004). Each state has trial courts at the very lowest level which hear both civil and criminal disputes. As in the federal court system, cases can be appealed to the state appellate courts, and then ultimately to the state Supreme Court. State courts are courts of general jurisdiction, which means that they hear all matters not reserved for the federal courts. Close to 90% of all cases heard in the United States are litigated in the state court system. Student online speech cases often raise constitutional concerns. Consequently, most of the student speech opinions examined in this study are from federal courts.

First Amendment Freedoms and Education

Over the past few decades, the Supreme Court has handed down several decisions concerning schools' ability to limit student speech. The first of these cases was *Tinker v. Des Moines Independent Community School District* (1969). This case questioned the constitutionality of a school district's policy that banned the wearing of armbands to school in protest of the war in Vietnam. When a group of students showed up to school on December 16th, 1965 wearing black armbands, they were suspended and told that they could not return until they had ceased wearing them. The students stayed home from school until January 1st, the day their protest was scheduled to end. The students' fathers filed a petition against the school board. The U.S. District Court decided that the school did have the right to curtail the students' speech, as it was reasonable to do so in order to prevent disturbance of school discipline. The petitioners appealed the ruling to the United States Court of Appeals for the Eight Circuit, and the judgment was affirmed.

The students in *Tinker* were not satisfied with the outcome of their case in the U.S. Court of Appeals, and so they appealed to the highest authority—the Supreme Court. The Supreme Court reversed the decision and remanded it to the lower court for further consideration. In so doing, the court made it clear that the First Amendment *does* apply to public schools. It famously stated "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Furthermore, the court held that a public school must demonstrate a constitutionally valid reason to regulate any form of speech. In other words, school administrators must not curtail free speech simply because they wish to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The speech must pose the risk of "material and substantial disruption" in order to be subject to regulation.

The *Tinker* decision sparked many more court cases questioning a public school's right to limit First Amendment freedoms. The next case to reach the Supreme Court on this subject was *Bethel School District v. Fraser* (1986). High school student Matthew Fraser had given a speech at a school-sponsored function nominating a fellow classmate for student government office. Throughout the speech, Fraser used sexual metaphors to describe the candidate. The speech caused students to react in many different ways. Some were embarrassed, others hooted and hollered, while others made lewd sexual gestures. Prior to giving the speech, Fraser consulted two teachers and informed them of his plan. Both recommended that he abstain from using sexual metaphors, and warned him that his actions could have serious consequences. Following the speech, at least one teacher felt it necessary to postpone her scheduled lesson to discuss what had happened. A disciplinary

rule at the high school stated "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." Citing this rule, school administrators suspended Fraser for three days and barred him from speaking at graduation.

Fraser filed suit and his case eventually made it to the Supreme Court. The court sided with the school district, agreeing that the school had a right to punish the student for his speech. First, because the speech being punished was not political in nature, the court held that the case was distinguishable from *Tinker* (in which the Supreme Court held that a school could not stop students from engaging in political speech) and that the school had the right to discipline the student. Furthermore, the court decided that the school had the power to limit lewd, vulgar speech that undermined the school's educational mission, and that doing so did not violate the First Amendment. The language Fraser used was considered obscenity, a type of speech the court had previously decided was not afforded First Amendment protection (*Miller v. California,* 1973). Finally, the court articulated a sort of balancing test in determining the power of a school to regulate speech. According to the court, "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" (*Fraser*).

Soon after the *Fraser* decision, the Supreme Court again had occasion to consider the First Amendment rights of public school students in the case of *Hazelwood School District v. Kuhlmeier* (1988). Students at the Hazlewood East High School had decided to publish stories on teenage pregnancy and divorce in the next edition of the school

newspaper. One article described the pregnancies of three young students at the school. Another spoke about divorce and told the stories of students who had experienced it. This article included disparaging remarks one student had made about her father, and identified that student by name. Each edition of the paper required approval from both the faculty adviser and the school's principal. When the principal received the proofs for this edition of the newspaper, he expressed concern. First, he felt that readers would be able to discern the identity of the pregnant students. Second, it was his belief that the school should receive consent to publish the divorce story from the parent who was spoken about in the article, and that the parent should be given the opportunity to respond to the remarks. As there was very little time left before the publication of these articles and the changes could not be made quickly enough, the principal asked that the two articles be removed from that particular edition of the paper.

Disagreeing with the principal's decision, members of the school newspaper's staff filed suit, alleging violation of First Amendment freedoms. The dispute eventually reached the Supreme Court, where it was decided in favor of the school district. The court first considered whether or not the newspaper was a legitimate public forum. Public forums are those that have traditionally been used for "purposes of assembly, communicating thoughts between citizens, and discussing public questions" (*Hague v. Committee for Industrial Organization,* 1939). School facilities are only deemed public forums when school authorities have opened those facilities, by policy or practice, for indiscriminate use by the general public or some subsect thereof (*Perry Education Association v. Perry Local Educators' Association,* 1983; *Widmar v. Vincent,* 1981).

In the *Hazelwood* case, the paper was entirely funded by the school. In examining its history, the court found that the paper was highly controlled by the adviser, who chose staff, editors, and topics of articles. It was never truly open to the public or student organizations for indiscriminate use. Given these realities, the newspaper was not a true public forum. Because the school had always placed a certain amount of restraint on the content to be published in the paper, it was allowed to exercise control in this instance. It is important to note that this case may have turned out differently had the school newspaper historically been free from any sort of administrative restriction.

Another important aspect of the decision in this case relates to speech that conflicts with institutional goals. The court also held that a public school need not affirmatively endorse speech that conflicts with its legitimate pedagogical goals. In the view of the court, educators should be granted a great deal of autonomy in determining what does and does not conflict with an institution's legitimate pedagogical goals.

The *Tinker* decision (in which the court held that students could not be prohibited from wearing armbands to school to protest the Vietnam war) set a strong precedent discouraging regulation of student speech. The *Fraser* and *Hazelwood* decisions, however, revealed that protections of student speech are not without their limits. A more recent case further underscored this point. In *Morse v. Frederick* (2007), the Supreme Court considered the constitutionality of a school's decision to punish a student for holding up a banner that read "Bong Hits 4 Jesus" at a school sponsored event. In a 5-4 decision, the court sided with the school. Though students do have the right to engage in personal speech on school grounds, the court explained, this right does not extend to speech that encourages drug use and undermines the school's efforts to discourage such

behavior. Moreover, the justices reasoned that public school students simply cannot expect to enjoy the full range of speech rights afforded to adults.

Taken as a whole, these decisions offer school administrators little certainty about which types of restrictions are and are not permitted. *Tinker* leaves one with the impression that regulation of student speech is not acceptable, but *Fraser, Hazelwood*, and *Morse* suggest that it is permissible in some instances. Moreover, a slight change in the facts in some of these cases may have resulted in an entirely different ruling.

The First Amendment and Higher Education

A major question posed by legal scholars is whether or not the aforementioned Supreme Court rulings apply to public institutions of higher education. The public policy rationale for allowing schools to regulate speech in the K-12 setting is closely related to the school's custodial responsibility in that setting. Several legal scholars, educators, and attorneys have argued that the same public policy concerns simply do not apply at the post-secondary level (Lindsay, 2012; Martin, 2003; Sun, Hutchens, & Breslin, 2013).

Nevertheless, courts routinely look to decisions such as *Tinker* and *Hazelwood* for guidance in speech cases related to higher education. A prime example is the case of *Brown v. Li* (2002). Christopher Brown was a master's student at the University of California- Santa Barbara (UCSB) working on his master's thesis. In the spring of 1999, his thesis was submitted and approved. After receiving approval, Brown added a section to his thesis titled "disacknowledgements." This section began "I would like to offer special *Fuck Yous* to the following degenerates for of being an ever-present hindrance during my graduate career …." and went on to name several faculty and staff members at UCSB. In order to graduate, Brown was required to file his thesis in the university's

library. When he attempted to do so, school administrators became aware of his added "disacknowledgements" section, and would not allow him to file the thesis. Brown brought a lawsuit that eventually made its way to the U.S. Court of Appeals for the 9th Circuit.

The court in *Brown* sided with the university. Relying on the precedent set by the Supreme Court in *Hazelwood* (in which the Supreme Court held that a school can regulate speech that interferes with its legitimate pedagogical goals), the court concluded that school officials did not violate Brown's rights because their actions were reasonable in light of their legitimate concern for maintaining professional standards. It is important to note, however, that the court made a distinction between this case and other cases in which courts had declined to apply the *Hazelwood* standard. Judge Graber recognized that the other cases involved extracurricular speech, while this case directly involved curricular speech. It is not clear that the court would have ruled in the same way, had the speech not been academic in nature. The Supreme Court denied a request to hear this case and determine whether or not *Hazelwood* applies to higher education.

Courts have also been tasked with considering whether or not institutions may favor or discriminate against certain types of speech in forums specifically created for the purpose of college student speech. A seminal case in this arena was *Healy v. James* (1972). Students at Central Connecticut State College sought to establish a chapter of Students for a Democratic Society (SDS). The institution's administration, fearing that a student chapter would mimic the disruptive and violent behavior characteristic of the National SDS, denied the group recognition and use of campus facilities. The Supreme Court found on behalf of the students, holding that, while the group could be required to

follow reasonable campus rules, the administration could not silence the students' voices simply because it disapproved of the group's message.

The case of *Widmar v. Vincent* (1981) dealt with a similar issue. Administrators at the University of Missouri at Kansas City informed a religious group that had previously been permitted to hold its meetings on campus that it was no longer allowed to do so because of an institutional regulation prohibiting the use of university facilities for religious worship and teaching. In an 8-1 decision, the Supreme Court held that the school's action was unconstitutional. It curtailed the group's right to free speech and assembly and essentially amounted to a content-based restriction on speech.

In *Rosenberger v. Rector and Visitors of University of Virginia* (1995), the Supreme Court considered the constitutionality of denying funding to student publications based on message. The University of Virginia's student activities fee is partially used to fund student publications. One student magazine, *Wide Awake,* sought $6,000 from the institution for publication expenses. *Wide Awake* was a magazine about "philosophical and religious expression." The funding request was denied, as administrators feared that giving money to the magazine would violate the Establishment Clause of the First Amendment, which prevents government entities from prohibiting the free exercise of religion or establishing a national religion. The Supreme Court held that this denial essentially amounted to viewpoint discrimination and was, therefore, unconstitutional.

In a similar case, *Board of Regents of University of Wisconsin System v. Southworth* (2000), a group of students at the University of Wisconsin-Madison challenged the constitutionality of an institution using a mandatory student activity fee to

fund the political or ideological activities of student groups. The petitioners argued that their monies should not be used to support activities with which they disagreed. The Supreme Court found in favor of the institution. It held that a school can require students to pay activity fees that are used to fund political and ideological speech that some may find offensive as long as the program is viewpoint neutral. That is, the institution must not discriminate in the types of groups to which it distributes such funds. Decisions about funding cannot be made based on the group's purpose or activities.

In 2015, the U.S. Court of Appeals for the Ninth Circuit handed down a decision that contemplated the proper standard to apply in college student speech cases (*Oyama v. University of Hawaii*, 813 F.3d 850, 9th Cir. 2015). Mark Oyama was a secondary education student at the University of Hawaii. He applied to become a student teacher, a prerequisite for the University to recommend him to Hawaii's teacher certification board. In his classes, Oyama made several comments that disturbed his professors and led them to question his suitability for the teaching profession. For example, Oyama opined that sex between a minor child and an adult should be legal so long as the sex is consensual. Additionally, Oyama made disparaging comments about people with disabilities and said that including them in the classroom environment would not be beneficial. Oyama completed a field teaching experience at a nearby school and received several evaluations stating that he was an "unacceptable" candidate. Given these issues, Oyama's application to the student teaching program was denied.

In denying Oyama's application, his supervising teacher, Dr. Moniz, cited a Department of Education policy requiring the university to verify a student teacher's "ability to function effectively as a teacher in a Hawaii Department of Education school."

According to Dr. Moniz, Oyama's expressed views were not consistent with the standards set by Hawaii's Department of Education and Hawaii Teacher Standards Board. Oyama disputed the denial, arguing that the university was punishing him for exercising his First Amendment right to free speech. He asked that the College of Education refund all of his tuition payments, in which case, he would forfeit all of his earned credits and grades. Moniz rejected Oyama's proposed solution and informed him that he could appeal in writing to the Office of the Dean of Students.

The Dean upheld the denial. Though she conceded that the school did not provide Oyama with timely notice of the standards required to move forward in the program, she felt denial of Oyama's application was appropriate. In light of the errors made by program officers, the dean offered to refund some of Oyama's expenses in return for Oyama's agreement to forego any claims related to his eligibility for the teacher preparation program. Oyama declined the Dean's offer.

Oyama brought suit against the university, alleging violations of his First and Fourteenth Amendment rights. The federal district court granted summary judgment to the university, deciding that the individual defendants did not violate Oyama's First Amendment rights and, therefore, had qualified immunity. The U.S. Court of Appeals for the Ninth Circuit conducted a *de novo* review of the case. In considering Oyama's First Amendment claims, the court acknowledged that no court had yet articulated a standard appropriate for this case. It characterized Oyama's issue as a "hybrid" claim: not quite a student speech case, not quite an employee speech case, but somewhere in the middle. Oyama was a student at a university, but was seeking certification to work as a public school teacher.

First, the court explored student speech doctrine. After discussing cases like *Tinker, Fraser,* and *Morse,* the court pointed out that the Supreme Court had not yet applied this doctrine to the university setting. The rationales articulated by courts for limiting speech in elementary and secondary schools are to make sure that students are actually learning the lessons taught and that students must be protected from material that is too inappropriate for their maturity level. The second rationale, said the court, is not relevant in higher education, while the first is not relevant in this particular case. College students are considered adults, and the school was not attempting to teach Oyama any lesson here—the issue arose out of the university's own certification process. Moreover, the court explained, this doctrine fails to recognize student academic freedom—a crucial component of higher education.

> The progress of our professions…may depend upon the 'discord and dissent' of students training to enter them: it is by challenging the inherited wisdom of their respective fields that the next generation of professionals may develop solutions to the problems that vexed their predecessors.

it reasoned. Thus, extant free speech doctrine was not applicable.

Similarly, the court asserted, public employee speech doctrine was inapplicable. Oyama was not, by definition, a government employee. He was simply an individual seeking entry into a program that could eventually help him to become a government employee. The court explained that, if it chose to characterize Oyama as a public employee, it would be forced to apply employee speech doctrine to those who do not yet work for the government but would like to in the future. it also raised concerns about the effect of the employee speech doctrine on student academic freedom. The purpose of the

employee speech doctrine is to allow the government to limit speech that could affect the efficiency of its operations (*Pickering v. Board of Education of Township High School,* 1968). College students should have more freedom to "test…ideas, critique professional conventions, and develop into…more mature professional[s]" than government employees. Denying Oyama these opportunities would be a serious affront to student academic freedom.

Given the identified concerns about both the student and employee speech doctrines, the court articulated a new standard in deciding Oyama's case. It looked to "certification" cases for guidance, in which courts have historically applied a wide range of doctrines. One common thread to the certification cases is that the courts seem to consistently espouse the idea that if decisions about certification are made because of professional standards and not because of personal disagreement with students' views, it is permissible to consider that speech in denying certification. Ultimately, the court applied a three-part test to Oyama's case. First, the school's denial of Oyama's application must have been directly related to established and defined professional standards. Second, the school's action must have been narrowly tailored to serve the university's foundational mission of evaluating students' suitability for teaching. Finally, the decision to deny Oyama's application should reflect reasonable professional judgment.

The court found that the school based its denial of Oyama's application on two sets of clearly defined professional standards: the Hawaii Department of Education Rules and the HTSB Code of Ethics. Additionally, the school's decision was sufficiently narrowly tailored, as it focused solely on Oyama's comments made in relation to

teaching. The restriction, therefore, was narrowly drawn. Lastly, the denial was reasonable, the court determined. Oyama's statements about sexual relationships with disabled students and minors raised two issues that are major concerns in the education profession. Thus, the outlined conditions were met and the appeals court upheld the district court's granting of summary judgment to the University. The outcome of the *Oyama* case reveals that free speech doctrine can differ from jurisdiction from jurisdiction, and that the issue of which speech standards apply to institutions of higher education is far from settled.

Title IX and Student Speech

As previously mentioned, institutions have to consider other federal laws when dealing with problematic student speech. Title IX of the Education Amendments Act of 1972 requires that no person be subjected to discrimination on the basis of sex under any education program that receives federal assistance (Ali, 2011). This law has been interpreted to prohibit sexual violence and sexual harassment, as both constitute discrimination on the basis of sex. When claims of sexual harassment or sexual violence are made on college campuses, administrators must take action to protect the victim in order to avoid losing federal funding. Certainly, sexual violence and harassment can cause substantial disruption on a college campus and to the life of the victim, thereby impeding the institution's mission and the student's education. At times, however, Title IX protections may come into conflict with students' First Amendment rights. This is especially true when it is not blatantly obvious that the speech at issue rises to the level of sexual harassment.

At the University of Oregon, for example, a female student was charged with harassment for yelling “I hit it first” out of a window at a couple (FIRE, 2014). The statement was reportedly made in jest, yet it was deemed to be sexual harassment and the student was charged with five separate conduct violations. In another incident at the University of Delaware, students were told to censor a message written on a large, plastic ball on which students were encouraged to write their thoughts (FIRE, 2016b). The message at issue contained the word “penis” and had an accompanying drawing of a penis. Officials from the institution informed students that failing to censor the ball could violate the university’s sexual misconduct policies.

As previously mentioned, the Office of Civil Rights’ definition of sexual harassment is quite broad, as it covers behavior as egregious as sexual violence as well as less harmful behavior like speech that creates a hostile environment (Lieberwitz et al., 2016). The Department of Justice, it seems, has further broadened this definition. In April of 2016, the DOJ released a findings letter detailing the outcome of its investigation into the sex discrimination policies and practices of the University of New Mexico (FIRE, 2016a). The letter declared that any unwelcome conduct of a sexual nature qualifies as sexual harassment, regardless of whether or not it creates a hostile environment. To comply with Title IX, therefore, a school must investigate all speech of a sexual nature that a student finds unwelcome, regardless of whether or not this speech is protected by the First Amendment. Inquiry into what is and is not unwelcome is inherently subjective. Thus, free speech advocates have heavily criticized both the Office of Civil Rights and the Department of Justice for seemingly requiring institutions of higher education to violate the First Amendment under certain circumstances (FIRE, 2016a). Given the ease

with which conflicts can arise between the Constitution and federal laws like Title IX, it is not surprising that administrators have difficulty making decisions related to student speech.

Contract Law and Student Speech

As discussed in the introduction, contract law principles may also apply to institutional regulation of students' online speech. In the case of *Carr v. St. John's University, New York* (1962) a court first considered whether or not a contract exists between an institution and its students. Two students, Howard Carr and Greta Schmidt Carr, were married in a civil ceremony. Two other students, Jean Catto and John Sharkey, witnessed the ceremony. After learning of the marriage, the institution dismissed the married couple for marrying outside of the Catholic Church and the witnesses for aiding them in committing this perceived sin.

The institution argued that, upon admission to the university, all students had agreed to live "in conformity with the ideals of Christian education and conduct." This included completing the sacrament of marriage within the Catholic Church. The court agreed with the school, finding that an implied contract exists between a private institution and its students; in exchange for a degree, the student will comply with the terms prescribed by the institution. Though the *Carr* holding only applied to private institutions, the court in *Healy v. Larsson* (1974) found that the same principle should apply to public schools.

An institution's student code of conduct can also be considered a contract. Courts have determined that the terms of the contract between a student and a college or university are contained in the brochures, course offering bulletins, and other official

statements, policies and publications of the institution (*Merrow v. Goldberg,* 1987). Administrators must be cautious in crafting codes of conduct and sanctioning students for violations of codes of conduct in order to avoid constitutional challenges. Codes of conduct must precisely describe which behaviors are forbidden, so that students understand the standards with which they must comply (Kaplin & Lee, 2013). If the code is too vague, it runs the risk of violating the due process clause of the Fourteenth Amendment.

Administrators must also exercise caution in the disciplinary process. First, codes of conduct should not arbitrarily discriminate in the types of penalties handed down or the procedural safeguards provided to different groups (Kaplin & Lee, 2013). Students must also be afforded procedural due process rights. These include providing the student notice of the charges against him and a chance to be heard. Failure to meet these requirements could expose the institution to legal action.

Courts are much more likely to uphold sanctions stemming from a breach of contract when the contract terms directly involve academics rather than discipline (Kaplin & Lee, 2013). In *Mahavongsanan v. Hall* (1976), the U.S. Court of Appeals for the Fifth Circuit sided with Georgia State University in determining that it had not breached its contract with a student by refusing to grant a master's degree, explaining that the courts must grant educational institutions "wide latitude and discretion" in setting and interpreting academic requirements. Indeed, courts have even historically permitted institutions to change the terms of the implied contract as students progress through the institution (Kaplin & Lee, 2013). It is possible that institutional rules and regulations

pertaining to student speech could be used to punish a student for their problematic online speech.

Institutional Values

Discussion of student speech and whether or not it should be constrained necessarily requires an examination of the values of institutions of higher education. A key mission of higher education is to encourage the free exchange of ideas in search of truth (Kaplin & Lee, 2013). The expression of all viewpoints, even those that are hateful and unsettling, is permitted and even encouraged on campuses because that is the nature of higher education (O'Neil, 1991). O'Neil (1997) notes that the very mission of the university is the pursuit of truth and understanding, which requires unfettered expression. According to Linda Ray Pratt (1991), former President of the American Association of University Professors, universities must support the free exchange of ideas, "precisely because the truth is not certain, or stable, and the intellectual work of the academy is always to challenge our understandings" (p. 100).

In some instances, speech on college campuses may be afforded greater protection than the same speech would be given in the world outside the college (O'Neil, 1997). Consider, for example, the case of Donald Silva, a professor at the University of New Hampshire accused of sexual harassment. Female students in Professor Silva's class became upset by sexually suggestive analogies the professor had used during the course of his writing class lectures, arguing that they amounted to sexual harassment (O'Neil, 1997). The institution sanctioned the professor harshly. In siding with the professor, the court found that the professor's speech was to be afforded broad protection. While such

speech may not have been protected off campus, academic freedom triumphed because the words were uttered inside of the classroom as part of the professor's lesson.

Paradoxically, while the very mission of colleges and universities depends on the open, unrestrained sharing of thoughts and ideas, certain institutional values sometimes impose higher standards on speech than does society as a whole (O'Neil, 1997). Honor codes are a prime example of such restraint. Though typically employed at private institutions, many public schools also have honor codes in place. Under some honor codes, students must promise not to lie. Failing to uphold this promise could result in suspension or even dismissal (O'Neil, 1997). While society at large might find a liar morally culpable, it is unlikely (in most cases) that a liar would face civil or criminal sanctions for speaking untruths. The honor code example perfectly captures a situation in which an institution that is supposed to protect and encourage speech may actually subject it to harsher restraint than the rest of society.

Institutions also value civility and the creation of learning environments in which all groups of students feel welcomed (Kaplin & Lee, 2013). The case of *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University* (1993) underscored this point. In 1991, a fraternity at George Mason University held an "ugly woman contest." One member wore black face, presenting an offensive caricature of a black woman. As punishment, the institution prohibited the fraternity from holding social and sporting activities for two years and required pre-approval of all other activities within that period. The fraternity challenged the sanctions on First Amendment grounds.

While the United States Court of Appeals for the Fourth Circuit ultimately found in favor of the fraternity, it did see some merit in the university's arguments. In

particular, it found that institutions of higher education have a substantial interest in "maintaining an environment free of discrimination and racism, and in providing gender-neutral education." George Mason argued that this interest was compelling enough to warrant curtailment of First Amendment rights. Though the court ultimately disagreed, the school's argument speaks to institutional values related to the cultivation of a respectful and civil campus climate.

Discriminatory speech can impede the university's mission to provide equal access to all groups of students (Hodulik, 1990). To combat speech like that at issue in the *Sigma Chi* case, some colleges and universities across the country have attempted to implement speech codes. The main premise of these codes is that certain kinds of speech can be so damaging that they are at odds with the goals of higher education (O'Neil, 1997). This includes ethnically demeaning, racist, and sexist speech. However, in restraining speech of this nature, colleges and universities may, in fact, be impeding their own mission of fostering the free exchange of ideas. Some suggest that, when a college bans certain viewpoints, it is affirmatively endorsing those viewpoints that are not banned (O'Neil, 1997). Instead of encouraging students to search for truth and understanding, therefore, the institution is essentially providing that truth.

There is no clear consensus within the literature as to which institutional values *should* win out when administrators consider student speech. While some feel constitutional liberties should be supported above all else, others argue that it is essential to cultivate an educational environment that is welcoming for all students (O'Neil, 1997). Which values ultimately prevail seems to be context dependent.

Increasing Prominence of Student Online Speech

As previously mentioned, the internet and online communication are playing an increasingly important role in the lives of college students, and in the lives of Americans in general. 98% of undergraduate students and 99% of graduate students report internet usage (Pew Research Center, 2011). A 2016 study published by the Pew Research Center reveals that adults are particularly active on social media sites with 56% of those surveyed indicating that they use multiple social media platforms. Among those above the age of 18 who use social media, adults in the 18-29 age range—which encompasses the population of traditional aged college students—are most active on these sites. 88% of adults between the ages of 18-29 who use the internet reported that they use Facebook. 36% of this same population reported using Twitter, while 59% use Instagram. Among those who use Facebook, 76% engage with the site daily, and 55% do so several times per day. 42% of Twitter users visit the site daily, while 51% of Instagram users visit the site each day. As this research illustrates that traditional aged college students are likely very active on Facebook and Twitter, it follows that Facebook and Twitter are a large part of their daily lives.

A 2013 study conducted by a media and promotions firm focused specifically on the internet and technology usage of undergraduate students. It revealed that each college student owns an average of 6.9 technological devices (Globe Newswire, 2013). 85% of students own a laptop, while 69% of students own a smartphone. As suggested by the Pew Research Study (2016), college students are also actively using social media platforms (Globe Newswire, 2013). 86% of the college students reported using Facebook

regularly. Twitter and Instagram are also increasing in popularity, with 38 and 30% of students reporting regular usage, respectively.

As one might expect, students are using technology to maintain social relationships (Globe Newswire, 2013). 29% of students use social media sites to share their location with friends through "check ins." 16% indicate that discussing information with friends via social media sites is extremely important to them, while 17% of students rate looking at friends' photos as extremely important. Students also reveal that social media plays an important role in maintaining family relationships. Overall, those surveyed revealed that they connect with family members an average of 31.1 times each week. 9.1 of these connections are made through social media platforms.

Social media platform usage among college students also differs somewhat from social media usage of the 18-29-year-old population as a whole. A 2016 study conducted by researchers at Alabama State University revealed that Instagram was the most used social media site by the college students surveyed (Knight-McCord et al., 2016). Snapchat and Facebook were the second and third most used sites, respectively. 76% of respondents indicated that they use social networking sites for 1-10 hours each day.

Additionally, technology is playing a large role in students' academic lives. 70% of students use their laptops for research and classwork. 47% regularly use their laptops to take notes in class (Globe Newswire, 2013). Other technological tools are being used for academic work as well. Students reported using tablets and smartphones for classwork, research, and reading textbooks. Furthermore, the number of students enrolled in online courses continues to increase. The percentage of students taking at least one online course has jumped from 23% to 45% in the last five years. Those taking online

courses are typically enrolled in an average of two per semester. Other research has confirmed this trend, indicating that one in every three college students now takes an online course (Bowen, 2013). This figure was just one in ten in 2002. Notably, though total enrollments in higher education declined between the fall of 2010 and the fall of 2011, enrollments in online programs grew by 9%. The time that students are spending on physical campuses, however, is not decreasing, despite the increase in online enrollment. A typical student spends an average of 10.2 hours per day on campus during the week and 6.5 hours on campus on the weekend (Global Newswire, 2013).

Colleges and universities are quickly realizing that institutional reputation and culture can be drastically impacted by students' online lives (Wandel, 2008). Social media can exert positive effects on students and on the institution. Some have hypothesized that use of the internet social media platforms by both students and administration can help students to become academically and socially integrated, thereby warding off attrition (Wandel, 2008). For example, students may use websites like Facebook to get to know their future roommates and other students at the institution prior to starting school. This may help to ease the transition to college life. Indeed, some research has shown that there is a positive correlation between social media usage and student engagement (Heiberger & Harper, 2008; Higher Education Research Institute, 2007). Social media can also be useful pedagogical tools. When used as part of a course, these platforms promote personal meaning construction, active participation, and learner self-direction (McLoughlin & Lee, 2010).

The internet and social media have also aided administrators in conducting student disciplinary proceedings (Wandel, 2008). For example, in one incident, an

attendee at a fraternity philanthropic event became so intoxicated that he had to be taken to the hospital for emergency medical treatment. When all fraternity members denied that there was alcohol at the event, college administrators performed a quick Facebook search for the title of the event, which returned twenty pictures of students consuming alcohol. Typically, however, administrators do not spend time monitoring the internet looking for violations of institutional rules. Instead, they turn to social media sites when a student's story does not comport with other information the administration has received.

As the literature reveals, students' increasing reliance on technology in both their social and academic lives has proven to be a double edged sword for students and administrators. On one hand, social networking may aid students in becoming academically and socially integrated, therefore decreasing attrition. On the other, the internet offers administrators—and the rest of the world—with a window into the private lives of students that otherwise might not exist. This window may provide administrators with the evidence necessary to levy disciplinary sanctions against the students, and depending on the audience, it may also cause damage to the institution's reputation.

The Value of Online Speech

A theme that emerges from the literature related to social media and internet usage is that many people view online speech as less valuable than other, more traditional forms of communication. For example, Shirky (2011) explains that some place a much higher value on broadcast media than social media. The internet and digital communication tools are often used for commerce, socializing, or personal distraction, which leads some to question their value as communication tools. An examination of the evolution of media, however, reveals that all forms of media were used for these same

purposes at some point. The fact that there are other uses for digital tools besides high-value communication does not preclude their use for that purpose.

The ubiquitous nature of technology has several positive benefits for society. It provides greater access to information, more opportunities to engage in public speech, and an enhanced ability to undertake collective action, among other things (Shirky, 2011). Online speech can also be a powerful tool for communication, and therefore, societal change. For example, the success of the beef protests in Korea in 2008 and the protests against education laws in Chile in 2006 is largely attributable to the assistance that internet communication provided in recruiting and mobilizing protestors. Because use of the internet for communication will likely continue to increase as more generations of digital natives (those who have spent their entire lives in the digital world) are born, and because it is clear that online speech can be extremely valuable, it is important to understand how online speech is viewed in the legal realm.

Student Academic Freedom

The concept of student free speech is interwoven with the concept of student academic freedom. Academic freedom has its roots in 19th century German educational philosophy. German universities guaranteed both *Lehrfreiheit*, the freedom to teach, and *Lernfreiheit*, the freedom to learn. Summarizing this concept of academic freedom, Professor Friedrich Paulsen of the University of Berlin wrote "It is no longer…the function of the university teacher to hand down a body of truth established by authorities but to search after scientific knowledge by investigation, and to teach his hearers to do the same" (Paulsen, 1906).

In the late 1880s, Jonas Gilman Clark, a successful American businessman, sought to create a modern university (Metzger, 1955). He hired G. Stanley Hall as the institution's first president, and Hall travelled Europe to recruit faculty and visit other universities. His time in Germany made a strong impression, and Hall recommended to Clark that the German educational model be implemented in this new institution. In 1889, Clark University opened as the country's first all-graduate institution. Its curriculum was focused entirely on the sciences, and the German principles of *Lernfreheit* and *Lehrfreiheit* featured prominently.

In 1915, there was a strong push for the creation of a professional organization for college and university teachers; thus, the American Association of University Professors (AAUP) was formed (Fuchs, 1963). One of the first issues tackled by the AAUP was that of academic freedom. Soon after its founding, the Committee on Academic Freedom and Tenure released a declaration of principles. This document examined the nature of the profession, the basis of academic authority, and the function of the academic institution. Since its inception, the AAUP has continued to formulate basic principles of academic freedom.

Contemporary research on academic freedom tends to focus on faculty academic freedom. Student academic freedom, however, is equally important. Throughout its existence, the AAUP, along with other groups, has continued to recognize the existence of student academic freedom in its publications. The "1940 Statement of Principles on Academic Freedom and Tenure" from the AAUP and the Association of American Colleges and Universities acknowledges the "rights of the…student to freedom in learning" (Metzger, 1990). In 1966, the AAUP released a "Statement on Professional

Ethics" which outlined professors' responsibility to "encourage the free pursuit of learning in their students" (AAUP Policy Documents and Reports, 171).

Perhaps the clearest statement of students' right to academic freedom came in 1968 with the "Statement on Rights and Freedoms of Students," shared by the AAUP, the Association of American Colleges and Universities, the U.S. Student Association, the National Association of Student Personnel Administrators, and the National Association for Women in Education. This statement spells out students' academic freedoms in the classroom, off campus, in disciplinary hearings, in student affairs, and in student records (Lee Howe, 1968). Most notably, the publication underscores students' rights to freedom of expression, freedom of association, and freedom of inquiry, and lists these rights as integral to student academic freedom. The statement was reviewed and affirmed in 1992, illustrating the AAUP's continued commitment to these ideals.

Though student academic freedom has consistently been supported in American higher education, the concept is underdeveloped in higher education literature. Additionally, the link between free speech and academic freedom often goes unexamined.

Courts and Student Academic Freedom

The concept of student academic freedom is similarly underdeveloped in relation to the law. There is disagreement among scholars as to whether or not student academic freedom has a legal basis. Professor Peter J. Byrne (1989) argues:

> The term "academic freedom" should be reserved for those rights that are necessary for the preservation of the unique functions of the university, particularly the goals of disinterested scholarship and teaching…no recognized

> student rights of free speech are properly part of constitutional academic freedom, because none of them has anything to do with scholarship or systematic learning. (p. 262)

Conversely, Walter Metzger (1987) asserts that student academic freedom must be recognized.

> Undoubtedly, students fit less snugly than teachers into the constitutional history of academic freedom. The question is: do they fit so poorly that they ought to be ignored?...in the end, it seems best to conclude that, in the academic freedom club, students qualify as special members…because to keep them out would be anomalous and impoverishing. (pp. 1304-1305).

Only a handful of court opinions have addressed the issue of student academic freedom. In *Sweezy v. New Hampshire* (1957), a case focused on the issue of faculty academic freedom, the Supreme Court explained that "teachers **and students** must always be free to inquire, to study and evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die" (emphasis added). The Court in *Healy v. James* (1972) stated that it was "reaffirming…academic freedom" by allowing the creation of a particular student group. To support its decision, the Court reasoned that "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." In *Bonnell v. Lorenzo* (2001), the U.S. Court of Appeals for the Sixth Circuit considered what to do when faculty academic freedom comes into conflict with student academic freedom. In discussing a professor's right to use profane or offensive language in the classroom, the court acknowledged that students have the right to learn in an environment free of hostility**.**

Some courts have recognized that positive societal benefits flow from student academic freedom. In *Rosenberger v. Rectors of the University of Virginia* (1995), Justice Kennedy, writing for the majority, heralded student academic freedom, stating "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." Similarly, in *Keyishian v. Board of Regents of New York* (1967), Justice Brennan wrote "the nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection."

The *Oyama* case examined previously represents perhaps the most consideration given to student academic freedom by a court. The U.S. Court of Appeals for the Ninth Circuit invoked the concept of student academic freedom in developing its new standard. No courts have yet expressly grappled with the issue of student academic freedom in the online realm.

Summary

A review of the literature might leave one with more questions than answers related to the regulation of college students' online speech. Clearly, the internet is now an important part of college student life that poses unique problems for administrators. There is evidence of discord among the courts as to how to handle student speech cases. Even courts at different levels within the same jurisdiction do not always agree on the proper application of legal standards. At certain institutions, state laws may dictate how administrators can or cannot respond to problematic online speech. Additionally, contract

law principles may come into play when determining how to handle these situations. Administrators must also balance the university's mission to foster the free exchange of ideas with its desire to foster a welcoming learning environment—something that is not always possible in the era of digital communications. Finally, as evidenced by the Court's discussion in the *Oyama* case, student academic freedom is an important part of higher education that is simply not accounted for in student speech doctrine. Taken as a whole, these findings underscore the need for a study on this issue—one that illuminates the law related to students' online speech and provides insight into how courts understand and treat the issue of student academic freedom in relation to online speech.

CHAPTER 3: CONCEPTUAL FRAMEWORK AND METHODOLOGY

Conceptual Framework

This study is guided by the concept of free speech and expression. The idea that speech should be free and unrestrained is not novel. From the early days of democracy in ancient Athens, it was understood that the use of speech and reason was essential to public life (Peters, 2010). The right to express oneself freely was so important to America's founding fathers that it was explicitly written into the United States Constitution. Politicians, judges, and other public officials often cite the right to engage in unfettered expression as one of the unique characteristics of America (FIRE, 2012). Furthermore, free speech and expression have long been encouraged and protected in academia (as seen in the cases cited in the literature review), where it is recognized that human-beings are not omniscient and thus, inquiry must be unfettered in order to create and improve knowledge (AAUP, 1992). The concept of free speech and expression, therefore, serves as a fundamental organizing concept for this study on college students' online speech.

Enlightenment Thought and Free Expression

The Enlightenment, a historical period characterized by the emphasis placed on reason and rationality, produced several philosophies that later impacted American free speech. Though his works pre-date the Enlightenment, philosopher John Milton's ideas related to free expression anticipated and influenced the philosophies of Enlightenment thinkers. In 1644, Milton authored what has come to be known as "the foundational essay of the free speech tradition," *Areopagiticia* (Powers, 2011). Speaking out against

restrictions on the press in England, Milton proclaims "Give me the liberty to know, to utter, and to argue freely according to conscience above all liberties" (Milton, 1959, p. 560). Civil liberty cannot truly be attained, Milton posits, until citizens are free to air their concerns to the government. In Milton's estimation, creation of knowledge happens only through the sharing of opinions.

Much of Milton's argument in favor of free expression is based on religion. God has given each man free will and the ability to reason and, therefore, man should be able to use that ability in determining for himself what is true and what is false (Powers, 2011). It is not the right of the government to deny citizens the opportunity to exercise these faculties by censoring material. Milton strengthens his argument against censorship by pointing out that the Bible itself was once considered blasphemous because of its references to wicked men (Milton, 1959). As a result, though the Bible was central to life in England at the time of Milton's writing, it had historically been censored in many places. Decisions about what material should be censored are arbitrary and subjective, and therefore, free expression should be allowed. The influence of *Aeropagiticia* can be seen in the reasoning of several other free speech philosophers.

The works of Enlightenment philosopher John Locke were extremely influential in the creation of the U.S. Constitution (Powers, 2011). Locke focused on the importance of free expression for reason. According to Locke (2016), the government is in no better position to know the truth than are any other individuals. By nature, each man has free will and reason; therefore, all men are equal. Thus, the government does not have the right to disrupt the natural state by forcing its opinion onto its citizens. This reasoning can be seen throughout the Bill of Rights and the Constitution as a whole (Powers, 2011).

In debates about free speech and expression, the quote "I disagree with what you say, but I will defend to the death your right to say it" is often incorrectly attributed to French Enlightenment philosopher, Voltaire. Though these were not Voltaire's words, he was, in fact, a supporter of free expression. After spending three years in England, Voltaire came to admire the country and the liberties it provided its citizens in relation to expression. Writing against censorship in France to a high-ranking government official, Voltaire begged "I implore you not to clip the wings of our writers so closely, nor to turn into barn-door fowls those who, allowed a start, might become eagles; reasonable liberty permits the mind to soar." Voltaire also recognized the social value of speech—even speech which the average person may find foolish. Such speech, even though considered despicable by many, can bring entertainment and pleasure. In Voltaire's estimation, this alone is reason enough to justify its free exercise. The influence of Voltaire's thoughts on free expression are evident in America's protections of all kinds of speech—even that which seems foolish or despicable.

Voltaire's thoughts on freedom of religion were likely also instructive for America's founding fathers. Observing the plurality of religions that co-existed in England helped Voltaire to gain an appreciation for religious freedom. Because so many religions existed, no one religion was able to dominate the others, and no religious leader became omnipotent. All sects were, therefore, required to tolerate each other in order to maintain order. In Voltaire's opinion, this should be the standard for all countries in order to keep the peace. "Toleration, in fine, never led to civil war; intolerance has covered the earth with carnage," he wrote in his *Treatise on Tolerance.* In his article "Freedom of Thought," Voltaire, like Milton, uses religion to make his point about freedom of

expression. He reminds the reader that Christianity was only able to grow and spread because the Romans allowed freedom of speech. Christians, therefore, should allow freedom of speech when they are in positions of power.

On Liberty and Free Expression

Perhaps the most influential philosopher in the discourse of free speech and expression is John Stuart Mill. In his work *On Liberty* (1869), Mill asserted that free speech benefits everyone, and thus, there is utility in allowing speech to remain unfettered. To silence unsavory or offensive viewpoints would be a great disservice to society. The first reason for this is that no human being is omniscient or infallible. Thus, the knowledge that has already been created may not be the truth; only by challenging existing knowledge can we, as a society, arrive at the real truth. Second, allowing opposing viewpoints to be shared can bolster the strength of the truth. If a suppressed viewpoint proves to be false, society will have the benefit of "the clearer perception and livelier impression of truth, produced by its collision with error" (Mill, 1869, p. 83). That is, perceptions that are able to withstand opposition can be viewed more clearly as true. Additionally, Mill argued that opinions are rarely wholly true or wholly false. Instead, conflicting opinions likely share some truth between them. Thus, we must allow the sharing of all opinions in order to see the whole picture.

Furthermore, Mill (1869) asserted that there is little value in knowing the truth if an individual does not understand *why* it is the truth. Simply accepting something as true because it is declared as such by authority figures is not actually "knowing" the truth. Each individual should have the opportunity to evaluate perceptions and decide for him or herself what is the truth. As progressive beings, Mill believes, humans must seek

knowledge or justified true beliefs. He maintains that the truth should be a living, continually evolving thing—not widely accepted, unchanging beliefs. In a society where opinions cannot be challenged, they become dead dogmas and have no real effect on the lives of citizens. Thus, the truth must constantly be re-evaluated and updated as necessary.

Though clearly a staunch defender of free expression, Mill (1869) acknowledged that expression can rightfully be interfered with under certain circumstances. When opinions are expressed "…such as to constitute their expression a positive instigation to some mischievous act," they can be punished. That is, speech can be curtailed when it causes harm. As an example, Mill cited the opinion that corn-dealers are starving the poor. If this opinion were merely circulated through the press, it would not be cause for punishment, as it would not likely incite a mischievous act. If it were uttered in front of an angry mob outside the house of a corn-dealer, however, it could be punished. Mill's "harm principle," as it is known, serves as the basis of many modern day speech regulations (Peters, 2010).

Democracy & Free Speech

The free speech rhetoric of contemporary philosophers has also been instrumental in shaping the concept of free speech. Philosopher and university administrator Alexander Meikeljohn (1948) examined the link between democracy and free speech. For a democracy—a self-government by the people—to work correctly, the electorate must remain informed. When those in power can manipulate or stifle opinions, the people are not able to remain informed and govern themselves properly. Meikeljohn argued that the motive for censoring speech matters little. He acknowledged that there may be times

in which leaders attempt to withhold or manipulate information in order to benefit society. Nevertheless, he asserted, doing so negates the democratic ideal. Supreme Court Justices have invoked Meikeljohn's ideas in several cases related to free expression (e.g. *Nixon v. Shrink Missouri Government PAC,* 2000).

Free Speech and Autonomy

Unlike Mill, philosopher Thomas Scanlon (1972) argued that there is intrinsic value to free speech. That is, it is not the outcome of allowing free speech that makes it so valuable (the essence of Mill's argument); rather, free speech is valuable in itself. The ability to express oneself freely is necessary in order for one to achieve autonomy. Autonomy is a key end goal, said Scanlon, as the government can only exercise true authority if it has been granted by autonomous individuals who are able to decide for themselves what to believe.

Nevertheless, like Mill, Scanlon (1972) argued that certain types of speech can rightfully be regulated. These include: speech that directly causes physical injury or damage, speech that places another person in a position of imminent bodily harm, speech that defames another or causes him to be publicly ridiculed, speech that helps another commit a harmful act, speech that would help others to inflict harm upon other citizens, and speech that creates a clear and present danger (see *Schenck v. United States,* 249 U.S. 47 (1919)). In Scanlon's view, however, there are two types of harmful speech that should not be prohibited (1972). These are 1). speech that results in listeners forming false beliefs and 2). speech that could cause those hearing the speech to believe that they should perform acts that are harmful. Because individuals should be free to decide for themselves what to believe, prohibiting these types of speech interferes with individual

autonomy. In Scanlon's arguments, we see the synthesis of the philosophies of Locke, Mill, and Meikeljohn.

Free Speech and Education

As far back as the Enlightenment, philosophers have recognized the importance of free speech for education (Powers, 2011). In texts from that time period, the argument that free expression will help individuals to subscribe to rationality appears again and again. Like Meikeljohn, many Enlightenment philosophers (e.g. Jan Brouwer) argued that free speech is necessary in order for citizens to properly participate in governance. Given that one of the primary tasks of American institutions of higher education is to prepare students to sustain and actively participate in our democracy, free speech must be allowed (AACU, 2011).

Moreover, freedom of expression is necessary to promote knowledge and learning because it helps to combat ignorance. If ignorance is allowed to prevail, society cannot advance. Speech constraints have never contributed to the advancement of knowledge, especially in the areas of arts and science. This rationale aligns with the very purpose of American colleges and universities, which is to transmit knowledge and test existing knowledge in order to create new information (AAUP, 1994). If free expression is not permitted, old knowledge cannot be questioned and new knowledge cannot be created. Thus, free expression is crucial to the success of American higher education. This basic truth has repeatedly been acknowledged by the legal system.

Freedom of Expression and the First Amendment

The philosophies outlined above related to freedom of expression have largely been incorporated into the First Amendment of the U.S. Constitution and its judicial

interpretation. The importance of freedom of expression to our founding fathers is evident by where it was placed in the Constitution—in the very First Amendment. Courts have been tasked with giving meaning to the First Amendment and determining what it does and does not protect. Over time, it has become clear that the courts consider free expression essential to American society, and that the First Amendment strongly supports this freedom. For example, in *DeJonge v. Oregon* (1937), Justice Hughes wrote

> …[it is] imperative…to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

Justice Harlan echoed these sentiments in *Cohen v. California* (1971), writing

> The constitutional right of free expression…is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Perhaps more important than those freedoms explicitly outlined in the First Amendment are those that are implied. Chief among these is the freedom of belief. Freedom of belief is essentially the precursor to expression, and therefore, it is necessary for the government to protect freedom of belief in order to protect freedom of expression.

The courts have consistently upheld freedom of belief (Emerson, 1970). This protection covers the right to freely express religious beliefs (*Davis v. Beason,* 1890), to be free from compulsory disclosure or affirmation of belief (*Minersville School District v. Gobitis,* 1940; *United States v. Lattimore,* 1953), and freedom from punishment for holding certain beliefs (*American Communications Association v. Douds,* 1950).

The First Amendment has been interpreted to include several other freedoms as well. A body of cases upheld the right of individuals to read freely, thereby preventing schools or individuals from removing objectionable books from public libraries (e.g. *Evans v. Selma Union High School District of Fresno County,* 1924; *Rosenberg v. Board of Education of City of New York,*1949; *Kreimer v. Bureau of Police for Morristown,* 1992). Several others protected the freedom of the press, even when the information published could potentially cause harm to the nation or paints an unflattering image of an individual (e.g. *New York Times Company v. United States,* 1971; *Hustler Magazine, Inc. v. Falwell,* 1988; *New York Times v. Sullivan,* 1964). Also staunchly defended by the U.S. courts is the right to dissent. As the court said in *Wooley v. Maynard* (1977), "the First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster…an idea they find morally objectionable." Additionally, courts have held that the First Amendment provides a right to privacy and anonymity. For example, in *Stanley v. Georgia* (1969), the Supreme Court overturned the conviction of a man who was found to possess obscene materials in violation of Georgia state laws. It held that the First Amendment protects an individual's right to receive information or ideas, regardless of their social worth. Moreover, the court reasoned, an individual should have some right to privacy because the government "cannot

constitutionally premise legislation on the desirability of controlling a person's private thoughts." The Supreme Court has also upheld the right to anonymous expression, stating that it is an "honorable tradition of advocacy and dissent" (*McIntyre v. Ohio Election Commission,* 1995).

In *Whitney v. California* (1927), Anita Whitney challenged her conviction under California's 1919 Criminal Syndicalism Act for heling to establish the Communist Labor Party. Ultimately, Whitney was unsuccessful, as she did not raise First Amendment claims. Nevertheless, Justice Brandeis's concurrence provided a powerful defense of free expression, and revealed that the Supreme Court's interpretation of the First Amendment is heavily influenced by the same philosophies that informed America's founding fathers. He wrote:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Free expression is considered so important to American political and civil institutions that even that expression which has little social value, is unsavory, or offends the masses is protected. Justice Douglas explained this almost categorical protection of speech in his opinion in *Terminiello v. City of Chicago* (1949):

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view.

Thus, the First Amendment has been interpreted to protect nearly all types of speech unless the social concerns it creates outweigh the value of protecting the speech. As explored in the literature review, there are very few categories of speech that do not enjoy First Amendment protection. Freedom of expression has been given pride of place in the U.S. Constitution, and its importance has been consistently affirmed in First Amendment jurisprudence.

Conceptual Lens

An organizing concept in the cases that will be considered is the idea of speech and expression in the online medium, which has complicated traditional notions of how

speech-related incidents are interpreted. For example, issues of actual threat can be hard to assess (e.g. *Tatro*). Additionally, because tone and inflection cannot be discerned from online speech, sarcasm and humor can be lost. What was intended to be a joke can easily be misconstrued as a serious affront. Based on the foregoing discussion, a key assumption of this study is that free speech and expression are valued by those both inside and outside of academic institutions and is essential to sustain democracy in the U.S. This study will consider legal cases through this lens in order to see how values related to speech and expression have been altered by the new speech climate.

Methodology

Legal Analysis

This study examines the current state of the law related to student online speech. Legal research is a type of document review that combines investigations of law and history (Oluwole, 2007). The researcher conducts a historical review of primary and secondary legal sources in order to answer research questions. I have conducted a thorough legal analysis of court decisions specifically related to student online speech and state laws affecting student online speech. The purpose of legal analysis is to attempt "to make sense of the evolving reality known as the law" (Russo, 2008). Legal research is a systematic investigation that involves both interpretation and explanation of the law that may begin with a single issue having implications that are far-reaching (Russo, 2006).

To find cases related to student online speech issues, I conducted searches using the case law search feature of Google Scholar and the legal database WestLaw. I began with cases I determined to be important based on my knowledge of the literature related to students' online speech (e.g. *Tatro v. University of Minnesota*, *Murakowski v.*

University of Delaware, Harrell v. Southern Oregon University, etc.). I then conducted keyword searches in these databases to uncover related cases, using terms such as "speech," "students," "online," and "First Amendment." Finally, I examined the citation history of cases located through the keyword searches to locate other potentially relevant cases. These methods uncovered a total of 25 opinions from 21 separate cases related to college student online speech.

Reasoning by analogy. Once appropriate legal cases were discovered, said cases were analyzed using reasoning by analogy. When cases are adjudicated, analogous cases are offered in support of the legal claims brought before the court (Walton, 2002). As the principle of *stare decisis,* or "standing by things decided," is the cornerstone of the American judicial system, comparisons are made between the case under consideration and previously decided cases in order to convince the court that deciding in a certain way would not be a departure from precedent (Wasserstrom, 1961). Alternatively, a party may choose to highlight the ways in which the instant case and previously decided cases are *dissimilar* to persuade the court that ruling in a particular way would not be a departure from precedent (Walton, 2002).

Put simply, reasoning from analogy requires breaking legal arguments down into their individual pieces and noting points of similarity and dissimilarity between cases (Walton, 2002). In my work, I have compared several cases related to students' online speech. By carefully considering the similarities and differences between the facts of each case and the reasoning used by each court, I was able to develop a clear picture of the present state of the law as it relates to students' online speech. Specifically, I was able

to discern under which circumstances courts find it permissible to regulate online speech, and which they do not.

Data sources

Analysis of legal issues may involve consideration of three different sources of information: primary sources, secondary sources, and finding tools (Russo, 2006). Primary legal sources include constitutions, statues, regulations, and case law. Secondary sources of information include writings about the law, such as summaries, critiques, law review articles, and treatises. Finding tools give the researcher easy access to the law and include electronic databases like Westlaw and LexisNexis.

For this study, primary sources will be the main data source. The student speech issues examined herein all involve the First Amendment of the United States Constitution. Though this amendment will not be analyzed on its own, interpretation of the First Amendment by the courts is a major part of each case examined. The data for this study comes from case law. Case law often helps to elucidate constitutions, statutes, and regulations (Russo, 2006), and thus, is a logical starting point for legal research. Moreover, because precedent plays a major role in the American legal system, focusing on case law is a legitimate research strategy.

Limitations

Although this dissertation attempts to shed light on the current state of law as it relates to students' online speech, it is limited by the ever-evolving nature of the law. As new cases are decided and new statutes passed all the time, the conclusions of this particular study may no longer be relevant in a few years' time. Nevertheless, if the law changes, the results of this study will be useful in tracing the evolution of student online

speech doctrine, just as the foundational student speech cases have been useful for this study.

Similarly, new technologies and media for online speech are regularly emerging. These media impact the landscape of online student speech, and could alter the ways judges decide cases of this nature.

CHAPTER 4: FINDINGS

Student Online Speech Cases

As discussed in Chapter 3, legal inquiry is a systematic investigation conducted to interpret and explain the law on a particular topic (Schimmel, 1996). In order to discern what the law is, one must gather information from a variety of sources, sort the pieces of information according to their relevance to the legal problem at hand and relative weight, and combine them into a cohesive analysis to the extent possible. This chapter provides findings related to a search of legal decisions dealing specifically with student online speech.

These opinions constitute the data for this study and were found in three ways: (a) through their inclusion in the extant research on college student online speech, (b) through keyword searches in Google Scholar and the legal database WestLaw, and (c) by carefully examining lists of cases citing opinions that had already been deemed relevant to this study. These methods uncovered a total of 25 opinions from 21 separate cases related to college student online speech. Thus, in a particular case, if multiple court opinions are available and relevant, all are examined[4]. At times, a case may have also been sent back to a lower court, which would have resulted in an additional opinion. Though decisions from lower courts are not necessarily binding on other courts, their inclusion in this study is crucial to understanding the law as it relates to student online speech. This represents an evolving area of the law that has not yet been considered by

[4] In some cases, not all opinions are of particular relevance. For example, a lower court opinion may decide a case on grounds unrelated to speech concerns, while the appellate court focuses more directly on those issues. Alternatively, an appellate court may simply uphold the lower court's decision without engaging in different analysis. Under these circumstances, certain opinions may not be included, as they add little value to the study.

the Supreme Court. Thus, lower and appellate court decisions can provide insight into judicial thought and could eventually be adopted by higher courts.

In examining each opinion, particular attention will be paid to the court's interpretation of legal standards as applied to the facts and circumstances of each case. Additionally, the cases will be organized into categories of student online speech that have emerged from the data: (a) academic speech in the online class environment; (b) online speech related to academics (such as professionalism standards), but that did not take place in an online class context; and (c) non-academic online speech. Building on these findings, a cohesive, in-depth analysis of the cases is presented in Chapter 5 to consider significant trends and issues that came about from analysis of the data.

Table 1 lists the student online speech opinions examined herein. Noted are the year each opinion was handed down, the court that issued the opinion, and the nature of the speech at issue. Circuit and district court opinions are federal, while the remaining opinions were decided at the state level. An expanded version of Table 1 appears in Appendix B. This expanded table also contains case summaries, a review of the court's decision, and a list of the legal standards applied in each opinion.

TABLE 1: STUDENT ONLINE SPEECH OPINIONS

Year	Case	Nature of Speech	Court
2001	*Rollins v. Cardinal Stritch University*	Non-academic	Minnesota Court of Appeals
2006	*Antebi v. Occidental College*	Non-academic	Court of Appeals of California
2008	*Murakowski v. University of*	Non-academic	U.S. District Court, District of Delaware

Year	Case	Nature of Speech	Court
	Delaware		
2009	*Key v. Robertson*	Non-academic	U.S. District Court, Eastern District of Virginia
2012	*Barnes v. Zaccari*	Non-academic	11th Circuit Court of Appeals
2013	*Zimmerman v. Board of Trustees of Ball State University*	Non-academic	U.S. District Court, Southern District of Indiana
2013	*Summa v. Hofstra University*	Non-academic	2nd Circuit Court of Appeals
2014	*Morales v. New York*	Non-academic	U.S. District Court, Southern District of New York
2015	*Yeasin v. University of Kansas*	Non-academic	Kansas Court of Appeals
2016	*Doe v. the Ohio State University*	Non-academic	U.S. District Court, Southern District of Ohio
2016	*DiPerna v. the Chicago School of Professional Psychology*	Non-academic	U.S. District Court, Northern District of Illinois
2016	*O'Brien v. Welty*	Non-academic	9th Circuit Court of Appeals
2008	*Snyder v. Millersville University*	Academic, non-classroom	U.S. District Court, Eastern District of Pennsylvania
2009	*Yoder v. University of Louisville* (trial court level)	Academic, non-classroom	U.S. District Court, Western District of Kentucky
2011	*Yoder v. University of Louisville* (appellate court level)	Academic, non-classroom	6th Circuit Court of Appeals
2012	*Yoder v. University of*	Academic, non-classroom	U.S. District Court, Western District of Kentucky

Year	Case	Nature of Speech	Court
	Louisville (trial court level, 2nd impression)		
2013	*Yoder v. University of Louisville* (appellate court level, 2nd impression)	Academic, non-classroom	6th Circuit Court of Appeals
2011	*Osei v. Temple University of Commonwealth System of Higher Education*	Academic, non-classroom	U.S. District Court, Eastern District of Pennsylvania
2011	*Byrnes v. Johnson County Community College*	Academic, non-classroom	U.S. District Court, District of Kansas
2011	*Tatro v. University of Minnesota* (appellate court level)	Academic, non-classroom	Minnesota Court of Appeals
2012	*Tatro v. University of Minnesota* (Minnesota Supreme Court)	Academic, non-classroom	Minnesota Supreme Court
2016	*Keefe v. Adams*	Academic, non-classroom	8th Circuit Court of Appeals
2016	*Odermatt v. Way*	Academic, non-classroom	U.S. District Court, Eastern District of New York
2009	*Harrell v. Southern Oregon University*	Academic, classroom	U.S. District Court, District of Oregon
2010	*Feine v. Parkland College Board of Trustees*	Academic, classroom	U.S. District Court, Central District of Illinois

Online Speech in the Instructional Realm

As will be seen throughout this study, how student online speech is treated is context dependent. In the physical realm, courts have typically allowed schools to exercise greater authority over student speech in instructional settings. The first context this study examined relates to cases in which curricular or instructional matters were implicated in a student's online speech. At times, the student speech in question arose in an online class setting. Another dimension that these cases reveal relates to student speech that educators have deemed to violate professionalism standards. Thus, the speech may not have directly arisen in an online class exchange, but it may have dealt with comments made on social media that, for instance, in some manner touched on classroom or instructional issues or referred to other students. In general, these cases reveal that courts have continued to recognize heightened educator control over student speech in curricular contexts. At the same time, the opinions reviewed dealing with student online speech in the curricular realm reveal courts wrestling to define the boundaries of institutional and faculty authority for student speech not directly arising in an instructional setting.

The online classroom. The first class of curricular speech cases that will be examined involves student speech taking place in online instructional settings. Overall, courts have afforded broad legal discretion to institutions in regulating speech within the online classroom.

Harrell v. Southern Oregon University. *Harrell v. Southern Oregon University* (2009) dealt with a student who made insulting comments towards his fellow classmates

on the online message boards for two different courses. Examples of the types of comments at issue included:

- Harrell's statement to a classmate that "clearly you haven't bothered to do your reading."
- A comment on a classmate's post that read "you did not follow the directions and attach your essay as a file. Additionally, paragraphs are your friends.;)"
- In response to a comment another student had made to a classmate's post stating that that individual had some good ideas, Harrell wrote "do you think so? Which ones do you think were 'good' and why?"

One of Harrell's professors described his behavior as "shredding the other students' esprit de corps irreparably." As explained later by the court, Harrell viewed class discussion as a form of "combat." Many students complained about Harrell's comments to the instructors of each course, and indicated that his responses caused them to refrain from posting. Harrell was issued a written reprimand for his statements in the first class, and was placed on probation for his behavior in the second. University officials informed Harrell that his statements had violated the school's conduct standards, which prohibited disrupting, obstructing, or interfering with education activities.

Harrell challenged the institution's policy in the U.S. District Court for the District of Oregon, alleging that it was both vague and overbroad. With this type of legal challenge, Harrell asserted that the policy was unclear and that it also captured student speech that was legally protected and not subject to restriction by the institution. Policy language that is too vague can cause confusion as to which behaviors it actually prohibits (*Connally v. General Construction Co.,* 1926). When it is overbroad, it can have a

chilling effect on student speech, as it burdens more speech than necessary to accomplish the goal for which it was enacted (*Board of Trustees of State Univ. of N.Y. v. Fox,* 1989). Both vagueness and overbreadth raise concerns about fairness. It is not fair to expect students to refrain from engaging in behaviors they did not know were forbidden. Likewise, students should not have to comply with standards that prohibit speech for which they have a legal right to engage. To protect citizens from unfair policies, courts have interpreted the First Amendment of the Constitution to prohibit such vague and/or overbroad speech regulations.

The court did not agree that the school's policy under which Harrell was sanctioned was overbroad or vague. First, it found that the regulation was no more inclusive than necessary to achieve the important governmental interest of "maintaining order and decorum in the online learning classroom." It did not seek to limit the ideas of the individual, but rather, the ways in which the individual interacts with others. Furthermore, the policy was not vague. It was quite clear from the language of the regulation, the court explained, which behavior was and was not acceptable. The regulation applied to Harrell's speech prohibited "displaying defiance or disrespect of others." The court conceded that the school's policy could have been more specific, but discussed that college students simply do not possess an absolute right to say whatever they please in a classroom setting. According to the court, when considered in context, the phrase "displaying defiance or disrespect of others" made it clear that the types of statements Harrell made were unacceptable under the relevant standards. As such, the court rejected the student's legal challenge to the policy.

Feine v. Parkland College Board of Trustees. The United States District Court for the Central District of Illinois cited *Harrell* in siding with a college that academically penalized a student, Feine, for inappropriate comments in an online learning environment (*Feine v. Parkland College Board of Trustees,* 2010). The syllabus for the course contained a stipulation that comments made within the virtual classroom could not include "personal attacks, prejudiced language, incoherent language, proselytizing, etc." Such postings could result in a loss of points or further disciplinary action. The professor deemed emails sent by Feine and discussion board posts he made to another student to be mean-spirited attacks and deducted points from Feine's assignment grade. This lowered his grade from an A to a D. Feine first attempted to lodge an institutional complaint against the instructor. When that proved unsuccessful, he took the institution to court, alleging violation of First Amendment freedoms. Specifically, he argued that the instructor's decision to lower his assignment grade constituted retaliation for protected speech.

To lodge a First Amendment retaliation claim, the court explained, Feine had to establish that his speech was constitutionally protected and that he suffered retaliation from the instructor/institution on the basis of the speech. The court determined that the speech at issue here was not protected speech, as the instructor was not penalizing Feine for *what* he was saying, but rather, *how* he was saying it. That is, the restriction on speech was not a content-based restriction that could be relied upon to sustain a successful First Amendment challenge. The instructor asked Feine to attempt to be more collaborative rather than combative in his posts, to refrain from attacking other students personally, and to be respectful. These instructions, the court reasoned, were viewpoint-neutral (i.e. were

not focused on particular views or beliefs of the student) and focused specifically on the manner (rude and disruptive) in which Feine communicated with others in an instructional context. Furthermore, the court concluded that the instructor's actions were reasonable, as they dealt with the enforcement of legitimate pedagogical concerns related to ensuring civility in a class environment. Therefore, even if Feine's speech would have received First Amendment protection outside of an instructional setting, the school could legally restrict his speech under the circumstances presented.

Important for this study, the court discussed that, despite the lack of physical boundaries, the virtual space of an online class equates in a legal sense to a traditional classroom space. It cited Supreme Court and federal court cases in which the courts held that restrictions on speech in such a forum are permissible, so long as they are content-neutral and reasonable (*Cornelius v. NAACP Legal Defense Educ. Fund*, 1985; *Christian Legal Society v. Walker*, 2006).

Professionalism standards. Several cases implicating student online speech have arisen in relation to professionalism standards. Colleges and universities, particularly in certain academic programs, are tasked with preparing students for the careers they will undertake upon graduation. For example, schools with nursing programs must teach their students how to responsibly care for patients. This involves instruction on both specific skills and knowledge directly tied to patients' physical needs and how to act ethically and professionally as a healthcare professional. These professional skills may also be relevant to the professional certification required in particular professions, such as with mental health professionals and attorneys. Requiring students to uphold the same professional standards that will be required of them upon entry into the workforce

while they are still in college helps the school to ensure that students who earn degrees from the institution are capable of representing the school and degree program well. For some programs, teaching and assessing professional dispositions is required in order to receive specialized programmatic accreditation. Additionally, schools have an ethical responsibility to make sure that they do not send graduates off into the field unprepared to fulfill the requirements of their jobs. Consequently, many institutions and programs incorporate professionalism standards into their curricula. In the online realm, several cases have arisen in which students have been sanctioned for their online speech that was deemed to have violated professionalism standards.

Snyder v. Millersville University. *Snyder v. Millersville University* (2008) dealt with institutional authority over the online student speech of a student teacher. In 2008, Stacey Snyder, an undergraduate student at Millersville University, was removed from her student teaching assignment for ignoring the institution's warnings not to share personal webpages with students at placement schools or discuss the placement school's students and teachers on personal webpages. Snyder posted a lengthy comment on her MySpace page discussing both the students and teachers at her placement school next to a picture captioned "drunken pirate," in which she was dressed as a pirate and was holding a plastic cup. In the comment, Snyder acknowledged that she was aware that students had been looking at her MySpace page. Additionally, she mentioned in the online post that the students kept asking her why she would not apply for a full-time job at the placement school, and she indicated that she was unhappy with her supervising teacher. "Do you think it would hurt me to tell them the real reason (or who the problem was)?" she wrote. At trial, Snyder explained that the picture of her in a pirate costume showed her with a

"stupid expression on my face…giving the peace sign…expressing myself at the moment, basically, peace, love, happiness…"

Snyder also told students at the placement school about her MySpace page on several occasions and was informed by her supervising teacher that discussing her MySpace account with students was improper. At one point, Snyder learned that one of her students had recognized her friend off campus from photos that Snyder had posted on her MySpace page. Despite the fact that Snyder herself had personally told the students about the existence of her MySpace page, she testified that she confronted the student about this incident and told her that it was inappropriate for her to look at her MySpace account and to talk to Snyder's relatives and friends outside of school. She explained that a student should have known better than to look at a teacher's social media page, as doing so crosses professional boundaries.

Upon learning of Snyder's MySpace postings, her supervising teacher reported them to her supervisor. Eventually, the concerns were raised with the school district's superintendent. Given the concerns that the MySpace issues raised about Snyder's professionalism, the school would not allow her to return to the placement school. Snyder's dismissal from her student teaching position effectively precluded her from obtaining an education degree. Officials at Millersville University, however, allowed her to repurpose her credits in order to graduate with a degree in English.

Snyder brought suit against the university in the U.S. District Court for the Middle District of Pennsylvania, alleging violations of her First and Fourteenth Amendment rights. The first issue the court considered was whether she should be considered an employee or a student for the purposes of her First Amendment claims. If

Snyder were considered an employee rather than a student, her speech would only be protected if it constituted a matter of public concern (*Brennan v. Norton,* 2003). If she were considered a student, the court explained, her speech would be protected unless the school could establish that it would substantially interfere with the rights of other students or the school's ability to educate its students effectively. Snyder argued that because she was enrolled at Millersville University as a student at the time of the incident and her online speech resulted in academic consequences at the university, she should be considered a student for the purposes of her First Amendment claim.

In several previous cases, courts had decided that students who were not enrolled in traditional courses but were working as apprentices or interns were more akin to public employees than actual students. In this case, the court felt that Snyder was an employee rather than a student, as she did not attend any classes at the university while student teaching and her student teaching assignment was professional in nature. She was responsible for teaching three different English classes, followed the calendar of the high school at which she was student teaching rather than the calendar of the university, and believed herself to be a teacher. Therefore, the court explained, Snyder's speech would not be protected unless it involved a matter of public concern.

As explained by the court, matters of public concern include political, social, or other community concerns. Because the plaintiff openly acknowledged that her speech involved personal and not public matters, the court found that it was not protected. That is, the court held that the speech that Snyder engaged in, including that occurring online, did not constitute speech that qualified as protected by the First Amendment. Therefore, the court upheld the school's decision to sanction Snyder for her speech.

In support of its determination that employee speech standards should be applied in this case rather than student speech standards, the court cited a number of cases in which other courts had upheld students' dismissals from practicums and internships for their speech. Snyder attempted to distinguish her case from those relied upon by the court by arguing that she was not suing her placement school—the school where she was technically an employee, in the eyes of the court—but rather, Millersville University, where she was enrolled as a student and had been denied an education degree. The court refused to accept this argument, stating that "whether Plantiff's MySpace posting was protected speech does not turn on her choice of defendants." Because the post spoke specifically about the place where she was considered an employee and not the place where she was considered a student, the public employee speech standards were applied.

Yoder v. University of Louisville. The case of *Yoder v. University of Louisville* (2009) raised issues similar to those in *Snyder.* Nursing student Nina Yoder was dismissed from a nursing program at a public university for making comments on her MySpace page about an obstetrics patient she had observed giving birth. Yoder was required to follow the patient through the birthing process as part of an assignment for one of her courses. One excerpt from Yoder's blog read "At last my girl gave one big push, and immediately out came a wrinkly bluish creature, all Picasso-like and weird, ugly as hell, covered in god knows what, screeching and waving its tentacles in the air." She also described the appearance of some pregnant women as "fucking terrifying" and referred to children as "demons sent to us from hell to torture us for the whole eternity." In addition to her offensive descriptions of babies and pregnant women, Yoder included several details about the patient herself. From the post, the reader could discern that the

patient worked at the hospital, had two other sons, received Oxytocin and an epidural, was in labor for eight hours, and gave birth to a baby girl. Yoder did not, however, reveal specific identifying information such as the patient's name. Though Yoder's post was overwhelmingly negative about pregnancy, children, and the birthing process, she concluded by explaining that the whole experience was quite emotional and left her wanting another baby of her own.

Some of Yoder's classmates viewed the blog on her MySpace page and were discussing it amongst themselves. One student informed the course instructor about the post and the fact that it had become a topic of conversation among the students. Upon reviewing the blog post, the director of the nursing program determined that it violated the school's honor code, the terms of the consent form signed by the patient Yoder had observed, a confidentiality agreement signed by Yoder, and the standards of the nursing profession. Consequently, Yoder was dismissed from the nursing program.

First trial court opinion. Yoder brought suit against the institution in the U.S. District Court for the Western District of Kentucky alleging violation of her constitutional rights. She argued that the program's honor code was unconstitutionally broad, and that the confidentiality agreement was unconstitutionally vague. Thus, she asserted, both policies ran afoul of the First Amendment. At the trial court level, the judge found in favor of Yoder. The court did not base its decision on constitutional principles, but rather, on contractual grounds, as a fundamental rule of judicial restraint requires that courts first consider nonconstitutional grounds for making a decision before reaching constitutional questions.

According to the court, Yoder's blog post did not actually violate the honor code or confidentiality agreement. Though the school argued that the blog contained identifying information, the court disagreed. It did not include the patient's name, address, social security number, age, ethnicity, race, etc. Moreover, none of the nursing school's rules or regulations defined the terms "confidentiality" or "identifying information." Consequently, the court reasoned that the school could not have expected Yoder to know that her blog post would violate established policies, as those policies did not give her notice of which specific behaviors were prohibited.

Additionally, the court rejected the school's argument that, confidentiality issues aside, Yoder's punishment was justified because her blog post violated the professionalism provision of the honor code. Its language was vulgar, the school contended, and presented information in an unprofessional way. Though the court did not disagree that the language of the blog post was vulgar, it did disagree that the speech at issue fell under the purview of the honor code. In its estimation, the blog post was not "unprofessional"—rather, it was entirely non-professional speech. It was simply a crude attempt at humor that was not created or used in any professional context. Moreover, the court reasoned, if the school wanted students to abide by school rules in both their professional and personal lives, it should clearly explain this obligation. The nursing school's policies did not provide Yoder with adequate notice that her online postings could put her in jeopardy of violating professionalism standards. Thus, the court decided in Yoder's favor.

First appellate court opinion. The institution appealed the district court's decision. On appeal, the case was remanded to the district court for further consideration,

as the U.S. Court of Appeals for the Sixth Circuit held that the student had not actually raised the contractual claims for the trial court to consider (*Yoder v. University of Louisville,* 2011). Therefore, it was improper for the trial court to decide the case on contractual grounds.

Second trial court opinion. Upon second impression, the district court decided in favor of the nursing school. To reach this decision, the court this time considered carefully the Consent Form signed by both Yoder and the birth-mother. The form read "I understand that information regarding my pregnancy and my healthcare will be presented in written or oral form to the student's instructor only." Yoder argued that, while the forms she was required to sign prohibited her from sharing certain information about the birth-mother, they only applied to the sharing of confidential information. However, the court concluded that the Consent Form contained no limitation that the prohibition on sharing information applied only to confidential information about the patient. Yoder's post described the patient's health issues and the treatment she received, among other things. The information was shared on a website where it could be accessed by the public, rather than exclusively with the student's instructor. Thus, the court reasoned, Yoder's blog clearly violated the requirements of the Consent Form.

Moreover, the court held that requiring students to adhere to the terms of a confidentiality agreement furthered a legitimate pedagogical purpose (*Yoder v. University of Louisville,* 2012), and therefore, did not violate the First Amendment. If the school of nursing believed that the best practice for nurses was to refrain from engaging in any public discussion of a patient's healthcare whatsoever, the court decided that it should be able to do so. The standard articulated in the *Hazelwood v. Kuhlmeier* (1988) decision,

discussed in the literature review, influenced the court's reasoning in this case. *Hazelwood* related to a high school's regulation of content in a school newspaper, and the Supreme Court held that regulation of school-sponsored speech was permissible if it furthered a legitimate pedagogical purpose. Though not citing *Hazelwood*, the *Yoder* court used the "legitimate pedagogical purpose" language of the *Hazelwood* decision in discussing and justifying the school's reasons for limiting the speech. Furthermore, the court gave the nursing school faculty a great deal of deference in interpreting the field's professionalism standards.

Second appellate court opinion. After the trial court's decision to grant summary judgment in favor of the university, Yoder again appealed to the U.S. Court of Appeals for the Sixth Circuit. First, the court considered whether or not the defendants in the case were protected from potential legal liability by what is known as qualified immunity. For the court to deny the defendants the right to qualified immunity, Yoder bore the responsibility to prove that her right to post the blog at issue was clearly established at the time of her removal from the program. The court found that no controlling legal authority existed that specifically prohibited the university's punishment of Yoder for her blog post. Yoder argued that an opinion from the U.S. Court of Appeals for the Third Circuit provided relevant guidance related to her speech claims. In the case, *Layshock ex rel. Layshock v. Hermitage School District* (2011), the Third Circuit held that schools cannot permissibly regulate off-campus speech under the First Amendment.

Relying on this determination in *Layshock,* Yoder asserted that similar principles shielded her off-campus speech from regulation by nursing school officials. The *Yoder* court countered that several other courts had permitted regulation of off-campus, online

speech when that speech could foreseeably cause a substantial disruption on campus. The court also refused to apply any of the Supreme Court's decisions on student speech issues relied upon by both parties in arguing their positions, as it felt that none of the cases cited were analogous to Yoder's. Neither the Supreme Court nor the Sixth Circuit, the court explained, had yet considered a case related to a school's authority to regulate off-campus, online student speech. Moreover, neither party had identified a case that concerned an institution's ability to discipline a nursing or medical student for off-campus speech that raised concerns about patient privacy. Thus, Yoder's case posed unique circumstances, such that application of extant student speech precedents would have been inappropriate.

The court also determined that it was not unreasonable for the school to believe that Yoder had waived her right to free speech[5]. The confidentiality agreement she had signed stated that she "agree[d] to consider confidential *any* and *all information* entrusted to [her] throughout [her] clinical rotations." This included personal, financial, medical, and employment related information. Additionally, the agreement indicated that a student who violated confidentiality could be terminated from the program immediately. Yoder was also required to sign a consent form that was signed by the patient as well. This form indicated that patient information would only be shared with the student's instructor.

The appellate court agreed with the trial court's determination that Yoder's blog discussed many personal, medical, and employment details related to the patient. These

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[5] In *Dixon v. Alabama State Board of Education* (1961), the Supreme Court held that schools cannot condition admission on the waiver of constitutional rights. Interestingly, the appellate court in *Yoder* did not engage in any discussion about the legality of requiring nursing students to waive their First Amendment rights.

included the fact that the patient worked at the hospital, which medicines the patient was given, how many hours she was in labor, that she was married, and that the baby was a girl. This information was then shared publicly on the internet. The court intimated that the fact that Yoder signed these forms indicated that she understood that she was not allowed to publish information of this nature. Thus, it would not be unreasonable for a jury to conclude that Yoder had waived her First Amendment rights and that her speech clearly violated the agreements.

Finally, Yoder argued that the school's Honor Statement, Confidentiality Agreement, and Consent Form were unconstitutionally overbroad. Additionally, she asserted that the Consent Form was unconstitutionally vague. Policies challenged for overbreadth will be upheld if (a) they are unrelated to the suppression of speech, (b) they further an important or substantial government interest, and (c) the policy at issue does not burden any more speech than is necessary to further that interest. The second prong of this test was easily satisfied by the university, as the court found that the institution possessed a valid interest in protecting the confidentiality of patients and encouraging patients to participate in the education of its students, such as allowing students to observe childbirth. Yoder could not establish that the policies burdened more speech than necessary. The court reasoned that students were still free to discuss any topic they wished, including pregnancy and childbirth, so long as they did not do so in the context of a specific patient who was involved in the student's clinical coursework. Given these findings, the court held that none of the challenged policies were overbroad.

Similarly, Yoder's vagueness claim in relation to the Consent Form was dismissed. The court explained that to prove that a restriction's terms are vague, one must

show that its prohibitive terms are not defined clearly and that a person of ordinary intelligence would not be able to identify which speech is and is not allowed. In this case, the Consent Form was very clear about what was and was not allowed. It explicitly stated that patient information would not be shared with anyone besides the instructor. Sharing this information in a blog post that was publicly available on the internet was clearly prohibited by the Consent Form. Therefore, the form was not unconstitutionally vague. Having failed on all counts, Yoder's case was dismissed as the court upheld the district court's grant of summary judgment in favor of the university.

Byrnes v. Johnson County Community College. *Byrnes v. Johnson County Community College* (2011) involves circumstances similar to those of *Yoder.* It concerned a nursing student's online expression related to her studies. Unlike *Yoder,* however, the *Byrnes* court ultimately sided with the student. Doyle Byrnes was a nursing student at Johnson County Community College (JCCC). Byrnes and three other students obtained permission from their obstetrics clinical instructor to photograph themselves examining a placenta specimen. The instructor told the girls that no identifying marks could be present in the photographs. Later, the instructor asked the girls what they planned to do with the pictures, and one responded that they were going to post them on Facebook. According to the students, the clinical instructor responded "Oh, you girls." All of the nursing students involved subsequently posted the photographs to their Facebook pages. The next day, Byrnes and her classmates who had posted the placenta pictures were dismissed from the nursing program.

Byrnes sought a preliminary injunction overturning the school's decision to dismiss her from the program. The U.S. District Court for the District of Kansas noted

that none of JCCC's policies, including the Nursing Student Code of Conduct, prohibited students from taking pictures in the classroom and sharing them with others. While the policy at issue in *Yoder* quite obviously prohibited discussion of any patient information with anyone other than the instructor, in *Byrnes,* there was no written policy at all that could conceivably apply to Facebook posts. Thus, the court found, the students were punished simply because they did not follow the unpublished and unclear standards of professionalism expected by the defendants. The court asserted that it was unfair, as such, to require Byrnes and the other students to comply with those standards.

A notable aspect of the *Byrnes* opinion that distinguishes it from similar cases is that a school official had actually given Byrnes and her classmates permission to take the picture at issue. Additionally, the teacher was informed of the students' plans to disseminate the photographs on the internet. In *Yoder,* the student clearly did not have the permission of anyone at the school to write or publish the blog. JCCC argued that the teacher involved in the incident was not aware that the students planned to publicly share the photographs, though all four students say they had a conversation with her about sharing the pictures on Facebook. Moreover, the court reasoned, the very purpose of taking a photo of something is to share it with others. It was reasonable, therefore, to anticipate that the photos would not remain private. According to the court, the conversation with the teacher about posting the photos on Facebook and the fact that the teacher allowed them to take the photos in the first place would lead any reasonable person in Byrnes' situation to conclude that her actions were not objectionable. Thus, the issue of consent played a substantial role in the court's finding that the school did not give Byrnes notice that her conduct put her at risk of violating professionalism standards.

In order to prevail on a motion for preliminary injunction, a plaintiff has to show that she will suffer irreparable harm absent the injunction. The court held that Byrnes would clearly suffer irreparable harm if the injunction was not granted. JCCC is a publicly funded school, therefore, the plaintiff had a constitutional right to attend. She had also already paid for classes that she did not receive credit for and could not receive a refund. Finally, Byrnes' expulsion from JCCC could impact her chances of being admitted to another nursing school. This harm, the court explained, was certain and not merely theoretical. She had lost credit for the Fall 2010 term (the term in which the incident took place) and would not be able to take any classes in the spring term, as the term had already begun at the start of court proceedings. Thus, the completion of her nursing degree and therefore the start of her nursing career had been delayed by at least one full academic year.

Next, the court weighed the harm that would be caused to the defendant if the injunction was granted against the harm the plaintiff would suffer if it was not. In the court's estimation, the harm suffered by Byrnes if the injunction was not granted would be great. Conversely, re-admitting Byrnes would cause little, if any, harm to the school. This determination was largely based on the fact that the defendants themselves failed to provide any evidence of potential harm.

As explained by the court, the next step in deciding whether or not to grant a preliminary injunction is a consideration of public interest. The court determined that encouraging professionalism by healthcare providers and maintaining confidentiality standards were significant public interests. It explained that there is also a public interest, however, in preventing public schools from imposing vague, subjective standards that

can be interpreted in unpredictable and arbitrary ways. In this case, the court found that there was not actually any violation of privacy, as one could not identify from the photo to whom the placenta belonged. Consequently, the balancing of public interests was clearly in Byrne's favor. Unlike the *Yoder* court, this court placed greater emphasis on a student's right to fairness than on a school's concerns about confidentiality. Because the school in *Byrnes* had not enacted policies similar to the ones used by the school in *Yoder* to protect patient confidentiality, the court sided with the student.

Finally, the court discussed the likelihood of Byrnes' claims succeeding on their merits in trial. If a claim is unlikely to succeed in further stages of the litigation process, a preliminary injunction is denied. Here, however, the court determined that Byrnes' claims were highly likely to be successful. Given all of these factors, the court granted Byrnes' request for a preliminary injunction and enjoined the school from enforcing her dismissal.

Tatro v. University of Minnesota. *Tatro v. University of Minnesota* (2012) also involved a student's Facebook speech. The case is similar to both *Yoder* and *Byrnes,* as the plaintiff was a student in a professional program and was sanctioned for speech that violated professionalism standards. Amanda Tatro, an undergraduate student at the University of Minnesota, was enrolled in the institution's mortuary science program. The program required completion of a laboratory course that made use of human cadavers for study. Tatro made a number of posts on her Facebook page about her experiences with one cadaver used in the laboratory course. For example, Tatro nicknamed the cadaver "Bernie" and shared that she was excited to "play" with him in her lab course. She also mused about stabbing someone with a sharp embalming tool called a trocar, and hiding a scalpel in her sleeve.

All students were required to complete an orientation prior to working with cadavers and signed a form agreeing to comply with all program policies, including those outlined in course syllabi. The syllabus for this particular course specifically prohibited blogging about the lab and cadaver dissection. Students were advised that blogging included posting on Facebook and Twitter. Moreover, the laboratory policies required that students use respectful and discreet language in discussing cadavers outside of the laboratory setting. When the director of the mortuary science program was told of Tatro's posts, Tatro was charged with violating rules governing behavior of students in the program and breaching the student code of conduct by engaging in assaultive or harassing conduct.

Tatro's posts regarding the scalpel and trocar created safety concerns amongst school staff members. The director of the mortuary science program met with Tatro to discuss her posts, and advised her to stay away from the mortuary science department while the matter was under investigation. Tatro took this directive to mean that she had been suspended, and feeling that this action violated her First Amendment rights, brought the incident to the attention of the local news media. News reports about Tatro's posts and the school's response drew letters and calls from both the general public and donor families who were concerned that she had exhibited poor judgment, immaturity, and a lack of professionalism. Many also questioned the university about how it would prevent similar student behavior in the future.

Tatro was ultimately allowed to return to the school to complete her coursework and final examinations for the semester. She was then provided with a hearing in relation to the allegations that she had violated the institution's policies. In defense of her posts,

Tatro explained that they were intended to be humorous and that humor helps her to combat the depression caused by her unique life circumstances. Her mother suffered a traumatic brain injury, and Tatro served as her primary caretaker. Additionally, Tatro herself suffered from a serious disease of the central nervous system. Though her posts were morbid in nature, Tatro argued that she had only intended for them to be read by her family and friends who understood her particular brand of humor. In regard to her post about stabbing someone with a trocar, Tatro explained that it did not reflect a serious intent to do harm. Instead, the post referred to her ex-boyfriend who lived in California and had broken up with her the night before. She wanted him to know that she "was pissed," and did not intend to induce fear in anyone.

Ultimately, Tatro was found responsible for violating the nursing school's policies. She received a failing grade for the laboratory course and was required to enroll in a clinical ethics course. Additionally, the school required Tatro to undergo a psychiatric evaluation and write a letter to the program's faculty about the importance of respect in the profession. Tatro brought suit against the school, alleging that its actions violated her First Amendment rights.

Minnesota Court of Appeals. In court, Tatro argued that the student code of conduct should not apply to her off-campus speech. The Minnesota Court of Appeals rejected this argument. It recognized that universities have a substantial interest in monitoring behavior that could potentially result in violence, such as her post about stabbing someone with an embalming tool[6]. Tatro also argued that her posts were not

[6] Sadly, Tatro died less than one week after her case was decided by the Minnesota Supreme Court (Simmons, 2012). Though her cause of death was never revealed, friends

prohibited, because the written rule only prohibited blogging, and Facebook is not considered a blog. The rule that prohibited blogging, however, also prohibited the use of disrespectful, indiscreet conversational language about cadavers. Tatro's posts, the court found, were not respectful or discreet—regardless of the medium through which they were conveyed. Additionally, Tatro asserted that the form she signed agreeing to comply with all program policies did not contain an actual list of rules by which she should abide. Though the court agreed that the form did not provide an explicit list of rules, it determined that the form was an acknowledgement that certain rules and policies had been explained during the orientation, and that all cadavers should be treated with respect and dignity.

Finally, Tatro argued that her Facebook posts were "literary expressions" that should have been constitutionally protected. Citing *Tinker* (in which the Supreme Court found that public schools may regulate student speech that would cause a material and substantial disruption in the educational environment) and rejecting Tatro's argument that the substantial disruption analysis should not apply in the university setting, the court concluded that Tatro's speech did cause a material and substantial disruption. Tatro's posts prompted a police investigation and caused cadaver donor families and funeral directors to question the integrity of the program and jeopardized future donations. It was within the boundaries of the school's authority, therefore, to discipline Tatro for her expression. Notably, in discussing *Tinker's* application in the university context, the court

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speculated publicly that her nerve disorder was responsible. Her lawyer revealed that she had undergone several surgeries in which spinal cord stimulators were implanted to help her move and walk. Interestingly, Tatro's health issues were potentially severe enough to cause her death, yet the court did not consider her physical condition in evaluating the threat posed by her speech.

determined that there was no practical reason to distinguish between the university setting and the elementary and secondary education settings. As evidenced by other student online speech opinions, this same sentiment is not shared by all courts. Based on these aforementioned considerations, the court sided with the university.

Minnesota Supreme Court. The case was appealed to the Minnesota Supreme Court, where the justices engaged in a different analysis that placed a higher premium on student speech rights and on the need to ground institutional authority on an identifiable legal rationale appropriate to a collegiate setting (*Tatro v. University of Minnesota,* 2012). It stated that the facts presented in the case differed from any other published legal decisions. As in *Yoder,* the court acknowledged that the issue of sanctioning a student for Facebook posts that violated academic program rules had never before been considered by that court or the U.S. Supreme Court. Given this novel legal question, the court concluded that it was not bound to adhere to the standards set forth in *Tinker* or *Hazelwood*. Applying the *Hazelwood* framework, the court reasoned, would give institutions far too much power to regulate a professional student's Facebook speech that should be constitutionally protected. The school would only need to show that its disciplinary actions were "reasonably related" to "legitimate pedagogical goals." The *Tinker* standard was also rejected because Tatro was not initially disciplined as a result of the "substantial disruption" her speech created, but rather, because the speech violated program rules. The court's decision in relation to the appropriate application of legal standards was significant. It had declined to apply the dominant lines of precedent followed in student speech cases. Moreover, the court revealed an appreciation of the

differences between the higher and elementary/secondary education settings in terms of student speech.

In deciding this case, the court looked to the particular environment of the school. Both the university and supporting *amici* (parties not directly involved in litigation but who submit legal briefs to the court on the legal issues presented) argued that the mortuary science program was a professional program intended to train students to become morticians, and that ethics comprised a fundamental aspect of the program. Consequently, it was imperative that the university set and enforce reasonable rules and standards of behavior. Ultimately, both Tatro and the institution agreed that a university should be able to regulate speech that does not comply with established standards of professional conduct. The court adopted this legal standard but also noted that "restrictions on a student's Facebook posts must be narrowly tailored and directly related to established professional conduct standards." In this way, students are protected from schools reaching into their personal lives to regulate speech that is unrelated to their academic program. The court reviewed the professional conduct standards related to respect for human cadavers and determined that the school's actions in response to Tatro's speech were directly related to those standards and narrowly tailored. In so deciding, the justices gave deference to university officials in dealing with curricular issues.

Keefe v. Adams. *Keefe v. Adams* (2016) is the most recent case related to the online speech of a student in a professional program. Craig Keefe enrolled in Central Lakes College's Associate Degree nursing program to become a registered nurse in the fall of 2012. He had previously obtained his licensed practical nursing certification from

the institution in the summer of 2011. A classmate of Keefe's reported to her instructor, Kim Scott, that Keefe had posted several threatening, school-related posts on his public Facebook page. She printed these posts out and brought them to the instructor. A second student made the same complaint a few days later and shared the posts with Scott, who then forwarded them to her supervisor, Connie Frisch. The second student told Scott that Keefe's posts made her uncomfortable and nervous, and that she "didn't feel she could function in the same physical space with [Keefe] at the clinical site."

After checking with the Vice President of Academic Affairs, Frisch asked Keefe to meet with her. When Keefe inquired about the subject of the meeting, Frisch responded that she would prefer to discuss the matter in person, due to the delicacy of the topic. In the meeting, Frisch reviewed the school's Due Process Policy with Keefe. She read portions of his posts aloud and informed him that they raised concerns about his ability to remain professional and maintain appropriate boundaries. Some illustrative posts read:

- Doesnt [sic] anyone know or have heard of mechanical pencils. Im [sic] going to take this electric pencil sharpener in this class and give someone a hemopneumothorax with it before to [sic] long. I might need some anger management.
- Glad group projects are group projects. I give her a big fat F for changing the group power point at eleven lastnight [sic] and resubmitting. Not enough whiskey to control that anger.
- LMAO, you keep reporting my post and get me banded. I don't really care. If thats [sic] the smartest thing you can come up with than I

> completely understand why your [sic] going to fail out of the RN program you stupid bitch…. And quite [sic] creeping on my page. Your [sic] not a friend of mine for a reason. If you don't like what I have to say than dont [sic] come and ask me, thats [sic] basically what creeping is isn't it. Stay off my page…

(*Keefe v. Adams,* 2014). Keefe offered three explanations for his posts. First, he said that many of the things he posted on his page were jokes. Next, he said that his Facebook account had been hacked. Finally, he shared that he thought his posts were private. Given Keefe's lack of remorse and understanding that he had acted in an unprofessional manner, Frisch chose to remove Keefe from the nursing program. He was allowed, however, to finish the semester and transfer his credits to a different course of study at Central Lakes College. To support her decision, Frisch cited a portion of the Nursing Program handbook, which explained that transgression of professional boundaries and behavior unbecoming of the nursing profession are grounds for dismissal. Keefe appealed Frisch's decision to the Vice President of Academic Affairs, who upheld the dismissal.

Claiming violations of his First and Fourteenth Amendment rights, Keefe brought suit against the college. The U.S. District Court for the District of Minnesota, granting Central Lakes College's motion for summary judgment, found that Keefe's fundamental rights were not violated and, therefore, the defendants were entitled to qualified immunity. The U.S. Court of Appeals for the Eighth Circuit reviewed the case and upheld the grant of summary judgment. Keefe argued that a college student may not be punished for off-campus speech unless that speech falls into a category that is not protected by the First Amendment.

The court first considered whether adopting the Code of Ethics of a nationally recognized organization as part of a program's curriculum impermissibly curtails First Amendment freedoms. It acknowledged that Keefe's Facebook speech was protected by the First Amendment, and that the Supreme Court typically "does not favor creating new First Amendment exceptions that could be used to restrict protected speech." Recognizing that the state has a strong interest in regulating health professions, however, the court reasoned that teaching viewpoint-neutral professional codes of ethics was permissible under the First Amendment. Though the broad wording of these codes could potentially be used to restrict protected speech, the court found that Keefe did not allege that the Code of Ethics was used as a pretext for any viewpoint or other form of discrimination.

Next, the court considered the fact that the speech took place off campus in an online setting. While Keefe argued that his off-campus speech could not be regulated unless it fell into a category unprotected by the First Amendment, the court disagreed. Citing *Hazelwood*, it held that off-campus speech that violates professional standards does not enjoy protection if it raises legitimate pedagogical concerns. Here, the court decided, the speech did raise legitimate pedagogical concerns, as compliance with a code of ethics is an important part of a nursing program's curriculum.

Finally, the court dismissed Keefe's contention that none of his posts were related to course assignments or requirements. As explored in the literature review, courts typically provide institutions of higher education greater deference in relation to disciplinary decisions arising in an academic context. This deference is a recognition on the part of the courts that educators are better equipped than judges to make decisions

about what conditions must be met in order to properly educate students. Thus, whether or not Keefe's speech was characterized as academic in nature had significant implications for how the court evaluated the school's disciplinary decision. One of Keefe's posts involved a physical threat directed at a classmate related to their medical studies, another complained about a group project the class had been assigned and Keefe's groupmates, and several were clearly directed at his classmates. Consequently, the court found, Keefe's posts were related to academics and could permissibly be regulated.

Odermatt v. Way. Though *Odermatt v. Way* (2016)[7] did not involve an institution of higher education as a defendant, it is illustrative of how certain courts evaluate student speech issues. Emily Odermatt was a student accepted to a graduate fellowship program operated by the New York City Teaching Fellows (NYCTF). The NYCTF offers fellowships to graduate students in order to recruit and prepare "high quality, dedicated individuals to become teachers who can raise student achievement in New York City." Fellows are assigned to a particular university for their graduate studies, for which most of the tuition is subsidized by the fellowship program. While pursuing graduate degrees, fellows are expected to take full-time teaching positions in New York City public schools. Prior to the start of the school year, they were required to complete pre-service

[7] *Odermatt v. Way* is a difficult case to classify. While Odermatt's speech related to the school and its curriculum, it is not quite as clear that her dismissal from the program was due to failure to uphold professionalism standards. There is language in the opinion, however, that indicates that officials at Relay viewed Odermatt's speech as unprofessional, and that this is what jeopardized her good standing with the school. Moreover, Odermatt sued the NYCTF and not an institution of higher education. Nevertheless, the issues discussed in this case and the standards applied have implications for college student online speech that raises concerns about professionalism.

training. Odermatt was assigned to the Relay School of Graduate Education, and began an eight-day biology pre-service training course at Relay in June of 2013.

The NYCTF set up a Facebook group to facilitate communication between the fellows. In the group, Odermatt made several statements that were critical of Relay. For example, she posted an article containing negative opinions about Relay and wrote "To all those who are in Relay: Read this article and begin to get worried." Additionally, she opined that the atmosphere at Relay was "cult-like" and that Relay was not a prestigious school and would look bad on her resume. A woman who had interviewed Odermatt for a teaching position at a middle school teachers' recruitment fair commented on one of Odermatt's posts, indicating that Odermatt's critical statements of both Relay and charter schools hurt her feelings. Rather than apologizing for her comments, Odermatt responded to the woman that she considers Facebook to be a forum for free expression and that she would not want to work for any employer that discouraged free speech.

Someone from Relay also saw Odermatt's posts and complained about her Facebook activity to Julie Fry, an administrator with the NYCTF. Fry spoke with Odermatt over the phone, informing her that her behavior had jeopardized her standing at Relay and that she would not pass her pre-service training if she continued to post similar comments on social media. In response to the conversation, Odermatt sent a six-page email to NYCTF, continuing to complain about Relay and arguing that Fry's comments were an attempt to infringe upon her rights to free expression. Two days later, Odermatt received notice that she was being removed from the fellowship program because she was no longer in good standing with Relay as a student.

Odermatt filed a lawsuit against administrators at NYCTF in the U.S. District Court for the Eastern District of New York, alleging that her First Amendment rights had been violated. First, she argued that the NYCTF engaged in viewpoint discrimination by removing her from the Facebook groups for NYCTF Fellows. The court, however, disagreed. Odermatt was only removed from the groups *after* she had been removed from the program. Because membership in the Facebook groups was contingent upon one's status as a fellow, the court found that Odermatt was no longer eligible to be a part of the Facebook groups at that point. Thus, she was not removed because of her viewpoint, but rather, because of her removal from the program.

Odermatt also argued that her removal from the fellowship program amounted to First Amendment retaliation. She posed two separate claims, one in which she would be considered a public employee of the Department of Education, and one in which she would be considered a student. While the court agreed that Odermatt was an employee of the DOE, it explained that she could also be considered a student. The court acknowledged that students have free speech rights, and that public employees have free speech rights as long as they are speaking on matters of public concern.

How Odermatt would be characterized, however, did not come into play in the court's decision, as it ultimately determined that she had not established a *prima facie* ("on its face;" a standard that must be satisfied in order for a claim to avoid early defeat in a lawsuit) case of retaliation. Specifically, Odermatt failed to establish a causal link between her speech and the NYCTF's decision to remove her from the program. In her complaint, the court found that Odermatt did not even identify the particular speech at issue or allege that it was constitutionally protected. Moreover, Odermatt did not allege

that the defendants (all officials from the NYCTF) were even aware of the speech. The program's decision, the court determined, was motivated by Relay's report that Odermatt was not in good standing as a student. While Relay's determination that Odermatt was not in good standing may have been motivated by her Facebook posts, this could not permissibly give rise to the inference that the person who removed Odermatt from the program was aware of or motivated by the postings. As a result, Odermatt's claims were dismissed.

In sum, Odermatt's claim that her dismissal from the fellows program was the result of unconstitutional retaliation for her protected speech was found to be invalid by the court. Odermatt's unprofessional speech in the Facebook environment jeopardized her good standing with the placement institution. Though it does not necessarily involve the incorporation of professionalism standards into curriculum or the application of those standards to student behavior, Odermatt highlights the fact that even speech taking place in non-academic contexts can be used to make determinations about students' ability to uphold professionalism standards.

General curricular speech. Some types of student online speech are directly related to academics or the classroom, but involve discipline on conduct grounds rather than academic.

Osei v. Temple University of Commonwealth System of Higher Education. *Osei v. Temple University of Commonwealth System of Higher Education* (2011) combines elements of claims made in *Odermatt, Yoder, Harrell* and *Feine.* As in *Odermatt* and *Feine,* Osei alleged that disciplinary actions against him were the result of impermissible retaliation for protected speech. The court here similarly determined that a claim of

retaliation could not be supported. As in *Yoder* and *Harrell,* Osei also argued that the regulations under which he was punished were unconstitutionally vague and overbroad. Again, the court found that these claims were invalid.

Michael Osei was a graduate student at Temple University. Osei was unhappy with the grades he received in a chemistry class he took from professor Dr. Krow. To express his dissatisfaction, he sent mass e-mails to both the entire chemistry class and to all users of the university e-mail system complaining about Krow and asking other students to support his claims. Osei corresponded with Krow several times about his grade, but was unhappy with Krow's responses. The tone of Osei's emails to Krow grew increasingly hostile. He made statements such as "I just want justice on you physically and spiritually", "Your game is over! Mine begins. You played with the wrong person this time.", and "Marl [sic] my words: The year 2010 will not start well for you". Concerned about the threatening nature of Osei's messages, Krow reported them to university administrators. Following a disciplinary hearing, Osei was informed that he would be suspended from the university for approximately six months, required to attend anger management classes, and put on probation through graduation. On appeal, the punishments against Osei were unanimously upheld.

Osei filed a lawsuit against the university in the U.S. District Court for the Middle District of Pennsylvania on the grounds that his First and Fourteenth Amendment rights were violated, and that the university impermissibly discriminated against him in violation of Title VI of the Civil Rights Act of 1964. Part of Osei's Fourteenth Amendment claim was that he was not provided with substantive due process. Osei contended that the section of the Student Code of Conduct under which he was punished

unjustifiably restricted protected speech and was both vague and overbroad. This provision, he argued, violated his right to substantive due process, because the government cannot infringe upon certain fundamental rights unless the infringement is narrowly tailored to serve a compelling state interest. Section 3 of the Student Code of Conduct prohibited "any act or threat of intimidation or physical violence toward another person including actual or threatened assault and battery." To prove that this section violated his substantive due process rights, Osei had to show that the speech he was punished for would have been protected by the First Amendment.

The court found that Osei's e-mails to Krow constituted true threats, and, as such, did not receive First Amendment protection. In making this determination, it considered whether or not a reasonable person would have foreseen that Osei's statements could cause the recipient to interpret his words as a serious expression of intent to assault or harm. Any reasonable person, the court held, would have foreseen that Krow would interpret these emails to reflect a serious intent to inflict harm. The court determined that Osei's statements were conditional in nature, suggesting that if certain conditions were not met, there would be negative consequences. Moreover, Osei contacted Krow directly and made him feel intimidated. Thus, the court held that Osei's speech was not protected by the First Amendment and his punishment was not a violation of his substantive due process rights.

Osei next argued that Section 3 was unconstitutionally vague and overbroad, as it unnecessarily restricted his freedoms as a student and it did not clearly define "threat of intimidation" or "intimidation." First, the court considered whether or not this provision was too vague. They noted that codes of conduct prescribed by educational institutions do

not necessarily have to be as rigorous in defining terms as criminal statutes. If an individual of ordinary intelligence can discern which behavior would put him at risk of punishment, the court explained, then the code of conduct is not void for vagueness. In this case, the court believed that an individual of ordinary intelligence would understand that sending emails like those sent by Osei was prohibited. Osei's claims about the breadth of Section 3 were similarly rejected, as the court again reiterated that school codes of conduct do not have to meet the same standards as criminal statutes.

According to Osei, his suspension from the institution was in response to the mass e-mails he sent out, and not to the threatening emails he sent Krow. Thus, he alleged, the school's suspension was discriminatory retaliation against him for engaging in speech protected by the First Amendment. The court found that Osei was unable to establish a causal link between the mass e-mails and his suspension. The mass e-mails were sent months before the institution made the decision to suspend him. In the intervening months, Osei had sent several threatening e-mails to Dr. Krow. The school cited the threatening e-mails as the reason for the disciplinary hearing that ultimately resulted in his suspension. Consequently, the court held that Osei could not prove that the school's actions against him were the result of discriminatory retaliation.

Non-Curricular Online Speech

In multiple cases, college students were punished for online speech that was not related to instructional contexts and that did not otherwise trigger concerns related to professionalism standards so as to place them in the academic realm. Furthermore, these decisions dealt with issues related to institutional authority to regulate off-campus speech. As previously discussed, courts have typically given schools less latitude in regulating

student conduct that is unrelated to academic matters. The cases examined below reveal courts grappling with the issue of just how much authority schools should be given in relation to off-campus, online speech.

Rollins v. Cardinal Stritch University. In many cases, institutions punished students for online speech that was not academic in nature. The first notable case related to non-curricular online speech arose in 2001. This case was particularly noteworthy because of the court's application of contract law principles. In *Rollins v. Cardinal Stritch University,* university administrators sanctioned a master's student (Rollins) after he sent several unwanted, unsolicited emails to members of his cohort group, though not as part of participation in a specific class. Rollins was enrolled in a degree program in which students were assigned to specific cohort groups. Each group progressed through the program together, engaging in ongoing interaction and developing cooperative relationships with each other. One of the emails Rollins sent to a female classmate contained a story about a college student who had written about the fantasy kidnapping and murder of his classmate. Another contained an image of "kissing lips" and the words "FOR THE MAN (OR WOMEN) IN YOUR LIFE."

The recipients of Rollins' emails complained to teachers about his messages. Rollins was asked by both students and administrators to discontinue his behavior, but failed to heed their requests. Following a disciplinary hearing, he was removed from his cohort group. He brought suit against the institution, alleging that the school failed to provide him with the right to due process as required under common law, and that CSU breached its contractual obligation to Rollins.

The Minnesota Court of Appeals found that a previous state Supreme Court decision imposed a legal duty upon private institutions, like Cardinal Stritch University, to provide due process rights similar to those afforded by the Fourth Amendment (*Rollins*). Nevertheless, the court determined that Rollins was not arbitrarily expelled and, indeed, was afforded adequate due process by the university. He had been provided with notice of the hearing, and the specific reasons for his suspension. He was given the opportunity to explain himself at the disciplinary hearing and to submit a proposal to CSU to allow him to join a new cohort group. Thus, the court held that Rollins' claims that he was deprived of due process were unsupported.

Rollins also argued that the school breached its contractual obligations that were either implicitly or expressly implied in the student handbook. The court discussed, however, that Minnesota courts were generally reluctant to rigidly apply contract doctrine to the student-university relationship. Instead, they typically applied certain contract elements as warranted on a case-by-case basis. In this particular instance, the court reasoned, a contract did not exist between the student and the university, as the language of the student handbook did not create an exchange of promises between the school and the student. Moreover, the court explained that even if a contract did exist, Rollins did not provide any evidence that CSU had breached any particular contractual obligation. Finally, the court concluded that the school's code of conduct clearly informed students which conduct was prohibited and that the institution reserved the right to discipline students whose conduct violated university standards. The code of conduct contained a list of 17 examples of behaviors that would be subject to disciplinary action, four of which were recited to Rollins when he was first notified of the complaints against him.

Additionally, the court found that the university had a legitimate interest in maintaining a welcoming educational environment, and put students on notice that behavior that compromised this environment would not be tolerated. As a result, Rollins' lawsuit was dismissed.

Zimmerman v. Board of Trustees of Ball State University. In *Zimmerman v. Board of Trustees of Ball State University* (2013), the U.S. District Court for the Southern District of Indiana was called upon to consider whether or not state law and contracts between an institution and its students were permissibly used to punish two undergraduates for their behavior. Jacob Zimmerman and Sean Sumwalt, students at Ball State University, lived in an off-campus apartment with a third roommate (whom the court referred to as "Target"). The pair played numerous pranks on Target, including placing a sandwich in Target's room to rot during a school break. Eventually, Zimmerman and Sumwalt moved out of the apartment they shared with Target, yet they continued to play jokes on him. They created a Facebook page for a fictitious female high school student named "Ashley" and engaged in conversations with Target from that page. A real female high school student assisted Zimmerman and Sumwalt in their ruse by posing as Ashley on the phone with Target. At some point, Target asked Ashley to go on a movie date with him, and she agreed. When Target arrived in the movie theater lobby, Zimmerman and Sumwalt began videotaping him. They explained that Target had been communicating with them the whole time and that Ashley did not exist. Zimmerman and Sumwalt subsequently posted the video on YouTube and titled it "[Target] is a pedophile."

Target informed university administrators of the treatment he had endured from Zimmerman and Sumwalt. He outlined the consequences of that treatment, revealing that he was suffering from anxiety, could not sleep at night, and was having difficulty focusing in school since Zimmerman and Sumwalt were in the same academic program. His medical provider prescribed him Zoloft, a daily medication used to treat depression and anxiety disorders. Given Target's allegations, administrators charged Zimmerman and Sumwalt with several violations of university policy. Specifically, the two were informed that they violated the parts of the Conduct Code that prohibit harassment and violation of another person's privacy by using audio, video or photographic devices to make an image or recording without that person's knowledge.

In a meeting with a university official, both Zimmerman and Sumwalt admitted that their actions violated university policy, and signed a paper to that effect. The administration chose to suspend the students for one year, at which time they could return on a probationary basis. The terms of this probation required them to meet with the disciplinary office before returning and to abstain from contacting Target. Zimmerman and Sumwalt felt these sanctions were too focused on punishment rather than rehabilitation, and that the investigation was not conducted properly. They alleged First Amendment, due process, and institutional liability claims resulting in legal action when the school refused to reconsider the sanctions.

A key argument of Zimmerman and Sumwalt was that the university did not have jurisdiction to punish them for their conduct, as the incidents at issue took place off campus. The university argued, however, that their disciplinary actions were permissible because the code of conduct gave them jurisdiction over certain off-campus behavior.

Moreover, the students waived their right to object to the application of the code of conduct when they signed the written statement agreeing that their actions violated university policy.

In considering the school's authority to regulate off-campus behavior, the court looked to an Indiana statute that granted institutions of higher education power to prevent or regulate off-campus student behavior in certain instances. The students argued that the statute at issue provided significantly less power to regulate off-campus behavior than on-campus behavior. Looking closely at the language of the statute however, the court determined that it gave Ball State the authority to regulate the behavior at issue here. Specifically, the law permitted universities to regulate off-campus behavior that was "unlawful or objectionable" if it "violate[d] the reasonable rules and standards of the state educational institution designed to protect the academic community from unlawful conduct presenting a serious threat to person or property of the academic community" (Indiana Code § 21-39-2-3). The students' "Catfish[8]"-like prank, the court reasoned, was objectionable and unlawful. Zimmerman and Sumwalt were attempting to provoke Target to commit unlawful behavior. Moreover, their behavior posed a serious threat to the academic community, as it resulted in significant challenges for Target, a student at the university, that interfered with his education.

Punishing them for their actions, the students argued, also violated their First Amendment rights. In their estimation, their actions constituted expressive conduct subject to constitutional protection. Specifically, they asserted that the First Amendment

[8] *Catfish* is a documentary film that follows a young man who has carried on an online relationship with a woman that turns out to be a middle-aged housewife rather than the twenty-something woman she has pretended to be.

insulated them from punishment for the creation of the Facebook page and the fictitious posts made therein. In considering this argument, the court noted that, even if the Facebook speech should have been protected, it was only part of the conduct for which they had been disciplined. Absent the creation and use of the Facebook account, the students' actions still would have violated the code of conduct.

Nevertheless, the court went on to examine whether or not the Facebook posts were, in fact, protected speech. Zimmerman and Sumwalt cited a Supreme Court opinion to support their argument that just because speech is false, it is not necessarily excluded from First Amendment protection (*United States v. Alvarez,* 2012). The court countered this contention, however, by pointing out that the *Alvarez* decision does not stand for the proposition that all false speech is entitled to protection. Spreading knowing or reckless falsehoods is not protected by the First Amendment, the court explained. In this case, in addition to being false, the speech at issue sought to entrap Target into committing a crime by engaging in a relationship with a minor. It also was intended to inflict emotional distress upon Target. Additionally, the students knew that the speech was false. Given these realities, the speech was not protected by the First Amendment. The school's decision to punish the students was upheld.

Antebi v. Occidental College. As previously mentioned, state laws can influence how student online speech is treated. As in *Zimmerman,* state law was involved in deciding *Antebi v. Occidental College* (2006). Jason Antebi was an undergraduate student at Occidental College. As a self-described "shock jock" radio host on a program broadcast by the student-run radio station, Antebi was disliked by many students on campus, some of whom filed official complaints against him with the college.

Specifically, they alleged that Antebi was racist and anti-Semitic, and that he sexually harassed women. Antebi was also accused of sending e-mails to the college's gay community, threatening retribution and physical violence for the complaints they made against him. Antebi was investigated and told that he would face disciplinary action if he did not apologize to the complainants. He refused to apologize and appealed the findings of the investigation. Antebi was then required to participate in a disciplinary conference with the Associate Dean of Students, Rameen Talesh. Among other things, Talesh found Antebi guilty of harassment and sending "spam" e-mails. Antebi pursued legal action against Occidental College, arguing that his speech should have been protected under California's "Leonard Law." California Education Code section 94367, also known as the Leonard Law, requires private colleges and universities in the state to provide students with the same protections for off-campus speech that they would receive under the First Amendment.

The California Court of Appeals for the Second District did not weigh the merits of Antebi's claim that his speech would have been protected under the First Amendment, and, therefore, should have been protected by the Leonard Law. Instead, it held that Antebi lacked standing to bring a claim under the Leonard Law, which provides protection to students enrolled in college at the time of their claim. Antebi had graduated from Occidental College over a year before his lawsuit was filed. The court reasoned that the legislature did not intend for the law to extend to graduated students, as (a) it could have easily included language to that effect in the statute if it so desired and (b) the law only provides for injunctive and declaratory relief, neither of which would benefit a graduated student. Thus, Antebi's Leonard Law claim was dismissed.

Yeasin v. University of Kansas. The *Yeasin v. University of Kansas* (2015) case presents an interesting contrast to the *Rollins* case examined earlier, as it provides an example of a court interpreting a contract in the student's favor. University of Kansas student Navid Yeasin was punished by the institution for posting tweets about his ex-girlfriend to his Twitter page. Yeasin and his ex-girlfriend (referred to as "W." by the court) had a contentious relationship, and W. had recently been granted a protection from abuse order against Yeasin as a result of an off-campus incident in which he had restrained her against her will. W. filed a complaint about Yeasin at the university's Office of Institutional Opportunity and Access (IOA). After interviewing Yeasin and reviewing the criminal protection from abuse order, the IOA issued a no contact order. Yeasin was told that violation of this order could result in expulsion.

The same night the order was issued, Yeasin tweeted "Jesus Navid, how is it that you always end up dating the psycho bitches? #butreallyguys." In the following weeks, Yeasin continued to post offensive tweets that referred to his "ex-girlfriend," but did not mention W. by name. W. reported these tweets to the IOA, who gave Yeasin a second warning and clarified that even indirect references to W. violated the no contact order. Undeterred, Yeasin continued to tweet about W., using hashtags such as "crazybitch", "crazyassex," and "psycho."

When confronted about his Twitter activity, Yeasin explained that he did not understand the no contact order as extending to his tweets, as he never intended for those tweets to reach W. Upon completing its investigation, the IOA recommended that disciplinary action be taken against Yeasin for his behavior. Though it acknowledged that the behavior had taken place off campus, the IOA concluded that Yeasin's speech had

affected the on-campus environment for W, thereby coming under the purview of the university's sexual harassment policy and code of conduct. Specifically, the IOA found that Yeasin had violated Article 22 of the Student Code. Yeasin was given notice that a hearing would be conducted to consider the appropriateness of disciplinary action. The disciplinary panel recommended that Yeasin be permanently expelled and banned from the campus until W. graduated. This punishment was upheld by the Vice Provost. Yeasin sought judicial review of the university's sanctions.

The trial court disagreed with the school's assertion that Yeasin's behavior violated its student code. The Kansas Court of Appeals agreed. It found that the language of Article 22 specifically stated that the misconduct at issue must occur on campus or at events sponsored by the university. While Article 20 of the Student Code used the language "or as otherwise required by federal, state, or local law," it did not provide notice of what off-campus conduct could be subject to disciplinary action. Furthermore, the court explained that there was no evidence in the code that administrators intended for Article 22 to be extended to off-campus behavior. Such a finding would require the court to add language to the Student Code, which it declined to do. Thus, unlike Rollins, Yeasin prevailed in his suit.

O'Brien v. Welty. At times, students' personal websites can put them at risk of disciplinary sanctions. This was the case in *O'Brien v. Welty* (2016). California State University Fresno ("Fresno State") student Neil O'Brien was an outspoken political conservative who often criticized the university. O'Brien started a website where he shared information he had found on the internet and through IRS searches about the

president of the student body. He also shared his criticism of the institution's separate graduation ceremony for Latino students.

Early in O'Brien's college career, administrators at Fresno State began monitoring and interfering with O'Brien's expressive activities. The Assistant Dean of Students requested that faculty and students gather information to use against him. The director of alumni relations asked college administrators to "do something" about O'Brien's website. Other university officials deleted some of O'Brien's comments from university-run Facebook pages and permanently blocked him from posting about particular issues.

At one point, a newspaper published by the school's Chicano and Latin American Studies Department published a poem critical of America, to which O'Brien objected. He decided to confront the paper's advisor and another faculty member who had criticized O'Brien. He confronted the professors individually, and each refused to speak to him. O'Brien videotaped the encounters. Both professors filed reports with the university police. Disciplinary proceedings were held, and O'Brien was prohibited from coming within 100 feet of the staff, classrooms, faculty, or offices of the Chicano and Latin Studies department. Additionally, he was placed on disciplinary probation for one semester, which prohibited him from holding any student government positions or club offices. According to university officials, a person could have reasonably viewed his behavior toward the professors as intimidating or harassing, and therefore, it violated the student code of conduct.

O'Brien brought suit against the university, arguing that his First Amendment rights were violated and that he was retaliated against for his speech. Though O'Brien's

retaliation claim was similar to those made in *Odermatt, Harrell*, and *Osei*, a different outcome resulted. O'Brien was able to convince the court that there was, at the very least, a legitimate question of fact as to whether or not the school engaged in retaliation. The U.S. Court of Appeals for the Ninth Circuit determined that O'Brien could lawfully be disciplined for his actions related to his confrontation of the faculty members. It explained, however, that even lawful action may be considered unlawful if it is motivated by retaliation for engaging in protected speech. To survive the school's motion for summary judgment, the court determined that O'Brien would have to state a plausible claim for retaliation under the First Amendment. This required consideration of whether (a) O'Brien engaged in protected speech prior to his punishment, (b) the school's actions would have dissuaded an ordinary person from engaging in protected speech, and (c) a reasonable conclusion could be drawn that the school's actions were substantially motivated by the protected speech. O'Brien was easily able to establish that he engaged in protected speech in the months prior to the incident with the professors. The court found that his critical website postings, though not approved by the university, were protected under the First Amendment.

Next, the court considered whether the defendants' disciplinary actions would be enough to dissuade an ordinary person from engaging in protected speech. O'Brien was prevented from going to certain parts of campus and was placed on disciplinary probation. He was no longer allowed to participate in student groups. The court reasoned that a jury could find that these sanctions would chill an ordinary person's protected speech.

Finally, the court considered whether or not the sanctions against O'Brien were motivated by his protected speech on his website. It noted that it was apparent from the record that the university was "out to get" O'Brien from the beginning of his enrollment there. The record also reflected that campus police officers who had seen the video tape of his encounters with the professors indicated that O'Brien's tone was respectful and non-threatening. Consequently, the court held that a jury could find that the sanctions against O'Brien following the videotaping incident were primarily motivated by his protected online speech rather than by his confrontation with the professors. Thus, the case was remanded to the district court for further consideration of O'Brien's retaliation claim.

Interestingly, the court cautioned against an "overreading" of this opinion. It noted that the fact that a student can show that school officials disagree with his viewpoints does not give him a free pass to violate school rules. Additionally, it reiterated that the university was justified in punishing O'Brien for his threatening, intimidating confrontation with the professors. Instead, the holding in this case should only be taken to relate to O'Brien's protected speech, his website postings.

***Murakowski v. University of Delaware* (2009).** Like *O'Brien*, the *Murakowski* case involved a student's postings on his website. Unlike *O'Brien*, however, the postings at issue in *Murakowski* did not involve mere criticism. They covered particularly offensive and disturbing topics. Murakowski, an undergraduate student at the University of Delaware, established a website using the university's web servers. On this website, he posted personal essays on several different topics, including violence and sexual abuse. In one particular post, Murakowski described how to kidnap, rape, and murder a woman.

Several other postings contained racist, sexist, and anti-Semitic statements. Other students became aware of Murakowski's website and complained to university administrators, alleging that his postings caused them to live in fear and anxiety.

Based on the complaints against Murakowski, the institution charged him with violating its Policy for Responsible Computing. The policy required all students to abide by all applicable local, state, and federal laws related to communications and publishing, but stated that speech would be left otherwise unrestrained. Murakowski was prohibited from staying in his on campus dormitory or attending classes until the school was provided with proof that he had been examined by a licensed mental health provider. If the mental health provider indicated that Murakowski was not a threat to himself or others, he would be allowed to return to campus. He was also asked to sign a waiver to allow the mental health provider to speak with the Associate Vice President of Student Life about Murakowski's mental health treatment.

Murakowski challenged the disciplinary action in the U.S. District Court for the District of Delaware. First, he alleged that the school violated his due process rights by holding only an informal disciplinary hearing, rather than a formal one. The court disagreed, reasoning that Murakowski was given both notice and an adequate chance to be heard. The process he was given was sufficient enough to uphold his right to due process.

Next, Murakowski alleged that the school violated his First Amendment free speech rights. While the court conceded that universities have the right to restrict speech that interferes with the opportunity for other students' education (*Tinker*), it rejected the school's claim that such interference occurred in this instance. A student changed her

schedule and sought counseling as a result of Murakowski's posts and the brother of one student and parent of another raised concerns to university officials. The court reasoned, however, that speech must cause more than "distraction or discomfiture" in order to be considered a substantial disruption of educational activities. Therefore, the effects of Murakowski's speech on the campus community were not severe enough to warrant punishment. The court also rejected the contention that Murakowski's speech rose to the level of true threats—a category of speech not protected by the First Amendment. This argument had been advanced by the university. The court found that his words, though disturbing, did not reveal an actual intent to inflict harm upon anyone on the university's campus. Thus, Murakowski's claims withstood the university's motion for summary judgment.

Barnes v. Zaccari. The case of *Barnes v. Zaccari* (2012) provides an example of an instance in which an administrator took action in relation to a student's online speech the name of protecting the student body from potential threats. As in *Osei,* an administrator felt that the student's speech was sufficiently threatening to render it constitutionally unprotected. Plaintiff Thomas Barnes was a student at Valdosta State University (VSU). Upon learning about the university's plans to construct a parking deck, Barnes expressed his concerns about its environmental impact. One way in which he did so was posting information to his personal Facebook page. Ronald Zaccari, President of VSU, met with Barnes to express his frustration with his continued opposition to the project. After this meeting, Barnes sent Zaccari three (respectful) emails outlining his reasons for opposing the parking garage. Zaccari was also monitoring Barnes' personal Facebook page, on which he posted a collage entitled "S.A.V.E.—Zaccari Memorial

Parking Garage." The collage included a picture of the president. He also posted an article titled "I'm mentally ill, but I'm no mass murderer."

Zaccari actively looked for ways to remove Barnes from VSU, asserting fears that he was a threat to both Zaccari's safety and the safety of the student body. Specifically, he felt that the inclusion of the word "Memorial" in the title of the collage posted on Barnes' Facebook page indicated that Barnes intended to kill him. Additionally, he was concerned that Barnes' mental illness rendered him a threat to the university community. Zaccari convened several meetings with administrators and health professionals to discuss Barnes, all of whom told Zaccari that Barnes was not a threat to himself or others. Ultimately, Zaccari chose to expel Barnes on his own and against the advice of university legal counsel, citing a policy that allows the dismissal of students who attempt to disrupt any teaching, research, administrative, disciplinary, or public service activity. Zaccari asserted that Barnes' Facebook collage illustrated that he posed a clear and present danger to the campus community. His expulsion was effective immediately, and Barnes did not receive any sort of disciplinary hearing.

Barnes brought suit against Zaccari both individually and in his capacity as the president of VSU in the U.S. District Court for the Middle District of Georgia. On several of his claims, including those made under the Americans with Disabilities Act, the district court awarded Barnes judgment as a matter of law. Zaccari appealed the district court's finding that he was not eligible for qualified immunity from Barnes' claims that his procedural due process rights were violated. To prove that a defendant should not be able to claim qualified immunity, the court explained that a plaintiff must establish that

(a) a constitutional right was violated and (b) the right was clearly established at the time of the violation.

To satisfy the first prong of this test, Barnes was required to show that he was deprived of a protected property interest. For a property interest to be protected, the court explained, the plaintiff must establish that he was entitled to a particular benefit. The plaintiff must also establish that he was due some sort of process and was denied that process. The U.S. Court of Appeals for the Eleventh Circuit determined that Barnes was entitled to remain enrolled at VSU. The school's Student Code of Conduct promised students that they would not face disciplinary action unless and until they were found responsible for violating the code. Until a student violates the code, a legitimate claim of entitlement to continued enrollment exists. Here, the court reasoned, there was no proof that Barnes had violated the code of conduct.

The court next turned to the issue of what process was due to Barnes. As a state university, VSU was required to provide Barnes with notice of the charges against him and some sort of hearing prior to taking disciplinary action. Zaccari argued that it was necessary for him to deprive Barnes of notice and a hearing because his speech created an emergency that required immediate action. He maintained that Barnes' emails and Facebook posts were threatening. The court disagreed, finding that Barnes emails and Facebook posts simply revealed that he was passionate about environmental issues. Moreover, Zaccari had been advised by several mental health professionals that Barnes was not a threat to himself or others. Thus, the court found that Zaccari's determination that Barnes speech was threatening and required emergency action was unreasonable. This determination differs from the court's conclusion in *Osei,* where it was found that a

reasonable person could foresee that Osei's emails would cause the recipient to fear for his safety. The court decided that Barnes had adequately proven that his right to due process was violated, and Zaccari was denied qualified immunity.

Morales v. New York. The case of *Morales v. New York* (2014) delves deeper into what kinds of online speech may be considered true threats, and provides an example of how some student online speech can trigger criminal charges. Edward Morales was a student at the State University of New York (SUNY) Purchase. He faced a host of difficulties both in his personal and academic lives. Physically, Morales suffered from a permanent partial disability requiring accommodations. Because of concerns about his mental health, Morales was unable to officially register for classes until he agreed to undergo a psychiatric evaluation. He was also charged with plagiarism by one of his professors. Morales was accused of vandalizing the school's student garden by a female student he did not personally know, and eventually, a no contact order was issued requiring him to refrain from contacting that student—an order he ultimately violated. Morales was also brought up on disciplinary charges for incidents occurring in on-campus housing.

In response to the several academic and conduct issues he faced at the institution, Morales wrote the following email to SUNY officials:

> What if I was some nuts-crazy (which I am not), and being pushed to the end, and I take a machine gun (which I will not) and because of school 'gang-like behavior' looses [sic] all opportunities to get to law school, then they garnish my SSD check to pay the loans, so I have nothing to live for, thus, this crazy student

(not me) goes out to the school and start killing people. This sound like it has happened before…wright [sic]?

The email was reported to the Westchester County District Attorney, who then charged Morales with aggravated harassment. Morales sued the individual university officials who reported him to the District Attorney in the U.S. District Court for the Middle District of New York, alleging that his email was protected speech under the First Amendment[9]. In his estimation, his speech did not indicate that he posed a "clear and present" danger to others, so punishment in relation to that speech was inappropriate.

In considering Morales' First Amendment claim, the court referred to *Tinker,* stating that students at public schools have a right to free speech or expression as long as that speech does not substantially disrupt the educational environment. It also noted, however, that *Tinker* does not require administrators to wait until a substantial disruption actually occurs to take action against a student. The court considered whether or not a reasonably competent school administrator would take the same actions in relation to protected speech. It found that it was reasonable for the defendants to interpret Morales' email as a threat that he intended to kill people at the school with a machine gun. Thus, even if they were mistaken as to Morales' actual intent, the school officials were justified in taking action in relation to Morales' speech because any competent administrator would have done the same. Consequently, the defendants were afforded qualified immunity in regard to Morales' First Amendment claim against them.

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[9] Morales also made several other claims against both SUNY and individual administrators. Those claims, however, are unrelated to his speech and are therefore not relevant for the purposes of this study.

DiPerna v. The Chicago School of Professional Psychology. A recently decided case highlights the ways in which social media evidence may be used in court, and the importance of consistent application of established policies (*DiPerna v. the Chicago School of Professional Psychology,* 2016). Though the plaintiff in this case made several claims, the one of interest for this study relates to the punishment she received for Instagram posts. Jennifer DiPerna was a student at the Chicago School of Professional Psychology. DiPerna, a white student, was put into a group with two African-American women for a course project that involved the examination of issues of diversity. One of DiPerna's groupmates contacted a program faculty member to express concerns about DiPerna's ability to work with patients from diverse backgrounds based on a conversation she had with her during a drag show the group attended as part of their project. A few weeks later, two different students reported a photo posted on DiPerna's Instagram account to an instructor. The post contained a picture of celebrity chef Paula Deen using a racial slur. When no action was taken against DiPerna for this post, the students again raised concerns to administrators. The institution's policies prohibited social media that was disparaging or injurious to other students, used ethnic slurs, or was otherwise inappropriate towards other students.

As a result of her Instagram post, DiPerna was required to attend a counseling session with the Department Chair and Associate Department Chair. In this meeting, DiPerna indicated that she did not believe her posts were inappropriate, as they were shared on her private Instagram account and were meant to be humorous. She also pointed out that another classmate shared posts containing similar racial slurs, yet she was not reprimanded. In addition to her counseling session, DiPerna was referred to the

Student Affairs Committee, who delayed her entry into her program-required internship and implemented an Academic Development Plan.

DiPerna sued the school in the U.S. District Court for the Northern District of Illinois. She alleged that another student in the program who had posted the same offensive phrases on her Instagram account had not been punished. Given this disparate treatment, DiPerna argued that the school had breached its contract with her, as it had failed to follow its own handbook. This argument was also made by the plaintiff in *Rollins.* In this case, unlike in *Rollins*, the court sided with the student.

In contract disputes between a student and a school, the court noted there only exists a legal remedy available to the student when the school has made an adverse academic decision that is arbitrary or capricious. DiPerna argued that the school's punishment for her Instagram post was arbitrary and capricious, because another student had not been disciplined for similar postings. To support this assertion, the plaintiff submitted examples of the other student's posts. The school argued that social media posts are difficult to authenticate, and therefore, should not be considered as evidence. The court, however, accepted that enough information existed to authenticate the posts in this case. The Instagram posts had the same name as the individual alleged to have made the posts, contained her picture, and showed the person wearing a "The Chicago School of Professional Psychology" shirt. On this basis, the court ruled that the posts were admissible.

On DiPerna's claim that she was punished in an arbitrary and capricious manner, the court held that there was a genuine issue of material fact. The defendants argued that, though DiPerna mentioned another student's Instagram posts in the counseling session,

she did not indicate that they were offensive. Consequently, they said, they did not know about the other student's social media policy violations in order to punish her. The court explained that, in considering motions for summary judgment, it must construe all facts in the light most favorable to the non-moving party. In this stage of litigation, the university was moving for summary judgment on DiPerna's claims. Therefore, the court considered the facts presented in the light most favorable to DiPerna. Because DiPerna insisted that she had told the school officials that the other student's posts were offensive, the court found that a genuine issue of material fact existed as to whether she was punished arbitrarily and capriciously. Thus, her claim withstood the summary judgment motion.

Doe v. the Ohio State University. In *Doe v. the Ohio State University* (2016), a student challenged the university's decision to sanction him for off-campus behavior involving a student from another school. Doe, a student and student instructor at Ohio State University (OSU), posted his ex-girlfriend's phone number and pictures of her on several social media sites after their break-up. Additionally, he photoshopped her face onto the naked body of another woman. The ex-girlfriend, a student at Capital University, reported Doe's behavior to the Capital University Police. As a result of her complaint, the Dean of Students at Capital University sent Doe a letter forbidding him to visit the university unless he first received the dean's express permission to do so. Doe's ex-girlfriend also filed a police report with the Dublin, Ohio Police Department.

The OSU Office of Student Life somehow received notice of the allegations and police reports. It issued a letter to Doe informing him that it had been alleged that he violated the sections of the Code of Student Conduct related to stalking, sexual

harassment, and sexual exploitation. As a result, the office requested to schedule a preliminary conference with Doe to discuss the allegations in order to determine whether charges were warranted. Doe sought a preliminary injunction prohibiting an investigation into his conduct and a declaratory judgment that OSU did not have jurisdiction to investigate his actions.

As in the *Zimmerman* case, the student argued that, given the language of a state statute, the university did not have the power to regulate his off-campus conduct. Specifically, Doe asserted that, because his ex-girlfriend was not a student at OSU and had no relationship with the university, the school had no jurisdiction to investigate her claims. Additionally, he contended that the statute providing OSU the power to regulate student conduct should only apply to on-campus behavior, as it is entitled "Authority to maintain law and order on campus."

The court rejected both of Doe's arguments. In considering an institution's power to regulate off-campus behavior, the court found that other courts have typically held that universities may regulate student conduct that occurs entirely off-campus so long as the university is able to establish that it possesses a legitimate interest based on its educational mission in regulating the behavior. A closer reading of the Ohio statute at issue revealed language granting OSU the authority to regulate off-campus behavior that is related to an activity in which a police report has been filed. Because Doe's actions resulted in two police reports (one from Capital University Police and one from the Dublin Police Department), the court held that OSU could permissibly regulate his behavior under the student conduct code. The court reasoned as well that the university had a legitimate interest in investigating the alleged sexual misconduct of one of its

students. Thus, even though the misconduct involved a student who did not attend OSU, the university had jurisdiction to investigate the claim because of the potential effect Doe's behavior could have on its own campus. Doe's requests were denied.

Summa v. Hofstra University. Another context in which non-curricular student online speech can become concerning for administrators is in relation to employees of the institution. All of the cases examined so far involve legal action between the student who was punished for his or her speech and the institution. This case, however, involves a lawsuit between an employee of the school who brought legal action against the institution because of the speech of its students. In *Summa v. Hofstra University* (2013)[10], the online behavior of members of the football team led to sexual harassment and retaliation claims against the university. Lauren Summa was a graduate student at Hofstra University who was hired to work as a manager for the football team during the first year of her graduate program. From the outset, the football players treated Summa in a way that made her uncomfortable. This treatment included inappropriate comments regarding her boyfriend and her qualifications to work as a manager.

Summa soon learned that some of the players had created a Facebook page that insulted both Summa and her boyfriend. Of primary concern were a fake "missing persons" photo of the boyfriend and a "Wanted" poster of Summa. Apparently, the two photos were intended to be a joke alleging that Summa had kidnapped her boyfriend. The missing persons photo included a caption that stated "at the time of his disappearance, weight may have fluctuated because of…excessive sexual activities." The wanted poster

[10] Though this case involves a private institution, the laws upon which the lawsuit was based apply equally to public and private institutions.

of Summa contained a list of aliases, including "Miss Piggie, The 'Wannabe' Big Boss Man, F.B . Manager." Upon learning of these posts, Summa reported the behavior to the head football coach, who then spoke to the involved players and ordered them to delete the page. The players followed his orders.

Following a particularly upsetting incident that occurred on a bus ride home from an away game, Summa met with the University's Equality Officer, Dr. Maureen Murphy. She relayed to Murphy all of the incidents of harassment that had taken place throughout the football season, including the creation of the Facebook page and the demeaning content it contained. Murphy conducted an investigation and concluded that the incident represented an opportunity to educate all of the Athletic Department on the university's harassment policy.

As far as Summa understood, she had been hired to work for the football team through both the fall and spring semesters. However, when she called the football office to obtain her spring work schedule, Summa was told that her position had been filled. She sought other employment, and was hired as a graduate assistant in the Office of University Relations by the Director of Marketing, Planning, and Operations. During this process, Summa began filing a complaint with the New York State Division of Human Rights against the university for retaliation in relation to her removal from her manager position. The university's Director of Human Resources, Evelyn Miller-Suber, became aware of this complaint in May 2007, approximately one month after Summa had been hired for the graduate assistantship.

In June of 2007, Miller-Suber contacted the Vice President for University Relations, Melissa Connolly, to remind her that she was required to sign off on any

paperwork for Summa's graduate assistantship with her office. Additionally, though it was not required, Miller-Suber suggested that Connolly interview anyone working for her office, including Summa, and that she should be sure that the candidates would be able to represent the university in the best light possible when meeting with external audiences. On this advice, Connolly chose to interview Summa, even though she had already been offered the position. Indicating that she found Summa's resume to be "imprecise" and that her recommendations were lukewarm, Connolly rescinded Summa's offer of employment. In response to this chain of events, Summa filed a lawsuit alleging sexual harassment and retaliation in violation of Titles VII and IX of the Civil Rights Act of 1964.

Under Title VII, which prohibits both intentional discrimination and employment practices that have discriminatory impact, Summa alleged that the football players' behavior constituted discrimination on the basis of sex which created a hostile work environment. The U.S. Court of Appeals for the Second Circuit decided that Hofstra could not be held responsible for the football players' behavior, as employers are only liable for the behavior of non-employees if it can be proven that the employer did know or should have known about the harassing behavior and failed to take appropriate action to remedy the situation. In this case, the court reasoned, Hofstra took remedial action each time Summa complained about the players' behavior. In relation to the Facebook complaint, for example, the head football coach immediately spoke to the players involved and ordered them to remove the posts. The players complied, and no further Facebook postings were made. Thus, Hofstra could not be held responsible for creating a hostile work environment under Title VII.

In regard to Summa's retaliation claims, however, the court felt that Summa had satisfied the necessary burden to proceed to trial. In order to succeed on a retaliation claim, a plaintiff must show that (a) she engaged in a protected activity (in this case, complaining about the harassment), (b) her employer was aware of this activity, (c) the employer took adverse employment action against her, and (d) there was a causal connection between the alleged adverse activity and the individual's harassment claim. The court found that Summa easily satisfied the second and third elements of this four-part test. The record reflected that several officials at Hofstra were aware of Summa's harassment claims, and she suffered two adverse employment actions: her removal from her position as football team manager, and the loss of her graduate assistant position in the Office of University Relations. As to the first two elements of the above outlined test, however, the court felt that the evidence was less clear.

The court had already ruled that Summa's hostile work environment claim under Title VII was invalid. It explained, however, that in order to establish that the harassment claims she made were protected activity, Summa needed only prove that she possessed a good faith, reasonable belief that the employment practice at issue was unlawful under Title VII. The district court, this court intimated, had erroneously concluded that Summa could not reasonably have believed that her sexual harassment complaints were related to violations of Title VII, as the school characterized the complaints as being related to a student-on-student problem, not an employer-on-employee problem. The appellate court, however, asserted that how the school characterized the complaints was not relevant—what mattered was how Summa herself saw the issue. It was clear, it argued, that Summa believed that the harassment events were employment related. Moreover, the court found

that this belief was entirely reasonable, as Summa only interacted with the football team because of her employment with the Athletic Department, not because of her position as a graduate student. Additionally, the harassing Facebook posts specifically referred to her position as football manager. Thus, the court determined, Summa met the burden of establishing that that she engaged in protected activity.

Next, the court examined the causal relationship between Summa's harassment complaints and the adverse employment actions she suffered. In regard to the decision to end Summa's employment with the football team, the university argued that it could not be considered retaliation for her harassment claims, as the person responsible for making this decision (the football equipment manager) had no knowledge of her complaints. The court explained, however, that it was not necessary to establish that the decisionmaker himself had direct knowledge of the complaints if it could be shown that he was encouraged by superiors to disfavor the plaintiff. Upon closer examination, the court found that there was no direct evidence that the head football coach told the equipment manager not to re-hire Summa for the spring semester, but the record clearly showed that Summa was previously told she would be employed through the spring semester. The court explained that a reasonable jury could conclude, therefore, that the head coach had influenced the decisionmaker's actions by either telling the equipment manager that new managers were needed or allowing him to replace Summa. Thus, the court felt that Summa could reasonably satisfy element four of her retaliation claim in relation to her employment with the football team.

Similarly, the court found that a reasonable jury could find that Summa's revocation of her graduate assistantship offer was caused by her harassment complaints.

One could reasonably conclude that the Director of Human Resources encouraged Connolly to rescind Summa's employment offer, the court explained. Though she had already been hired by another person, the director of Human Resources encouraged Connolly to take a closer look at Summa. In doing so, Connolly examined Summa's legal actions and harassment complaints. Moreover, the adverse employment action occurred within two months of Summa's complaint to the NYSDHR. The court intimated that a jury could plausibly find that this temporal connection was enough to establish causation.

To overcome a *prima facie* case of retaliation like the one Summa established, an employer must demonstrate that it had legitimate, non-retaliatory reasons to take adverse employment action against the employee. Looking at the record as a whole, the court determined that a reasonable person could find that the university had legitimate, non-retaliatory reasons for removing Summa as a football manager and graduate assistant. First, Summa had waited until just days before the start of the spring semester to contact the football office regarding her schedule. The university argued, therefore, that it did not know that Summa wished to continue her employment and because it needed football managers prior to the start of the spring season, it sought other candidates for the position. In regard to her employment as a graduate assistant, the court found that a reasonable jury could conclude that Summa's "imprecise" resume and poor recommendation could be reason enough to rescind her assistantship offer. Thus, the burden shifted back to Summa to establish that the university's actions were, in fact, motivated by discriminatory retaliation.

According to the court, a plaintiff does not need to prove that retaliation was the only motivating factor in an adverse employment decision, just that it was the

determinative factor. The court held that Summa had presented enough evidence to show that there was, at the very least, a legitimate question of fact with relation to the motivating factors. Summa had engaged in multiple conversations with the football staff about her employment for the spring semester, and produced emails from the athletic department that listed the amount of her spring stipend. These pieces of information, the court felt, gave rise to the inference that the football staff knew she was interested in returning for the spring. In regard to the graduate assistantship position, the court found that Summa presented evidence that she had already been hired for the position and had accepted the offer. Moreover, no other graduate assistants at the university were required to re-interview with another administrator after they had already been hired. The court held, therefore, that a reasonable jury could conclude that both adverse employment decisions were motivated by discriminatory retaliation. Summa's case was allowed to proceed to trial. This case reveals that even the online speech of individuals who are not employees of a university can expose the institution to employment-related legal claims.

Key v. Robertson. The case of *Key v. Robertson* (2009) highlights the many different legal standards that may come into play in a student online speech case. Adam Key, a law student at Regent University, was disciplined for a post he made to his Facebook page. Key had found a video online of the law school's chancellor, Pat Robertson, that showed Robertson scratching his face with his middle finger. When the video was paused at a certain point, it appeared that Robertson was giving the audience the "middle finger". Key took a screenshot of this image and uploaded it to his Facebook site, making it his profile picture. The post was brought to the attention of the law

school's administration, and Key was asked to remove it because it violated the school's policy prohibiting obscene behavior.

After being reprimanded by the school for his post, Key informed administrators that he would be issuing a press release to various media outlets outlining the school's actions. When he brought the press release to the school's public relations office, some employees indicated that his behavior frightened them and the Regent police were informed that Key was creating a disturbance. The school also received complaints from several students who said that, as a result of the Facebook incident, Key's behavior had become "threatening" and "erratic." There were also reports that Key owned a gun and had been carrying it on campus, in violation of the school's weapons policy. When Key refused to meet with administrators to discuss these allegations, he was suspended from the law school for one year.

Key brought suit against the university in the U.S. District Court for the Eastern District of Virginia, alleging that the school's behavior violated (among other things) his First Amendment rights and the Higher Education Act. As previously discussed, in order to hold an institution liable for violating constitutional rights, one must first establish that the institution is a government actor. According to Key, the fact that Regent University received both direct and indirect state funds qualified the school as a government actor. The court disagreed, noting that the mere fact that a school has received public funds does not classify its decisions as state actions. Moreover, in other cases in the same jurisdiction, the court had commented that Regent was a private entity. Key's constitutional claims, therefore, failed because he did not fulfill the "state action" requirement.

Next, Key argued that Regent's decision to suspend him for one year violated his free speech rights under the Higher Education Act. Section 1011a of the Higher Education Act discusses that schools receiving indirect or direct federal funding should refrain from punishing students for speech that would be considered protected under the First Amendment. The court did not engage in an examination of whether or not Key's speech would have been protected under the First Amendment or the legal force of the provision in relation to higher education institutions. Instead, it considered whether or not Key could appropriately bring a claim under this act. Citing several other cases, the court held that a private citizen does not have the right to bring a lawsuit under the Higher Education Act; the provisions of the act are only able to be legally enforced by the U.S. Department of Education. Claims against institutions made under this act can only be brought by the Secretary of Education. Therefore, Key's Higher Education Act claim was dismissed.

Summary

The above 25 opinions represent the wide variety of factors taken into consideration when student online speech cases are litigated. Emerging from the data is a sort of typology of problematic student online speech: speech that is academic and occurs in an online classroom setting, online speech that does not take place in the classroom environment and violates professionalism standards, and online speech that is non-academic and does not take place in the classroom environment. As indicated in the preceeding discussion of these cases, the specific legal standards applied by courts in each case and the factors considered legally relevant can vary widely depending on the court and the institutional context (i.e. Factors such as the rules the institution has in

place and the impact of the speech on the educational environment). Moreover, an institution's authority to regulate online speech varies based on where that speech falls in the typology identified from the data: speech occurring in online class settings, speech implicating academic concerns but taking place outside of the online class setting, and speech that is entirely non-academic and takes place outside of the class setting. These court decisions will be analyzed and their implications discussed in the following chapters.

CHAPTER 5: ANALYSIS

The 25 opinions related to college student online speech from various federal and state trial and appellate courts examined herein provide insight into how courts may treat particular speech issues in particular contexts. This chapter will focus on analyzing the data to extract key lessons and principles. Specifically, it seeks to answer the following questions:

1. How are courts interpreting college students' First Amendment rights in online contexts, specifically:
    a. In the instructional realm?
    b. Outside of instructional settings?
2. To what extent have courts relied on or referenced concepts of academic freedom, if at all, in defining student speech rights in online contexts?

Comparative legal analysis of the data reveals several themes and sub-themes, which are examined below. The five major themes emerging from the data relate to (1) the impact of multiple legal standards in shaping the contours of student speech rights in online contexts, (2) the importance of clear policy construction and consistent adherence to standards, (3) the influence of student academic freedom considerations on courts' reasoning about college students' online speech rights, (4) inconsistency among courts regarding the appropriate legal standards to assess student speech rights and corresponding institutional authority in online speech cases, and (5) the importance of the context in which the online speech arises in delineating student rights and institutional authority.

Reconciling Various Sources of Law

One theme that emerged from the student online speech data related to how courts are often required to consider several different sources of law in one case. As evidenced by the discussion below, state laws and other federal laws may significantly impact an institution's power to regulate student online speech. Moreover, some laws may result in the perception by colleges, whether accurate or not, that they create certain institutional obligations which may conflict with student speech freedoms.

State Laws

In addition to federal law (namely, the Constitution), many states have laws that are relevant to college student speech. Some state constitutions, for example, give speech rights that are more expansive than those provided by the First Amendment (Hutchens, 2012). Additionally, several states have introduced legislation to combat other unique issues posed by social media, such as privacy concerns and cyberbullying. In some of the student online speech cases, state laws strongly impacted the court's analysis of the issues.

As previously examined, private colleges are not required to adhere to the legal standards mandated by the First Amendment in regard to student speech (Kaplin & Lee, 2013). Some states, however, have enacted laws requiring private institutions to afford their students First Amendment protections. For example, California's "Leonard Law" states that "no private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that . . . is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the

California Constitution" (California Education Code §94367, 1992). Therefore, most higher education institutions within the state of California must respect students' First Amendment right to free speech (the law does contain a provision, however, exempting religious institutions from this requirement). This law was originally enacted in 1992, long before the dawn of the social media age. It is unlikely, therefore, that California lawmakers considered online communication in its construction. Nevertheless, because online speech is protected by the First Amendment, school administrators must now consider how the Leonard Law may apply to internet expression.

Application of the Leonard Law played a key role in *Antebi v. Occidental College* (2006), where the court ruled that the plaintiff could not bring a claim against a school under the Leonard Law for punishing him for sending spam emails since he had already graduated from the institution. State law was also cited in *Rollins v. Cardinal Stritch* (2001), in which a student was disciplined for sending unwanted emails to his cohort group. Though Cardinal Stritch was a private university, state common law imposed a duty on private institutions to afford their students due process protections.

In some states, statutes have been construed to give institutions of higher education authority to regulate off-campus conduct, including student online speech. The court in *Zimmerman v. Board of Trustees of Ball State University* (2013), for example, rejected the student's argument that the university could not permissibly regulate off-campus conduct. Zimmerman was punished for using Facebook to perpetrate a prank against a former roommate. The court determined that an Indiana statute gave institutions of higher education the power to regulate behavior that was unlawful or unreasonable and presented a serious threat to person or property of the academic community. Here, the

court found, attempting to induce Target to engage in a relationship with a minor was illegal. It also threatened Target, a student at the university. Though the statute itself did not explicitly state that it applied to off-campus behavior or that it applied to internet speech, the court's interpretation of the statute protected the school's decision to sanction Zimmerman. Similarly, the court in *Doe v. Ohio State University* (2016), in which a student was punished for disseminating private information about his ex-girlfriend online, found that an Ohio statute gave the university the power to regulate off-campus behavior that was related to activity in which a police report was filed. Two police reports had been filed in relation to Doe's online speech; consequently, the institution had jurisdiction to sanction him. Again, though this statute made no explicit mention of online speech, the court's interpretation supported its application to the student's online postings. In cases such as *Zimmerman* and *Doe* where a state law clearly grants institution's authority to regulate speech taking place in off-campus settings, it seems that the courts are much more willing to defer to the institution. Rather than engaging in a deep discussion about the merits of allowing a college to regulate the off-campus behavior of its students, the courts simply consider whether or not the behavior at issue falls within the ambit of the statute.

Federal Statutes

Title IX. Federal statutes may also impact student online speech cases. Consider, for example, the *Yeasin* case. *Yeasin* underscores how difficult it is for administrators to make conduct decisions in these murky legal technological environments. The school's administrators argued that they had to take action against Yeasin in order to comply with the terms of Title IX. Yeasin's tweets toward his ex-girlfriend could be construed as

discrimination on the basis of sex. Thus, the institution feared that failure to punish Yeasin for his tweets could violate Title IX and result in loss of federal funding.

The court admitted this argument had some merit and looked to the language of the "Dear Colleague" letter of 2011 from the U.S. Department of Education that provides administrators with guidance related to Title IX. The letter reads, in part:

> Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator's friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment.

This portion, according to the court, illustrated the U.S. Department of Education's intent that the school control only those behaviors that took place on the physical campus. Thus, the court determined that it was not necessary for the school to regulate off-campus, online behavior in order to comply with Title IX.

Higher Education Act. Another federal statute that relates to student online speech is the Higher Education Act. In *Key v. Robertson* (2009), the plaintiff attempted to use the Higher Education Act to hold a private institution legally accountable for impermissibly curtailing speech. One portion of the Higher Education Act provides that schools receiving federal funding, including private institutions, should not punish students for speech that would be considered protected under the First Amendment (20

U.S.C. § 1011a). Consequently, punishing a student for constitutionally protected online speech would violate the Act.

Instead of weighing the merits of the student's claim that his speech would have, in fact, been protected by the First Amendment, the court noted that the Higher Education Act does not provide for a private right of action. Private citizens, like Key, cannot bring lawsuits against institutions for failing to comply with the Act. Noticeably absent from the *Key* decision was discussion of whether this portion of the Higher Education Act could actually be used to bring action against schools at all. The beginning of the section reads "It is the sense of Congress that no student attending an institution of higher education…" This language gives rise to the inference that the provision is merely suggestive, rather than a binding mandate. Clearly, this portion of the Higher Education Act indicates that members of Congress recognize the importance of freedom of speech for students and encourage institutions of higher education to support those freedoms. It has not been interpreted, however, to provide the Department of Education with enforcement authority related to protecting college students' speech[11]

As evidenced by analysis of the above cases, both state and federal laws can affect student online speech cases. In some instances, state statutes grant schools more power to regulate behavior. In others, they can restrict disciplinary powers. They may also create real or perceived obligations for schools that may conflict with established student speech law. Finally, state and federal laws that do not explicitly consider the

[11] Critics of the Higher Education Act have argued that student free speech protections should be strengthened in its next iteration (Leef, 2017). The National Association of Scholars, for example, advocates requiring institutions to submit an annual report outlining the measures they have taken to uphold First Amendment rights.

unique case of student online speech can nonetheless be applied to that context, creating the necessity for administrators to evaluate all laws for possible applicability to online speech.

Policy Construction and Adherence

Many of the student online speech opinions focused heavily on the academic and disciplinary policies used to sanction students. The specific language (or lack thereof) used in institutional policies related to conduct or academics was of particular importance in deciding whether schools were justified in their actions. A lack of precision in policy language, as shown in several cases, can create legal challenges based on concerns about appropriate notice of standards to students, vagueness in defining when speech or expressive activity could subject a student to a conduct or academic sanction, or the crafting of policies that could encroach on legally protected speech (i.e. overbreadth). As explained in Chapter 4, when policy language is too vague, confusion may exist as to what types of behavior or speech are actually prohibited. An overbroad policy may have a chilling effect on student speech by including legally protected speech within its purview. Both vagueness and overbreadth raise concerns about fairness. Students cannot be expected to refrain from engaging in behaviors they did not know were forbidden, and they should not have to comply with standards that prohibit speech that should be protected.

In the interest of protecting speakers from unfair policies, courts have interpreted the First Amendment of the Constitution to prohibit vague and/or overbroad regulations. Vague policies can cause discriminatory and/or arbitrary enforcement by failing to establish minimal guidelines governing enforcement (*Osei v. Temple University of*

Commonwealth System of Higher Education, 2011). Moreover, a vague policy may leave questions as to which behaviors are actually prohibited, therefore violating an individual's Fourteenth Amendment right to due process (*Yoder v. University of Louisville,* 2013). Overbroad policies may burden more speech than they need to in order to serve the purpose for which they were created, thereby infringing upon First Amendment rights (*Yoder v. University of Louisville,* 2013). In the context of higher education, where unfettered expression is crucial to the pursuit of knowledge, these legal protections arguably have increased importance. The student online speech cases highlight that, in determining an institution's power to regulate student online speech, many courts were influenced by policy specificity to provide appropriate notice of standards to students and to not encroach upon legally protected speech and expression. However, inconsistency existed among courts in some instances in determining when policies that implicated student online speech provided enough specificity to satisfy these legal considerations.

Notice of expected behavior can be provided to students through clear, specific policy language. In *Rollins*, the court found that the institution's actions in sanctioning the student were appropriate. Its reasoning on this matter is instructive in relation to the issue of policy specificity. The institution's policies clearly explained prohibited behaviors in class settings, including email communications. Moreover, the students received adequate notice of relevant policies through publication in the student handbook. For these reasons, the court supported the school's actions. Had the school failed to establish clear policies governing student behavior or neglected to provide adequate

notice, including applicability of rules to online contexts, it is possible that the court could have found the institution's disciplinary policies deficient.

In *Yeasin v. University of Kansas* (2015), in which a student was punished for a series of tweets directed at his ex-girlfriend, an appellate court decided against the university because of imprecision in relevant policy language. The court's analysis focused sharply on the language in the institution's code of conduct. A provision in the conduct code provided that the school's authority over student conduct encompassed behavior occurring on campus or at university sponsored off-campus events. Relevant policy included no reference to the institutional authority extending to student behavior taking place off campus and outside of the ambit of a university-sponsored event. Because of this state of affairs, the court sided with Yeasin in holding that he could not be sanctioned under the school's code of conduct, as it did not apply to the off-campus behavior of sending tweets for which he was sanctioned. If the institution had specified that university authority over student conduct extended to this type of off-campus behavior, a stronger legal basis would have existed to subject the student to discipline under the conduct code. Absent such language, however, the court determined that the university failed to provide the student sufficient notice regarding unacceptable conduct, including, in this instance, that off-campus but also online in nature.

The sufficiency of notice issue in *Yeasin* proved determinative to the court, despite the institution's arguments that its legal compliance responsibilities under Title IX required it to regulate the conduct in question. According to the court, despite such considerations, if the school interpreted a need to discipline students for off-campus, non-university sanctioned events to comply with Title IX, it bore the responsibility to provide

sufficient notice to students regarding the reach of institutional authority in student conduct matters.

Similar to what transpired in *Yeasin,* the trial court in *Yoder v. University of Louisville* (2009) initially determined that the university's policies did not adequately put students on notice of what was unacceptable behavior in relation to commentary on social media. The university dismissed Yoder from a nursing program for posting comments on her MySpace page about an obstetrics patient whose birth she had observed. While the case went through several court iterations in which Yoder eventually lost, the initial trial court opinion issued in the case found in her favor. Not unlike *Yeasin,* the court determined that the policies relied upon by the university to sanction Yoder provided insufficient notice. Specifically, the confidentiality provisions of the Honor Code and the Confidentiality Agreement that the student was required to sign did not clearly define "confidentiality" or "identifying information." Thus, the court concluded, it was unfair to expect Yoder to know that her blog post represented a breach of confidentiality and a violation of applicable professionalism standards. Absent a definition of "identifying information," the court also found it unreasonable to expect Yoder to discern that the information about the patient and her family that Yoder posted on MySpace qualified as revealing identifying information. As discussed by the court, Yoder did not include the patient's name, phone number, or social security number in her posting. As such, the court decided that the nursing school's policies failed to provide adequate notice to Yoder that her social media posting would violate nursing program standards and subject her to dismissal from the program.

At least partially indicative of the evolving nature of judicial responses to student online speech, subsequent opinions in the *Yoder* case revealed a substantially different approach to the needed policy specificity for a policy to pass legal muster. After a federal appeals court ordered the case should be reconsidered by the lower court, this time a federal district court held in favor of the university. That is, the court, upon rehearing, decided that Yoder received sufficient notice regarding the impermissibility of sharing the information in question on her MySpace page. In making this determination, the court found a consent form signed by Yoder and the patient significant. According to the court, language contained in the consent form prohibited Yoder from disseminating any information about the patient, not just identifying information. The court concluded, therefore, that the school acted within its permissible authority in determining that Yoder's blog post violated the consent form. Though the outcome is different, the trial court's reasoning is not entirely inconsistent with its first opinion, as the court followed its own precedent of closely examining the policies' terms. It is not clear why the consent form was not initially considered by the trial court, but once it was thoroughly examined, the court determined that its wording was sufficiently clear to justify Yoder's punishment. The school had, in fact, given Yoder adequate notice that her behavior was not allowed.

In *Byrnes v. Johnson County Community College* (2011), policy language also played a major role in the court's decision that the college was not justified in punishing a student for posting a picture on Facebook that she had taken with a human placenta in one of her nursing school clinicals. None of the school's policies contained language that prohibited taking pictures in the classroom and sharing them with others, either in person

or on social media sites. Punishment of the student for this conduct, therefore, was based solely on the fact that her behavior violated the unpublished standards teachers and administrators thought students should adhere to in their social media activity. Holding students accountable to unwritten standards, the court found, was unfair. The court did not dispute that valid arguments existed to prohibit students from posting photographs online of bodily organs used in class assignments. However, stated the court, the college could easily have written rules prohibiting this type of conduct to provide sufficient notice to students of the impressibility of such online sharing. Without such language in applicable handbooks and syllabi, the court concluded that the institution lacked the appropriate authority to punish Byrnes for posting the photograph online.

Another issue related to specificity revealed in the opinions involved how easily, at least from the point of view of the court, an average person could discern the permissibility of the online speech. That is, the more obvious it was to the court that the speech in question could be expected to be prohibited, the greater leniency it provided to the institution in enforcing the policy. For example, in *Osei v. Temple University of Commonwealth System of Higher Education* (2011), the court did not engage in any type of intricate analysis related to whether a university could discipline a student for sending threatening emails to a professor. The court concluded that a person of ordinary intelligence could easily discern that making clearly identifiable threats, even online as opposed to in person, constituted a violation of student conduct standards.

In some contexts, however, greater levels of policy specificity were required for the policy to withstand judicial scrutiny related to whether it provided adequate notice of expected conduct. When the policy was related to upholding standards of professionalism

in online speech, as in *Yoder,* for example, both the trial and appellate courts engaged in close examinations of policy language to determine whether the student should know her speech would be prohibited. Behaviors that are prohibited by professionalism standards, such as discussing a person's medical conditions, might otherwise be considered socially acceptable. It is not necessarily objectively obvious, therefore, that the speech is inappropriate. In such instances, policy language must be clear to satisfy the requirement of providing fair notice.

Additionally, the *Osei* court only engaged in a cursory discussion of Osei's vagueness claim. It seemed to suggest that institutions of higher education should be given leniency in regard to the specificity of their policies. The court likened the disciplinary process at schools to criminal prosecution. It went on to explain, however, that school regulations do not have to pass the same rigorous standards for specificity as criminal statutes. This proposition seems to be well-settled, as the court cited supporting opinions from the Third, Fourth, and Seventh circuits (*Sill v. Pennsylvania State University,* 1972; *Soglin v. Kauffman,* 1969; *Sword v. Fox,* 1971). School regulations, the court asserted, will only be struck down when the vagueness is "especially problematic." Ironically, the court did not clarify what would be considered especially problematic.

It is also commonly argued that school policies related to student speech are overbroad. In order for a policy to withstand a claim of overbreadth, it must be shown that the policy does not burden any more speech than necessary to achieve an important or substantial governmental interest. In *Yoder,* the only speech prohibited by the policy at issue, the court found, was the sharing of information about patients involved in students' clinical coursework. Thus, it did not burden any more speech than necessary. Had the

policy prohibited, for example, all discussion of pregnancy and birth, it likely would have been struck down by the court as overbroad. In considering Osei's claim of overbreadth, the *Osei* court, again, neglected to discuss Temple University's policies in depth. It simply reiterated that school regulations do not have to satisfy the same standards as criminal statutes.

In sum, the student online speech opinions reveal important lessons about policy construction. Chief among these is the proposition that policies must be sufficiently specific to provide students with notice of prohibited behaviors. If a college wishes to exercise authority over behavior within a specific context, it must explicitly give itself that authority within its policies. Moreover, when it is objectively obvious that a behavior would violate a code of conduct, less specificity is required in the policy governing that behavior. Finally, there is evidence that at least some courts have declined to require college policies to exhibit high levels of specificity.

Consistent Adherence to Policies

The cases reviewed also revealed that as an important addendum to clarity in standards, institutions need to demonstrate consistency in the enforcement of standards as applied to instances involving student online speech. Thus, even if a standard is clear, the institution's actions are legally vulnerable if it is not consistently enforced. This principle is perhaps best illustrated in *DiPerna v. the Chicago School of Professional Psychology* (2016). In this case, a school disciplined one student for an Instagram post containing a racial slur but not another student who posted the same slur. This discrepancy in treatment jeopardized the institution's chances of succeeding on a summary judgment motion. The school's policies explicitly prohibited social media postings that used ethnic

slurs, but the institution failed to apply the rule consistently to all students. As a result, the court found that there was a genuine issue of material fact as to whether or not the school acted in an arbitrary and capricious manner in punishing DiPerna.

The opinions discussed in this section provide several valuable insights about policy construction. First, a school must clearly give students notice of which behaviors are prohibited. This includes defining terms used in the policies when necessary. Specificity and clarity in policy language can help a policy to avoid claims of vagueness or overbreadth. Next, a court will not add language to a policy that is not already there. Thus, schools must explicitly state which conduct they wish to regulate in the policy. Finally, a school should follow its established policies and apply them consistently to all students. Failure to satisfy any of the above outlined conditions can raise serious questions about fairness and, therefore, expose the school to legal challenges. Moreover, simply because speech takes place online does not mean that institutions do not have to satisfy the same standards of fairness that would be expected in relation to on-campus speech.

Student Academic Freedom

As outlined above, courts continue to struggle to determine which standards should apply in relation to college student speech. An argument can be made that the answer to this question can be found in examination of the concept of student academic freedom. This concept was developed in the higher education context, as the mission of higher education is distinct from that of elementary and secondary education (Moshman, 2009). While elementary and secondary students are provided with knowledge by their

teachers, college students are encouraged to seek out and create knowledge on their own. To do so requires a certain degree of academic freedom.

The concept of academic freedom is not explicitly invoked in most of the student online speech cases. However, insofar as student academic freedom involves the free expression rights of students in the classroom and academic settings as well as their free expression rights generally, student academic freedom is, in fact, considered in several of the opinions. Comparing student academic freedom discourse to the student online speech cases reveals that the courts show a clear appreciation of student academic freedom.

The Joint Statement on Rights and Freedoms of Students ("Joint Statement") was formulated by representatives from the American Association of University Professors, the United States National Student Association (now the United States Student Association), the Association of American Colleges (now the Association of American Colleges and Universities), the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors (Lee Howe, 1968). This document explains the importance of student academic freedom and outlines the minimal standards that must be met in order to respect that freedom. As discussed in the literature review, the Joint Statement spells out students' academic freedoms in the classroom, off campus, in disciplinary hearings, in student affairs, and in student records (Lee Howe, 1968). The cornerstones of student academic freedom are students' rights to freedom of expression, freedom of inquiry, and freedom of association. Comparison of the Joint Statement with the student online speech opinions reveals several points of similarity.

According to the Joint Statement, academic freedom is essential to the vitality of any community of scholars (Lee Howe, 1968). In the classroom, this means that students should be free to express disagreement and share their thoughts. In the larger academic community, students should be permitted to join organizations that align with their personal interests and discuss all questions of interest to them. Expression of opinions should be encouraged and supported. Off campus, students should enjoy the same rights of free expression that other citizens enjoy. Moreover, institutions should not interfere with "such intellectual and personal development as is often promoted by their exercise of the rights of citizenship both on and off campus" (Lee Howe, 1968). In each of the online student speech cases, even though they may have found against the student, the courts exhibited an appreciation of the importance of free expression. For example, in *Murakowski v. University of Delaware* (2008), where a student was disciplined for postings on his website, the court referred to freedom of speech as a "cherished right." In *O'Brien v. Welty* (2016), the court explained that expressing one's opinion (in this case, a student's opposition to the school on his personal website) is an important constitutional right that should not be chilled. It is evident, therefore, that though the opinions examined herein may place some limits on the expression of speech in certain contexts, the courts clearly support notions of student academic freedom overall.

Perhaps one of the strongest points of consistency between the student online speech cases and the Joint Statement is the respect afforded to procedural fairness. The Joint Statement affirms that procedural fairness is an essential element of academic freedom (Lee Howe, 1968). In disciplining students, this involves developing clear standards, giving students notice of disciplinary rules, applying standards uniformly to all

students, and providing students with notice of the charges against them and an opportunity to be heard.

Indeed, as evidenced by the above analysis of the student online speech opinions, courts seem to agree that all of these elements are essential to providing a student with procedural fairness, even in relation to speech that occurs online. The courts in *Barnes, Rollins, Murakowski,* and *Osei* affirmed the importance of providing students with notice of the charges against them and an opportunity to be heard. In *Byrnes* and the first trial court opinion in *Yoder,* the courts found that an institution must give students notice of the rules they are expected to follow. Though the policies at issue in *Yoder* (2013) and *Osei* ultimately withstood judicial scrutiny, the courts agreed with the plaintiffs' assertions that standards governing online speech must be clear. By finding that a reasonable jury could conclude that the school acted in an arbitrary and capricious manner in disciplining the plaintiff for her Instagram post, the *DiPerna* court indicated that it is necessary for schools to apply their rules uniformly.

Though free expression is of the utmost importance for student academic freedom, the Joint Statement acknowledges that limitations should be placed on this freedom in certain situations. It specifically addresses potential conflicts between the academic freedoms of two students or multiple students. Students should be free from harassment and exploitation in order to enhance their learning opportunities. Thus, when one student chooses to use his academic freedom to harass or exploit others, the institution can permissibly curtail that student's expression. The court in *Murakowski,* echoed this sentiment, stating:

> A university differs from public forums, such as, theaters, auditoriums, streets or parks. Since a university's mission is education, it has the right to impose reasonable regulations consistent with its mission upon the use of its campus and facilities. Thus, a university has the right to exclude First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity for other students to obtain an education.

In other words, at times, it may be necessary for the institution to intervene and limit the academic freedom of an individual student in order to protect the academic freedom of other students.

The *Harrell v. Southern Oregon University* (2009) case, in which a student was disciplined for his statements in an online class setting, provides another example of an instance in which the opinion of the court in relation to student academic freedom aligns perfectly with the Joint Statement. The court implied that there are limits to student academic freedom. Certainly, students are free to express opinions and unpopular views. However, the court asserted that they must do so in a mature manner. "A classroom is not a public forum where each student has an absolute constitutional right to say whatever he pleases, when he pleases, however he pleases, for as long and as often as he pleases." Thus, it was not *that* Harrell chose to express himself that was objectionable, it was *how* he chose to do so. The fact that this classroom was in the virtual realm rather than the physical did not change the court's assessment. The Joint Statement, like the *Harrell* court, explains that students must exercise their academic freedom responsibly (Lee Howe, 1968).

The court in *Feine v. Parkland College Board of Trustees* (2010) also discusses the limits of student academic freedom in relation to a school's decision to sanction a student for inappropriate comments in an online learning environment. While it seemed to agree that students do have academic freedom to express themselves and their opinions in the classroom setting, the court also acknowledged that some restrictions may be necessary in order to enhance academic freedom overall. In this particular case, for example, one of Feine's professors explained that "if we only tear each other down and don't offer other ideas and evidence, we cannot progress and learn from each other." Certainly, the very purpose of student academic freedom is to enhance learning (Lee Howe, 1968), not to hinder it. Thus, regulating student classroom speech that so negatively impacts the learning environment comports with accepted notions of student academic freedom.

Notably, the speech at issue in *Harrell* and *Feine* may have been received differently if it occurred in the physical classroom rather than online. It is difficult, for example, to discern tone or detect humor in written speech. Consequently, comments that offended students in an online classroom may not have had quite as negative an impact on the educational environment in the physical classroom. This reveals that evaluation of whether a student is using his or her academic freedom responsibly can be seriously impacted by the on-campus/off-campus distinction.

Additionally, when student academic freedom and faculty or institutional academic freedom come into conflict, student academic freedom is subordinate. For example, while students should be permitted to freely express opinions in an academic setting, according to the Joint Statement, this does not give them permission to violate

academic policies (Lee Howe, 1968). In *Keefe v. Adams* (2016), in which a nursing student was punished for his Facebook posts, the plaintiff argued that, because his posts were not related to his course of study, censoring them violated his right to free speech. Certainly, if true, this would also violate his right to student academic freedom, as "students…should be free to examine and discuss all questions of interest to them and to express opinions publicly and privately" (Lee Howe,1968). However, the court found that Keefe's speech did, in fact, relate to the nursing program. Moreover, student academic freedom as explained in the Joint Statement does not exempt students from maintaining the academic standards established for the courses in which they are enrolled (Lee Howe, 1968). In this case, the school had incorporated professionalism standards into its curriculum. Thus, the court ultimately respected the institution's academic freedom and supported its decision.

One potentially controversial argument related to academic freedom that was advanced in the online speech cases is that giving up constitutional freedoms can actually enhance a students' right to learn. For example, in *Yoder*, the district court intimated that waiving the right to say and do certain things afforded the plaintiff the opportunity to observe something she would not have been able to otherwise. Observing pregnancy related health care was beneficial to her education as a nurse. Similarly, in *Tatro v. University of Minnesota* (2012), a case involving the punishment of a mortuary science student for her Facebook posts, the school asserted that students who voluntarily enter programs that condition participation on the students' agreement to abide by certain rules and regulations cannot later assert that they have a constitutional right to engage in conduct prohibited by those policies. In the context of a mortuary science program,

requiring a student to treat cadavers with respect helps to ensure that the program will continue to attract cadaver donors. The cadavers serve as an important learning tool; therefore, giving up the right to post about them on Facebook ultimately benefits the student. This viewpoint is not inconsistent with the Joint Statement, which explains that "the freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community" (Lee Howe, 1968). If waiving certain rights helps to create the proper conditions for learning, it fosters and supports student academic freedom. It is, however, inconsistent with notions of fairness typically relied upon by the courts in interpreting student rights. As examined earlier, the Supreme Court ruled that it was impermissible to condition admission into a college program on the waiver of constitutional rights.

A second argument emerging from the data that indirectly implicates student academic freedom concerns is that a school cannot impose broad rules that would prohibit students from criticizing faculty members or posting other offensive statements that are unrelated to the field of study. This argument was advanced by the plaintiff in *Tatro.* The court agreed that such broad rules would "allow a public university to regulate a student's personal expression at any time, at any place, for any claimed curriculum-based reason." In this case, however, the court focused on the school's right to academic freedom, explaining that, though academic freedom does not immunize a university from First Amendment challenges, courts tend to defer to the expertise of the school's faculty and officials in defining academic standards.

At times, courts may send conflicting messages related to student academic freedom. This was true in the *Snyder v. Millersville University* (2006) decision, one of the

only student online speech cases in which student academic freedom was directly discussed. Snyder was removed from her student teaching assignment and precluding from earning an education degree because of her Myspace postings. In a sense, the *Snyder* court showed that it recognized the importance of student academic freedom, noting that other courts have consistently conferred First Amendment protection on student speech to promote academic freedom. This protection should only be revoked, the court explained, if "school officials can make out a specific and significant fear that the challenged speech would substantially disrupt or interfere with the work of the school or the rights of other students." Nevertheless, student academic freedom did not ultimately factor into the court's decision in *Snyder*, as it was determined that Snyder was an employee and not a student for the purposes of her First Amendment claim.

A potentially compelling argument also exists that the *Snyder* court disrespected student academic freedom by choosing to classify Snyder as a public employee rather than a student. The Joint Statement asserts that students should be given the same free speech rights as other citizens off campus (Lee Howe, 1968). Moreover, the purpose of student academic freedom is to aid students in developing intellectually and personally. Arguably, Snyder had not yet transitioned from a student to a non-student. She had not yet earned her degree, and had embarked on the student teaching process in order to gain practice as a teacher while still receiving instruction and supervision from her school in relation to that assignment. As the *Oyama v. University of Hawaii* (2015) court recognized, students should have more freedom to "test…ideas, critique professional conventions, and develop into…more mature professional[s]" than government

employees. Classifying Snyder as a public employee, it could be contended, prematurely stripped her of this freedom.

In sum, the data from this study reveal that in the context of student online speech, courts respect student academic freedom and their discussions involving the topic are largely consistent with the principles outlined in the Joint Statement. While the courts' reasons for providing students with certain freedoms may differ from those of the authors of the Joint Statement, it is clear that both generally agree that these freedoms are essential to the success of the higher education enterprise.

Appropriate Standards for the Higher Ed Context

A dominant theme identified from the student online speech cases deals with conflict and inconsistency among courts regarding the specific legal rules to apply in online speech cases, especially those involving some kind of instructional or professionalism dimension. In some instances, courts turned to public employee speech standards when adjudicating student online speech claims. In others, standards derived from elementary and secondary education cases (*Hazelwood* and *Tinker*) provided the determinative legal framework. As the following analysis will reveal, it is not certain that application of either set of standards is appropriate in the higher education context.

Application of the *Tinker* and *Hazelwood* Standards

One conclusion that can be drawn from analysis of the online speech cases examined here is that application of the *Tinker* and *Hazelwood* standards in college student speech cases is not always predictable. In the *Murakowski* case, the court applied the *Tinker* standard (independent student speech can be regulated if it involves a material or substantial disruption of classwork) and concluded that the website postings at issue

did not meet the standard for permissibly regulating speech. Students' complaints that Murakowski's posts caused them to live in fear and anxiety, the court determined, did not rise to the level of a substantial disruption. Neither did the fact that one student sought counseling as a result of Murakowski's posts and changed her class schedule to avoid him. Notably, the court did not preclude schools from interfering with student online speech—it simply felt that the facts of this particular case did not warrant such interference.

What remains unclear is exactly what constitutes a substantial disruption in the higher education setting—particularly in relation to online speech. By sticking closely to the facts of the case, the *Murakowski* court did little to clear up the uncertainty related to the substantial disruption standard articulated in *Tinker* as it is applied in the college context. Furthermore, the decision also highlights the propensity for subjectivity that exists in legal decision making. Speech that this court found to be merely be uncomfortable may be deemed disruptive by another.

In the elementary and secondary school context, wearing black armbands to school, the Supreme Court decided, did not cause substantial disruption (*Tinker*). A Myspace page making fun of a middle school principal, the U.S. Court of Appeals for the Third Circuit held, was (or had the potential to be) a substantial disruption (*J.S. ex rel. Snyder v. Blue Mountain Sch. Dist*., 2011). Similarly, the U.S. Court of Appeals for the Second Circuit felt that a high school student's blog post referring to school administrators as "douchebags" and encouraging her peers to call them and "piss them off some more" was substantially disruptive (*Doninger v. Niehoff,* 2008). In higher education, the Minnesota Court of Appeals felt that a student's Facebook posts about

cadavers she had worked with in her mortuary science program created a substantial disruption (*Tatro v. University of Minnesota,* 2011). These examples highlight the wide variation in application of the *Tinker* substantial disruption standard. While any application of legal standards should be fact specific, there is no guarantee that two different courts will look at the same set of facts the same way.

It seems that the facts of the *Yeasin* case may provide a good example of a substantial disruption occurring on campus as a result of online speech. W., Yeasin's ex-girlfriend, expressed that his tweets created continued distress for her and made her fear going to campus. This interfered with her academic performance and opportunity to benefit from the school's programs and activities. In this case, however, the *Tinker* standard was not considered. This is likely because Yeasin himself only raised contractual claims, and did not allege violation of his First Amendment rights. Had Yeasin raised a First Amendment claim, it is probable that court would find that the school was justified in punishing him for his non-curricular online speech because of the substantial disruption it caused on campus.

Of note in several of the cases examined here is the courts' failure to acknowledge the increasingly blurred distinction between on campus and off-campus conduct. The cyber world has no physical boundaries; thus, cyber speech can be readily accessed both on campus and off. Though, as explained above, the *Yeasin* court did not apply the *Tinker* substantial disruption standard, it did engage in some discussion of the differences between on-campus and off-campus speech. Because Yeasin tweeted from off campus, the court reasoned, the language of Title IX did not require the school to regulate his

speech, as Title IX only requires the regulation of off-campus behavior when it leads to the creation of a sexually hostile environment on campus.

It can be argued, however, that Yeasin's speech certainly affected the campus environment and made it sexually hostile for W., causing her to fear for her safety at school. The mere fact that a student happens to be standing outside the boundaries of the campus when posting a tweet, Facebook post, etc. does not change the fact that that speech can instantly reach and impact an audience on campus. In the context of student speech, then, does it make sense to differentiate between online content that was posted from on campus and online content that was posted from off campus, particularly when that speech affects the educational environment? This is a question with which the courts must grapple as more cases of this nature arise. Certainly, there has to be a line that schools cannot cross to regulate student speech. It is not quite as clear anymore, however, where this line should be drawn.

Application of the *Hazelwood* standard (school-sponsored speech can be limited if the restrictions are related to legitimate pedagogical goals) to college student online speech is also somewhat unpredictable. It seems that the *Keefe* court articulated a new, expanded interpretation of the *Hazelwood* standard. It asserted that the *Hazelwood* "legitimate pedagogical goals" standard has broader relevance to other contexts besides school-sponsored speech, thereby expanding its application to student speech that is not school-sponsored. In other words, the school may be able to punish a student for his speech even if it cannot be considered endorsed by, approved by, or representative of the school. "…Because compliance with the Nurses Association Code of Ethics is a legitimate part of the Associate Degree Nursing Program's curriculum," the court

reasoned, "speech reflecting non-compliance with that code that is related to academic activities 'materially disrupts' the Program's 'legitimate pedagogical concerns.'" In so deciding, the Court seems to articulate a new legal standard—so long as speech is *related* to academic activities, even if it is not school-sponsored, the school can permissibly regulate that speech if it raises legitimate pedagogical concerns. Though the court may have reached the same conclusion applying different speech standards, it is not clear that reliance on *Hazelwood*—or the court's expanded application of the *Hazelwood* standard--was appropriate in this instance.

One might also conclude that it does not take much for speech to be classified as curricular in nature. Generally, as will be discussed later in this chapter, courts give institutions more leeway in regulating speech that is academic. In *Keefe,* the speech at issue involved a Facebook argument with a classmate and a complaint about group projects. The court also concluded that his statement "I'm going to…give someone a hemopneumothorax" was related to his medical studies.

The connection between Keefe's speech and the school is, arguably, tenuous at best. Keefe insisted that, since the speech was made off campus and was not academic, *Hazelwood* should not apply. He asserted that he could not be punished for his speech unless it fell into a class of expression unprotected by the First Amendment, such as obscenity. Indeed, courts faced with similar sets of facts declined to apply the *Hazelwood* standard. This was true in *Tatro* (2012), where the Minnesota Supreme Court explained that the fact that Tatro's speech related to her mortuary science studies was not enough to establish that it bore the imprimatur of the university. Thus, application of *Hazelwood,* the *Tatro* court decided, was inappropriate.

Tatro's Facebook posts—in which she spoke directly about a cadaver she had used in class—were arguably much more closely linked to her academic studies than Keefe's. Nevertheless, the *Keefe* court chose to apply *Hazelwood,* while the *Tatro* court did not. Classifying Keefe's speech as academic in nature gave the court more flexibility in choosing which standards to apply in relation to his First Amendment claim, and ultimately afforded the school more power in regulating that speech.

Classifying Students as Employees

The *Snyder v. Millersville University* (2006) case underscores the point that which speech standards are applied in student online speech cases is inconsistent. In some cases, the *Tinker* standard is applied—a standard first developed for children in the elementary and secondary contexts. In these cases, college students are essentially treated as children. In this particular case, an entirely different standard was applied and the court determined the student to be an employee because her speech involved her student teaching placement. She was, therefore, treated as an adult and her speech enjoyed no protection. The court gave little consideration to the unique nature of pre-professional internships and placement programs. As the court in the aforementioned *Oyama* decision explained, the purpose of the employee speech doctrine is to allow the government to limit speech that could affect the efficiency of its operations. College students should have more freedom to "test…ideas, critique professional conventions, and develop into…more mature professional[s]" than government employees. By applying public employee speech doctrine to Snyder, the court held her to a higher standard of maturity than, debatably, a student should be held.

Debate over Proper Application of Standards

Comparing the *Oyama* court's reasoning to that of the *Snyder* court reveals that potentially persuasive arguments exist regarding the inappropriateness of applying public employee speech doctrine to college students. It is also unclear, however, that students should be governed by the same speech standards as children—those articulated in *Tinker* and *Hazelwood*. Some courts seem to feel that the differences between the elementary and secondary context and the higher education context matter little in choosing which legal principles should govern student speech. A notable aspect of the *Harrell* decision is that the plaintiff argued that the magistrate judge erred by applying standards applicable to "minor schoolchildren, rather than adults in a university setting." This argument stemmed from the magistrate judge's application of the *Tinker* and *Hazelwood* standards in ruling that the university's punishment of Harrell for his speech in the online classroom was permissible. The district court rejected this contention, stating "The need to maintain order in the classroom does not cease at puberty."

In *Keefe,* the majority suggests that it may make even more sense to regulate college student speech than it does to regulate that of elementary and high school students. "A college or university may have an even stronger interest in the content of its curriculum and imposing academic discipline than did the high school at issue in *Hazelwood.*" Though not dispositive in this case and contrary to generally accepted discourse on the regulation of speech on college campuses, this assertion reveals the way in which at least some judges are thinking about college student speech.

Conversely, some judges assert that the *Hazelwood* and *Tinker* standards have no place whatsoever in higher education. In her separate opinion in the *Keefe* case, Judge

Jane Kelly articulated concerns about the application of elementary and secondary education standards in the higher education context. She explained that colleges are traditionally places of virtually unlimited expression, and therefore, restrictions that may be permissible in the elementary and secondary school contexts are simply not permissible in higher education. In its discussion of the university's right to regulate student speech, the *Murakowski* court similarly alluded to the differences between colleges and elementary and secondary schools. It cited *DeJohn v. Temple University* (2008), in which the court explained that certain conversations may not be prohibited among college students that can be prohibited among high school and elementary students, as college students are adults. The court explained that teachers and administrators in the secondary and elementary school contexts are acting *in loco parentis*, or "in the place of parents," and have a duty to protect students from offensive forms of expression. This same duty does not exist in the college context, where students are legally considered adults.

The disparity in opinions within the *Keefe* court and the differences in the application of legal precedent between other courts in the cases examined above exemplify the struggle courts face in choosing which legal standards should govern student speech in higher education. Indeed, neither the decision to apply the *Tinker* and *Hazelwood* standards nor the decision not to is legally improper. Because the Supreme Court has yet to rule on whether or not elementary and secondary school standards apply or articulate new standards for speech in the university context, there is no binding precedent as to which standards should be used. Thus, these struggles are likely to continue. From an academic standpoint, a potentially compelling argument exists that

neither set of standards is appropriate given the unique characteristics of the college environment and the goals of higher education. Though some courts have acknowledged this point, none has yet articulated new student online speech standards that take these concerns into account.

Additionally, as new cases arise, courts may be forced to give more consideration to the unique characteristics of online speech. As evidenced by *Yeasin*, even off-campus speech can have serious on-campus consequences when it is delivered virtually. Thus, to the extent that the on-campus effects of speech matter in relation to institutional authority to impose regulations, courts may have to consider that the on/off-campus dichotomy, at least as it relates to online speech, has become a false one.

The Impact of Online Speech Context

Perhaps the most salient conclusion to be drawn from the analysis of student online speech cases is that the context in which speech occurs can be the most important factor in a court's determination about authority of the institution to regulate that speech. A school's power to regulate student online speech varies greatly depending on whether or not it occurs in an online "classroom" setting, is related to academics or the classroom setting, or occurs in a non-classroom setting. These issues are examined below.

Speech in the Online Classroom

At the two ends of the spectrum, there are online classroom speech and non-academic speech in a non-classroom setting. From the online classroom speech cases, one conclusion emerges: it is quite clear that schools have significant power to limit speech in the online classroom setting in the interest of maintaining an environment conducive to learning. In *Harrell,* for example, the court upheld the school's decision to sanction the

student for his speech in online course message boards. It accepted the school's contention that Harrell's speech constituted a violation of the institution's conduct standards, which prohibited obstructing, disrupting, or interfering with educational activities. It can be argued that Harrell's speech was not sufficiently disruptive to warrant interference with his First Amendment rights. At the very worst, his comments were insulting. Outside of the classroom context, this speech certainly would have been protected. However, the court gave a high level of deference to the school in deciding what actions were necessary to maintain order and decorum in the online learning environment.

Similarly, the speech at issue in *Feine* seems sufficiently innocuous to avoid disciplinary action. Feine's emails to another student were characterized as "mean-spirited attacks" by the teacher. These remarks, however, lowered Feine's assignment grade from an A to a D. In supporting the teacher's actions, the court determined that they were related to legitimate pedagogical goals, and were therefore reasonable. Again, the court deferred to the judgment of the school.

Most interestingly, the *Feine* court affirmed that, despite the lack of physical boundaries, the online classroom space functions just like a traditional classroom space and is considered a non-public forum for the purposes of student speech. It cited Supreme Court and federal court cases that held that restrictions on speech in a non-public forum are permissible, so long as they are content-neutral and reasonable. Thus, though the online classroom environment may be unique in many respects, it is not so unique that it requires application of different standards in relation to student speech.

Online Speech Related to Academics Outside of the Online Classroom

In the middle of the spectrum of student online speech are cases where student speech is academic or related to academics but takes place outside of the online classroom setting. In this study, all of the cases within this category are related to school requirements that students uphold professionalism standards. One major difference between colleges and elementary and secondary schools is that colleges prepare students for the careers they will undertake upon graduating. Thus, as the online student speech cases reveal, many institutions and programs incorporate professionalism standards into their curricula. The issue of whether or not it is permissible to sanction students for violations of professionalism standards is unique to higher education speech cases. It is an issue that has not been decided by the Supreme Court, and therefore, courts considering cases involving professionalism standards must find a way to either apply existing student speech standards or articulate new standards altogether.

A general lesson to be gleaned from analysis of the student online speech cases related to professionalism standards is that courts generally defer to the discretion of the school in deciding what should be included in a curriculum. This deference is an acknowledgment on the part of the courts that educators are better equipped than judges to make decisions about what conditions are necessary to foster learning. In *Yoder* (2012), the court intimated that the purpose of the School of Nursing was to educate prospective nurses. Consequently, the court determined, the school was entitled to teach students to abstain from posting any information whatsoever about patients' healthcare, if it felt that this was the best practice. The court further explained that deference to colleges in making decisions about the curricula of healthcare programs is especially

necessary, as giving a student a degree from a healthcare program places the school's stamp of approval on that student's qualifications to work in the chosen profession. This sentiment was echoed by the court in *Keefe*. In *Tatro* (2012), the Minnesota Supreme Court similarly examined the appropriate level of deference given to university administrators. It found that, because judges do not have the same experience and expertise as school administrators, courts should provide "decent" respect to administrators' decisions related to pedagogical approaches. This was even true, the court determined, in the context of off-campus, online behavior.

The *Byrnes* court similarly noted that colleges and universities are typically given broad discretion in relation to their academic decisions. It rejected the school's argument, however, that Byrnes' dismissal was an academic decision and not a disciplinary one. Here, the plaintiff was punished for violation of a code of conduct and not for violation of a specific policy related to her academic program. The court found that this made her expulsion disciplinary in nature rather than academic. As such, the school's decision did not enjoy the same level of deference from the court.

Courts have recognized that there are several legitimate pedagogical reasons for wanting to hold students to particular professionalism standards. In *Yoder,* for example, the court reasoned that a student's public discussion of a patient's healthcare could imperil the school's ability to obtain willing patients for clinical instruction. The court in *Byrnes* similarly found that patient confidentiality was an important concern, as was the professionalism of healthcare providers. In *Tatro,* the court determined that respectful treatment of human cadavers was necessary for the school to maintain the trust of those

who donate their bodies to be studied. Failure to treat cadavers respectfully could also jeopardize other programs at the university that relied on human cadavers for research.

Though offering legitimate pedagogical reasons for establishing policies limiting student speech is a necessary condition for withstanding judicial scrutiny, it is not sufficient. In integrating professional standards into curricula, institutions must be sure that the limitations on speech are no broader than necessary in light of the legitimate pedagogical concerns of the school. In *Yoder,* for example, students were still permitted to speak about any topic except the care of specific patients they had worked with. Thus, the court decided that the regulations were not too broad. The *Tatro* (2012) court emphasized the importance of using narrowly tailored restrictions that are tied to specific professional standards. The rules of the mortuary science program requiring respectful treatment of human cadavers comported with a professional standard that prohibited morticians from treating the body of the deceased with anything other than dignity and respect. Additionally, the professionalism standards students are required to uphold cannot be vague. In *Byrnes*, the court found that the standards the students were held to were entirely unpublished and based on the defendant's sense of propriety. Thus, it was unfair to expect students to abide by them.

Another potentially significant conclusion to be gleaned from analysis of the professionalism cases is that when students voluntarily enroll in professional programs that require them to uphold professionalism standards, some courts may find that they no longer have a constitutional right to refuse to comply with those standards. Essentially, the student has waived his or her First Amendment rights in exchange for receiving the education necessary to work in a particular field. This argument was advanced by the

university in *Tatro.* Similarly, in *Yoder* (2013), the court found that it was not objectively unreasonable for school officials to assume that Yoder's signing of the policies constituted a waiver of her First Amendment rights. Notably, the court in *Tatro* did not directly address this argument. The *Yoder* court only found that it was not objectively unreasonable to think Yoder had waived her First Amendment rights, which allowed the school to prevail on the claim that it was due qualified immunity. Thus, it is not a given that courts will consider voluntary enrollment and signing of policies to be a waiver of First Amendment rights. Nevertheless, reasoning of this nature, if adopted by other courts, could have serious implications for student speech, both online and off.

The chilling effect of professionalism standards. While most courts seem to support the incorporation of professionalism standards into school curriculums, some judges suggest that such incorporation could threaten fundamental rights. In a separate opinion in the *Keefe* case, in which the judge concurred in part and dissented in part with the majority opinion, Judge Jane Kelly expressed concerns about the effects these standards could have on student speech. Because professionalism standards are often broadly written, she explained, they can be construed in ways that curtail even protected speech. A school official could, ostensibly, cite a broadly worded professionalism standard to censure speech with which he does not agree. Such an application of professionalism standards would be counter to higher education's mission to encourage the pursuit of truth, as it could silence certain viewpoints in favor of promoting others. Thus, Kelly opined, courts should engage in a case by case analysis of the specific professionalism standards at issue and their application.

In *Tatro,* the plaintiff made a similar argument. She asserted that a school cannot impose broad rules related to professionalism standards that would prohibit students from criticizing faculty members or posting other offensive statements that are unrelated to the field of study. The court agreed with Tatro that such broad rules would "allow a public university to regulate a student's personal expression at any time, at any place, for any claimed curriculum-based reason." Nevertheless, it chose to defer to the expertise of the school's faculty in defining academic standards. The incorporation of professionalism standards into the curriculum is permissible, the court held, so long as any restrictions on speech are narrowly tailored and directly related to established professional conduct standards.

Non-academic Online Speech Outside the Classroom

At the other end of the spectrum, the conclusions that can be drawn about a university's power to regulate student online speech that is non-academic are less clear. On the whole, analysis of the non-curricular online speech cases reveals that courts give institutions much less deference in relation to their disciplinary decisions in this context. In *Murakowski,* for example, the institution argued that the student's website postings created a substantial disruption on campus, and therefore, could permissibly be regulated. What the school saw as a substantial disruption, however, was a mere distraction or discomfiture in the eyes of the court. It refused to defer to the institution's judgment that Murakowski's speech created a substantial disruption and did not deserve First Amendment protection.

Similarly, in *Barnes v. Zaccari* (2012)*,* in which a student was punished for Facebook posts that the institution's president found to be threatening, the court declined

to support the president's assertion that the plaintiff's online speech constituted a true threat. The speech, though passionate, was not overtly threatening, and multiple mental health professionals had indicated that Zaccari was not a threat to himself or others. Instead of simply accepting Barnes' assessment of Zaccari's speech, the court looked at the totality of the circumstances to determine if that assessment was reasonable. Likewise, in *Yeasin,* the court disagreed with the school's argument that its code of conduct should apply to off-campus online speech. Without a provision to that effect in the code of conduct, the court reasoned, students could not know which conduct was prohibited. Therefore, the students' right to fairness in disciplinary matters outweighed considerations of deference to university officials in interpreting and applying conduct standards.

If an institution's decision related to non-academic online speech can pass a reasonableness test, however, the court is likely to allow the regulation. In *Barnes,* the court felt it was objectively unreasonable for Barnes to conclude that Zaccari's speech was a threat. In *Morales v. New York* (2014), on the other hand, the court found that any reasonable administrator would view the student's email as a threat. The hypothetical situation described in Morales' email was sufficiently concerning to justify conclusions that he intended to bring a gun to campus and shoot people. By acting as the court felt a reasonable person would in those circumstances, the school officials in *Morales* were protected from legal liability.

Another way in which a college may be able to support its exercise of authority over non-academic online speech is establishing that it creates a substantial disruption on the physical campus. Though in the eyes of the court the facts of the *Murakowski* case did

not indicate that the student's speech caused a substantial disruption, the court did not preclude schools altogether from arguing that online speech has created a substantial disruption on campus. Under the right set of facts, a court could conclude that a student's non-academic online speech created a substantial disruption on campus.

Additionally, courts are likely to support a school's regulation of non-academic online speech if applicable state laws give them that power. In the *Zimmerman* case, Indiana state law permitted regulation of off-campus student conduct that was unlawful or objectionable if it "violate[d] the reasonable rules and standards of the state educational institution designed to protect the academic community from unlawful conduct presenting a serious threat to person or property of the academic community." Since Zimmerman and Sumwalt were trying to provoke Target to engage in an illegal relationship with a minor, their behavior was clearly unlawful. In *Doe,* the plaintiff claimed that the Ohio statute which granted the university disciplinary powers did not apply to off-campus behavior. The court determined that the statute did, in fact, contain language permitting the school to regulate off-campus behavior related to the filing of a police report. Consequently, the institution had properly asserted jurisdiction because two police reports were filed in relation to the plaintiff's off-campus conduct.

Analysis of the above cases reveals two main conclusions about the context in which speech takes place. First, in each context involving discipline of students for their speech, there are limits to regulation of online speech; institutions are not given full power to regulate speech in any context, nor are they entirely precluded from regulating speech in any context. Second, courts are more likely to support a school's disciplinary

decision in cases related to online classroom speech or online speech related to academics than in those related to non-academic online speech.

Conclusion

Analysis of the 25 court opinions examined in this study supports several key conclusions. First, in order to comport with notions of fairness and therefore withstand legal challenge, academic and disciplinary policies used to govern student online speech must use specific language and be consistently applied to all students. Next, the Constitution is not the only source of law that must be considered in regulating student online speech; federal and state statutes can play a critical role in establishing an institution's disciplinary power and determining a student's right to challenge a school's action. Moreover, these laws may create real or perceived obligations to protect certain student rights that may conflict with the right to free expression. Third, courts continue to struggle in deciding which student speech precedent should be followed and which standards applied in the context of higher education. Finally, the context in which speech occurs is of prime importance in determining a university's authority to regulate online speech. The theoretical and practical implications of these conclusions will be examined in the following chapter.

CHAPTER 6: CONCLUSIONS AND IMPLICATIONS

Conclusions

In this study, 25 court opinions from 21 cases implicating student online speech issues were examined and analyzed. This analysis provided insight into how courts are interpreting student online speech rights in the online realm. First, the data reveal that a variety of legal sources may be considered in a particular case, and each of these legal sources can have major implications for how courts interpret both the student's right to free expression in the online realm and the institution's authority to regulate such expression. Next, it can be concluded that policy construction and consistent adherence to established policies are incredibly influential in courts' analyses related to institutional authority in relation to student online speech. Third, judicial analysis of student online speech rights in the online realm comports with established concepts of student academic freedom. Fourth, courts continue to struggle in determining which legal standards should appropriately govern college student speech. This determination is further complicated by the unique characteristics of the online context. Finally, courts' decisions related to institutional authority to regulate online speech are heavily influenced by the specific context in which the online speech takes place, whether it be in the virtual class space, completely unrelated to academics, or somewhere in between. The above outlined conclusions have important implications for both theory and practice.

Implications

Implications for Theory

This research contributes to theory by applying the concept of student academic freedom to the legal doctrine of college student speech (specifically, student online

speech). Comparison of the courts' reasoning in the examined 25 opinions reveals that legal interpretation of college student speech rights reflects an appreciation for the concepts of student academic freedom discussed in the literature—specifically, those referenced in the Joint Statement on the Rights and Freedoms of Students. Perhaps, therefore, student academic freedom concerns could guide the development of new legal standards to be applied in the context of college student speech. Given the unique goals of higher education, this approach seems more appropriate than applying standards originally articulated for application to separate, inapposite contexts (i.e. the case of public employees or elementary and secondary school students).

Additionally, this research contributes to theory by applying concepts of free expression to the context of legal interpretation of student online speech rights. Though extant higher education literature reveals that courts have historically supported college student expression as essential to the mission of higher education institutions, there has been little examination of whether this same judicial support exists in relation to student online speech. To that end, this study reveals two points of note. First, in the eyes of the courts, student online speech is just as valuable as student speech taking place in the physical realm. Thus, while societal attitudes may exist suggesting that online speech has lesser value than speech taking place offline, this same attitude is not shared by the courts. Indeed, though not in relation to student speech, the Supreme Court itself recently commented on the importance of online speech (Liptak, 2017).[12] Justice Elena Kagan commented on the importance of social media and the internet as "crucially important

[12] These comments were made in discussing a North Carolina law that bars registered sex offenders from using social media services.

channel[s] of political communication," noting that the President of the United States, every state governor, and every member of Congress have Twitter accounts. Justice Anthony Kennedy took this argument a step further, musing that social media sites have become just as important as the public square, if not more so, for debate. The attitudes about the value of online speech by the courts in the above examined cases are shared and supported by the highest court in the country.

Second, as in cases related to offline speech in the physical realm, courts also recognized that reasonable limitations may be placed on student online speech in order to preserve an educational environment conducive to helping institutions achieve both their own missions and the broader goals of higher education.

Finally, this study contributes to theory by considering the proper relationship between colleges and their students in terms of appropriate assertions of institutional authority over students. Though college students are legally considered adults, some courts have determined that the nature of being a student requires some oversight on the part of the institution in order to foster the intellectual and personal growth necessary for students to become productive members of society. Nevertheless, given how critical free inquiry and free expression are to this personal and intellectual growth, it is not necessarily appropriate for colleges to exert the same amount of control over their students as would be expected or required of school officials in elementary and secondary education contexts. Though this study does not provide a definitive answer as to the level of authority institutions of higher education should properly exercise over their students, it raises several important considerations that can inform the literature.

Implications for Practice

This study also has several implications for practice. First, the findings reveal examples of instances in which federal laws other than the Constitution and state laws may influence courts' treatment of institutional authority over student online speech. These examples could be useful for administrators in crafting policies. Laws that may have been written long before the advent of the internet and social media could have important implications for student online speech. For example, some state laws may be interpreted to provide institutions jurisdiction over student online speech. This was true in both *Doe* and *Zimmerman,* in which the courts supported the institutions' disciplinary actions against the students for their online speech, as state statutes gave the institutions authority to regulate certain types of off-campus speech. Consequently, in crafting policies related to student online speech, administrators must carefully consider all sources of law that could potentially be relevant.

Next, the study provides higher education administrators with current information regarding judicial treatment of issues related to institutional authority over student online speech. Specifically, the findings reveal that institutional regulation of student online speech is permissible, under the right circumstances. In online class settings, courts are much more likely to find that institutions have authority to regulate student speech. Courts will commonly defer to the faculty or administrator's judgment about what is necessary to create an environment that fosters learning. Typically, courts will allow schools to regulate online speech that violates established professionalism standards that have been incorporated into the curriculum. While professionalism standards seem to be a legitimate source of legal authority, however, institutions must think about the

appropriate use of such standards. In *Tatro,* for example, the court found that there was a standard in the mortuary science profession that required the respectful treatment of corpses. In the case of professional programs, accreditation may be dependent on an institution's teaching of professional behavior and evaluation of students' ability to act professionally.

Third, the findings of this study raise concerns about treating students with fairness. While an institution may have the legal authority to regulate certain types of speech, administrators must also consider their ethical obligations to students in relation to such speech. Several of the opinions examined in this study reveal that administrators are given a great deal of deference in making decisions about speech in the curricular realm. As such, they have an important professional responsibility to exercise that authority in a way that is fair to students and that aligns with overall institutional commitments to fairness that go beyond those that are legally mandated. The *Yoder* case, for example, is illustrative of this point. The student did not divulge any identifiable information about the patient, and, therefore, did not see an issue with her actions. Rather than expelling the student from the nursing school for her blog post, perhaps it would have been more appropriate to use the incident as a teaching moment to help Yoder mature as a student and a professional.

Relatedly, a fourth implication of this research for practice is that it is essential for institutions to work with students to understand their responsibilities. Many of the problematic instances of student online speech arising in the cases potentially could have been avoided by implementing orientation programs or other types of specialized training. As previously discussed, while some speech is obviously likely to violate a code

of conduct, other speech is not necessarily viewed as unacceptable outside of the curricular realm. It may be difficult for a student to recognize, therefore, that his or her speech is inappropriate. Moreover, in addition to aiding students in understanding their responsibilities as professionals, there is a need for institutions to help students understand their responsibilities as members of society. Consider, for example, the *Murakowski* case, in which the court found that, though they were disturbing, the institution did not have the authority to regulate the student's posts about violence and sexual abuse. The fact that a certain type of speech is legal does not mean that engaging in that speech is the right thing to do. Given higher education's goal of molding productive citizens who are able to function in an increasingly diverse society, administrators may want to consider how to engage students to promote self-reflection about how they want to treat others and consideration of potential consequences for their speech.

Conversely, administrators must consider how to respond to students who have been affected by the online speech (whether legally protected or not) of other students. As evidenced by the *Yeasin* case, even speech that is ultimately deemed to be protected by the court may have serious negative consequences for its recipient. Moreover, simply punishing a student for speech that is not protected does not necessarily end the institution's obligation to take action. Administrators must consider how they can best support other members of the university community who are impacted by a student's problematic online speech in order to maintain a campus environment that is conducive to learning.

Finally, in order to permissibly regulate student online speech, administrators must be sure that the school has clearly established policies, that students are put on notice of exactly which behaviors are prohibited, and that the policies are consistently applied to all students. It is not quite as clear, however, exactly how much authority institutions will be given to regulate student online speech that is unrelated to the class environment. The findings also give rise to the inference that institutional policies do not need to clearly define every term or provide an exhaustive list of prohibited behaviors, so long as they can be understood by the reasonable person.

Limitations

This study has three major limitations. First, as technology continues to evolve, so will its impacts on student online speech. Therefore, it is possible that new technologies may emerge that fundamentally change the ways in which students communicate online, and therefore, how online speech rights are interpreted by the courts. Second, the results and conclusions outlined here are limited by the lack of guidance from the Supreme Court on the issue of college student online speech. The Supreme Court has consistently declined to decide which lines of legal precedent should apply to college student speech. Furthermore, issues related to college student speech rights in the online context have never been considered by the Supreme Court. Without a decision from the highest court in the country on these issues, there is no binding precedent that must be followed by all courts. Thus, the legal conclusions found in this study could potentially be altered by future court cases, especially from the Supreme Court. As discussed in Chapter 3, this study is limited by the ever-evolving nature of the law. Because technology continues to increase in importance in the lives of college students, there will undoubtedly be more

lawsuits involving student online speech. Courts could potentially interpret student online speech rights in ways that differ significantly from those outlined here. Nevertheless, this study will serve as an important historical record of the evolution of the jurisprudence related to student online speech.

Recommendations for Future Research

While this study focused primarily on case law related to student online speech rights, as indicated by some of the cases examined herein, state statues could play potentially significant roles in the interpretation of institutional authority related to student online speech. Several states, for example, have passed laws prohibiting colleges and universities from requiring students to provide passwords to their social media accounts (Snyder, Hutchens, Jones & Sun, 2015). It seems that an increasing number of states are considering and/or enacting statutes that either directly or indirectly implicate student online speech issues. One potential strand of research related to this study could focus specifically on the effects and implications of these laws.

A second area of future research relates to institutional values. As indicated in the literature review, issues related to student speech often pit two institutional values (such as free expression and civility) against each other. While this theme came through in analysis of the legal cases, it was not thoroughly examined, as institutional values were not ultimately determinative in the opinions. Nevertheless, the tension between institutional values can certainly have serious implications for administrative treatment of student online speech. A possible area of focus could be on the effects of student online speech on institutional values, and, conversely, the impact of institutional values on treatment of student online speech.

Concluding Remarks

College student online speech can seriously impact the educational environment of colleges and universities. Analysis of legal interpretation of student online speech rights reveals both an appreciation on the part of the courts of the importance of free expression as well as the necessity of allowing administrative authority over online expression under certain circumstances. As courts continue to grapple with questions of the appropriate application of legal standards in relation to student online speech, it will be necessary for institutions of higher education to understand how courts have historically treated student online speech rights. In that regard, this study provides several critical insights and implications.

References

Ali, R. (2011, April 4). Dear colleague letter. Washington, DC: U.S. Department of Education, Office for Civil Rights.

American Association of Colleges and Universities (AACU). (2011). A Crucible Moment: College Learning and Democracy's Future. *Washington, DC: Association of American Colleges and Universities*.

American Association of University Professors (AAUP). (1994). *On Freedom of Expression and Campus Speech Codes.* Retrieved from: https://www.aaup.org/report/freedomexpression-and-campus-speech-codes.

Antebi v. Occidental College, 47 Cal. Rptr. 3d 277, 141 Cal. App. 4th 1542 (Ct. App. 2006).

Anti-Bullying Bill of Rights Act. P.L. 2010, c. 122. Retrieved from: http://www.njleg.state.nj.us/2010/Bills/AL10/122_.PDF.

Barnes v. Zaccari, 669 F.3d 1295 (11th Cir. 2012).

Baum, L. (1976). Implementation of judicial decisions: An organizational analysis. *American Politics Quarterly, 4*(1), 86-114.

Beatty, L. (2013). Intrafraternity Council to take steps to increase diversity awareness following president's tweets. *Daily Collegian.* Retrieved from: http://www.collegian.psu.edu/news/borough/article_6429719a-881f-51be-8f53 5466ba293145.html.

Bethel School District v. Fraser, 478 U.S. 675 (1986).

Black's Law Dictionary (West Group, 10th ed. 2014).

Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217 (2000).

Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 483 (1989)

Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001).

Bowen, W.G. (2013). *Higher education in the digital age.* Princeton, NJ: Princeton University Press.

Burl, D.M. (2011). From Tinker to Twitter: Managing student speech on social media. NACUA Notes, 9(7). Retrieved from: http://counsel.cua.edu/studlife/publications/nacuanotesmarch16.cfm.

Brennan v. Norton, 350 F.3d 399, 412 (2003).

Brown v. Li, 308 F.3d 939, 941 (9th Cir. 2002).

Byrne, J.P. (1989). Academic freedom: A special concern of the first amendment. *The Yale Law Journal, 99*(2), 251-340.

Byrnes v. Johnson County Community College, Civil Action No. 10-2690-EFM-DJW (D. Kan. Jan. 19, 2011).

Caldwell, M. (2013). Controversial tweet from Penn State student draws social media backlash. *Daily Collegian.* Retrieved from: http://www.collegian.psu.edu/news/campus/article_a952263c-1692-11e3-a544-001a4bcf6878.html.

California Education Code §94367 (1992). Retrieved from: http://www.leginfo.ca.gov/cgi-bin/displaycode?section=edc&group=94001-95000&file=94367.

Carnegie Foundation for the Advancement of Teaching (1990). Campus life: In search of community. Lawrenceville, NJ: Princeton University Press.

Carnegie Foundation for the Advancement of Teaching (2014). *Carnegie classifications: Lookup and Listings.* Retrieved from: http://classifications.carnegiefoundation

.org/lookup_listings/srp.php?clq=%7B%22ipug2005_ids%22%3A%22%22%2%22ipgrad2005_ids%22%3A%22%22%2C%22enrprofile2005_ids%22%3A%%22%2C%22ugprfile2005_ids%22%3A%22%22%2C%22sizeset2005_ids%223A%2216%22%2C%22basic2005_ids%22%3A%22%22%2C%22eng2005_ids22%3A%22%22%2C%22search_string%22%3A%22%22%2C%22first_letter%2%3A%22%22%2C%22level%22%3A%22%22%2C%22control%22%3A%22%22%2C%22accred%22%3A%22%22%2C%22state%22%3A%22%22%2C%2region%22%3A%22%22%2C%22urbanicity%22%3A%22%22%2C%22wome%22%3A%22%22%2C%22hbcu%22%3A%22%22%2C%22hsi%22%3A%22%2%2C%22tribal%22%3A%22%22%2C%22msi%22%3A%22%22%2C%22landgrant%22%3A%22%22%2C%22coplac%22%3A%22%22%2C%22urban%22A%22%22%7D&limit=50&unit_id=214777&start_page=standard.php&control1&sizeset2005=16&submit=FIND+SIMILAR.

Carr v. St. John's University, New York, 187 N.E.2d 18 (N.Y. 1962).

Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942).

Chang, M. (2000). Improving campus racial dynamics: A balancing act among competing interests. *Review of Higher Education, 23*(2), 153-175.

Charmaz, K. (2011). Constructing grounded theory: A practical guide through qualitative analysis. Thousand Oaks, CA: Sage Publications.

Connally v. General Construction Co., 269 U.S. 385, 391 (1926)

Creswell, J.W. (2013). Qualitative inquiry and research design (3rd Ed.). Thousand Oaks, CA: Sage Publications.

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

DeWulf, K. (2016). An unintended consequence of Title IX: Lack of clarity in the anti sex discrimination statute is being used to censor student media. *Student Press Law Center.* Retrieved from: http://www.splc.org/article/2016/10/an-unintended consequence-of-title-ix.

DiPerna v. the Chicago School of Professional Psychology, No. 14-cv-57 (N.D. Ill. Nov. 28, 2016).

Doe v. The Ohio State University, 136 F. Supp. 3d 854 (S.D. Ohio 2016).

Doninger v. Niehoff, 527 F.3d 41, 45, 47 (2d Cir. 2008)

Emerson, T.I. (1970). *The System of Freedom of Expression.* New York: Random House.

Erickson, R. (2012, December 6). An open letter to the Penn State community. The Pennsylvania State University. Retrieved from: http://news.psu.edu/story/143992/ 2012/12/06/open-letter-penn-state-community.

Feine v. Parkland College, 2010 WL 1524201 (C.D. Ill. 2010).

FIRE. (2014). Four-word joke results in five conduct charges for University of Oregon student. *Foundation for Individual Rights in Education.* Retrieved from: https://www.thefire.org/four-word-joke-results-five-conduct-charges-university oregon-student/

FIRE. (2016a). Department of Justice: Title IX requires violating First Amendment. *Foundation for Individual Rights in Education.* Retrieved from: https://www.thefire.org/department-of-justice-title-ix-requires-violating-first amendment/.

FIRE. (2016b). University of Delaware police to students: Self-censor 'free speech ball.' *Foundation for Individual Rights in Education.* Retrieved from: https://www.thefire.org/university-of-delaware-police-to-students-self-censor free-speech-ball/

Furman v. Georgia, 408 U.S. 238 (1972).

Globe Newswire. (2013). Tech savvy college students are gathering gadgets, saying yes to showrooming and rejecting second screening. *Nasdaq GlobeNewswire.* Retrieved from: http://www.globenewswire.com/news-release/ 2013/06/13/554002/10036312/en/Tech-Savvy-College-Students-Are-Gathering Gadgets-Saying-Yes-to-Showrooming-and-Rejecting-Second-Screening.html

Gorman v. University of Rhode Island, 837 F.2d 7 (1st Cir. 1988).

Hague v. Committee for Industrial Organization, 307 U.S. 496, 1939.

Harrell v. Southern Oregon University, 2009 WL 3562732 (D. Or. 2009).

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

Healy v. Larsson, 323 N.Y.S.2d 625, affirmed, 318 N.E.2d 608 (N.Y. 1974).

Healy v. James, 408 U.S. 169 (1972).

Heiberger, G. and Harper, R. (2008). Have you Facebooked Astin lately? Using technology to increase student involvement. In R. Junco & D.M. Timms (Eds.), *Using emerging technologies to enhance student engagement.* New Directions for Student Services (pp. 19-35). San Francisco, CA: Jossey-Bass.

Higher Education Research Institute. (2007). *College freshmen and online social networking sites. http://www.heri.ucla.edu/PDFs/pubs/briefs/brief-091107 SocialNetworking.pdf.*

Hodulik, P. (1990). Prohibiting discriminatory harassment by regulating student speech: a balancing of First Amendment and university interests. *Journal of College and University Law, 16*(4), 573-588.

Hutchens, N.H. (2012). You can't post that…or can you? Legal issues related to college and university students' online speech. Journal of Student Affairs Research and Practice, 49(1), 1-15.

Hutchens, N.H. (2015). Does new Illinois law grant institutions access to students' social media accounts in certain situations? *Higher Education Law.* Retrieved from: http://www.highereducationlaw.org/url/2015/2/1/does-new-illinois-law-grant institutions-access-to-students.html.

Hutchens, N. H., Wilson, K., & Block, J. (2013). CLS v. Martinez and competing legal discourses over the appropriate degree of judicial deference to the co-curricular realm. *JC & UL*, *39*, 541.

Illinois Public Act 098-0129 (2014). Retrieved from: http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=098-0129.

Indiana Code § 21-39-2-3

Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University, 773 F.Supp 792 (1991).

Johnson, C.A. (1979). Judicial decisions and organizational change: A theory. *Administration and Society, 11*(27), 27-51.

Johnson, R.M. (1967). *The Dynamics of Compliance.* Evanston, Ill.: Northwestern University Press.

J.S. ex rel. Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011)

Kaufman, E. (2017). Harvard rescinds offers to incoming freshmen over hateful memes. *CNN.com.* Retrieved from: http://www.cnn.com/2017/06/05/us/harvard memes/index.html

Keefe v. Adams, 44 F. Supp. 3d 874 (D. Minn. 2014).

Keefe v. Adams, No. 14-2988 (8th Cir. Oct. 26, 2016).

Key v. Robertson, 626 F. Supp. 2d 566 (E.D. Va. 2009).

Kaplin,W. A.,& Lee, B. A. (2013). *The law of higher education: A comprehensive guide to legal implications of administrative decision-making (5th ed.).* San Francisco, CA: Jossey Bass.

Knight-McCord, J., Cleary, D., Grant, N., Herron, A., Jumbo, S., ... Emmanuel, R. (2016). What social media sites do college students use most? *The Journal of Undergraduate Ethnic Minority Psychology, 2.*

Krathwohl, D.R. (2009). *Methods of Educational and Social Science Research: The Logic of Methods* (3rd ed.). Long Grove, IL: Waveland Press.

Krislov, S. (1972). The perimeters of power: The concept of compliance as an approach to the study of the legal and political processes. In S. Krislov et al. (Eds.), *Compliance and the Law: A Multi-Disciplinary Approach* (pp. 333-350). Beverly Hills, CA: Sage.

Lee, J. & Adler, L. (2006). Qualitative research redux: Researching contemporary legal issues concerning education. In S. Permuth & R.D. Mawdsley (Eds.), *Research*

Methods for Studying Legal Issues in Education (pp. 25-56). Dayton, OH: Education Law Association.

Lee Howe, L. (1968). " Joint Statement on Rights and Freedom of Students". *AAUP Bulletin*, *54*(1), 112-112.

Leef, G. (2017). If we can't repeal the Higher Education Act, let's improve it. *James. G. Martin Center for Academic Renewal.* Retrieved from: https://www.jamesgmartin.center/2017/04/cant-repeal-higher-education-act-lets improve/.

Lieberwitz, R. L., Jaleel, R., Kelleher, T., Scott, J. W., Young, D., Reichman, H., & Runyan, A. S. (2016). The History, Uses, and Abuses of Title IX. *Academe*, *102*, 69.

Lindsay, M. (2012) Tinker goes to college: Why high school free speech standards should not apply to post-secondary students—Tatro v. University of Minnesota. *William Mitchell Law Review, 38*(4), 1470-1514.

Liptak, A. (2017). A Constitution right to Facebook and Twitter? Supreme Court weighs in. *New York Times.* Retrieved from: https://www.nytimes.com/2017/02/27/ us/politics/supreme-court-north-carolina-sex-offenders-social-media.html.

Locke, J. (2016). *Second treatise of government and a letter concerning toleration*. Oxford University Press.

Mahavongsanan v. Hall, 529 F.2D 448 (5th Cir. 1976).

Martin, B.R. (2003). Demoted to high school: Are college students' free speech rights the same as those of high school students? *Boston College Law Review, 45*(173).

Maxwell, J.A. *Qualitative research design: An interactive approach* (3rd Ed.). Thousand Oaks, CA: Sage Publications.

McLoughlin, C. & Lee, M.J. (2010). Personalised and self-regulated learning in the web 2.0 era:International exemplars of innovative pedagogy using social software. *Australasian Journal of Educational Technology, 26* (1) (2010), pp. 28–43

Meiklejohn, A. (1948). *Free speech and its relation to self-government*. The Lawbook Exchange, Ltd.

Merrow v. Goldberg, 672 F.Supp. 766 (1987).

Metzger, W. P. (1955). The German contribution to the American theory of academic freedom. *Bulletin of the American Association of University Professors (1915 1955)*, *41*(2), 214-230.

Metzger, W. P. (1987). Profession and constitution: Two definitions of academic freedom in America. *Tex. L. Rev.*, *66*, 1265.

Metzger, W. P. (1990). The 1940 statement of principles on academic freedom and tenure. *Law and Contemporary Problems*, *53*(3), 3-77.

Mill, J. S. (1869). *On liberty*. Longmans, Green, Reader, and Dyer.

Miller v. California, 413 U.S. 15 (1973).

Milton, J. (1959). *Complete Prose Works.* Douglas Bush et al. (Eds.). New Haven: Yale University Press.

Morales v. New York, 22 F. Supp. 3d 256 (S.D.N.Y. 2014).

Morse v. Frederick, 551 U.S. 393 (2007).

Moshman, D. (2009). *Liberty & Learning: Academic Freedom for Teachers and Students.* Portsmouth, NH: Heinemann.

Murakowski v. University of Delaware, 575 F. Supp. 2d 571 (D. Del. 2008).

New Hampshire House Bill 142 (2015). Retrieved from: http://www.gencourt.state.nh.us/house/members/m_billtext.aspx?billnumber=H0142.html.

New Jersey Anti-Bullying Bill of Rights. (2010). Retrieved from: http://www.njleg.state.nj.us/2010/Bills/AL10/122_.PDF.

New Jersey v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980).

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

O'Brien v. Welty, 818 F.3d 920 (9th Cir. 2016).

Odermatt v. Way, 188 F. Supp. 3d 198 (E.D.N.Y. 2016).

Oluwole, J. (2007). Public employment-free speech jurisprudence: proposal of a new constitutional test for disciplined whistleblowing teachers (Doctoral dissertation). Available from ProQuest Dissertations and Theses database. (UMI No. 1434728).

O'Neil, R.M. (1991). Academic freedom in retrospect and in prospect. In P.J. Hollingsworth (Ed.), *Unfettered Expression: Freedom in American Intellectual Life* (pp. 19-30). Ann Arbor: University of Michigan Press.

O'Neil, R. M. (1997). Free speech in the college community. Bloomington, Ind: Indiana University Press.

O'Neil, R.M. (2008). Time, place, and manner restrictions. In J. Vile, D. Hudson, and D. Schultz (Eds.), *Encyclopedia of the First Amendment* (pp. 1069-1070). Washington, DC: CQ Press.

Osei v. Temple Univ. of Commonwealth Sys. of Higher Educ., 2011 W.L. 4549609 (2011).

Oyama v. University of Hawaii, 813 F.3d 850 (9th Cir. 2015).

Park, M. & Lah, K. (2017). Berkeley protests of Yiannopoulos caused $100,000 in damage. *CNN.com.* Retrieved from: http://www.cnn.com/2017/02/01/us/milo yiannopoulos-berkeley/index.html.

Parker, I. (2012, February 6). The story of a suicide. The New Yorker, pp. 14-21.

Paulsen, F., & Thilly, F. (1906). *The German universities and university study*. Longmans, Green.

Pearson. (2015). Student mobile device survey 2015. *National Report: College Students.* Retrieved from: http://www.pearsoned.com/wp-content/uploads/2015-Pearson StudentMobile-Device-Survey-College.pdf.

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 1983.

Peters, J. D. (2010). *Courting the abyss: Free speech and the liberal tradition*. University of Chicago Press.

Pew Research Center (2011). College students and technology. Retrieved from: http://www.pewinternet.org/2011/07/19/college-students-and-technology/

Pew Research Center (2016). Social media update 2016. Retrieved from: http://www.pewinternet.org/2015/01/09/social-media-update-2014/.

Ponter, E. (2012). Penn State sorority Chi Omega under investigation due to racially insensitive image. Onward State. Retrieved from: http://onwardstate.com/2012/ 12/04/penn-state-sorority-chi-omega-under-investigation-due-to-racially insensitivephotograph-2/.

Powers, E. (2011). *Freedom of Speech: The History of an Idea*. Bucknell University Press.

Pratt, L.R. (1991). Academic freedom and the merits of uncertainty. In P.J.Hollingsworth (Ed.), *Unfettered Expression: Freedom in American Intellectual Life* (pp. 99-115). Ann Arbor: University of Michigan Press.

Rollins v. Cardinal Stritch University, 626 N.W.2d 464 (Minn. App. 2001).

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995).

Russo, C.J. (2006). Legal research: the "Traditional" method. In S. Permuth & R.D. Mawdsley (Eds.), *Research Methods for Studying Legal Issues in Education* (pp. 5-24). Dayton, OH: Education Law Association.

Russo, C.J. (2008). *Encyclopedia of Education Law* (pp. xxxiii). Thousand Oaks, CA: Sage Publications.

Ryan, G.W. & Bernard, H.R. (2003). Techniques to identify themes. *Field Methods, 15*(1), pp. 85-109.

Santus, R. (2014). University of Maryland students' research uncovers legally questionable policies. *Student Policy Law Center.* Retrieved from: http://www.splc.org/article/2014/03/social-media-monitoring-widespread-among college-athletic-departments-public-records-survey-shows.

Scanlon, T. (1972). A theory of freedom of expression. *Philosophy & Public Affairs*, 204 226.

Schenck v. United States, 249 U.S. 47 (1919).

Seenauth, C. (2014). The constitutionality of public university imposed restrictions on social media usage by NCAA student-athletes. Paper presented at the 40th Annual Conference of the Sports Lawyers Association, Chicago, IL. Retrieved from:

https://www.sportslaw.org/conference/conference2014/NCAASocialMediaBansCarenSeenauth.pdf.

Shirky, C. (2011). The Political Power of Social Media. *Foreign Affairs*, *90*(1), 28-41.

Siegel, E. G. (1990). Closing the campus gates to free expression: The regulation of offensive speech at colleges and universities. *Emory Law Journal*, 39(4), 1351.

Sill v. Pennsylvania State University, 462 F.2d 463 (3d Cir. 1972).

Simmons, A. (2012). U grad in Facebook case dies. *Star Tribune.* Retrieved from: http://www.startribune.com/u-grad-in-facebook-case-dies/160401465/

Snyder, E.M., Hutchens, N.H., Jones, W.A., & Sun, J.C. (2015). Social medial policies in intercollegiate athletics: The speech and privacy rights of student-athletes. *Journal for the Study of Sports and Athletes in Education, 9*(1), 50-74.

Snyder v. Millersville University, 2008 WL 5093140 (E.D. Pa. 2008).

Social Media Governance. 2014. Social media policy database. Retrieved from: http://socialmediagovernance.com/policies/?f=7.

Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969).

Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971).

Stanford University. (2014). The fundamental standard. *Stanford University.* Retrieved from: http://studentaffairs.stanford.edu/communitystandards/integrity/fundamental-standard.

Sun, J.C., Hutchens, N.H., & Breslin, J.D. (2013). A virtual land of confusion with students' online speech: Introducing the curricular nexus test. *University of Pennsylvania Journal of Constitutional Law*, 16(1), 49-96.

Stripling, J. (2011). Panelists debate how far colleges should go to monitor online behavior. *Chronicle of Higher Education.* Retrieved from: http://chronicle.com.ezaccess.libraries.psu.edu/article/Panelists-Debate-How Far/126298/.

Summa v. Hofstra University, 708 F.3d 115 (2d Cir. 2013).

Tatro v. University of Minnesota, 816 N.W. 2d 509, 518 (Minn. 2012).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

United States v. Carolene Products Company, 304 U.S. 144 (1938).

United States Department of State Bureau of International Programs (2004). *Outline of the U.S. Legal System.* Retrieved from: usinfo.state.gov.

Walton, D. (2002). Legal argumentation and evidence. University Park: Pennsylvania State University Press.

Wandel, T.L. (2008). Colleges and universities want to be your friend: Communicating via online social networking. *Planning for Higher Education, 37*(1), pp. 35-48.

Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).

Wasby, S.L. (1973). The United States Supreme Court's impact: Broadening our focus. *Notre Dame Lawyer, 49,* 1023-1036.

Wasserstrom, R. A. (1961). The judicial decision: Toward a theory of legal justification. Stanford, CA: Stanford University Press.

Wassom, B. (2011). *Private Schools and Social Media*. Retrieved from wassom.com: http://www.wassom.com/private-schools-and-social-media.html.

Watts v. United States, 394 U.S. 705, 1969.

Widmar v. Vincent, 454 U.S. 263 (1981).

Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972).

Yeasin v. University of Kansas, 360 P.3d 423, 51 Kan. App. 2d 939 (2015).

Yin, R.K. (2009). Case Study Research: Design and Methods (5th ed.). Thousand Oaks, CA: Sage.

Yoder v. University of Louisville, 2009 WL 2406235 (W.D. Ky. 2009).

Yoder v. University of Louisville, 417 F. App'x 529 (6th Cir. 2011).

Yoder v. University of Louisville, Civil Action No. 3: 09-CV-00205 (W.D. Ky. Mar. 30, 2012).

Yoder v. University of Louisville, No. 12-5354 (6th Cir. May 15, 2013).

Zimmerman v. Bd. Of Trustees of Ball State, 940 F. Supp. 2d 875 (S.D. Ind. 2013).

Appendix A: Seminal Student Speech Cases decided by the Supreme Court

Case	Year	Holding
Tinker v. Des Moines Independent Community School District	1969	A school cannot stop students from engaging in political speech
Healy v. James	1972	A school cannot refuse to recognize a student group based on an unsubstantiated fear of disruption
Widmar v. Vincent	1981	A school cannot prevent a student group from holding religious meetings on campus
Bethel School District v. Fraser	1986	A school has the right to limit vulgar, lewd speech that conflicts with its mission
Hazelwood School District v. Kuhlmeier	1988	A school need not endorse speech that conflicts with its legitimate pedagogical goals
Rosenberger v. Rector	1995	A school cannot deny

and Visitors of University of Virginia		funding to student publications based on message
Board of Regents of University of Wisconsin System v. Southworth	2000	A school can require students to pay activity fees that are used to fund political & ideological speech that some may find offensive, so long as the program is viewpoint neutral
Morse v. Frederick	2007	The First Amendment does not prevent educators from censoring speech that promotes illegal drug use

Appendix B: Summary of Findings

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
NON-CURRICULAR SPEECH CASES					
2001	*Rollins v. Cardinal Stritch University*	College student removed from cohort for sending them unwanted emails. Alleged that school failed to fulfill contractual obligations.	Non-curricular	No contract existed between the school and the student, and even if one had, there is no proof that the school violated it.	Contract law doctrine
2006	*Antebi v. Occidental College*	A student was punished for sending "spam" emails to members of the campus gay community. He brought suit claiming that his punishment violated California's Leonard Law.	Non-curricular	The court declined to weigh the merits of Antebi's claim that his speech would have been protected under the First Amendment and therefore was protected by the Leonard Law. They held that Antebi lacked standing to pursue a claim under the Leonard Law because he had already graduated at the time of the lawsuit.	Standing under California's Leonard Law
2008	*Murakowski v. University of Delaware*	Student was sanctioned for offensive posts on website hosted on university servers. Alleged	Non-curricular	The behavior in this case did not rise to the level of a substantial disruption. Court also rejected the	*Tinker*

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
		violation of 1st & 14th Amendment rights.		notion that Murakowski's speech rose to the level of a true threat.	
2009	*Key v. Robertson*	A student was disciplined for a post about the school's president made to his Facebook page. He sued, alleging violation of his 1st Amendment rights and the Higher Education Act.	Non-curricular	The school could not be considered a government actor, and therefore could not be held liable for violating First Amendment Rights. Additionally, there is no private right to action under the Higher Education Act. Key's claims were dismissed.	State action doctrine, Higher Education Act
2012	*Barnes v. Zaccari*	A student was punished for posts to his Facebook page critical of university action and emails to the president. He was expelled from the university without notice or a hearing. He brought suit and prevailed on several of his claims in district court. The president appealed the	Non-curricular	The student had a clear protected property interest in his continued enrollment in the school. That right was clearly violated. The president, therefore, was not protected by qualified immunity.	Substantive due process standards

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
		court's decision that he was not entitled to qualified immunity on the student's due process claims.			
2013	*Zimmerman v. Board of Trustees of Ball State University*	College students who repeatedly harassed their roommate through social media and other pranks were punished by the university. Students First Amendment, due process, and institutional liability actions.	Non-curricular	Indiana state law gave Ball State University the authority to regulate off-campus behavior that was objectionable or unlawful. Students' Facebook speech was not protected by the First Amendment.	State law; reckless and knowing falsehood standard
2013	*Summa v. Hofstra University*	A graduate student who was also employed as the manager of the football team complained to the school as a result of harassing behavior by the football players, which included demeaning Facebook posts.	Non-curricular	The school took prompt action in punishing the football players for their harassing speech, including the Facebook page, and therefore could not be held liable for creating hostile work environment.	Summary judgment, negligence in responding to harassing behavior, four-part test for discriminatory retaliation claims

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
		She was then removed from her employment as a manager of the football team. After being hired as a graduate assistant, the student was required to re-interview and her offer of employment was rescinded. She sued alleging the university created a hostile work environment in violation of Title VII and that she had been retaliated against for her complaints.		There were genuine issues of material fact related to her retaliation claim, however, so her claims withstood summary judgment.	
2014	*Morales v. New York*	A student wrote an email to school officials in response to disciplinary charges he had received. Viewing the email as a threat, the school reported it to the district attorney, who then pressed charges against the student. The student alleged that his email was	Non-curricular	Any reasonable administrator would view the student's email as a true threat, therefore, the university officials acted appropriately and were given qualified immunity.	Reasonableness of action

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
		protected under the First Amendment and should not have been reported to the prosecutor. The defendants claimed that they had qualified immunity.			
2015	*Yeasin v. University of Kansas*	College student was involved in off-campus dispute with girlfriend. After being issued a no contact order by the school, he continued to tweet about the ex-girlfriend. He was sanctioned by the school. Claimed violation of his contractual rights.	Non-curricular	The Student Code did not mention that it applied to off-campus behavior. Student prevailed.	Contract law doctrine
2016	*Doe v. the Ohio State University*	A college student was investigated for posting his ex-girlfriend's phone number and pictures on multiple social media sites. He alleged that the university did not have jurisdiction to investigate him.	Non-curricular	A state statute gave the school power to regulate off-campus behavior. Additionally, even though the complainant was a student at another school, OSU had jurisdiction to investigate because the complaint	State statute; legitimate interest

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
				involved sexual misconduct by one of its students.	
2016	*DiPerna v. the Chicago School of Professional Psychology*	A was disciplined for an Instagram post that included a racial slur. She filed a breach of contract action, alleging that the school's actions against her were arbitrary and capricious.	Non-curricular	The court allowed the admission of Instagram posts the plaintiff presented to show that other students had posted similar racial slurs but were not punished for them. A genuine issue of material fact as to whether or not the school's actions were arbitrary and capricious did exist, so the case was allowed to proceed.	Summary judgment; contract law doctrine, arbitrary and capricious disciplinary action
2016	*O'Brien v. Welty*	A student posted criticisms of the institution on a website he created. He was later disciplined for a separate matter, and sued alleging that his punishment was retaliation for his protected speech.	Non-curricular	A reasonable jury could find that the school's punishment was primarily motivated by his protected online speech. Thus, summary judgment in favor of the university on his retaliation claim was inappropriate.	Discriminatory retaliation test, summary judgment
CURRICULAR SPEECH CASES RELATED TO PROFESSIONALISM STANDARDS					
2008	*Snyder v. Millersville*	Student teacher was removed	Curricular	Snyder did not attend classes and	Public employee speech doctrine

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
	University	from her assignment for sharing MySpace page with students & discussing the placement school's students & teachers online. She alleged violation of her 1st & 14th Amendment rights.		her assignment was professional in nature, so she was more like an employee than a student. Her speech was not a matter of public concern, so it did not enjoy protection.	
2009	*Yoder v. University of Louisville* (trial court level)	Nursing student dismissed from program for comments made on her MySpace page about an obstetrics patient whose birth she had observed. Alleged violation of 1st & 14th Amendment rights.	Curricular	The school's policies did not put Yoder on notice that her online postings could violate professionalism standards.	Contract law doctrine
2011	*Yoder v. University of Louisville* (appellate court level)	Nursing student dismissed from program for comments made on her MySpace page about an obstetrics patient whose birth she had observed. Alleged violation of 1st & 14th Amendment rights. The university	Curricular	Yoder had not actually raised contractual concerns, thus, the trial court erred in considering them. The case was remanded back to the district court.	

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
		appealed.			
2012	*Yoder v. University of Louisville* (trial court level, 2nd impression)	Nursing student dismissed from program for comments made on her MySpace page about an obstetrics patient whose birth she had observed. Alleged violation of 1st & 14th Amendment rights.	Curricular	The court agreed that requiring students to adhere to a confidentiality agreement furthered a legitimate pedagogical purpose. It deferred to the judgment of the nursing school faculty in interpreting the field's professional standards.	"Legitimate pedagogical concerns" standard; deference to school officials in setting curricula
2013	*Yoder v. University of Louisville* (appellate court level, 2nd impression)	On appeal, the court considered whether or not the defendants had qualified immunity. They also considered Yoder's claims that the nursing school's policies were unconstitutionally vague and overbroad.	Curricular	The defendants did have qualified immunity. Yoder had effectively waived her First Amendment rights by signing the nursing school's policies, which were not vague or overbroad.	Qualified immunity, vagueness and overbreadth

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
2011	*Byrnes v. Johnson County Community College*	A nursing student was disciplined for posting a picture of a human placenta taken during an obstetrics clinical. She was expelled from the program and sought a preliminary injunction.	Curricular	The student had permission to take the photo and the school should have reasonably known that it would be shared. The school was attempting to hold the students to unwritten, unclear standards, which was unfair. The student would suffer great irreparable harm if she was expelled. The preliminary injunction was granted.	Preliminary injunction standards
2011	*Tatro v. University of Minnesota* (appellate court level)	Mortuary science student was punished for posting on her facebook page about her experiences with using a cadaver. Alleged violation of 1st Amendment rights.	Curricular	Tatro's speech caused a material and substantial disruption, so punishment did not violate the 1st Amendment.	*Tinker*

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
2012	*Tatro v. University of Minnesota* (Minnesota Supreme Court)	Mortuary science student was punished for posting on her facebook page about her experiences with using a cadaver. Alleged violation of 1st Amendment rights. Student appealed to the Minnesota Supreme Court.	Curricular	Supreme Court refused to apply *Tinker* or *Hazelwood.* Instead, it decided that a school should be able to regulate speech that doesn't comply with standards of professional conduct, so long as these regulations are narrowly tailored & directly related to the professional standards.	Regulations must be narrowly tailored & directly related to professional standards.
2016	*Keefe v. Adams*	Student was removed from nursing program based on his unprofessional speech on Facebook. Alleged violation of 1st Amendment rights.	Curricular	Off-campus speech can be regulated if it raises legitimate pedagogical concerns. It is legal to incorporate professionalism standards into a curriculum, given strong state interest. Additionally, Keefe's posts were directly related to course content.	*Hazelwood*
2016	*Odermatt v. Way*	A student was removed from a graduate	Curricular	Odermatt failed to establish a prima facie case of	Four-part discriminatory retaliation test

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
		fellowship program when her placement graduate school decided that she was no longer in good standing as a student. This determination was likely the result of Facebook posts she made that were critical of the school. She sued the program, alleging that it had violated her First Amendment rights.		retaliation. There was no causal link between her speech and the NYCTF's decision to remove her from the program.	
CURRICULAR SPEECH IN THE ONLINE CLASSROOM					
2009	*Harrell v. Southern Oregon University*	A student made insulting comments toward his classmates on the online messages boards for two courses. University officials told him that his statements violated conduct standards prohibiting disruption of educational activities. Alleged that the policy violated the 1st	Curricular	The policy at issue was not overbroad. It was necessary to achieve an important governmental interest (maintaining order and decorum in the online classroom). The policy was also clear enough. Thus, it did not violate the 1st Amendment.	*Tinker* and *Hazelwood*

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
		Amendment.			
2010	*Feine v. Parkland College Board of Trustees*	Student was penalized for inappropriate comments in an online learning environment. Alleged violation of 1st Amendment rights.	Curricular	The restriction was not content based, and therefore, did not trigger a 1st Amendment challenge. Also, the school's actions were reasonably related to legitimate pedagogical goals.	"Reasonableness" of restrictions
CURRICULAR SPEECH (GENERAL)					
2011	*Osei v. Temple University of Commonwealth System of Higher Education*	A graduate student sent mass emails criticizing his professor and hostile emails directly to the professor. He was punished by the university and brought suit alleging violations of his 1st & 14th Amendment rights.	Curricular	The school did not infringe upon his fundamental right to free speech because his emails were true threats and would not be protected under the First Amendment. The school's code of conduct was not unconstitutionally vague or overbroad. Additionally, there was no causal link between student's protected speech (the mass emails) and his punishment to establish a prima facie case of	True threat analysis, vagueness and overbreadth, discriminatory retaliation test

Year	Case	Summary	Nature of Speech	Decision	Legal Standard Applied
				retaliation.	

Appendix C: Glossary of Legal Terms

Actual malice- knowledge that information published about an individual was false or publishing information with reckless disregard of whether or not it was false (Black's Law Dictionary).

Amici/amicus curiae- a "friend" of the court. Amici are parties that are not involved in litigation, but give expert testimony in a particular case. They may support a public interest that is not being address in the trial (Black's Law Dictionary).

Certiorari- a Latin word meaning "to be informed of." In the legal context, this word is used to indicate that a higher (appellate) court has agreed to review a particular case decided by a lower court (Black's Law Dictionary).

Concurring opinion- an opinion given by another authority that is in agreeance with and upholds the opinion of the first authority (Black's Law Dictionary). A concurring opinion may be issued when a judge agrees with the final outcome of the case, but does not agree with the majority's reasoning of how or why that outcome should be reached.

Content-based restrictions- restrictions on speech that have been imposed because of *what* the speaker is saying. These restrictions must be able to withstand strict scrutiny in order to be upheld.

Contract- a covenant or agreement between two or more persons, with a lawful consideration or cause (Black's Law Dictionary).

Controlling opinion- the opinion that becomes binding precedent when more than one opinion is issued in a particular case. In a case where no one opinion has earned the support of a majority of justices, the opinion that has garnered the majority of the majority becomes the controlling opinion (SCOTUS Blog).

Declaratory relief- a type of relief in which the court determines the rights of the parties without awarding damages or ordering anything to be done (Black's Law Dictionary).

De novo- anew, afresh. Most commonly used when discussing a court's review of a case (Black's law dictionary).

Dicta- observations or remarks made by a judge concerning some rule, principle, or application of law that is not necessarily involved in the case being decided or essential to its outcome. Dicta is not binding.

Due process- the due process clause of the Fourteenth Amendment prohibits the government from depriving individuals of life, liberty, and property without first providing them with some procedural protections. This is known as **procedural due process.** Courts typically find that students at public institutions have a property interest in their enrollment. If a public institution wishes to deprive a student of this property

interest, it must first provide the student with notice of the charges against him/her and a chance to be heard. The hearing provided must also be fair, in that it provides the individual the opportunity to respond, explain, and defend. A right to **substantive due process** also arises from the due process clause of the Fourteenth Amendment. Substantive due process prohibits government entities from infringing upon fundamental constitutional liberties, such as the right to free speech. While procedural due process is concerned with the actual *process* involved with depriving an individual of those liberties, substantive due process is concerned with *which* liberties the person is deprived of (Black's Law Dictionary).

Fighting words- Speech that is uttered in a face-to-face setting and has the potential to incite immediate violence (*Chaplinsky v. State of New Hampshire*, 1942).

Holding- the court's determination of a matter of law in a particular case. It is the legal principle that is to be drawn from the court's decision (Black's Law Dictionary).

Injunctive relief- a type of relief which forbids a defendant to do some act, or to continue doing some act (Black's Law Dictionary).

In loco parentis- in the place of the parent (Black's Law Dictionary).

Libel- the writing of falsities about another individual.

Majority opinion- the decision in a particular case enjoying the support of more than half of the court's judges (Black's Law Dictionary).

Obscenity- indecent or lewd conduct or expression that tends to corrupt the public morals. Obscenity is not protected under the First Amendment (Black's Law Dictionary).

Precedent- a previously decided case that is considered binding authority for an identical or similar case that raises a similar question of law (Black's Law Dictionary).

Prima facie- on the face of it; on first appearance; at first sight. (Black's Law Dictionary).

Public forum- Public forums are those that have traditionally been used for "purposes of assembly, communicating thoughts between citizens, and discussing public questions" (*Hague v. Committee for Industrial Organization,* 1939). School facilities are only deemed public forums when they have been opened, by policy or practice, for indiscriminate use by the general public or some subsect thereof (*Perry Education Association v. Perry Local Educators' Association,* 1983; *Widmar v. Vincent,* 1981). Public forums are not only limited to physical locations—outlets for expression such as newspapers can be considered public forums as well.

Qualified immunity- a protection from lawsuits for government officials when they perform their duties reasonably. Government officials can only be sued when it is alleged

that officials violated a clearly established statutory or constitutional right (Wex Legal Dictionary).

Remand- to send a case that has been brought into appellate court back to the court it came from for further proceedings (Black's Law Dictionary).

Slander- the speaking of malicious and false words about another so as to injure his reputation (Black's Law Dictionary).

Stare Decisis- to stand by cases already decided and uphold precedents (Black's Law Dictionary).

Strict scrutiny- a level of review used by the courts when governmental curtailment of a fundamental right is in question. In order to survive strict scrutiny, a restriction on a fundamental right must be narrowly tailored to achieve a significant governmental interest and must be no more restrictive than necessary to achieve that interest (*Smith v. Tarrant County College District*)

Summary judgment- a procedure used during pretrial proceedings in which one party asks the judge to decide a case without proceeding to trial. When the moving party can demonstrate that there is no genuine issue of material fact that must be decided by a judge or jury and that it is entitled to judgment as a matter of law, a judge may grant summary

judgment in favor of that party. This, in theory, ends the proceedings and resolves the dispute—though the other party may choose to appeal (Kaplin & Lee, 2014).

True threat- "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" (*Virginia v. Black*, 2003).

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Presentations

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