

WHO'S LOOKING AT YOUR FACEBOOK PROFILE? THE USE OF STUDENT CONDUCT CODES TO CENSOR COLLEGE STUDENTS' ONLINE SPEECH

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INTRODUCTION

Matthew Walston, an undergraduate student at the University of Central Florida, was like many other college students. He had an account on the social networking site, Facebook, and he used it to interact with other college students.¹ A few years ago, Walston used his account to create a group titled, "Victor Perez is a Jerk and a Fool," to protest Perez's candidacy for Student Senate.² Perez subsequently filed a complaint with Central Florida's Office of Student Rights and Responsibilities, claiming that Walston had engaged in "personal abuse" against him, in violation of the school's student conduct code.³ The online form Perez used to report the violation, a "Golden Rule Incident Report Form," asked students to determine whether the incident occurred on-campus or off-campus.⁴

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1. Press Release, Found. for Individual Rights in Educ., Student Wins Facebook.com Case at University of Central Florida (Mar. 6, 2006), <http://www.thefire.org/index.php/article/6867.html?PHPSESSID=6ecff0658cdd1994eb4f83ba06843e23>.

2. *Id.*

3. E-mail from Victor Perez, Student, Univ. of Cent. Fla., to Patricia Mackown, Dir., Office of Student Rights and Responsibilities, Univ. of Cent. Fla. (Sept. 15, 2005, 19:45:44 EST), <http://www.thefire.org/pdfs/7fdbe0c575a42510cecad418cd164a5b.pdf> (last visited Oct. 23, 2008) (e-mail submitted through a university website which was referred to as a "Golden Rule Incident Report Form" and used by Perez to report the Facebook group created by Walston).

4. *Id.*

Perez indicated that the incident occurred off-campus.⁵ The University subsequently notified Walston that they had received an “incident report alleging violations of *UCF’s Rules of Conduct* as outlined in The Golden Rule student handbook.”⁶ Charges were also brought against Walston for violating the student conduct code.⁷

A few months after Walston was notified of the charges against him, the Foundation for Individual Rights in Education (FIRE), an organization which assists college students in the protection of their First Amendment rights, interceded on his behalf.⁸ FIRE contacted Central Florida, claiming that the charges against Walston “chill[ed] expression on UCF’s campus and ignore[d] constitutional guarantees of freedom of speech that UCF, as a public institution, is obligated to protect.”⁹ Eventually, the judiciary board found that Walston did not violate any university policies.¹⁰

Despite the fact that Walston was eventually vindicated by a university judiciary committee, he still had to endure months of uncertainty regarding his fate at the university.¹¹ Further, an even greater misfortune of this event is the fact that it happened at a public university, which claimed to protect its students’ First Amendment rights.¹² Colleges, both public and private alike, are revising their

5. *Id.*

6. Letter from Nicholas A. Oleksy, Coordinator, Office of Student Conduct, Univ. of Cent. Fla., to Matt Walston, Student, Univ. of Cent. Fla. (Oct. 3, 2005), <http://www.thefire.org/pdfs/b60cc54570baa9022a9380f7b1bf4c6f.pdf> (discussing that an “incident report” had been filed against Walston for “harassment” and that Walston was to meet with the administration to discuss the report).

7. Letter from Patricia MacKown, Dir., Office of Student Rights and Responsibilities, Univ. of Cent. Fla., to Matt Walston, Student, Univ. of Cent. Fla. (Feb. 7, 2006), <http://www.thefire.org/pdfs/6451201f6f8b26d251954fedee0d3be5.pdf> (explaining that the charges against Walston were unfounded).

8. Press Release, Found. for Individual Rights in Educ., Student Wins Facebook.com Case, *supra* note 1.

9. Letter from Robert L. Shibley, Program Manager, Found. for Individual Rights in Educ., to John C. Hitt, President, Univ. of Cent. Fla. (Jan. 31, 2006), <http://www.thefire.org/pdfs/d65810609934f97bffffe79ff298fb4.pdf> (discussing FIRE’s response to the charges brought against Matthew Walston for allegedly violating the University of Central Florida’s Golden Rule policy).

10. Letter from Patricia Mackown, *supra* note 7 (“At the conduct board hearing held February 6, 2006, you were found ‘Not In Violation’ of university policy, specifically, Personal Abuse—(#4, of the ‘Rules of Conduct’ in the 2005-2006 edition of The Golden Rule).”).

11. *See* Press Release, Found. for Individual Rights in Educ., Student Wins Facebook.com Case, *supra* note 1.

12. *See* OFFICE OF STUDENT RIGHTS AND RESPONSIBILITIES, UNIV. OF CENT. FLA., THE GOLDEN RULE 5 (2007–2008), available at <http://www.goldenrule.sdes.ucf.edu/Golden%20>

discipline codes to punish off-campus conduct;¹³ however, such modifications of these codes could have implications for students communicating online. Millions of college students have accounts on social networking sites,¹⁴ and undoubtedly, many of these students have used these accounts to disparage fellow students, teachers and staff. Unfortunately, if the administrations of public colleges and universities react to speech posted by college students online and off-campus—like Central Florida reacted to Walston's speech—then potentially thousands of college students are currently under threat of being disciplined by their school for off-campus cyberspeech, which could be interpreted as violating the student conduct code.

With the increasing usage of social networking sites, blogs, and online communities among college students, Walston's experience with Central Florida is becoming more common, including recent incidents at the University of Illinois¹⁵ and Valdosta State University.¹⁶ These experiences suggest that universities are increasingly punishing college students for cyberspeech which occurs off-campus.¹⁷ Federal courts have not specifically addressed what

Rule%20-%202007-2008.pdf#page=1 (explaining that the Rule “shall not be interpreted to abridge the right of any member of the University community to freedom of expression protected by the First Amendment of the United States Constitution and any other applicable law”) [hereinafter THE GOLDEN RULE].

13. See *infra* Part II.B.

14. See Facebook, Statistics, <http://www.facebook.com/press/info.php?statistics> (last visited Oct. 23, 2008) (claiming that there are “[m]ore than 110 million active users” and Facebook “[m]aintain[s] 85 percent [of the] market share of 4-year U.S. universities”).

15. In late 2006, University of Illinois, Urbana-Champaign students joined a group on Facebook to protest the school's potential discarding of the university's mascot, “Chief Illiniwek,” as it was considered to be racist and offensive to others. Press Release, Found. for Individual Rights in Educ., University of Illinois Threatens Student with Punishment for Online Speech (Feb. 15, 2007), <http://www.thefire.org/index.php/article/7742.html>. The group, titled “If They Get Rid of the Chief I'm Becoming a Racist,” stirred up controversy on campus. *Id.* Eventually, the University was asked by staff and faculty in the American Indian Studies Program to “initiate disciplinary proceedings’ against the student who posted the comments” in the group, as a student had posted comments which were deemed by others to be offensive and possibly threatening. *Id.* The University opened an investigation against the student to investigate whether any university policies were violated with the posting of the comment. *Id.* Currently, it is unclear what the resolution was to this situation.

16. See Andy Guess, *Maybe He Shouldn't Have Spoken His Mind*, INSIDE HIGHER ED, Jan. 11, 2008, <http://www.insidehighered.com/news/2008/01/11/valdosta> (discussing the case at Valdosta State University in which a student was expelled as a result of posting messages on his Facebook account protesting the recent actions by the University to build new parking garages on campus).

17. This article only discusses discipline of online speech by public colleges and universities and not their private counterparts, as the First Amendment does not apply to private action. However, there are several notable incidents of private universities punishing

amount of First Amendment protection should be afforded to the online speech of college students, and past legal scholarship has also provided little guidance on this topic.¹⁸ Because federal courts have remained fairly quiet on this emerging medium of speech, institutions of higher education are more able to continue disciplining students for off-campus cyberspeech that is thought to violate an institution's student conduct code.

This paper will examine the recent revising of student conduct codes at public colleges and universities to reflect the ability to discipline students for off-campus conduct. Further, this paper will review the current law regarding student speech at both the secondary and post-secondary levels, in addition to analyzing the law regarding off-campus student cyberspeech.¹⁹ Finally, to avoid interference with

students for online speech, thereby demonstrating the increasing number of incidents involving the suppression of speech among college students. For example, in 2006, students at Syracuse University created a group on the social network site Facebook to write inappropriate comments about a doctoral student in the English Department. Rob Capriccioso, *Facebook Face Off*, INSIDE HIGHER ED, Feb. 14, 2006, <http://www.insidehighered.com/news/2006/02/14/facebook>. The group, titled "Clearly Rachel doesn't know what she's doing, ever," was comprised of college students who had the doctoral student as a teaching assistant. *Id.* Eventually, three freshman girls, who were officers in the group, were removed from the freshman English course taught by the doctoral student, placed on probation, and required to educate the student body about the consequences of Facebook. *Id.* Another incident capturing national media attention occurred in 2006, when Justin Park, a student at Johns Hopkins University, used his Facebook account to send out messages for a Halloween party. Paul D. Thacker, *Free Speech and Punishment at Hopkins*, INSIDE HIGHER ED, Dec. 1, 2006, <http://www.insidehighered.com/news/2006/12/01/jhu>. The party, titled "Halloween in the Hood," was considered derogatory to some students—many who were ethnic minorities. *Id.* The university's Student Conduct Board suspended Park for three semesters, required him to "complete 300 hours of community service, read 12 books and complete a reflection paper for each, and attend a workshop on diversity and race relations." *Id.* Despite the intervention of the Foundation for Individual Rights in Education on Park's behalf, the university refused to alter his position regarding Park. Letter from Stephen S. Dunham, Vice President and Gen. Counsel, Johns Hopkins Univ., to Greg Lukianoff, President, Found. for Individual Rights in Educ. (April 27, 2007), <http://www.thefire.org/pdfs/8d1d909d45d9cf2777147857c59fd36.pdf>. An incident similar to the one which took place at Syracuse University also took place at Cowley College. Foss Farrar, *Cowley Students Punished for MySpace Comments*, THE ARKANSAS CITY TRAVELER, May 5, 2006, http://www.arkcity.net/stories/050506/com_0003.shtml.

18. See *infra* Part IV.

19. Despite the recent occurrence, this paper will not discuss the potential use of online monitoring software by colleges and universities to monitor student speech on online social networks such as MySpace and Facebook. The software program, which would allow administrators to search Facebook profiles and monitor the activities of their athletes, YouDiligence, is not in use yet. See Elia Powers, *Extra Eyes for Athletics Staff*, INSIDE HIGHER ED, Jan. 22, 2008, <http://www.insidehighered.com/news/2008/01/22/youdiligence>. However, many colleges and universities have expressed an interest in the software. *Id.* Even

college students' constitutional right to free speech, this paper sets forth a two-fold argument.

First, if public institutions of higher education desire to preserve the "marketplace of ideas" and the principles of the First Amendment, which many claim to uphold, then these institutions should modify their student conduct codes to prohibit discipline for off-campus speech unless such speech is a true threat or constitutes a crime under existing law.²⁰ Second, this article proposes a standard for determining whether public colleges and universities have violated a student's First Amendment rights by disciplining the student for his or her off-campus speech. Under this standard, speech should be classified as either on-campus or off-campus speech. If the speech is determined to be off-campus speech, then the speech must be analyzed to determine whether or not it can be classified as a true threat or a crime. If speech does not fall into one of these categories, then the student cannot be disciplined for the speech. While there are indeed limitations to this standard, these limitations highlight the inadequacy of current First Amendment jurisprudence in addressing the technological advances of today.

Part I of this paper provides background on the use of social networking sites, blogs, and message boards by college students. Part II discusses the current state of student conduct codes among public colleges and universities and analyzes the conflicting policy goals of post-secondary student conduct regulation. Part III analyzes the standards used by courts in determining the constitutionality of student speech. Part IV examines the current state of federal case law as applied to off-campus student cyberspeech. Finally, Part V discusses and applies a standard for determining when discipline for college student off-campus speech violates the First Amendment. Further, this section discusses the need for greater clarification regarding what constitutes a true threat and "off-campus" speech.

if schools are not using high-tech software, though, to monitor these sites, some university administrations have acknowledged that they monitor their students' social networking sites. One of these schools includes Seattle University, which has stated that they browse students' pages when something is "brought to their attention." Nick Perry, *Official Party Pooper Riles Seattle U. Students*, THE SEATTLE TIMES, May 31, 2008, http://seattletimes.nwsources.com/html/localnews/2004449470_seattleuparties31m.html.

20. Given that public colleges and universities would be able to discipline students for off-campus speech that constitutes a crime, this standard would allow schools to discipline students for severe harassment, such as sexual harassment.

I. CYBERSPEECH ON COLLEGE CAMPUSES

Colleges and universities originally came under attack during the 1960s by students alleging that universities were stifling free speech and preventing academic freedom from flourishing.²¹ In the 1980s and 90s, universities were once again facing criticism by students and faculty alike for censoring speech.²² During this period, students called for public college and university administrations to discard their speech codes, which often suppressed a significant amount of speech among students.²³ Today, as technology rapidly changes, institutions of higher education are again in the spotlight for suppressing free speech.²⁴ The speech, though, does not take place in a classroom or on the lawns of a university. Rather, the speech occurs in cyberspace. Though some of this speech may have been written on university computers, much of this speech takes place in the quiet corners of a public library, in off-campus housing, or in a coffee shop, for example. Students are posting information, in the form of words and pictures, on social networking sites such as Facebook and MySpace. Other students use blogs as their outlet. And still some decide to take their speech to online message boards, including the Internet's newest gossip community, Juicy Campus.²⁵ Regardless of

21. See, e.g., THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S (Robert Cohen & Reginald E. Zelnik eds., 2002) (collection of articles discussing the Free Speech Movement which took place in the 1960s at the University of California-Berkeley); DONALD A. DOWNS, CORNELL '69: LIBERALISM AND THE CRISIS OF THE AMERICAN UNIVERSITY (1999) (discussing the uprising taking place on the campus of Cornell University in the late 1960s and the struggle over academic freedom).

22. See, e.g., DONALD A. DOWNS, RESTORING FREE SPEECH AND LIBERTY ON CAMPUS (2005) (using case studies to discuss the rise and fall of campus speech codes on several university campuses across the nation in the last couple of decades); Stephen Fleischer, *Campus Speech Codes: The Threat to Liberal Education*, 27 J. MARSHALL L. REV. 709 (1994) (discussing that speech codes in institutions of higher education threaten the principles of the First Amendment); cf. Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C. & U.L. 91 (1996) (discussing that the principles of the First Amendment and freedom from harassment should not necessarily be viewed as conflicting, but rather as two principles which can coexist with each other).

23. See DOWNS, RESTORING FREE SPEECH AND LIBERTY ON CAMPUS, *supra* note 22.

24. See, e.g., Press Release, Found. for Individual Rights in Educ., Student Wins Facebook.com Case, *supra* note 1; Press Release, Found. for Individual Rights in Educ., University of Illinois Threatens Student with Punishment, *supra* note 15; Guess, *supra* note 16.

25. Sunny Hostin, *Online Campus Gossips Won't Show Their Faces*, CNN.COM, April 11, 2008, <http://www.cnn.com/2008/CRIME/03/17/sunny.juicy/index.html>.

the online medium, public colleges and universities are using student conduct codes to discipline students for their online speech.²⁶

This section discusses the recent increase in the use of the Internet by college students as a means of interacting with other students and others beyond the campus community through the written expression of their thoughts and ideas. Three online media are discussed, specifically social networks, blogs, and online message boards.

A. *The Growth of Social Networks*

Several years ago, the social networking phenomenon began. In 2003, MySpace was created,²⁷ and a year later, Facebook was launched from a dorm room at Harvard University.²⁸ Though MySpace has more registered users in the U.S.,²⁹ Facebook is the most popular on college campuses.³⁰ Nonetheless, both social networking sites deserve attention because of their prominence on America's college and university campuses.

Facebook is a mainstay among college students across the nation.³¹ The site describes itself as a "social utility that helps people communicate more efficiently with their friends, family and coworkers."³² Facebook was created by college student Mark Zuckerberg and originally launched in February 2004, at Harvard

26. See, e.g., Press Release, Found. for Individual Rights in Educ., Student Wins Facebook.com Case, *supra* note 1 (discussing the discipline of a student at the University of Central Florida for the creation of a Facebook group); Press Release, Found. for Individual Rights in Educ., University of Illinois Threatens Student with Punishment, *supra* note 15 (discussing the inquiry into a Facebook group created by University of Illinois students); Guess, *supra* note 16 (discussing the expulsion of a Valdosta State University student for the creation of a Facebook group).

27. Alex Williams, *Do You MySpace?*, N.Y. TIMES, Aug. 28, 2005, http://www.nytimes.com/2005/08/28/fashion/sundaystyles/28MYSPACE.html?_r=1&oref=slogin.

28. Facebook, Facebook Factsheet, <http://www.facebook.com/press/info.php?factsheet> (last visited Oct. 23, 2008); Laura Locke, *The Future of Facebook*, TIME, July 17, 2007, <http://www.time.com/time/business/article/0,8599,1644040,00.html>.

29. See Brian Stelter, *MySpace Getting a Facelift in Effort to Turn Popularity into Wealth*, INT'L HERALD TRIB., June 16, 2008, <http://www.iht.com/articles/2008/06/15/technology/myspace16.php> ("MySpace has a U.S. audience of 73 million, and Facebook counts 36 million, according to comScore. Worldwide, Facebook tied MySpace for the first time in April, with about 115 million users for each.")

30. See Facebook, Statistics, *supra* note 14 (noting that Facebook has 85% of the market-share on college campuses).

31. See *id.*

32. Facebook, Facebook Factsheet, *supra* note 28.

University, before expanding to other colleges in the Ivy League and eventually colleges and universities across the country.³³ Today, Facebook is open to the entire world with more than 90 million active users,³⁴ and the site touts itself as the fourth “most trafficked social media site in the world.”³⁵ Many colleges caution students about the dangers of posting information on social networks such as Facebook.³⁶ These warnings frequently take place during freshman orientation and can also be found on college and university websites.³⁷ However, these warnings often reference the dangers of violence, identity theft, and future employment prospects,³⁸ instead of referencing the danger of information which could violate the school’s student conduct code because the speech is deemed to be harassing or abusive, for example. Even though most schools state that they do not actively monitor students’ social networking sites, if a school becomes aware of behavior that violates its code of conduct, the school administration will take action.³⁹

33. See Facebook, Company Timeline, <http://www.facebook.com/press/info.php?time> line (last visited Oct. 23, 2008).

34. Facebook, Facebook Factsheet, *supra* note 28 (defining active users as “users who have returned to the site in the last 30 days”).

35. Facebook, Statistics, *supra* note 14.

36. *E.g.*, Tracy Mitrano, Thoughts on Facebook (April 2006), <http://www.cit.cornell.edu/policy/memos/facebook.html> (discussing various dangers of using Facebook, including the potential inability to remove information once it is out in cyberspace, the possibility that future employers can see students’ information and photos, which could hurt their employment prospects, and the ability to be sued civilly for posting information about others which is known to be untrue).

37. See *id.* See also Hastings College, Facebook Student Notice, <http://www.hastings.edu/downloads/FBnotice.htm> (last visited Aug. 14, 2008) (discussing the potential ramifications of using Facebook, including identify theft, stalking, and providing damaging information to potential employers, but also explaining that certain content posted on Facebook can violate college policy); Univ. of Maine Student Affairs, Facebook Do’s and Don’ts, <http://www.umaine.edu/studentaffairs/facebook.asp> (last visited Aug. 14, 2008) (discussing what students should and should not do on Facebook, as well as explaining that while the University does not specifically monitor Facebook accounts, if information is brought to the attention of the University which violates the law or University policy, the University may take action); Rollins College, Thoughts on Facebook, MySpace, and Other Similar Services, <http://www.rollins.edu/it/policies/facebook.shtml> (last visited Aug. 14, 2008) (using the information provided by Cornell University to enlighten students about the potential problems caused by using social networks); Mount Holyoke Dean of Students, Facebook, <http://www.mtholyoke.edu/offices/dos/12937.shtml> (last visited Aug. 14, 2008) (using the information provided by Cornell University to enlighten students about the potential problems caused by using social networks).

38. *E.g.*, Mitrano, *supra* note 36.

39. See Sara Lipka, *The Digital Limits of ‘In Loco Parentis,’* CHRON. HIGHER EDUC. (Wash., D.C.), Mar. 7, 2008, at A1 (discussing the predicament schools find themselves in

In addition to Facebook, MySpace is also popular on college campuses. MySpace currently has 37 million registered users in the U.S. compared to Facebook's 36 million users.⁴⁰ However, since April 2008, both social networking sites had 115 million registered users worldwide.⁴¹ Despite the popularity of MySpace, the social networking site has not gained the widespread appeal on campuses as Facebook, given that Facebook was originally designed as a social networking site for college students.⁴² Even though Facebook has now opened its site to non-students, Facebook is still used heavily by college students.⁴³

B. Blogging

Instead of journals and diaries, many college students are now using online blogs to express their thoughts and share personal stories. Blogging, though, exposes an individual's speech to anyone with access to the Internet. Blogs have become so popular that admissions departments at many colleges and universities are now finding students to blog about their college experience for prospective students.⁴⁴ Many college students today have blogs, and some of these blogs are featured on The College Blog Network, a website which attempts to provide its viewers with a collection of some of the best blogs created and maintained by college students.⁴⁵

C. Message Boards

Recently, college students have been using online message boards to express themselves. One of these message boards, Juicy Campus, provides a medium for co-eds to spread gossip and rumors about other students on their campus while remaining anonymous.⁴⁶ As of March 2008, the website, created by a Duke University

regarding whether or not to monitor or investigate social networking profiles of college students).

40. Stelter, *supra* note 29.

41. *Id.*

42. Facebook, Company Timeline, *supra* note 33.

43. Facebook, Facebook Factsheet, *supra* note 28.

44. See Marcella Bombardieri, *College Blogs Tell It Like It Is*, BOSTON GLOBE, Apr. 16, 2007, http://www.boston.com/news/local/articles/2007/04/16/college_blogs_tell_it_like_it_is/.

45. See The College Blog Network, <http://www.thecollegeblognetwork.com> (last visited July 1, 2008).

46. See Juicy Campus, <http://www.juicycampus.com/> (last visited June 24, 2008).

graduate, was available to 59 college campuses.⁴⁷ Many colleges are considering banning the website from campus computers because of the vulgar and often libelous nature of the comments posted to the site.⁴⁸ The website has recently come under attack for failing to remove information from the message boards which has been found to be untrue.⁴⁹ Despite the problems associated with these message boards, college students continue to use these sites.

II. POLICY GOALS OF STUDENT CONDUCT CODES

When determining what amount of constitutional protection should be afforded to students attending public institutions of higher education, courts must consider both the interests of the state and the rights of the students. This section discusses the use of student conduct codes by public colleges and universities and examines some of the policy goals that must be considered when determining how to apply such codes to student behavior. These goals include the preservation of the “marketplace of ideas,” the doctrine of *in loco parentis*, and protection against school violence, especially in the wake of several recent fatal incidents of violence on college campuses across the nation. Though this is not an exhaustive list of policy goals, these goals are important when determining whether or not colleges and universities should discipline off-campus speech.

47. Richard Morgan, *A Crash Course in Online Gossip*, N.Y. TIMES, Mar. 16, 2008, http://www.nytimes.com/2008/03/16/fashion/16juicy.html?_r=1&em&ex=1205812800&en=099611f51958dfcf&ei=5087%0A&oref=slogin.

48. *Id.* See also Jeffrey R. Young, *Web Site Promising ‘Juicy’ Campus Gossip Faces Backlash*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 12, 2008, <http://chronicle.com/wired-campus/article/?id=2736> (noting that Pepperdine University’s student government considered banning the website from campus).

49. *E.g.*, Hostin, *supra* note 25 (discussing the legal obstacles to preventing libel from appearing on Internet message boards such as Juicy Campus); see also Richard Morgan, *Juicy Campus: College Gossip Leaves the Bathroom Wall and Goes Online*, INT’L HERALD TRIB., Mar. 18, 2008, <http://iht.com/articles/2008/03/18/arts/gossip.php> (discussing the problem of Juicy Campus on college campuses and the effects of the message board on students). It is difficult to remove information from websites because the Communications Decency Act of 1996 provides a significant amount of immunity to ISPs and hosts of websites from tort liability. Hostin, *supra* note 25. The First Amendment also provides some protection to these hosts. *Id.* In June 2008, Juicy Campus modified their terms and conditions to reflect the fact that the website “is not responsible for, does not control, does not endorse, and does not verify the Content posted to the Site or available through the Site.” Juicy Campus, Terms and Conditions, <http://www.juicycampus.com/posts/terms-condition>. Further, Juicy Campus “has no obligation to monitor the reliability, accuracy, legitimacy or quality of any such Content.” *Id.*

A. Overview of Student Conduct Codes

Student conduct codes are guidelines set forth by colleges and universities in an effort to maintain a safe, yet productive, campus environment.⁵⁰ These codes are often created by a university's board of regents or some other governing board. While the exact purpose and intent of such codes vary by institution, generally, the purpose of these codes is "(1) to guide student behavior and (2) to establish procedural mechanisms that safeguard the rights of the students accused of conduct that violates a campus code."⁵¹ Given this definition, the University of Florida, one of the nation's largest public universities, aptly demonstrates, for example, the purpose of these codes in its own student code of conduct:

The purpose of the Student Conduct Code is to set forth the specific authority and responsibility of the University in maintaining social discipline, to establish guidelines which facilitate an open, just, civil and safe campus community . . . [and] to outline the educational process for determining student and student organization responsibility for alleged violations of University regulations.⁵²

Because public colleges and universities are state entities, they must abide by the U.S. Constitution, and therefore, ensure that all students are afforded their procedural due process rights and other rights

50. Given the rise in the amount of corporate scandals and questions regarding the amount of ethics training law students are receiving, some are discussing the need for law schools to revisit student conduct codes. See Steven K. Berenson, *What Should Law School Student Conduct Codes Do?* 38 AKRON L. REV. 803 (2005).

51. Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 B.Y.U. EDUC. & L.J. 1, 1-2 (2003) (discussing the rights which must be afforded students in public institutions of higher education and noting that schools which "recognize students' rights find that procedures designed to protect students' rights protect the schools themselves, as those procedures reveal the relevant facts underlying the disciplinary action, and insulate the school from lawsuits alleging a breach of the student's rights").

52. UNIV. OF FLA. DEAN OF STUDENTS OFFICE, REGULATIONS OF THE UNIVERSITY OF FLORIDA, <http://www.dso.ufl.edu/studentguide/studentconductcode.php> (last visited July 3, 2008). This purpose is similar to other state universities, such as Ohio State University, whose Code of Student Conduct states that the "code of student conduct is established to foster and protect the core missions of the university, to foster the scholarly and civic development of the university's students in a safe and secure learning environment, and to protect the people, properties and processes that support the university and its missions." OHIO STATE UNIV. OFFICE OF STUDENT LIFE, CODE OF STUDENT CONDUCT (Dec. 7, 2007), available at http://studentaffairs.osu.edu/resource_csc.asp [hereinafter OSU CODE OF CONDUCT].

guaranteed by the Constitution.⁵³ These additional rights include protecting one's right to free speech under the First Amendment when adjudicating matters under student conduct codes.

Recently, public universities have begun to revisit their student conduct codes in an effort to determine whether off-campus conduct by students should be disciplined by the university.⁵⁴ This is likely in response to the increase in the "amount of purposeless destruction in which students are engaged."⁵⁵ Aptly put, "[t]his destruction often spills over the gates of the ivy covered towers into the communities in which the colleges reside."⁵⁶ The examples of public universities revisiting their student conduct codes are abundant. The University of Wisconsin-Madison has recently considered a proposal to alter the Wisconsin Administrative Code, therefore allowing the university to punish students for off-campus conduct, including "dangerous conduct, sexual misconduct, stalking and violation of the law."⁵⁷ Other universities, including the University of Minnesota,⁵⁸ Pennsylvania State University,⁵⁹ University of Colorado-Boulder,⁶⁰

53. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975) (holding that a school district violated a group of high school students' Fourteenth Amendment procedural due process rights under the U.S. Constitution when the students were expelled without a hearing).

54. See William DeJong & Tamara Vehige, The Higher Educ. Ctr. for Alcohol and Other Drug Abuse and Violence Prevention, *The Off-Campus Environment: Approaches for Reducing Alcohol and Other Drug Problems*, PREVENTION UPDATES, Apr. 2008, at 5, available at http://www.ocssral.colostate.edu/towngown/ul_files/HEC_off-campus.pdf (discussing the increase in the number of schools revising their student conduct codes to include off-campus conduct).

55. Laura Marini Davis, *Has Big Brother Moved Off-Campus? An Examination of College Communities' Responses to Unruly Student Behavior*, 35 J.L. & EDUC., Apr. 2006, at 153, 154.

56. *Id.*

57. Diana Savage, *Students Share Concerns About State Conduct Rules at Forum*, THE DAILY CARDINAL, Mar. 5, 2008, <http://www.dailycardinal.com/article/2238> (internal quotation omitted).

58. UNIV. OF MINN. BD. OF REGENTS, STUDENT CONDUCT CODE (Dec. 8, 2006), available at http://www1.umn.edu/regents/policies/academic/Student_Conduct_Code.html. The University of Minnesota's policy, which was amended December 8, 2006, applies to any off-campus conduct which:

as alleged, adversely affects a substantial University interest and either: (a) constitutes a criminal offense as defined by state or federal law, regardless of the existence or outcome of any criminal proceeding; or (b) indicates that the student may present a danger or threat to the health or safety of the student or others.

Id. The policy discusses the "guiding principles" of the need for the student conduct code along with the "responsibilities of dual membership" with the school and the community. *Id.*

59. JUDICIAL AFFAIRS, DIV. OF STUDENT AFFAIRS, PA. STATE UNIV., OFF-CAMPUS MISCONDUCT POLICY, http://www.sa.psu.edu/ja/pdf/Off-Campus_Misconduct_Policy.PDF (last visited Oct. 22, 2008) ("While the University has a primary duty to supervise behavior on

and Ohio State University,⁶¹ have recently modified their student discipline codes⁶² to include off-campus conduct. Public colleges and universities are amending their student conduct codes in an effort to discipline students for behavior which is considered to be dangerous and damaging to the reputation of the school. Such violations include underage drinking, disorderly conduct, and behavior that affects the physical or mental health of students and others.⁶³

Despite the efforts of schools to discipline students for behavior which could harm others on campus or the community, increasingly,

its premises, there are many circumstances where the off-campus behavior of students affects a Substantial University Interest and warrants disciplinary action.”). Sections of the code which could implicate students engaging in off-campus online speech include activity which “affects a Substantial University Interest” and “[s]ignificantly impinges upon the rights, property, or achievements of self or others or significantly breaches the peace and/or causes social disorder,” or is “detrimental to the educational interests of the University.” *Id.* In addition to punishment for off-campus behavior, students who have “been the target of a hate crime, an act of intolerance, discrimination or harassment,” or those who have witnessed such acts, can report such incidents to the University, and these reports will be “sent to the staff of the Office of the Vice Provost for Educational Equity, the Campus Environment Team, and the Diversity Advocate.” PA. STATE UNIV., PROTOCOL FOR RESPONDING TO BIAS MOTIVATED INCIDENTS (Oct. 2006), available at http://www.equity.psu.edu/reporhate/reports/final_protocol.pdf.

60. OFFICE OF JUDICIAL AFFAIRS, UNIV. OF COLO. AT BOULDER, STUDENT CONDUCT CODE POLICIES AND PROCEDURES 2007–2008 4 (Aug. 2007), available at <http://www.colorado.edu/studentaffairs/judicialaffairs/downloads/studentcode200708.pdf> (the University of Colorado-Boulder has the jurisdiction to discipline off-campus conduct when the conduct: “(1) adversely affects the health, safety or security of any member of the university community or the mission of the university; or (2) involves any records or documents of the university”).

61. Under the Code of Student Conduct, the “code also applies to the off-campus conduct of students and registered student organizations in direct connection” with various situations. OSU CODE OF CONDUCT, *supra* note 52. Most of these situations are directly related to the university, such as when students engage in activities associated with “academic course requirements” or “any activity supporting pursuit of a degree” such as an internship. *Id.* Other situations include “any activity sponsored, conducted, or authorized by the university or by registered student organizations” such as participating in a band trip and engaging in underage drinking. *Id.* Further, students can be punished for their off-campus behavior when a “police report has been filed, a summons or indictment has been issued, or an arrest has occurred for a crime of violence,” or in any activity which “causes substantial destruction of property belonging to the university or members of the university community or causes serious harm to the health or safety of members of the university community.” *Id.* The last activity is where most students could violate the policy with off-campus cyberspeech.

62. Megan Twohey, *Students' Off-Campus Behavior to Be Targeted*, MILWAUKEE J. SENTINEL, Mar. 26, 2007, <http://www.jsonline.com/story/index.aspx?id=582303> (discussing that several public universities have amended their student conduct codes to apply to off-campus conduct, including the University of Minnesota, University of Colorado, and Pennsylvania State University). The list of colleges and universities who have modified their student conduct codes to reflect off-campus conduct and discussed in this section has been partially compiled by Twohey.

63. See DeJong & Vehige, *supra* note 54, at 4.

universities have used their student conduct codes to discipline students for off-campus cyberspeech. For example, as previously discussed in this article, Matthew Walston was a student at the University of Central Florida who used his Facebook account to create a group which disparaged a fellow student running for student senate.⁶⁴ The University of Central Florida has a student conduct code which applies to conduct occurring “off-campus when that conduct is determined to adversely affect the interest(s) of any part of the University.”⁶⁵ At Central Florida, Walston’s Facebook group claimed a student senate candidate was a “jerk” and a “fool.”⁶⁶ Walston was charged by the University with violating the “Golden Rule” of the student conduct code because he had engaged in “personal abuse” and “harassment.”⁶⁷ The code states that personal abuse is “[v]erbal or written abuse of any person including lewd, indecent, or obscene expressions of conduct,” and harassment is defined as:

Behavior (including written or electronic communication such as AOL IM, ICQ, etc.) directed at a member of the University community which is intended to and would cause severe emotional distress, intimidation, or coercion to a reasonable person in the victim’s position, or would place a reasonable person in the victim’s position in fear of bodily injury or death.⁶⁸

Although the section defining harassment states that the section “shall not be interpreted to abridge the right of any member of the University community to freedom of expression protected by the First Amendment of the United States Constitution and any other applicable law,”⁶⁹ Walston was still notified by the University that he was being charged with violating the student conduct code.⁷⁰ Further, it was not until an outside organization, the Foundation for Individual

64. See Press Release, Found. for Individual Rights in Educ., Student Wins Facebook.com Case, *supra* note 1.

65. THE GOLDEN RULE, *supra* note 12, at 5.

66. Press Release, Found. for Individual Rights in Educ., Student Wins Facebook.com Case, *supra* note 1.

67. See Letter from Patricia MacKown, *supra* note 7.

68. THE GOLDEN RULE, *supra* note 12, at 5.

69. *Id.*

70. See Press Release, Found. for Individual Rights in Educ., Student Wins Facebook.com Case, *supra* note 1.

Rights in Education, became involved that the judicial board at Central Florida dismissed the charges against Walston.⁷¹

Another example of a public institution using its student conduct code to punish a student for off-campus cyberspeech occurred at Valdosta State University, a public university located in Georgia.⁷² In late 2006, T. Hayden Barnes, a sophomore at Valdosta State used his Facebook profile to protest his school's plan to use \$30 million from student fees to construct on-campus parking garages.⁷³ Barnes also sent e-mails and letters to students, staff, and the campus newspaper hoping that others would express outrage to the use of student fees for such a purpose.⁷⁴ Instead, Barnes received a letter under his dorm room door explaining that he had been "administratively withdrawn" from school, and he would need to leave campus within a matter of days.⁷⁵ The letter, written by Ronald Zaccari, president of Valdosta State, stated that "[a]s a result of recent activities directed towards me by you," including a photo montage created by Barnes on his Facebook profile, "you . . . present a clear and present danger to [the] campus."⁷⁶ The Facebook posting was titled "S.A.V.E.—Zaccari Memorial Parking Garage," and included photos of Zaccari, a parking garage, a bulldozer, and a sign which stated, "No Blood for Oil."⁷⁷

Barnes was not allowed to seek readmission to the university until he had received notice from a "non-university appointed psychiatrist indicating that [he was] not a danger to [himself] and others."⁷⁸ Further, he was to receive "[d]ocumentation from a certified mental health professional indicating that during [his] tenure at Valdosta State [he] will be receiving on-going therapy."⁷⁹ Barnes subsequently appealed the expulsion decision to the Board of

71. *Id.* See also Letter from Patricia MacKown, *supra* note 7 (discussing that Walston was exonerated of the charges against him).

72. See Guess, *supra* note 16.

73. *Id.* (Valdosta State University has an extremely strict speech code, "restricting student expression to a single stage on the 168-acre campus, only between the hours of 12 and 1 p.m. and 5 and 6 p.m., with prior registration").

74. See *id.*

75. *Id.*

76. Letter from Ronald Zaccari, President, Valdosta State Univ., to T. Hayden Barnes, Student, Valdosta State Univ., Notice to be Administratively Withdrawn from Valdosta State University (May 7, 2007), available at <http://www.thefire.org/index.php/article/8521.html>.

77. *Id.*

78. *Id.*

79. *Id.*

Regents.⁸⁰ However, the University stood by their original decision to expel Barnes.⁸¹ On January 9, 2008, Barnes, with assistance from the Foundation for Individual Rights in Education, filed a lawsuit in the U.S. District Court for the Northern District of Georgia against Valdosta State University, President Zaccari, and other university officials.⁸² One week later, the Board of Regents overturned President Zaccari's decision to expel Barnes from school.⁸³ However, by then, Barnes was attending another university.⁸⁴

Student conduct codes which allow universities to discipline students for off-campus conduct can indeed be beneficial to the university community. They allow public colleges and universities to remove students they believe pose a threat to the campus community. These codes can also be used to discipline students for disorderly behavior, allowing the university to maintain a positive presence within the community. However, the aforementioned examples demonstrate that student conduct codes have been used to discipline students for their off-campus online conduct. When cyberspeech does not pose a violent threat to the campus community, such as when a student calls someone a "jerk" and a "fool," then potential First Amendment issues should be raised.

B. Colleges and Universities as "Marketplaces" of Ideas

Students and scholars alike often criticize the use of student conduct codes because of their potential to suppress the "marketplace of ideas," which is frequently associated with institutions of higher education.⁸⁵ In *Abrams v. United States*, Justice Oliver Wendell Holmes, in a widely cited passage of his dissent,⁸⁶ expressed the principle of a "free trade of ideas" embodied in the U.S. Constitution:

80. Guess, *supra* note 16.

81. *Id.*

82. See Complaint, Barnes v. Zaccari, et al., No. 1-08-CV-0077 (N.D. Ga. Jan. 9. 2008), available at <http://www.thefire.org/index.php/article/8789.html>.

83. Alicia Eakin, *Board of Regents Reverses VSU Expulsion*, WALB.COM NEWS, Jan. 17, 2008, http://www.walb.com/Global/story.asp?S=7737318&nav=menu_37_2.

84. *Id.*

85. See, e.g., DOWNS, RESTORING FREE SPEECH AND LIBERTY ON CAMPUS, *supra* note 22; MARTIN P. GOLDING, FREE SPEECH ON CAMPUS (2000) (discussing and analyzing the debate over academic freedom and free speech on college and university campuses, including the enactment of speech codes).

86. See, e.g., Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 824-25 (2008).

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.⁸⁷

Though Justice Holmes's dissent did not specifically refer to the "free trade in ideas" in the realm of education, his discussion does underscore the importance of "ideas" in the flourishing of society. Nearly half a century later, the Supreme Court noted the importance of freedom of expression in higher education in *Keyishian v. Board of Regents*.⁸⁸ The Court stated that "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"⁸⁹ This principle was reiterated in *Healy v. James* when the Court stated, "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."⁹⁰

While Justice Fortas famously noted that students do not shed their constitutional rights at the schoolhouse gates,⁹¹ college students have always been afforded more constitutional protection than

87. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

88. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)

Our Nation is deeply committed to safeguarding academic freedom . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Id. (internal citation omitted).

89. *Id.* at 603 (citation omitted).

90. *Healy v. James*, 408 U.S. 169, 180–81 (1972) (citation omitted) (holding that while colleges and universities may place neutral time, place, and manner restrictions on granting official recognition to student organizations, they may not interfere with the organization's First Amendment right to association).

91. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that students have a First Amendment right to freedom of speech when such speech does not cause a substantial disruption and does not interfere with the rights of other students).

elementary and secondary school students because of their maturity.⁹² Specifically:

Universities . . . have a student body made up of young adults who are trusted—and in American culture, expected—to challenge ideas and question authority. [Students] are better equipped than they were as K-12 students to participate in the marketplace of ideas. As a result, restrictions on their speech are less likely to be marketplace enhancing.⁹³

This First Amendment protection, though, is not absolute, and courts will often defer to the colleges and universities to determine when such speech no longer becomes valuable to the “marketplace of ideas.”⁹⁴ The marketplace of ideas can be endangered by the creation of speech codes and vague disciplinary policies.⁹⁵ In the past, speech codes have been “‘designed to punish ‘racist,’ ‘sexist,’ and, in some instances, any speech that may create a ‘hostile learning environment.’”⁹⁶ Despite First Amendment challenges and court orders prohibiting vague speech codes—especially those dealing with hate speech—many public colleges and universities continued to maintain their speech codes.⁹⁷

92. Blocher, *supra* note 86, at 879.

93. *Id.*

94. *See id.* (“Although they cannot resort as easily as K-12 schools to the discipline-and-order justification, universities are just as—if not more—entitled to claim that their decisions to restrict or enable speech are made in the interest of advancing the pursuit of knowledge and truth.”).

95. *See* Melanie A. Moore, *Free Speech on College Campuses: Protecting the First Amendment in the Marketplace of Ideas*, 96 W. VA. L. REV. 511, 513 (1993) (“One of the primary tools being used in this assault on free speech is the enactment of college speech codes”). For clarification purposes, speech codes are a subset of student conduct codes. Speech codes are frequently referred to those parts of student conduct codes which are deemed to censor speech.

96. *Id.*

97. *See* Jon B. Gould, *The Precedent that Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 LAW & SOC'Y REV. 345, 360 (2001) (finding that in a study of public and private college and university speech codes, “[a]lthough a majority of schools maintained speech policies neither before nor after the court cases, almost a quarter of institutions either retained offending policies or adopted new ones following these decisions”). *See also* FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2007: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES (2007), available at http://www.thefire.org/Fire_speech_codes_report_2007.pdf (finding that in a survey analyzing speech codes at 346 public and private colleges and universities, a majority of schools still maintain speech code which “both clearly and substantially restricts freedom of speech”).

C. Doctrine of In Loco Parentis

The doctrine of *in loco parentis*, which is Latin for “in the place of a parent,”⁹⁸ is used extensively today in public schools to justify an extensive amount of involvement by the states in the education of children. However, the doctrine is less influential in higher education.⁹⁹ Therefore, while K-12 students may have what scholars consider a “special, duty-creating relationship”¹⁰⁰ with their public institutions of education, such a relationship is not well-founded for students of higher education.¹⁰¹ Rather, the relationship between students and public colleges and universities is fairly “complex.”¹⁰²

In the higher education context, the doctrine of *in loco parentis* is becoming more of an issue as an increasing number of colleges and universities consider monitoring students' social networking sites such as Facebook and MySpace for student conduct violations.¹⁰³ Many schools have decided against monitoring their students' social networking sites because of the time and resources needed to monitor the sites along with the possible legal ramifications of searching students' social networking pages.¹⁰⁴ However, school administrators

98. BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

99. See Edward N. Stoner II & John Wesley Lowery, *Navigating Past the “Spirit of Insubordination”: A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 8 (2004)

During the 1960s . . . courts began to move away from the concept of *in loco parentis*. Instead, courts viewed the relationship between students and institutions as contractual. Under this view, institutions enter into contracts with their students to provide them with educational services in exchange for students' paying certain fees and obeying certain rules.

Id.

100. Peter F. Lake, *The Special Relationship(s) Between a College and a Student: Law and Policy Ramifications for the Post In Loco Parentis College*, 37 IDAHO L. REV. 531, 535 (2001) (discussing the relationship between college and students and what duties are owed to students by the institution of higher education).

101. See *id.* at 536.

102. *Id.* Problems could arise if public colleges and universities are deemed to have a “duty-creating relationship” with adult students:

Legally, the combinations of various ways in which an [institution of higher education] might have a duty of reasonable care do not add up to a legal doctrine of *in loco parentis*. However, the political consequences of misperceiving the messages from the courts could lead, in some instances, to a return to some of the political relations of an earlier period in [institution of higher education] institutional history.

Id.

103. See Lipka, *supra* note 39.

104. *Id.* (“Disciplining one student and not another, or missing a post that upset someone, would expose colleges to litigation.”).

also find themselves in a bit of a catch-22, because “administrators realize they cannot ignore reports of misconduct online. Even if they do not actively monitor social-networking sites, a disturbing post brought to their attention puts them on notice to respond. If they don’t, they may be found negligent *in court*.”¹⁰⁵

D. Protecting Against School Violence

Student conduct codes are also created to protect students from harm at the hands of other students.¹⁰⁶ In light of the most recent school shootings, including those at Virginia Tech¹⁰⁷ and Northern Illinois University,¹⁰⁸ schools should be able to have the means to protect students from potential threats, and therefore, it can reasonably be argued that institutions of higher education must be able to punish students for threatening speech. This authority could extend to both on-campus and off-campus speech.

Further, in the wake of the Virginia Tech shootings, colleges and universities are becoming increasingly concerned about lawsuits resulting from students’ violent actions towards other students on campus.¹⁰⁹ If a “particular violent act can be deemed unforeseeable,” then it most likely will not give rise to a negligence cause of action;¹¹⁰ however, under certain circumstances, there are “warning signs.”¹¹¹ Where such signals exist, “a court may find that a college or university owes a duty to its students.”¹¹² Even if an act of violence is foreseeable, though, it is difficult to determine whether or not the

105. *Id.*

106. Following after recent college students across the nation, other individuals are asking to make our nation’s K-12 schools and institutions of higher education a safe environment for students, faculty, and staff. *See, e.g., Julie Rawe, Can We Make Campuses Safer?*, TIME, April 16, 2007, <http://www.time.com/time/nation/article/0,8599,1611164,00.html>.

107. *See Massacre at Virginia Tech*, CNN.COM, <http://www.cnn.com/SPECIALS/2007/virginiatech.shootings/> (providing information and memorials on the shootings at Virginia Tech) (last visited Oct. 23, 2008).

108. *See Kevin Bohn, 6 Shot Dead, Including Gunman, at Northern Illinois University*, CNN.COM, Feb. 14, 2008, <http://www.cnn.com/2008/US/02/14/university.shooting/>.

109. *See Brett A. Sokolow et al., College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319 (2008) (discussing what liability colleges and universities assume when students enrolled in the institution assault other students, staff and faculty).

110. *Id.* at 333 n.108.

111. *Id.* at 347.

112. *Id.*

threat would be imminent or contain enough specificity.¹¹³ Further, state institutions of higher education are often protected by statutory immunity, and for those states that allow individuals to sue, the damages caps are often so low that initiating a lawsuit can be cost prohibitive.¹¹⁴

III. STUDENT SPEECH AND THE LAW

Given the increasing use of cyber-communication, many schools are now using their existing student conduct codes to discipline students for off-campus cyberspeech. Punishment of speech by school administrators, though, often raises First Amendment challenges. The U.S. Supreme Court and lower federal courts have attempted to address student speech rights, however, this area of law continues to remain underdeveloped. Further, the case law regarding the First Amendment protections to be afforded to K-12 students for *off-campus* cyberspeech remains divided,¹¹⁵ and the case law in this area is non-existent in regards to college students. Despite the underdevelopment of this case law, a clear trend emerges. Courts are more willing to grant a greater amount of First Amendment rights to college students when compared to their K-12 counterparts.

A. *The Beginning of Student Speech Standards*

1. *The Tinker Standard*

The Supreme Court first considered student speech rights in *Tinker v. Des Moines Independent Community School District*.¹¹⁶ In *Tinker*, a group of middle school and high school students had devised a plan to wear black arm bands to school in an effort to publicly demonstrate their opposition to the Vietnam War.¹¹⁷ Shortly after their decision to wear the armbands, the principals of their respective schools were notified of the students' intention.¹¹⁸ The principals subsequently enacted policies prohibiting students from wearing the armbands, and those who refused to adhere to the policy

113. *Id.* at 325–27.

114. *See id.* at 336–40

115. *See infra* Part IV.

116. 393 U.S. 503 (1969).

117. *Id.* at 504.

118. *Id.*

would be suspended.¹¹⁹ While aware of the plan, Mary Beth and John Tinker, along with Christopher Eckhardt, wore their armbands to school and were consequently suspended until their dress conformed to the school policy.¹²⁰

The disciplined students sued the school, claiming that their First Amendment right to free speech was violated.¹²¹ The Court attempted to strike a balance between the needs of the school to maintain discipline and order and the rights of the students to engage in expressive speech.¹²² In determining the proper role of the school in limiting speech, the court noted that school administrators may limit speech and expression when it “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.”¹²³ The Court found that no “interference” took place because “there [was] no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.”¹²⁴ Further, schools may limit student speech and expression when it “impinge[s] upon the rights of other students.”¹²⁵ However, the Court found no evidence of this.¹²⁶

More generally, *Tinker* demonstrates that schools may limit student speech in an effort to maintain the order and pedagogical purpose of educational institutions; however, “[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”¹²⁷

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 509.

123. *Id.*

124. *Id.* at 508.

125. *Id.* at 509.

126. *Id.*

127. *Id.*

2. *The Fraser Standard*

Tinker had been the law regarding student speech rights until the Court modified *Tinker* in *Bethel School District No. 403 v. Fraser*.¹²⁸ Matthew Fraser, a high school senior, “delivered a speech nominating a fellow student for student elective office.”¹²⁹ The speech referred to this student “in terms of an elaborate, graphic, and explicit sexual metaphor.”¹³⁰ Before he gave the speech, Fraser was unsure of its appropriateness.¹³¹ Fraser asked two teachers for their opinion of the speech.¹³² The teachers advised him not to deliver the speech given its nature and advised him that there could be “severe consequences” if he delivered the speech.¹³³ Despite this advice, Fraser delivered the speech to the assembly, which included about 600 high school students.¹³⁴

After school officials informed Fraser that he would be suspended for three days, Fraser appealed the matter through the School District’s grievance procedure.¹³⁵ The hearing officer determined that the speech was “indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly.”¹³⁶ Therefore, the school was able to discipline Fraser. Ultimately, Fraser served a two-day suspension for the speech¹³⁷ and was declared ineligible to speak at the commencement exercises.¹³⁸

The *Fraser* Court did not follow *Tinker* because the case was “unrelated to any political viewpoint.”¹³⁹ Nonetheless, the Court determined that school officials did not violate Fraser’s First Amendment rights since the speech was “offensively lewd and indecent.”¹⁴⁰ Notably, school officials may prohibit and punish speech which “undermine[s] the school’s basic educational

128. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

129. *Id.* at 677.

130. *Id.* at 677–78.

131. *Id.* at 678.

132. *Id.*

133. *Id.*

134. *Id.* at 677.

135. *Id.* at 678.

136. *Id.* at 678–79.

137. *Id.* at 679.

138. *Id.* at 678.

139. *Id.* at 685.

140. *Id.*

mission.”¹⁴¹ The Court justified its decision by reasoning that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”¹⁴² The Court, while acknowledging that students have some constitutional rights, noted that, “[t]he 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.”¹⁴³ Further, schools are able to regulate student speech when it is plainly obscene because “[t]he process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.”¹⁴⁴

Despite the majority opinion, Justices Marshall and Stevens dissented. Justice Marshall, in his dissent, stated that Fraser should not have been punished for his speech because, applying the *Tinker* standard, “the School District failed to demonstrate that [Fraser’s] remarks were indeed disruptive.”¹⁴⁵ Justice Marshall noted that “the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school’s educational mission.”¹⁴⁶ However, in Fraser’s situation, the School District “failed to bring in evidence sufficient to convince either of the two lower courts that education at Bethel School was disrupted by [Fraser’s] speech.”¹⁴⁷ Conversely, Justice Stevens’s dissent was not as terse as Justice Marshall’s. Rather, Justice Stevens explained that under the Due Process Clause of the Fourteenth Amendment, Fraser was “entitled to fair notice of the scope of the prohibition [regarding

141. *Id.*

142. *Id.* at 682.

143. *Id.* at 681.

144. *Id.* at 683. The Court continued:

Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

Id.

145. *Id.* at 690.

146. *Id.*

147. *Id.*

speech] and the consequences of its violation.”¹⁴⁸ Even if Fraser’s speech violated the “rules of conduct in an educational institution,” Justice Stevens explained that Fraser “should not be disciplined for speaking frankly in a school assembly if he had no reason to anticipate punitive consequences.”¹⁴⁹ Fraser’s speech was not prohibited under the school’s disciplinary rule.¹⁵⁰ Rather, the school’s rule against such conduct was “sufficiently ambiguous that without a further explanation or construction it could not advise the reader of the student handbook that the speech would be forbidden.”¹⁵¹ Finally, more generally, when determining whether certain speech in an educational setting is offensive, the Supreme Court is not in a position to address such issues.¹⁵² Rather, the district court judges are in a better position because of their ability to better evaluate the norms of the community.¹⁵³

3. *The Hazelwood Standard*

The Court’s decision in *Hazelwood School District v. Kuhlmeier* is another digression from the *Tinker* standard.¹⁵⁴ In *Hazelwood*, former high school students sued the Hazelwood School District, alleging that the school violated their First Amendment rights when the school’s newspaper advisor omitted two pages from an edition of the student newspaper.¹⁵⁵ The pages contained articles pertaining to students who had experienced either a personal pregnancy or a divorce in the family.¹⁵⁶ The newspaper advisor was concerned that “the pregnant students still might be identifiable from the text” and that “the article’s references to sexual activity and birth control were inappropriate for some of the younger students at the school.”¹⁵⁷ The advisor was also concerned that the parents of the student discussing divorce were not notified of the article.¹⁵⁸

148. *Id.* at 691.

149. *Id.* at 692–93.

150. *Id.* at 694.

151. *Id.* at 695.

152. *Id.* at 696.

153. *Id.*

154. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

155. *Id.* at 262.

156. *Id.* at 263.

157. *Id.*

158. *Id.*

The Court did not apply the standards enumerated in *Tinker* or *Fraser*, but instead opted to apply a public forum analysis.¹⁵⁹ In choosing not to apply *Tinker*, the Court stated that *Tinker* concerned “educators’ ability to silence a student’s personal expression that happens to occur on the school premises,” whereas “[this case] concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”¹⁶⁰

When applying a public forum analysis, the court determines whether a newspaper is a “forum for public expression.”¹⁶¹ Public schools are not public forums, open to unlimited speech and expression because they “do not possess all of the attributes of streets, parks, and other traditional public forums.”¹⁶² Instead, the student newspaper was a non-public forum because of the way it has been treated by the school.¹⁶³ Specifically, the newspaper was part of the school curriculum, and articles had to be approved by both the newspaper advisor and the school principal.¹⁶⁴ Therefore, when schools create non-public forums, “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns*.”¹⁶⁵

The question regarding the application of *Hazelwood* to college students has been marked by a fairly large amount of scholarship.¹⁶⁶

159. *Id.* at 267.

160. *Id.* at 271. Further, the Court noted, “[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression.” *Id.* at 272–73.

161. *Id.* at 267.

162. *Id.*

163. *Id.* at 268–70.

164. *Id.* at 268–69.

165. *Id.* at 273 (emphasis added).

166. See, e.g., Edward L. Carter, Kevin R. Kemper & Barbara L. Morgenstern, *Applying Hazelwood to College Speech: Forum Doctrine and Government Speech in the U.S. Courts of Appeals*, 48 S. TEX. L. REV. 157 (2006) (discussing the application of *Hazelwood* to college student speech by lower federal courts); Jessica Golby, *The Case Against Extending Hazelwood v. Kuhlmeier’s Public Forum Analysis to the Regulation of University Student Speech*, 84 WASH. U. L.R. 1263 (2006) (providing an “alternative approach for assessing attempts to regulate student speech at the university level that takes into account both the university’s educational and social functions.”); Karyl Roberts Martin, *Demoted to High*

Though *Hazelwood* addressed the First Amendment's application to student publications, the case could have implications for the federal courts' application of K-12 off-campus speech cases to college student off-campus speech cases, because many federal circuits have applied *Hazelwood* to the college setting.¹⁶⁷

C. *The Future of Student Speech*

Some believed the Supreme Court was about to articulate a clearer standard for student speech, specifically off-campus speech, when the Court granted certiorari in *Morse v. Frederick*.¹⁶⁸ In *Morse*, a student standing across the street from his school was disciplined by the school after refusing to take down a sign that read, "Bong Hits for Jesus."¹⁶⁹ Ultimately, the Court's holding was exceedingly narrow. Instead of developing a standard for off-campus speech, the Court held that the speech was on-campus, and schools have the authority to discipline students for speech which advocates illegal drug use.¹⁷⁰

D. *The U.S. Supreme Court and College Speech*

The U.S. Supreme Court has addressed several cases related to college speech. In these cases, the Court has repeatedly held that

School: Are College Students' Free Speech Rights the Same as Those of High School Students? 45 B.C. L. REV. 173 (2003) (arguing that the *Hazelwood* standard should not be applied to college student speech); Gregory C. Lisby, *Resolving the Hazelwood Conundrum: The First Amendment Rights of College Students in Kincaid v. Gibson and Beyond*, 7 COMM. L. & POL'Y 129 (2002) (concluding that the speech of college students may have more First Amendment protection than high school students); Mark J. Fiore, *Trampling the "Marketplace of Ideas": The Case Against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915 (2002) (arguing that *Hazelwood* should not be extended to college student speech).

167. Overall, while most scholars believe *Hazelwood* does not apply to the college setting, the lower courts have tended to hold the opposite—*Hazelwood* does apply to institutions of higher education. See, e.g., *Kincaid v. Gibson*, 236 F.3d 342, 344 (6th Cir. 2001) (en banc) (applying *Hazelwood* to determine whether the censorship of a student yearbook was constitutional); *Brown v. Li*, 308 F.3d 939, 942–48 (9th Cir. 2002) (applying *Hazelwood* in determining whether or not the removal of a graduate thesis from a college library was constitutional); *Hosty v. Carter*, 412 F.3d 731, 732–34 (7th Cir. 2005) (en banc) (applying *Hazelwood* in determining whether the censorship of a college newspaper receiving student fee money was constitutional). Only the First Circuit has deviated from the norm of applying *Hazelwood* to college campuses. *Student Gov't Ass'n v. Bd. of Trs. of the Univ. of Mass.*, 868 F.2d 473 (1st Cir. 1989) (declining to apply *Hazelwood*). The U.S. Supreme Court has remained silent on this issue.

168. See, e.g., Martha McCarthy, *Student Expression Rights: Is a New Standard on the Horizon?*, 216 ED. LAW REP. 15 (2007).

169. *Morse v. Frederick*, 127 S.Ct. 2618, 2621 (2007).

170. *Id.* at 2625–26.

college students are afforded a substantial amount of First Amendment protection from censorship by colleges and universities. Three important cases have helped protect the free speech rights of students in higher education, including *Healy v. James*, *Papish v. Board of Curators of University of Missouri*, and *Rosenberger v. University of Virginia*.

In *Healy*, the Supreme Court recognized the First Amendment associational rights of college students. These associational rights are important in allowing college students to engage in free speech. In this case, students from Central Connecticut State College sued the college after a local chapter of the Students for a Democratic Society (SDS) was denied formal recognition by the college.¹⁷¹ The purpose of the organization was to “provide ‘a forum of discussion and self-education for students developing an analysis of American society.’”¹⁷² The committee charged by the college with deciding whether to approve organizations for college recognition did not approve SDS because the committee was concerned “over the relationship between the proposed local group and the National SDS organization.”¹⁷³ Eventually, by a 6-2 vote, the committee approved the application for recognition. However, the president of the college “rejected the Committee’s recommendation, and issued a statement indicating that [SDS’s] organization was not to be accorded the benefits of official campus recognition.”¹⁷⁴

The Court held that the rejection of the group’s status on campus was unconstitutional.¹⁷⁵ While a college can impose “reasonable regulations with respect to the time, the place, and the manner in which student groups conduct their speech-related” in an effort to uphold “campus law,”¹⁷⁶ institutions of higher education cannot infringe on the association right of student organizations.¹⁷⁷ The Court reasoned that if colleges and universities deny official recognition to student groups who abide by campus rules, then these groups cannot use university resources to promote their organizations.¹⁷⁸ More specifically, “the organization’s ability to

171. *Healy v. James*, 408 U.S. 169, 171 (1972).

172. *Id.*

173. *Id.* at 172.

174. *Id.* at 174.

175. *Id.* at 194.

176. *Id.* at 192–93.

177. *Id.* at 181.

178. *Id.* at 181–82.

participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.”¹⁷⁹

Further, the Court protected the “indecent” speech of college students in *Papish*.¹⁸⁰ In this case, a journalism graduate student was expelled from the University of Missouri for publishing an “underground” newspaper.¹⁸¹ The newspaper was found to be “indecent” by university administrators because the front cover of the newspaper contained “a political cartoon previously printed in another newspaper depicting policemen raping the Statue of Liberty and the Goddess of Justice.”¹⁸² The newspaper also printed expletives in relation to the cartoon.¹⁸³ The Court held that the student’s expulsion violated her First Amendment right to free speech.¹⁸⁴ Noting that *Healy* was handed down shortly before *Papish*, the Court stated: “We think *Healy* makes it clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus [sic] may not be shut off in the name alone of ‘conventions of decency.’”¹⁸⁵ Because the University disciplined the graduate student based on the viewpoint of her speech instead of the “the time, place, or manner of its distribution,” she was entitled to First Amendment protection.¹⁸⁶ *Papish* highlights the fact that courts are more responsive to protecting the indecent speech of college students than of high school students.¹⁸⁷

Finally, the Supreme Court has also protected college students against viewpoint discrimination in student fee funding decisions. In *Rosenberger*, the Court held that the University could not deny student funding to a Christian campus publication, *Wide Awake: A Christian Perspective*.¹⁸⁸ The University collected mandatory student fees from students, and these fees were distributed to student groups

179. *Id.* at 182–83.

180. *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667 (1973).

181. *Id.*

182. *Id.*

183. *Id.* at 667–68.

184. *Id.* at 671.

185. *Id.* at 670.

186. *Id.*

187. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 675 (1986).

188. *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 819 (1995).

who applied for funding.¹⁸⁹ *Wide Awake* was denied funding from the Student Activities Fund because the newspaper “‘primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality,’ as prohibited by the University’s SAF Guidelines.”¹⁹⁰ The Court reasoned that the First Amendment rights of the group responsible for publishing *Wide Awake* were violated because the University engaged in viewpoint discrimination in denying the group funding. Notably, the Court stated that the danger of viewpoint discrimination is “‘especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.”¹⁹¹

Despite these Supreme Court cases, the Court has remained silent on several issues related to college speech. These issues include, among others, whether college administrators can discipline college students for off-campus speech, what constitutes off-campus speech, and whether student publications receiving financial support from the college or university can be afforded First Amendment protection.

IV. OFF-CAMPUS CYBERSPEECH

There is a dearth of case law analyzing the application of *Tinker*—or any other student speech standard—to off-campus speech by college students. Cyberspeech is often conducted off-campus, using non-school resources. Further, unlike K-12 students, college students are adults. Therefore, to apply *Tinker* and other student speech standards, such as *Fraser*, to off-campus speech could substantially limit the free speech of students. This section discusses the current law regarding the constitutional protections afforded to off-campus student speech.

A. *Cyberspeech Not Constitutionally Protected*

When applying the *Tinker* standard, many courts have held that students’ cyberspeech is not protected under the First Amendment.¹⁹²

189. *Id.*

190. *Id.*

191. *Id.* at 835.

192. *See, e.g., J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002) (holding that a student’s First Amendment rights were not violated when a personal website ridiculing a teacher cause emotional distress to the targeted teacher and created disruption

In the most recent student cyberspeech case handed down by the U.S. Court of Appeals for the Second Circuit earlier this year, *Doninger v. Niehoff*, the court reasoned that that off-campus cyberspeech posted on a website was most likely not protected by the First Amendment from discipline by school administrators.¹⁹³ In 2007, Avery Doninger, a junior at Lewis Mills High School in Burlington, Connecticut, along with other members of the student council, protested the administration's canceling of a student event, Jamfest—an event similar to a battle-of-the-bands.¹⁹⁴ The administration had postponed Jamfest several times because of the construction of a new auditorium.¹⁹⁵ When the new date for the event was proposed, the faculty member responsible for running the technology for the auditorium was not able to attend.¹⁹⁶ Though students had proposed the idea of allowing other students to handle the technology while having parents supervise, the administration rejected this plan.¹⁹⁷ Because it was close to the end of the school year, it appeared that Jamfest would be cancelled.¹⁹⁸ Several members of the student council, including Doninger, sent a mass e-mail to numerous individuals in the community asking for them to contact the administration, specifically Paula Schwartz, the district superintendent, asking them to reconsider holding Jamfest.¹⁹⁹ Schwartz became upset with the influx of e-mails and phone calls, and Niehoff, the high school principal handled the situation.²⁰⁰ Niehoff mentioned to Doninger that she was “amenable to rescheduling Jamfest so it could be held in the new auditorium.”²⁰¹ Further, Niehoff wanted Doninger to send out a “corrective e-mail” to reflect that the administration was not necessarily canceling Jamfest.²⁰²

among students); *Layshock v. Hermitage Sch. Dist.*, 412 F.Supp.2d 502 (W.D. Pa. 2006) (holding that creating a parody profile of a teacher on MySpace, in which many other students had access, constituted speech which caused a substantial disruption and did not warrant First Amendment protection).

193. *Doninger v. Niehoff*, 527 F.3d 41 (2nd Cir. 2008).

194. *Id.* at 44.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 44–45.

200. *Id.* at 44.

201. *Id.* at 45.

202. *Id.*

Doninger returned home and decided to post something on a personal blog about Jamfest.²⁰³ She wrote the following post:

Jamfest is cancelled due to douchebags in central office. here is an email that we sent to a ton of people and asked them to forward to everyone in their address book to help get support for jamfest. basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. we have so much support and we really appreciate it. however, she got pissed off and decided to just cancel the whole thing all together. anddd so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. andd..here is the letter we sent out to parents.²⁰⁴

Doninger also attached the e-mail that had been written earlier in the day by Doninger and other members of the student council.²⁰⁵ She also included an e-mail her mom wrote to the administration about Jamfest.²⁰⁶

As a result of sending the blog, the administration stated that they would hold Jamfest on an alternative date.²⁰⁷ However, Doninger was subsequently disciplined for her blog post.²⁰⁸ Nienhoff stated that the blog post “failed to display the civility and good citizenship expected of class officers.”²⁰⁹ Further, Doninger had “disregarded [Nienhoff’s] counsel regarding the proper means of addressing issues of concern with school administrators.”²¹⁰ Doninger, who was the current junior class secretary, was prohibited from running as the senior class secretary.²¹¹ Even though her name was not on the ballot, she received enough write-in votes to win the nomination.²¹² However, she was not allowed to take office.²¹³ Subsequently, she sued both Schwartz and Hienhoff, claiming that both administrators had violated her First Amendment rights.²¹⁴

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 46.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 46–47.

Both the district court and the court of appeals denied Doninger's preliminary injunction against school administrators, which would have prevented them from imposing the disciplinary sanction.²¹⁵ Discussing the *Tinker* standard, the court of appeals noted that even though the U.S. Supreme Court has remained silent on the extent that schools can punish students for off-campus speech, "a student may be disciplined for expressive conduct, even conduct occurring off school grounds, when this conduct 'would foreseeably create a risk of substantial disruption within the school environment,' at least when it was similarly foreseeable that the off-campus expression might also reach campus."²¹⁶ However, it was less "clear" whether *Fraser* applied to off-campus speech.²¹⁷ Nonetheless, the court reasoned that the argument of whether *Fraser* applied in this case did not need to be discussed because *Tinker* applied.²¹⁸ The court concluded that Doninger knew that there was a "foreseeable" risk that substantial disruption on campus would occur.²¹⁹ First, she referred to the administration in vulgar terms, and someone responded to her blog post with more vulgarity.²²⁰ Second, Doninger used "misleading" information—claiming that Jamfest had been cancelled when it had not—in hopes that individuals would contact the administration about Jamfest.²²¹ As such, the court affirmed the denial of a preliminary injunction.²²²

In another recent case, also decided by the Second Circuit, the court also held that a student's online speech was not protected under the First Amendment.²²³ In *Wisniewski v. Board of Education of Weedsport Central School District*, the school district disciplined Aaron Wisniewski, a middle school student, after he had created an IM icon on the popular AOL Instant Messaging program depicting "a pistol firing a bullet at a person's head, above which there were dots representing splattered blood."²²⁴ Further, "[b]eneath the drawing

215. *Id.* at 42, 54.

216. *Id.* at 48.

217. *Id.* at 49–50.

218. *Id.* at 51.

219. *Id.* at 50.

220. *Id.* at 50–51.

221. *Id.* at 51.

222. *Id.* at 42, 54.

223. *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 35 (2nd Cir. 2007).

224. *Id.* at 36.

appeared the words ‘Kill Mr. VanderMolen.’”²²⁵ Those on his “buddy” list—friends who could communicate with him—were able to see this rendering.²²⁶ Wisniewski had this icon on his IM buddy page for at least three weeks, and eventually, a student notified the school principle about the situation.²²⁷ While Wisniewski stated that it was merely a joke and a criminal investigation arrived at this same conclusion, he was suspended for five days.²²⁸ The Second Circuit, applying the *Tinker* standard, concluded that Wisniewski’s speech, even if it expressed an opinion, “cross[ed] the boundary of protected speech and constitute[ed] student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would ‘materially and substantially disrupt the work and discipline of the school.’”²²⁹ As such, Wisniewski’s speech was not entitled to First Amendment protection.²³⁰

B. Cyberspeech Constitutionally Protected

As discussed above, in most instances, federal courts, using the *Tinker* standard, have held that off-campus cyberspeech by students is not constitutionally protected under the First Amendment when it causes a substantial disruption on-campus. However, in several cases, courts have held that some off-campus cyberspeech has not caused enough of a substantial disruption on-campus to warrant the suppression of a student’s First Amendment right to free speech. Although the federal courts in the cases discussed below have applied *Tinker* to off-campus speech, the courts in these cases have not taken such a broad interpretation of “substantial disruption” so as to allow discipline in all student off-campus cyberspeech cases in which school administrators believe the speech to be disruptive to the school’s educational mission and environment.

In most situations where federal courts have ruled against discipline for student cyberspeech, the student did not bring the speech onto campus. In *Latour v. Riverside Beaver School District*, the U.S. District Court for the Western District of Pennsylvania held that the school district likely violated the First Amendment rights of

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 38–39.

230. *Id.* at 38–40.

Anthony Latour; this ruling was made in a hearing for a preliminary injunction preventing the school from imposing discipline on Latour—discipline which included two years of expulsion from the school.²³¹ Latour had created several rap songs in his own time and away from school.²³² Though it is not entirely clear how the school became aware of the songs, there was no indication that he brought any of the songs or lyrics to school.²³³ The school expelled him for the content of four songs, which included “Murder, He Wrote,” and “Massacre.”²³⁴ Applying both a true threat analysis and the *Tinker* standard, the court found that the songs did not constitute a violent threat nor cause a substantial disruption on campus.²³⁵ Therefore, Latour’s First Amendment rights were likely violated by the school district.²³⁶

Further, in *Emmett v. Kent School District No. 415*, the student did not bring speech he posted on a webpage onto campus. Rather, the district was notified of the speech when the website was discussed as part of a news segment by a local television station.²³⁷ In *Emmett*, the U.S. District Court for the Western District of Washington held that a school district’s discipline of a student for comments posted on a website likely violated his First Amendment rights.²³⁸ Nick Emmett, a high school senior, created a website on his home computer, which looked similar to the high school website.²³⁹ However, there was a disclaimer on the website claiming that it was merely for entertainment purposes.²⁴⁰ The website “posted mock ‘obituaries’ of at least two of [Nick’s friends].”²⁴¹ Further, the obituaries were “written in tongue-in-cheek, inspired, apparently, by a creative writing class last year in which students were assigned to write their own obituary.”²⁴² Finally, the website had a place where students could vote “on who would ‘die’ next—that is, who would be

231. Latour v. Riverside Beaver Sch. Dist., No. Civ. A. 05-1076, 2005 WL 2106562, at *2 (W.D.Pa. Aug. 24, 2005).

232. *Id.* at *1.

233. *Id.*

234. *Id.*

235. *Id.* at **1–2.

236. *Id.*

237. *Emmett v. Kent Sch. Dist. No. 415*, 92 F.Supp.2d 1088, 1089 (W.D. Wash. 2000).

238. *Id.* at 1090.

239. *Id.* at 1089.

240. *Id.*

241. *Id.*

242. *Id.*

the subject of the next mock obituary.”²⁴³ Emmett was subsequently disciplined by the school for the website.²⁴⁴ The federal district court held that Emmett was likely to succeed on his First Amendment claims against the district, and therefore, the court enforced a temporary restraining order against the district, forbidding them to enforce the disciplinary sanctions against Emmett.²⁴⁵

Finally, in *Beussink v. Woodland R-IV School District*, Brandon Beussink, a high school student, created a website which was “highly critical of the administration at Woodland High School.”²⁴⁶ Further, there was “no evidence that Beussink used school facilities or school resources to create his homepage” or that another student accessed the website using a school computer prior to school faculty being notified of the website.²⁴⁷ When a teacher was notified of the website by a student who had accessed the website at Beussink’s home, the school administration suspended Beussink.²⁴⁸ The district court held that Beussink’s First Amendment claims against the school district would likely succeed given the fact that there was not a substantial disruption caused by the website, and Beussink was disciplined for the content of the website and not for any disruption the website caused at school.²⁴⁹

Though judges may be more likely to protect student cyberspeech when the speech is uttered off-campus, federal courts have also upheld the free speech rights of students when the cyberspeech was brought onto campus. In particular, the U.S. District Court for the Western District of Pennsylvania upheld the free speech rights of a student in *Killion v. Franklin Regional School District*.²⁵⁰ Zachariah Paul, a high school student, was upset “by a denial of a student parking permit and the imposition of various rules and regulations for members of the track team [of which Paul was a member].”²⁵¹ Paul decided to create a “Top Ten” list, which was aimed at Robert Bozzuto, the school’s athletic director.²⁵² The list

243. *Id.*

244. *Id.*

245. *Id.* at 1090.

246. *Beussink v. Woodland R-IV Sch. Dist.*, 30 F.Supp.2d 1175, 1177 (E.D.Mo. 1998).

247. *Id.* at 1177–78.

248. *Id.* at 1187.

249. *Id.* at 1178–80.

250. *Killion v. Franklin Reg’l Sch. Dist.*, 136 F.Supp.2d 446 (W.D. Pa. 2001).

251. *Id.* at 448.

252. *Id.*

“contained . . . statements regarding Bozzuto’s appearance, including the size of his genitals.”²⁵³ Paul e-mailed this list to his friends. However, he never brought the list to campus.²⁵⁴ Nonetheless, other students who had obtained a copy of the list had brought it on campus.²⁵⁵ When the school discovered the list, Paul was subsequently suspended for ten days.²⁵⁶ Paul then sued the school, claiming the administration had violated his First Amendment rights when disciplining him for his off-campus speech.²⁵⁷ In *Killion*, the U.S. District Court for the Western District of Pennsylvania held that Paul’s off-campus speech on the website did not cause a substantial disruption on-campus. Therefore, under the *Tinker* standard, the school district could not punish Paul for his off-campus speech.

Finally, even though courts are more likely to uphold students’ free speech rights when the cyberspeech does not take place on-campus, there have been instances where federal courts have upheld the free speech right of students when the online speech was created off-campus, yet was accessed on school property.

In *Coy v. Board of Education of North Canton City Schools*, Jon Coy, a middle school student, created a website on his personal home computer.²⁵⁸ Coy used the website to post pictures of himself and his friends, including “biographical information of Coy and his friends, quotes attributed to Coy and his friends, and a section entitled ‘losers.’”²⁵⁹ Coy posted pictures of three boys from his school on the “losers” section of the website.²⁶⁰ The website contained a “few insulting sentences . . . under each picture.”²⁶¹ Further, the “most objectionable was a sentence describing one boy as being sexually aroused by his mother.”²⁶² Finally, the website also contained pictures of people “giving the ‘finger’” and also used profanity.²⁶³ Coy had occasionally checked the website from a school computer,

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 449.

257. *Id.*

258. *Coy ex rel. Coy v. Bd. of Educ. of N. Canton City Sch.*, 205 F.Supp.2d 791, 795 (N.D. Ohio 2002).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

and other students had notified a teacher about the website.²⁶⁴ Subsequently, Coy was suspended for four days and eventually expelled for eighty days.²⁶⁵ Coy sued the administration claiming they violated his First Amendment rights when they disciplined him.

The U.S. District Court for the Northern District of Ohio applied the *Tinker* standard²⁶⁶ and dismissed the school district's motion for summary judgment, holding that Coy's First Amendment rights were potentially violated.²⁶⁷ The court reasoned that the school "disciplined Coy for the expressive content of his website and not for having viewed it at school."²⁶⁸ This finding suggests that the school disciplined Coy for the content of the site instead of violating the school's Internet policy.²⁶⁹ Second, the court found that "no evidence suggests that Coy's acts in accessing the website had any effect upon the school district's ability to maintain discipline in the school."²⁷⁰

The differing treatment of K-12 off-campus speech by the federal courts suggests that some federal courts may incorrectly apply current case law regarding college speech to college students' off-campus cyberspeech. Given this possibility, it is imperative that federal courts develop a standard regarding off-campus student speech which is both uniform and upholds college students' First Amendment rights.

V. DEVELOPING A CONSISTENT STANDARD FOR COLLEGE STUDENT CYBERSPEECH

Disciplining students for off-campus cyberspeech is different than disciplining students for on-campus speech. Unlike areas on-campus, in which public colleges and universities can exercise greater control over students by imposing reasonable time, place, and manner restrictions on student speech,²⁷¹ administrators at public institutions

264. *Id.*

265. *Id.* at 796.

266. *Id.* at 800.

267. *Id.* at 801.

268. *Id.* at 800 (The school "produced no evidence that they ever previously disciplined, let alone expelled, another student for accessing an unauthorized web site").

269. *Id.*

270. *Id.* at 801.

271. *See Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973) (holding that while a university may impose reasonable time, place and manner restrictions on speech, they may not engage in viewpoint discrimination when determining whether or not to discipline a student for such speech). *See also Perry Educ. Ass'n v. Perry Local Educators'*

of higher education do not control cyberspace.²⁷² Therefore, some colleges and universities are now using student conduct codes to discipline student speech. However, this section provides a two-fold argument in an effort to protect college students from being disciplined for their cyberspeech.

First, college students have a higher expectation of First Amendment protection because of their status as adults, and as such, if public colleges and universities desire to uphold the “marketplace of ideas” and an environment of free inquiry, which most claim to protect, these institutions should revise their student conduct codes to discipline students for off-campus speech only when such speech constitutes a true threat or a crime. Second, while federal courts have not considered the question of what First Amendment protection should be afforded to college students’ off-campus cyberspeech, past federal case law indicates that college student free speech jurisprudence differs from K-12 student free speech jurisprudence. Rather, college students’ First Amendment rights are greater than those of K-12 students.²⁷³

Given that college students have been afforded more protection under the First Amendment compared to K-12 students, federal courts

Ass’n, 460 U.S. 37 (1983) (developing the public forum analysis when holding that employee mailboxes were not public forums).

272. For example, students have been known to chant expletives at other students from opposing teams at sporting events, especially at home games. Because much of this speech takes place on-campus, administrators are in a better position to discipline this speech under the First Amendment than if this conduct occurred in a private facility off-campus. Louis M. Benedict & John D. McMillen, *Free Expression Verses Prohibited Speech: The First Amendment and College Student Sports Fans*, 15 J. LEGAL ASPECTS SPORT 5 (1995).

273. Unlike high school students, college students are guaranteed a higher form of protection under the First Amendment. The Supreme Court in *Fraser* held that “[K-12] schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct.” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). However, institutions of higher education do not have such latitude in determining whether or not offensive and inappropriate language can occur on campus. In *Papish*, the Court has upheld that while colleges and universities can impose reasonable time, place and manner restrictions on college student speech, they cannot engage in viewpoint discrimination when determining what speech to censor. 410 U.S. at 670. Most recently, the Third Circuit reiterated this point in *DeJohn v. Temple University*: “[A]lthough ‘[s]peech codes are disfavored under the First Amendment because of their tendency to silence or interfere with protected speech . . . [.] public secondary and elementary school administrators are granted more leeway [to restrict speech] than public colleges and universities’” No. 07-2220, 2008 WL 2952777, at *10 (3d Cir. Aug. 4, 2008). Therefore, when colleges and universities engage in censorship of college speech, they will inevitably risk the possibility of violating a student’s First Amendment right to free speech.

should therefore adopt an unequivocal standard that public colleges and universities cannot discipline college students for off-campus speech unless such speech constitutes a true threat or a crime under existing law. Such a standard would send a clear message to institutions of higher education that these institutions cannot censor speech under the guise of student conduct codes so as to punish unfavorable cyberspeech. This standard would also better protect college students' First Amendment rights while at the same time attempt to protect the institutional goals of providing a "marketplace of ideas" and protecting students, staff and faculty from school violence.

The development of a standard for college student off-campus speech is necessary. First, although the federal case law strongly supports the position that college students must be afforded a significant amount of protection under the First Amendment, none of these frequently cited cases address off-campus speech. Rather, the speech in these cases occurred on-campus. In *Papish*, a student distributed an underground student newspaper on campus.²⁷⁴ Further, in *Doe v. University of Michigan*, students challenged the constitutionality of a sexual discrimination policy after "incidents of racism and racial harassment" took place in dormitories, the on-campus radio station, and elsewhere on campus.²⁷⁵ In *UWM Post, Inc. v. Board of Regents of University of Wisconsin*, a group of plaintiffs challenged the constitutionality of a university anti-discrimination policy.²⁷⁶ The challenge was a facial and not an as-applied challenge.²⁷⁷ Therefore, the court did not need to address whether there are differing constitutional protections afforded to on-campus and off-campus speech. Finally, in *Dambrot v. Central Michigan University*, a football coach was disciplined after using a racial epithet in an on-campus locker room when speaking to players.²⁷⁸

274. *Papish*, 410 U.S. at 667.

275. *Doe v. Univ. of Mich.* 721 F.Supp. 852, 854 (E.D. Mich. 1989) (holding that a sexual discrimination policy violated the First Amendment because of its vagueness and broadness).

276. *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis.*, 774 F.Supp. 1163, 1164 (E.D.Wis. 1991) (holding that a campus speech code violated the First Amendment because of its vagueness and broadness).

277. *Id.* at 1164-65.

278. *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1180-81 (6th Cir. 1995) (discussing that university policy restricting certain speech violated the First Amendment because it was both vague and overbroad).

Second, while there is case law analyzing the First Amendment protections of K-12 student cyberspeech, there are no federal cases addressing college student cyberspeech. As such, this may leave college students vulnerable to the application of K-12 student cyberspeech cases to college student cyberspeech cases.

In each of the aforementioned on-campus college speech cases, the federal courts protected the First Amendment right to free speech of the college student. However, if this constitutional right is to be afforded to college students while on campus, it is imperative that the First Amendment protections afforded to college students must be even greater for the students' off-campus cyberspeech—and this should be made clear by the federal courts. The situation at the University of Central Florida, discussed in the introduction of this article, strongly indicates that college student conduct codes are being used to censor speech that institutions of higher education disagree with and find distasteful. Adopting the standard discussed above will assist in protecting the First Amendment rights of college students while using the Internet.

A. Application of the Standard to College Student Off-Campus Cyberspeech

Under the standard discussed above, Matthew Walston, the college student from the University of Central Florida who created a Facebook group disparaging a candidate for student senate²⁷⁹ should not have had charges brought against him for violating his school's student conduct code. Walston's speech was protected by the First Amendment, especially since the speech was made off-campus.

Recently, some lower federal courts have deviated from the *Tinker-Fraser-Hazelwood* trilogy when determining whether school officials have violated a student's First Amendment rights. Instead, these courts have relied on the U.S. Supreme Court's holding in *Watts v. United States*, in which a "true threat" is not protected by the First Amendment.²⁸⁰ Although there is not a federal case applying the "true threat" analysis to college speech, the doctrine can be applied to

279. See Press Release, Found. for Individual Rights in Educ., Student Wins Facebook.com Case, *supra* note 1.

280. *Watts v. United States*, 394 U.S. 705, 707 (1969) (holding that defendant's First Amendment rights were not violated when he was "convicted of violating a 1917 statute which prohibits any person from 'knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States.'" *Id.* at 705.).

such speech. The reasoning behind denying constitutional protection to a “true threat” is that “although there may be some political or social value associated with threatening words in some circumstances, the government has an overriding interest in ‘protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.’”²⁸¹ The Supreme Court has not provided the lower federal courts with much guidance in determining what constitutes a “true threat.” Nonetheless, in applying the true threat doctrine to student speech, federal courts have focused on two cases: *Doe v. Pulaski County Special School District*²⁸² and *Lovell v. Poway Unified School District*.²⁸³ This section discusses the two approaches to the true threat doctrine as applied to student speech.²⁸⁴ Walston’s speech does not constitute a true threat under either true threat standard.

1. “Reasonable Recipient” Standard

The first true threat standard is the reasonable recipient standard.²⁸⁵ In *Pulaski*, a junior high school boy had written threatening letters intended for a girl who had recently broken up with him.²⁸⁶ Though he never sent the letters to the girl, a friend of the boy had found them in his room, and eventually, school officials were notified of the presence of the letters.²⁸⁷ The boy was subsequently expelled.²⁸⁸ The Eighth Circuit Court of Appeals, in determining whether the letters were constitutionally protected speech under the First Amendment, adopted an “objective test” for determining whether a “reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm.”²⁸⁹

281. *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (citation omitted).

282. *Id.*; see also Jonnie Macke, *The True Threat Doctrine as Misapplied in Doe v. Pulaski County Special School District*, 57 ARK. L. REV. 303 (2004) (arguing that the “true threat” doctrine should not have been applied in *Pulaski*, and the letters were protected speech under the First Amendment).

283. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996).

284. Further, federal courts have discussed the application of the true threats doctrine to off-campus student cyberspeech. See *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 37–38 (2nd Cir. 2007).

285. *Pulaski*, 306 F.3d at 622.

286. *Id.* at 620.

287. *Id.* at 620.

288. *Id.*

289. *Id.* at 622.

The question is whether the “reasonable person” should be analyzed from the view of the speaker or the listener.²⁹⁰ The Eighth Circuit held that the “nature of the alleged threat” should be evaluated from the “viewpoint of a reasonable recipient.”²⁹¹

When conducting a true threat “inquiry,” a court must evaluate “whether the recipient of the alleged threat could reasonably conclude that it expresses ‘a determination or intent to injury presently or in the future.’”²⁹² There are several factors courts can consider when engaging in this inquiry, including:

- (1) the reaction of those who heard the alleged threat; (2) whether the threat was conditional; (3) whether the person who made the alleged threat communicated it directly to the object of the threat; (4) whether the speaker had a history of making threats against the person purportedly threatened; and (5) whether the recipient had a propensity to engage in violence.²⁹³

Using this analysis, the court must answer two questions: (1) Did the speaker intend to communicate the purported threat, and if so, (2) would a reasonable recipient have perceived the letters as a threat?²⁹⁴ Under these questions, the Eighth Circuit majority held that the boy’s First Amendment rights were not violated when school officials expelled him for his letters because the letters, “viewing the entire factual circumstances,” constituted a “true threat.”²⁹⁵ However, four judges dissented, and would have found that the letters were protected speech and did not constitute a “true threat.”²⁹⁶ More simply, to the dissenters, the boy did not intend to communicate his letters to the general public, and a reasonable recipient would not have perceived the words in the letter to be a legitimate threat of violence.

2. “Reasonable Speaker” Standard

Like the Eighth Circuit, in *Lovell*, the Ninth Circuit adopted an “objective standard” for determining whether a threat is

290. *Id.* (“Some ask whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat, whereas others ask how a reasonable person standing in the recipient’s shoes would view the alleged threat.”).

291. *Id.*

292. *Id.* (citations omitted).

293. *Id.* at 623 (citation omitted).

294. *Id.* at 624–25.

295. *Id.* at 626.

296. *Id.* at 635 (Heaney, J., dissenting).

constitutionally protected.²⁹⁷ However, unlike the Eighth Circuit, the Ninth Circuit adopted the “reasonable speaker” standard.²⁹⁸ Specifically, the court asked “whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.”²⁹⁹ The court also noted that the “[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners.”³⁰⁰

In *Lovell*, a high school girl was upset with her guidance counselor because she was not able to get into classes that she wanted to take.³⁰¹ There was some dispute as to what the girl told the counselor, but it was to the effect that the girl would shoot the counselor if she didn’t get into the classes.³⁰² The Ninth Circuit found that the girl’s words were not constitutionally protected speech, as they constituted a true threat.³⁰³ This was aided by the fact that the counselor would have perceived them to be a threat of violence given the increasing incidents of school violence around the country.³⁰⁴

Under both the “reasonable recipient” and “reasonable speaker” standards, Walston’s speech at the University of Central Florida does not constitute a true threat. Using the reasonable recipient standard, there is no evidence that Walston intended to communicate a threat when he created a Facebook group which called a student senate candidate a “jerk” and a “fool.”³⁰⁵ Rather, it appeared that the creation of the group was to merely highlight Walston’s personal views about the candidate.³⁰⁶ Further, a reasonable recipient would not have perceived the Facebook group to be a threat. In the world of politics, many candidates for both state and federal office alike have been called much worse. Even if the reasonable speaker standard is used, Walston’s words would not have constituted a true threat. Rather, a reasonable person in the position of Walston would not have

297. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996).

298. *Id.*

299. *Id.* (citation omitted).

300. *Id.* (citation omitted).

301. *Id.* at 368.

302. *Id.*

303. *Id.* at 373.

304. *Id.*

305. See Press Release, Found. for Individual Rights in Educ., Student Wins Facebook.com Case, *supra* note 1.

306. *Id.*

viewed the Facebook group as a “serious expression of intent to harm or assault.”³⁰⁷

B. Criticisms of the True Threat Doctrine

The true threat doctrine has faced some criticism; however, in the end, federal courts continue to apply it. First, a major criticism of this doctrine is that there is variation among the federal circuits regarding the application of the test.³⁰⁸ Although there is variation among the circuits, most circuits have applied either the reasonable speaker or the reasonable listener test when considering questions of student speech.³⁰⁹ Nonetheless, Jennifer Rothman suggests that “inconsistent and conflicting standards will chill more speech than would a single, clear, and predictable national standard.”³¹⁰ While this may very well be the case, requiring that schools only discipline students for speech that constitutes a true threat under the test adopted by the federal circuit where the institution is located is more likely to protect students' First Amendment rights than allowing colleges and universities to continue disciplining students under their current speech codes. Furthermore, two years after the publication of Rothman's article, the U.S. Supreme Court did define a “true threat” in *Virginia v. Black*: “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”³¹¹

Second, some scholars have discussed the need for a modified true threat standard, specifically including an intent requirement.³¹²

307. *Lovell*, 90 F.3d at 372.

308. See *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997) for an overview of the differing variations on the true threat test. See also Jennifer Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 302–14 (2001).

309. See Rothman, *supra* note 308, at 302–14.

310. *Id.* at 302.

311. *Virginia v. Black*, 538 U.S. 343, 359 (2003) (holding that a statute prohibiting cross-burning violated the First Amendment since the jury instructions regarding the “prima facie evidence provision” created presumption of intent to intimidate).

312. Jennifer Rothman suggests that the current doctrine is inadequate because the test lacks an intent, or “mens rea,” requirement. Rather, she suggests that while the reasonable listener standard should remain, two other prongs should be added to the test, including an intent prong, and an actor prong. The intent prong requires that the “speaker must have purposely, knowingly, or recklessly made a statement which would intimidate, frighten, or coerce the victim(s) with the threat of physical force, violence, or destruction of substantial property.” Rothman, *supra* note 308, at 333–34. Further, the actor prong requires that the “speaker must have purposely, knowingly, or recklessly suggested, either explicitly or

These scholars have noted that requiring intent on the part of the student speaker would take away some discretion on the part of the trial judge in determining who a “reasonable person” would be.³¹³ Rather, a subjective intent standard should be required.³¹⁴ Though in theory, requiring some level of mens rea on the part of the student speaker may be beneficial, if the judge is the fact finder, the judge would still have discretion in determining whether or not the student speaker had the subjective intent to make a threat when speaking. Further, in criminal law, subjective tests have often been rejected for objective tests.³¹⁵

Though the true threat doctrine may have flaws, this does not imply that the doctrine itself is not applicable to student speech. Rather, it only suggests that the doctrine requires further clarification by the U.S. Supreme Court in an effort to better apply the doctrine to student speech.

C. On-Campus v. Off-Campus Speech: How Do We Determine the Difference?

While there was speculation that the U.S. Supreme Court would create a standard for determining whether speech is on-campus or off-

implicitly, that the threat would be carried out by either the speaker or his co-conspirators rather than by unrelated third parties.” *Id.* at 334. *See also* Andrew P. Stanner, Note, *Toward an Improved True Threat Doctrine for Student Speakers*, 81 N.Y.U. L. REV. 385 (2006) (discussing that the true threats doctrine is vague partly because it does not have an intent requirement, thereby not requiring a mens rea by the speaker).

313. Stanner, *supra* note 312, at 410 (“[I]t falls to trial judges to determine what a ‘reasonable person’ would consider to be a threat. Despite the purportedly objective nature of this test, the vagueness problem persists: The outcome of a given case depends far more on the predilections of the judge than on the particular facts.”).

314. *Id.*

315. *See* Stanner, *supra* note 312, at 410 (discussing the preference for objective tests than subjective tests). For example, most jurisdictions use an objective standard (the reasonable person standard) when determining whether or not an individual was adequately provoked to mitigate murder to manslaughter. However, under the Model Penal Code, manslaughter is mitigated to murder when it is “committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.” Model Penal Code § 210.3(1)(a)-(b) (2001). Therefore, this is essentially a subjective standard. However, this standard has not been widely accepted. “Of some 34 jurisdictions that revised their criminal codes in the post-Model Penal Code era, 5 adopted its provocation proposals almost whole” SANFORD H. KADISH, STEPHAN J. SCHULHOFER & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES, CASES AND MATERIALS* 405 (2007). Most of the other states declined to extend the subjective standard portion of the Model Penal Code. *Id.*

campus speech in *Morse*,³¹⁶ the Court did not do so.³¹⁷ As such, when considering student cyberspeech cases, lower federal courts have considered for themselves whether student cyberspeech was made on-campus or off-campus. Unfortunately, when determining whether such speech is on-campus or off-campus, these cases have applied the “substantial disruption” standard in *Tinker*.³¹⁸ Using the *Tinker* standard has often led to federal courts delineating the following standard regarding whether to classify student speech as either on-campus or off-campus speech: notably, schools can discipline student off-campus speech if “this conduct ‘would foreseeably create a risk of substantial disruption within the school environment,’ at least when it was similarly foreseeable that the off-campus expression might also reach campus.”³¹⁹

It is the position, though, of this paper that *Tinker* is a K-12 student speech standard, and therefore, this standard should not be applied to college student speech. If *Tinker* is not used, however, then colleges and universities are likely to find that there is a lack of guidance from the courts in determining when college speech is made on-campus and when such speech is made off-campus. Federal courts should not apply the *Tinker* “substantial disruption” standard, but rather, should establish a bright-line standard that if the speech is made off-campus and not brought on campus by the speaker, then the speech should be classified as off-campus. The speech should also be considered off-campus regardless if it is brought on campus by others.

D. What About the Fighting Words Doctrine?

Under Supreme Court case law, speech by college students would also not be protected when the speech is deemed to be “fighting words.” Fighting words are considered to be unprotected by the First Amendment because “such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”³²⁰ However, though the doctrine has been used by colleges and universities to

316. See, e.g., McCarthy, *supra* note 168.

317. See *Morse v. Frederick*, 127 S.Ct. 2618, 2624 (2007).

318. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

319. *Doninger v. Niehoff*, 527 F.3d 41, 48 (2nd Cir. 2008); see also *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d at 34 (2nd Cir. 2007).

320. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

justify their student conduct codes,³²¹ it is unclear what application this doctrine has in the realm of college cyberspeech. Notably, the “bulk of the [fighting words doctrine] jurisprudence took root several decades ago, prior to the inception of the technology revolution and the opening of cyberspace.”³²² Federal courts have not adequately addressed the application of the doctrine to cyberspeech.³²³

Since *Chaplinsky v. New Hampshire*, in which the U.S. Supreme Court articulated the fighting words doctrine,³²⁴ the Court has attempted to further articulate what speech is deemed to be fighting words and what speech does not fall into such a category. In *Chaplinsky*, Walter Chaplinsky, a Jehovah Witness, was “distributing the literature of his sect on the streets.”³²⁵ Shortly thereafter, he was “warned [by law enforcement] . . . that the crowd was getting restless.”³²⁶ The crowd continued, and Chaplinsky was taken to the police station.³²⁷ During this time, Chaplinsky saw the marshal and said, “‘You are a God damned racketeer’ and ‘a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists’”³²⁸ Subsequently, Chaplinsky was arrested for violating a state law that prohibited individuals from provoking another individual in public.³²⁹

321. See, e.g., *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. System*, 774 F.Supp. 1163, 1172–1173 (E.D. Wis. 1991) (holding that University code was overbroad, failed to conform to fighting words “imminent breach of the peace” requirement, and was thus invalid); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184 (6th Cir. 1995) (holding policy was under inclusive and thus not a valid prohibition of fighting words).

322. Sanjiv N. Singh, *Cyberspace: A New Frontier for Fighting Words*, 25 RUTGERS COMPUTER & TECH. L.J. 283, 285–286 (1999).

323. *But see* *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (discussing the application of the fighting words doctrine to speech posted on a website, titled the Nuremberg Files, listing the names of doctors who have performed abortions).

324. *Chaplinsky*, 315 U.S. at 568.

325. *Id.* at 569.

326. *Id.* at 570.

327. *Id.*

328. *Id.* at 569.

329. *Id.* The state law applied to anyone

address[ing] any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, or make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id.

Chaplinsky challenged the law on First Amendment grounds.³³⁰ However, the Supreme Court held that the law was constitutional.³³¹ Because the purpose of the law was to “preserve the public peace,”³³² and not to target the content of speech, the court reasoned that the law was “narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace.”³³³

The Court also discussed the fighting words doctrine in *R.A.V. v. City of St. Paul*.³³⁴ In this case, the Court held that even though laws can prohibit speech which constitutes “fighting words,” this speech cannot be prohibited based on the content of the speech. In *R.A.V.*, the petitioner, who was alleged to have placed a “burning cross on a black family’s lawn,” was charged under a city ordinance prohibiting such conduct.³³⁵ Though the Minnesota Supreme Court held that the ordinance was constitutional because the words of the ordinance prohibited action that would constitute fighting words under *Chaplinsky*, the U.S. Supreme Court reversed.³³⁶ The Court held that the ordinance was facially unconstitutional because it prohibited words based on their content instead of merely their likely result on society.³³⁷ Justice Scalia, writing for the majority, explained that even though ordinance’s phrase that states, “‘arouses anger, alarm or resentment in others,’ has been limited by the Minnesota Supreme Court’s construction to reach only those symbols or displays that amount to ‘fighting words,’ . . . [t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”³³⁸

330. *Id.*

331. *Id.* at 573.

332. *Id.*

333. *Id.*

334. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

335. The ordinance stated:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 380.

336. *Id.* at 396.

337. *Id.* at 391.

338. *Id.*

Walston's speech at the University of Central Florida would not necessarily be analyzed under the fighting words doctrine because his speech would not lead to an *imminent* breach of the peace, as the speech was made over the Internet on a Facebook group and not in person, which the aforementioned cases suggest is needed. Further, there is no evidence that Walston intended to *incite* anger or violence with his Facebook group, and it is not likely that the words of a "jerk" and a "fool" would elicit such a response.

With most cyberspeech, the fighting words doctrine would not apply because the imminence requirement is missing. Though there are some forms of cyber-communication in which there could be imminence—such as the use of a cell phone, texting, or instant messaging—most college cyberspeech cases arise because the speaker is a college student who posted something on Facebook or MySpace. This discussion, though, highlights the fact that the federal courts need to revisit the fighting words doctrine to determine whether it has any application to cyberspeech. It also indicates that the true threat doctrine provides a better avenue to protect college students from discipline by colleges and universities for their cyberspeech.

CONCLUSION

Public college and universities are increasingly using student conduct codes to discipline students for their off-campus cyberspeech. This paper has provided background on the use of such codes, discussed standards used by courts to determine when college student speech is protected under the First Amendment, and analyzed the current state of college student off-campus cyberspeech in light of current federal case law. This paper has also argued that to protect the First Amendment rights of college students to free speech, colleges should not discipline students for their off-campus cyberspeech unless such speech presents a true threat or constitutes a crime under state or federal law. Further, these institutions should also modify their student conduct codes accordingly. Finally, this paper proposes a standard which would discipline college students for their off-campus speech only when such speech constitutes a true threat or a crime. Until the federal courts better articulate a standard for determining the First Amendment rights of college students to their off-campus cyberspeech—a standard which provides greater protection for college students than the protection currently afforded

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to elementary and high school students—the problems students face today in public colleges and universities will continue to occur.

