

## TOPIC:

### FROM *TINKER* TO TWITTER: MANAGING STUDENT SPEECH ON SOCIAL MEDIA

## INTRODUCTION:

Social media provides students a new mechanism for a familiar exercise: that of personal expression. It gives students an instant forum by which to publicly evaluate and comment on their campus environments, institutional policies, classes, professors, administration and fellow students in real-time. Like a high-speed rail, social media zips through our campuses nearly unseen, dragging behind it the heavy weight of social injustices and complicated jurisprudence accumulated from decades of student speech. Given social media's potential for positive impact, no one is suggesting we pull the brakes on it, and in many ways the technology is already out of our grasp. The purpose of this NACUANOTE is to provide some guidance when dealing with issues resulting from student misuse of social media.

## DISCUSSION:

### What is social media?

"Social media" is defined by Merriam-Webster as "forms of electronic communication (as web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content." [\[1\]](#) Social media is a defining component of Web 2.0, the term given to the information technology that permits users to be active creators and sharers of online information, rather than simply absorbers of information [\[2\]](#). Currently, the most popular examples of this technology include *blogging* (WordPress, Xanga), *microblogging* (Twitter), *social networking* (Facebook, Bebo, LinkedIn), *wikis* (Wikipedia), *multimedia* (YouTube, Picasa, TwitPic, Shutterfly), *presence apps* (Foursquare, Yelp, Gowalla), *virtual worlds* (Second Life), *chat rooms*, *listservs*, and *bulletin boards*.

This is a limited list that is bound to change quickly, likely precipitated by our own students' contributions to the field [\[3\]](#). Instead of trying to master the nuances of each application that arrives on the scene, practitioners would do well to understand the impact of, and basic legal issues associated with, social media.

### Should institutions monitor student use of social media sites?

Institutions may be tempted to monitor social media sites for misconduct or evidence of possible danger to students or others. Putting aside the issue of potential liability associated with such

activity, it would likely prove impossible given the number of social media sites currently available to students [4]. Instead, institutions should consider more targeted and strategic investigations of social media use such as to investigate reports of potentially actionable behavior. Also, different rules may apply to school-sponsored blogs or other social media sites as opposed to purely personal websites and postings. Whichever approach they decide upon, institutions should create an internal protocol that most appropriately fits the needs and interests of their campuses and then follow it consistently.

## **Can colleges and universities sanction students in response to student speech posted on social media sites?**

The issue of inappropriate, controversial or contentious student speech on campus communities is not a new one, but online speech adds to the challenge for a number of reasons. First, the speech occurs online, where a much broader audience can potentially access it compared with typical on-campus speech. Also, layers of student-imposed privacy may exist online; as a result, institutions often acquire knowledge of student online speech because of another student who has access to the speech [5]. Finally, *so much* online speech exists, it's hard to know when to respond. As with any inappropriate student behavior, administrators can and should respond to inappropriate online speech, although the specific response should vary depending upon the type of speech encountered.

The law is reasonably settled with regard to student speech that takes place on public campuses, stemming from a line of cases starting in the 1960s in which the Supreme Court held that a school cannot sanction a student for speech unless it can demonstrate the speech does or will “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.” [6] The fact-specific applications of this law, however, especially with regard to online speech, still engender much debate [7]. Much speech that might be characterized as inappropriate, controversial or contentious will be protected by the First Amendment. Indeed, courts have repeatedly pointed out that college and university campuses are “peculiarly marketplace[s] of ideas” [8] and that the “mere dissemination of ideas—no matter how offensive to good taste—on a state university campus—may not be shut off in the name alone of ‘conventions’ of decency.” [9] As a result, public institutions may only prohibit and discipline speech falling in those categories outside the protection of the First Amendment, such as “fighting words,” [10] speech inciting imminent lawless action [11], “true threats,” [12] unlawful harassment [13], obscenity, and defamation.

Private institutions, which are not subject to constitutional considerations [14], may respond to student speech in accordance with school policy but should be wary of the effect that a given response may have on educational and public relations efforts [15].

Accordingly, both private and public institutions should look to their student conduct codes to respond to speech that promotes or produces an unlawful end, promotes the imminent prospect of actual violence or harm, or that meets the judicial standards of harassment, defamation and obscenity [16].

More problematic are situations where an institution seeks to respond to online speech that is inappropriate but constitutionally-protected. “Educational interventions” provide institutions the invaluable opportunity to confront student behavior without imposing harsh or unconstitutional sanctions, particularly in those situations in which an institution might not want to interject itself as an interested party. The purpose of an educational intervention is to inform the student that the institution is aware of her comments and to discuss with the student the impact her behavior may have on the larger campus community. It gives the student an opportunity to discuss her motivations and may enable campus staff to identify a larger issue at hand. In this meeting, school administrators should try to identify the student's interests with the ultimate goal of instilling in the student an understanding of the responsibility she has in making such comments, the possible

consequences that might attach [\[17\]](#), and connecting her with relevant campus resources that might deepen the student's connection with and investment to the community, hopefully reducing the risk of future incidents.

Once the appropriate campus official has met with the student, the official should follow up with a written letter reiterating specific recommendations made during the meeting. Doing so provides a paper trail and may provide the institution with the justification to take heightened action if additional problems surface.

## **Should an institution have a social media policy? What should an institution think about when writing a “social media” policy?**

Rarely do social media sites raise issues that are not already covered by current institutional policies. For example, a school's existing conduct code may already address many issues arising out of student social media use, although those codes may need to be revised to clarify that they apply to online as well as in-person activities. Institutional computer use policies already address limits on the use of computing facilities for personal reasons and any expectation of privacy in such use. A university's IP policy may address the use (and misuse) of university insignia by faculty or students and student organizations. The HR process may already cover whether the college can or will rely on information found in external sources when making decisions.

If an institution adopts a separate social media policy, it should be written to reflect state and federal law as well as institutional policies. In addition, social media policies should not be media-specific and instead should be written broadly enough to encompass technologies currently existing and not yet created. For example, those institutions that adopted a “Myspace Policy” are now grappling with how to expand or modify it to encompass Facebook and other technologies [\[18\]](#).

## **How should an institution address cyber-harassment or “cyber-bullying”?**

Two letters from the Department of Education's Office of Civil Rights (“OCR”) remind institutions about their multiple responsibilities when responding to student harassment. First, it is critical for institutions to be mindful about students' free speech rights, as anti-harassment laws are not intended to undermine the First Amendment [\[19\]](#). Second, student misconduct that falls under an anti-bullying policy also may trigger responsibilities under one or more of the civil rights laws enforced by OCR [\[20\]](#). This will include peer harassment based on race, color, national origin, sex or disability that meets the standard articulated by OCR [\[21\]](#).

While institutions do not have a duty to respond to every objectionable or offensive statement, they are obligated to respond to student harassment that is “sufficiently severe, pervasive, or persistent as to interfere with or limit a student's ability to participate in or benefit from the services, activities or opportunities offered by a school.” [\[22\]](#) A higher education institution has a responsibility to respond to harassment that takes place in any medium over which the school has “substantial control,” [\[23\]](#) such as a University-sponsored online discussion forum. The most recent OCR “Dear Colleague” letter suggests an institution may also have a duty to respond to online harassment over which it has no control or oversight, provided it knew or reasonably should have known about it [\[24\]](#). Institutions should also look to their student codes when addressing potentially harassing behavior that does not implicate a civil rights law.

## **What should an institution do when a student threatens to hurt another**

## **student or a faculty member in an online post?**

Given the concern around student safety following recent college and university tragedies, institutions can and should take a student's threats seriously. Whereas private institutions can react to threats according to the standards set in their conduct code, public institutions are again limited by First Amendment considerations. In public institutions, only speech that meets the criteria of a "true threat" is removed from the scope of constitutional protection. While the statement need not identify a specific individual as its target, a "true threat" must be sufficiently specific as to its potential target or targets to render the statement more than hypothetical [25]. For example, in a 2002 case, the court used the totality of the circumstances to evaluate whether a high school student's Myspace blog about why his algebra teacher should die met the "true threat" standard [26]. After reviewing the specific statements, the context in which they were made, the reaction of listeners and others as well as the nature of the comments, the court focused on the lack of immediacy in the school's response to determine the student's comments did not constitute a "true threat."

Finally, these judicial standards do not prevent or in any way limit administrators from sharing student behavior with student concern teams or institutional threat assessment teams, which maintain a larger picture of the student body and are trained to identify the more significant matters.

## **Do institutional civility or speech codes apply to online speech?**

The exact wording of your code would determine its application, but in general there would be no reason to treat online speech differently from any other type of speech under such codes. Both public and private institutions need to be aware of any speech policies they (or departments under their control) promulgate, which may be interpreted by the courts or media as providing students additional speech "rights." [27] When responding to or restricting student speech, institutions should be prepared to state why the issue at hand falls outside the scope of speech protected by the institution's civility or speech code. At the same time, at least in the case of public institutions, speech or civility codes themselves need to be closely examined to ensure they do not restrict students' First Amendment rights.

## **A student posted a defamatory remark about another student on an online gossip site. How should an institution respond?**

Defamation often arises in the context of campus gossip sites [28]. While your student code may not cover "defamation" or you may not wish to investigate whether Jason S. really is the biggest jerk in your Greek system, you may want to sit down with the alleged offender to discuss the situation or activate one of the other "educational initiatives" described above. Alternatively, your legal office may suggest the targeted student seek outside counsel for personal representation.

Your office may have to field emails or phone calls from angry students (although most likely from parents of angry students) asking you to try to investigate the offending student, block students' access to these websites, or take some other action in response to the posting. You will need to be prepared to explain the legal considerations (e.g., First Amendment free speech issues) and operational reasons (e.g., you do not own or manage these websites and do not block sites whose content you disagree with) for your action or, as they may perceive, inaction.

## **A video posted online is brought to the attention of a college administrator. The video shows footage of several underage students playing a drinking**

## **game. How should an institution address this situation?**

Follow institutional policy. Institutions should strongly consider extending the jurisdictional application of their student conduct codes to off-campus behavior. A conduct code with appropriate jurisdictional provisions provides institutions the opportunity to respond to inappropriate or illegal behavior documented on social media sites.

In this case, the institution could use the online video to support disciplinary action taken against the students in response to their illegal under-aged drinking. Note that the institution would likely not have any ground for disciplining the student for posting the video of the event.

## **How should an institution respond to a student's website or Facebook page that glorifies an eating disorder or other self-harming behavior?**

Some of the most disconcerting instances of questionable student speech may not violate an institution's policies or conduct codes [29]. In the absence of a specific threat, higher education administrators may not have an affirmative duty to respond. However, it may be in the best interest of the campus community and the student to reach out to these individuals to offer campus resources and identify whether a larger issue warrants a more immediate response.

Whenever a student's online behavior causes concern, school officials should consider informing the student concern team or threat assessment team to see if the student is exhibiting concerning behavior elsewhere on campus [30]. Doing so may reveal a pattern of inappropriate and actionable behavior, enable the school to proactively connect the student to her larger community, and respond to colleagues' concerns that the student's behaviors be recognized at a "higher" level.

## **When should an institution contact parents?**

Institutions should consider contacting parents or other members of the student's support team when (1) their institutional policies mandate parental contact [31] or (2) when a student's behavior may pose a risk to the student or others. For example, evidence posted online of a student's frequent binge drinking episodes may not initially appear to be a case of self-harming, but such behavior may pose a serious risk to the student or others. Depending on the institution's policies, contacting a parent with the link to the online evidence may be desirable.

If that online evidence becomes part of the student's education record, i.e. through a formal meeting or disciplinary procedure, the school may still be able to share that information with the family without running afoul of the Family Educational Rights and Privacy Act ("FERPA") [32]. Under FERPA, institutions may share information maintained in a student's education records with parents without the student's consent if the student is claimed as a dependent on the parent's taxes. Alternatively, institutions may contact appropriate parties, including parents, if knowledge of the information is necessary to protect the health or safety of the student or other individuals, or if a student under 21 years of age has been found in violation of university alcohol or drug rules [33].

## **Is there anything an institution can do to prevent the misuse of social media by students?**

This is a perfect prelude to the old adage: fight speech with speech.

Many institutions have decided to take a proactive approach in educating their campus communities about the impact of social media, not simply for the benefit of their students' professional development, but also in an effort to reduce institutional vulnerability. In the interest of education and career services, some institutions have proactively incorporated information on social media within their orientation programs, their curricula or their institutional policies. For example, during its orientation, the University of Iowa's College of Law presents a seminar on "Managing your Online Identity." Similarly, DePaul publishes a list of recommendations related to social media, which students can access on its website [\[34\]](#).

It seems a natural reaction to want to "clamp down" following inflammatory speech, but institutions would do well to encourage the offended individuals to exercise their own First Amendment rights by responding to the speech. Administrators could charge university committees with the responsibility of reviewing and making recommendations to respond to campus climate. Institutions could host brown-bag luncheons and encourage break-out sessions to discuss the issue. Students could create student organizations that provide proactive outreach and response to victims of inappropriate language.

Alternatively, institutions can also work with their own students to advocate for and promulgate campus communities that, at least in spirit, discourage offensive or harmful online speech. Many campuses have taken steps to proactively prevent campus gossip sites from taking hold of their institutions [\[35\]](#). Some private institutions may have more flexibility in blocking specific sites and may wish to preclude their on-campus networks from accessing these campus gossip sites at the risk of alarming free speech advocates and possibly giving additional attention to these sites. Institutions can work with their student government leaders to inculcate a culture of accountability and transparency, which many of the newer gossip sites preclude by permitting anonymous commenting. Additionally, institutions can create campus climate taskforces that provide proactive outreach.

## CONCLUSION:

While the technology is new, the issue of inappropriate, problematic and hurtful speech on campuses is not. For this reason institutions can generally rely on institutional precedent when responding to online speech. On the other hand, the proliferation and exponentially broader reach of online speech has prompted institutions to identify and create new ways of connecting with students about their behavior, methods that may be more effective than traditional judicial norms. Needless to say, as new technologies develop, so too will the related issues colleges must confront. It will be the responsibility of all university staff, including attorneys, to find creative and effective ways to address inappropriate online speech, the best of which will fall within institutions' educational missions.

## FOOTNOTES:

**FN1.** [www.Merriam-Webster.com](http://www.Merriam-Webster.com).

**FN2.** For example, prior to Web 2.0, people interested in the results of the Boston Marathon could wait for the online newspaper to update its most recent article. As a

result of the social media technology of Web 2.0 people wrote journals about their training that they uploaded on their blog, took pictures of the starting line (on their phone) that they uploaded to Facebook, “tweeted” their progress during the race onto Twitter, and took videos of the finish line that they then uploaded to YouTube.

- FN3.** For just two examples, see <http://www.cubicl.com/> and [www.facebook.com](http://www.facebook.com), both created by college students. Online gossip sites, like Juicy Campus, and the more recent College ACB were also created by students.
- FN4.** For a partial list of these sites, see: [http://en.wikipedia.org/wiki/List\\_of\\_social\\_networking\\_websites](http://en.wikipedia.org/wiki/List_of_social_networking_websites).
- FN5.** Higher education institutions can respond to third-party reports of information; however institutions are advised to obtain hard copies of the offending material, particular if they want to take adverse action against a student in response. In fact, the first thing institutions should do when beginning to form a response to social media is to print and maintain a hardcopy of the speech to preserve it in the event the student tries to delete or change it. The absence of evidence of the offending speech could undermine the accusing student’s allegation that another student violated institutional policy, particularly if the accused student could present evidence to the contrary (for example, copies of his or her social networking site clear of such speech). In order to prevail, the accusing student or institution would need to meet the burden of proof identified in its student conduct process.
- FN6.** *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
- FN7.** For example, the Third Circuit recently heard *en banc* a pair of cases involving secondary school students posting negative comments about school personnel. See Shannon P. Duffy, [3<sup>rd</sup> Circuit Mulls Student Suspensions for MySpace Postings](#), Law.com, June 4, 2010.
- FN8.** *Healy v. James*, 408 U.S. 169, 180 (1972).
- FN9.** *Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973).
- FN10.** Words “that by their very utterance . . . tend to incite an immediate breach of the peace,” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).
- FN11.** “Advocacy [that] is directed to inciting or producing imminent lawless action and is likely to produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
- FN12.** “[A] statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person.” *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058, 1077 (9th Cir. 2002) (en banc), *cert denied*, 123 S. Ct. 2367 (2003).
- FN13.** For example, in the case of student-on-student peer sexual harassment, “conduct so severe, pervasive and objectively offensive and that so undermines and detracts from the victim’s educational experience, that the victims are effectively denied equal access to an institutions resources and opportunities.” *Davis v. Monroe County Bd.*

*of Educ.*, 526 U.S. 629, 633 (1999).

- FN14.** California, however, has a statute that subjects private institutions of higher learning to First Amendment constraints. See Cal. Educ. Code § 94367.
- FN15.** For example, The University of Chicago grappled with how to reconcile its “civility” policies with its Police Department’s recent investigation of a student’s Facebook page. See Jill Laster, [U. of Chicago Student Questions University’s Reaction to Facebook Post](#), THE CHRON. OF HIGHER ED., March 25, 2010.
- FN16.** See David Aronofsky, Patricia Brady, and Scott Varady, [Student Speech: Protected Speech, Threats, Fighting Words, and Other First Amendment Case Developments](#), NACUA Annual Conference Outline (2007); and Jonathan Alger and William Thro, [Campus “Speech Codes” and Institutional Response to “Offensive” Speech on Campus](#), April One-Day CLE Outline (2006).
- FN17.** For example, the state bar of Florida adopted a policy allowing investigation of social networking websites on a case-by-case basis as part of bar admission. See Jan Pudlow, [On Facebook? FBBE may be planning a visit](#), THE FLORIDA BAR NEWS, September 1, 2009 \*.
- FN18.** One website has undertaken the task of listing social media policies, which includes a variety of industries that take a number of approaches to social media, including proactive, prohibitive or neutral. See <http://www.compliancebuilding.com/about/publications/social-media-policies/>. For a list of higher education specific policies, see [Richard A. Paul, and Margaret L. Wu, Web 2.0: Employee Use of the Internet and Social Media in the University Setting](#), NACUA March CLE Outline (2010).
- FN19.** See Department of Education [“Dear Colleague” Letter re First Amendment Issues](#) (July 28, 2003).
- FN20.** See Department of Education [“Dear Colleague” Letter re Bullying](#) (October 26, 2010).
- FN21.** For more information on what constitutes sexual harassment and schools’ obligations to investigate and respond, see the Department of Education, Office for Civil Rights’ revised [Sexual Harassment Guidance: Harassment of Student by School Employees, Other Students, or Third Parties](#).
- In 2009, OCR also issued a letter of finding regarding an incident involving a Hofstra University student, interpreted by some as imposing a responsibility on schools to respond to sexual harassment in cyberspace to the same degree they respond to harassment in the classroom. For an analysis of this interpretation and a wider discussion of the challenge of responding to social media, see Joseph Storch, [In Loco Parentis, Post-Juicy Campus](#), Inside Higher Ed, September 17, 2009.
- FN22.** See Department of Education [“Dear Colleague” Letter re Bullying](#) (October 26, 2010).
- FN23.** See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

- FN24.** See Department of Education [“Dear Colleague” Letter re Bullying](#) (October 26, 2010).
- FN25.** William A. Kaplin & Barbara A. Lee, THE LAW OF HIGHER EDUCATION 1395 (4th Ed. 2006). Citing *Virginia v. Black*, 538 U.S. 343 (2003), the Ninth Circuit has suggested that, at least in some situations, a subjective intent to terrorize may be required to render a statement unprotected under the First Amendment. See *United States v. Castagana*, 604 F. 3d 1160, 1165 (9th Cir. 2010) . While also an exception to the First Amendment, the doctrine around “fighting words,” is narrowly circumscribed to apply to face-to-face communications.
- FN26.** *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002). Another example of an analysis of an online threat came in January 2010 when Truman University was faced with the question of how to respond to an anti-Semitic death threat posted on a student’s Twitter page. Although we do not have any information as to how the school ultimately resolved the situation, the campus paper quoted the Dean of Students’ intended analysis, including a review of whether the student had the means to carry out the crime, whether the student had exhibited violent behavior and if he had taken any steps to carry out the threat. See Andrea Hewitt, [Truman student Tweets anti-Semitic threats](#), TRUMAN STATE UNIVERSITY INDEX, January 21, 2010.
- FN27.** See *supra* note 15.
- FN28.** These include the now-defunct [juicycampus.com](#) and [collegeacb.com](#), which permit students to post comment anonymously – to an extent. While courts have carved out a First Amendment right to speak anonymously on the Internet, that right does not extend to speech not protected by the First Amendment. See *Polito v. AOL Time Warner, Inc.*, 78 Pa. D. & C.4th 328 (2004). For example, in 2009, a New York Civil Supreme Court ordered Google to reveal the identity of the “Skanks of NYC” blog’s anonymous author, Rosemary Port, following a lawsuit by former model, Liskula Cohen, whom Port had disparaged in her blog. See *Liskula Cohen v. Google, Inc.*, Index No. 100012/09 (N.Y. Sup. Ct. 2009).
- FN29.** An example might be a student’s frequent contribution to a pro-eating disorder group on Facebook. See <http://www.newsweek.com/id/170528>.
- FN30.** For an excellent article on creating such a team, see John H. Dunkle, Zachary B. Silverstein, and Scott L. Warner, [Managing Violent and Other Troubling Students: The Role of Threat Assessment Teams on Campus](#), JOURNAL OF COLLEGE AND UNIVERSITY LAW, 34 JCUL 3 at 585 (2008).
- FN31.** Some schools have implemented mandatory parental-contacts in the event of self-harming or suicidal behavior.
- FN32.** 20 § USC 1232(g) *et. seq.*
- FN33.** For detailed discussion of FERPA and when disclosures are appropriate, see Nancy Tribbensee and Steve McDonald, [NACUANOTES: FERPA and Campus Safety](#) (June 19, 2009).
- FN34.** [http://brandresources.depaul.edu/vendor\\_guidelines/g\\_recommendation.aspx](http://brandresources.depaul.edu/vendor_guidelines/g_recommendation.aspx).

**FN35.** See Matt Tamul, [Emory to Respond to Gossip Website](#), EMORY WHEEL, February 25, 2008. Note that this approach risks increased awareness of such programs. For example, the student government at Pepperdine cited some regret in passing a resolution that urged the administration to prohibit access to Juicy Campus, which they say only increased student awareness. See Richard Morgan, [Juicy Campus: College gossip leaves the bathroom wall and goes online](#), THE NEW YORK TIMES, March 18, 2008.

## **AUTHOR:**

[Denielle M. Burl](#), Special Assistant to the Vice-President, University of Connecticut.

## **RESOURCES:**

- NACUA's [Social Networking by Employees and Students Resource Page](#)

*Permitted Uses of NACUANOTES Copyright and Disclaimer Notice*

**NACUANOTES Homepage | NACUANOTES Issues  
Contact Us | NACUA Home Page**

*"To advance the effective practice of higher education attorneys for the benefit of the colleges and universities they serve."*