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The Legal Implications of Your Tweets, Snaps, Hashtags, and All That Other Social Media Lingo

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Overview

- Free speech
Students
Employees
- Social Media in the Classroom
- Privacy and Security



Common Social Media Platforms

- Facebook
- Instagram
- Snapchat
- Twitter
- YouTube
- LinkedIn
- Yik Yak
- Burnbook
- Whisper
- Flickr
- Blogs



Special Characteristics of Social Media

- Instant
- Broad-reaching
 - Information can go viral
- Easy access
- Private accounts
- Anonymity
- Effects on public relations and perception



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Free Speech



- Not a new issue, but new methods
 - Social media provides more ways to speak, easier access to speak, and new challenges in determining the boundaries of speech
 - Supreme Court has not taken up this matter
 - Some case law from lower courts



Key Considerations in Online Speech Analysis

- Is this speech or conduct?
- Is it protected speech?
- Where does the speech occur?
 - On campus?
 - Off-campus?
 - Nexus to campus?
- Is it parody?
- Has it created a material, substantial disruption?
- Does it trigger other obligations?
 - Ex: Title IX, Campus SaVE, Clery, etc.
- Does it intersect with other Constitutional rights?



Speech or Conduct?

- Are we focusing on the speech or the actual conduct of the student?
 - *Requa v. Kent School District* (W.D. Wash. 2007)
 - Video of teacher posted to YouTube and MySpace
 - Student standing behind teacher making pelvic thrusts at her, commenting on teacher's hygiene, etc.
 - Focus on violations of Student Code of Conduct



Potential Conduct Violations

- Threats
- Harassment
- Intimidation
- Hazing
- Stalking
- Disruption of normal university activities
- Unauthorized electronic recording
- Violation of computer use policies
- ...etc.



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Brief History of Student Speech Cases



Student Speech Cases

Tinker v. Des Moines Independent Cmnty School District (1969)

- May limit or discipline student expression if school officials reasonably conclude that expression will **“materially and substantially disrupt the work and discipline of the school”**

Healy v. James (1972)

- Colleges may prohibit students’ associational activities that would **“infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of students to obtain an education”**
 - College has less leeway in regulating or disciplining such speech than secondary schools



School Sponsored Speech

Morse v. Frederick (2007)

- “May take steps to safeguard those entrusted to their care from speech that can **reasonably be regarded as encouraging illegal drug use**”
- Bong hits for Jesus case—student held up sign during school sponsored event
 - Captive audience



Deference to Schools

Christian Legal Society v. Martinez (2010)

- US Supreme Court explained that:
 - Courts have final say on whether public university exceeded constitutional constraints
 - **But** determining what constitutes **sound educational policy is within the discretion of school administrators and educators**



Is it protected speech?

Unprotected speech:

- True threats
- Fighting words
- Speech that incites imminent lawless action
- Child pornography
- Defamation
- Obscenity
- Unlawful harassment and discrimination**
Offensive does not mean unprotected



University Policies

Public institution

- May control access to and use of university property
- Policy/restrictions must comport with First Amendment requirements



Location of the Speech

Forum analysis:

- Type of forum created influences the control university can exercise over speech
 - Traditional public forum
 - Designated public forum
 - Limited public forum
 - Nonpublic forum
- Forum rules apply to physical and virtual spaces
- Have we created a forum? If so, which type?
 - University sponsored website/account/etc.



Location of Speech

On-Campus?

Off-Campus?

- Much more difficult to decide
- U.S. Supreme Court has not given clear guidance
 - Denied cert in three cases in January 2013
 - Split in circuits



Restrictions on Speech

- Content based restriction?
- Viewpoint neutral?
- Prior restraint?
- Overbroad?
- Vague?



Restrictions

Reasonable time, place, and manner restriction

- Time
- Place
- Manner



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University Policies and Standards

University Policy 302, Web Communications

University Policy 304, Electronic Communication Systems

University Policy 406, Code of Student Responsibility

UNC Charlotte Standard for Responsible Use



Kowalski v. Berkeley County Schools (4th Circ. 2012)

- “sufficiently connected to the school environment” to trigger substantial disruption analysis

DJM v. Hannibal Public School District (8th Circ. 2011)

- Off-campus application of Tinker is appropriate where it is **reasonably foreseeable that off-campus threats create a risk of substantial disruption within the school environment**



Layshock v. Hermitage School District (3rd Circ. 2011)

- District court found it created curiosity not a substantial disruption – Third Circuit upheld
- Court found that school could not regulate the expressive conduct which occurred outside the school context

Yeasin v. University of Kansas (Kansas Ct. of App. 2015)

- Conduct Code did not extend disciplinary jurisdiction to off-campus misconduct



Is there a material and substantial disruption?

Tatro v. University of Minnesota (Minn. Ct. App. 2012)

- Threat to stab someone, death list, concern from university community, police investigation, integrity of program
- **Impact of speech on those who learned of it**
- Integrity of academic program
 - Academic program rules ok to regulate student speech online
 - BUT must be narrowly tailored and directly related to established professional conduct standards

Murakowski v. University of Delaware (D. Del. 2008)

- Individual posted messages with violent themes about women on a website while on school computer system
- Court found this was not a “true threat” and did not cause a “material disruption”
 - “[a]lthough complete chaos is not required, **something more than distraction or discomfiture created by the speech is needed.**”

Discussion





Punishment v. Education

Punishment

- Expulsion
- Suspension
- Written warning
- Termination

Education

- Educational conversation
- Training



Anonymous Speech

- Gossip sites
- First Amendment still applies
- Platform for hate speech, disruptive speech, etc.
- Difficult to identify



Public v. Private

- **Public: State Actor**
 - First Amendment protections
- **Private**
 - First Amendment does not apply
 - BUT..still may have contract claims OR reluctance to punish speech

[@BelmontUniv](#) I just wanted to inform you that this very offensive & racist post was by a Belmont student and I think it should be addressed.



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Employees



Employees and Social Media

Speaking:

- As a citizen? Or official duty?
- On a matter of public concern? Or private concern?

Balance interests of university and speaker



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As a Private Citizen...

- Pursuant to official duties?or
- As a citizen on individual behalf?
 - Senior level administrators
 - Faculty
 - Staff



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...On a Matter of Public Concern

- Content
- Form
- Context



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Impact on Operations

Employee's interest in speech and public's interest in hearing it

v.

University's legitimate interest in efficient performance of the
workplace and the impact it has on operations



Examples in the Employee Context

- *City of San Diego v. Roe*, 543 U.S. 77 (2004)
 - Police officer discharged for selling pornographic tapes of himself on eBay
 - “speech” was NOT matter of public concern
 - “speech was detrimental to mission and functions of employer
- *Snyder v. Millersville University* (E.D. Pa. 2008)
 - Student teacher posted picture on MySpace profile that showed her in pirate costume, drinking from a cup, which included the caption ‘Drunken Pirate.’
 - Court ruled as a student teacher, her actions were not a matter of public concern



Example in the Employee Context

- Deputy sheriff “likes” FB page of boss’s election opponent
 - Fired and upheld, later 4th Circ. found a “like” to qualify for First Amendment protection
- “WTF! No overnight homicides? You’re slacking Tucson.”
 - Reporter fired and firing sustained
- Employees in Charlotte Meck Schools:
 - “I hate my students”
 - “most ghetto school in Charlotte:
 - Fired and sustained by the court



Faculty Members


- Academic Freedom
- Instructional setting
 - Germane to subject matter of course
- *Adams v. UNC Wilmington*

Examples in the Employee Context

- University of Tennessee Professor:



Instapundit.com
@instapundit




Run them down.



WBTV News @WBTV_News
LIVE NOW: Protesters on I-277 stopping traffic and surrounding vehicles. AVOID. Watch live » 3wb.tv/1TGw8DS
#KeithLamontScott

RETWEETS **48** LIKES **55**



8:51 PM - 21 Sep 2016

- University of Kansas professor:



David Guth
@DWGuth




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

← Reply ↻ Retweet ★ Favorite ⋮ More

45
RETWEETS

5
FAVORITES





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Use of Social Media by Employees

- Public records
- University policies on web communications, etc.
- Laws and regulations regarding political activities with university resources



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Social Media in the Classroom



Uses in the Classroom

- Class discussion groups
- Creating apps
- Scholarly debates
- Research
- Communicating with students
- Group projects



Use of Social Media in the Classroom

Classroom space made more public

- Students can post photos, live tweet, periscope, etc.

FERPA concerns

Create a duty and obligation to report

ADA Accessibility

Intellectual Property



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Privacy Considerations



Privacy Rights

- Fourth Amendment
 - Reasonable expectation of privacy
- Electronic Communication Privacy Act
 - Prevents an entity from “intentionally accessing without authorization...and thereby obtaining an electronic communication from an electronic communication service while it is in storage”



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Protecting Your Privacy

- Cyberstalking
- Identity Theft



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Safety and Security



Cyberbullying

- Growing problem
- Linked to suicides on campuses



Electronic Harassment

Electronic Harassment

- Title IV, Title IX, VAWA obligations, etc.
 - Cyberstalking
- University has obligation to respond to discriminatory harassment...
 - Objectively and subjectively?
 - Severe? Persistent? Pervasive?
 - Do we have substantial control?
 - Do we know or reasonably should know about it?



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Other Safety Concerns for University

- Threats to the university community
- Speech that may lead to further issues
- Concerning behavior
 - Suicide prevention



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Monitoring



Advantages to proactive monitoring

- Identify cyberbullying, electronic harassment, concerning behavior, and other risks to the University
- Know students' interests, concerns, etc.

Disadvantages to proactive monitoring

- Creates liability for university
 - Assumed a duty and may face liability if fail to meet that duty
 - Failure to monitor properly
 - Failure to act
- Infringing on rights of students



Liability for Monitoring

- Failure to monitor
 - Create a duty→miss something→liability
- Failure to act
 - Monitor→see something→fail to do anything→liability
- Special circumstances
 - Learn of something—should monitor/look into it?
 - Policy?
 - Particular groups?
 - Always be mindful of assumption of a duty



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QUESTIONS, COMMENTS, DISCUSSION

#ThanksNinerNation