

NEW MEDIA, OLD PRINCIPLES: DIGITAL COMMUNICATION AND FREE SPEECH ON CAMPUS

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I.	INTRODUCTION	333
II.	E-MAIL: A FLASHPOINT FOR CONFLICT AND CENSORSHIP	337
III.	ONLINE EXPRESSION: MORE VISIBILITY FOR STUDENT SPEECH PROMPTS MORE CENSORSHIP	348
IV.	CONCLUSION.....	357

I. INTRODUCTION

With every passing year, the longstanding battle over freedom of expression for students at our nation's colleges and universities moves farther and farther away from the physical confines of the campus itself. Where once the fiercest conflicts over students' rights to freedom of speech revolved around access to passersby on grassy quads, today's collegiate free speech controversies often take place in a digital realm that would have been almost entirely alien to students of just twenty years ago. The immediacy of e-mail and the massive interconnectivity made possible by social networking sites like Facebook have fused with ubiquitous high-speed broadband access to present college students with unprecedented opportunities to speak their

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minds—simpler, faster, and to larger audiences than ever before. But while the technology has changed, the underlying dynamics of the conflicts have not. Just like their predecessors from twenty years ago, today's students continue to be punished for speech that is either protected by the First Amendment (at public colleges) or would be protected in society at large (at private colleges).

In spite of being memorably described by Justice William Brennan as “peculiarly the ‘marketplace of ideas,’”¹ college campuses remain surprisingly and stubbornly hostile to freedom of expression and First Amendment rights. Since its founding in 1999, the Foundation for Individual Rights in Education (FIRE), a non-partisan, non-profit organization dedicated to defending the civil liberties of college students and faculty, has documented a shocking number of instances of student speech that, while protected, nevertheless elicited punishment after having offended, irritated, disturbed, or simply inconvenienced a fellow student or administrator.² Unfortunately, many of these punishments are not the result of administrators acting outside of the dictates of campus policy, but rather adhering to it.³ Each year, FIRE catalogues speech-related policies maintained by colleges and universities across the country.⁴ During the 2009–2010 academic year, FIRE reviewed policies at 390 of the nation's largest and most prestigious public and private institutions to provide an accurate assessment of the state of free speech on campus.⁵ FIRE's research revealed that more than two-thirds of these institutions maintained policies explicitly prohibiting protected speech.⁶

1. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *see also* *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

2. Both authors work for FIRE. For a full accounting of FIRE's cases, visit <http://thefire.org/cases/all/>.

3. FIRE, SPOTLIGHT ON SPEECH CODES 2011: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES 10 (2010) [hereinafter SPOTLIGHT ON SPEECH CODES 2011], *available at* <http://thefire.org/public/pdfs/312bde37d07b913b47b63e275a5713f4.pdf?direct>.

4. *Spotlight on Speech Codes Reports*, FIRE, <http://thefire.org/code/speechcodereport/> (last visited Mar. 27, 2011).

5. SPOTLIGHT ON SPEECH CODES 2011, *supra* note 3.

6. *Id.* at 6. Detailed information about FIRE's data and methodology may

Making matters still worse, these policies continue to be widely maintained and enforced despite a consistent string of legal precedent dating back more than two decades, making clear that speech codes—university regulations prohibiting expression that would be constitutionally protected in society at large—are unconstitutional at public universities.⁷ While private universities are not directly bound by the First Amendment, the majority present themselves as bastions of free expression and make explicit promises to students to that effect in promotional materials and handbooks.⁸ Accordingly, these private universities are both contractually and morally bound to deliver

be found in this most recent report. *Id.* at 4–9. Most instances of the punishment or threatened punishment of protected speech involve allegations of “harassment.” *Id.* at 12. Similarly, FIRE’s research demonstrates that many colleges continue to maintain overbroad or vague harassment policies. *Id.* at 18. Despite this confusion, in *Davis v. Monroe County Board of Education*, the Supreme Court defined peer-on-peer harassment in the educational context as conduct that is “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity . . .” 526 U.S. 629, 633 (1999). The Department of Education’s Office for Civil Rights, the federal agency charged with enforcing the prohibitions on discriminatory harassment in Titles VI and XI, affirmed the primacy of the *Davis* standard in discussing hostile environment harassment in a 2003 “Dear Colleague” letter sent to college administrators. See Letter from Gerald A. Reynolds, Assistant Sec’y, Office for Civil Rights (July 28, 2003), <http://www.ed.gov/about/offices/list/ocr/firstamend.html>.

For a detailed discussion of the misuse of harassment rationales to punish protected speech on campus, see Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385 (2009).

7. See, e.g., *McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (striking down hazing/harassment policy and prohibition on emotional distress); *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (discriminatory harassment policy); *Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004) (prohibition on “insults, epithets, ridicule or, personal attacks,”); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 362 (M.D. Pa. 2003) (prohibition on “acts of intolerance”); *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 22, 1998) (sexual harassment policy); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) (discriminatory harassment policy); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (discriminatory harassment policy).

8. Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 145 (2010).

on these promises.⁹

Given this documented hostility to protected speech on campuses across the country, it is unsurprising that the widespread adoption and integration of e-mail and social media into students' lives has resulted in a growing number of cases of students being punished for engaging in protected speech online.¹⁰ Every year, FIRE notes an increase in the volume of cases submitted to us that involve protected speech sent via e-

9. Courts have commonly held that a contractual relationship exists between a university and its students. *See, e.g.*, *Corso v. Creighton Univ.*, 731 F.2d 529, 531 (8th Cir. 1984) (“The relationship between a university and a student is contractual in nature.”); *Hendricks v. Clemson Univ.*, 578 S.E.2d 711, 717 (S.C. 2003) (university agreed that “some aspects of the student/university relationship are indeed contractual”); *Organiscak v. Cleveland State Univ.*, 116 Ohio Misc. 2d 14, 17 (Ohio Ct. Cl. 2001) (“It is axiomatic that ‘when a student enrolls in a college or university, pays his or her tuition and fees, and attends such school, the resulting relationship may reasonably be construed as being contractual in nature.’” (quoting *Bleicher v. Univ. of Cincinnati Coll. of Med.*, 604 N.E.2d 783, 787 (Ohio 1992))).

Many jurisdictions look to the terms of student handbooks and policy manuals to determine the terms of this contract, and will interpret those terms according to state contract law. *See Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 34 (1st Cir. 2007) (“The relevant terms of the contractual relationship between a student and a university typically include language found in the university’s student handbook.”); *cf. McConnell v. Howard Univ.*, 818 F.2d 58, 62–63 (D.C. Cir. 1987) (“It is well established that, under District of Columbia law, an employee handbook such as the Howard University Faculty Handbook defines the rights and obligations of the employee and the employer, and is a contract enforceable by the courts.”). In *McConnell v. Le Moyne College*, for instance, a New York appellate court held that Le Moyne College must act in accordance with its student catalogue because “[w]hen a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion[,] that procedure must be substantially observed[.]” 808 N.Y.S.2d 860, 861 (N.Y. App. Div. 2006) (alteration in original) (quoting *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1306 (N.Y. 1980)). Some courts, however, have held that guidebooks and other student materials are non-binding or need not be precisely followed. *See Love v. Duke Univ.*, 776 F. Supp. 1070, 1075 (M.D.N.C. 1991), *aff’d*, 959 F.2d 231 (4th Cir. 1992) (Duke University’s academic bulletin was not a binding contract); *Pacella v. Tufts Univ. Sch. of Dental Med.*, 66 F. Supp. 2d 234, 241 (D. Mass. 1999) (ruling that the provisions of the handbook are not contractually binding on the university in part because the university could unilaterally modify them without notice).

10. *Case Archive*, FIRE, <http://thefire.org/cases/all> (last visited Mar. 26, 2011).

mail, Facebook, blogs, and other new electronic media.¹¹ In this essay, we will review several of the more egregious violations of free expression rights involving online speech that FIRE has documented in recent years and offer reflections on what these cases tell us about the evolution of free speech principles in the age of social media.¹²

II. E-MAIL: A FLASHPOINT FOR CONFLICT AND CENSORSHIP

In the past fifteen years, e-mail has become an ubiquitous element of college life and the predominant mode of communication between students, faculty, and administrators. The widespread reliance upon e-mail to facilitate all types of conversation on campus—be it academic, social, political, or otherwise—has accordingly shifted controversies sparked by speech from the campus green to e-mail inboxes. As a result of this relocation, FIRE has intervened in many cases involving punishment (or the threat of punishment) for protected speech sent via e-mail.¹³

Many e-mail controversies recreate familiar types of free-speech disputes, wherein controversial or contentious speech upsets its audience and is singled out for punishment, despite the fact that it is protected by the First Amendment or promises of free expression. For example, at the University of Georgia (UGA), a student, Jacob Lovell, was charged with two violations of UGA's University Conduct Regulations following the receipt of an e-mail Lovell sent to the university's Parking Services department complaining about the lack of parking for scooters on campus.¹⁴ Lovell's flippant e-mail—which, among other barbs, asked Parking Services, “Did you guys just throw darts at a map

11. See SPOTLIGHT ON SPEECH CODES 2011, *supra* note 3, at 19–20.

12. This essay reviews FIRE cases involving online speech and, as should quickly become apparent, does not purport to serve as a comprehensive survey of the state of First Amendment jurisprudence regarding online speech rights for students and faculty.

13. See *Case Archive*, *supra* note 10.

14. William E. Lee, *Protecting Speech on College Campus*, ATLANTA J. CONST., Mar. 15, 2011, www.ajc.com/opinion/protecting-speech-on-college-873675.html.

to decide where to put scooter corrals?”—prompted a letter from Associate Dean of Students Kimberly Ellis stating that Lovell allegedly “engaged in disorderly conduct and disrupted parking services when he sent an email to them that was threatening.”¹⁵ Similarly, at Clemson University, a student, William Kirwan, was charged with “Disorderly Conduct,” “Harassment,” “Failure to Comply with Official Request,” and “Computer Misuse” after he sent Clemson administrator Laura McMaster a sharply-worded e-mail rebuffing McMaster’s request that Kirwan’s student group participate in Clemson’s Fall Organizations Fair.¹⁶ In his e-mail, Kirwan told McMaster that “I’m not going to let you bully the organization into doing the things you want us to do or perceive as important,” and joked that she must have been “smoking crack” prior to her attempt to persuade him to participate.¹⁷

An e-mail need not contain acid-tongued sarcasm to subject its author to threats of punishment, however. Indeed, some

15. E-mail from Jacob Lovell, Student, Univ. of Ga., to Univ. of Ga. Parking Servs., (Aug. 17, 2010), thefire.org/article/12270.html; Letter from Kimberly Ellis, Assoc. Dean of Students, Univ. of Ga., to Jacob Lovell, Student, Univ. of Ga. (Sept. 3, 2010), thefire.org/public/pdfs/379e186dc1f1ba2e209f363721db23e1.pdf?direct. Following a letter from FIRE pointing out that punishing Lovell for his protected speech would violate his First Amendment rights, the charges were dropped. Press Release, FIRE, Victory in Georgia: Student Cleared of Charges for Complaint about Campus Parking (Sept. 22, 2010), <http://thefire.org/article/12275.html>. See also Valerie Strauss, *Student Gets in Trouble for E-mail on Scooter Parking*, WASH. POST, Sept. 26, 2010, <http://voices.washingtonpost.com/answer-sheet/hu/student-gets-in-trouble-for-em.html>.

16. Letter from Justin Carter, Assoc. Director, Office of Cmty. and Ethical Standards, Div. of Student Affairs, Clemson Univ., to William Kirwan, Student, Clemson Univ. (May 19, 2010), thefire.org/public/pdfs/9ee7328fb39730591680a89f978c3430.pdf?direct.

17. E-mail from William Kirwan, Student, Clemson Univ., to Laura McMaster, Assoc. Dir. of Campus Programming, Clemson Univ. (May 13, 2010 4:22 PM), thefire.org/public/pdfs/37bfa702cc504728722e0876b715c5d4.pdf?direct. Again, following a letter from FIRE, the charges were dropped. Press Release, FIRE, Victory: Clemson Drops All Charges Against Student Accused of ‘Disorderly Conduct’ for E-Mail, (May 26, 2010), <http://thefire.org/article/11924.html>. Clemson’s response acknowledged that “the First Amendment protects speech even when it is rude or offensive” and assured FIRE that “Clemson University does not prohibit speech in violation of the First Amendment.” *Id.*

restrictions on e-mail on campus have attempted to silence core political speech.¹⁸ For example, in recent years, college administrators have sought to forbid students from using campus e-mail to engage in political expression, mistakenly thinking that by allowing such dialogue on university e-mail servers may leave the institution more vulnerable to a loss of its tax exemption under United States Internal Revenue Code.¹⁹ In September of 2008, Nicholas S. Hathaway, the University of Oklahoma's Executive Vice President and Vice President of Administration and Finance, sent an e-mail to all University of Oklahoma students, faculty, and staff, informing them that university e-mail accounts "may not be used to endorse or oppose a candidate, including the forwarding of political humor/commentary."²⁰ While conceding that students, faculty, and staff were permitted to enjoy "limited personal use" of their university e-mail accounts, Hathaway warned that even this use "may not include political issues outside of the educational context as it places the university at risk of losing its tax exempt status."²¹ Following a letter from FIRE, University of Oklahoma President David L.

18. FIRE POLICY STATEMENT ON POLITICAL ACTIVITY ON CAMPUS 1, 2, Oct. 28, 2008, *available at* <http://thefire.org/index.php/article/9799.html>.

19. 26 U.S.C. § 501(c)(3) (2006). Section 501(c)(3) restricts qualifying non-profit organizations from engaging in certain political activity. *Id.* However, whether or not a 501(c)(3) organization has engaged in prohibited political activity is an *ad hoc* determination contingent upon examination of the totality of the circumstances in each case. Rev. Rul. 07-41, 2007-25 I.R.B. 1421. "[I]n the campus context, the IRS has interpreted the restriction on political activity differently in light of the educational mission of colleges and universities, allowing certain activities . . . that would otherwise likely constitute prohibited activity." FIRE POLICY STATEMENT ON POLITICAL ACTIVITY ON CAMPUS, *supra* note 18, at 9. Further, the IRS has made clear that the restriction on political activity applies to those actions taken by the university or college as a whole, and not the actions of individual faculty or students. *Id.* "As long as partisan political activity on campus by students and student groups is neither privileged nor hindered by the institution, and as long as partisan political speech by students and faculty does not overcome the strong presumption that they do not speak for the institution, then the tax-exempt status of universities and colleges should not be affected." *Id.*

20. E-mail from Nicholas S. Hathaway, Exec. Vice President and Vice President Admin. and Fin., Univ. of Okla., to Univ. of Okla. Faculty, Staff and Students (Sept. 12, 2008), <http://thefire.org/public/pdfs/43841407618806767066eae97655cf8.pdf?direct>.

21. *Id.*

Boren clarified that university policy “does not limit the right of anyone to express individual views” and that “[i]ndividual free speech by all members of the university community is fully protected.”²² Boren further made clear that Hathaway’s announcement was “rescinded and withdrawn.”²³

Similarly, in July of 2010, Grambling State University’s (GSU) Office of Media Relations sent an e-mail containing the following instruction to all GSU students: “DO NOT FORWARD campaign solicitations using university email as this implies your support for the candidate and may be viewed as utilizing university resources for solicitation purposes, a violation of university and state policy.”²⁴ Following a letter from FIRE and similar criticism from the American Civil Liberties Union of Louisiana, GSU President Frank G. Pogue stated that policy revisions were forthcoming.²⁵

But while GSU Director of Public Relations Vanessa Littleton assured FIRE²⁶ that e-mail at GSU was governed by the “Grambling State University Email Use Policy,” that policy also presents significant constitutional infirmities.²⁷ For example, the policy forbids “the creation or distribution of any disruptive or offensive messages, including offensive comments about race, gender, hair color, disabilities, age, sexual orientation, pornography, religious beliefs and practice, political beliefs, or

22. E-mail from David L. Boren, President, Univ. of Okla., to Univ. of Okla. Cmty., (Oct. 27, 2008 6:54 PM), <http://thefire.org/index.php/article/9850.html>.

23. *Id.*; see also William Creeley, *Victory for Free Speech at University of Oklahoma: Ban on Political E-mails Rescinded*, FIRE (Oct. 28, 2008), <http://thefire.org/article/9857.html>.

24. E-mail from Grambling State Univ. to Students (July 13, 2010 2:00PM), <http://thefire.org/public/pdfs/5b78feda553f8d50caeea206897dff64.pdf> direct.

25. Letter from Frank G. Pogue, President, Grambling State Univ., to Will Creeley, Dir. of Legal and Pub. Advocacy, FIRE (Oct. 8, 2010), <http://thefire.org/public/pdfs/8dd85a9e69f1a986c3b12edbfdd3c44c.pdf?direct>.

26. Press Release, Grambling State Univ., Grambling State Univ. Email Use Policy (Sept. 22, 2010), <http://thefire.org/article/12283.html>.

27. See Press Release, FIRE and ACLU of La., Joint Statement Regarding Grambling State University’s Response (Sept. 22, 2010), <http://thefire.org/article/12281.html>.

national origin.”²⁸ But the fact that a student may be sanctioned under the policy for sending an e-mail including “offensive messages” means that engaging in wide swaths of constitutionally protected expression may serve as grounds for punishment, as most speech that a recipient may find offensive is nonetheless constitutionally protected.²⁹ As the Supreme Court has noted, “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”³⁰ The policy also prohibits “[s]ending chain letters or joke emails from a Grambling State University email account”³¹ But again, jokes, including satire and parody, are unquestionably protected under the First Amendment. In *Hustler Magazine v. Falwell*,³² the Supreme Court ruled that the First Amendment protects even the most outlandishly offensive parody—in that case, a cartoon suggested that the Reverend Jerry Falwell lost his virginity in a drunken encounter with his mother in an outhouse.³³ Under these precedents and others, it is clear that GSU’s current e-mail policy is just as unconstitutionally overbroad as their previous one.³⁴

Unfortunately, far too many schools maintain equally overbroad policies governing e-mail speech. Examples are legion. North Dakota State University prohibits “[e]ntering obscene or offensive material into computers or sending obscene or offensive material through the Internet or any other electronic system [is] prohibited.”³⁵ While expression that meets the legal standard for

28. *Id.* (internal quotation marks omitted).

29. *Id.*

30. *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973).

31. Press Release, Grambling State Univ., *supra* note 26.

32. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

33. *Id.* at 48, 57.

34. A statute or law regulating speech is unconstitutionally overbroad “if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate.” *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864 (E.D. Mich. 1989) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

35. N.D. STATE UNIV., RIGHTS AND RESPONSIBILITIES OF COMMUNITY: A CODE OF STUDENT BEHAVIOR 12 (2008), *available at* <http://thefire.org/public/pdfs/2ddf3de3f47ed3726fb22f99f8ccbb9b.pdf?direct>.

obscenity announced by the Supreme Court in *Miller v. California*³⁶ does not enjoy First Amendment protection, merely “offensive” expression surely does.³⁷ Oregon State University bans “sexually suggestive mail; explicit sexual graphic materials; and racist, sexist or homophobic statements and verbal obscenity in mail and postings.”³⁸ While presumably well-intentioned, this prohibition similarly oversteps the bounds of the First Amendment by introducing an inherently subjective, hopelessly vague ban.³⁹ Similarly, Texas Tech University forbids “the use of abusive or otherwise objectionable language in either public or private messages.”⁴⁰ Northeastern Illinois University prohibits “[p]osting or sending . . . offensive material which is not related in any matter to academically approved research & learning, providing instruction or within the person’s official business capacity.”⁴¹ The University of Connecticut outlaws using e-mail to send “abusive” messages or otherwise using e-mail “in a manner that is not conducive to the academic mission.”⁴²

Each of these policies, and the many more like them, restrict the expressive rights of students in ways that resuscitate the speech codes rejected by federal and state courts for the past two decades.⁴³ By maintaining e-mail policies that inhibit and proscribe speech protected by the First Amendment, universities effectively ignore this jurisprudence, inviting future litigation. More worrisome is the fact that, as a result of these restrictions, universities teach students that certain speech is subject to

36. *Miller v. California*, 413 U.S. 15 (1973).

37. *See id.* at 24.

38. *Speech Code Rating: Oregon State University*, FIRE, <http://thefire.org/spotlight/codes/1334.html> (last visited Mar. 27, 2011).

39. *See Miller*, 413 U.S. at 24.

40. TEX. TECH UNIV., LAWS AND TEXAS TECH UNIVERSITY SYSTEM POLICIES AFFECTING COMPUTER USE, *available at* <http://www.depts.ttu.edu/itts/documentation/laws/ethics2.html> (last updated July 9, 2003).

41. NE. ILL. UNIV., ACCEPTABLE USE OF INFORMATION TECHNOLOGY RESOURCES(2009), *available at* http://www.neiu.edu/DOCUMENTS/NEIU_works UIS%20-%20Docs/I1_IT/01_Acceptable_Use/Pol_I1.1.1.pdf.

42. UNIV. OF CONN., RESPONSIBILITIES OF COMMUNITY LIFE: THE STUDENT CODE 5 (2000), *available at* http://www.community.uconn.edu/docs/The_Student_Code.pdf.

43. *See supra* note 7.

punishment when expressed online and that the First Amendment's protection does not extend to e-mail expression. This dangerous lesson miseducates students in their rights and the importance of freedom of expression, and, as such, diminishes the potential for academic, social, political, civic, and artistic growth otherwise enabled by the immediacy and ease of e-mail.

One e-mail case that illustrates the new dynamics of censorship applicable to e-mail and highlights the unique considerations raised by the digital medium arose at Michigan State University in 2008.⁴⁴ In August of that year, Michigan State University Senior Associate Provost June Youatt announced that the administration had decided to proceed with its plan to shorten the fall semester by two days, among other calendar changes.⁴⁵ The administration's plan to shorten the calendar became an issue of significant interest to the Associated Students of Michigan State University (ASMSU), MSU's student government, and the University Committee on Student Affairs (UCSA), a committee which includes students, faculty members, and administrators.⁴⁶ Each group was concerned that the change would make the difference in instructional time offered in the fall (70 days) and spring (74 days) more pronounced and should not be unilaterally enforced without significant input from relevant faculty governance committees.⁴⁷ Members of both student government and the UCSA began discussing a potential coordinated response of their own via e-mail.⁴⁸

One student member of both ASMSU and UCSA, Kara Spencer, informed those ASMSU and UCSA members participating in the e-mail discussion that she planned to send an

44. Press Release, FIRE, Student Government Leader at Mich. State Univ. Found Guilty of 'Spamming' After Criticizing Administration Decision (Dec. 10, 2008), <http://thefire.org/article/10020.html>.

45. Memorandum from Mich. State Univ. Comm. on Academic Policy, Response to Provost: Fall Welcome and Academic Year Start Date 9_4_08 (Aug. 28, 2008), <http://ucap.msu.edu> (follow "Supporting Docs" hyperlink; then follow "9/11/2008" hyperlink) (last visited Mar. 27, 2011).

46. Greg Lukianoff, *It's Raining Spam at Michigan State U*, HUFFINGTON POST (Dec. 8, 2008 4:48 PM), www.huffingtonpost.com/greg-lukianoff/its-raining-spam-at-michi_b_149378.html.

47. *See id.*

48. *Id.*

informational e-mail to faculty, voicing the groups' concerns about the proposed schedule change.⁴⁹ She wrote:

Also, I compiled a database of all faculty on campus and will be sending out an informational email this afternoon regarding the proposed changes and including contact info for faculty reps on Faculty Council should they choose to be heard on the issue. In line with the approach taken with the Board of Trustees, this email will not identify me as a part of UCSA or ASMSU, so I will be "speaking" as a concerned student/member of the university community. The email will not go out until later this afternoon, so if anyone has input or concerns, please feel free to contact me.⁵⁰

No concerns were aired; indeed, Spencer received an e-mail from a faculty member on the committee, thanking her for spreading the word.⁵¹ On September 15, Spencer e-mailed 391 faculty members whom she had carefully selected from the more than 5,000 members of MSU's faculty with the text of the statement coordinated by the ASMSU and UCSA.⁵² Kara's e-mail read, in part:

The Provost has proposed changes to the Academic Calendar and Fall Welcome schedule which are slated for final approval on September 23, 2008. Faculty, administrators, and students have voiced concerns regarding the process of the proposal. As concerned students we feel that adequate time has not been given to address the multitude of issues the proposed changes raise.

In discussions with members of the university community, we have discovered that many are unaware of the impending changes, or the likely repercussions, which will greatly affect

49. *Id.*

50. E-mail from Kara Spencer, Student, Mich. State Univ., to Faculty Members, Mich. State Univ., (Sept. 14, 2008 11:59 AM), <http://thefire.org/public/pdfs/ca7cb63de309af773641f5a8fe05baa5.pdf?direct>.

51. E-mail from Kathy Petroni, Faculty Member, Mich. State Univ., to Kara Spencer, Student, Mich. State Univ., (Sept. 14, 2008 4:37 PM), <http://thefire.org/public/pdfs/ca7cb63de309af773641f5a8fe05baa5.pdf?direct>.

52. E-mail from Kara Spencer, Student, Mich. State Univ., to Selected Faculty, Mich. State Univ., (Sept. 15, 2008, 11:42 AM), <http://thefire.org/public/pdfs/f41e4f45d70a14800b4c3e30a58c319a.pdf?direct>. See also E-mail from Kara Spencer, *supra* note 50.

both faculty and students alike.

. . . .

We believe that an inclusive dialogue among members of the University community and a comprehensive evaluation of all available information are imperative before any proposal can be adopted. Such a review would require that the Provost's proposal not be implemented for the 2009-2010 academic year.

Given the immediacy of the situation, we request that any faculty wishing to be heard on this issue contact their . . . Faculty Council representative or the Provost's office.⁵³

Unfortunately for Spencer, her e-mail was not received by one faculty recipient in the informative, civic-minded spirit in which it was intended. Shortly after Spencer sent her e-mail, Professor Katherine Gross complained about receiving this e-mail to Information Technology Administrator John Gorentz, who forwarded the complaint to MSU Network Administrator Randall J. Hall.⁵⁴ On September 16, Spencer received an e-mail from Hall summoning her to a mandatory meeting with Hall "for the investigation" of her e-mail as a possible violation of MSU's Network Acceptable Use Policy.⁵⁵

At the meeting and in formal charges that followed, Hall characterized Spencer's e-mail as "spam" and accused her of having violated three MSU policies: GSR-3.04 ("No student shall represent a group falsely or use the resources of a group without proper authorization,"); GSR-4.05 ("No student shall use any University facility, equipment, or materials except for their authorized purposes,") and the Network Acceptable Use Policy.⁵⁶ In the meeting, Hall further suggested that Spencer had violated additional policies, GSR 4.08 and 5.02, arguing that Spencer's

53. *Id.*

54. Press Release, FIRE, Michigan State University Student Faces Suspension for 'Spam' After E-mailing Professors (Dec. 4, 2008), <http://thefire.org/article/9994.html>.

55. E-mail from Randall Hall, Network Adm'r, Mich. State Univ., to Kara Spencer, Student, Mich. State Univ. (Sept. 16, 2008, 4:57 PM), <http://thefire.org/public/pdfs/90e11cfb7a978d19a08bc06f290f6a2d.pdf?direct>.

56. Mich. Stat. Univ., Disciplinary (Allegations) Form against Kara Spencer, Sept. 17, 2008, <http://thefire.org/public/pdfs/ae43588d257a0fc64f512e2c99de1b35.pdf?direct>.

e-mail was the electronic equivalent of junk mail and thus constituted a disruption of the activities of its recipients.⁵⁷

On October 31, 2008, Spencer attended a mandatory meeting with Assistant Director of Student Life Cathy Neuman.⁵⁸ Spencer denied that she had broken any policy and requested a hearing in front of the MSU Student-Faculty Judiciary.⁵⁹ On November 19, Spencer received an e-mail from the Judicial Affairs Office regarding the hearing and the formal charges against her, and notifying her that the maximum penalty for her alleged infractions was suspension from MSU.⁶⁰ Spencer was found guilty of spamming, and a disciplinary warning was placed in her file.⁶¹

In response to this finding, FIRE and 12 other national civil liberties organizations wrote an open letter to MSU President Lou Anna K. Simon on December 17, 2008 criticizing both MSU's anti-spam policy and the ruling against Spencer.⁶² The letter argued:

First, MSU's "anti-spam" policy is constitutionally suspect on its face. It is vague and allows the university unfettered discretion, requiring prior administrative approval before sending e-mails to more than approximately "20-30" recipients. It also discriminates on the basis of content, prohibiting e-mail sent "for personal purposes, advertising or

57. *Id.*

58. Letter from Adam Kissel, Dir., Individual Rights Def. Program, FIRE, to Lou Anna K. Simon, President, Mich. State Univ. (Nov. 26, 2008), <http://thefire.org/public/pdfs/844c5a42f77b3701346b817c9bc8f9fa.pdf?direct>.

59. *Id.*

60. E-mail from Judicial Affairs Office, Mich. State Univ., to Kara Spencer, Student, Mich. State Univ. (Dec. 10, 2008, 1:28 PM), <http://thefire.org/public/pdfs/230f22d0ff78f0192f716ed0aa81fa5c.pdf?direct>.

61. *Id.*

62. The letter was signed by FIRE, the Electronic Frontier Foundation, the Alliance Defense Fund Center for Academic Freedom, the Center for Democracy and Technology, Feminists for Free Expression, the National Coalition Against Censorship, the People For the American Way Foundation, the Woodhull Censorship Foundation, the Electronic Frontier Foundation, the American Booksellers Foundation for Free Expression, the Defending Dissent Foundation, the First Amendment Project, the Online Policy Group, and Reporters Without Borders USA. Open Letter to Michigan State University President Lou Anna K. Simon (Dec. 17, 2008), <http://thefire.org/public/pdfs/563763864da70ad7c8048a790c4fd153.pdf?direct>.

solicitations, or political statements or purposes.”

Second, the policy’s application in this instance is egregiously wrongheaded. Spencer is a student government leader. Her speech was in conjunction with a formal student-faculty committee’s response to a significant change in the university calendar—a policy shift that, if enacted, would affect the entire MSU community. With the implicit approval of her committee, Spencer e-mailed a set of professors about a matter of campus concern. Her effort is directly analogous to writing fellow citizens exhorting them to voice opinions about impending regulatory decisions, or writing local government officials about a funding issue.⁶³

The letter concluded by urging MSU to overturn the guilty finding against Spencer and to revise MSU’s anti-spam policy, offering assistance in doing so.⁶⁴

The coalition effort was partially successful: On January 22, 2009, MSU’s Judicial Affairs Office notified Spencer that the charges against her had been withdrawn, mooted her appeal.⁶⁵ But while MSU also revised its policy governing e-mail use in May of 2009, the revised policy significantly tightened the previous policy’s restrictions, now defining “bulk e-mail” as “[t]he transmission of an identical or substantially identical e-mail message within a 48 hour period from an internal user to more than 10 other internal users who have not elected to receive such e-mail.”⁶⁶ The new policy also stipulates that university e-mail services are “not intended as a forum for the expression of personal opinions,” contending that “[o]ther means exist in the University community for the expression and dissemination of personal opinions on matters of interest within the University

63. *Id.*

64. *Id.*

65. E-mail from Rick Shafer, Assoc. Dir., Judicial Affairs Office, Mich. State Univ., to Kara Spencer, Student, Mich. State Univ. (Jan. 22, 2009, 1:51 PM), <http://thefire.org/public/pdfs/7f28ebaa1af0e32e4dfbe19c7b11b071.pdf?direct>.

66. MICH. STATE UNIV., APPROPRIATE USE OF MSU E-MAIL SERVICES BY INTERNAL USERS ON MSUNET, (May 2, 2009), *available at* <http://thefire.org/public/pdfs/8a334a8e576deefe137d4dbef677abda.pdf?direct>.

community.”⁶⁷ Given that MSU students, faculty, and staff almost certainly continue to use MSU e-mail services to communicate personal opinions, this restriction allows MSU essentially unfettered discretion to punish those personal opinions it chooses to subject to the harsh terms of the policy. Not only is this result all but certain to invite selective prosecution, it is, practically speaking, staggeringly out-of-touch with the reality of campus communication today, where e-mail is the medium of choice for a vast amount of human interaction whether academic, political, or personal.

III. ONLINE EXPRESSION: MORE VISIBILITY FOR STUDENT SPEECH PROMPTS MORE CENSORSHIP

While e-mail has provided one new staging ground for free speech battles, the advent of other avenues of online expression—including blogs and social networking sites like Facebook—has provided many more. These new means of online expression provide not only the immediacy of e-mail but also a potentially limitless audience. As a result of their reach, instances of student speech on sites like Facebook have prompted instances of aggressive administrative censorship.⁶⁸ In monitoring student expression on blogs and social media sites, college administrators are spurred by a recognition that online expression may offend, embarrass, or insult in newly visible ways. As a result, administrators have harshly punished students for protected online expression that might not have otherwise raised their ire.⁶⁹

The 2006 case of Justin Park at Johns Hopkins University (JHU) is instructive. Park, a Korean-American student who enrolled at Johns Hopkins at the age of 15 and served as social chair of his fraternity,⁷⁰ created an invitation to a themed

67. *Id.*

68. See, e.g., Rick Rojas, *When Students' Controversial Words Go Viral, What Is the University's Role?*, L.A. TIMES, Mar. 27, 2011, http://www.msnbc.msn.com/id/33179582/ns/technology_and_science-tech_and_gadgets/.

69. *Id.*

70. Greg Lukianoff & Will Creeley, *Facing Off over Facebook: Who's Looking at You, Kid?*, THE BOS. PHOENIX, Mar. 2, 2007, <http://thephoenix.com/>

“Halloween in the Hood” party his fraternity was planning and posted it on Facebook on October 26, 2006.⁷¹ For the party—one in a series of intentionally provocative themed parties thrown by the fraternity, including a “White Trash Trailer Bash” and a “Catholic Schoolgirl Party”—Park crafted an invitation that listed rapper Ice-T as the party’s host and required partygoers to “come dressed in yo’ bomb ass Halloween costume or git smok’d.”⁷² Soon after the invitation was posted online, however, Park received a message from JHU’s Director of Greek Affairs, who called it offensive and asked him to take it down.⁷³ Park complied with the request, but in response to repeated inquiries about the party, posted a new invitation on October 27.⁷⁴ Park removed what he thought to be the offensive language and included a note stating that he did not “condone or advocate racism, fascism, communism, consumerism, capitalism, terrorism, organism(s), sexism, womanism, jism, or any other –ism’s.”⁷⁵ The invitation still referred to Baltimore, Maryland as an “HIV pit,” made mocking references to O. J. Simpson and Johnnie Cochran, and asked attendees to wear “copious amounts of so-called ‘bling bling ice ice.’”⁷⁶ Park’s fraternity, Sigma Chi, hosted the party as planned on October 28.⁷⁷

On November 6, Associate Dean of Students Dorothy Sheppard sent Park a letter informing him that because the two Facebook invitations had “contained offensive racial stereotyping,” Park was being charged with “failing to respect the rights of others and refrain from behavior that impairs the university’s purpose or its reputation in the community;” conduct in violation of the “university’s anti-harassment policy;” “failure to comply with the directions of a university administrator;” “conduct or a pattern of conduct that harasses a person or group;”

boston/news/34242-facing-off-over-facebook/.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* (internal quotation marks omitted).

77. *Id.*

and “intimidation . . .”⁷⁸ On November 20, following a hearing, Sheppard wrote Park to inform him that he had been found guilty of all charges.⁷⁹ As a result, Park was suspended from the university for one year, effective immediately; required to complete 300 hours of community service; attend a diversity workshop; and read 12 books, writing a paper on each.⁸⁰ Though Park’s punishment was later reduced by an undisclosed degree following an appeal, the case illustrates the way in which the new visibility of online expression has prompted vigorous attempts to stifle protected student speech.⁸¹

More recently, at Syracuse University College of Law (SUCOL), a student, Len Audaer, was threatened with “harassment charges” and subjected to a three-month-long investigation for his role in a parody blog about life in law school.⁸² On October 18, 2010, Audaer was called to a meeting with SUCOL Associate Professor of Law Gregory Germain to discuss harassment charges being levied against him for his alleged involvement with the blog *SUCOLitis*.⁸³ The blog consisted of “fake news” and sharp satire in the style of *The Onion*⁸⁴ and included a disclaimer stating, “No actual news

78. Letter from Dorothy Sheppard, Assoc. Dean of Students, Johns Hopkins Univ., to Justin Park, Student, Johns Hopkins Univ. (Nov. 6, 2006), <http://thefire.org/public/pdfs/e7068cd0cac4351039d15b4c86e8044e.pdf?direct>.

79. Letter from Dorothy Sheppard, Assoc. Dean of Students, Johns Hopkins Univ., to Justin Park, Student, Johns Hopkins Univ. (Nov. 20, 2006), <http://thefire.org/public/pdfs/d240ccd70d981aed4eeaec0d6135977c.pdf?direct>.

80. *Id.* While Johns Hopkins, as a private university, is not bound by the First Amendment, it explicitly promised Park and his peers the right to “a forum for the free expression of ideas”—even those ideas, conveyed by speech such as Park’s invitation, that may offend or insult others. JOHNS HOPKINS UNIV., UNDERGRADUATE STUDENT HANDBOOK 35 (2006–2007), *available at* <http://thefire.org/public/pdfs/d549cb55e39550d1a2f7f1a0b4d328bf.pdf?direct>.

81. Press Release, FIRE, Johns Hopkins University Resolves ‘Halloween in the Hood’ Case; Students’ Rights Remain in Jeopardy (Jan. 8, 2007), <http://thefire.org/article/7631.html>.

82. Press Release, FIRE, Syracuse University Threatens ‘Harassment’ Charges over Satirical Blog; Seeks Gag Order on Alleged Author (Dec. 14, 2010), <http://thefire.org/article/12615.html>.

83. *Id.*

84. *History of the Onion*, THE ONION, <http://mediakit.theonion.com> (last visited March 26, 2011).

stories appear on the site.”⁸⁵ Penned by multiple anonymous authors, the blog attributed obviously fake quotes to SUCOL students, faculty, and staff.⁸⁶ Real students were named, but the site was designed to be hidden from search engines and was later password-protected.

While uncertain that Audaer was one of the authors responsible for the blog, or what he may have written, Germain threatened Audaer with prosecution for harassment, despite the fact that the university’s definition of harassment should have precluded such prosecution. Syracuse defines harassment as “[c]onduct which threatens the mental health, physical health, or safety of any person or persons,” or conduct “whether physical or verbal, oral or written, which is beyond the bounds of protected free speech, directed at a specific individual(s), easily construed as ‘fighting words,’ and likely to cause an immediate breach of the peace.”⁸⁷ Though the blog may have upset certain readers, the site’s humor was surely not “beyond the bounds of protected free speech,” a determination a law school could be reasonably expected to make.⁸⁸ Nevertheless, Germain’s investigation continued from October 2010 until February 2011.⁸⁹ Germain only dropped the charges following a voluntary apology from Audaer and heavy public pressure from FIRE, including naming Syracuse one of the worst universities in the nation for free

85. *Where Do I Sue?*, SUCOLITIS, <http://thefir.org/public/pdfs/deb9f397ddb01887ld68333a08f15fle.pdf?direct>.

86. Headlines included “Senate President Elected SU’s Sexiest Semite,” “Popular Administrator Presumed Dead,” and “New Program Pairs Stressed 3Ls with Promiscuous 1Ls.” See SUCOLITIS Blog Posts, <http://thefire.org/public/pdfs/4aed51d20fbd3edfd97b50a59c6edbb6.pdf?direct>.

87. SYRACUSE UNIV., STUDENT HANDBOOK 4 (2009) *available at* <http://www.syr.edu/currentstudents/publications/pdfs/SU-StudentHndbk-low.pdf>.

88. Letter to the Editor, SUCOLITIS Investigation Questions Free Expression Values, THE DAILY ORANGE (Dec. 15, 2010), <http://www.dailyorange.com/opinion/letter-to-the-editor-sucolitis-investigation-questions-free-expression-values-1.1831296>.

89. See *Victory: Syracuse University Drops Allegations Against Student Blogger*, THE MORAL LIBERAL (Feb. 2, 2011), <http://www.themoralliberal.com/2011/02/02/victory-syracuse-university-drops-allegations-against-student-blogger/>.

speech in an article for *The Huffington Post*.⁹⁰

Like Park, Audaer faced punishment for online expression that would be protected in society at large and should have been protected under his university's promises of freedom of expression.⁹¹ But because both Park and Audaer engaged in their provocative attempts at humor online—and thus in full view of fellow students, professors, administrators, alumni, and the general public—they were subjected to an arguably heightened scrutiny, and their speech was deemed more worthy of punishment by administrators who might not otherwise have even known it had been uttered. Park and Audaer are far from alone in this respect. Examples abound: the students at Cowley College banned from participating in theater department activities following their complaints about the department on a MySpace blog;⁹² the student at the University of Central Florida charged with “personal abuse” harassment for calling a student government candidate a “Jerk and a Fool” on Facebook;⁹³ the University of Chicago student contacted by campus police following a Facebook joke about a dream which involved assassinating a professor;⁹⁴ the Syracuse University students put on disciplinary probation for starting a Facebook group critical of a teaching assistant (“Clearly Rachel Doesn’t Know What She’s Doing . . . EVER,”);⁹⁵ and so on.

90. Greg Lukianoff, *The 12 Worst Colleges For Free Speech*, THE HUFFINGTON POST (Jan. 27, 2011, 8:36 AM), http://www.huffingtonpost.com/greg-lukianoff/the-12-worst-colleges-for_b_814706.html#s230502&title=Syracuse_UniversitySyracuse_New.

91. SYRACUSE UNIV., STUDENT HANDBOOK, *supra* note 87, at 30 (“Syracuse University is committed to the principle that freedom of discussion is essential to the search for truth and, consequently, welcomes and encourages the expression of dissent.”).

92. Sara Lipka, *The Digital Limits of “In Loco Parentis,”* THE CHRONICLE OF HIGHER EDUCATION (Mar. 7, 2008), <http://chronicle.com/article/The-Digital-Limits-of-In-Loco/25398/>.

93. Press Release, FIRE, Student Wins Facebook.com Case at University of Central Florida, (Mar. 6, 2006), <http://thefire.org/article/6867.html>.

94. Jill Laster, *U. of Chicago Student Questions University’s Reaction to Facebook Post*, THE CHRONICLE OF HIGHER EDUCATION (Mar. 25, 2010, 3:24 PM), <http://chronicle.com/blogs/wiredcampus/u-of-chicago-student-questions-universitys-reaction-to-facebook-post/22040>.

95. Nancy Buczek, *Schools Discipline Students over Internet Content*, THE POST-STANDARD, Feb. 2, 2006, at A1, available at <http://thefire.org/>

But perhaps the most egregious instance of punishment for protected online student speech occurred in 2007 at Valdosta State University (VSU) in Georgia, where student T. Hayden Barnes was ordered “administratively withdrawn” from campus by then-President Ronald Zaccari as a result of a cut-and-paste collage that Barnes posted on his Facebook page.⁹⁶ Barnes first earned Zaccari’s attention during the 2007 spring semester when Barnes peacefully protested Zaccari’s plan to spend \$30 million of student funds to construct two parking facilities on campus.⁹⁷ Barnes, a dedicated environmentalist, was appalled at the idea, preferring that the money be spent on environmentally friendly alternative means of campus transport or other initiatives, such as providing aid to the victims of Hurricane Katrina. Barnes began a one-man campaign to educate his fellow students about the environmental threats he believed were presented by Zaccari’s construction plans by posting flyers and by contacting Zaccari, student and faculty governing bodies, and members of the Board of Regents of the University System of Georgia via e-mail.⁹⁸ Barnes also authored a letter to the editor of the Valdosta State student newspaper, met with student groups he believed might share his concerns, and again wrote Zaccari to request an exemption from the mandatory student fee that had been designated for funding the construction.⁹⁹ Finally, Barnes posted a series of entries and responses on his Facebook page regarding his view of the proposed construction.¹⁰⁰ With these efforts, Barnes sought to detail his concerns and effectively advocate for his position amongst his fellow students—a shining example of civic engagement at the campus level.

Zaccari, however, did not appreciate Barnes’s campaign.

article/6855.html.

96. Letter from Ronald Zaccari, President, Valdosta State Univ., to T. Hayden Barnes, Student, Valdosta State Univ. (May 7, 2007), <http://thefire.org/public/pdfs/37d5b605294223968e960144dfdcda88.pdf?direct>.

97. The description of events that follows relies on the finding of facts by the United States District Court, Northern District of Georgia, Atlanta Division in its order. *Barnes v. Zaccari*, Case No. 1:08-CV-00077-CAP, 2010 WL 4977482 (N.D. Ga. Sept. 3, 2010).

98. *Barnes*, 2010 WL 4977482, at *1.

99. *See id.*

100. *Id.*

After noticing Barnes's flyers around campus, Zaccari instructed his staff to determine who was posting the notices.¹⁰¹

On March 26, 2007, Barnes was informed by members of VSU's Students Against Violating the Environment (SAVE) that Zaccari was upset by his flyers.¹⁰² In response, Barnes took the flyers down, deleted his Facebook entries, and wrote a letter to Zaccari informing him that he would end his efforts and that he did not want to have his actions viewed as an attack on Zaccari and that he did not want to harm the viability of other environmental initiatives on campus.¹⁰³ Nevertheless, Barnes continued to be intensely interested in the issue, contacting members of the Board of Regents via telephone and e-mail to respectfully state his opposition to the plan.¹⁰⁴ Further, Barnes created a digital collage, which contained pictures of a parking garage, a bulldozer, the earth flattened with tire marks, an asthma inhaler, and a picture of a bus.¹⁰⁵ The collage featured slogans such as "more smog," "bus system that might have been," "climate change statement for President Zaccari," and "S.A.V.E. – Zaccari Memorial Parking Garage."¹⁰⁶ Following Barnes's contact with Board of Regents members and his Facebook posts, which were being monitored by members of Zaccari's staff, Zaccari summoned Barnes to a meeting.¹⁰⁷ During the meeting, which lasted over an hour, Zaccari told Barnes that he had personally embarrassed him, that he thought Barnes had "gone away" following his earlier apology, and that he could not forgive Barnes for his protests.¹⁰⁸ Following the meeting, Barnes again continued his campaign, sending Zaccari an e-mail with alternative ideas for the funding and writing a letter to the editor of the student newspaper.¹⁰⁹

101. *Id.*

102. *Id.*

103. *Id.* at *2.

104. *Id.*

105. T. Hayden Barnes, Posting of Photo Collage, FACEBOOK (Apr. 13, 2007), <http://thefire.org/public/pdfs/b4dd6b0a21c428ec6f7bbf12b588702c.pdf?direct>.

106. *Id.*

107. *Barnes*, 2010 WL 4977482, at *2.

108. *Id.*

109. *Id.*

Increasingly irritated and under pressure from the Board of Regents to address the protests, Zaccari initiated a series of meetings with members of his administration and campus police to discuss Barnes.¹¹⁰ At Zaccari's urging, investigations were launched into Barnes's mental health and academic progress.¹¹¹ Despite being repeatedly told by multiple staff members over the course of several meetings that Barnes did not present any type of threat to himself or others, Zaccari nevertheless decided to order that Barnes be "administratively withdrawn"—essentially expelled—because he presented a "danger" to both Zaccari personally and the VSU campus generally.¹¹² On May 7, 2007, Zaccari communicated his decision to Barnes by leaving a signed copy of the administrative withdrawal underneath his dorm room door, along with a printout of the collage Barnes had posted to his Facebook page weeks earlier.¹¹³ Two days later, Barnes was notified that he was required to vacate his dorm room and leave campus within 48 hours—all on the basis of protected speech he posted on Facebook and all without notice of the charges against him or any opportunity to defend himself in a hearing.¹¹⁴

After Barnes's appeal to the Board of Regents stalled, he filed a civil rights lawsuit in January 2008 against Zaccari, members of his administration, Valdosta State University, and the Board of Regents alleging, among other counts, a violation of his First Amendment and due process rights and breach of contract.¹¹⁵ In reply briefs, attorneys for Zaccari and the Board of Regents argued that Barnes's online speech was not protected.¹¹⁶

In September 2010, a federal district court found Zaccari solely responsible for Barnes's expulsion, ruling that the

110. *Id.* at *3.

111. *Id.* at *4.

112. *Id.* at *5–7.

113. *Id.* at *7.

114. *Id.*

115. Complaint for Declaratory and Injunctive Relief and Damages, Barnes v. Zaccari, No. 1:08-CV-0077-CAP, 2010 WL 4977482 (N.D. Ga. Sept. 3, 2010), 2008 WL 7298036.

116. *E.g.*, Defendants Valdosta State University, Board of Regents, Zaccari, Gaskis, Keppler, Mast, and Morgan's Brief in Support of Their Pre-Answer Motion to Dismiss, Barnes v. Zaccari, No. 1:08-CV-0077-CAP, 2010 WL 4977482 (N.D. Ga. Sept. 3, 2010), 2008 WL 7298037.

“undisputed facts show that Zaccari ignored the lawyers’ warnings that withdrawing Barnes would require due process” and finding Zaccari’s arguments to the contrary “disingenuous.”¹¹⁷ Because Zaccari disregarded clearly established law regarding the right of students facing disciplinary action to receive notice of charges and a hearing, the court found that Zaccari “caused Barnes to be deprived of his rights” and was not entitled to the defense of qualified immunity.¹¹⁸ The case is currently pending before the United States Court of Appeals for the Eleventh Circuit on interlocutory appeal by Zaccari and the Board of Regents.

Barnes’s treatment illustrates the way in which social media can serve as a magnet for censorship of protected speech. Because Barnes’s Facebook posts were both visible and subject to official monitoring in ways that traditional modes of interpersonal communication might not be, Zaccari was able to seize upon Barnes’s online speech as a justification for punishment, arguing that Barnes’s Facebook collage was evidence of a threat.¹¹⁹ Had Barnes’s collage been posted on his dorm room wall instead, Zaccari would not have been afforded this opportunity. In the same way, had the barbed commentary on *SUCOLitis* been confined to jokes between friends, it is equally unlikely Len Audaer would have found himself the subject of an investigation into harassment. But because blogs and social media sites have made student speech newly accessible and subject to monitoring, the urge to censor allegedly “harmful,” but protected, speech becomes stronger.

IV. CONCLUSION

E-mail, social networking sites, blogs, and other forms of online communication have dramatically changed the means by

117. *Barnes*, 2010 WL 4977482, at *16.

118. *Id.* at *20. For more detailed analysis of the doctrine of qualified immunity and student rights, see Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students’ Speech Rights*, 8 CARDOZO PUB. L. POL’Y & ETHICS J. 515 (2010).

119. *Barnes*, 2010 WL 4977482, at *4.

which students talk to each other. But while the modes of communication may have changed in the past 50 years, the content of the speech remains much the same. Just like their analog predecessors, today's students express themselves in passionate, irreverent, and occasionally challenging ways. Some of this speech will provoke debate; some will offend others—and indeed, is perhaps intended to do so. In the case of blogs or social networking sites, the new visibility afforded by these mediums may make the impact of this speech seem more intense; in the case of e-mail, the speed of communication may make the speech seem more insistent. However, it is crucial that administrators remember that no matter the means of the expression, the core principles guiding our understanding of what speech is and is not protected remain unchanged. The First Amendment has weathered technological revolutions before, and it will do so again. For the most part, the legal tests we employ to ascertain whether speech enjoys First Amendment protection do not rely on the medium in which the expression occurs. The exacting definition of peer-on-peer harassment remains the same, whether the speech takes place online or on the campus green; the legal test for incitement still requires the satisfaction of the same elements, whether the expression at issue is visible on a screen or heard on the way to class. While the media may be new, the speech—and how we evaluate it—is not.

Further, the new visibility of speech offers opportunities for increased understanding and tolerance of differing viewpoints and different ways of speaking to one another. This is a significant development. In the first years following FIRE's founding in 1999, it was possible to believe that campus administrators consistently overreacted to student speech because they were simply not familiar with the way students actually talk to each other in private: using slang, vulgarity, insults intended to be affectionate, multiple levels of sarcasm and irony, and jokes sometimes intended to mean the exact opposite of what a plain reading might indicate. Now, with an ocean of student speech published on Facebook and Twitter, administrators are hard-pressed to avoid a greater level of familiarity with the actual nature of student speech. Administrators need to realize that jokes are jokes, and unfunny,

would-be collegiate comedians do not enjoy any less First Amendment protection than the rest of us. It can reasonably be hoped that electronic media and the sheer volume and diversity of the communications to which it provides access and insight will eventually encourage college administrators to drop attempts to police student speech—if not due to a newfound respect for free speech, then out of a recognition of the utter futility of the enterprise.

As once private speech becomes increasingly public online, we must allow our social expectations to evolve to accommodate viewpoints and ways of speaking that, while not our own, are nevertheless protected by the First Amendment. By doing so, we can begin to resolve the current tension regarding online speech on campus.