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The Case of the Student's Racist Facebook Message

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Abstract

Despite a long list of judicial decisions striking down broadly worded university speech codes, universities continue to promulgate and enforce such policies under various guises. This essay examines a case in which a committee of administrators and faculty sought to punish a student for a racist Facebook message alleged to be harassment, a threat, disorderly conduct, and a disruption. On the one side, the committee claimed its action was supported by legal doctrines regarding contracts; time, place, and manner restrictions; captive audiences; student social media use; and the university's zero tolerance policy. On the other side, faculty First Amendment advocates argued the student's speech was protected speech. This article attempts to lay out the arguments on both sides and establish that the student's speech (and speech like it) is so clearly protected that the administrators and faculty who attempt to punish it should lose qualified immunity if sued.

After more than thirty years of scholarly and public debate, the expression and regulation of hate speech remains a significant topic of legal, ethical, and political concern, including university regulation of alleged student and faculty hate speech.¹ In the voluminous literature on the subject spanning academic disciplines such as philosophy, law, education, communication, and political science, two positions predominate regarding the lawfulness of hate speech: those who advocate broad regulations and those who defend narrow regulations. Advocates of broad regulations argue that hate speech violates basic ethical precepts such as ethical reciprocity and respect for persons, causes serious harms, is low-value speech not protected by the

First Amendment, and is recognized internationally as low-value speech unworthy of legal protection.² Those who defend narrow regulations appeal to traditional free speech doctrines concerning overbreadth, undue vagueness and arbitrary enforcement, and values such as liberty and autonomy.³ The debate in higher education typically focuses on public institutions because of their obligation to uphold the First Amendment,⁴ but in some cases the arguments extend to private institutions as a matter of state law or institutional commitment.⁵ Although it has been argued that broad hate speech regulations have won the culture war,⁶ they have—at least for now—lost the legal war: broad regulations of faculty or student speech have been struck down in at least fourteen cases in states including Michigan, Wisconsin, Virginia, New Hampshire, California, Pennsylvania (, Texas, and the Virgin Islands.⁷ However, most universities continue to have policies that violate or threaten free speech guarantees,⁸ many universities punish or threaten to punish protected speech,⁹ and all wonder how best to deal with the emerging cyber–hate speech issue given conflicting lower court rulings.¹⁰ This article addresses all three of these concerns, at least in part, as they relate to a case involving a student’s racist Facebook message. The article argues that even though the student’s message was crass, offensive, and unethical, it is constitutionally protected speech, and so clearly protected that administrators and faculty who sought to punish it should be denied qualified immunity if sued.

Before proceeding, I should note four points. First, my argument is based in a belief not merely that broad campus speech regulations are inconsistent with current judicial interpretations of constitutional law but also that they should remain so; however, in this article those reasons must be assumed rather than articulated or defended.¹¹ Second, nothing in the argument hinges on the use of the term *hate speech*. It is merely a term of convenience widely used in the literature. In other words, my focus is on whether or not the speech involved in the case, and speech like it, should be subject to government sanction whether it is labeled hate speech, discriminatory speech, biased speech, racist speech, or not labeled at all. Third, after introducing the case, I proceed through a series of arguments and counterarguments offered by a committee of administrators and faculty and their First Amendment opponents. This approach serves both as a heuristic device and as a means to convey the nature and sequence of the arguments in the actual situation as closely as possible, while also striving for overall coherence and adding analytical depth. Finally, this article does not name any names. The university is anonymous and all names are pseudonyms.

1. The Case

Bib was a nineteen-year-old-female, white, rural, first-year, first-generation student. One day in class she

became annoyed by the comments of some black students and used her laptop computer to post a Facebook private message (PM) to her friend Moll. The message was: “Damn niggers and bitches. Niggers are rapists and thieves and bitches are loud and nasty.” Without Bib’s approval or knowledge, Moll posted the message on Hap’s wall. Moll and Hap are nineteen-year-old female, white, rural, first-year, first-generation students who live on the same dorm floor as Bib.

Hap showed Bib’s message to her black roommate, Lat, who was outraged by the message and immediately told the other black student on the floor, Pom. She too became angry, and together they created a poster condemning Bib’s message and inviting Bib to talk to them about how the message made them feel, and taped it to Bib’s door.

The dormitory floor resident advisor (RA) soon saw the poster and spoke with Lat and Pom. The RA then told the hall director, who notified the director of residence life, who notified the campus bias incident team. As this was occurring, Bib saw the poster and met with Lat and Pom. During the conversation, Bib apologized and all three women left the discussion satisfied.

However, without any formal or informal complaint and without consulting legal counsel or conducting any hearing, a committee of administrators and faculty met and decided Bib’s message violated four university policies. First, it was harassing speech that violated the residence hall policy on harassment: “Harassing behavior, regardless of the method (written, verbal, via email or phone, online communities or other information technology resources, posting of inappropriate materials in any public area) is prohibited in the residence halls.” Second, it was abusive language that violated the residence hall policy on disorderly conduct: “Disorderly conduct within the residence halls is not permitted. This includes, but is not limited to, engaging in fighting, prank activities, using abusive language or acting in a manner so as to disturb or threaten the public peace.” Third, it was disruptive and offensive speech that violated the computer use policy, which banned “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 national origin.” Fourth, it was racist speech that violated the Discriminatory Conduct Policy:

Racist and other discriminatory conduct . . . will not be tolerated. Discrimination, discriminatory attitudes, and expressions that reflect discrimination are inconsistent with . . . efforts . . . to foster an environment of respect for the dignity and worth of all members of the university community and to eliminate all manifestations of discrimination within the university. [This] encompasses harassing conduct based upon the race, sex, gender identity or expression, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age of an individual or individuals. . . . Institutions may wish to provide specific examples of

racist and other discriminatory conduct, to further enhance understanding of the problem.

Such examples might include: . . . 3. Verbal assaults based on ethnicity, such as name calling, racial slurs, or “jokes” that demean a victim’s color, culture or history.

Although Lat and Pom told the committee of administrators and faculty that they were satisfied with Bib’s apology and did not want her punished, the committee dismissed their opinion as immature and tainted by social conditioning to accept racism and white privilege. Indeed, the committee members believed Bib’s message was an implied threat given the connection they believe exists between hate speech and hate crime. The university has a “zero tolerance policy” for bias and hate, and the committee believed failure to punish Bib would send the message to vulnerable students that the university does not value them. Thus, Bib was ordered to vacate her dormitory room within the week, write a formal letter of apology, take a class on racism and discrimination, and write a five-page essay.

2. Initial First Amendment Objections

Are these punishments defensible? Many factors can play a role in answering this question, but two basic starting points include overbreadth and relevant constitutionally unprotected speech categories. In this article I leave aside the argument that the committee violated Bib’s due process procedural rights and arbitrarily enforced unduly vague policies.¹²

Facial Overbreadth

A government policy that restricts protected speech is overbroad, and it may be overbroad on its face, in its application, or both. In cases of applied overbreadth, the plaintiff need only show the government censored protected speech in the case at hand. In cases of facial overbreadth, the plaintiff must show (1) that the law restricts protected speech (not necessarily the speech in the case at hand) and (2) that the restriction is substantial.¹³ In determining whether the restriction is substantial, the court weighs the harm of invalidating a law that is constitutional in some applications against the real threat of chilling legitimate third-party speech.¹⁴ Courts do not consider unconstitutional a policy that only minimally restricts protected speech, does not pose a realistic threat to protected speech, or can be saved through a narrowing construction.¹⁵ Whether or not any of the four policies administrators appealed to were overbroad should be a major concern because broadly worded university speech policies have been struck down repeatedly.¹⁶ Were the policies used to punish Bib overbroad?

First, let us consider the issue of facial overbreadth. All four policies invoked by the committee have facial defects, that is, they contain language that on its face threatens protected speech.

The computer use policy is overbroad on its face insofar as it prohibits speech solely on the basis that it is offensive. The US Supreme Court has ruled in a long line of cases that government cannot punish speech merely for being offensive.¹⁷ This restriction on government power applies whether the expression was offensive to an individual¹⁸ or a majority.¹⁹ The protected status of merely offensive speech has been repeatedly stated in faculty and student speech cases.²⁰ For example, in a faculty case the Ninth Circuit Court of Appeals asserted, “It is axiomatic that the government may not silence speech because the ideas it promotes are thought to be offensive.”²¹ In a student case, the Third Circuit Court of Appeals observed, “The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.”²²

The discriminatory conduct policy is overbroad on its face insofar as its language has a blanket prohibition on racial slurs, jokes, and the like. Courts have consistently held that racial slurs, jokes, and the like per se do not justify government sanctions. Racist speech, hate speech, discriminatory speech, and biased speech are not themselves categories of constitutionally unprotected speech. To be punishable, the speech must constitute genuine harassment, a true threat, disorderly conduct, or fit some other category of constitutionally unprotected speech.²³

The harassment policy is facially overbroad for the same reasons many harassment policies were struck down in prior cases. The mere use of “buzzwords applicable to anti-discrimination legislation” is not sufficient to justify a policy.²⁴ Indeed, in the very first higher education student hate speech legal decision, the court specifically identified words such as “stigmatize,” “victimize,” “threat,” and “interfere” as unduly vague in the absence of language limiting their scope to constitutionally unprotected speech.²⁵ Most important, the policy does not specify that the speech must be severe *and* pervasive *and* objectively offensive, the standard for student-to-student harassment announced by the US Supreme Court.²⁶

The housing disorderly conduct policy is facially overbroad since it suffers the same overbreadth defect as the Michigan State University disruptive conduct policy struck down in 2012.²⁷ Relying on *Houston v. Hill*, 482 U.S. 451 (1987), the Michigan Supreme Court held that the plain language of the MSU policy allowed officials to punish constitutionally protected speech by giving them “unfettered discretion,” since the policy could be enforced “against *anyone* who disrupts in *any* way *anyone* carrying out *any* activity for or with MSU.”²⁸ To withstand constitutional scrutiny, the policy needs to specify what forms or extent of disruptive speech are unprotected, since some disruptive speech is protected, such as a student’s classroom speech that merely interrupts or causes confusion or minor disorder. That speech can “interrupt” or cause “confusion” or “disorder” and still be protected is evidenced, for example, in the 1949 *Terminiello* decision, in which the US

Supreme Court held “a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”²⁹ Since the housing disorderly conduct policy used to punish Bib offers no clarifying language distinguishing protected and unprotected disruptive speech, it too is facially overbroad.

If all four policies are facially overbroad, then the university has lost all of its claimed bases on which to punish Bib’s message unless there is a saving construction of the policies. A saving or narrowing construction is possible if the problematic portion(s) of the policies can be severed while staying true to the intentions of the policymakers; however, the court will not re-write the policy to avoid overbreadth and should assume “not the best of intentions, but the worst.”³⁰ Given the fact that no broad university student speech regulation subjected to judicial review—regulations nearly identical to these—has been saved by a narrowing construction, even when that option has been explicitly addressed by the court, it would take a leap of faith to think these policies are savable.

Beyond the problem of facial overbreadth, we must examine whether the policies were applied to protected speech, that is, whether the policies suffer from applied overbreadth. The committee claimed Bib’s speech was constitutionally unprotected harassment, a threat, disorderly conduct, and disruptive.³¹ Was it?

Harassment. Bib’s speech fails to meet the necessary conditions for genuine harassment. First, Bib’s speech could only be considered harassment under the hostile environment harassment doctrine (as opposed to the quid pro quo harassment doctrine) since it did not involve any impermissible exchange initiated by a person in a position of power over the victim, such as a higher grade in exchange for a sex act.³² Second, the relevant hostile environment standard is not the “severe or pervasive” standard. That standard applies to employee-employee hostile environment harassment and instructor-student hostile environment harassment. For student-to-student hostile environment harassment, the US Supreme Court has held that educational institutions may be held liable under Title IX of the Civil Rights Act only “where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school” and observed that “damages are not available for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender.”³³ The speech must meet all three conditions—it is not sufficient that the speech be severe in a single instance³⁴—and Bib’s speech was not systematic or pervasive since it was (1) a single occurrence (2) in a private message that (3) was not sent to or intended to be seen or read by the offended parties. I would argue that Bib’s speech also was not severe, but that is a moot point given the *Davis* rule. Moreover, and perhaps most

important, Bib's message cannot constitute genuine harassment because her message did not deprive Lat or Pom access to any educational opportunity or benefit provided by the university. The *Davis* decision identifies the deprivation of physical access to educational facilities such as an athletic field or computer lab as paradigmatic forms of denying access, and rejects alleged deprivations such as a decline in grades per se as sufficient (though there is no evidence or even allegation in Bib's case that her speech caused any decline in Lat's or Pom's grades).³⁵

True Threat. Bib's message also fails to meet the necessary conditions for being a true threat. The US Supreme Court has ruled that a true threat exists only 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."³⁶ The relevant state law defines a true threat as "a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech."³⁷ Whether or not an expression is a true threat depends on the totality of facts in that case, such as its context, the intent of the speaker, reaction of the recipient, the intended target, and its being unconditional and unequivocal.³⁸ However, Bib's message did not contain any threat at all, much less an unconditional and unequivocal threat to commit unlawful violence or a serious expression of a purpose to inflict harm. Moreover, its context was a private message in a private forum, and neither the intended recipient (Moll) nor any of the subsequent unintended recipients (Hap, Lat, and Pom) understood it to be a threat to their health or safety.

It is instructive to compare Bib's message to two higher education cases involving alleged threats, *United States v. Alkhabaz*, 104 F. 3d 1492 (6th Cir. 1997), and *United States v. Machado*, 195 F. 3d 454 (9th Cir. 1999). Abraham Jacob Alkhabaz, aka Jake Baker, indicated a sexual interest in violence against women and girls through fictitious stories he posted to a usenet group and wrote in e-mails to another individual with the username "Arthur Gonda." One of the stories used the name of a classmate at the University of Michigan. Alkhabaz did not communicate any of the stories to the named classmate. Although a threat does not have to be directly communicated to the intended target—it can be communicated through a third party³⁹ or website⁴⁰—the court held there was no true threat, since a true threat involves an attempt to achieve a goal through intimidation, and Alkhabaz had no such goal of intimidation; rather, his goal was held to be a desire to "foster a friendship based on shared sexual fantasies."⁴¹ If a "snuff" story by Alkhabaz naming an individual fails to constitute a true threat, it is difficult to see how Bib's Facebook message could.

In contrast, Richard Machado, a student at UC-Irvine, was convicted of a true threat. Machado sent—and resent when he got no immediate response—this e-mail to fifty-nine Asian students:

Subject: FUck you Asian Shit

Hey Stupid Fucker,

As you can see in the name, I hate Asians, including you. If it weren't for asias [sic] at UCI, it would be a much more popular campus. You are responsible for ALL the crimes that occur on campus. YOU are why I want you and your stupid ass comrades to get the fuck out of UCI [sic], If you don't, I will hunt you down and kill your stupid asses. Do you hear me? I personally will make it my life career [sic] to find and kill everyone one of you personally. OK?????? That's how determined I am.

Get the fuck out.

MOther FUcker (Asian Hater)

After an initial trial ended with a hung jury, the retrial jury found Machado's e-mail to be a true threat.⁴² One fact supporting the determination that Machado's e-mail constituted a true threat was that it was targeted and sent directly to potential victims of unlawful violence. A second fact contributing to the conviction was the e-mail's unconditional and unequivocal threat to commit unlawful violence. A third fact weighing in favor of it being a credible threat was that even though not every recipient of the e-mails took them to be threats, many did, and ten students filed a complaint. A fourth fact weighing in favor of it being a credible threat was that the e-mail was resent, which suggests a serious intent to carry out the threat. During trial, jurors also discovered numerous conduct elements further implicating Machado: he stole cash from his Asian roommate and without authorization used the roommate's credit card and car, he had a prior incident involving a threat, and he attempted to flee to Mexico. Machado claimed the e-mail was merely an attempt to "scare" his targets, but the jury found the totality of facts made his threat credible. Bib's Facebook message does not meet any of the conditions or include any of the conduct elements involved in the Machado case.

Disorderly Conduct. Bib's speech does not meet the necessary conditions for disorderly conduct. The relevant state law defines disorderly conduct as conduct in a private or public place that is "violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly in circumstances in which the conduct tends to cause or provoke a disturbance."⁴³ The state Supreme Court has ruled that this law can apply to pure speech, even when the speech fails to cause an actual disturbance, if it is constitutionally unprotected "abusive" speech that is not an essential part of any exposition of ideas and utterly devoid of social value.⁴⁴ Did Bib's speech cause a "disturbance," or, failing that, constitute unprotected "abusive" speech?

Bib's speech did not cause or provoke any real disturbance. There was no violence or threat of violence, no disruption of classes or university or dorm activities. No student complained to the university.

The only “disturbance” resulting from it was a few emotional conversations, a poster taped to Bib’s door, and a dialogue between three students that led to greater civility, tolerance, and appreciation of diversity. In effect, the only “disturbance” caused by Bib’s message was the counterspeech of Lat and Pom, and if speech provoking counterspeech is equivalent to disorderly conduct, then no speech is safe; it all becomes vulnerable to the so-called heckler’s veto.

The Supreme Court has ruled in a long line of cases that speech does not become unprotected just because others become agitated at the message or even respond to it violently, that the state cannot ban or punish speech merely because some audience wishes to stop it or will react badly to it.⁴⁵ Worth particular attention here is the US Supreme Court statement in *Tinker v. Des Moines* (1969) that

in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . . In 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 accompanies an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.⁴⁶

Perhaps the idea is summed up best in a Seventh Circuit decision protecting an art display that officials claimed could have caused a riot: “The rioters are the culpable parties, not the artist whose work unintentionally provoked them to violence.”⁴⁷

Since Bib’s speech was not intended to provoke a disruption and did not cause a “disruption” in any legally relevant sense of that term, the committee must show Bib’s message was sufficiently abusive to justify the panel’s application of the disorderly conduct policy. However, the relevant state decisions interpret “abusive” pure speech to be equivalent to true threats or genuine harassment. *State v. Perkins*, 243 Wis. 2d 141 (2001), involved a death threat to a local judge; *State v. Douglas*, 243 Wis. 2d 204 (2001) involved a high school student death threat to a school administrator; *State v. A.S.*, 243 Wis. 2d 173 (2001), involved a middle school student’s threats to kill and rape; *State v. Schwebke*, 253 Wis. 2d 1 (2002), involved anonymous harassing mail sent to three individuals on six occasions that caused significant life disruption and fear for all three victims. Since Bib’s message falls far short of any of these factual circumstances, in other words, since it is neither a true threat nor genuine harassment, it cannot be equated to the kind of abusive speech prohibited by the state disorderly conduct law.

Indeed, a disorderly conduct prosecution in Bib's case is a bizarre notion. It would be like charging the author of a book with disorderly conduct after a reader brings the book into the dormitory and a roommate takes offense to a passage she sees or hears. Less strictly analogous, but worth mentioning because it actually occurred, it is like charging a reader of a book with racial harassment or disorderly conduct when someone else takes offense to the book's cover.⁴⁸ In 2007 a student-employee at Indiana University–Purdue University Indianapolis (IU-PUI) named Keith Sampson was found guilty of racial harassment for reading *Notre Dame vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan* during work breaks in the presence of black employees. According to university officials, the book's merely having the words in the title on the cover was enough to make Sampson guilty of showing "disdain and insensitivity" (and thus guilty of racial harassment) to coworkers. Fortunately, a vigorous public outcry forced the university to overturn the finding and clear Sampson's record.

Tinker Disruption. Bib's speech fails to meet the legal conditions necessary to constitute a disruption. The leading case for disruption sanctions for student speech in education is *Tinker*, which announced the "material and substantial disruption" standard. The first issue that arises is whether or not a standard announced for the K–12 context applies equally to the higher education context. Disruption cases predominantly involve high school students, whose speech is much less protected by courts than the speech of college students because K–12 and higher education have different pedagogical goals, because in loco parentis still applies to K–12 but not to higher education, because K–12 has special needs for school discipline, because of the difference in the maturity of K–12 and higher education students, and because students often live in close quarters in dormitories in higher education.⁴⁹ However, the US Supreme Court has not provided a definitive answer regarding the similarities and differences between the K–12 and higher education contexts, and thus lower courts have rendered some conflicting decisions in higher education student speech cases.⁵⁰ However, it is a moot point whether Bib's message is more protected as that of a higher education student rather than of a high school student since her speech fails to meet the conditions specified in *Tinker*, *Fraser*, *Hazelwood*, or *Morse*. When analyzing allegations that a university student's speech is disruptive under the *Tinker* standard, courts have explained that the listener's reaction to offensive speech is not a legitimate secondary effect,⁵¹ that the claim must be grounded in a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech,⁵² that the claim cannot extend to such statements as "You're just a dumb black woman or homosexual,"⁵³ and that it cannot be premised on a feeling or mere opinion that exposure to the message is somehow harmful to certain students.⁵⁴ Bib's message fails to meet any of these conditions. Moreover, the *Fraser*, *Hazelwood*, and *Morse*

rationales cannot apply to Bib's speech since all three decisions were premised on the student speech's being under school auspices, which Bib's speech was not.

In sum, all four policies invoked by the committee of administrators and faculty to justify sanctions against Bib suffer from insurmountable constitutional defects. They all are facially overbroad as well as overbroad in their application. Bib's message fails by a dramatic margin to meet the legal conditions necessary to count as genuine student-to-student hostile environment harassment, a true threat, disorderly conduct, or disruptive conduct.

3. University Replies and First Amendment Counterreplies

Committee members were not convinced by these arguments. Since hate speech is just plain wrong in their opinion, they have to believe there is some legal basis for them to punish it.

Contracts. Their first reply was to maintain that by explicitly signing the residence hall and computer usage contracts and implicitly agreeing to the harassment and racial discrimination policies by matriculating, Bib was bound by the four policies the committee was enforcing regardless of what the First Amendment says. When Bib signed the contracts, she waived her constitutional rights.

This is plainly false. This essay has already cited numerous cases in which courts have struck down university policies that violate the First Amendment, including overbroad university Internet restrictions,⁵⁵ and we can add speech restrictions applied to public housing or residence halls.⁵⁶ As the Minnesota Supreme Court noted in its 2012 *Tatro* decision, "[A] university cannot impose a . . . requirement that forces students to agree to otherwise invalid restrictions on . . . free speech rights."⁵⁷

Time, Place, Manner Restrictions. The committee had a ready second reply: The policies and our enforcement of them are justified because they merely are reasonable time, place, and manner regulations applied to vulnerable students in their dormitory living space.⁵⁸

It is true that courts uphold some time, place, and manner restrictions on public property,⁵⁹ and the extent of the restrictions depends on the location of the expression.⁶⁰ A traditional public forum (i.e., public property traditionally used as a forum for free expression, such as a street, sidewalk, park, or the proverbial college quad) has the most First Amendment protection. A limited or designated public forum (i.e., public property open for expression only on a limited basis or for a designated purpose, such as a municipal theater or university meeting room) has less protection. A nonpublic forum (i.e., public property not primarily designated for expression, such as an airport or prison) has the least protection. Generally speaking, a dormitory is considered a "nonpublic forum" (except for public areas and displays that would be considered

traditional public forums) in which an offensive message may be restricted so long as it is incompatible with the defined purposes of the public space, and the policy is both reasonable and content-neutral.⁶¹

However, even if we assume for the sake of argument that the policy is reasonable and content-neutral, the administrators' appeal to time, place, and manner restrictions fails when we analyze the "place" of Bib's message. In order for time, place, and manner restrictions to be applicable, the place of the speech has to be on public property (in a public forum), and, more specifically, given the administrators' argument, the place of the speech has to be the dormitory. But where did Bib's cyberspeech occur?

In one sense, Bib's speech was not in a public space at all, since it appeared and only was intended to appear as a private message in a private electronic speech forum. However, in another sense Bib's message occurred in a public space, since her physical location was a university classroom on a university-issued computer. Since lower courts, dealing with cases arising in K-12 contexts, have split on whether cyberspeech occurs in the speaker's physical location, the message's cyberlocation, or some combination thereof,⁶² what should we say here?

Fortunately, in this case we do not need to try to resolve the conflicting lower court decisions, since the proposed justification fails whether Bib's speech is held to be public or private. Let us assume the speech should be interpreted as being in a public space, that is, in the classroom or the computer itself. If Bib's speech occurred in the classroom, then the instructor of the class, had she or he caught Bib in the act, could have legitimately punished Bib for violating the university policy on the misuse of laptops during class (the policy requires students to use their laptops only for class-related purposes during class time). But this university policy and any sanction issuing from it have nothing to do with the racist content of the message or the sanctions pursued by the administrators, or—most important—the alleged dorm-related time, place, and manner restriction. The same problem arises if Bib's speech is held to have occurred on the university-issued computer: her computer was not in the dormitory, nor was the message intended to be displayed in the dormitory. Thus, even if Bib's speech occurred in a public forum—the classroom—the proposed sanctions based on the enforcement of reasonable time, place, and manner restrictions in the dormitory cannot be justified. And if the speech occurred in a nonpublic forum (the private forum Facebook), the time, place, and manner doctrine is irrelevant. Thus, this doctrine cannot justify the sanctions.

Analogy to Tatro. The committee suggested the 2012 *Tatro* decision, in which the Minnesota Supreme Court upheld university sanctions against a mortuary student for a series of Facebook messages, supported their position. In that case, the Minnesota Supreme Court upheld university sanctions against Amanda Tatro for a series of four Facebook posts and status updates containing violent and disrespectful language regarding a cadaver she worked on in an anatomy lab.⁶³ The university required that her grade for the course be

changed from a “C” to an “F,” that she complete a directed course of study in clinical ethics, that she write a letter to a university official addressing respect in the mortuary science program and the profession, that she undergo a psychiatric evaluation and complete any requirements issuing therefrom, and that she remain on probation the duration of her undergraduate studies.

However, the appeal to *Tatro* fails, too. First, the comparison fails because the court observed that, “Courts have refused to allow schools to regulate out-of-school speech where the speech did not or was unlikely to cause a substantial disruption of school activities.”⁶⁴ As this article has already shown, Bib’s message did not cause nor was it likely to cause a substantial disruption of university activities. However, *Tatro* was not decided on grounds of disruption; in fact, the court explicitly set that aside. Rather, the discipline for Amanda Tatro’s speech was upheld as a violation of academic program rules. The court emphasized two conditions regarding its decision: such restrictions can only apply to students enrolled in professional programs with narrowly tailored standards of conduct directly related to professional standards of conduct, and the speech must be public—as opposed to private. Bib’s Facebook message fails both requirements. The court is not crystal clear on what counts as a professional program with narrowly tailored standards of conduct directly related to professional standards of conduct (the court compared the mortuary science program to legal decisions regarding psychological counseling programs),⁶⁵ but Bib was not enrolled in a professional program, nor was her speech public. “In this case the University is not sanctioning Tatro for a private conversation, but for Facebook posts that could be viewed by thousands of Facebook users and for sharing the Facebook posts with the news media.” Bib’s private message to Moll is not analogous.

The same conclusion can be drawn from a review of *Murakowski v. University of Delaware*, 575 F. Supp. 2d 571 (D.C. Del. 2008). In this case, the university sought to punish a student for threatening and disruptive speech for a website that included “snuff” and rape essays and jokes, depictions of animal cruelty, and more. The court held that the website did not constitute a true threat or disruptive conduct. It was not a true threat since the student’s remarks were

sophomoric, immature, crude and highly offensive in an alleged misguided attempt at humor or parody. They do not, however, constitute a serious expression of intent to inflict harm. . . . [A] number of his comments, although directed to women as a whole, are not directed to specific individuals, a particular group or even to women on the University’s campus. The “Happy Birthday to me” article, which contains the comment regarding an Asian girl, is focused primarily on criticizing, in very bad taste, the handicapped. Moreover, of the over eighty articles on Murakowski’s website, less than ten caused the University concern. Apparently, some of the offensive commentaries had been on his website for more than a

year. While certain students, a parent and University officials were offended, other students did not take his “works” seriously or view them as threatening.⁶⁶

Murakowski’s speech does not constitute a disruption under the *Tinker* standard (the court explicitly notes that is the appropriate standard, as opposed to the *Bethel* or *Hazelwood* standards) since no instructors or administrators were adversely impacted to the point that they were unable to work through the end of the academic year. No substitute instructors were needed as a result of the reaction to the postings that could have or would have adversely impacted the educational environment. Three students and a parent complained. One student was negatively affected and sought counseling. The other complainants expressed offense regarding the website, but did not appear to be materially affected by it, nor feared for their safety. There is no evidence that his writings were of interest to other students or a topic of conversation on campus even in light of the events at Virginia Tech. Certain materials had been published for a while—long enough to determine whether the web site would or likely could create disorder and adversely affect the delivery of education. No negative atmosphere permeated the campus because of Murakowski’s writings. The University has presented no evidence which reasonably led it to forecast material interference with campus education and activities. The evidence does not suggest that Murakowski’s website or articles were intentionally aimed at disrupting the college environment and actually materially did so in a concrete fashion.⁶⁷

Captive Audience. The committee claimed Lat and Pom were a captive audience who may be protected from unwanted expression like Bib’s.

A captive audience is an unwilling audience who is effectively powerless to avoid or respond to the message. Under the right circumstances this can include, for example, a person at home,⁶⁸ an employee in the workplace,⁶⁹ or a student in a classroom.⁷⁰ However, neither of the conditions is met in Bib’s case. Lat and Pom had the ability to avoid the message (Bib did not send her message to them, they got it as third- and fourthhand information, respectively), and they had the ability to respond. In fact, they did respond very effectively through counterspeech. As one court put it in a 2010 campus hate speech case, “The right to provoke, shock and offend lies at the very core of the First Amendment. This is particularly so on college campuses”;⁷¹ and “It’s easy enough to assert that [racially offensive] ideas contribute nothing to academic debate, and that [they do] more harm than good. But the First Amendment doesn’t allow us to weigh the pros and cons of certain types of speech. Those offended . . . should engage . . . in debate or hit the ‘delete’ button when they receive [such] emails. They may not invoke the power of the government to shut [the

speaker] up.”⁷² Thus, a more appropriate university response “would have been instead to say to those offended by . . . [the] speech that their right to protest that speech by all peaceable means would be as stringently safeguarded . . . as would . . . [the] right to engage in it.”⁷³

Zero Tolerance. We arrive now at the last appeal of the committee: Hate speech is just plain wrong and the university has a zero tolerance policy which authorizes us to punish it.

This last appeal fails, too. Courts have explicitly held that universities cannot enforce general policies requiring student speech be nonhateful, civil, tolerant, reasonable, or the like; they may only promote such speech as an aspiration.⁷⁴ In the words of the district court striking down the California State University System civility requirement,

Civility easily could be understood as permitting only those forms of interaction that produce as little friction as possible. . . . The First Amendment difficulty with this kind of mandate should be obvious: the requirement “to be civil to one another” and the directive to eschew behaviors that are not consistent with “good citizenship” reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. Similarly, mandating civility could deprive speakers of the tools they most need to connect emotionally with their audience, to move their audience to share their passion.⁷⁵

In sum, zero tolerance policies and enhanced penalties for hate-motivated *crimes* may be constitutional;⁷⁶ but zero tolerance policies for hate *speech* are not unconstitutional.

Qualified Immunity

At this point, a reasonable person might think (for a second time) that the argument was done. It was not. Although the committee conceded punishment would be unconstitutional given current judicial decisions, some members maintained that these decisions permitting hate speech are wrong and said they will do the right thing and punish Bib anyway. If she sues and they lose, they are not concerned because they will be protected from personal liability by university lawyers under the doctrine of qualified immunity. Perhaps some readers imagine I am making this up, that there cannot really be university administrators and faculty who are so incompetent or callous to the law, but experience proves otherwise. There are numerous cases in which university officials have lost qualified immunity in free speech cases because of their culpable ignorance or disdain of the law.⁷⁷ Qualified immunity protects government agents from personal liability for civil damages for violating legal rights when making job-related decisions, *except* when the official violates a clearly

established law a reasonable person in the official's position would be aware of.⁷⁸ As the US Supreme Court stated, qualified immunity protects “all but the plainly incompetent and those who knowingly violate the law.”⁷⁹ The committee handling Bib's case was plainly incompetent. Courts have (1) *invariably* ruled against broad campus hate speech regulations, (2) held that universities have a *heightened and unique* obligation to protect free speech,⁸⁰ (3) held that the loss of free speech—even for a minimal time—constitutes an *irreparable injury*,⁸¹ and (4) struck down broad university speech restrictions even when no one has been punished when the restrictions sufficiently chill speech.⁸² Even a cursory investigation of the case law behind the various doctrines the committee imagined justified its sanctions would have proved otherwise, as would have a call to any competent First Amendment attorney. Moreover, even after acknowledging that sanctions against Bib would be unconstitutional, the committee still indicated a willingness to impose penalties for speech its members dislike. Until and unless more courts deny qualified immunity to such officials, they will continue to violate student (and faculty) free speech rights with near impunity.⁸³ There are far more effective, and legal, ways to address Bib's racist speech than what happened here.

In closing, I want to emphasize two positive aspects of the case. First, the two students—Lat and Pom—got it right. They responded to Bib with counterspeech, and very effectively. The committee should have applauded their courage and skill rather than dismiss them as naive puppets of a racist society. The committee could have supported Lat and Pom by arranging a floor meeting to discuss the incident, or a university forum on discriminatory speech, or pursuing any number of other nonpunitive responses. Second, at least sometimes watchful faculty can intervene to protect student speech from wrongful university sanctions. The bottom line is that except in very narrowly defined circumstances free speech protects even the speech we hate, and public university officials do not have the right to silence students or punish their speech, including their use of social media, unless it meets strict and specific legal requirements.

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Dr. Shiell also is a member of the Wisconsin Humanities Council Speakers Bureau, and an activist defending student and faculty rights through shared governance and professional organizations.

Notes

¹ See, for example, Jeremy Waldron, *The Harm of Hate Speech* (Cambridge, MA: Harvard University Press, 2012); Michael Herz and Peter Molnar, *The Content and Context of Hate Speech* (Cambridge: Cambridge University Press, 2012); Corey Brettschneider, *When the State Speaks, What Should It Say?* (Princeton, NJ: Princeton University Press, 2012); and Greg Lukianoff, *Unlearning Liberty* (New York: Encounter, 2012).

- ² Some influential defenses of broad campus hate speech restrictions include Mari Matsuda, ed., *Words That Wound* (Boulder, CO: Westview, 1993); Alexander Tsesis, *Destructive Messages* (New York: New York University Press, 2002); and Richard Delgado and Jean Stefancic, *Understanding Words That Wound* (Boulder, CO: Westview, 2004). Andrew Altman proposed a regulation much like the regulation at Stanford University that courts deemed overbroad. Altman, "Liberalism and Campus Hate Speech: A Philosophical Examination," *Ethics* 103, no. 2 (1993): 302–17.
- ³ One of the most influential early defenses of narrow campus hate speech restrictions was Nadine Strossen, "Regulating Racist Speech on Campus: A Modest Proposal?," *Duke Law Journal* 484 (1990): 484–573. A comprehensive book-length defense is provided in Timothy C. Shiell, *Campus Hate Speech on Trial*, 2nd ed., rev. (Lawrence: University Press of Kansas, 2009).
- ⁴ The First Amendment to the US Constitution was initially applied to state government in *Gitlow v. New York*, 268 U.S. 652 (1925). Since public universities are branches of state government, the US Supreme Court has held that they too are subject to the First Amendment. Two influential cases are *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).
- ⁵ Examples of the First Amendment's relevance to private schools through state law are California's "Leonard Law" (*Corry v. Stanford University*, No. 740309, Santa Clara Superior Court, February 27, 1995) and the Massachusetts Civil Rights Act (*Abramowitz v. Trustees of Boston University*, C.A. No. 82680, Suffolk Superior Court, 1986). Examples of the First Amendment's relevance to private schools through school commitment are Harvard University (see Faculty of Arts and Sciences "Free Speech Guidelines" available at <http://thefire.org/public/pdfs/0e06adc0b3cc0ccbcd96fc4b1c4ecea6.pdf?direct>) and the University of Notre Dame (mission statement and Open Speaker Policy available at <http://thefire.org/article/10249.html>).
- ⁶ Jon Gould, *Speak No Evil* (Chicago: University of Chicago Press, 2005).
- ⁷ *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich.1989); *UWM Post Inc. v. Board of Regents*, 774 F. Supp. 1163 (1991); *Iota Xi v. George Mason University*, 773 F. Supp. 792 (E.D. Va. 1991); *Silva v. University of New Hampshire*, 888 F. Supp. 293 (D.N.H. 1994); *Corry v. Stanford University*, No. 740309 (Santa Clara Superior Court, February 27, 1995); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995); *Coben v. San Bernardino Valley College*, 92 F. 3d 968 (9th Cir. 1996); *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); *College Republicans v. Reed*, 523 F. Supp. 2d 1003 (N.D. Ca. 2007); *DeJohn v. Temple*, 537 F. 3d 301 (3rd Cir. 2008); *McCauley v. University of the Virgin Islands*, 618 F. 3d 232 (3rd Cir. 2010); *Rodriguez v. Maricopa Community College Dist.*, 605 F. 3d 703 (9th Cir. 2010); *People v. Rapp*, No. 143343, 143344, Michigan Supreme Court (July 27, 2012).
- ⁸ FIRE reported in 2012 that 65% of 392 institutions studied had severely restrictive "red light" policies, another 29% had restrictive "yellow light" policies, and only 14 of 392 (4%) had fully constitutional "green light" policies. FIRE, "Spotlight on Speech Codes 2012: The State of Free Speech on Our Nation's Campuses," <http://thefire.org/code/speechcodereport/>. FIRE's methods and numbers are disputed by some scholars. See Gould, *Speak No Evil*, 149–53 and 173–76; "Returning Fire," *Chronicle of Higher Education* (supp.), April 20, 2007; and Robert O'Neil, "...But Litigation Is the Wrong Response," *Chronicle of Higher Education Review*, August 1, 2003, B9–B10. But see Azhar Majeed's response to Gould and O'Neil, "Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes," *Georgetown Journal of Law and Public Policy* 7, no. 2 (2009): 481–544.
- ⁹ See cases at FIRE, <http://thefire.org>; Center for Campus Free Speech, www.campuspeech.org/; Center for Individual Rights, www.cir-usa.org/; and Student Press Law Center, www.splc.org/.
- ¹⁰ Kelly Sarabyn, "The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights," *Texas Journal on Civil Liberties and Civil Rights* 14, no. 1 (Fall 2008): 27–93.
- ¹¹ Thomas Emerson provides a classic statement of the consequentialist argument for robust free speech combining the earlier work of John Stuart Mill, Alexander Meiklejohn, and others by emphasizing its role as a means to self-realization, discovering and preserving truth, democratic participation and self-rule, and maintaining a balance between stability and change. Emerson, *Toward a General Theory of the First Amendment* (New York: Random House, 1966). Others have argued for robust free speech as essential to creating and maintaining a tolerant society. See Lee Bollinger, *The Tolerant Society* (New York: Oxford University Press, 1986). Others maintain that free speech has intrinsic value. See Thomas Scanlon, "A Theory of Free Expression," *Philosophy and Public Affairs* 1, no. 2 (1972): 204–26; Joseph Raz, *The Morality of Freedom* (Oxford, UK: Clarendon, 1986); Raz, "Free

Expression and Personal Identification,” in *Free Expression*, ed. W. J. Waluchnow (Oxford, Clarendon, 1992), 1–29; and Ronald Dworkin, “The Coming Battles over Free Speech,” *New York Review of Books*, June 11, 1992. See also Susan Brison’s critique, “The Autonomy Defense of Free Speech,” *Ethics* 108, no. 2 (1992): 312–39.

¹² Due process is a concern for fair procedures and outcomes in criminal and civil cases as well as administrative proceedings grounded in the Fifth and Fourteenth Amendments involving procedural rights, substantive rights, a prohibition against unduly vague laws, and the incorporation of the Bill of Rights. Courts have not provided an exhaustive or definitive list of due process rights for anyone, much less students in disciplinary proceedings, but procedural rights commonly include the right to present evidence on one’s own behalf, the right to some kind of advice or counsel, the right to know one’s accuser and the incriminating evidence, the right to confront and cross-examine the accuser, and the right to have a decision based on a record generated in open proceedings. Complications regarding due process rights for higher education students are addressed in Fernand N. Dutille, “Students and Due Process in Higher Education: Of Interests and Procedures,” *Florida Coastal Law Journal*, paper 482 (2001). 243-290. A law is void for vagueness if it fails to define the crime “[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Broad campus regulations of hate speech have been struck down as void for vagueness. See, e.g., *Doe*, 721 F. Supp. at 867 and *Dambrot*, 55 F. 3d at 1183–84.

¹³ *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

¹⁴ *U.S. v. Williams*, 553 U.S. 285 (2008); *Virginia v. Hicks*, 539 U.S. 113 (2003); *Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Examples of facially overbroad laws include a Jacksonville, Florida, ordinance prohibiting drive-in theaters from showing movies depicting any form of nudity if the film could be seen from a public road or place (*Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)); a Los Angeles law stating the airport was “not open for First Amendment activities by any individual” (*Board of Airport v. Jews for Jesus*, 482 U.S. 569 (1987)); and a federal law criminalizing the sale or possession of depictions of animal cruelty (*U.S. v. Stevens*, 130 S. Ct. 1577 (2010)).

¹⁵ See, e.g., *Doe*, 721 F. Supp. at 866–67.

¹⁶ See list of cases at n. 7.

¹⁷ Influential cases include *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Nationalist Social Party v. Skokie*, 432 U.S. 43 (1977); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); and *Snyder v. Phelps*, 131 S. Ct. 1207 (2010).

¹⁸ *Hustler v. Falwell*, 485 U.S. 46 (1988).

¹⁹ *Texas v. Johnson*, 491 U.S. 397 (1989).

²⁰ See, e.g., *Doe*, 721 F. Supp. at 863; *Iota Xi*, 773 F. Supp. at 795; *Corry*, No. 740309 S.C. S.C. at 18; and *College Republicans*, 523 F. Supp. at 1014.

²¹ *Rodriguez v. Maricopa Community College Dist.*, 605 F. 3d. 703, 708 (9th Cir. 2010).

²² *McCaughey*, 618 F. 3d at 41, quoting *Saxe*, 240 F. 3d at 215; see *Papish*, 410 U.S. at 670; *Tinker*, 393 U.S. at 509; and *Sypniewski*, 307 F. 3d at 259 n.16.

²³ *Doe*, 721 F. Supp. at 862–63. See also *UWM Post*, 774 F. Supp. at 1174–75.

²⁴ *Bair*, 280 F. Supp. at 372.

²⁵ *Doe*, 721 F. Supp. at 867.

²⁶ *Davis v. Monroe*, 526, U.S. 629 (1999). See also *DeJohn*, 537 F. 3d at 317–18.

²⁷ *People v. Rapp*, Michigan Supreme Court, No. 143343; 143344, July 27, 2012, see esp. 8–16.

²⁸ *Rapp*, No. 143343; 143344 at 8.

²⁹ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

³⁰ *Bair*, 280 F. Supp. 2d at 367.

³¹ In the early stages of the hate speech debate, defenders of broad hate speech restrictions relied heavily on the fighting words and group libel/defamation categories of unprotected speech. Fighting words analyses appeal to *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). For fighting words analyses, see, e.g., Cass Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993); Kent Greenawalt, *Fighting Words* (Princeton, NJ: Princeton University Press, 1995); Charles Lawrence III, “If He Hollers Let Him Go: Regulating Racist Speech on Campus,” *Duke Law Journal* 431 (1990); 431-483; and Thomas Grey, “Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment,” *Social Philosophy and Policy* 8, no. 2 (1991): 81–107. Group

- libel/defamation defenses rely on *Beaubarnais v. Illinois*, 343 U.S. 250 (1952). For group libel defenses, see, e.g., Donald Alexander Downs, *Nazis in Skokie* (Notre Dame, IN: Notre Dame University Press, 1985); Kenneth Lasson, "Racial Defamation as Free Speech: Abusing the First Amendment," *Columbia Human Rights Law Review* 17, no. 1 (1985): 11-55; Richard Delgado, "Campus Antiracism Rules," *Constitutional Narratives in Collision*, *Northwestern Law Review* 85, no. 2 (1991): 343-387; and Rhonda Hartman, "Revitalizing Group Defamation as a Remedy for Hate Speech on Campus," *Oregon Law Review* 71 (1993), 855-900. However, the fighting words and group libel approaches were essentially abandoned in the late 1990s as courts consistently rejected them. Interestingly, Donald Downs later became a leading activist opposing broad campus speech restrictions, and Jeremy Waldron has attempted to revive the group defamation approach. See Downs, *Restoring Free Speech and Liberty on Campus* (Cambridge: Cambridge University Press, 2006); and Waldron, *Harm of Hate Speech*.
- ³² The first US Supreme Court decision upholding quid pro quo harassment was the Title VII employment case *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). An example of quid pro quo harassment in a Title IX education context is *Johnson v. Galen Health Institutes*, 267 F. Supp. 2d 679 (W.D. Ky. 2003).
- ³³ *Davis v. Monroe*, 526 U.S. 629, 650, 651 (1999).
- ³⁴ *Davis*, 526 U.S. at 652.
- ³⁵ *Davis*, 526 U.S. at 860.
- ³⁶ *Virginia v. Black*, 538 U.S. 343, 359 (2003).
- ³⁷ *State v. Perkins*, 243 Wis. 2d 141 (2001) and Wisconsin Statutes 940.203(2)(c).
- ³⁸ The lead "true threats" case is *Watts v. United States*, 394 U.S. 705 (1969).
- ³⁹ *United States v. Morales*, 272 F. 3d 284 (5th Cir. 2001).
- ⁴⁰ *United States v. Sutcliffe*, 505 F. 3d 944 (9th Cir. 2007).
- ⁴¹ *Alkhabaz*, 104 F. 3d at 1496.
- ⁴² *United States v. Machado*, 195 F. 3d 454 (9th Cir. 1999). This case dealt with a last (failed) procedural challenge from Machado but includes some of the undisputed facts of the case and a case history. For further examples of online true threats, see *United States v. Quon* (Asian American student sent death threat email to Hispanic professors, employees, and students); *Maine v. Belanger* (student death threat e-mails to gay and lesbian students); and *Pennsylvania v. ALPHA HQ* (student website death threats to campus antihate organizer; also involved "real world" threats and harassment). See Bastiaan Vanacker, *Global Medium, Local Laws: Regulating Cross-border Cyberhate* (El Paso, TX: LFB Scholarly Publishing, 2009), 73-78.
- ⁴³ Crimes against Public Peace, Order, and Other Interests, Disorderly Conduct, 947 Wisconsin Statutes s. 1 (2001-12), <http://docs.legis.wisconsin.gov/statutes/statutes/947/01>.
- ⁴⁴ *State v. A.S.*, 243 Wis. 2d 173 (2001).
- ⁴⁵ See, e.g., *Terminiello v. Chicago*, 337 U.S. 1 (1949) and *Edwards v. Louisiana*, 372 U.S. 229 (1963).
- ⁴⁶ *Tinker v. Des Moines* 393 U.S. 503, 508-9 (1969).
- ⁴⁷ *Nelson v. Streeter*, 16 F. 3d 145, 150 (7th Cir. 1994).
- ⁴⁸ "Indiana University-Purdue University Indianapolis: Student Employee Found Guilty of 'Racial Harassment' for Reading a Book," <http://www.thefire.org/case/760.html>.
- ⁴⁹ See *McCauley*, 618 F. 3d at 18-31.
- ⁵⁰ The cyberspeech issue is especially problematic at the K-12 level. See Kenneth Pike, "Locating the Misplaced Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech," *Brigham Young University Law Review*, no. 3, article 9 (2008); Brannon Denning and Molly Taylor, "Morse v. Frederick and the Regulation of Student Cyberspeech," *Hastings Constitutional Law Quarterly* 35, no. 4 (Summer 2008): 835-96; and Joe Dryden, "It's a Matter of Life and Death: Judicial Support for School Authority over Off-Campus Student Cyber Bullying and Harassment," *University of La Verne Law Review* 33, no. 2 (May 2012): 171. Compare, e.g., *Emmett v. Kent School District* 92 F. Supp. 2d 1088 (W.D. Wa. 2000) (student Internet speech created off campus is "entirely outside of the school's supervision or control") with *Doniger v. Niehoff*, 527 F. 3d 41 (2d Cir. 2008) ("disruption" and "nexus" tests used to uphold restriction of off-campus speech).
- ⁵¹ *Corry*, No. 740309 S.C.S.C., at 18.
- ⁵² *Bair*, 280 F. Supp. 2d at 368.
- ⁵³ *UWM Post*, 774 F. Supp. at 1178.
- ⁵⁴ *Iota Xi*, 773 F. Supp. at 793.

- ⁵⁵ See, e.g., *Murakowski v. Delaware*, 575 F. Supp. 2d 571 (2008) (protects sexual web content). The lead online precedent is *Reno v. ACLU*, 521 U.S. 844 (1997) (federal Internet regulations).
- ⁵⁶ See, e.g., *Wu v. University of Connecticut*, H-89-649 PCD (D. Conn., January 25, 1990) (hate speech code settlement). For public housing cases, see *Lawson v. Housing Authority of Milwaukee*, 270 Wis. 269 (1955); and *Resident Action Council v. Seattle*, Supreme Court of Washington, No. 80006-5, January 3, 2008.
- ⁵⁷ *Tatro v. University of Minnesota*, No. A10-1440, June 12, 2012, <http://caselaw.findlaw.com/mn-supreme-court/1604002.html>, n. 6.
- ⁵⁸ For an attempt to defend a model dormitory speech policy, see Joshua S. Press, “Teachers, Leave Those Kids Alone? On Free Speech and Shouting Fiery Epithets in a Crowded Dormitory,” *Northwestern University Law Review* 102, no. 2 (2008), 987-1028.
- ⁵⁹ See, e.g., *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Watchtower Society v. Stratton*, 536 U.S. 150 (2002); and *Roberts v. Haragan*.
- ⁶⁰ *Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983).
- ⁶¹ *Chapman v. Thomas*, 743 F. 2d 1056, 1059 (4th Cir. 1984).
- ⁶² Cf. *Laysbuck v. Hermitage*, 650 F. 3d 205 (3rd Cir. 2011) (satirical MySpace profile) and *J.S. v. Blue Mountain*, 650 F. 3d 915 (3rd Cir. 2011) (satirical MySpace profile) with *Kowalski v. Berkeley*, 652 F. 3d 565 (4th Cir. 2011) (bullying case) and *D.J.M. v. Hannibal*, 647 F. 3d 754 (8th Cir. 2011) (true threat instant messages). There are some inconsistencies among federal judicial districts. See, e.g., Sarabyn, “Twenty-Sixth Amendment.”
- ⁶³ The four Facebook posts were: “Amanda Beth Tatro Gets to play, I mean dissect, Bernie today. Let’s see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I hide it in my sleeve.” “Amanda Beth Tatro Is looking forward to Monday’s embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar.” “Amanda Beth Tatro Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm . . . perhaps I will spend the evening updating my ‘Death List # 5’ and making friends with the crematory guy. I do know the code.” “Amanda Beth Tatro realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang out with when I need to gather my sanity? Bye, bye Bernie. Locket of hair in my pocket.”
- ⁶⁴ *Tatro v. University of Minnesota*, No. A10-1440, June 12, 2012, <http://caselaw.findlaw.com/mn-supreme-court/1604002.html>.
- ⁶⁵ *Tatro* cites two previous counseling cases to support its decision: *Ward v. Polite*, 667 F. 3d 727 (6th Cir. 2012) and *Keeton v. Anderson-Wiley*, 664 F. 3d 865 (11th Cir. 2011).
- ⁶⁶ *Murakowski*, 575 F. Supp. 2d at 590.
- ⁶⁷ *Murakowski*, 575 F. Supp. 2d at 592.
- ⁶⁸ *Frisby v. Schultz*, 487 U.S. 474 (1988).
- ⁶⁹ *Aguilar v. Avis Rent-a-Car*, 980 P. 2d 846 (Cal. 1999).
- ⁷⁰ *Martin v. Parish*, 805 F. 2d 583 (5th Cir. 1985).
- ⁷¹ *Rodriguez v. Maricopa County Community College Dist.*, 605 F. 3d. 703, 708 (9th Cir. 2010).
- ⁷² *Rodriguez*, 605 F. 3d. at 711.
- ⁷³ *Iota Xi*, 773 F. Supp. at 794, quoting *Berger v. Battaglia*, 779 F. 2d 992, 1001 (4th Cir. 1985).
- ⁷⁴ See, e.g., *College Republicans v. Reed*, 523 F. Supp. 2d 1005 (N.D. Ca. 2007) (state system civility policy); and *Bair v. Shippensburg University*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (student code of conduct).
- ⁷⁵ *College Republicans v. Reed*, 523 F. Supp. 1005, 1019 (N.D. Cal. 2007). The court added in the attending footnote, “The Court admires [civility]—and nothing in this opinion is intended to suggest that it is untoward for a university to want to cultivate an environment that encourages open-minded, thorough, respectful and reasoned exploration of and debate about important and sensitive questions. The issue presented by plaintiffs’ motion, however, is not what the Court admires, but what the First Amendment requires.”
- ⁷⁶ *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).
- ⁷⁷ Most recently, *Barnes v. Zaccari*, <http://thefire.org/article/15395.html>. The lead case for loss of qualified immunity is *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (Nixon aides case). Cases in which university officials have lost qualified immunity have involved students, faculty, and third parties. Student cases: *Schiff v. Williams*, 519 F. 2d 257 (5th Cir. 1975) (student newspaper); *Husain v. Springer*, 494 F. 3d 108 (2nd Cir. 2007) (student newspaper); *Sigal v. Moses*, 2008 U.S. Dist. LEXIS 95039 (S.D.N.Y. Nov. 21, 2008) (student elections); *Commissioned II Love*,

Savannah State Univ. Chapter v. Yarbrough, 621 F. Supp. 2d 1312 (S.D. Ga. 2007) (student association); *Mink v. Knox*, 2011 U.S. Dist. LEXIS 59380 (D. Colo. 2011) (satirical photo). Faculty cases: *Dube v. SUNY*, 900 F. 2d 587 (2d Cir. 1990) (in-class speech); *Levin v. Harleson*, 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in part* 966 F. 2d 85 (2d Cir. 1992) (extracurricular writings); *Silva v. University of New Hampshire*, 888 F. Supp. 293 (1994) (sexual harassment); *Burnham v. Ianni*, 119 F. 3d 668 (8th Cir. 1997) (photos removed); *Boober v. Board of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky., July 21, 1998) (matter of public concern); *Hall v. Kutztown*, 1998 U.S. Dist. LEXIS 138 (E.D. Pa., January 12, 1998) (matter of public concern). Third-party cases: *Giebel v. Sylvester*, 244 F. 3d 1182 (9th Cir. 2001) (handbills); *Putnam v. Keller*, 332 F. 3d 541 (8th Cir. 2003) (former instructor banned from campus); *Davis v. Stratton*, 575 F. Supp. 2d 410 (N.D.N.Y. 2008) (preacher removal).

⁷⁸ 42 U.S.C. § 1983.

⁷⁹ *Malley v. Brigg*, 475 U.S. 335, 341 (1986).

⁸⁰ See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234 (invited speaker); *UWM Post*; and *Board of Regents v. Southworth*, 529 U.S. 217 (2000) (segregated fee system funding student groups).

⁸¹ *Elrod v. Burns*, 427 U.S. 347 (1976).

⁸² The first “chilling effects” case was *Lamont v. Postmaster General*, 381 U.S. 301 (1965). Some relevant student speech cases include *Corry v. Stanford University*, Santa Clara Superior Court, No. 740309, February 27, 1995; *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004); and *McCauley v. University of the Virgin Islands*, 618 F. 3d 232 (2010).

⁸³ See Azhar Majeed, “Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators Who Violate Students’ Speech Rights,” *Cardozo Public Law, Policy and Ethics Journal* 8, no. 3 (2010), 515-576; and Majeed, “Defying the Constitution,” 81-82.