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

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*, I

college students' constitutional right

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. M

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.

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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 lear

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 C

and Ohio State University,[61] have recently modified their student discipline codes[62]

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 harassmently inon ni2(lL7(eewF0)]TJ1lBm0sall not ( )T)5.7(nF

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).

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

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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

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 mtda 32.58 Td:.8(58 Td:.8(58 T14dkwDe

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.*

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 caus( )]7(0 -1.1302 TD-0.0008 Tc4.0893 T212-ac-4.9.8(he 7ndouiatceoni7]TJadulteduunptudejus 7(

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 the 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."

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).

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 be 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 Statute 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 cammpus [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

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 "0.2ipublisnial7(,)-09()4.7l.9683 Tw[(funding. TD-0tt)-04 Court sity'tTt.614c0.062

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Doninger returned home and decided to post something on a

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 pus to warra

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 substae wr0found,ta0 0 7w(school.)]26 -1.2[32eat4hool e, -1.130.0003650001 T

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 Bozzzuto'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]

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* standard[266] 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) (develouev9nTw[(Rather, colle03e1.52 0 e22a1.130 l 10130 l 10130 c0.0685 T cer4s(enalyspro)-0ond, n ark

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 disguise 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 if irdei(274Tm0.004h8(s caper4h8(im0.0(580.-0.6ce 4 (E)5.2

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 senate[279] 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

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.

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.

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

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." *10:mnT -.2(spirartt)6. ontpgeUlRsh in o th334D[(")]TJT6 35 49.928m-0.01R rh ie*

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 *Tinke*r 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*

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*

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

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 as 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

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