SOCIAL MEDIA:
FACULTY AND STUDENT RIGHTS AND RESPONSIBILITIES

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Student online speech *is speech* and the most important advice that can be given in dealing with online speech is to approach it according to well-established First Amendment jurisprudence. If there is any real difference in the way that online and traditional speech are treated in the courts, it springs from the fact that online speech has the potential to travel farther and faster than traditional speech, reaches a much broader audience, is easier to access, and can remain "out there" in the cyber world long after being removed from its original source.

The first step in analyzing student online speech is to apply the rules from *Tinker,* 393 U.S. 503 (1969) and its progeny. While these student speech cases addressed by the U.S. Supreme Court almost all deal with high school students, courts apply them to higher education cases by adjusting the rules to fit a more mature (we hope!) population. Online employee speech cases are, on the other hand, addressed through the *Connick/Pickering* line of cases.

Selected Cases Involving Students

Foundational First Amendment Cases

The grandfather of student speech law is *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). During the Vietnam era, junior and senior high school students were suspended from school for wearing black arm bands to protest the war. The Supreme Court found that the school had violated the students' right to freedom of speech: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." This right is not unlimited, however. A school may protect its educational function by stopping speech that presents a "material and substantial" disruption to the work of the school.

In *Bethel School District v. Fraser,* 478 U.S. 675 (1986), a student gave a speech supporting a friend's candidacy for student government during an assembly to 600 students, including some as young as 14. The speech was full of sexual innuendo and the student was disciplined. The court found in favor of the school, holding that, at the k-12 level, vulgar, lewd and patently offensive speech is not protected:

> [T]hese "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing

> interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

Id. at 681.

Today, the material disruption standard is frequently applied to higher education freedom of speech cases. In *Murakowski v. University of Delaware,* a student was disciplined for postings made on a personal website housed on a university server. 575 F. Supp. 2d 571 (D. Del. 2008). On the website, the student wrote compositions that included rape, mutilation, sexual oppression, murder, racial slurs and negative references to homosexuals and disabled individuals. According to *Fraser,* at the k-12 level, lewd or patently offensive language is not protected. However, in *Murakowski*, the court did not consider the offensiveness of the website to be a factor. Instead, the court looked at the postings to decide whether they constituted a true threat or a material disruption under *Tinker.* The court found the posting were neither, and held that the website was protected speech.

While not discussed at length in the case, the ruling in *Fraser* may also represent the fact that the speech occurred during the course of an assembly which students were required to attend. Though argued on a forum basis, higher education cases involving online classes also reflect the idea that institutions should be able to regulate student speech when the presence of the students is compelled and they have no option to walk away. *See, e.g., Harrell v. Southern Oregon University*, 2009 WL 3562732 (D. Or. Oct. 30, 2009); and *Feine v. Parkland College*, 2010 WL 1524201 (C.D. Ill. 2010).

In *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988), a school principal required that a newspaper published as part of a journalism class remove articles concerning divorce and teenage pregnancy. Under the particular circumstances in this case, the newspaper was produced by a journalism class and was, therefor, a part of the curriculum. Based on these facts, the Court held that the speech in question was school *sponsored,* and thus could be regulated by the school.

Finally, in *Morse v. Frederick,* students were allowed out of class to watch the Olympic torch pass through town. 551 U.S. 393 (2007). All students of First Amendment law have probably seen the photograph of the student who chose this particular moment to unfurl his banner with the words, "BONG HiTS 4 JESUS." When the student refused to take his banner down in response to a request by the school administration, he was disciplined. The Court, also having no sense of humor, ruled in favor of the school. Because the school had officially sanctioned students' observation of the torch runner, the Court reasoned that the event was school sponsored, and hence, it was within the right of the school to sanction a student for speech advocating drug abuse.

While the issue of whether speech is school sponsored has not raised its head in most of the cases involving student online speech at the higher education level, it is not difficult to imagine a situation where students representing the university might engage in offensive online

speech. Under such circumstances, an administrator would want to rely on *Kuhlmeier* and *Morse* as the justification for any discipline of the students.

Cases Involving Speech Codes

Universities frequently have speech codes as a part of their student codes of conduct and these speech codes are used to regulate both online and traditional speech. These speech codes are often challenged by students who have never been charged with a violation of the code. An exception to traditional rules concerning standing, courts will usually let these claims proceed finding that the "very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court." *Bair v. Shippensburg University*, 280 F. Supp. 2d 357, 364-65 (M.D. Penn. 2003), (*citing New York v. Ferber*, 458 U.S. 747,772 (1982)). In *Bair,* two students challenged certain provisions of a speech code as being overbroad. The court agreed with the students as to the following sections:

> Acts of intolerance directed toward other community members will not be condoned. This is especially true, but not limited to, acts of intolerance directed at others for ethnic, racial, gender, sexual orientation, physical, lifestyle, religious, age, and/or political characteristics.
>
> The expression of ones' beliefs should be communicated in a manner that does not provoke, harass, intimidate, or harm another.
>
> No person shall participate in acts of intolerance that demonstrate malicious intentions toward others.
>
> Racism shall be defined as the subordination of any person or group based upon race, color, creed or national origin. It shall be a violation of this policy for any person or group to maliciously intend to engage in any activity, (covert or overt) that attempts injure, harm, malign, or harass, that causes the subordination, intimidation, and/or harassment of a person or group based upon race, color, creed national origin, sex, disability or age.
>
> Shippensburg University's commitment to racial tolerance, cultural diversity and social justice will require every member of this community to ensure that the principles of these ideals be mirrored in their attitudes and behaviors.

Id. at 368-73.

In finding these provisions overbroad the court noted that the Supreme Court has repeatedly held that speech cannot be prohibited just because it offends someone's sensibilities: "[t]he Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it." Saxe, 240 F.3d at 215 (citing *Tinker*, 393 U.S. at 509; *Texas v. Johnson*, 491 U.S. 397, 414, (1989); *Street v. New York,*

394 U.S. 576, 592 (1969); and *Doe v. University of Michigan*, 721 F.Supp. 852, 863 (E.D. Mich. 1989)).

In *Esfeller v. O'Keef*, the 5th Circuit upheld a speech code that prohibited "extreme, outrageous or persistent acts, or communications that are intended or reasonably likely to harass, intimidate, or humiliate another." 2010 WL 3035144 (5th Cir. 2010) (unpublished opinion). The court noted that the conduct code did not prohibit speech that was merely hostile, disruptive or offensive.

In *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004), a law student at Texas Tech challenged various speech policies of the university. The court ruled that the section of the speech code banning insults, epithets, ridicule, or personal attacks was overbroad.

In another challenge to a student speech code, a student was accused of violating the code by harassing a female student who had accused his friend of sexual assault. *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010). The case has an extensive discussion of the difference between protected speech at the k-12 level and the college level. The court declined to believe that institutions of higher learning use their student conduct processes to educate their students. Most student affairs professionals would be offended by the court's statement that, "In general, there is no educational component to discipline in a university setting." *Id.* at 246. Therefore, "[p]ublic universities have significantly less leeway in regulating student speech than public elementary or high schools." *Id.* at 247.

The *McCauley* court found the following provisions overbroad:

> Misbehavior at Sports events, concerts, and Social Cultural Events. . . Displaying in the Field House, softball field, soccer field, cafeteria and Reichhold Center for the Arts any unauthorized or obscene, offensive or obstructive sign.
>
> Conduct which causes Emotional Distress. . . This includes conduct which results in physical manifestations, significant restraints on normal behavior or conduct and/or which compels the victim to see assistance in dealing with the distress.
>
> Verbal Assault, Lewd, Indecent or Obscene Conduct or Expressions on University Owned or Controlled Property or a University Sponsored or Supervised Functions.

Id. at 247-53. In particular, the court found that the provision concerning emotional distress was to be applied in an impermissible subjective manner: "This prong prevents speech without any regard for whether the speech is objectively problematic." *Id.* at 250-51.

K-12 Cases Involving Online Speech

There are considerably more k-12 cases on the issue of online speech than there are higher education cases. Two cases in particular that reveal the lack of a bright line rule for

dealing with these issues are *Layshock v. Hermitage School District*, 593 F.3d 249 (3rd Cir. 2010) and *Snyder v. Blue Mountain School District*, 593 F.3d 286 (3rd Cir. 2010), two cases from different panels of the same circuit, coming out the same day and reaching opposite holdings.

In *Layshock*, a high school student used his grandmother's computer to create a fake profile for his principal on an online social network. He accessed the school's website to copy a photograph of the principal, which he added to the profile. The student was later suspended for three days. A three judge panel of the 3rd Circuit held that the student's right to freedom of speech had been violated: "It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school activities." *Layshock*, 593 F.3d at 260.

In *Snyder*, an eighth grade student also constructed an online profile for her principal using a home computer. The three judge panel here upheld the school's discipline of the student under the *Tinker* material disruption standard. 593 F.3d at 299.

The opinions in both *Layshock* and *Snyder* have been vacated and the 3rd Cir has granted them a hearing en banc.

The following are a sampling of other online k-12 speech cases:

Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010). A student started a Facebook page entitled, "Ms. Sarah Phelps is the worst teacher I've ever met." She created the page on her home computer and left it up for three days, and the teacher never saw the page. Principal suspended student for three days and moved her into a different English class. The court held for the student, finding that the speech was off campus and there was no disruption to the educational process. This case touches upon a frequent issue in online cases: where does the speech occur? Because the student did the page on her home computer and it was clear that she never intended the page to be viewed from anyone on campus, the court found the speech to be off campus. On a cautionary note: The court in this case held that the principal had violated a clearly established constitutional right and, therefore, lost qualified immunity.

Requa v. Kent School District No. 415, 492 F. Supp. 2d 1272 (W.D. Wash. 2007). Here a high school student recorded video of his teacher without her knowledge. The video portrayed the teacher in an uncomplimentary manner and in one scene, a fellow student stood behind the teacher and made pelvic thrusts. The video was edited to include comments on the teacher's hygiene and organization habits and graphics that said "Caution Booty Ahead," followed by a shot of teacher's backside. The student posted the video on YouTube and was later suspended when the principal saw it. School suspended student for 40 days and the student brought a lawsuit against the school. The school argued, and the court agreed, that the student was being punished for surreptitiously filming the teacher's backside and filming the teacher in embarrassing positions; therefore, the student was being punished for conduct, rather than for speech. The opinion includes a statement that "the Court takes judicial notice that 'booty' is a common slang term for buttocks."

J. C. v. Beverly Hills Unified School Dist., 711 F. Supp. 2d 1094 (C.D. Cal., 2010). A high school student filmed her classmates "talking ugly" about a third student and then posted the video on YouTube. Student was suspended. The court found that the student's argument that the speech took place off campus was not dispositive, even if just because the speech eventually found its way onto campus.

> "Given this background, the Court can draw several general conclusions regarding the application of the Supreme Court's precendents to student expression originating off campus. First, the majority of the courts will apply Tinker where speech originating off campus is brought to school or to the attention of school authorities, whether by the author himself or some other means. The end result established by these cases is that any speech, regardless of its geographic origin, which causes or is foreseeably likely to cause a substantial disruption of school activities can be regulated by the school. Second, some courts will apply the Supreme Court's student speech precedents, including *Tinker*, only where there is a sufficient nexus between the off-campus speech and the school. It is unclear, however, when such a nexus exists. The Second Circuit has held that a sufficient nexus exists where it is "reasonably foreseeable" that the speech would reach campus. The mere fact that the speech was brought on campus may or may not be sufficient. Third, in unique cases where the speaker took specific efforts to keep the speech off campus (*Thomas*), or clearly did not intend the speech to reach campus and publicized it in such a manner that it unlikely to do so (*Porter*), the student speech precedents likely should not apply. In these latter scenarios, school officials have no authority, beyond the general principles governing speech in a public arena, to regulate such speech.

Id. at 1107. In spite of this discussion, the court held for the student finding that the video did not cause a material disruption to the school. The court stated that it "is not aware of any authority. . . that extends the *Tinker* rights of others prong so far as to hold that a school may regulate any speech that may cause some emotional harm to a student." *Id.* at 1123.

LaVine v. Blaine School District, 257 F.3d 981 (9th Cir. 2001). A high school expelled student who had written a graphic and disturbing poem about killing his classmates. Even though the poem was not written for class, the court upheld the suspension of the student based on the substantial disruption standard from *Tinker*. One of the factors considered was that the student had troubled history, including suicidal ideation.

Higher Education Cases Involving Online Speech

The type of forum involved plays an important role in whether an institution has the right to regulate speech. Online classes are not public fora, and therefore, the institution has greater authority. In *Feine v. Parkland College*, students in an online college class were required to interact using postings and e-mails. 2010 WL 1524201 (C.D. Ill. 2010). The professor warned them that "[i]nappropriate postings (for example: personal attacks, prejudiced language, incoherent ramblings, proselytizing, etc.) will not be tolerated and may result in the removal of the posting, a loss of points, or further disciplinary measures." On two occasions, a student's

messages were characterized by the professor as "mean spirited" and "thinly veiled attacks," and the professor deducted 10 points from his grade on one assignment.

The student brought a claim for violation of his right to free speech, but court found that an online class was a non-public forum and stated that the government "may restrict speech in a non-public forum as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's viewpoint." The court held that the rules that the professor had put in place for class interaction were related to the manner of the speech and not its content; therefore, the plaintiff's right to free speech had not been violated. The court further chastised the plaintiff for bringing a claim in federal court about a 10 point deduction in a grade.

Another case involving an online class is *Harrell v. Southern Oregon University.* 2009 WL 3562732 (D. Or. Oct. 30, 2009). Here, the court also upheld disciplinary action taken against a student for making disrespectful comments to other students in the class.

Another case that also turns on the relevant forum is *Crosby v. South Orange County Community College District.* 91 Cal. Rptr. 3d 161 (Cal. Act. App. 2009). A student who was instructed not to view pornographic material on a website in the college library brought a First Amendment Claim against the school. Court stated that libraries do not create a designated or traditional public forum when they provide internet access to patrons. The Library could restrict the computers to a use consistent with their educational mission.

Students may be surprised to find that their social media pages are not as private as they thought they were. In *Moreno v. Hanford Sentinel, Inc.*, a college student wrote in great depth on her MySpace page how much she hated her home town. 91 Cal. Pptr. 3d 858 (Ca. Ct. App. 2009). Her high school principal sent the post to the local paper that printed it as a letter to the editor. In a sad turn of events, the entire town turned on the student and her family. Her family ended up having to move and her father had to close a small business that he had operated for 20 years. The student brought an invasion of privacy claim against the principal, but the court held that the student had no expectation of privacy in something that had been posted on MySpace. The opinion does not, however, discuss any privacy settings that the student may have had on her account or how the principal accessed the site.

Administrators wishing to craft a speech code that will pass constitutional muster should read *Esfeller v. O'Keefe.* 2010 WL 3035144 (5th Cir. 2010) (unpublished opinion). In *Esfeller*, a student was charged with a violation of LSU's code of conduct for persistently harassing and threatening his ex-girlfriend through e-mail and social networking sites. The conduct code prohibited "extreme, outrageous or persistent acts, or communications that are intended or reasonably likely to harass, intimidate, or humiliate another." The Fifth Circuit upheld the code noting that it did not overbroadly prohibit speech that was merely hostile, disruptive or offensive.

As discussed previously, in *Murakowski v. University of Delaware*, a student was disciplined for postings made on a personal website belonging to the university. Supp. 2d 571 (D. Del. 2008). The website in question ostensibly promoted violence against women and sexual abuse. The court looked at the postings to decide whether they constituted a "true threat" and

found that they did not. Then the court applied the *Tinker* standard and further found that the website was not likely to cause a "material disruption" to the educational process.

Student speech may be evaluated by the same standards as employee speech if the court determines that the student was acting as an employee in a particular situation. In *Snyder v. Millersville University*, a student teacher was removed from student teaching placement because she posted critical statements about her supervising teacher on her MySpace page. 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008). Furthermore, she had told students about her page and the page had a picture of the student teacher in a pirate hat drinking from a plastic cup. Court found that, under the circumstances, student was acting more as an employee than as a student, and the issue was whether she was speaking on a matter of public concern. Because she was not, her speech was not protected and her dismissal was upheld.

In *Yoder v. University of Louisville*, a nursing student was dismissed for writing in her blog about witnessing a woman giving birth. 2009 WL 2406235 (W:D: Ky. 2009). The court stated that the blog was in poor taste and poorly written, but still held for the student on the basis that the student did not violate any university policy. Noting the importance of confidentiality in the medical professions, the court reasoned that the blog did not include any information by which the woman could be identified. Because the student did not keep the blog as part of her professional experience, the blog was more non-professional than unprofessional.

Greenbaum v. Google, 845 N.Y.S.2d 695 (S. Ct. N.Y. 2007). An elected school board member believed she had been defamed on an anonymous blog. She brought a claim against Google, demanding to know to whom the blog belonged. The court stated that, prior to requiring Google to provide the information, the plaintiff would have to prove the likelihood that her defamation claim would succeed. Because the speech in the blog was considered by the court to be protected, Google was not required to provide the identity of the blogger.

The First Amendment applies to state action, and therefore, students at private institutions will not be able to bring First Amendment claims against their institutions. In *Key v. Robertson*, a law student at private school excerpted a frame from a video of Pat Robertson scratching his nose with his middle finger and made the picture the student's profile image on his Facebook account. 626 F. Supp. 2d 566 (E.D. Va. 2009). The law school administration was not amused and asked the student to remove the picture. The student brought a first amendment claim against the institution and claimed that the action by the institution was state action because the law school received large amounts of federal dollars through student financial aid. Court disagreed stating that the receipt of federal funds was not enough to make action by an institution state action.

In another case involving a private school, the court applied the standard that the school could not act in an arbitrary manner in disciplining a student. *Rollins v. Cardinal Stritch University*, 624 N.W.2d 464 (Minn. Ct. App. 2001). The student was removed from a cohort because he repeatedly sent offensive e-mails to classmates. When the student challenged his dismissal, the court noted that even private institutions cannot act in an arbitrary manner in disciplining students. The court then went on to uphold the dismissal reasoning that the institution had the right to "preserve to all its students an environment that is conducive to

academic pursuit, social growth and individual discipline." *See also, Becker v. City University of Seattle*, No. 09-5655, 2010 WL 2721032 (E.D. Pa. 2010). (Court upheld discipline of online student at private school stating that student's First Amendment Claim was not supported by state action).

Federal Discrimination Law

While an institution cannot adopt anti-discriminatory speech conduct policies that prohibit constitutionally protected speech, an institution must still protect its students from harassment that under Title IX, Title VI, and the ADA is "so severe, pervasive and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school" *Davis v. Monroe*, 526 U.S. 629, 642 (1999). If the institution's response is deliberate indifference, or "clearly unreasonable in light of the known circumstances," the institution may be liable to the student for its actions or inactions. *Id.*

In *Davis,* a fifth grade female student was repeatedly sexually harassed by another student. The harassment included making sexual statements, groping, and acting out of sexual acts upon the student. Although the female student repeated complained, the harassing student was never disciplined. The father of the victim read in her diary that the harassment was causing her to consider suicide and a criminal charge was brought against the harasser, who was convicted of sexual battery. Because of the severity of the harassment and the school's deliberate indifference, the school was held liable. Furthermore, the institution could be required to pay monetary damages. *Id.* a 642.

Deliberate indifference can result from facts existing at an institution prior to the harassment occurring. In *Simpson v. University of Colorado Boulder,* female students were assaulted by football players during recruiting visits. 500 F.3d 1170 (10th Cir. 2007). The 10th Circuit overturned summary judgment for the university, finding that liability based on deliberate indifference under Title IX could result if "the risk of an assault during recruiting visits was obvious." *Id.* at 1180-81.

In *Bryant v. Independent School District No. I-38,* the 10th Circuit applied the *Davis* test to an African American student's claim of peer-to-peer harassment on the basis of race. 334 F.3d 928 (10th Cir. 2003). The court held that in a claim for deliberate indifference under Title VI, the victim must allege that (1) the institution had knowledge of the harassment, (2) the institution was deliberately indifferent, (3) the harassment was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school. *Id.* at 934.

The same test for liability under the ADA was articulated by the 6th Circuit in *S.S. v. Eastern Kentucky University.* 532 F.3d 445 (6th Cir. 2008). For the institution to be liable to the victim under the ADA, the student must prove that he or she has a disability and was harassed because of the disability, and that the harassment was sufficiently severe or pervasive so as to create a hostile environment, altering the condition of the victim's education. Furthermore the institution must have acted with deliberate indifferent to the harassment. *Id.* at 454.

In *Dambrot v. Central Michigan University, the university disciplined a coach for use of a racial slur in the locker room. 55 F.3d 1177 (6th Cir. 1995). The university had an anti-discriminatory harassment policy that prohibited:*

"any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . (c) demeaning or slurring individuals through . . . written literature because of the racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation."

Id. at 1182.

The court found the policy to be unconstitutionally overbroad and vague. Furthermore, even if the university interpreted the policy to only apply o fighting words, the policy was unconstitutional because it only prohibited fighting words that targeted individuals based on race or ethnicity. Regardless, termination of coach was permissible under *Connick/Pickering* test because his words did not touch on a matter of public concern. *Id.* at 1187.

Finally, in *Ward v. Wilbanks, a* graduate student in counselor education refused to counsel homosexual clients because of her religious beliefs. No. 09-CV-11237, Slip Copy 2010 WL 3026428 (E.D. Mich. 2010). The student had been offered a remediation program that would help her counsel homosexual clients successfully, but she refused. She was dismissed from the counseling program, and she brought claims against the University alleging that her rights to freedom of speech and free exercise of religion had been violated. The university had adopted the American Counseling Association Code of Ethics and Standards which stated that counselors must be able to work successfully with clients whose values differ from the counselors'. The court found that the university was enforcing a conduct code, not a speech code, and no one at the university had ever tried to change her religious beliefs.

Factors to Consider When Evaluating Student Speech

Although there are no bright line rules in regulating online student speech, there are factors which courts consider in most of the cases. Some of these include:

- Is the speech purely political? Most online fora are public. Speech that is purely political and occurs in a public forum will be protected speech and rarely will an institution be able to prove that there is a material disruption to the educational process severe enough to justify prohibiting political speech. (Most online student speech cases, however, do not deal with purely political speech.)
- Most defendants who are successful in proving a material disruption to the learning environment can point to a history of disruption related to the specific type of speech at issue.
- In what type of forum is the speech occurring? In a non-public forum, such as an online class, the institution will have a much greater degree of power in controlling online

speech. For example, the professor may put standards in place requiring that the speech be respectful and collegial.

- Where is the speech occurring? If off-campus, is it being sent to or accessed by individuals on campus? Is the speech occurring through campus e-mail accounts or going through the campus servers?
- Does the speech violate existing law? Does it create a hostile environment for individuals in a protected class (race, color, national origin, sex, or disability)? (Is it sufficiently severe, pervasive, or persistent so as to interfere with or limit the student's ability to participate in or benefit from the services, activities, or opportunities offered by a school? If so, the school must not exhibit deliberate indifference.)
- What is the nexus between the speech and the institution? Did the student intend the speech to remain off campus? Is the target of the speech a member of the campus community?
- Does the speech represent a true threat? Does the speech have the potential to cause imminent violence or danger?
- Does the speech violate any university policy? Has the policy been reviewed to determine if it is constitutional and not overly broad or vague?
- Is the speech defamatory?
- Is the posting designed to be satirical? Would a reasonable person know that the posting was satirical and not true?
- Could the speech be considered school-sponsored? Is the student representing the school while speaking?

Public Employee Free Speech Rights

Institutions of higher education have much greater leeway in regulating the speech of their employees than in regulating the speech of their students. To determine when employee speech is protected from retaliation under the First Amendment, courts must find:

(1) that the employee is speaking as a citizen and not as an official employee on a matter pursuant to their job function, *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006);

(2) they are speaking on a matter of public concern rather than on a matter of private interest, *Connick v. Myers*, 461 U.S. 138, 146 (1983); and

(3) their interest in the speech outweighs the interest of the government in promoting efficient operation of their offices, *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

In *Pickering v. Board of Education*, the Supreme Court rejected the idea that teachers or other public employees may be constitutionally compelled to relinquish First Amendment rights they would otherwise enjoy as a citizen. *Id.* However, the Court did acknowledge that States have an interest as an employer in regulating the speech of its employees. Therefore, the Court articulated a balancing test for determining when employee speech is protected from retaliation under the First Amendment. This balancing test asks whether the employee's interest in the

speech outweighs the interest of the government in prompting efficient operation of their offices. *Id.*

In *Connick v. Meyers*, the Supreme Court revisited the issue of a public employee's right to free speech. 461 U.S. at 146. The Court stated that in order to be entitled to the balancing test outlined in *Pickering*, the speech of the employee must be on a matter of public concern, rather than private significance. *Id.* In order to determine whether a speech is a matter of public concern requires courts to analyze the "content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

In *Garcetti v. Ceballos*, the Supreme Court once again reiterated the Pickering-Connick decisions in "promot[ing] the individual and societal interest that are served when employees speak as citizens on matters of public concern and to the respect the needs of government employers attempting to perform their important public functions." 547 U.S. 420. However, the Court added an important qualifier that the speaker is speaking "as a citizen" as opposed to speech made pursuant to the employee's "official duties": "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 421.

However, the Court expressly stated that it was not ruling on whether or not the rule would apply to the speech of faculty:

> There is some argument that the expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Id. at 425.

This year, in *Adams v. Trustees of the University of N.C. Wilmington*, the 4th Circuit stated that the speech of a faculty member on a matter of public concern was excluded from *Garcetti*. ___ F.3d ___, 2011 WL 1289054 (4th Cir. 2011).

> Applying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment. In light of the above factors, we will not apply *Garcetti* to the circumstances of this case.

Id. at *12. *But, c.f., Renken v. Gregory*, 541 F.3d 769, 774 (7th Cir. 2008) (holding that faculty member calling attention to fund misuse related to a project that he was in charge of administering was speaking as an employee and not as a private citizen); *Capehart v. Hahs*, No. 08-CV-1423, 2011 WL 657848, *4(N.D. Ill. 2011) (faculty member's speech concerning military and CIA recruiting on campus was pursuant to her official duties and therefore, not

protected); and *Miller v. University of South Alabama*, No. 09-0146-KD-B, 2010 WL 1994910, *11 (S.D. Ala. 2010) (faculty member speaking in faculty meeting was speaking in official capacity and not as a citizen).

Selected Cases Involving Employees

Stengle v. Office of Dispute Resolution, 631 F.Supp2d 564 (2009). A special education due process hearing officer's contract was not renewed based on, among other things, postings on a blog created by the employee addressing special education issues. The Court found that although the employee was not speaking in her official capacity as a hearing officer and was speaking on a matter of public concern, the government's interest "in ensuring that impartial due process is afforded those seeking resolution of special education issues" outweighed the employee's interest "in exercising her right to free speech."

Spanierman v. Hughes, 576 F.Supp.2d 292 (2008). A teacher's contract was not renewed after his use of two different MySpace profile's to interact with students. Although the Court found that the teacher "was not acting pursuant to his responsibilities as a teacher, the only speech based on a matter of a public concern and therefore protected was a single poem (the majority of the content was personal conversations). However, the teacher "failed to establish the necessary casual connection between his [protected] speech and the allegedly retaliatory action taken against him." Furthermore, the Court found the school could still prevail by showing that they would have taken the same adverse action absent the protected speech.

Snyder v. Millersville University, 2008 WL 5093140. A student-teacher was dismissed from her assigned school and therefore failed to qualify for her degree and graduate after referring students to her MySpace account containing pictures and postings deemed unprofessional and critical of her supervising professor. After the Court determined that the student-teacher was acting more in a teacher role than a student, they found that the speech was not on matters of public concern but rather personal in nature and therefore unprotected by the First Amendment.

Dambrot v. Central Michigan University, 55 F.3d 1177 (6th Cir. 1995). A university did not renew the contract of a coach based on his use of a racial slur in the locker room. Even though the university's anti-discrimination policy was struck down as unconstitutional, the court found that the coach's dismissal under the *Connick/Pickering* test was proper because the coach was not speaking on a matter of public concern when he was addressing his players.

Land v. L'anse Cruese Public School Board of Education, 2010 WL 2135356. A tenured teacher was terminated after inappropriate photographs of her at a combined bachelor/bachelorette party, taken and posted without her knowledge, appeared on an internet website. After being reinstated by the State Tenure Commission, the Court of Appeals affirmed finding that "where a teacher's conduct, outside the school and not involving students, is the basis for discipline . . . there is a serious question as to whether the public school may take action against that teacher without showing that that conduct has an adverse affect upon the educational process."

Pietrylo v. Hillstone Restaurant Group, 2009 WL 3128420. An employee was terminated after accessing a chat-group on MySpace without authorization. The employee filed suit claiming her privacy rights were violated when her manager requested her user information and password which was used by the manager to access the chat-group on five occasions. A jury found the employee to be wrongfully terminated and the managers to have invaded the defendant's privacy. The case at hand denies the defendants motion for judgment as matter of law and motion for new trial.

Pickering/Connick Analysis (prior to Garcetti)

"[A] public employee's comments as a citizen are protected; comments as an employee are protected as long as they are on a public issue . . . If the comments are found to be touching on a matter of public concern, then the court will balance the interests of the parties."

After Addition of Garcetti

The Court's revisiting of "public employee speech" issues in Garcetti would appear to give public employers, such as the University, greater leeway in dealing with expressive conduct by employees. However, because the contours of speech that is "pursuant to official duties" are not self-evident and that determination rests upon a careful analysis of the pertinent facts (what are the employee's responsibilities, how did the topic of the employee's speech relate to those duties, did the employee actually have an affirmative to speak out regarding that topic, who was the audience of the communication, etc.) any retaliatory action taken in response to employee communications should only be undertaken after full consultation with human resources personnel and legal counsel.

SOCIAL MEDIA: FACULTY AND STUDENT RIGHTS AND RESPONSIBILITIES[1]

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A. Introduction: As social media sweep the nation and the world, constituents of postsecondary institutions increasingly use, abuse, and struggle to have clues about this fast growing medium and its emergent culture of communication and colloquy. And it's not just our students who use these modalities; our faculty, staff, alumni, donors, and funders use them. Moreover, our academic units, our service units, our athletic programs, our alumni programs, our development offices, our admissions offices, etc. are riding (or seeking to ride) the social media wave. It is big business and a waxing mechanism to acquire market share, social acceptance, immediate information, and new revenue streams. Social media is burgeoning into the classroom and the lab. It is quickly making e-mail passé and the annual holiday card an antiquity. It is a hallmark of the migration from a "push economy" to a "pull economy" (or at least a more hybrid model).

As disruptive, mysterious, unnecessary, distracting, and invasive as some feel social media are, most postsecondary institutions cannot to afford to eschew or ignore them. The sooner we learn how the technology fits (or does not fit) within the extant architecture, the better. The implications for social media are, at a minimum, social, financial, pragmatic, and legal. In this outline, I will focus primarily on: what social media are, why we should be mindful of the forums we create, how the contracts we sign with social media providers might affect our institutions, and what pragmatic advice we should be offering to our communities around social media.

B. Definition—What are "Social Media": Still in its infancy, the umbrella of "Social Media" is not yet a precisely defined category or concept. "Social Media" has been defined as "[A] group of Internet-based applications … which allows the creation and exchange of user-generated content."[3]

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[1] This conference paper is meant to complement the fine work (of the same title as this outline) of my co-presenter, Donna Gurney, of the University of Mississippi. Please see her excellent overview of the foundational law relating to how the First Amendment is applied in the context of Social Media, which she prepared for our joint presentation at this (2011) annual conference. Of additional import, in the NACUA electronic archives, are Denielle Burl's NACUANOTE entitled From *Tinker* to Twitter: Managing Student Speech On Social Media and Youndy Cook, Priya Harjani, and Peter Land's March 2011 NACUA Conference Outline entitled Employee's Use of Web 2.0: Take This Job and Twitter It. This outline attempts to gather the dregs left uncovered by these three terrific works rather than restating what has already been covered well and it should be read so as to supplement them.

[2] Special thanks Daniel Lindquist and Curtiss Flexter for their assistance in preparing these materials.

[3] Kaplan, Andreas M.; Michael Haenlein (2010). "Users of the world, unite! The challenges and opportunities of Social Media". *Business Horizons* **53** (1): 59–68.doi:10.1016/j.bushor.2009.09.003. ISSN 0007-6813. Retrieved 2010-09-15.

Another definition is the use of web-based and mobile technologies to turn communication into interactive dialogue.

There is certainly no consistent legal definition, though a variety of courts have acknowledged "social media," "social networking," and a variety of other technologies widely considered to fall under the rubric of "social media" (e.g. Facebook, Youtube, MySpace, Flickr, etc.).[4] But, despite the increasing number of cases involving social media, courts do not define it, but rather acknowledge it self-referentially. Generally, when courts refer to social media, it appears to be nothing more than the mode of communication that happened to host the facts in question.

1. Some Descriptive Examples of Specific Social Media: While many of us are familiar these technologies, it is useful to get more illustrative descriptions of some of these technologies to get a sense of the rubric. The social media tend to center around social engagement, announcements/news, sharing content, and public commentary.

    a. *Social Engagement: Facebook* is website and service that allows users to engage socially with friends, family, and others. Users have their own profile page where they can post information about themselves, pictures, and status updates. Users can allow everyone in the Facebook community to see their profile and information or limit the ability to view the information to only those who the user has accepted as a "friend" or establish a wide range of levels of access (though, admittedly, many users have struggled with the privacy/access controls). Users are able to interact with one another through a chat mechanism with other users as well as to comment more asynchronously on friends' photos and status updates, etc. Facebook is seen as a way for users to keep up with what their friends and family are up to as well as a means to announce the events of their lives—from the profound to the mundane. It is possible through the user profiles to play games, establish coalitions, and exchange an abundance of information and intellectual property. Businesses have taken notice of the popularity of Facebook and used it as a tool to market to a younger demographic. While there have been some concerns over privacy, security, and control over content posted to Facebook, the site is as popular as ever. Were Facebook a country, it would boast the third largest population in the world, behind China and India. There are similar services in many countries, including MySpace in the United States.

    b. *Announcement/news: Twitter* is a website and concomitant service that connects users to information from sources they wish to follow and to broadcast information to those who wish to follow them; so, users are both publishers and receivers of information. Twitter limits users to express themselves in messages of up to 140 characters per "tweet". Users are able to post information and choose the other users whom they wish to follow. When a user you are following posts ("tweets") something, it appears on your homepage and can be programed to prompt your e-mail or cell phone. Twitter is a means to communicate with one another but also a means to get the most up-to-date, immediate news by choosing specific people or organizations to follow. For example, a user can follow CNN and when it tweets about breaking news, it appears on the user's homepage. This immediacy in getting

[4] For example, *Spanierman v. Hughes*, 576 F. Supp. 2d 292, 297 (D. Conn. 2008)

the information that one wants is the major perk for Twitter. Not only can users get up-to-the-minute information, they are also able to share links and other items of note to those who follow them. Twitter in convenient for meeting up with colleagues at the NACUA and for staging revolutions to overthrow tyrannical dictators.

c. *Sharing Content: YouTube* is a webservice that allows users to post videos online for others to view. Users are able to upload these videos and set privacy settings for public viewing where either anyone can search for or access the video or to private where only those with the link to the video are able to view the video (and the video would not show up in an ordinary search). There are a wide variety of videos available on YouTube including family videos, music videos, videos of pets, sports highlights, video blogs, and entertainment. Note for instance this video of now president of Oberlin College (and former General Counsel at the University of Michigan), Marvin Krislov: http://www.youtube.com/watch?v=FAwqbEsCfsI. The number of "hits" (visits) to specific videos and the associated commentary establish status in the context of this social medium. There are dozens of services akin to YouTube.com, including notably, *flickr.com*, a service dedicated to sharing photographs.

d. *Public Commentary: Blogger* is a blog-publishing webservice. A Blog is a type of website where users can post their thoughts on different subjects, descriptions of places and events, or post updates of occurrences in their lives. The host of a blog can enable the public or some subset of the public to comment on the blog. Blog posts can vary from speaking on an online soapbox to chronicling ones experiences on a study abroad program. Another popular similar website is *LiveJournal* which is essentially an online journal where others can read a user's entries. Both websites are interactive, where others are able to post comments.

C. A Fundamental Proposition: Your institution does not need special policies to address social media. In fact, I think it is a mistake, in all but a very few circumstances, to create medium specific policies. In almost all cases, it is preferable to have policies that apply across media.

Most activities that would require us to regulate them in the social media context have analogous activities in other contexts, where we already have policy. For instance, we do not need a social media sexual harassment policy, because we should already have policies that address sexual harassment on our campuses. Similarly, we should note need special social media defamation, cheating, copyright infringement, endorsement, use of the institution's name, contracting, etc. polices, because the policies we have should be written to focus on the activities that concern us, not the media.

It is possible that some institutions have extant policies that date back far enough to be limited in ways where it would be difficult to determine how to apply those policies to the virtual world. For instance, the University of Michigan used to have a "code of student conduct" with a jurisdiction that applied fifty miles from front door of the student union. It is not hard to imagine situations (both virtual and non-virtual) that would make such a limitation unappealing. The solution here was to change the extant policy to focus on behavior, constituents, and relation to the University rather than distance from a door (or medium).

There will be those who suggest that our institutions need special policies for social media, think long and hard before encouraging or endorsing such an approach. Instead, please consider focusing giving guidance about how to use the technology. I have found that the vast majority of problems surrounding social media on campus come from users lack of experience with the technology and scope.

I have attached to this outline a copy of the University of Michigan's Voices of the Staff Guidelines for the Use of Social Media, which I helped to draft. While it is already in need of an update, it is my hope that you will find it useful as a starting point for your own campus' efforts to help constituents make the most productive choices surrounding social media.

D. Why The Forum You Create Is Important: For public institutions, the First Amendment is omnipresent when it comes to speech in the forums those institutions create. The kind of speech forum your institution creates is of critical importance for two reasons: the kind of forum determines how much your institution is permitted to control the speech that takes place there and how much your institution is responsible for the speech that takes place there. Not surprisingly these go hand-in-hand: the more control you have, the more responsibility you have.

When a public institution or employees or agents of a public institution use social media to create a "space" for speech, the forum rules apply—quite similarly to the way in which they would in a traditional, non-virtual space. So it is best to be deliberate when considering which type of forum your institution is creating. Or put another way, how we classify the use of property controlled by a state actor is critical to understanding the scope of speech rights of the individual who use that "space" to communicate.

1. First Amendment jurisprudence has established (primarily) three types of forums public institutions can create: a.) the public forum; b.) the non-public forum; and c) the designated/limited public forum.

    a. **Public Forum:** Public forums are places that have traditionally been made open to the public for speech, free association, colloquy, and assembly. They include places like public streets and thoroughfares, parks, sidewalks, campus "quadrangles" or "diags", and the like.[5] Expressive activities in a public forum receive more First Amendment protection than expressive activities in other types of forum.

        i. In a public forum, speech may never be limited based on viewpoint by the public institution.[6]

        ii. Ordinarily, speech in a public forum may not be prevented, limited, suppressed, or controlled due to its content. If fact, in order control speech in a public forum, the public institution must demonstrate a compelling interest and must only use a narrowly tailored means to meet *that* interest (the strict scrutiny standard). Though the institution may create reasonable "time, place,

[5] See, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733 (1969) and *Hague v. CIO*, 307 U.S. 496 (1939)

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

and manner" rules, if they are applied neutrally speakers within the forum. [7]

1. It is easy to create a virtual public forum by creating "places" where anyone can "post", where there are few rules, and where those rules are neutral rules of general applicability. Many institutions have established Facebook pages, which are open to the world and that would be considered by courts to be traditional public forums.

2. It can be tempting to "retroactively" decide to remove content in a forum like this because it is objectionable for one reason or another. But, in the context of the public forum, the public institution must use the highest level of restraint and care when address concerns based on content.

b. **Non-Public Forum:** Along the spectrum of forums, this is at the opposite end of the public forum. It typically includes spaces that while owned or controlled by the government are not traditionally made open to members of the public at their own discretion; these are spaces for the public institution to carry out its business and are not designed or designated for the public to gather and speak at its own whim. Examples include, classrooms, offices, academic buildings—most of the structures and facilities on public campuses. As long as the public institution use reasonable means to achieve a reasonable purpose (rational basis test), it may regulate speech in its non-public forums. (This, however, does not include the ability of the institution to suppress specific viewpoints.)[8]

i. Even though public institutions are state actors, they are not required to make their non-public forums open to the public for expressive activities. They are entitled to conduct their educational, administrative, research, and other programmatic activities without opening up those spaces for public discourse.

ii. In a non-public forum, the institution may implement reasonable, content-based restrictions, so long as the rules are neutral and generally applicable, and reasonably related to the purposes and functions of the spaces and the activities intended therein.

1. Examples of non-public forums in social media may include spaces dedicated to teaching or research activities, intranets, services dedicated to a limited audience for a purpose tied to the operations of the institution, and the like.

2. Note, it can be tricky, at times to differentiate between non-public forums and designated/limited public forums.

c. **Designated/Limited Public Forum:** Designated/Limited public forums arise from the rights a public institution has to control a non-public forum. Specifically, an

[7] See, *Perry Educ. Association v. Perry Local Educators' Associationn*, 460 U.S. 37 (1983)

[8] See, *Perry Educ. Association v. Perry Local Educators' Associationn*, 460 U.S. 37 (1983)

institution can intentionally create a designated public forum when it "dedicates" a non-public forum for expressive activities by some class of speakers.[9] This class of speakers can be narrow or broad. In creating the designated/limited public forum, the institution is relinquishing some (but not all) control over the space, which has been set aside for expressive activity for an intentional institutional purpose. For example, institutions can designate space for student activities, musical activities, performance spaces, bulletin boards for student organizations, and the like.

i. It is common for public institutions to have the same space function a non-public forum at times and as a designated/limited public forum at other times.

1. For example, a large chemistry auditorium may be a non-public forum during the class day, but be reserved for more public meetings, films, or organized activities in the evenings and on weekends.

ii. Content-based regulations of expressive activities in designated/ limited public forums are subject to strict scrutiny within the confines of the designation, unless they are reasonable time/place/manner restrictions, which are subject to the rational basis test.

1. Examples of designated/limited public forums might include student personals/bulletin boards, web/social media space dedicated to student expression or commentary about a specific subject matter.

2. It is important to realize that the jurisprudence around forums arose in the non-virtual context. The Supreme Court, however, has recognized that the First Amendment forum doctrine applies in contexts beyond physical space.[10] To date, there are no examples in which forum jurisprudence has been applied differently to social media context than it has been in other contexts. We have every reason to believe that the standards we apply in the physical spaces on campus, as well as to student organizations, will and do apply in the social media realm.

E. Contracting With Social Media Organizations: Of course, many institutions want one or more accounts with social media organizations. For instance, your admissions office wants to be able to "tweet" to applicants, your athletic department wants to be able to promote its activities through Facebook, your dean of students wants to use YouTube to show off its events, etc. The accounts are easy to set up and the terms of service contract can be executed with the click of a button, often for free. But given the ease with which this can be done, it is worth considering a variety of contractual issues that arise.

1. If your institution has a signature authority policy (which if you don't, you should), you'll want to be sure that someone who is authorized to review the terms of service agreement and "sign" (i.e., click) it on behalf of the institution is doing so. This is especially important

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

[10] See, *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) and *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000)

because many social networking companies use non-negotiable agreements that have genuine legal effects. They also often require that the clicking party be lawfully authorized to do.

a. Twitter's Terms of Service state in part: *You may use the Services only if you can form a binding contract with Twitter and are not a person barred from receiving services under the laws of the United States or other applicable jurisdiction.*

b. Moreover, many people do not read the click-though agreements, which could bind the institution (or that individual) to unexpected terms. Often the person who is "clicking" is more focused on the acquiring the service than understanding the affect on the institution. Just because it is easy and exigent to just "click" the "I agree" button does not mean that the person doing the clicking has the authority to bind the institution.

c. These agreements are often non-negotiable—take it or leave it. The terms are typically inclined to the benefit of the account holder, but rather to protect the service provider.

2. The terms of these agreements may not be consistent with extant institutional policy or practice and they be different than people expect them to be. It is critical that they not only have legal review, but that the unit that wishes to implement the account be aware of the limitations. It is easy to give away rights you never expected to.

    a. In a section called "YOUR RIGHTS", Twitter establishes: *By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).*

        i. While you certainly want Twitter to be able to do these things to accomplish your service expectations, this language is broad enough to make uses of the Content in a manner inconsistent with your mission and your desires. For instance, one institution I know used Twitter to enable a search committee to communicate while conducting multiple interviews simultaneously. Twitter's terms of service would not prohibit Twitter from posting the comment beyond the confines of the search committee (although, that would be very bad business for them).

        ii. Also notice that Twitter is not describing "your rights" but rather *their* rights in that portion of the section.

3. The terms of service your institution agrees to may preclude users from making what would be deemed ordinary uses in the context of the institution but that would violate the standards of the service provider.

    a. Consider Twitter's limitations speech: *You will not post content that: is hateful, threatening, or pornographic; incites violence; or contains nudity or graphic or gratuitous violence.*

i. While most of this set of prohibitions would not be too difficult for campus users to comport with, some scholars (e.g., in art, medicine, public health, nursing, criminal justice, sociology, etc.) may be using graphic or nude images or graphic descriptions of gratuitous violence as part of their scholarship or scholarly communications.

b. Facebook has research restrictions that researchers may not be aware of: *If you collect information from users, you will: obtain their consent, make it clear you (and not Facebook) are the one collecting their information, and post a privacy policy explaining what information you collect and how you will use it.*

i. Because of federal research protocols most research will address some of these concerns, but the requirement that account holder specifically acknowledge that it and not Facebook is collecting the data is one that most research enterprises (whether sponsored research or institutional research) are likely to overlook.

c. Twitter also limits some commercial uses that colleges may make without considering the limitation: *You will not use your personal profile for your own commercial gain (such as selling your status update to an advertiser).*

i. For-profit institutions may be violating this term when communicating with prospective student

ii. Depending upon the definition of "personal" (which is not adequately defined), your institution may be in breach by promoting its athletic program, its tee-shirt sales, or the published scholarly works of its faculty.

d. Facebook puts limitations on certain kinds of activities I have seen several colleges use in admissions, student activities, and even in the academic context: *You will not offer any contest, giveaway, or sweepstakes ("promotion") on Facebook without our prior written consent.*

i. Most campuses and their units would not think to contact Facebook for prior written permission.

4. Although the bulk of the users of social media services are individuals, institutional accounts may not be adequately addressed by the terms of service.

a. Twitter's terms of service say: *We may revise these Terms from time to time, the most current version will always be at twitter.com/tos. If the revision, in our sole discretion, is material we will notify you via an @Twitter update or e-mail to the email associated with your account. By continuing to access or use the Services after those revisions become effective, you agree to be bound by the revised Terms.*

i. A change in terms may be exceedingly inconvenient for an individual. Its effects on multiple units at an educational institution are likely to be very unpredictable, especially for Twitter, which has individual users in mind.

ii. It is not often that postsecondary institutions sign unregulated agreements that permit the other party to change any and all of the terms of the agreement with no mutual agreement.

b. Twitter's terms—again being more focused in individuals than institutions—say: *You will not create more than one personal profile.*

i. Because "personal" is not well-defined and appears to be synonymous with a notion of "account holder", this kind of term could put an institution (the only legal entity with the authority to click the terms of service) with multiple accounts in breach.

5. Just about any content that users place in a social media outlet has intellectual property rights held by someone. And the terms of service frequently ask users to give broad IP rights to the service.

a. Twitter says: *you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook ("IP License"). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it . . . By "use" we mean use, copy, publicly perform or display, distribute, modify, translate, and create derivative works of.*

i. These are exceedingly broad rights, although in the case of Twitter, they are at least limited somewhat by the users' ability to delete them (unless, of course, another user is using it).

ii. Also note, that Twitter is asking for a license from users who may be making lawful uses of works but where they don't have the right to license those uses to Twitter.

6. For some institutions, the account contract may have terms that the institution may not, as a matter of state law, agree to.

a. For instance, consider Facebook's venue provision. *You will resolve any claim, cause of action or dispute ("claim") you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.*

i. Not only are these terms that very few people on our campuses have the authority to agree to, but for many state institutions, there are state law provisions that make agreeing to such terms a problem.