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About the Wiley A. Branton/ Howard Law Journal Symposium:



Each year, Howard University School of Law and the *Howard Law Journal* pay tribute to the life and legacy of our former dean, Wiley A. Branton. What began as a scholarship award ceremony for the first-year student who completed the year with the highest grade point average has grown into a day-long program that focuses on an area of legal significance inspired by Branton's career as a prominent civil rights activist and exceptional litigator. The Symposium is then memorialized in the *Journal's* spring issue following the Symposium. The expansive nature of Branton's work has allowed the *Journal* to span a wide range of topics throughout the years, and the *Journal* is honored to present this issue, President Obama's Legacy in the Courts: Executive Power and the Federal Judiciary, in recognition of the great Wiley A. Branton. Past Symposium issues include:

*Unfinished Work of the Civil Rights Act of 1964:
Shaping An Agenda for the Next 40 Years*

The Value of the Vote: The 1965 Voting Rights Act and Beyond

*What Is Black?: Perspectives on Coalition Building
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LETTER FROM THE EDITOR-IN-CHIEF

The third issue of the *Howard Law Journal* is dedicated to a symposium honoring the legacy of former Howard University School of Law Dean and notable civil rights leader, Wiley A. Branton. Each year, students, scholars, faculty, and staff, as well as family members and close friends of Wiley A. Branton, come together to engage in productive discourse about a topic that is plaguing our society today. The focus of our discussions is what we can do about these issues as both current and future legal practitioners and social engineers.

The fourteenth annual symposium held on October 13, 2017 was entitled, “Speaking Truth to Power: A New Age of First Amendment Rights?” Throughout history, protests have been held on the streets, through march, song, or even dance. But now, protests have evolved. The internet has given individuals, and even high-ranking elected officials, the ability to communicate their opinions with those of similar and opposing views, or to spread a digital movement. To understand these new challenges, the Symposium touched upon a range of topics including protest speech, media rights, and the current Administration. Many of our panelists have written pieces about the new age of First Amendment rights, and so they have been included here in our Fourteenth Annual Branton Symposium Issue.

Our first article, written by David L. Hudson, Jr., focuses on the effect of the *Hazelwood School District v. Kuhlmeier* decision on K-12 students and on students at the collegiate level. In particular, Hudson’s article, titled “Thirty years of *Hazelwood* and Its Spread to Colleges and University Campuses,” argues that standard established in *Hazelwood* has not only increased censorship of certain forms of school-sponsored student speech, but has also impacted First Amendment jurisprudence involving college and university campuses. In conclusion, Hudson contends that the *Hazelwood* standard should be applied sparingly, if at all, at the college and university level.

Next, Rachel Levinson-Waldman highlights issues arising from law enforcement’s use of social media in her article, “Government Access to and Manipulation of Social Media: Legal and Policy Changes.” Levinson-Waldman informs the reader of the legal framework that governs this social media use, and proposes ways that the First, Fourth, and Fourteenth Amendments can confine law enforcement’s unrestricted access to social media.

Carol Pauli, in her article, “‘Fake News,’ No News, and the Needs of Local Communities,” brings awareness to the lack of accurate information disseminated on the internet. She contends that the internet has become a



marketplace filed with unprocessed data and disinformation, hindering communities' ability to thrive. Pauli then gives a chilling warning to those who seek to track down the truth. She enlightens the reader that our movements are recorded, followed, measured, and compiled for the use of others, whom are largely unseen. As a result, she proposes two avenues to cement communities in factual information: control the data that is gathered by internet service providers to determine community needs, and delegate initiatives to report local news to community colleges.

The Branton Symposium Keynote speaker, Erwin Chemerinsky, then discusses a unique and new challenge universities face with student speech. In his Essay, "The Challenge of Free Speech on Campus," Dean Chemerinsky explains that, in the past, student speech was suppressed by school administrators. Now, outside speakers and outside disruptors, like antifa, are the suppressors. He gives numerous accounts of demonstrations held on college campuses, such as University of California, Berkeley, that began as an ordinary student protest, but ended in an unmanageable riot and violent event. This leads him to address a specific question: "why must campuses tolerate hate speech?"

Next, in "Interpreting Constitutional Provisions in Tandem," Kiel Brennan-Marquez examines the harmonization and relationship of Intra-Constitutional provisions, and questions what type of analytic relationship courts should strive for when analyzing rules, such as the First and Fourth Amendment, in unison. In his discussion, he provides two theories to Intra-Constitutional Harmonization and offers three principles courts can use when deciding between both theories.

The final three pieces are authored by members of the *Howard Law Journal*. In Danielle Hayes's article, "He Say, She Say: *Utah v. Strieff* and the Role of Narrative in Judicial Decisions," she analyzes the Supreme Court decision, *Utah v. Strieff*, and the role of narrative in judicial decisions. In particular, Hayes argues that the current narrative gives biased levels of deference to police officers when adjudicating whether to exclude unlawfully obtained evidence. As a result, numerous exceptions to the exclusionary rule have been created, which ultimately inhibits the rule's effectiveness and limits citizen's rights. She proposes that the Court adopt a race conscious perspective to create a more balanced judgment of officer-civilian interactions.

Thereafter, Kristopher Jiles adds to the First Amendment dialogue held at the Branton Symposium. In his article, "Trigger Fingers Turn to Twitter Fingers: The Evolution of the Tinker Standard and Its Impact on Cyberbullying Amongst Adolescents," Jiles discusses the seminal case, *Tinker v. Des Moines Independent Community School District*, and its limitations in the digital age of social media platforms such as Facebook and Twitter. Jiles argues that in light of complications imposed by cyberbullying, courts have adopted conflicting tests, that, in addition to *Tinker*, allow administrators to



extend their reach to off-campus matters. He concludes by explaining the appropriate test that should be adopted by the Supreme Court.

Lastly, Monique Curry, in her article “‘Get That Son of A ***** Off the Field’: Regulating Student-Athlete Protest Speech in Public University Sports Facilities,” explores the public forum doctrine as it applies to student-athlete speech in public university stadiums, arenas, and other areas for sport purposes. She argues that, while public university sport facilities are public spaces in which protest discourse is generally protected, student-athletes are not afforded similar protection because of their unique status, and participation as an athlete precludes them from exemplifying expressive conduct. Accordingly, Curry presents two alternatives to protect student-athlete speech and expression within university sport facilities.

In my final letter from the Editor-in-Chief, and on behalf of the entire *Howard Law Journal*, I sincerely thank you all for your support and readership. It has truly been an honor to serve as Editor-in-Chief for the past year. The scholarship, advocacy, and dialogue that have stemmed from this Volume have been both inspiring and insightful. The submissions by these authors represent compelling additions to the expansive discussion of one of our most fundamental rights and exemplifies the principles and attitudes that make our society so unique. It gives me great confidence that the *Howard Law Journal* will continue its legacy of excellence, will continue to be at the forefront of difficult conversations and will continue to produce exemplary and thought-provoking scholarly writing.

MATTHEW WELLINGTON BURNS
EDITOR-IN-CHIEF
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Thirty Years of *Hazelwood* and Its Spread to Colleges and University Campuses

DAVID L. HUDSON, JR.*

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I. INTRODUCTION: THE *HAZELWOOD* DECISION

Thirty years ago, the U.S. Supreme Court dramatically decreased the level of First Amendment protection for high school students in *Hazelwood School District. v. Kuhlmeier*.¹ The Court in *Hazelwood* created a new rule for so-called “school-sponsored” student speech, as opposed to student-initiated speech. This decision proved to be very deferential to school administrators and led to increased censorship across the country. The decision sparked an outcry that became

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



known as the anti-*Hazelwood* movement.² Numerous states passed laws that provided greater statutory protection for high school student journalists or other students than the limited constitutional protection the Supreme Court provided in *Hazelwood*.³

Sadly, the *Hazelwood* standard not only led to increased censorship of high school newspapers and other forms of school-sponsored student speech, but it also crept outside of its original application in the K-12 environment and impacted First Amendment jurisprudence involving college and university campuses.⁴ This metastasizing phenomenon has occurred in a variety of contexts, including college press censorship cases,⁵ curricular choices of university professors,⁶ professionalism standards,⁷ online speech disputes,⁸ and even professorial speech cases.⁹

The *Hazelwood* standard should be applied sparingly, if at all, at the college and university level. College and university students, nearly all of whom are legal adults, are learning in environments that are supposed to represent the marketplace of ideas. Universities are, as Erwin Chemerinsky and Howard Gillman explain, “spaces where all ideas can be expressed.”¹⁰

Unfortunately, some ideas are not accepted at public college and university campuses. Students are often shielded from ideas deemed offensive by trigger warnings or safe spaces. They sometimes are protected from speech that might cause a “microaggression.” Indeed, something different is happening at colleges and universities in recent years, as Greg Lukianoff and Jonathan Haidt expressed so vividly in

2. Elaina Koros, *A Catalyst for Reform: North Dakota's New Anti-Hazelwood Law Has Rebuilt a National Movement*, STUDENT PRESS L. CTR. (Aug. 24, 2015), <http://www.splc.org/article/2015/08/a-catalyst-for-reform>.

3. *Id.*

4. Vikram David Amar & Alan Brownstein, *A Close-up Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1946 (2017) (noting that “*Hazelwood* has a reach that in fact has extended to college campuses.”).

5. See Alan Brownstein, *The Nonforum As A First Amendment Category: Bringing Order Out Of The Chaos Of Free Speech Cases Involving School-Sponsored Activities*, 42 U.C. DAVIS L. REV. 717, 749 (2009).

6. *Id.* at 761–62.

7. See Neal H. Hutchens, *A Delicate Balance: Faculty Authority To Incorporate Professionalism Standards Into The Curriculum Versus College And University Students' First Amendment Rights*, 270 ED. LAW REP. 371, 371 (2011).

8. See *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 593 F.3d 286, 290 (3d Cir. 2011) (en banc).

9. *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); see, e.g., *Gorum v. Sessoms*, 561 F.3d 179, 182–86 (3d Cir. 2009).

10. ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 72 (2017).



their article “*The Coddling of the American Mind*.”¹¹ Part of this rising tide of censorship at college and university campuses can be attributed to the growing use of the *Hazelwood* standard in a variety of contexts. This Article first examines K-12 student speech law before *Hazelwood* and then discusses the *Hazelwood* decision. Next, the article focuses on the spread of *Hazelwood* and its deferential standard to the college and university level. This section examines cases from five different areas where the standard has been utilized with increasing frequency. Finally, the Article offers a few concluding thoughts on the *Hazelwood* standard and why it should be limited, if not interred.

A. Student (K-12) Speech Before *Hazelwood*

K-12 students possessed a greater degree of free speech rights under the First Amendment before the *Hazelwood* decision. While students possessed little to no free speech rights for the nineteenth century and a good portion of the twentieth century, the U.S. Supreme Court changed the equation in the seminal flag-salute decision *West Virginia Bd. of Educ. v. Barnette*, issued on Flag Day in 1943.¹²

Marie and Gathie Barnette attended Slip Hill Grade School near Charleston, West Virginia.¹³ They and their father were Jehovah Witnesses and did not believe in saluting the flag, considering it a graven image.¹⁴ They ended up facing expulsion for exercising their religious freedom. “Our teacher was very understanding,” Marie Snodgrass (formerly Barnette) recalled in 2009.¹⁵ “However, the principal was sterner. He wanted to know why we wouldn’t do what the other kids were doing. He was a little less kind.”¹⁶

The legal outcome looked bleak for the sisters, as the Supreme Court had upheld a flag salute law only a few years previously.¹⁷ That decision had tragically contributed to a wave of violence perpetrated

11. Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, THE ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>.

12. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 644 (1943).

13. David L. Hudson Jr., *Woman in Barnette Reflects on Flag Salute Case*, NEWSEUM INSTITUTE (Apr. 29, 2009), <http://www.newseuminstitute.org/2009/04/29/woman-in-barnette-reflects-on-flag-salute-case/>.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940).



against Jehovah Witnesses across the country.¹⁸ However, the Supreme Court was looking for a case to rectify its mistake, and found such a case in *Barnette*. The Court declared that public school officials violated the First Amendment by forcing students to salute the flag and recite the Pledge of Allegiance.¹⁹ In celebrated language, Justice Robert Jackson wrote:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.²⁰

That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.²¹

The *Barnette* decision ensured that public school students possess some level of First Amendment free speech rights in the public schools. However, there was some confusion over whether the decision rested on the Free Exercise Clause or the Free Speech Clause. Furthermore, the Supreme Court did not establish a legal test to determine when student speech should be protected.²²

In 1969, the Court finally articulated a test for student speech in a celebrated decision, *Tinker v. Des Moines Independent Community School District*²³ that has roots in the Civil Rights and anti-war movements. The case involved a group of students from Des Moines, Iowa, who sought ways to express their opposition to the Vietnam War, support Robert Kennedy's Christmas truce, and mourn those who had died in the conflict.²⁴ John Tinker, Mary Beth Tinker, Christopher

18. Garret Epps, *America's New Lesson in Tolerance*, THE ATLANTIC (Sept. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/09/americas-new-lesson-in-tolerance/498404/>.

19. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

20. *Id.*

21. *Id.* at 637.

22. DAVID L. HUDSON, JR., LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREEDOM OF EXPRESSION IN AMERICAN SCHOOLS 45 (2011) ("The uncertainties of *Barnette* meant that school officials and students did not know the precise contours of First Amendment rights in schools.").

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

24. Davis L. Hudson, Jr., *On 30-Year Anniversary, Tinker Participants Look Back at Landmark Case*, NEWSEUM INST. (Feb. 24, 1999), <http://www.newseuminstitute.org/1999/02/24/on-30-year-anniversary-tinker-participants-look-back-at-landmark-case/>.

Eckhardt, and a few other students chose black armbands as their symbol of protest.²⁵

School officials quickly learned of the impending protest and passed a no-armband rule.²⁶ Tellingly, school officials selectively targeted the black armbands, allowing students to wear other symbols, such as Iron Crosses and political campaign buttons.²⁷ Thus, school officials engaged in what is known in First Amendment doctrine as viewpoint discrimination. They selectively targeted a specific symbol associated with a specific viewpoint.²⁸

After they were suspended from school, the Tinkers and Eckhardt sued in federal court.²⁹ They lost in the lower courts but took the fight all the way to the Supreme Court and achieved redemption before the High Court by a 7-2 vote.³⁰ The Court ruled that the students had a First Amendment right to wear black peace armbands to their school.³¹ The Court proclaimed that students do not “shed their constitutional rights to freedom of speech or expression at the school-house gates.”³² The Court also established a relatively speech-protective test in *Tinker* – that school officials can censor student speech only if the officials can reasonably forecast that the speech will cause a substantial disruption of school activities or invades the rights of others.³³

The *Tinker* decision showed a remarkable degree of respect for student rights.³⁴ Much of the opinion reads like a paean to student expression and a denunciation of official school censorship.³⁵ The Court wrote that “schools are not enclaves of totalitarianism”³⁶ and “students may not be regarded as closed-circuit recipients of only that

25. *Id.*

26. *Tinker*, 393 U.S. at 504.

27. *Id.* at 510; see also HUDSON, *supra* note 22, at 59–60.

28. David L. Hudson, Jr., *School Officials Should Remember Lessons of Tinker*, NEWSEUM INSTITUTE (Nov. 23, 2009), <http://www.newseuminstitute.org/2009/11/23/school-officials-should-remember-lessons-of-tinker/>.

29. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 972 (S.D. Iowa 1966).

30. *Tinker*, 393 U.S. at 503, 514.

31. *Id.* at 513–14.

32. *Id.* at 506.

33. *Id.* at 508, 514.

34. Stuart L. Leviton, *Is Anyone Listening to Our Students? A Plea for Respect and Inclusion*, 21 FLA. ST. L. REV. 35, 41 (1993).

35. David L. Hudson, Jr., *Black Armbands, “Boobies” Bracelets and the Need to Protect Student Speech*, 81 UMKC L. REV. 595, 596 (2013); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gate*, 48 DRAKE L. REV. 527, 527 (2000).

36. *Tinker*, 393 U.S. at 511.



which the State chooses to communicate.”³⁷ The decision led to a litany of challenges to dress codes, hair regulations, censorship of student publications, and a variety of other challenges.³⁸

B. The *Hazelwood* Decision

A more conservative Supreme Court created exceptions to the *Tinker* standard in the 1980s, beginning by carving out a new rule for student speech that was vulgar and lewd. A student named Matthew Fraser was suspended after delivering a speech nominating another student for elective office.³⁹ The problem for school officials was that his speech was laced with sexual references.⁴⁰ The Court explained in *Bethel Sch. Dist. v. Fraser* that students’ free expression rights “must be balanced against society’s countervailing interests in teaching students the boundaries of socially appropriate behavior.”⁴¹ The Court also explained that students, as minors, don’t have the same constitutional rights as adults.⁴²

That ruling set the stage for the Court’s next foray into student speech and another carve-out to the *Tinker* standard. Students at Hazelwood East High School produced a newspaper called *The Spectrum* as part of their journalism class.⁴³ They had an advisor who generally supported their efforts.⁴⁴ However, that advisor left in the spring semester to take a job in the private industry.⁴⁵ A new advisor took over, one who was not as familiar with the process.⁴⁶ The students submitted copies of the articles for the spring edition to the new advisor.⁴⁷ Two of the articles dealt with teen pregnancy and the impact of divorce upon teens.⁴⁸

The advisor showed the articles to the school principal, Robert Reynolds, who objected to the two articles.⁴⁹ Reynolds believed that

37. *Id.*

38. See generally HUDSON, *supra* note 22, at 69 (noting that the decision in *Tinker* brought forward a number of student-speech related issues).

39. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 678 (1986).

40. *Id.* at 678–79.

41. *Id.* at 681.

42. *Id.* at 682.

43. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988).

44. See generally *id.* at 263–64 (noting that the advisor made issue primarily with the identity of the individuals of the reported in the subjected articles).

45. *Id.* at 263.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*



the pregnancy article did not shield the identity of the pregnant student quoted.⁵⁰ He also felt that the article's references to sexual activity and birth control were unsuitable for some younger students.⁵¹ The censorial justification for this article was dubious. The pregnant students had consented to interviews, gave their names, and were, of course, pregnant.⁵² The journalism students had even changed the pregnant students' names in the actual article.⁵³

Reynolds also objected to the divorce article, opining that the article did not afford the parent of a student quoted a chance to respond to comments the student made about the parent.⁵⁴ The article in question quoted a freshman student who said, "my dad wasn't spending enough time with my mom, my sister and I. He was always out of town on business or out late playing cards with the guys."⁵⁵

"It wasn't the topic, and it wasn't the point of view," Reynolds said. "It was the invasion of privacy and lack of balanced view."⁵⁶ The copy of the article that Reynolds had read featured the real name of the student whose father was identified.⁵⁷ He thought the father should have a chance to respond to the article. However, the student editors already had replaced the student's name with a pseudonym.⁵⁸

Reynolds ordered two pages deleted from the six-page paper.⁵⁹ Three female student editors – Cathy Kuhlmeier, Lee Ann Tippett West, and Leslie Smart – objected to the decision and filed suit in federal district court.⁶⁰

The district court ruled in favor of school officials after a bench trial.⁶¹ At trial, the students introduced evidence that, since 1976, the newspaper had covered a range of topics including articles on teenage

50. *Id.*

51. *Id.*

52. Bari Sue Kenyon, *Drawing the Line on Student Rights: Censorship Has No Place in High School*, N.Y. TIMES (Feb. 21, 1988), <http://www.nytimes.com/1988/02/21/nyregion/long-island-opinion-drawing-line-student-rights-censorship-has-no-place-high.html>.

53. *Hazelwood*, 484 U.S. at 263.

54. *Id.*

55. *Id.*

56. Michael D. Sorkin & Tom Uhlenbrock, *Educators Elated; Not so Students*, ST. LOUIS POST-DISPATCH, Jan. 14, 1988, at 8A.

57. *Id.*

58. William H. Freivogel, *Supreme Court's Rulings Limit Rights of Students*, ST. LOUIS POST-DISPATCH, Jan. 17, 1988, at 8C.

59. *Id.*

60. David G. Savage, *Justice OK Censorship by Schools: Say Educators Can Control Content of Pupil Publications*, L.A. TIMES (Jan. 14, 1988), http://articles.latimes.com/1988-01-14/news/mn-36120_1_high-school-students.

61. *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1450 (E.D. Mo. 1985).

dating, the impact of television on kids, students' use of drugs and alcohol, race relations, teenage marriage, the death penalty, a desegregation case in St. Louis, teenage pregnancy, religious cults, the military draft, school busing, and student Fourth Amendment rights.⁶²

While the student newspaper covered a range of topics, the district court viewed the newspaper more as a learning opportunity in a controlled environment rather than a public forum in which students could write topics freely without editorial control.⁶³ The court explained that “the *Spectrum* was an integral part of Hazelwood East’s curriculum, as opposed to a public forum for free expression by students.”⁶⁴ The district court added that “the most telling facts are the nature and extent of the Journalism II teacher’s control and final authority with respect to almost every aspect of producing *Spectrum*, as well as the control or pre-publication review exercised by Hazelwood officials in the past.”⁶⁵ The district court reasoned that school officials could censor a school-sponsored publication as long as the school had a “substantial and reasonable basis.”⁶⁶

The U.S. Court of Appeals for the Eighth Circuit reversed, finding that the *Spectrum* was not part of the school curriculum and instead was operated as a “conduit for student viewpoint.”⁶⁷ The appeals court reasoned that school officials could not censor the student articles unless school officials could show that the articles would cause a substantial disruption of school activities or would invade the rights of others.⁶⁸

The Eighth Circuit addressed whether the two articles in question invaded the rights of others.⁶⁹ It reasoned that student speech invades the rights of others only when such expression could expose the school to tort liability.⁷⁰ The appeals court found that there could be no tort action over the divorce article because the story did not use the quoted students’ real names.⁷¹ The only possible tort action available with the pregnancy article would have been invasion of privacy. However, this tort was not possible because the pregnant students freely

62. *Id.* at 1453.

63. *Id.* at 1465–66.

64. *Id.* at 1465.

65. *Id.* at 1465–66.

66. *Id.* at 1463 (quoting *Frasca v. Andrews*, 463 F. Supp. 1053, 1052 (E.D.N.Y. 1979)).

67. *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1372 (8th Cir. 1986).

68. *Id.* at 1374.

69. *Id.*

70. *Id.* at 1376.

71. *Id.*



consented to the interviews and the students did not even identify them by their real names.⁷²

The Eighth Circuit also noted that the *Spectrum* was distributed not only to students and the school community, but to the public as well.⁷³ The appeals court concluded that the *Spectrum* was a public forum and there was no evidence that the articles could reasonably have caused a substantial disruption.⁷⁴ Thus, the students prevailed.

On further appeal, the Supreme Court reversed in a 5-3 decision.⁷⁵ Justice Byron White wrote the opinion for the majority.⁷⁶ White focused on whether the student newspaper was a public forum open to indiscriminate use by the public or whether it was a “supervised learning experience for journalism students.”⁷⁷ He opined that the newspaper was created as part of journalism class and there was no intent on the part of school officials to relinquish control over its content.⁷⁸

Kuhlmeier and the other plaintiffs argued that the Supreme Court should apply the *Tinker* “substantial disruption” standard.⁷⁹ Presumably, she would have prevailed easily under this standard, as there appeared to be no showing remotely close to a finding of disruption, much less a substantial disruption.

The school district advanced the curriculum argument, that it had greater control over this type of student speech because the newspaper was part of the curriculum.⁸⁰ “The real issue in this case is that the school paper produced as part of a class was a matter of the school curriculum,” said attorney Robert P. Baine, who argued the case for the school district.⁸¹ “Ultimately, the board of education determined curricular content. The school can require a student newspaper to be reflective of good journalism standards.”⁸²

72. *Id.* at 1376.

73. *Id.* at 1372.

74. *Id.* at 1378.

75. There were only eight justices at the time, as Justice Anthony Kennedy was not appointed until Feb. 1988.

76. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988).

77. *Id.* at 270.

78. *Id.*

79. *Id.* at 265.

80. *Id.* at 268.

81. David L. Hudson, Jr., *Cathy Cowan Reflects on Her High School Journalism Fight in Hazelwood case*, NEWSEUM INST. (Dec. 27, 2001), <http://www.newseuminstitute.org/2001/12/27/cathy-cowan-reflects-on-her-high-school-journalism-fight-in-hazelwood-case/>.

82. *Id.*



The majority framed the issue in a way that many lower courts have recited: “the question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school district to promote particular student speech.”⁸³ The majority referred to the student newspaper and other school-sponsored publications as school-sponsored speech.⁸⁴ Such speech, wrote Justice White, was speech that “students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”⁸⁵

The Court created a new rule for school-sponsored student speech, as opposed to student-initiated speech under *Tinker*. Under this rule, school officials could censor school-sponsored student speech “so long as their actions are reasonably related to legitimate pedagogical concerns.”⁸⁶ The Court’s standard for school-sponsored speech was remarkably similar to a standard the Court had articulated one year earlier in a prison censorship case, *Turner v. Safley*.⁸⁷ The standard in the *Safley* case was that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”⁸⁸ Thus, the Court seemingly substituted the word “pedagogical” for “penological.”⁸⁹

This “legitimate pedagogical concerns” standard was very broad. The majority provided numerous examples, including censoring student articles that were “ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.”⁹⁰ The Court also noted that school officials could prohibit school-sponsored student speech that advocated illegal drug or alcohol usage, irresponsible sex, or other inappropriate behavior.⁹¹ The majority also determined that school officials could reasonably censor school-sponsored student speech that “associate[d] the

83. *Hazelwood*, 484 U.S. at 270–71.

84. *Id.* at 271.

85. *Id.*

86. *Id.* at 273.

87. *Turner v. Safley*, 482 U.S. 78, 87, 91 (1987).

88. *Id.* at 89.

89. DAVID L. HUDSON, JR., LET THE STUDENTS SPEAK: A HISTORY OF THE FIGHT FOR FREE EXPRESSION IN AMERICAN SCHOOLS 99 (Christopher Finan ed., 2011).

90. *Hazelwood*, 484 U.S. at 271.

91. *Id.* at 272.

school with any position other than neutrality on matters of political controversy.”⁹²

Applying this broad standard, the majority determined that Principal Reynolds acted reasonably in removing the two articles.⁹³ It found that his concerns about students identifying the pregnant student quoted were reasonable, as were his fears that the article was not “sufficiently sensitive to the privacy interests” of the pregnant students’ boyfriends and family members.⁹⁴ The majority also determined that Principal Reynolds acted reasonably with regard to the divorce article, as the article contained very critical comments about the father of one of the students quoted in the story.⁹⁵ Reynolds believed that in the interest of “journalistic fairness” the parent should have had the opportunity to respond – a concern shared by the majority.⁹⁶ The majority concluded that Reynolds did not act unreasonably.⁹⁷

Justice William Brennan – joined by Justices Thurgood Marshall and Harry Blackmun – wrote a fiery dissent. He criticized the majority’s creation of a new category for school-sponsored student speech and instead would have evaluated the case under the familiar *Tinker* standard.⁹⁸ He accused the majority of sanctioning “blanket censorship authority.”⁹⁹

He noted that Principal Reynolds never consulted the students before censoring their articles.¹⁰⁰ He also warned that the majority’s deferential standard would allow school officials the ability to “camouflage viewpoint discrimination as the ‘mere’ protection of students from sensitive topics.”¹⁰¹ Brennan accused Principal Reynolds of “brutal censorship”¹⁰² and criticized the Court for teaching the wrong civics lesson.¹⁰³

Administrators praised the Court’s decision. “The authority of boards of education was being threatened if this case had been

92. *Id.*

93. *Id.* at 276.

94. *Id.* at 274.

95. *Id.* at 275.

96. *Id.*

97. *Id.* at 275–76.

98. *Id.* at 277 (Brennan, J., dissenting).

99. *Id.* at 280.

100. *Id.* at 285.

101. *Id.* at 288.

102. *Id.* at 289.

103. *Id.* at 277, 291.

lost,”¹⁰⁴ said Francis Hess, superintendent of the Hazelwood School District. “It’s a victory for our authority to control our own curriculum.”¹⁰⁵

C. Anti-Hazelwood Movement

Criticism abounded of the Court’s decision in *Hazelwood*. Journalism Professor Sherry Richiardi told the *St. Louis Post Dispatch*: “we’ve removed the First Amendment from our high schools. It will have an incredibly chilling effect.”¹⁰⁶ The *Los Angeles Times* editorialized that the Supreme Court majority taught “censorship as a lesson.”¹⁰⁷ *New York Times* reporter Fred M. Hechinger proved prescient when he wrote before oral argument in *Hazelwood* that the Court’s decision “could have a lasting effect on student journalism and young people’s views about freedom of the press and responsibility.”¹⁰⁸ High school editor Kim Jenkins wrote that she was “enraged” by the Court’s decision.¹⁰⁹ She said student journalists lost opportunities to learn and instead would be subject to the whims of school administrators.¹¹⁰

Some states responded with laws – called anti-*Hazelwood* laws – that provided greater statutory protection to student journalists or all students than the Supreme Court did in *Hazelwood*.¹¹¹ Most of the state laws required school officials to meet the *Tinker* standard of substantial disruption before censoring students. For example, Massachusetts’ law provides:

The right of students to freedom of expression in the public schools shall not be abridged, provided that such right shall not cause any disruption or disorder within the school. Freedom of expression shall include without limitation, the rights and responsibilities of students, collectively and individually, (a) to express their views

104. Sorkin & Uhlenbrock, *supra* note 56, at A1.

105. *Id.*

106. *Id.*

107. *Censorship as a Lesson*, L.A. TIMES (Jan. 16, 1988), http://articles.latimes.com/1988-01-16/local/me-9100_1_supreme-court.

108. Fred M. Hechinger, *Limits on Student Press*, N.Y. TIMES (Oct. 20, 1987), <http://www.nytimes.com/1987/10/20/science/about-education-limits-on-student-press.html>.

109. Kim Jenkins, *First Amendment: Is It Just for Adults?*, N.Y. TIMES (Jan. 31, 1988), <http://www.nytimes.com/1988/01/31/nyregion/new-jersey-opinion-first-amendment-is-it-just-for-adults.html>.

110. *Id.*

111. Mike Hiestand, *Understanding “Anti-Hazelwood” Laws*, NAT’L SCHOLASTIC PRESS ASS’N, <http://studentpress.org/nspa/its-the-law-understanding-anti-hazelwood-laws/> (last visited Feb. 10, 2017).



through speech and symbols, (b) to write, publish and disseminate their views, (c) to assemble peaceably on school property for the purpose of expressing their opinions. Any assembly planned by students during regularly scheduled school hours shall be held only at a time and place approved in advance by the school principal or his designee.¹¹²

Iowa – the state home to the famous *Tinker* case – adopted an anti-*Hazelwood* statute that went into effect July 1, 1989.¹¹³ Its legislative sponsor, Sen. Richard Varn, said that “students can’t learn about fundamental rights and freedoms unless they are allowed to use those rights.”¹¹⁴ Mark Goodman, the longtime director of the Student Press Law Center, said that anti-*Hazelwood* laws were necessary because “an increasing number of school officials are taking advantage of the Supreme Court’s broad language [in *Hazelwood*] and censoring student viewpoints simply because they disagree with them.”¹¹⁵

While the passage of anti-*Hazelwood* laws is a laudable effort, the reality is that those states represent a distinct minority. Most states do not have such a statute.¹¹⁶ The climate at many high schools around the country is one where censorship prevails. Free speech expert Greg Lukianoff writes that “high school newspapers have been punished, censored, or shut down on a fairly regular basis” for such innocuous things such as articles on abstinence, tattoos, abortion, and gay marriage.¹¹⁷ High school officials regularly censor articles “for reasons ranging from harmony, to patriotism, to convenience.”¹¹⁸ Law professor Catherine J. Ross similarly concludes that “*Hazelwood* almost always functions as the equivalent of a ‘get out of jail free’ card for administrators.”¹¹⁹

112. ADMINISTRATION OF THE GOVERNMENT, PUBLIC SECONDARY SCHOOLS; RIGHTS OF STUDENTS TO FREEDOM OF EXPRESSION; LIMITATIONS, Definitions, ch. 71 § 82 (2017).

113. Brian Schraum, *Iowa Supreme Court Lets Adviser’s ‘Anti-Hazelwood’ Victory Stand*, STUDENT PRESS L. CTR. (Jan. 23, 2012), <http://www.splc.org/blog/splc/2012/01/iowa-supreme-court-lets-advisers-anti-hazelwood-victory-stand>.

114. Nat Hentoff, *In Iowa, Free Speech for Students*, WASH. POST, Aug. 28, 1989, at A13.

115. Fred M. Hechinger, *About Education: How free should high school student papers be?*, N.Y. TIMES, July 5, 1989, at B7.

116. *The First Amendment in Schools: Resource Guide: Student Publications*, NAT’L COAL AGAINST CENSORSHIP, <http://ncac.org/resource/the-first-amendment-in-schools-resource-guide-student-publications> (last visited Jan. 17, 2018).

117. GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF CAMPUS DEBATE 16–17 (2012).

118. *Id.* at 17.

119. CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS’ FIRST AMENDMENT RIGHTS 52 (2015).



The *Hazelwood* standard is far too deferential to school officials. Even worse, some school officials “exploit the construct of school sponsorship to roll students’ rights further back than the Supreme Court had envisioned.”¹²⁰ For example, the *Hazelwood* standard has been used to justify censorship of student speech that clearly does not bear the imprimatur of the school.¹²¹

II. EXPANSION OF *HAZELWOOD* TO THE COLLEGE AND UNIVERSITY LEVEL

The Supreme Court in *Hazelwood* was not completely silent on whether its decision applied to school-sponsored speech on college and university campuses. In a footnote, the Court simply stated that it was not deciding that issue: “We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”¹²²

However, lower courts have not been reluctant to apply *Hazelwood* to limit school-sponsored expression on college and university campuses. These courts cite and rely on *Hazelwood* for the following points from the ill-fated decision:

Universities have greater control over school-sponsored speech or speech that bears the imprimatur of the school;¹²³

Universities have greater control over student speech that occurs in the curriculum than purely student-initiated speech;¹²⁴

Universities can regulate school-sponsored speech if their justification is reasonably related to a legitimate pedagogical concern.¹²⁵

The application of *Hazelwood* to college and university students is troubling. After all, the vast majority of college and university students are legal adults, at eighteen years of age or older. They have the right to vote via the Twenty-Sixth Amendment.¹²⁶ This amendment, as scholar Kelly Sarabyn writes, “ensured that students . . . had First

120. *Id.* at 96.

121. *Id.*

122. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

123. *Id.* at 270–71.

124. *Id.* at 271.

125. *Id.* at 273.

126. See Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students’ First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 29 (2008) (arguing that the Twenty-Sixth Amendment should lead to the abrogation of less than full First Amendment should end “the childhood abrogation of constitutional rights” for college and university students).

Amendment rights in the university forum and were therefore participants in, rather than recipients of, the marketplace of ideas.”¹²⁷ Furthermore, “the pedagogical missions of public universities and public elementary and high schools are undeniably different.”¹²⁸ Colleges and universities are the ideal marketplaces of ideas where First Amendment freedoms ideally should flourish.¹²⁹ Furthermore, the Supreme Court has declared that college and university campuses should have the full protections of the First Amendment, writing: “the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”¹³⁰

The First Amendment ideal does not match the reality of the situation. The reality is that college and university students face many threats to their free speech rights.¹³¹

A. College Press Censorship

It did not take long for college administrators to view the *Hazelwood* decision as a recipe for censoring student newspapers. Less than 24 hours after the *Hazelwood* decision, the California State University system began studying how the decision could be applied to college and university newspapers.¹³² At California State Los Angeles, the independent publisher of the college newspaper was designated “laboratory supervisor.”¹³³ The genesis of the change was not only the *Hazelwood* decision but a feeling among university officials that there was too much “negative news” coming from the student newspaper.¹³⁴

The U.S. Court of Appeals for the Seventh Circuit sent a shockwave through the First Amendment community when it extended the *Hazelwood* standard to uphold the censorship of a college

127. *Id.* at 86.

128. *McCauley v. Univ. of V.I.*, 618 F.3d 232, 243 (3d Cir. 2010).

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

130. *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 671 (1973) (“The First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech.”); *see also Healy v. James*, 408 U.S. 169, 180 (1972).

131. Robert Shibley, *Current Threats to Free Speech on Campus*, 14 *FIRST AMEND. L. REV.* 239 (2016).

132. Joan Zyda, *Campus Censorship Made Easy: Cal State L.A. Adapts Missouri High School Ruling*, *L.A. TIMES*, Apr. 9, 1988, at A8.

133. *Id.*

134. *Id.*

newspaper in *Hosty v. Carter*.¹³⁵ Margaret Hosty, a student at Governors State University, wrote articles in the school newspaper, *The Innovator*, criticizing the Dean of the College of Arts and Science.¹³⁶ University officials accused the college newspaper staff of irresponsible journalism and defamation.¹³⁷

Patricia Carter, the Dean of Student Affairs and Services, called the printers of the newspaper and told them not to print any more issues.¹³⁸ In essence, university officials shut down a college newspaper because they did not like its critical articles. Hosty and other staff members of the paper sued in federal court, alleging a violation of their First Amendment rights.¹³⁹

The federal district court judge dismissed a few defendants outright or on qualified immunity grounds, but refused to deny the claims against others, including Carter.¹⁴⁰ The district court reasoned that the college newspaper was a public forum and that, as a state university newspaper, it was entitled to traditional free press protections.¹⁴¹ The federal district court did not cite the *Hazelwood* decision in its opinion.

Carter moved for an interlocutory appeal on the denial of qualified immunity.¹⁴² A three-judge panel of the Seventh Circuit affirmed.¹⁴³ The panel reasoned that *Hazelwood* was “inappropriate for a university setting.”¹⁴⁴ Carter then petitioned for *en banc* review.¹⁴⁵

The full panel of the Seventh Circuit reversed.¹⁴⁶ Writing for the majority, Judge Frank Easterbrook determined that “*Hazelwood* provides our starting point.”¹⁴⁷ According to Easterbrook, *Hazelwood* supplied the proper framework by asking whether the newspaper was a public or nonpublic forum.¹⁴⁸ He also noted that other circuits had

135. *Hosty v. Carter*, 412 F.3d 731, 738 (7th Cir. 2005).

136. *Id.* at 732–33.

137. *Id.* at 733.

138. *Id.*

139. *Id.*

140. *Id.* at 738.

141. *Hosty v. Governors State Univ.*, 174 F. Supp. 2d 782, 787 (N.D. Ill. 2001).

142. *Hosty v. Carter*, 325 F.3d 945, 947 (7th Cir. 2003).

143. *Id.* at 950.

144. *Id.* at 949.

145. *Id.* at 945.

146. *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005).

147. *Id.* at 734.

148. *Id.* at 735–36.



applied the *Hazelwood* standard when addressing curricular speech at the university level.¹⁴⁹

The Seventh Circuit did not determine the public forum status of the *Innovator*, but noted that the law was not clearly established and granted Carter qualified immunity.¹⁵⁰ Legal commentators excoriated the decision as a devastating blow against college press freedom.¹⁵¹

The *Hosty* decision sparked an outcry among student free press advocates. It muddied the waters for college journalists.¹⁵² Illinois soon passed the College Campus Press Act, which enhanced protections for college and university-level journalists.¹⁵³ To this day, the Student Press Law Center (SPLC) and others have battled against extending *Hazelwood* to college and university campuses.¹⁵⁴ The SPLC's "New Voices" campaign has led to rulings that have prohibited the application of the *Hazelwood* standard to college and university journalists, if not also high school journalists.¹⁵⁵

As the SPLC and other free press advocates recognize, student journalists provide a key news outlet for the public; they often uncover corruption and do other vitally important work.¹⁵⁶ The American Bar Association recently recognized this reality, and its House of Delegates passed a resolution that calls for rigorous protections for student journalists at the secondary and post-secondary levels.¹⁵⁷

149. *Id.* at 735.

150. *Id.* at 739.

151. Chris Sanders, Comment, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159, 172 (2006) ("If Hazelwood arrives on college campuses, it is difficult to see a stopping point for the wreckage it could leave in its wake."); Samantha Harris, *FIRE Policy Statement on "Hosty v. Carter,"* FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Sept. 19, 2005), <http://www.thefire.org/fire-policy-statement-on-hosty-v-carter/>.

152. Jessica B. Lyons, Note, *Defining Freedom of the College Press After Hosty v. Carter*, 59 VAND. L. REV. 1771, 1786 (2006).

153. Meg McSherry Breslin, *Student-press freedom act OK'd*, CHICAGO TRIB. (June 8, 2007), http://articles.chicagotribune.com/2007-06-08/news/0706070826_1_student-journalists-college-journalists-student-paper; Luke Sheahan, *Illinois State Legislature Passes Student Press Bill*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (June 8, 2007), <https://www.thefire.org/illinois-state-legislature-passes-student-press-bill/>.

154. See Kaitlin DeWulf, *Maryland and Illinois Join Nationwide Anti-Censorship Movement by Filing New Voices Bills*, STUDENT PRESS L. CTR. (Feb. 11, 2016), <http://www.splc.org/article/2016/02/maryland-and-illinois-new-voices-bills>.

155. *Id.*

156. Tyler J. Buller, *The State Response to Hazelwood v. Kuhlmeier*, 66 ME L. REV. 91, 91–92 (2013) ("Student reporters uncover corruption, help hold government officials accountable to taxpayers and the public, and bring to light important issues that would otherwise go unreported.").

157. Adam Goldstein, *American Bar Association Calls for Protections for Student Media*, THE TORCH (Aug. 17, 2017), <https://www.thefire.org/american-bar-association-calls-for-protections-for-student-media/>.

B. Class Assignments and Curricular Speech

Many courts have applied the *Hazelwood* standard to class assignments or curricular speech.¹⁵⁸ The U.S. Court of Appeals for the Sixth Circuit applied *Hazelwood* in evaluating whether a university comported with the First Amendment when it expelled a graduate student for speaking out against counseling gay and lesbian patients.¹⁵⁹ Julia Ward, who had a 3.91 grade point average, ran afoul of officials in the counseling program at Eastern Michigan University because she asked her faculty supervisor to assign her to another patient when she was originally asked to counsel a gay client, citing her religious beliefs.¹⁶⁰

The Sixth Circuit applied the *Hazelwood* standard, noting that the standard applies regardless of the age of the student.¹⁶¹ “The key word is student,” the panel wrote.¹⁶² “*Hazelwood* respects the latitude educational institutions – at any level – must have to further legitimate curricular objectives.”¹⁶³ The appeals court emphasized another reason why *Hazelwood* applies at all levels of schooling – that it matters whose speech it.¹⁶⁴ “The closer expression comes to school-sponsored speech, the less likely the First Amendment protects it.”¹⁶⁵

In Ward’s case, the Sixth Circuit reinstated her claim, even after applying the deferential *Hazelwood* standard, because no professor ever told Ward that she could not refuse to see particular clients.¹⁶⁶ The appeals court noted that the university had on occasion allowed students some say over which clients they counseled.¹⁶⁷ The panel also wrote that a reasonable juror could find evidence of “religious-speech discrimination” from the way officials treated Ward.¹⁶⁸

While the result in *Ward* was palatable, as there appeared to be evidence of bias against religious speech, the Sixth Circuit’s extension

158. See Emily Gold Waldman, *University Imprimatur on Student Speech: The Certification Cases*, 11 FIRST AMEND. L. REV. 382, 394 (2013) (“Although some have stopped short of saying that *Hazelwood* applies to all school-sponsored speech in the university setting, there is growing consensus that *Hazelwood*’s ‘reasonably related to legitimate pedagogical concerns’ standard should at least apply to university students’ curricular speech.”).

159. *Ward v. Polite*, 667 F.3d 727, 729–32 (6th Cir. 2012).

160. *Id.* at 730.

161. *Id.* at 733.

162. *Id.*

163. *Id.*

164. *Id.* at 734.

165. *Ward v. Polite*, 667 F.3d 727, 734 (6th Cir. 2012).

166. *Id.* at 736.

167. *Id.*

168. *Id.* at 737.



of *Hazelwood* was troubling. As legal commentator Will Creeley cogently explains: “the Sixth Circuit’s opinion in *Ward* . . . treat[s] legal precedent involving the rights of high school students and college students as though they were effectively interchangeable and of equal applicability in evaluating the merit of *Ward*’s First Amendment claim.”¹⁶⁹

Even more recently, the U.S. Court of Appeals for the Tenth Circuit applied the *Hazelwood* logic to a University of New Mexico graduate student who was expelled from a class after making critical comments of the 1985 film *Desert Hearts* in a writing assignment.¹⁷⁰ The student had received A or A minus grades on her other papers but received no grade when she wrote in a paper that “lesbianism is a very death-like state as far as its inability to reproduce naturally” and that “the only signs of potency in the form of the male cock exist in the emasculated body” of a female character.¹⁷¹

The student was forced out of the class after the professor accused her of hate speech and said it was not in the student’s best interest to return to class.¹⁷² The student eventually sued in state court, but the defendants removed to federal court.¹⁷³ A federal district court granted summary judgment to the defendants on qualified immunity grounds.¹⁷⁴ On appeal, a two-judge panel of the Tenth Circuit unanimously affirmed.¹⁷⁵

The Tenth Circuit relied extensively on *Hazelwood*, citing the deferential standard and numerous passages from the case.¹⁷⁶ The appeals court characterized the student’s speech as school-sponsored, recited the deferential *Hazelwood* standard, and surmised that *Hazelwood* sanctioned viewpoint-based decisions about school-sponsored student speech.¹⁷⁷

The appeals court reasoned that *Hazelwood* arguably applied with even more force at the college level, because “the need for aca-

169. Will Creeley, *Sixth Circuit Relies on High School Cases to Assess Graduate Student’s Rights*, THE TORCH (Feb. 10, 2012), <https://www.thefire.org/sixth-circuit-relies-on-high-school-cases-to-assess-graduate-students-rights/>.

170. *Pompeo v. Bd. of Regents of the Univ. of N.M.*, 852 F.3d 973, 977, 982 (10th Cir. 2017).

171. *Id.* at 978.

172. *Id.* at 979.

173. *Id.* at 981.

174. *Id.*

175. *Id.* at 973, 977. There were only two judges, because Judge Neil Gorsuch, who originally was on the panel, was elevated to the U.S. Supreme Court.

176. *Pompeo v. Bd. of Regents of the Univ. of N.M.*, 852 F.3d 973, 977, 982 (10th Cir. 2017).

177. *Id.* at 982–83.



ademic discipline and editorial rigor increases as a student's learning progresses."¹⁷⁸ The appeals court acknowledged that "certain forms of viewpoint discrimination are undoubtedly contrary to [the educational ideal]," but said its precedent did not prohibit educators from censoring student speech "based on viewpoints that they believe are offensive or inflammatory."¹⁷⁹ The student argued that she should not be punished because she offered a viewpoint contrary to the professor's or used words that university officials did not like.¹⁸⁰ The appeals court ended up deferring to university officials lest it "turn every classroom into a courtroom."¹⁸¹

In another case, a federal district court in Ohio rejected the First Amendment claim of a student in Ohio University's College of Education.¹⁸² The school's credential review board removed the student after several professors complained the student did not get along well or work well with others and criticized youth literature as "trash" or "garbage."¹⁸³

The federal district court relied on the *Hazelwood* case for two main points. First, it quoted *Hazelwood's* language that "a school need not tolerate student speech that is inconsistent with its basic educational mission."¹⁸⁴ Second, and more importantly, the court applied the *Hazelwood* rational basis test to find that the college of education had a legitimate pedagogical reason to remove the student, because teachers must possess the ability to communicate with others and be respectful of students.¹⁸⁵

Another variant of the class assignment line of cases arises when a student challenges a professor's regulation of her speech in a class assignment. A federal district court in Texas addressed a college student's First Amendment claim that her professor discriminated against her by refusing to allow her to speak about the topic of abortion for her public speaking assignment.¹⁸⁶ The federal district court relied extensively on *Hazelwood* and found that the professor had le-

178. *Id.* at 984 (quoting *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002)).

179. *Id.* at 986.

180. *See id.* at 977.

181. *Id.* at 989–90 (quoting *Fleming v. Jefferson Cty. Sch. Dist. R-I*, 298 F.3d 918, 928 (10th Cir. 2002)). The *Fleming* case involved high school speech.

182. *Winkle v. Ruggieri*, 2013 WL 230136, No. 2:12-CV-01079, at *1 (S.D. Ohio, Jan. 22, 2013).

183. *Id.* at *1.

184. *Id.* at *4 (quoting *Hazelwood*, 484 U.S. at 266).

185. *Id.* at *5.

186. *O'Neal v. Falcon*, 668 F. Supp. 2d 979, 981–82 (W.D. Tex. 2009).

gitimate pedagogical concerns with limiting students from speaking about the divisive topic of abortion, which may have distracted students.¹⁸⁷

The student sued her political science professor at San Antonio College after he gave her a grade of B minus instead of an A.¹⁸⁸ She contended that he gave her the low grade because she wanted to speak on the topic of abortion.¹⁸⁹ The district court applied the *Hazelwood* standard without ever questioning whether the standard should apply to college and university students instead of high school students.¹⁹⁰

At least one legal commentator has questioned whether courts should apply *Hazelwood* with unfailing obeisance to student classroom speech.¹⁹¹ The commentator explains that *Hazelwood* was principally about giving school officials greater control over school-sponsored student speech, but that certain student classroom speech carries no concerns of being interpreted as school-sponsored.¹⁹²

Graduate students' challenges to university denial of their thesis papers or similar curricular disputes also have raised the specter of the deferential *Hazelwood* standard. The U.S. Court of Appeals for the Ninth Circuit ruled that the *Hazelwood* standard allowed officials at the University of California, Santa Barbara to deny part of a student's thesis and not file his thesis in the school library.¹⁹³

Christopher Brown, who was a graduate student in the Department of Material Science, wrote a thesis entitled "The Morphology of Calcium Carbonate: Factors Affecting Crystal Shape."¹⁹⁴ Brown's reviewing committee members all approved of his thesis.¹⁹⁵ However, Brown then inserted into his thesis a "Disacknowledgements" section that began: "I would like to offer special Fuck You's to the following

187. *Id.* at 986–87.

188. *Id.* at 981.

189. *See id.* at 982–83.

190. *Id.* at 985.

191. Adam Hoising, *School Sponsorship and Hazelwood's Protection of Student Speech: Appropriate for all Curriculum Contexts?*, NEB. L. REV. (July 24, 2012), <https://lawreview.unl.edu/white-paper-%E2%80%9Cschool-sponsorship%E2%80%9D-and-hazelwood%E2%80%99s-protection-student-speech-appropriate-all>.

192. *Id.* ("Lower federal courts have routinely applied *Hazelwood's* scope of First Amendment protection when students select, discuss, or present a particular topic as part of curriculum that allows students to freely and sovereignly choose their substantive topic of desire. *Hazelwood's* adoption, however, is inappropriate in this context.")

193. *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002).

194. *Id.* at 943.

195. *Id.*

degenerates for being an ever-present hindrance during my graduate career.”¹⁹⁶

Department officials would not approve of the “Disacknowledgments” section and would not file Brown’s thesis with the library, though they did eventually give him his degree.¹⁹⁷ Brown pursued grievance remedies unsuccessfully and later filed suit in federal court.¹⁹⁸ A federal district court granted summary judgment to university officials.¹⁹⁹ On appeal, the Ninth Circuit affirmed by a 2-1 vote with three separate opinions.²⁰⁰

Judge Susan Graber wrote the main opinion.²⁰¹ She grappled at length with whether the *Hazelwood* standard applied at the college and university level.²⁰² Her opinion acknowledged that the Supreme Court had left the question open in *Hazelwood* and admitted it did not “know with certainty” that the Supreme Court would hold that *Hazelwood* controls such inquiries into a college student’s curricular expression.²⁰³ Judge Graber reasoned that *Hazelwood* did apply: “In view of a university’s strong interest in setting the content of its curriculum and teaching that content, *Hazelwood* provides a workable standard for evaluating a university student’s First Amendment claim stemming from curricular speech.”²⁰⁴

The Ninth Circuit majority applied the deferential *Hazelwood* standard and found that university officials had a legitimate pedagogical concern with Brown’s thesis — to teach him “the proper format for a scientific paper.”²⁰⁵ Brown claimed that he had a First Amendment right to draft an acknowledgements or “disacknowledgements” section from any viewpoint.²⁰⁶ The Ninth Circuit majority disagreed, noting that *Hazelwood* establishes that university officials or professors “may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with the student disagrees, so long as the requirement serves a legitimate pedagogical purpose.”²⁰⁷

196. *Id.*

197. *Id.* at 954.

198. *Id.* at 945–46.

199. *Brown v. Li*, 308 F.3d 939, 945–946 (9th Cir. 2002).

200. *Id.* at 939, 941.

201. *Id.* at 941.

202. *See id.* at 949.

203. *Id.* at 951.

204. *Id.* at 952.

205. *Brown v. Li*, 308 F.3d 939, 952 (9th Cir. 2002).

206. *Id.* at 953.

207. *Id.* at 953.

In a concurring opinion, Judge Warren Ferguson saw no First Amendment problem at all.²⁰⁸ He viewed Brown's act of inserting his disacknowledgements section as a form of cheating not protected by the First Amendment: "The plaintiff cannot cheat and then seek to evade accountability through the First Amendment."²⁰⁹

Judge Stephen Reinhardt dissented on the First Amendment issue.²¹⁰ He wrote that the *Hazelwood* standard is "wholly inappropriate" and "would seriously undermine the rights of all college and graduate students attending state institutions of higher learning."²¹¹ He later wrote that he "vehemently disagree[d]" with the decision to import the *Hazelwood* standard into the university context.²¹² Reinhardt explained that the *Hazelwood* decision limited high school students who were "young, emotionally immature, and more likely to be inappropriately influenced by school-sponsored speech on controversial topics."²¹³ Reinhardt also pointed out that college and university students, as adults, are given greater rights, such as the right to vote, join the military, purchase cigarettes, and marry.²¹⁴

C. Professionalism Concerns

Several recent federal appellate courts have applied the *Hazelwood* standard to uphold college and university restrictions over students' alleged failure to adhere to professionalism standards.²¹⁵ Jennifer Keeton, a Masters student in counseling, ran afoul of officials at Augusta State University because she expressed her displeasure in class and in written assignments with the "gay and lesbian lifestyle."²¹⁶ Officials expressed concern that Keeton would not be able to serve as a good counselor to people from various backgrounds and required her to undergo a remediation plan.²¹⁷

Keeton withdrew from the program and sued, alleging a violation of her free speech and free exercise rights under the First Amend-

208. *See id.* at 955 (Ferguson, J., concurring).

209. *Id.* at 956.

210. *See id.* at 956–57 (Reinhardt, J., dissenting).

211. *Brown v. Li*, 308 F.3d 939, 957 (9th Cir. 2002).

212. *Id.* at 960.

213. *Id.* at 961.

214. *Id.* at 961.

215. Susan Kruth, *Ninth Circuit Cites 'Professional Standards' in Allowing University to Punish Student Speech*, THE FIRE (Dec. 30, 2015), at <https://www.thefire.org/ninth-circuit-cites-professional-standards-in-allowing-university-to-punish-student-speech/>.

216. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 873 (11th Cir. 2011).

217. *Id.* at 867.



ment.²¹⁸ A federal district court denied her injunctive relief, and the U.S. Court of Appeals for the Eleventh Circuit affirmed.²¹⁹

The appeals court accepted the college officials' arguments that it could impose the remediation condition on Keeton, because she did not adhere to the American Counselors Association (ACA) Code of Ethics, which required counselors to respect all patients' dignity and show sensitivity.²²⁰ The Eleventh Circuit relied heavily on *Hazelwood*, finding that the clinical practicum was a school-sponsored activity within the meaning of *Hazelwood*.²²¹ Furthermore, the course was part of the curriculum to which school officials are owed special deference.²²²

The appeals court then applied the *Hazelwood* standard, finding that the university "had a legitimate pedagogical concern in teaching its students to comply with the ACA Code of Ethics."²²³ The remediation plan targeted these concerns by trying to ensure that Keeton would be able to counsel patients while still adhering to the ACA Code of Ethics.

This represents, as student press advocate Frank LoMonte has forcefully shown, "a breathtaking expansion of the *Hazelwood* doctrine."²²⁴ The professionalism argument is dangerous from a First Amendment perspective. As free speech expert Mary-Rose Papandrea explains, "professionalism arguments have an elastic character and threaten to encompass virtually any decision a school might make."²²⁵

The Ninth Circuit has created a different standard for evaluating a university's action against a student for violating professionalism norms in *Oyama v. University of Hawaii*.²²⁶ The Ninth Circuit determined that a university could withhold a student teaching application if the concerns were directly related to professionalism standards and were narrowly tailored.²²⁷

218. *Id.* at 871.

219. *Id.* at 865.

220. *Id.* at 869, 880.

221. *Id.* at 875.

222. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 875–876 (11th Cir. 2011).

223. *Id.* at 876.

224. Frank LoMonte, "The Key Word is Student": *Hazelwood* Censorship Crashes the Ivy-Covered Gates, 11 FIRST AMEND. L. REV. 305, 340 (2011).

225. Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1858 (2017).

226. *Oyama v. Univ. of Hawaii*, 813 F.3d 850, 875–76 (9th Cir. 2015).

227. *Id.* at 868.

Even though it formulated a different standard, the Ninth Circuit still found *Hazelwood* and student speech doctrine instructive in two ways. First, student speech law recognizes “an institutional rationale for a school’s decision to regulate its student speech.”²²⁸ Second, and more significantly, *Hazelwood* establishes “a school’s interest in managing how it “lend[s] its name or its ‘imprimatur’ to student expression.”²²⁹

However, the Ninth Circuit refused to fully apply *Hazelwood* – as Judge Garber had done in *Brown v. Li* – because it “fails to account for the vital importance of academic freedom at public colleges and universities.”²³⁰ Furthermore, the Ninth Circuit in *Oyama* aptly noted that certification decisions by universities involve adults, not high school students.²³¹

While the Ninth Circuit laudably did not apply the *Hazelwood* standard with full force, the decision still had an influence on the appeals court’s deference to university officials and remains a “deeply regrettable result for students who think critically and wish to speak openly about professional rules and laws that affect their future professions — and for the generations of students who could benefit from these frank discussions.”²³²

D. Online Speech

Some courts have used the *Hazelwood* standard to uphold college and university discipline of students for online speech. The U.S. Court of Appeals for the Eighth Circuit ruled that school officials at Central Lakes College could remove a student from its associated nursing degree program for inappropriate Facebook posts.²³³

Craig Keefe made several posts on Facebook that alarmed a classmate.²³⁴ Some of these posts included the following statements:

Glad group projects are group projects. I give her a big fat F for changing the group power point at eleven last night and resubmitting. Not enough whiskey to control that anger.

228. *Id.* at 862.

229. *Id.* (quoting *Hazelwood*, 484 U.S. at 271–72).

230. *Oyama v. Univ. of Hawaii*, 813 F.3d 850, 863 (9th Cir. 2015).

231. *Id.* at 863.

232. *Kruth*, *supra* note 215.

233. *Keefe v. Adams*, 840 F.3d 523, 529 (8th Cir. 2016).

234. *Id.* at 526.



Doesnt anyone know or have heard of mechanical pencils. Im going to take this electric pencil sharpener in this class and give someone a hemopneumothorax with it before to long. I might need some anger management.

LMAO [a classmate], you keep reporting my post and get me banded. I don't really care. If thats the smartest thing you can come up with than I completely understand why your going to fail out of the RN program you stupid bitch. . . .And quite creeping on my page. Your not a friend of mine for a reason. If you don't like what I have to say than don't come and ask me, thats basically what creeping is isn't it. Stay off my page²³⁵

Keefe said that many of the posts were jokes, but college officials removed Keefe from the nursing program for not adhering to professionalism standards.²³⁶ He was cited for “transgression of professional boundaries.”²³⁷

Keefe contended that college officials violated his First Amendment free speech rights by removing him from the program for online speech created off-campus that was not related to any assignment or coursework.²³⁸ Citing the *Hazelwood* decision, the Eighth Circuit explained that “college administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, ‘so long as their actions are reasonably related to legitimate pedagogical concerns.’”²³⁹

The Eighth Circuit reasoned that the college had a legitimate educational concern in ensuring that its nursing students comply with the Nurses Association Code of Ethics.²⁴⁰ “As our sister circuits have recognized, a college or university may have an even stronger interest in the content of its curriculum and imposing academic discipline than did the high school at issue in *Hazelwood*.”²⁴¹ The appeals court also noted that two of Keefe’s classmates indicated they had problems with his posts and would have trouble sharing clinical space with Keefe.²⁴²

The *Keefe* decision is disturbing not only for allowing college administrators to rely on broad notions of professionalism but also be-

235. *Id.* at 526–27.

236. *Id.* at 527.

237. *Keefe v. Adams*, 840 F.3d 523, 527–28 (8th Cir. 2016).

238. *Id.* at 529.

239. *Id.* at 531 (citing *Hazelwood*, 484 U.S. at 273).

240. *Id.*

241. *Keefe v. Adams*, 840 F.3d 523, 531 (8th Cir. 2016).

242. *Id.* at 532.



cause it allows colleges and universities to punish students for speech they make anywhere at any time.²⁴³ As the Cato Institute explained in an *amicus curiae* brief to the Supreme Court, “If he was speaking at the wrong place and time when he was at home after school, there will never be a proper place and time for him to speak.”²⁴⁴

The *Keefe* decision also does not square with the Supreme Court’s decision in *Papish v. Board of Curators of University of Missouri*.²⁴⁵ In that decision, graduate student Barbara Papish was disciplined for distributing an independent newspaper on campus that depicted a police officer raping the Statue of Liberty and the Goddess of Justice.²⁴⁶ Another article in the newspaper contained a headline “M----- F----- Acquitted.”²⁴⁷ The school attempted to expel Papish for “indecent conduct or speech.”²⁴⁸ The Supreme Court explained that “the mere dissemination of ideas - no matter how offensive to good taste - on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”²⁴⁹ The Cato Institute explains that the Supreme Court’s holding in *Papish* “must apply equally when speech is being shut off in the name of professionalism rather than of decency.”²⁵⁰

Some commentators have called for a stronger standard than *Hazelwood*’s remarkably deferential “reasonably related to legitimate pedagogical standards” review. A pair of scholars have argued that “college officials must demonstrate a ‘directly related’ application to the pedagogical interest in order to limit student speech.”²⁵¹

E. Professorial Speech

Most courts apply a line of Supreme Court cases dealing with public employees when examining the free speech claims of college

243. *Id.* at 531.

244. Amicus Brief of Cato Institute, Electronic Frontier Foundation, National Coalition Against Censorship, and Student Press Law Center in Support of Petitioner, at p. 8, *Keefe v. Adams*, 840 F.3d 523, 527–28 (8th Cir. 2016) (No. 16-1035).

245. *Papish v. Bd. of Curators of Univ. of Missouri*, 410 U.S. 667, 670 (1973).

246. *Id.* at 667–68.

247. *Id.*

248. *Id.* at 668.

249. *Id.* at 670.

250. Amicus Brief, *supra* note 244, at 9.

251. Jeffrey C. Sun & Neal H. Hutchens, *College Students’ Online Speech: Searching for the Appropriate Standards within First Amendment Case Principles*, 2014 CARDOZO L. REV. DE NOVO 129, 136 (2014).



and university faculty.²⁵² Under this rubric, the initial question is one posed by *Garcetti v. Ceballos*— was the public employee speaking as an employee pursuant to official job duties or was the instructor speaking more as a private citizen.²⁵³ If the employee was speaking as a citizen, then courts ask whether the employee spoke on a matter of public concern or whether the speech was merely a private grievance.²⁵⁴ If the speech touches on a matter of public concern, then the courts balance the employee’s free speech rights against the employer’s efficiency interests.²⁵⁵

However, some federal courts have applied the *Hazelwood* standard to limit speech by college and university professors. The U.S. Court of Appeals for the Eleventh Circuit used the *Hazelwood* standard in determining whether university officials violated the First Amendment rights of an education professor when they prevented him from interjecting his religious beliefs into the classroom.²⁵⁶ The professor had argued that the university classroom was a public forum in which there were enhanced free speech rights.²⁵⁷ The Eleventh Circuit rejected that assertion, quoting a long passage from *Hazelwood* stating that school facilities become a public forum only when school officials by policy or practice open the facilities up for indiscriminate use.²⁵⁸ The appeals court concluded that Dr. Bishop’s classroom was not a public forum for First Amendment purposes.²⁵⁹

The Eleventh Circuit then determined that the *Hazelwood* standard provided the appropriate framework for resolving Dr. Bishop’s First Amendment claim.²⁶⁰ The appeals court recognized that the case involved high school students, but “adopt[ed] the Court’s reasoning [in *Hazelwood*] as suitable to our ends, even at the university level.”²⁶¹

252. These include *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

253. *Garcetti*, 547 U.S. at 421; Two circuits – the 4th and the 9th – do not apply *Garcetti* in the university setting because of academic freedom concerns.

254. *Id.* at 421.

255. *Pickering*, 391 U.S. at 568 (“The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”).

256. *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991).

257. *Id.*

258. *Id.* at 1071 (quoting *Hazelwood*, 484 U.S. at 267).

259. *Id.*

260. *Id.*

261. *Id.* at 1074.



While paying deference to the concept of academic freedom, the appeals court determined that the university's restrictions on Dr. Bishop's religious proselytizing during classroom hours were reasonable.²⁶² The appeals court determined that "the University's interests in the classroom conduct of its professors are sufficient, in the balance we have suggested, to warrant the reasonable restrictions it has imposed on Dr. Bishop."²⁶³

The U.S. Court of Appeals for the Tenth Circuit likewise used the *Hazelwood* standard to reject the First Amendment lawsuit of a junior college professor fired for allegedly making inappropriate comments in class.²⁶⁴ Stuart R. Vanderhurst taught in the college's veterinary school program, including classes in clinical pathology, anaesthetic nursing, radiology, and veterinary medical nursing.²⁶⁵ Vanderhurst allegedly made sexual references and other inappropriate comments in some of his classes.²⁶⁶ For example, he referenced the presence of tampons in sewer plants when discussing animal parasites, referred to anal and oral sex in a lecture on the transmission of parasites, and used the terms "floaters" and "sinkers" to discuss feces.²⁶⁷

University officials ultimately terminated Vanderhurst for several reasons, including using offensive language and engaging in offensive conduct in class.²⁶⁸ Vanderhurst pursued administrative remedies to no avail and then sued in state court.²⁶⁹ The case was removed to federal district court and eventually proceeded to a jury.²⁷⁰ The jury determined that college officials violated Vanderhurst's First Amendment rights and awarded more than \$557, 000 in damages.²⁷¹

The college officials moved for the district court to grant a Rule 50 motion granting a judgment notwithstanding the verdict.²⁷² The district court denied the motion.²⁷³ On appeal, the Tenth Circuit affirmed in part because attorneys for the defendants waived the argument that there were legitimate pedagogical reasons for terminating

262. Bishop v. Aronov, 926 F.2d 1066, 1078 (11th Cir. 1991).

263. *Id.*

264. Vanderhurst v. Colorado Mountain Coll. Dist., 208 F.3d 908, 914 (10th Cir. 2000).

265. *Id.* at 911.

266. *Id.*

267. *Id.*

268. *Id.* at 912.

269. *Id.*

270. *Id.*

271. *Id.* at 918.

272. *Id.*

273. *Id.* at 915.



the professor.²⁷⁴ However, the Tenth Circuit stated that the appropriate test to determine whether college officials violated the First Amendment was the *Hazelwood* test – whether the professor’s termination was reasonably related to legitimate pedagogical concerns.²⁷⁵

Interestingly, attorneys on both sides agreed that the *Hazelwood* standard was the appropriate standard to use.²⁷⁶ The Tenth Circuit assumed that the *Hazelwood* standard should apply, though it acknowledged that its use of the standard may not be definitive.²⁷⁷ While the procedural nature of the decision may explain the Tenth Circuit’s use of *Hazelwood*, such use of the standard by another appellate court creates damaging precedent.

III. CONCLUSION

Hazelwood was an unfortunate decision that deprived high school journalists of their First Amendment rights and sanctioned what Justice Brennan accurately called “brutal censorship.”²⁷⁸ It led to a wave of administrative censorship of high school student journalists and a lowering of free speech protection for virtually all K-12 students. The Court in *Hazelwood* created a legal standard that applied to not only school newspapers, but also to other forms of school-sponsored speech. The decision created a gaping exception to the more speech-protective standard the Court had articulated in *Tinker*. The decision should be overruled. If not overruled, more states need to pass anti-*Hazelwood* laws that limit its impact in particular states. These statutes have had a positive impact.²⁷⁹

Even worse, the *Hazelwood* standard has metastasized onto college and university campuses, impacting a wide variety of students and even professors in different capacities. The Supreme Court wrote more than seventy years ago: “Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.”²⁸⁰

274. *Id.*

275. *Id.* at 914.

276. *Id.* at 915.

277. *Id.*

278. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 289 (1988) (Brennan, J., dissenting).

279. Buller, *supra* note 156, at 93.

280. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

Thirty Years of Hazelwood

College and university students are simply not similarly situated to high school students. Universities are adult forums where students are meant to be exposed to a variety of viewpoints.²⁸¹ The *Hazelwood* standard is inappropriate for college and university campuses, which are supposed to be bastions of learning and liberty for adults. *Hazelwood* was a decision based on the different mission of the high school setting and, in part, the age of high school students. It should have very limited application on college campuses.

281. Sarabyn, *supra* note 126, at 87.





Government Access to and Manipulation of Social Media: Legal and Policy Challenges

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INTRODUCTION

Technology is transforming the practice of policing and intelligence. In addition to the proliferation of overt surveillance technologies, such as body cameras and license plate readers, there is a revolution playing out online where domestic law enforcement agencies are using social media to monitor individual targets and build profiles of networks of connected individuals. Social media is fertile

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ground for information collection and analysis. Facebook boasts over two billion active users per month; its subsidiary Instagram has 800 million monthly users; and Twitter weighs in at 330 million monthly active users, including nearly a quarter of all U.S. citizens.¹ It is thus no surprise that in a 2016 survey of over 500 domestic law enforcement agencies, three-quarters reported that they use social media to solicit tips on crime, and nearly the same number use it to monitor public sentiment and gather intelligence for investigations.² Another sixty percent have contacted social media companies to obtain evidence to use in a criminal case.³

While these new capabilities may have value for law enforcement, they also pose novel legal and policy dilemmas.⁴ On the privacy front, government surveillance was once limited by practical considerations like the time and financial cost associated with monitoring people.⁵ As surveillance technology grows ever more sophisticated, however, the quantity of data and ease of accessibility grows as well, lowering the bureaucratic barriers to privacy intrusions and creating opportunities for near-frictionless surveillance that the Founders could not have envisioned. And in an era when people use social media sites “to engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought,’”⁶ studies indicating that online surveillance produces a chilling effect and thus may suppress protected speech, association, and religious and political activity are of particular concern.⁷

1. Dan Noyes, *The Top 20 Valuable Facebook Statistics — Updated February 2018*, ZEPHORIA DIG. MKTG., <https://zephoria.com/top-15-valuable-facebook-statistics/> (last visited Mar. 9, 2018); Rob Mathison, *23+ Useful Instagram Statistics for Social Media Marketers*, HOOTSUITE BLOG (Jan. 24, 2018), <https://blog.hootsuite.com/instagram-statistics/>; Salman Aslam, *Twitter by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE (Jan. 1, 2018), <https://www.omnicoreagency.com/twitter-statistics/>; Kit Smith, *44 Incredible and Interesting Twitter Statistics*, BRANDWATCH BLOG (Dec. 17, 2017), <https://www.brandwatch.com/blog/44-twitter-stats-2016/>.

2. KIDEUK KIM, ET AL., URBAN INST., *2016 LAW ENFORCEMENT USE OF SOCIAL MEDIA SURVEY 3* (2017), <http://www.theiacp.org/Portals/0/documents/pdfs/2016-law-enforcement-use-of-social-media-survey.pdf>.

3. *Id.* at 5.

4. See generally Alexandra Mateescu et al., *Social Media Surveillance and Law Enforcement*, DATA & SOCIETY (Oct. 27, 2015), http://www.datacivilrights.org/pubs/2015-1027/Social_Media_Surveillance_and_Law_Enforcement.pdf.

5. See generally Harry Surden, *Structural Rights in Privacy*, 60 SMU L. REV. 1605 (2007), <http://ssrn.com/abstract=1004675>.

6. *Packingham v. North Carolina*, No. 15-1194, slip op. at 5 (U.S. June 19, 2017) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997) (internal quotation marks omitted)).

7. See generally Nafeez Ahmed, “Chilling Effect” of Mass Surveillance Is Silencing Dissent Online, *Study Says*, VICE: MOTHERBOARD (Mar. 17, 2016, 6:00 AM), <http://motherboard.vice.com/read/chilling-effect-of-mass-surveillance-is-silencing-dissent-online-study-says>; Jason Leo-



Moreover, much as with other types of surveillance technologies, social media monitoring appears likely to disproportionately affect communities of color. Youth of color are particular targets, with the most high-profile examples arising in the context of gang surveillance, raising concerns that already over-policed communities will bear the brunt of its intrusion.⁸ These tools are likely to pose even more difficult questions in an era of live video streaming, a popular tool that police have used to gather information and also manipulated to control users' access to their friends and contacts.⁹

This essay highlights issues arising from law enforcement's use of social media for a range of purposes; analyzes the legal framework that governs its use; and proposes basic principles to govern law enforcement's access to social media in order to ensure transparency and safeguard individuals' rights to privacy, freedom of expression, and freedom of association.

I. LAW ENFORCEMENT MONITORING OF PUBLICLY AVAILABLE SOCIAL MEDIA

As social media plays an increasingly prominent role in individuals' social interactions, political involvement, and economic transactions, it becomes an increasingly attractive target for law enforcement scrutiny as well. While tools for social media analysis run the gamut from straightforward to sophisticated, and with companies developing ever more creative ways to mine the data embedded in social media communications, law enforcement surveillance of social media can be

pold, *How the Government Monitored Twitter During Baltimore's Freddie Gray Protests*, VICE (May 18, 2016, 8:00 PM), <https://www.vice.com/read/riot-police-v23n3>.

8. See generally Ben Popper, *How the NYPD Is Using Social Media to Put Harlem Teens Behind Bars*, THE VERGE (Dec. 10, 2014, 1:15 PM), <http://www.theverge.com/2014/12/10/7341077/nypd-harlem-crews-social-media-rikers-prison>.

9. See Lehigh University, *Live-Streaming Crime: How Will Facebook Live and Periscope Challenge US Privacy Law?*, SCI. DAILY (Aug. 3, 2016), <http://www.sciencedaily.com/releases/2016/08/160803140150.htm>. In August 2016, police requested that Facebook cut off the account of a woman who was live-streaming her hostage negotiations; they subsequently killed her during a shoot-out. See *Baltimore County Woman Killed in Police Standoff Tried to Live Stream Incident*, KTLA5 (Aug. 3, 2016, 12:25 PM), <http://ktla.com/2016/08/03/baltimore-county-woman-killed-in-police-standoff-tried-to-live-stream-incident/>. The police said they made the request because her friends were encouraging her to resist law enforcement and were making it difficult to negotiate; her friends say the police requested the account takedown simply to cut her off from family and community support. *Id.*; Rachel Weiner & Lynh Bui, *Korryn Gaines, Killed By Police in Standoff, Posted Parts of Encounter On Social Media*, WASH. POST (Aug. 2, 2016), https://www.washingtonpost.com/local/public-safety/maryland-woman-shot-by-police-in-standoff-posted-part-of-encounter-on-social-media/2016/08/02/d4650ee6-58cc-11e6-831d-0324760ca856_story.html?utm_term=.552347d39c78.



divided into three broad categories: (1) following or watching online an identified individual, group of individuals, or affiliation (e.g., an online hashtag); (2) using an informant, a friend of the target, or an undercover account to obtain information; and (3) using analytical software to generate data about individuals, groups, associations, or locations. In addition, law enforcement officers can go directly to the social media platforms themselves to request information, from basic subscriber information to metadata to the content of messages. Each platform has various mechanisms to handle these direct requests and levels of legal process that are required; the more private the data, the more robust the legal protections.¹⁰

A. Following Individuals, Groups, or Affiliations

1. Technology and Case Studies

Perhaps the simplest way of learning more about a target or group of individuals online is to follow them on public social media platforms, either individually or by hashtag. On both Twitter and Instagram, for instance, even without an account, it is possible to view any information about a person with a public account via a direct profile link or a search engine.¹¹ It is feasible to find someone in a similar way on Facebook, although Facebook's privacy settings tend to be somewhat more restrictive than Twitter's, meaning that viewing an individual's public profile is likely to yield less information (though still a significant amount).¹² Messaging and social media services such as

10. See generally *Information for Law Enforcement Authorities*, FACEBOOK, <https://www.facebook.com/safety/groups/law/guidelines/> (last visited Jan. 16, 2018); *Information for Law Enforcement*, INSTAGRAM, <https://help.instagram.com/494561080557017> (last visited Jan. 16, 2018); *Guidelines for Law Enforcement*, TWITTER, <https://support.twitter.com/articles/41949#7> (last visited Jan. 16, 2018); *Twitter Privacy Policy*, TWITTER, <https://twitter.com/privacy?lang=en> (last visited Jan. 16, 2018); *Snapchat Law Enforcement Guide*, SNAPCHAT (Oct. 11, 2016), https://www.snapchat.com/static_files/lawenforcement.pdf (last visited Jan. 16, 2018).

11. A February 2015 survey about Instagram found that forty-three percent of Instagram users have their accounts set to private, meaning that even someone with an account will be unable to view those users' photos unless they accept a friend request. See Melchior Schöller, *10 Surprising Instagram Stats*, LINKEDIN SLIDESHARE (Mar. 31, 2015), <https://www.slideshare.net/melkischoller/10-surprising-instagram-facts>. While up-to-date numbers on Twitter are not available, studies suggest that a substantial majority of Twitter postings are public. One study estimated that only about ten to fifteen percent of tweets made in 2009 and 2010 were unavailable because the accounts were private. See Alexis Madrigal, *How Twitter Has Changed Over the Years in 12 Charts*, THE ATLANTIC (Mar. 30, 2014), <https://www.theatlantic.com/technology/archive/2014/03/how-twitter-has-changed-over-the-years-in-12-charts/359869/>.

12. See *What is Public Information?*, FACEBOOK, <https://www.facebook.com/help/203805466323736> (last visited Feb. 18, 2017) (detailing what information is always publicly available on Facebook); *How Can I Adjust My Privacy Settings?*, FACEBOOK, <https://www.facebook.com/help/>



Snapchat are more restrictive; only individuals with accounts can see most information about others using the service.¹³

The easy availability of detailed information about individuals' activities has turned social media into a wellspring of information for law enforcement, efforts that inevitably put greater scrutiny on communities of color and particularly youth of color. The New York City Police Department (NYPD) and New York District Attorney's office have been particularly heavy users of social media information.¹⁴ The NYPD's Intelligence Division, which includes a team of detectives and officers described as having "knowledge of current technologies and street jargon," has used social media to monitor and anticipate "large-scale events and criminal activity," as well as to assist other units with criminal investigations.¹⁵ The department's Juvenile Justice Division focuses on "analyzing social networking by local youth gangs and neighborhood crews," groups whose members watch each other's backs but do not have the hierarchy or organizational structure of gangs.¹⁶ In addition, a special social networking unit inside the Division maps out territories covered by crews, block by block, to facilitate the monitoring of crew members on Facebook.¹⁷ Posts on social net-

193677450678703?helpref=uf_permalink (last visited Feb. 19, 2017) (describing how to use Facebook's privacy settings).

13. *How to View Snapchat Profile*, WikiHow, <https://www.wikihow.com/View-Snapchat-Profile> (last visited Mar. 12, 2018); Sean Keach, *Happy Snapper: How to Use Snap Maps Without Having the Snapchat App*, SUN (Feb. 12, 2018, 1:11 PM), <https://www.thesun.co.uk/tech/5558154/how-to-use-snap-maps-without-snapchat-app/>.

14. See OFFICE OF COMMUNITY ORIENTED POLICING SERVS., U.S. DEP'T JUSTICE AND POLICE EXEC. RESEARCH FORUM, *SOCIAL MEDIA AND TACTICAL CONSIDERATIONS 13* (2013) [hereinafter *COPS*] (identifying the Department's Intelligence Division and Juvenile Justice Division as being at the forefront of social media analysis within the NYPD). The NYPD's 2012 policy on using social networks for investigative purposes permits officers to access social network sites, and states that "[n]o prior authorization [is] required to review publicly accessible information" Tim Cushing, *NYPD Social Media Monitoring Policy Allows For Use of Aliases, Has Exceptions for Terrorist Activity*, TECHDIRT (Feb. 11, 2015, 4:10 AM), <https://www.techdirt.com/articles/20150206/17211929943/nypd-social-media-monitoring-policy-allows-use-aliases-has-exceptions-terrorist-activity.shtml>; see also *Handschu v. Police Dep't of N.Y.*, 241 F. Supp. 3d 433, 460 (S.D.N.Y. 2017) ("For the purpose of developing intelligence information to detect or prevent terrorism or other unlawful activities, the NYPD is authorized to conduct online search activity and to access online sites and forums on the same terms and conditions as members of the public generally."). A separate policy governs the general use of social media by members of the service, focusing more on officers' public-facing use. See, e.g., Shawn Musgrave, *NYPD Social Media Policy*, MUCKROCK, <https://www.muckrock.com/foi/new-york-city-17/nypd-social-media-policy-11570/#> (last visited May 12, 2017).

15. *COPS*, *supra* note 14, at 13–14.

16. *Id.* at 13.

17. *Id.* at 15. As of 2013, 250 crews had been identified and mapped. *Id.*; see also *JECS Provides Crew Maps by Borough*, JUVENILE JUSTICE DIVISION 2 (Fall 2013), http://www.nyc.gov/html/nypd/downloads/pdf/community_affairs/jjdnewsletter.pdf.



works have also been provided to probation and parole officers, and conditions of parole or probation sometimes include a prohibition on engaging in social networking interactions with other crew members, which could mean a virtual freeze on any online activity for the affected youth, in light of the near impossibility of building an impervious digital wall.¹⁸

Like many teenagers, young people who join crews communicate on social media, posting pictures of parties and tagging videos with their crews' name. Unlike suburban kids, however, their boasts and brags are often watched in real time by law enforcement, starting — by at least one account — when the youth are as young as ten years old.¹⁹ And because criminal conspiracy laws allow even a picture of friends together at a party to be used as evidence of a criminal act, social media postings can have significant real-world consequences.²⁰

In one well-reported case, a young man named Asheem Henry was arrested based largely on social media postings he put up as a juvenile.²¹ His younger brother Jelani was subsequently arrested after being wrongly identified as a suspect in an attempted murder; at his arraignment, the district attorney used evidence that Jelani, then a teenager, had “liked” posts about his brother’s crew to persuade the judge to deny him bail and send him to Rikers Island.²² Jelani served two years at Rikers awaiting trial — including nine months in solitary confinement — until his case was finally dismissed.²³ In the words of CryptoHarlem security researcher Matt Mitchell, “if you’re black or brown, your social media content comes with a cost — it’s a virtual prison pipeline.”²⁴

18. *COPS*, *supra* note 14, at 16.

19. See Rose Hackman, *Is the Online Surveillance of Black Teenagers the New Stop-And-Frisk?*, *THE GUARDIAN* (Apr. 23, 2015, 8:00 AM), <http://www.theguardian.com/us-news/2015/apr/23/online-surveillance-black-teenagers-new-stop-and-frisk>.

20. See Popper, *supra* note 8. Notably, some scholars agree that online activity can provide a valuable window into real-life feuds and can even provide the spark that turns those feuds into potentially deadly encounters. See Ben Schamisso, *How Social Media Can be Used to Stop Gang Violence*, *NEWSY* (Dec. 2, 2016), <http://www.newsny.com/videos/social-media-contributes-to-gang-violence-nationwide/#.WFbTBCjJpZE.twitter>. They have advocated for “violence interrupters,” social workers, and other community advocates — not law enforcement — to play a role in watching, interpreting, and defusing online exchanges before they translate into real-life violence. *Id.*

21. Popper, *supra* note 8.

22. *Id.*

23. *Id.*

24. George Joseph, *How Police Spy on Social Media*, *CITYLAB* (Dec. 14, 2016), <https://www.citylab.com/equity/2016/12/how-police-are-watching-on-social-media/508991/>; see also Debra Cassens Weiss, *Suit Claims Arrests Over Social Media Posts and Rap Lyrics Violated First Amendment Rights*, *ABA J.* (Jan. 13, 2017, 4:30 AM), <http://www.abajournal.com/news/article/>

Of course, actions that could draw scrutiny on social media — from hitting a “like” or “favorite” button to commenting on a post or sharing a video — are deeply contextual and can be almost impossible to interpret.²⁵ A “like,” for instance, could mean that the user approves of the post, or simply that she wants to acknowledge it; an outside observer cannot reasonably infer a concrete meaning from a brief interaction online, and research suggests that automated tools are poor judges of social media as well.²⁶ There is also no guarantee that the person who appears to have communicated online is actually the person whose name is displayed; it is not uncommon for people to share computers and to accidentally (or intentionally) use another’s account. One individual could even set up an account for another person, whether with malicious purpose or not.

Social media monitoring can also put individuals, groups, and affiliations (for instance, all persons using a particular hashtag) under scrutiny in ways that implicate constitutional rights. The NYPD’s Intelligence Division, for instance, explicitly monitors mass demonstrations and protests.²⁷ According to Department of Justice materials, the Division obtains information about upcoming protests and monitors events in real-time, including “minute-by-minute information about the size and demeanor of crowds of protestors.”²⁸ This online activity is usually supplemented by intelligence officers on the ground, and is also fed in real time to the NYPD’s operations center during “any large event.”²⁹ Fusion centers — multi-stakeholder centers created in the wake of 9/11 to facilitate information-sharing under the auspices of DOJ and DHS — have also flagged alerts on social media about upcoming protests for local police departments, an un-

suit_claims_arrests_over_social_media_posts_and_rap_lyrics_violated_first_a (describing arrest and detention of two men for posting rap lyrics and social media posts on the grounds that they promoted gang violence). Declarations filed by police officers in support of arrest warrants stated that the defendants were friends with gang members on Facebook, and that one had posted a message on Facebook about the arrest of two gang members). *See id.*

25. *See, e.g.,* Meredith Broussard, *When Cops Check Facebook*, THE ATLANTIC (Apr. 19, 2015), <http://www.theatlantic.com/politics/archive/2015/04/when-cops-check-facebook/390882/> (observing that “liking” a post on Facebook could mean approval or could mean something vastly different, depending on the context).

26. *See generally* Natasha Duarte, et al., *Mixed Messages? The Limits of Automated Social Media Content Analysis*, CTR. FOR DEMOCRACY & TECH. (Nov. 2017), <https://cdt.org/files/2017/11/Mixed-Messages-Paper.pdf>.

27. *COPS*, *supra* note 14, at 15, 33.

28. *Id.* at 15.

29. *Id.* It is not clear whether this monitoring occurs by following people publicly, utilizing undercover accounts, or using one of the social media monitoring tools described later, but the most likely option is a combination of the three.



dertaking that is a dubious fit with the centers' original focus on counterterrorism.³⁰

Of course, social media is bound to yield legitimate leads as well. One Kentucky defendant was arrested after posting a Facebook picture of himself siphoning fuel from a patrol car, while a burglar in Washington, D.C., took a picture of himself "wearing the victim's coat and holding up the victim's cash," and posted the picture on the victim's Facebook page, using the victim's computer.³¹ Notably, when 103 people were arrested in New York City in June 2014 for participating in a criminal conspiracy, Facebook was cited over 300 times in the indictment.³² People may also post pictures of themselves holding illegal firearms or drugs, or "'brag[]' about committing serious violent crimes."³³ Once an individual comes under law enforcement scrutiny, social media can offer a wealth of contextual information unconnected to criminal behavior as well: "travel, hobbies, places visited, appointments, circle of friends, family members, relationships, actions," and more.³⁴

Police departments have also credited social media for enabling them to anticipate repeat offenses, although there is little transparency about how the process works. In 2010 and 2011, for instance, people involved in a spate of violent flash mobs in Philadelphia stole merchandise, knocked over bystanders, and obstructed traffic.³⁵ According to the city's police chief, the department learned that plans were being posted on social media several days before each flash mob, and officers began reviewing publicly available posts on Facebook, Twitter, and other platforms to learn about "potentially dangerous incidents."³⁶ Notably, it is not clear how the police decided whom to follow, what they did with information that was not relevant to this

30. See generally *So-Called "Counterterror" Fusion Center in Massachusetts Monitored Black Lives Matter Protestors*, PRIVACY SOS BLOG (Nov. 27, 2015), <https://privacysos.org/blog/so-called-counterterror-fusion-center-in-massachusetts-monitored-black-lives-matter-protesters/>; *COPS*, *supra* note 14, at 15 (noting New York fusion center's collaboration with the NYPD during "very large events").

31. Adrian Fontecilla, *The Ascendance of Social Media as Evidence*, CRIM. JUST., Spring, 2013, at 55.

32. Popper, *supra* note 8; Press Release, Manhattan District Attorney's Office, District Attorney Vance and Police Commissioner Bratton Announce Largest Indicted Gang Case in NYC History (June 25, 2015), <http://manhattanda.org/press-release/district-attorney-vance-and-police-commissioner-bratton-announce-indictments-two-major>.

33. *COPS*, *supra* note 14, at 12.

34. *Id.*

35. *Id.* at 18.

36. *Id.*



task, or how long they retained any information they collected, leaving the public to rely on the department's description of events.³⁷ In other circumstances, allegations that social media helped facilitate large-scale violent events have proven false. In the case of the 2011 Vancouver riot after the loss of the Canucks to the Boston Bruins, for instance, social media was used primarily for post-riot investigation and outreach, not to plan the riot.³⁸

2. Constitutional and Policy Considerations

Law enforcement's use of technological tools to monitor and collect information about American citizens and residents raises First, Fourth, and Fourteenth Amendment issues, as well as important policy questions. This section addresses each of those in turn.

37. See PHILADELPHIA POLICE DEP'T, DIRECTIVE 6.10 SOCIAL MEDIA AND NETWORKING 2 (2012), <https://www.phillypolice.com/accountability/index.html> (stating that "[t]here is no reasonable expectation of privacy when engaging in social networking online. As such, the content of social networking websites may be obtained for use in criminal trials, civil proceedings, and departmental investigations."). Even more alarmingly, the police department directed downtown Philadelphia businesses to call 911 "if you see a large group of youngsters or others who appear to be moving very quickly or running from or to something" or saw "any large groups gathering." *COPS*, *supra* note 14, at 19–20. Notwithstanding the genuine risk posed by these flash mobs — one of the most recent in Center City Philadelphia allegedly resulted in violent attacks on several bystanders — these policies seem guaranteed to be enforced disproportionately against youth of color, whose gatherings in large groups will inevitably be viewed as more suspicious than equivalent assemblies of white youths or others. See Dan Wing et al., *30 Arrested After Flash Mob Strikes Center City Philadelphia*, CBS PHILLY (Mar. 6, 2017, 1:55 PM), <http://philadelphia.cbslocal.com/2017/03/06/philly-police-more-than-100-kids-participated-in-flash-mob-some-arrested/> (describing flash mob attack at Center City Philadelphia); *COPS*, *supra* note 14, at 20 (noting that after a series of mobbing events involving assaults on bystanders, Minneapolis police began to monitor social media to pick up clues in advance; the report does not disclose details about which sites or accounts were monitored or how they were chosen).

38. *COPS*, *supra* note 14, at 26, 32 (noting that the riots were primarily fueled by high levels of alcohol consumption, not by social media). Social media can be a valuable source of information during a natural disaster or other public safety crisis as well. During 2017's Hurricane Harvey, for instance, when many phone lines in Houston, Texas, were down or inaccessible and the city's 911 system was overwhelmed, residents turned to social media to tweet pleas for help to first responders and to the public at large. See Peter Holley, "Water is swallowing us up": In Houston, Desperate Flood Victims Turn to Social Media for Survival, WASH. POST (Aug. 28, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/08/28/water-is-swallowing-us-up-in-houston-desperate-flood-victims-turn-to-social-media-for-survival/?utm_term=.f9fde49e62f2. Many of the victims explicitly tagged the Houston police or other law enforcement agencies, but government officials may have also been monitoring social media channels; one article depicted the Houston police chief responding to a tweet that did not tag or refer to the police department. See Rachel Chason, "Urgent Please Send Help": Desperate Houston Residents Plead on Social Media for Rescue, WASH. POST (Aug. 28, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/08/28/urgent-please-send-help-houston-residents-turn-to-social-media-for-help-sunday-night/?tid=a_inl&utm_term=.1695be905381.



a. Fourth, First, and Fourteenth Amendment

The Fourth Amendment guarantees the right of the people to be free from unreasonable searches and seizures.³⁹ Where the police enter an individual's home or detain an individual, the Fourth Amendment is implicated as a straightforward matter. In the information age, however, where the state's action involves the collection of information about an individual, rather than an intrusion into her home or body, the inquiry generally focuses on whether the individual challenging the action had a "reasonable expectation of privacy" in the information collected: that is, whether she expected that a particular behavior would be private, and if so, whether society – as an objective matter – recognizes that expectation as reasonable.⁴⁰ When it comes to social media, it is something of an uphill battle to argue that there is an expectation of privacy in information that is shared online; for that to change, courts will need to begin to reconsider the dogma that privacy requires secrecy.

The reasonable expectation of privacy test was articulated in Justice Harlan's concurrence in the seminal 1967 Supreme Court case *U.S. v. Katz*. In *Katz*, the police used a wiretap, for which they did not obtain a warrant, to listen in on conversations that bookie Charles Katz conducted from a public phone booth.⁴¹ The government argued that because the wiretap did not physically invade the phone booth, it was not constitutionally proscribed and did not require a warrant.⁴² Rejecting this argument, the Court observed that Mr. Katz intended to preserve his privacy when he closed the doors to the phone booth and placed his call; although observers could still *see* that he was making a call, "what he sought to exclude when he entered the booth was not the intruding eye – it was the uninvited ear."⁴³ In the Court's words, "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."⁴⁴ In concurrence, Justice Harlan set out the reasonable expectation of privacy test that has become a touchstone of Fourth Amendment jurisprudence.⁴⁵

39. U.S. Const. amend. IV.

40. *Katz v. United States*, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring).

41. *Id.* at 349–52.

42. *Id.* at 349–53.

43. *Id.* at 352.

44. *Id.* at 359.

45. *Id.* at 360–61 (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an



Since its issuance, *Katz* has served as the starting point in challenges to law enforcement's collection of information about individuals in ostensibly public areas, whether they be phone booths, public roads, or pedestrian gathering areas. Thus, in *United States v. Knotts*, the Supreme Court held several decades after *Katz* that the police were justified in using a hidden beeper to track a suspect's car in public without a warrant: because anyone on the roads could see the driver, the Court held, the police could as well.⁴⁶

When police have gone further, however, eliciting information that is not obviously available to the average member of the viewing public, the courts have drawn a constitutional line. Thus, in *United States v. Karo*, the police not only tracked a suspect to a private house but also confirmed that he was inside the house, courtesy of a beeper they had surreptitiously planted in the can of ether he was transporting.⁴⁷ Because the officers would normally have needed to obtain a probable cause warrant to enter the house and confirm his presence, using a beeper to do the job was outside the bounds of the Fourth Amendment.⁴⁸ Similarly, the Supreme Court held in *Kyllo v. United States* that using a heat sensor that detected the use of marijuana grow lights inside a house – again, a discovery that would have otherwise required an officer to enter the house armed with a warrant issued by a neutral magistrate – had to comply with the mandates of the Fourth Amendment.⁴⁹

What, then, do these cases tell us about the social media context? Monitoring individuals (or even groups) directly on public social media (that is, without the use of undercover accounts or sophisticated analytical tools) may look analogous to the kind of one-on-one real-world tracking the Court endorsed in *Knotts*, making courts reluctant to halt such monitoring on Fourth Amendment grounds.⁵⁰ Particularly since post-*Katz* Fourth Amendment doctrine rests in large part on concepts of “privacy,” courts are likely to find the notion that

actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”)

46. *United States v. Knotts*, 460 U.S. 276, 284–85 (1983).

47. *United States v. Karo*, 468 U.S. 705, 708 (1984).

48. *Id.* at 715–18.

49. *Kyllo v. United States*, 533 U.S. 27, 29, 40 (2001).

50. Notably, the *Knotts* Court warned that “dragnet-type law enforcement practices” might implicate the Fourth Amendment – practices that more closely resemble the algorithmic analyses described below. *Knotts*, 460 U.S. at 284.



materials voluntarily posted on public social media sites cannot be considered “private” to be persuasive, if not dispositive.⁵¹

On the other hand, the two situations are not as analogous as they appear on initial inspection. In *Knotts*, the police officers had to physically tail the vehicle in order to remain within range of the tracking device, requiring a significant commitment of time and personnel and heightening the risk that the officers could be detected by the target.⁵² By contrast, following targets on social media is nearly undetectable, particularly on platforms (such as Twitter) that do not require police to connect directly with a target in order to monitor them. It is also far less resource-intensive than physically tailing a person, even without using the kind of specialized analytical software described in Section C. As described in that section, a majority of the Supreme Court is embracing the idea that where technological advances enable law enforcement to undertake surveillance of civilians with far greater ease, and with far less expenditure of time and money than in the nation’s early days, constitutional obligations may be triggered. While no court has yet considered the application of this recent approach in the social media context, these factors could shift the analysis when the issue gets litigated.

At the moment, the First and Fourteenth Amendments may have far more to say than the Fourth Amendment about monitoring individuals on social media when the surveillance is based on religious affiliations, associations, political leanings, or other protected categories or activities. Notably, the Supreme Court recently affirmed social media’s First Amendment pedigree, holding that “the most important place[] . . . for the exchange of views . . . is cyberspace – the ‘vast democratic forums of the Internet’ in general, and social media in particular.”⁵³ Thus, to “foreclose access to social media altogether” would be to “prevent the user from engaging in the legitimate exercise of First Amendment rights.”⁵⁴ In a similar vein, the Fourth Circuit has affirmatively held that both “likes” and comments on Facebook con-

51. See, e.g., *People v. Harris*, 949 N.Y.S.2d 590, 595 (City Crim. Ct. 2012) *appeal dismissed*, 2013 WL 2097575 (N.Y. App. Term 2013) (“If you post a tweet, just like you scream it out the window, there is no reasonable expectation of privacy.”).

52. *Knotts*, 460 U.S. at 278.

53. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (quoting *Reno v. American Civil Liberties Union*, 521 U. S. 844, 868 (1997)).

54. *Packingham*, 137 S. Ct. at 1737.



stitute First Amendment-protected speech.⁵⁵ Could monitoring social media users in cyberspace thus trigger a viable First Amendment challenge? A circuit court case from 2015 suggests the answer could be yes. But to understand its significance, we first have to rewind nearly five decades.

Some forty-five years ago, in *Laird v. Tatum*, the Supreme Court considered a challenge to a large-scale data-gathering program in the U.S.⁵⁶ The Army had established this program in the late 1960s, in response to civil rights protests.⁵⁷ The Army collected “information about public activities that were thought to have at least some potential for civil disorder,” reported it back to Army intelligence headquarters, and stored the data in a military data bank.⁵⁸ The information came from Army intelligence agents who attended public meetings, as well as from media sources and police departments.⁵⁹ By the early 1970s, facing Congressional pushback and stepped-up oversight of the Army’s domestic surveillance programs, the Army reduced its efforts, including purging the records stored in the computer data bank.⁶⁰ The Under Secretary of the Army also represented to Senator Sam Ervin that the Army would be collecting information on a more limited category of events, would not be storing the reports in a computer, and would destroy the reports “60 days after publication or 60 days after the end of the disturbance.”⁶¹ This new regimen was intended to prevent the Army from “‘watching’ the lawful activities of civilians.”⁶²

The *Laird* majority concluded (over multiple strong dissents) that “the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose” does not unconstitutionally chill the lawful exercise of an individual’s First Amendment rights.⁶³ The Court characterized the plaintiffs’ challenge to the Army’s program as a “disagree[ment] with the judgments made by the Executive Branch with respect to the type

55. *Bland v. Roberts*, 730 F.3d 368, 385, 388 (4th Cir. 2013) (holding that both “likes” and comments on Facebook constitute protected First Amendment speech).

56. *Laird v. Tatum*, 408 U.S. 1, 2 (1972).

57. *Id.* at 2.

58. *Id.* at 6.

59. *Id.*

60. *Id.* at 7.

61. *Id.* at 7–8.

62. *Id.* at 8.

63. *Id.* at 10.



and amount of information the Army needs” and an objection to “the very existence of the Army’s data-gathering system.”⁶⁴ With only “allegations of a subjective chill,” and no showing of a “specific present objective harm or a threat of specific future harm”⁶⁵ – no denial of a professional affiliation, no loss of employment, no obligation to request government permission to send certain communications – there was no injury specific and direct enough to give the plaintiffs standing.⁶⁶

Since *Laird v. Tatum* was handed down, it has generally been understood to stand for the proposition that a chilling effect isn’t enough to get standing. But in *Hassan v. City of New York*, the U.S. Court of Appeals for the Third Circuit put an important gloss on *Laird*, holding that when *discriminatory* government surveillance dissuades individuals from exercising their rights, they can challenge the surveillance.⁶⁷

Hassan involved the NYPD’s surveillance of Muslim communities in New York and New Jersey after the 9/11 terrorist attacks.⁶⁸ The surveillance took a variety of forms, including the use of photography, video, license plate readers, surveillance cameras, and undercover officers; attendance at student group meetings and outings; and the monitoring and surveillance of mosques, bookstores, bars, cafes, and nightclubs.⁶⁹ The NYPD division conducting the surveillance produced documents reporting on mosques and the “ethnic composition of the Muslim community” in Newark, N.J.; lists of “businesses owned or frequented by Muslims;” information about flyers advertising tutoring in the Quran; and much more.⁷⁰ A group of individuals, organizations, and members of mosques or other associations named in the NYPD reports sued the NYPD after an Associated Press article revealed the existence and breadth of the program.⁷¹

The plaintiffs argued that the NYPD’s surveillance program intentionally targeted Muslims, using visible indicia of religion (mosques, businesses with prayer mats) as well as “ethnicity as a proxy for faith.”⁷² Because of the stigma and the harm to their repu-

64. *Id.* at 13.

65. *Id.* at 13–14.

66. *Id.* at 11–12 (listing examples of concrete harms).

67. *Hassan v. City of New York*, 804 F.3d 277, 292 (3d Cir. 2015).

68. *Id.* at 285.

69. *Id.*

70. *Id.* at 286–87.

71. *Id.* at 287, 292.

72. *Id.* at 286.

tations that followed the disclosure of the program and revelations that they were being surveilled by law enforcement, all of the plaintiffs suffered injury: the individual plaintiffs curtailed their worship and religious activities, including decreasing their mosque attendance and avoiding discussing their faith in public places, while organizational plaintiffs lost members and potential members, lost opportunities to collaborate with other organizations, and changed their programming to avoid attracting further NYPD attention.⁷³ Some also suffered financial harm, by losing customers or financial support.⁷⁴

The Third Circuit swiftly dispatched the city's arguments that the plaintiffs lacked standing.⁷⁵ In response to the city's assertion that the plaintiffs hadn't suffered a real injury because the city had not "overtly condemned the Muslim religion," the panel pointed to *Brown v. Board of Education*, observing that the "'badge of inferiority' inflicted by unequal treatment itself" is a cognizable harm.⁷⁶ The fact that the surveillance affected a "broad class" – perhaps on the order of hundreds or even thousands of other people – did not dilute their injury; because the plaintiffs were "the very targets of the allegedly unconstitutional surveillance," they were "unquestionably 'affect[ed] . . . in a personal and individual way.'"⁷⁷ The court distinguished *Laird* on the grounds that the plaintiffs' objection here was not to the "*mere existence*" of non-discriminatory surveillance activity; instead, the NYPD's surveillance program was carried out in a "discriminatory manner" and caused "direct, ongoing, and immediate harm": namely, the very real impact on the plaintiffs' abilities to undertake their religious and other activities.⁷⁸ Because "*Laird* doesn't stand for the proposition that public surveillance is . . . *per se* immune from constitutional attack or subject to a heightened requirement of injury," those harms were sufficient to confer standing.⁷⁹ Indeed, a showing that surveillance is racially based, or is undertaken in retaliation for the exercise of First Amendment rights, is itself enough to bestow standing.⁸⁰

73. *Id.* at 287–88.

74. *Id.* at 288.

75. *Id.* at 289.

76. *Id.* at 291 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

77. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992)).

78. *Id.* at 292.

79. *Id.*

80. *Id.* (citing *Hall v. Pa. State Police*, 570 F.2d 86 (3d Cir. 1978) (holding that the state could not rely on racially based criteria in photographing "suspicious persons" entering a bank,

Because the plaintiffs cleared the standing hurdle, the panel conducted an initial assessment of their claims that the surveillance program had infringed their rights to equal protection under the Fourteenth Amendment and to freedom of religion under the First Amendment, to determine whether they had stated a sufficient claim to survive the city's motion to dismiss.⁸¹

On the equal protection claim, the plaintiffs had to allege (and eventually prove) not only that the NYPD surveilled more Muslims than members of any other religious faith, but that their religious affiliation was "a substantial factor" in the differential treatment.⁸² To meet that standard, the plaintiffs could (1) identify a facially discriminatory policy; (2) identify a policy that was applied to Muslims "with a greater degree of severity than other religious groups;" or (3) identify a "facially neutral policy that the city purposefully designed to impose different burdens on Muslims and that has that detrimental effect (even if it is applied evenhandedly)."⁸³ The plaintiffs argued here that the NYPD's surveillance program expressly singled out Muslims for "disfavored treatment," and alleged enough specifics to survive.⁸⁴

The court rejected the city's argument that even if the plaintiffs did plausibly allege a facially discriminatory policy, it was irrelevant because the city's more likely purpose was public safety, not religious discrimination.⁸⁵ As the court tartly noted, the city "wrongly assume[d] that invidious motive is a necessary element of discriminatory intent. It is not."⁸⁶ Discrimination can be intentional without being "motivated by ill will, enmity, or hostility"; critically, if the NYPD surveilled the plaintiffs only because they were Muslim, the fact that they may have been sincerely motivated by a legitimate law enforcement purpose was irrelevant.⁸⁷ The court observed that this would remain true "even where national security is at stake," emphasizing:

even if it could photograph *all* people entering the bank); *Anderson v. Davila*, 125 F.3d 148, 162 (3d Cir. 1997) (observing that government retaliation in response to exercise of the "right to petition the government for grievances," a "protected activity under the First Amendment," is a "specific present harm" that gives rise to a justiciable claim); *see also* *House v. Napolitano*, No. 11-10852-DJC, 2012 WL 1038816, at *11 (D. Mass. Mar. 28, 2012) (affirming that simply because a search is otherwise constitutional under the Fourth Amendment does not mean that government agents may "target someone for their political association").

81. *Hassan v. City of New York*, 804 F.3d 277, 294 (3d Cir. 2015).

82. *Id.*

83. *Id.* (citations and internal quotation marks omitted).

84. *Id.* at 295.

85. *Id.* at 297.

86. *Id.*

87. *Id.* at 298 (citations and internal quotation marks omitted).



“We have learned from experience that it is often where the asserted [governmental] interest appears most compelling that we must be most vigilant in protecting constitutional rights.”⁸⁸

This analysis informed the court’s (far briefer) analysis of the plaintiffs’ First Amendment claims, which survived as well.⁸⁹ As with the Equal Protection Clause claims, the court held, “allegations of overt hostility and prejudice are [not] required to make out claims under the First Amendment.”⁹⁰

How might this play out in the context of social media monitoring? Even *Laird* has a more sympathetic reading than is often acknowledged. First, while the Court doesn’t explicitly rely on it, the fact that the Army’s program had been significantly constricted by the time the matter was up for decision seemed to be of some consequence to the Court: the Court may have been particularly inclined to tread lightly on the First Amendment issues where the government’s incursion into civilian political matters was in retreat anyway.

Second, the Court in *Laird* characterized the alleged chilling effect as “aris[ing] merely from the individual’s knowledge that a governmental agency was engaged in certain activities or from the individuals’ concomitant fear that, armed with the fruits of those activities, the agency might in the future take some other and additional action detrimental to that individual.”⁹¹ As Justice Douglas pointed out in dissent, even at the time that was a disingenuous description of the state of affairs:

The present controversy is not a remote, imaginary conflict. Respondents were targets of the Army’s surveillance. First, the surveillance was not casual but massive and comprehensive. Second, the intelligence reports were regularly and widely circulated and were exchanged with reports of the FBI, state and municipal police departments, and the CIA. Third, the Army’s surveillance was not collecting material in public records but staking out teams of agents, infiltrating undercover agents, creating command posts inside meetings, posing as press photographers and newsmen, posing as TV newsmen, posing as students, and shadowing public figures. Finally, we know from the hearings conducted by Senator Ervin that the Army has misused or abused its reporting functions.⁹²

88. *Id.* at 306–07.

89. *Id.* at 309.

90. *Id.*

91. *Laird v. Tatum*, 408 U.S. 1, 11 (1972).

92. *Id.* at 26–27 (Douglas, J., dissenting).



But even taking the majority's characterization at face value, the Court acknowledged that where the complainant is objecting to a specific exercise of governmental authority beyond "mere" surveillance, and where she is or will be subject to that governmental power, she may have a constitutional claim.⁹³ The Court cited to *Baird v. State Bar of Arizona*, in which a lawyer was prevented from joining the bar "solely because of her refusal to answer a question regarding the organizations with which she had been associated in the past."⁹⁴ The Supreme Court concluded in *Baird* that the government "may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes."⁹⁵ Seen through this lens, if an individual's social media were surveilled on the basis of her associations or political beliefs and she were prosecuted for an unrelated offense as a result, or she were denied a housing or other civil benefit, that exercise of governmental authority would appear to confer constitutional standing.

Hassan and its sister cases sharpen the point even further. Under *Hassan*, a social media monitoring policy that is wielded against, for instance, Muslims or African-Americans "with a greater degree of severity than other . . . groups" may run afoul of the Fourteenth Amendment – and importantly, that holds true even if the surveillance was not motivated by "ill will, enmity, or hostility."⁹⁶ This is not a mere hypothetical; the Department of Homeland Security, for instance, was found to have directly monitored activity by Black Lives Matter protestors on Twitter.⁹⁷ And as detailed in Section A1, social media surveillance in many cities is likely to be disproportionately targeted at minority youth. Of course, the surveillance still has to inflict a concrete harm to be constitutionally cognizable. But if victims of the surveillance can point to concrete ways that it prevented them from exercising their First Amendment rights – for instance, if they pulled back on political organizing, activism, or communications – then they may have more in common with the potentially successful plaintiffs in *Hassan* than the disappointed ones in *Laird*.

93. *Id.* at 11.

94. *Id.* (citing *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971)).

95. *Id.* at 11–12.

96. *Hassan v. City of New York*, 804 F.3d 277, 298 (3d Cir. 2015).

97. Jason Leopold, *Emails Show Feds Have Monitored 'Professional Protestor' DeRay McKesson*, VICE (Aug. 11, 2015), <https://news.vice.com/article/emails-show-feds-have-monitored-professional-protester-deray-mckesson>; Lee Fang, *Why Was an FBI Joint Terrorism Task Force Tracking a Black Lives Matter Protest?* THE INTERCEPT (Mar. 12, 2015), <https://theintercept.com/2015/03/12/fbi-appeared-use-informant-track-black-lives-matter-protest/>.



Anderson v. Davila offers useful guidance as well. In *Anderson*, a former employee of the Virgin Islands Police Department filed an EEOC claim and an employment discrimination lawsuit against his former employer; in response to – and, as Mr. Anderson alleged, in retaliation for – the complaints, the police department began intensively investigating him, including putting him under surveillance.⁹⁸ The Third Circuit had little trouble upholding the district court’s injunction against the surveillance, observing that government retaliation in response to exercise of the “right to petition the government for grievances” – a “protected activity under the First Amendment” – is a “specific present harm” that gives rise to a justiciable claim.⁹⁹ Monitoring individuals on social media in retaliation for their First Amendment speech, including protesting government policies, would appear to fall squarely under the umbrella of *Anderson*.

B. Using an Informant, a Friend of the Target, or an Undercover Account to View Otherwise Private Information

When it comes to information not hosted on a public channel – for instance, a private Twitter account, or a Facebook account with reasonably robust privacy settings¹⁰⁰ – law enforcement officers still have several options for viewing information of interest. Officers or detectives can ask an individual who is virtual friends with the target, including an informant or cooperating witness, to view the target’s posts, pictures, and more, and report back about what he or she has seen.¹⁰¹ One fugitive, for example, was nabbed after posting comments and pictures on his Facebook page boasting about living the

98. *Anderson v. Davila*, 125 F.3d 148, 152 (3d Cir. 1997).

99. *Id.* at 160.

100. In 2012, Consumer Reports estimated that 13 million U.S. Facebook users did not understand or utilize privacy settings on Facebook. (As of January 2017, there were 214 million Facebook users in the United States.) See *13 Million U.S. Facebook Users Don’t Use Privacy Controls, Risk Sharing Updates Beyond Their “Friends”*, CONSUMER REPORTS (May 3, 2012), <http://www.consumerreports.org/media-room/press-releases/2012/05/my-entry/>.

101. The Department of Justice (DOJ) permits an FBI agent to use this tactic in furtherance of a criminal investigation if the same kind of communication would be authorized over the phone, and the NYPD permits officers to “access social network sites using an online alias” after completing a procedure and receiving approval. *The Department of Justice’s Principles for Conducting Online Undercover Operations*, PUBLIC INTELLIGENCE (Mar. 22, 2012), <https://publicintel.ligence.net/the-department-of-justices-principles-for-conducting-online-undercover-operations/>; Operations Order 34: Use Of Social Networks for Investigative Purposes – General Procedure, New York Police Department (Sept. 5, 2012), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1657435/nypd-social-media-surveillance.pdf>.



good life in Cancun.¹⁰² His Facebook friends – who were publicly viewable on his profile – included a former Justice Department official living in the area.¹⁰³ The prosecutor pursuing the case, suspecting that he would be able to trust a Justice Department employee, reached out and asked him to dig up the fugitive’s address, leading to the fugitive’s arrest several months later.¹⁰⁴

Law enforcement officers can also create undercover accounts to connect surreptitiously with unknowing civilians; indeed, several social media monitoring companies have advertised their ability to create undercover accounts in bulk.¹⁰⁵ Whether using a service or on their own, a number of jurisdictions are doing just this. For instance, the Cook County (Chicago) Sheriff’s Office Intelligence Center encouraged sheriff’s office intelligence analysts to set up fake accounts to collect information; presentation slides noted that doing so is prohibited by most of the platforms’ policies, though not by law.¹⁰⁶ California Highway Patrol officers created Twitter accounts that did not identify them as law enforcement in order to monitor planned demonstrations.¹⁰⁷ Craftily, the Boston police department has used undercover accounts to try to smoke out underground music shows.¹⁰⁸

As with use of social media monitoring tools generally, use of these technologies in the undercover context may disproportionately affect communities of color. An NYPD initiative, for example, allows detectives to send friend requests to juveniles who have committed

102. Alexandra Topping, *Fugitive Caught After Updating His Status on Facebook*, THE GUARDIAN (Oct. 14, 2009), <https://www.theguardian.com/technology/2009/oct/14/mexico-fugitive-facebook-arrest>.

103. *Id.*

104. *Id.*

105. *See, e.g.*, Geofeedia, e-mail message to Riverside Police Department (Oct. 20, 2015), http://www.aclunc.org/docs/20161011_geofeedia_twitter_instagram_riverside_pd.pdf (noting that “[t]here is no limit on how many fake accounts can be uploaded into the database [to see private users]”).

106. George Joseph, *How Police Are Watching You on Social Media*, CITYLAB (Dec. 14, 2016), <https://www.citylab.com/equity/2016/12/how-police-are-watching-on-social-media/508991/>, (noting that analysts appeared to be compiling information from social media for “longer term retention, not just for ‘situational awareness’”). Another detective reported using a fictitious Facebook profile to connect with a drug suspect; the suspect “checked in” regularly from various locations, enabling the detective to track and capture him. *COPS*, *supra* note 14, at 12.

107. James Queally, *CHP Chief Says Officer Aimed Gun at Protestors After Partner was Attacked*, LOS ANGELES TIMES (Dec. 11, 2014), <http://www.latimes.com/local/lanow/la-me-ln-chp-officer-gun-demonstrators-20141211-htmlstory.html>.

108. Luke O’Neil, *Boston Punk Zombies are Watching You!*, SLATE (Mar. 29 2013, 5:45 AM), http://www.slate.com/articles/news_and_politics/crime/2013/03/boston_police_catfishing_in_die_rockers_cops_pose_as_punks_on_the_internet.html.



robberies.¹⁰⁹ The detectives typically befriend the participants – mostly black and Hispanic males – by using a fake avatar of a female teenager.¹¹⁰ They are not allowed to interact directly with the teenagers, but they do “spend at least two hours daily monitoring the teenagers’ chatter.”¹¹¹ Notably, while the program is intended to prevent youth from committing additional crimes, it has not been shown to have any effect on reducing robberies, further heightening concerns about its focus on youth of color.¹¹²

To take another example, security staff at Minneapolis’s Mall of America, working in coordination with the local city attorney’s office, created undercover accounts on Facebook to build dossiers on activists involved in the Black Lives Matter movement.¹¹³ The dossiers included pictures, timelines showing where to find the activists in various videos from the protest, and “information scraped from their social media accounts.”¹¹⁴ A number of the activists surveilled were organizers for a large protest at the Mall of America; after the protest, eleven of the participants were charged with criminal misdemeanors.¹¹⁵

And in a troubling federal incident, the Drug Enforcement Administration arrested a woman named Sondra Arquiett on drug charges, appropriated pictures of her and her minor children without her knowledge, and used them to create a Facebook profile. A DEA agent then used the profile without her permission to make friend requests in her name to wanted fugitives, essentially using her as the

109. Wendy Ruderman, *To Stem Juvenile Robberies, Police Trail Youths Before the Crime*, NEW YORK TIMES (Mar. 3, 2013), <http://www.nytimes.com/2013/03/04/nyregion/to-stem-juvenile-robberies-police-trail-youths-before-the-crime.html>.

110. *Id.*

111. *Id.*; see also Joseph, *supra* note 106 (quoting a retired NYPD detective sergeant explaining that “[r]equesting a friendship, as a policeman you have to be careful of that entrapment issue. But if you just put a half-naked picture of [a] woman in there, you’re gonna get in.”).

112. J. David Goodman, *Report Finds Juvenile Program Failed to Reduce Robberies, but Police Are Expanding It*, NY TIMES (Jan. 4, 2016), http://www.nytimes.com/2016/01/05/nyregion/report-finds-juvenile-program-failed-to-reduce-robberies-but-police-are-expanding-it.html?_r=0. Nevertheless, some perpetrators are nabbed by the program; see, e.g., Oren Yaniv, *Cop Helps Take Down Brooklyn Crew Accused of Burglary Spree by Friending Them on Facebook*, NY DAILY NEWS (May 30, 2012), <http://www.nydailynews.com/new-york/helps-brooklyn-crew-accused-burglary-spree-friending-facebook-article-1.1086892>.

113. Lee Fang, *Mall of America Security Catfished Black Lives Matter Activists, Documents Show*, THE INTERCEPT (Mar. 18, 2015), <https://theintercept.com/2015/03/18/mall-americas-intelligence-analyst-catfished-black-lives-matter-activists-collect-information/>.

114. *Id.*

115. *Id.*



cover for his undercover activities.¹¹⁶ Ms. Arquiett challenged the DEA's practice, arguing that the use of her personal data implicated her as a cooperater with the criminal investigation and put her in danger.¹¹⁷ The DEA ultimately paid Ms. Arquiett \$134,000 to settle her challenge.¹¹⁸ While the DOJ pledged to review its tactics after this case came to light, the department has not yet updated its policies on online investigations.¹¹⁹

1. Policy and legal considerations

From a Fourth Amendment perspective, courts have generally permitted law enforcement agents to engage in undercover activities, both in real life and online, without getting a warrant or clearing some other judicial hurdle. This approach dates to the same era as *Laird*; the Supreme Court that constricted the grounds for a viable First Amendment claim also blessed the government's ability to solicit intimate information from a third party, be it an individual entrusted with the information based on a personal association or a company in a position to receive it because of a transactional relationship.¹²⁰ Emerging interpretations of the Fourth Amendment suggest that could change, though the case law has not yet caught up.

Thus, in *Hoffa v. United States*, union boss Jimmy Hoffa invited someone he believed to be a fellow union member into his hotel room and shared confidences with him.¹²¹ His confidant, Edward Partin, turned out to be a government informant, who regularly shared details of their conversations with a federal agent and whose testimony at trial was a substantial factor in Hoffa's conviction for attempted bribery.¹²² Hoffa argued that because Partin failed to disclose his true identity, Hoffa had not truly consented to having him in the hotel suite, and that by listening to Hoffa, Partin conducted an illegal search

116. Sari Horwitz, *Justice Dept. Will Review Practice of Creating Fake Facebook Profiles*, WASH. POST (Oct. 7, 2014), https://www.washingtonpost.com/world/national-security/justice-dept-will-review-practice-of-creating-fake-facebook-profiles/2014/10/07/3f9a2fe8-4e57-11e4-aa5e-7153e466a02d_story.html.

117. *Id.*

118. David Kravets, *DEA settles fake Facebook profile lawsuit without admitting wrongdoing*, ARS TECHNICA (Jan. 20, 2015), <http://arstechnica.com/tech-policy/2015/01/dea-settles-fake-facebook-profile-lawsuit-without-admitting-wrongdoing/>.

119. Horwitz, *supra* note 116.

120. *See generally* *United States v. Miller*, 425 U.S. 435 (1976); *Laird v. Tatum*, 408 U.S. 1, (1972).

121. *Hoffa v. United States*, 385 U.S. 293, 296 (1966).

122. *Id.*

in violation of the Fourth Amendment.¹²³ The Court rejected this view, reasoning:

Partin did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence. [Hoffa], in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing.¹²⁴

The Court concluded: “Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”¹²⁵

Hoffa paved the way for the case that would help crystallize the modern-day third-party doctrine: the 1976 case *United States v. Miller*.¹²⁶ *Miller* involved the federal government’s use of defective subpoenas to obtain copies of the bank records of one Mitch Miller, who was suspected of running an illegal whiskey distillery.¹²⁷ After Miller was indicted for conspiracy to defraud the government, he moved to suppress the records on the grounds that in the absence of a valid warrant, they had been illegally seized. In a cursory opinion, the Supreme Court held – relying on *Hoffa* – that:

[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.¹²⁸

While the opinion emphasized that the records were not “confidential communications” but “negotiable instruments,” and that they related to “transactions to which the bank was *itself* a party”¹²⁹ – a fairly limited category of documents – the case has taken on the status of canon and now stands for the proposition that nearly any informa-

123. *Id.* at 300.

124. *Id.* at 302.

125. *Id.* Chief Justice Warren dissented, arguing that an “invasion of basic rights made possible by prevailing upon friendship with the victim is no less proscribed than an invasion accomplished by force.” *Id.* at 314 (Warren, C.J., dissenting).

126. See *United States v. Miller*, 425 U.S. 435, 435 (1976).

127. *Id.* at 436.

128. *Id.* at 443 (citing *United States v. White*, 401 U.S. 745 (1971); *Hoffa*, 385 U.S. at 293; *Lopez v. United States*, 373 U.S. 427 (1963)).

129. *Id.* at 440-41 (emphasis added).



tion released to a third party, under almost any circumstance, is fair game for the government, in the absence of a statute putting it off limits.¹³⁰

Thus, in one of the earliest appellate opinions to consider the police use of an online undercover identity, the Sixth Circuit held in *Guest v. Leis* (2001) that subscribers to an “online bulletin board system” had no legitimate expectation of privacy because they had voluntarily disclosed the information to the bulletin board’s system operator.¹³¹ A complaint about online obscenity had led police to investigate the bulletin board, the precursor to services like AOL and modern social-networking sites.¹³² Using an undercover persona, officers accessed the system to view the allegedly obscene images; armed with that data, they submitted a request for a warrant to collect subscriber information such as names, email addresses, birthdates, and passwords.¹³³

A class of subscribers challenged the collection of data on the ground that it was a search or seizure under the Fourth Amendment, requiring police to get a warrant first.¹³⁴ Citing to *Miller* for the proposition that “[i]ndividuals generally lose a reasonable expectation of privacy in their information once they reveal it to third parties”¹³⁵ – arguably a much broader holding than the Supreme Court actually reached in *Miller* – the court rejected the subscribers’ claim concluding that no Fourth Amendment violation had occurred.¹³⁶

130. In dissent, Justice Brennan quoted approvingly, and at length, from a unanimous decision by the California Supreme Court in a factually similar 1974 case, *Burrows v. Superior Court*, 529 P.2d 590 (Cal. 1974). Anticipating by many decades the modern-day Supreme Court’s decisions in *Jones and Riley*, Justice Mosk observed: “For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entirely volitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affairs, opinions, habits and associations. Indeed, the totality of bank records provides a virtual current biography.” *Id.* at 596 (quoted in *Miller*, 425 U.S. at 451 (Brennan, J., dissenting)). Justice Mosk added that “judicial interpretations of the reach of the constitutional protection of individual privacy must keep pace with the perils created by . . . new [electronic] devices.” *Id.* (quoted in *Miller*, 425 U.S. at 452 (Brennan, J., dissenting)).

131. *Guest v. Leis*, 255 F.3d 325, 336 (6th Cir. 2001).

132. *Id.* at 330.

133. *Id.* at 330, 335.

134. *Id.* at 330.

135. *Id.* at 335 (*Miller*, 425 U.S. at 443).

136. *Id.* at 336 (citing *United States v. Maxwell*, 45 M.J. 406 (C.A.A.F. 1996) (holding that computer users do not have legitimate expectation of privacy in subscriber information because they have conveyed it to the system operator); *United States v. Kennedy*, 81 F. Supp. 2d 1103 (D. Kan. 2000) (rejecting privacy interest in subscriber information communicated to internet service provider)).



Other courts have reached similar conclusions, holding that where a social media user shares photos and other information with “friends,” even if those friends are actually government informants, they surrender any expectation that the information will be kept confidential.¹³⁷ A New York district court relied on *Guest* and *Katz* to hold in 2012 that sending information over the internet or via email “extinguished” the reasonable expectation of privacy that a user would otherwise have in the contents of his or her computer.¹³⁸

In that case, *U.S. v. Meregildo*, the government used an informant who was Facebook “friends” with the target of their investigation to give the government access to his profile, a move that yielded information that ultimately led to the issuance of a search warrant.¹³⁹ The court acknowledged that a user’s decision to activate privacy settings reflects his “intent to preserve information as private,” and that the information shielded by the privacy settings could therefore be protected under the Fourth Amendment.¹⁴⁰ Nevertheless, the defendant’s “legitimate expectation of privacy ended when he disseminated posts to his ‘friends’ because those friends were free to use the information however they wanted – including sharing it with the Government.”¹⁴¹ Because the defendant “surrendered his expectation of privacy,” the government’s use of an informant to access his Facebook profile did not violate the Fourth Amendment.¹⁴²

Notwithstanding this history, some cracks are starting to appear in the near-consensus around the breadth of the third party doctrine – most notably in *U.S. v. Jones*, the Supreme Court’s 2012 case on location surveillance.¹⁴³ In *Jones*, the government attached a GPS tracker to the defendant’s car without a warrant, and used it to track his location with granular accuracy for a month.¹⁴⁴ While Justice Scalia’s majority opinion for the Court held that the attachment itself violated the

137. See, e.g., *United States v. Gatson*, No. 13-705, 2014 U.S. Dist. LEXIS 173588 at *60 (D.N.J. Dec. 16, 2014); *United States v. Meregildo*, 883 F. Supp. 2d 523 (S.D.N.Y. 2012). See also Jordan Crook, *Police Can Create Fake Instagram Accounts to Investigate Suspects*, TECHCRUNCH (Dec. 24, 2014), <https://techcrunch.com/2014/12/24/police-can-create-fake-instagram-accounts-to-investigate-suspects/>.

138. *Meregildo*, 883 F. Supp. 2d at 525.

139. *Id.*

140. *Id.*

141. *Id.* at 526; accord *Palmieri v. United States*, 72 F. Supp. 3d 191, 210 (D.D.C. 2014) (once Facebook information was voluntarily shared with a “friend,” including a known government agent, the account holder had no reasonable expectation of privacy in the data).

142. *Meregildo*, 883 F. Supp. 2d at 526.

143. See generally *United States v. Jones*, 565 U.S. 400 (2012).

144. *Id.* at 403.



Fourth Amendment by virtue of being a trespass, it was the concurring opinions by Justices Sotomayor and Alito that continue to garner attention. In particular, Justice Sotomayor – responding to *Katz* and its progeny in the context of surveillance in public – suggested that it might be time to revisit the scope of the third-party doctrine, opining:

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy.¹⁴⁵

Justice Sotomayor’s admonition may be less salient in the social media arena, where data is often shared not only with a social media provider but with the world, making it hard to distinguish between lack of secrecy and lack of privacy. And she did not explicitly call into question the Court’s informant doctrine, as developed in *Hoffa* and others. Nevertheless, as one brick falls in the third-party wall, more may follow. Notably, the Supreme Court is currently considering a case, *U.S. v. Carpenter*, that could reshape the third party doctrine for the digital age.¹⁴⁶

Moreover, social media is susceptible to a particular type of deception that is nearly impossible in the real-world context. Partin may have been able to persuade Hoffa that he was a sympathetic fellow union member, to Hoffa’s misfortune, but it would have been impossible to persuade Hoffa that he was, for instance, Hoffa’s own brother; Hoffa would have the contrary evidence in front of him (which would also call into question Partin’s other statements).

On the internet, however, as they say, no one knows you’re a dog. An undercover agent could not only befriend an unwitting target but pretend to be someone who is actually known to the target in real life; if the agent is careful to build an authentic-seeming profile and is con-

145. *Id.* at 417–18 (Sotomayor, J., concurring).

146. *United States v. Carpenter*, 819 F. 3d 880 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211 (June 5, 2017) (No. 16-402); Orin Kerr, *Third Party Rights and the Carpenter Cell-Site Case*, WASH. POST (June 15, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/15/third-party-rights-and-the-carpenter-cell-site-case/?utm_term=.2b3a839789d1.

fidient the real person does not have a competing online profile, he could entice the target to share information that never would have been revealed without the intimate relationship the target thought they shared. And while it is certainly the case that even that intimate friend could disclose confidences to the government, carrying out the deception in cyberspace deprives the suspect of an opportunity she would otherwise have to assess the likelihood that her friend might betray her.

The notion that the Fourth Amendment must evolve to keep up with the digital age gained additional force in *Riley v. California*, involving the warrantless search of a cellphone incident to arrest, where Justice Roberts wrote for a unanimous Court:

The United States asserts that a search of all data stored on a cell phone is “materially indistinguishable” from searches of these sorts of physical items. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee’s pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.¹⁴⁷

Finally, on the First and Fourteenth Amendment side, the concerns detailed above apply with equal force when it comes to law enforcement using undercover accounts or other surreptitious monitoring techniques to target marginalized groups or inhibit the exercise of protected activity. As one appeals court has recognized, “the constitutionally protected right, [the] freedom to associate freely and anonymously, will be chilled” by disclosure of a protected association, regardless of whether the information is obtained from an informant or online friend.¹⁴⁸

In short, while the Fourth Amendment in its current iteration offers police a significant degree of latitude to operate undercover, law enforcement is not entirely free to misbehave online.

147. *Riley v. California*, 134 S. Ct. 2473, 2488–89 (2014).

148. *In re First Nat'l Bank*, 701 F.2d 115, 117–18 (10th Cir. 1983).



2. Law Enforcement and Company Policies

Notably, constitutional challenges are not the only mechanism for accountability; restrictions on undercover activity and the use of informants online may be more likely to come from some combination of agency policies and internal oversight mechanisms. In 2012, for instance, the NYPD released a set of guidelines governing the use of social networks for investigative purposes, including engaging in undercover operations online.¹⁴⁹ The policy requires supervisory approval for use of an online alias; where terrorist activity is suspected, the Intelligence Division is notified as well,¹⁵⁰ and where political activity is involved, the Intelligence Division must be involved and the Deputy Commissioner of Intelligence authorize the monitoring.¹⁵¹

Of course, policies are only as good as their enforcement. The NYPD's independent Inspector General (IG) found in 2016 that the department's Intelligence Bureau had repeatedly violated its own rules on investigations of political activity.¹⁵² In half the cases the IG sampled, the NYPD had failed to provide a justification for continuing the cases; a quarter of the intelligence investigations continued for at least a month after their authorization had expired; and *no* case file properly explained why an undercover officer or informant was necessary, often simply transposing identical boilerplate language from one application to another.¹⁵³ In addition, this intrusive authority was deployed disproportionately against Muslims: more than 95% of the persons under investigation were "associated with Muslims and/or engaged in political activity that those individuals associated with Islam."¹⁵⁴ Strong internal guidelines must be matched by a robust departmental culture of compliance to be effective.

149. *NYPD Operations Order 34: Use of Social Networks for Investigative Purposes*, PUBLIC INTELLIGENCE (Oct. 13, 2013), <https://publicintelligence.net/nypd-social-network-investigations/>.

150. NEW YORK POLICE DEP'T, OPERATIONS ORDER 34: USE OF SOCIAL NETWORKS FOR INVESTIGATIVE PURPOSES – GENERAL PROCEDURE 1–2 (Sept. 5, 2012), <https://s3.amazonaws.com/s3.documentcloud.org/documents/1657435/nypd-social-media-surveillance.pdf>.

151. *Id.* at 4. See generally *Handschu v. Police Dep't of New York*, 241 F. Supp. 3d 433, 460 (S.D.N.Y. 2017) (setting out circumstances in which "undercover operations" are permitted).

152. See Rocco Parascandola & Greg Smith, *NYPD Repeatedly Broke Rules When Investigating Muslims Groups, Inspector General Report Charges*, NY DAILY NEWS (Aug. 24, 2016), <http://www.nydailynews.com/new-york/nypd-broke-rules-probing-muslim-groups-inspector-general-article-1.2762445>; OFFICE OF THE INSPECTOR GENERAL FOR THE NYPD, AN INVESTIGATION OF NYPD'S COMPLIANCE WITH RULES GOVERNING INVESTIGATIONS OF POLITICAL ACTIVITY 1 (Aug. 23, 2016), http://www1.nyc.gov/assets/oignypd/downloads/pdf/oig_intel_report_823_final_for_release.pdf.

153. Parascandola & Smith, *supra* note 152.

154. *Id.*

In the federal law enforcement realm, current DOJ policies on online undercover investigations allow agents to assume someone else's identity and communicate through it with that person's consent, as long as the communication would be otherwise authorized under relevant FBI rules. Using a person's online identity without consent, by contrast, is supposed to be done "infrequently and only in serious criminal cases."¹⁵⁵ These restrictions are somewhat porous: while a set of 2002 DOJ guidelines require a special agent in charge to approve "undercover operations" in advance, the agent may engage in a fairly extensive set of communications with the target before the interaction is treated as an undercover operation, allowing the agent to communicate undercover without approval or significant oversight for some time.¹⁵⁶

Finally, companies' terms of service can be relevant too. When the Sondra Arquiett case became public, Facebook sent a strongly worded letter to the DEA, noting that impersonating another user online is a violation of its terms of service (though in practice, users appear to be able to choose a wide variety of names).¹⁵⁷ The company

155. *The Department of Justice's Principles for Conducting Online Undercover Operations*, PUB. INTELLIGENCE (Mar. 22, 2012), <https://publicintelligence.net/the-department-of-justices-principles-for-conducting-online-undercover-operations/>.

156. US DEPARTMENT OF JUSTICE, *Attorney General's Guidelines for FBI Undercover Operations* 1 (2002), <http://www.justice.gov/sites/default/files/ag/legacy/2013/09/24/undercover-fbi-operations.pdf>. The guidelines explain that the approval process is not necessarily triggered by the first online communication, because there must be a series of activities over a period of time to rise to the level of an undercover operation, including at least "three substantive contacts" by the agent with the individual being investigated. A series of messages sent through social media could constitute just one discrete contact, "much like a series of verbal exchanges can comprise a single conversation"; higher-level approval therefore may not be required until the subject and the agent have communicated fairly extensively. *See also* ONLINE INVESTIGATIONS WORKING GROUP, *ONLINE INVESTIGATIVE PRINCIPLES FOR FEDERAL LAW ENFORCEMENT AGENT* 33 (Nov. 1999), <https://info.publicintelligence.net/DoJ-OnlineInvestigations.pdf> (interagency principles on online undercover operations, indicating that agents can use a fake name online in circumstances where they could do the same thing in "the physical world"). Notably, FBI agents can also establish fake websites to interact with the public, though there are no published reports of the agency having set up fake social media platforms. *See id.* at 42.

157. *Letter from Joe Sullivan to Drug Enforcement Administration Administrator Michele Leonhart*, FACEBOOK INC. (Oct. 17, 2014), <https://www.documentcloud.org/documents/1336541-facebook-letter-to-dea.html>; *see also Statement of Rights and Responsibilities*, FACEBOOK INC. (May 12, 2017), [https://www.facebook.com/legal/terms/WhatNamesareAllowedonFacebook?](https://www.facebook.com/legal/terms/WhatNamesareAllowedonFacebook?_content), FACEBOOK INC. (May 12, 2017), https://www.facebook.com/help/112146705538576?helpref=faq_content (noting that a user's Facebook name should be "the name your friends call you every day" and should match the name on his or her form of identification). In response to criticism over its "real name policy," Facebook loosened its requirements somewhat, permitting users to provide more information if they choose a different name under special circumstances (for instance, transgender people, Native Americans, and survivors of domestic violence). *See* Alex Hern, *Facebook Relaxes "Real Name" Policy in Face of Protest*, THE GUARDIAN (Nov. 2, 2015), <https://www.theguardian.com/technology/2015/nov/02/facebook-real-name-policy-protest>.



emphasized that law enforcement authorities are obligated to comply with these policies as well – though the Cook County Sheriff’s Office presentation described above suggests that at least some law enforcement agencies consider adherence to corporate policies to be optional.¹⁵⁸

C. Utilizing Analytical Software to Analyze Individuals’ Locations, Associations, Political Affiliations, and More

The methods described above – while often invasive and potentially constitutionally problematic – largely do not require special expertise or tools. Little more is needed beyond a computer, an Internet connection, and perhaps a social media account. Far more sophisticated tools have been available through a suite of data analysis companies that offer the capability to automatically monitor online activity, conduct social network analysis, organize users by location, run keyword searches on social media postings, and more – most often on Twitter, but on Facebook and other social media platforms as well.¹⁵⁹

It is worth noting that – as described in more detail below – the major social media platforms severely curtailed access by these services to their data for law enforcement and surveillance purposes in the fall of 2016, causing several of the data analytics companies to reduce in size or shutter entirely.¹⁶⁰ While law enforcement agencies are undoubtedly still using social media for surveillance, it appears that one of the routes to engage in large-scale monitoring and network

158. While there is a growing consensus that terms of service violations are over-used and abused to target average computer users under the Computer Fraud and Abuse Act (CFAA), platforms can use their terms of service to police the police without resort to the coercive tools in the CFAA. See, e.g., Tim Wu, *Fixing the Worst Law in Technology*, NEW YORKER (Mar. 18, 2013), <http://www.newyorker.com/news/news-desk/fixing-the-worst-law-in-technology>.

159. See, e.g., Victor Li, *Software Helps Assemble Social Media Posts From a Specific Event or Point in Time*, ABA J. (Feb. 1, 2017), http://www.abajournal.com/magazine/article/trial_drone_social_media_data (describing program that uses geolocation technology and data mining to “re-create an event by identifying everyone who posts publicly to social media at a given time and location”). This type of social media monitoring is turning into big business; a recent study by the Brennan Center for Justice, where I am an attorney, showed that police departments, cities, and counties across the country had spent close to \$6 million on social media monitoring software, with the big spenders laying out hundreds of thousands of dollars each. See also *Map: Social Media Monitoring by Police Departments, Cities, and Counties*, BRENNAN CTR. FOR JUST. (Apr. 5, 2017), <https://www.brennancenter.org/analysis/map-social-media-monitoring-police-departments-cities-and-counties>. This sum does not take into account the amounts spent by departments to do social media monitoring on their own or to buy a service other than the ones identified in the study; the overall figures are thus likely far larger.

160. See *infra* note 179.



analysis has been narrowed.¹⁶¹ Regardless of recent developments, however, sophisticated data analysis of social media by law enforcement agencies is unlikely to be gone for good; one recent report, for instance, suggests that law enforcement agencies may still be able to purchase analytical products based on social media data even if they cannot access the data itself.¹⁶²

Some companies also offer geo-tagging or geo-fencing, allowing law enforcement to monitor every post coming from a designated location in close to real-time, or to monitor all such tweets that mention a particular word for which an alert has been set.¹⁶³ Along with providing critical information for agencies responding to emergencies, this function could allow for easier monitoring of protests and other public events. The Toronto Police Service, for instance, used a monitoring service to track public sentiment during “large events and mass demonstrations” via publicly available information on Facebook and Twitter, including keywords and hashtags.¹⁶⁴ Instagram also collects a substantial amount of location information and makes it available to third parties; while developers can no longer market it for surveillance purposes, it is still likely to be available to the savvy law enforcement officer who is tracking an individual or group on his or her own.¹⁶⁵

When a user accesses these apps on a cellphone without disabling the phone’s location services function, the app may draw precise loca-

161. See, e.g., *We Have Discontinued Service for the BlueJay Twitter Monitor*, BRIGHTPLANET (May 12, 2017), <http://brightplanet.com/bluejay/>; see also *Capitalizing on The Power of The Deep Web*, 31 MIND (May 12, 2017), <http://www.3i-mind.com/products/openmind/>; *Lexis-Nexis Launches New Social Media Investigative Solution for Law Enforcement*, LEXISNEXIS RISK SOLUTIONS (Oct. 15, 2013), <http://www.lexisnexis.com/risk/newsevents/press-release.aspx?id=1381851197735305>; see also DIGITALSTAKEOUT, <http://www.digitalstakeout.com/> (last visited May 12, 2017).

162. Aaron Gregg, *For This Company, Online Surveillance Leads to Profit in Washington Suburbs*, WASHINGTON POST (Sept. 10, 2017), https://www.washingtonpost.com/business/economy/for-this-company-online-surveillance-leads-to-profit-in-washingtons-suburbs/2017/09/08/6067c924-9409-11e7-89fa-bb822a46da5b_story.html?utm_term=.a39bd2d13032.

163. See, e.g., *Location-Based Intelligence*, DIGITALSTAKEOUT (May 15, 2017), <https://www.digitalstakeout.com/use-cases/location-based-intelligence>; see also G.W. Schulz, *Homeland Security Office OKs Efforts to Monitor Threats Via Social Media*, REVEAL NEWS (Nov. 15, 2012), <https://www.revealnews.org/article/homeland-security-office-oks-efforts-to-monitor-threats-via-social-media/>; Ali Winston, *Oakland Cops Quietly Acquired Social Media Surveillance Tool*, EAST BAY EXPRESS (Apr. 13, 2016), <http://www.eastbayexpress.com/oakland/oakland-cops-quietly-acquired-social-media-surveillance-tool/Content?oid=4747526>; Phil Harris, *Social Media In the Time of Protest*, OFFICER (Mar. 16, 2016), <http://www.officer.com/article/12155701/how-to-use-social-media-amidst-protests>.

164. COPS, *supra* note 14, at 8.

165. See, e.g., Jeff Reifman, *Using Social Media to Locate Eyewitnesses to Important Events*, TUTS+ (May 4, 2015), <https://code.tutsplus.com/tutorials/using-social-media-to-locate-eyewitnesses-to-important-events—cms-23563>.



tion information from the phone as well.¹⁶⁶ Notably, this is likely to disproportionately affect poor consumers, who are far more likely to use their phones rather than a computer or other device to go online.¹⁶⁷

Finally, social media data can be incorporated into predictive policing programs, an algorithmic approach that purports to predict where crimes are going to happen or who is going to be a perpetrator or victim of a crime.¹⁶⁸ Hitachi, for instance, advertises a “predictive crime analytics” tool that combines social media information with other data, including license plate readers, gunshots sensors, historical crime data, weather, and more.¹⁶⁹ Another company (formerly called Intrado, now West) offers a software product called “Beware” that uses content from social media posts, along with a host of other data, to produce “threat scores” for individuals, a process that is opaque and highly susceptible to errors.¹⁷⁰

166. When consumers access social media apps on mobile devices, the products collect location information via GPS, Bluetooth, Wifi, nearby cell towers, and even the device’s gyroscope or accelerometer. It appears that the monitoring tools cannot extract this information if the user disables the location services function on his or her phone (at least with an iPhone), but they may still be able to derive it from other clues, including the content in the social media postings. See, e.g., *Data Policy*, FACEBOOK INC. (May 12, 2017), <https://facebook.com/policy.php> (indicating that Facebook collects information about the locations of photos that are posted, and collects specific geographic location of devices using the app through GPS, Bluetooth, or WiFi signals); see also *Twitter Privacy Policy*, TWITTER INC. (May 12, 2017), <https://twitter.com/privacy?lang=en> (indicating that Twitter collects locations that are posted in profiles, Tweets or hashtags, and collects device location information in the same way as Facebook); *Privacy Policy*, INSTAGRAM, INC. (May 12, 2017), <https://www.instagram.com/about/legal/privacy/> (indicating that Instagram collects geographical metadata via location tags or location data obtained through signals when the user has enabled location access); *Privacy Policy*, SNAP INC. (Apr. 12, 2017), <https://www.snap.com/en-US/privacy/privacy-policy/> (noting that when location services are enabled by the user, Snapchat may collect precise location information using methods that include GPS, wireless networks, cell towers, Wi-Fi access and other sensors, including gyroscopes, accelerometers, and compasses; in addition, the policy notes without further elaboration that “when you use our services we may collect information about your location”); *About Privacy and Location Services in iOS 8 and Later*, APPLE INC. (Sept. 15, 2016), <https://support.apple.com/en-us/HT203033> (“When Location Services are off, apps can’t use your location in the foreground or background.”).

167. Mary Madden et al., *Privacy, Poverty and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH. U. L. REV. 53, 70 (2017) (“sixty-three percent of smartphones internet users who live in households earning less than \$20,000 per year say they mostly go online using their cell phone, compared with just twenty-one percent of those in households earning \$100,000 or more per year”).

168. See, e.g., Sean Captain, *Hitachi Says It Can Predict Crimes Before They Happen*, FAST COMPANY (Sept. 28, 2015), <https://www.fastcompany.com/3051578/elasticity/hitachi-says-it-can-predict-crimes-before-they-happen>.

169. *Hitachi Data Systems Unveils New Advancements In Predictive Policing To Support Safer, Smarter Societies*, HITACHI VANTARA (Sept. 28, 2015), <https://www.hds.com/corporate/press-analyst-center/press-releases/2015/gl150928.html>.

170. Justin Jouvenal, *The New Way Police Are Surveilling You: Calculating Your Threat “Score”*, WASH. POST (Jan. 10, 2016), <https://www.washingtonpost.com/local/public-safety/the->



Predictive policing itself has been the subject of sustained criticism on the grounds that it is opaque, disproportionately affects communities of color, replicates patterns of discriminatory policing, and is of debatable efficacy. Adding social media postings to predictive tools is likely to exacerbate the issue; social media is highly contextual, with likes, retweets, and even content notoriously difficult to interpret.¹⁷¹ Even where perpetrators of major crimes have made elliptical online references to their intentions before the fact, it is not obvious how they could be accurately picked out of the sea of words in cyberspace, a dilemma that has been grudgingly acknowledged in the counterterrorism context as well.¹⁷²

In recent years, reports of misuse of these monitoring and analytical tools have made headlines. In the spring of 2016, the Civil Rights Director of the Oregon Department of Justice filed a complaint asserting that a colleague at the department had used a social media monitoring tool, Digital Stakeout, to search for Twitter users referencing the #BlackLivesMatter hashtag.¹⁷³ Because he had used the hashtag, the director's Twitter account was flagged, and he was

new-way-police-are-surveilling-you-calculating-your-threat-score/2016/01/10/e42bccac-8e15-11e5-baf4-bdf37355da0c_story.html?utm_term=.ed0553f1ca7b.

171. See, e.g., *Twitter Joke to "Destroy America" Reportedly Gets U.K. Tourist Barred from US*, FOX NEWS (Jan. 30, 2012), <http://www.foxnews.com/travel/2012/01/30/twitter-joke-to-destroy-america-gets-tourists-barred-from-us.html> (British travelers barred from entering United States after joking about on Twitter "destroying America"—British slang for partying). For a comprehensive critique of automated social media analysis tools, see *Mixed Messages: The Limits of Automated Social Media Content Analysis*, CTR. FOR DEMOCRACY & TECHN. (Nov. 28, 2017), <https://cdt.org/insight/mixed-messages-the-limits-of-automated-social-media-content-analysis/>.

172. See, e.g., Angela Moon, *Oregon Shooting "Threat" May Have Circulated on Social Media*, REUTERS (Oct. 2, 2015), <http://www.reuters.com/article/us-usa-shooting-oregon-threats-idUSKCN0RV5W720151002>; *Initiative: Social Media Behavior & Real-World Consequences*, CRIZENS CRIME COMMISSION OF NEW YORK CITY (May 12, 2017), <http://www.nycrimcommission.org/social-media-use-preceding-real-world-violence.php>; RACHEL LEVINSON-WALDMAN, BRENNAN CTR. FOR JUSTICE, *WHAT THE GOV'T DOES WITH AMERICANS' DATA* 16 (2013), <https://www.brennancenter.org/sites/default/files/publications/What%20Govt%20Does%20with%20Data%20100813.pdf> (quoting multiple officials' observations that one of the main obstacles to picking out critical national security information has been the overabundance of data); see also Faiza Patel & Rachel Levinson-Waldman, *Monitoring Kids' Social Media Accounts Won't Prevent the Next School Shooting*, WASH. POST (Mar. 5, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/03/05/monitoring-kids-social-media-accounts-wont-prevent-the-next-school-shooting/?utm_term=.92bfd7e2e2d4 (detailing the scant hard evidence on social media of intent to commit a school shooting before the fact).

173. See Nigel Jaquiss, *Oregon Department of Justice Civil Rights Chief Intends to Sue His Agency Over Black Lives Matter Surveillance*, WILLAMETTE WEEK (Apr. 15, 2016), <http://www.wweek.com/news/2016/04/15/oregon-department-of-justice-civil-rights-chief-intends-to-sue-his-agency-over-black-lives-matter-surveillance/>.



deemed a “threat to public safety.”¹⁷⁴ The Oregon Attorney General subsequently fired the investigator involved and demoted another official.¹⁷⁵

That fall, the ACLU of Northern California revealed through public records requests that several online data analysis companies had marketed themselves to law enforcement agencies by touting their ability to track and follow lawful protestors, including at events in response to the killing of Michael Brown, gatherings using the hashtag #BlackLivesMatter, and more.¹⁷⁶ These capabilities were not merely an intriguing hypothetical: the Baltimore police used Geofeedia to monitor protests in the city after the death of Freddie Gray, and even identified and arrested protestors with outstanding warrants by running their pictures through a facial recognition system.¹⁷⁷ The City of Boston tested out a similar program at a large-scale music festival shortly after the 2013 Boston Marathon bombing; the program, which used facial recognition tools to monitor attendees, allowed “city representatives, Boston Police, and IBM support staff [to] watch in real time, all while simultaneously monitoring social media key words related to the event.”¹⁷⁸

Partially in response to the ACLU’s disclosures and the resulting media coverage, several social media platforms took steps to limit the availability of their data to companies that were mining it for sale to law enforcement agencies. Shortly after the ACLU of Northern California disclosed its findings, Twitter and Facebook cut off access by several of the most high-profile companies to the platforms’ streaming API, or application programming interface, which had allowed the

174. See *id.*; see generally Complaint, Johnson v. Rosenblum, No. EEMRC160406-40462, Or. Bureau of Lab. and Indus. (Apr. 5, 2016), <https://s3.amazonaws.com/wapopartners.com/week-wp/wp-content/uploads/2016/04/15172052/Johnson-complaint.pdf>.

175. Dana Tims, *Justice Department Investigator Fired Over Black Lives Matter Profiling Scandal*, OREGON LIVE (Oct. 25, 2016), http://www.oregonlive.com/politics/index.ssf/2016/10/black_lives_matter_profiling.html.

176. Matt Cagle, *Facebook, Instagram, and Twitter Provided Data Access for a Surveillance Product Marketed to Target Activists of Color*, AM. C.L. UNION OF NORTHERN CAL. (Oct. 11, 2016), <https://www.aclunc.org/blog/facebook-instagram-and-twitter-provided-data-access-surveillance-product-marketed-target>; see also Nicole Ozer, *Police Use of Social Media Surveillance Software is Escalating, and Activists Are in the Digital Crosshairs*, AM. C.L. UNION (Sept. 22, 2016), <https://www.aclu.org/blog/free-future/police-use-social-media-surveillance-software-escalating-and-activists-are-digital>.

177. Russell Brandom, *Facebook, Twitter, and Instagram Surveillance Was Used to Arrest Baltimore Protestors*, THE VERGE (Oct. 11, 2016), <http://www.theverge.com/2016/10/11/13243890/facebook-twitter-instagram-police-surveillance-geofeedia-api>.

178. Luke O’Neill, *Beantown’s Big Brother: How Boston Police Used Facial Recognition Technology to Spy on Thousands of Music Festival Attendees*, NOISEY (Aug. 13, 2014, 12:00 PM) https://noisey.vice.com/en_us/article/6wm356/beantowns-big-brother.

companies to query social media data in real time.¹⁷⁹ In early 2017, Facebook and Instagram issued a statement “clarifying” that their policy does not permit developers to use their data for surveillance; public records requests regarding Department of Homeland Security access to social media for visa vetting purposes suggest that Facebook has stringently implemented those restrictions.¹⁸⁰

1. Legal considerations

While courts have not yet ruled whether these kinds of algorithmic programs violate the constitutional rights of those being surveilled, aspects of these tools raise both First Amendment and Fourth Amendment issues. In the Fourth Amendment arena, recall *U.S. v. Knotts*. While the Supreme Court declared in *Knotts* that a police officer might observe someone walk or drive down a public street without getting a warrant, the Court also reasoned that “dragnet-type law enforcement practices” might raise more acute constitutional concerns.¹⁸¹ Indeed, even in *U.S. v. Katz*, the Court observed that the Fourth Amendment “protects people, not places,” and added

179. *Developer Agreement & Policy*, TWITTER, INC. (Sept. 30, 2016), <https://dev.twitter.com/overview/terms/agreement-and-policy>; see also Chris Moody, *Developer Policies to Protect People's Voices on Twitter*, TWITTER, INC. (Nov. 22, 2016), <https://blog.twitter.com/2016/developer-policies-to-protect-people-s-voices-on-twitter>; Ally Marotti, *Twitter Cuts Off Chicago Startup Geofeedia After ACLU Reports Police Surveillance*, CHICAGO TRIBUNE (Oct. 11, 2016), <http://www.chicagotribune.com/bluesky/originals/ct-twitter-suspends-geofeedia-access-bsi-20161011-story.html>; Colin Daileda, *Twitter Cuts Ties with Another Social Media Surveillance Company*, MASHABLE (Oct. 20, 2016), http://mashable.com/2016/10/20/twitter-social-media-surveillance-snaprends/#1n5_wdk9k5qm; Dell Cameron & David Gilmour, *Twitter Cuts Off Third Surveillance Firm for Encouraging Police to Spy on Activists*, DAILY DOT (Dec. 9, 2016), <https://www.dailydot.com/layer8/media-sonar-twitter-social-media-monitoring/>; Dell Cameron, *Twitter Cuts Ties with Second Firm Police Use to Spy on Social Media*, DAILY DOT (Oct. 20, 2016), <https://www.dailydot.com/layer8/twitter-snaprends-geofeedia-social-media-monitoring-facebook/>; Billy Utt, *Snaprends CEO Responds: No More Govt Surveillance*, AUSTININNO (Nov. 2, 2016), <https://www.americaninno.com/austin/snaprends-ceo-responds-no-more-govt-surveillance/>; Jordan Pearson, *Facebook Banned this Canadian Surveillance Company from Accessing Its Data*, MOTHERBOARD VICE (Jan. 19, 2017), https://motherboard.vice.com/en_us/article/instagram-banned-this-canadian-surveillance-company-from-accessing-its-data-media-sonar.

180. *Facebook U.S. Public Policy*, FACEBOOK (Mar. 13, 2017), <https://www.facebook.com/uspublicpolicy/posts/1617594498258356>; see also *Platform Policy*, INSTAGRAM, INC. (Feb. 22, 2017), <https://www.instagram.com/about/legal/terms/api/>; Colin Lecher, *Facebook Updates its Platform Policy to Forbid Using Data for Surveillance*, CNBC (Mar. 13, 2017), <http://www.cnbc.com/2017/03/13/facebook-bans-developers-from-using-data-for-surveillance.html>; Sam Levin, *Facebook and Instagram Ban Developers from Using Data for Surveillance*, THE GUARDIAN (Mar. 13, 2017), <https://www.theguardian.com/technology/2017/mar/13/facebook-instagram-surveillance-privacy-data>; Aliya Silverstein, *Obama Team Did Some “Extreme Vetting” of Muslims Before Trump, New Documents Show*, DAILY BEAST (Jan. 2, 2018, 5:00 AM), <https://www.thedailybeast.com/obama-team-did-some-extreme-vetting-of-muslims-before-trump-new-documents-show>.

181. *United States v. Knotts*, 460 U.S. 276, 284 (1983).



that what a person “seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected.”¹⁸² Taken together, these and a set of more recent cases stand for the proposition that the accumulation and retention of a large quantity of personal information implicates Fourth Amendment rights – even if that information is technically available to the public.

Take, for example, *U.S. v. Jones*, in which a police officer attached a GPS tracker to a car without a warrant and used it to collect highly detailed information about the driver’s location over the course of a month.¹⁸³ When the evidence came out in the course of a criminal case against him, he asked the court to throw it out, arguing that its warrantless collection violated his Fourth Amendment rights.¹⁸⁴ While Justice Scalia’s 2012 majority opinion relied on the fact that the simple act of attaching the device without a warrant violated the Fourth Amendment’s prohibition on trespass, five justices writing separately indicated that the device’s collection of a large quantity of sensitive data, at extraordinarily low cost, gave them pause as well.¹⁸⁵ Justice Sotomayor emphasized that GPS monitoring “generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations,”¹⁸⁶ a capability that Justice Alito described as at odds with “society’s expectation . . . that law enforcement agents and others would not – and . . . simply could not – secretly monitor and catalogue every single movement of an individual’s car for a very long period.”¹⁸⁷ It is not hard to imagine that the analysis of a wealth of online data, used to extract information that would not otherwise be visible to the average observer, would raise similar concerns.

Similarly, the Court recently ruled that law enforcement generally must get a warrant before viewing their contents of modern-day cell phones, highlighting the ways in which the quantity and diversity

182. *Katz v. United States*, 389 U.S. 347, 351 (1967) (emphasis added).

183. *United States v. Jones*, 565 U.S. 400, 403 (2012).

184. *Id.* at 404.

185. *Id.* at 416.

186. *Id.* at 415–16 (Sotomayor, J., concurring) (adding that “because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices”).

187. *Id.* at 430 (Alito, J., concurring) (opining that “the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy”).



of information they hold could enable an observer to extrapolate any number of details about the user's life:

Even the most basic phones that sell for less than \$20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet.¹⁸⁸

The Court's sensitivity to the constitutional significance of an accumulation of data, even where discrete pieces may individually be public, suggests that the justices may also be attentive to the transformation of publicly available information such as social media posts into much more detailed insights about location, associations, and more.¹⁸⁹

Finally, many of the First Amendment issues raised above come into play here as well and are even magnified. Katherine Strandburg, who has written extensively about the First Amendment implications of using data analysis techniques on social networks, has emphasized that this type of data mining, used to infer who is connected and how (rather than to elicit the *content* of their communications), "poses a serious threat to liberty because of its potential to chill unpopular, yet legitimate, association."¹⁹⁰ She thus suggests that the First Amendment right to freedom of association must offer "an additional check, distinct from the Fourth Amendment's protections from unreasonable search and seizure," on surveillance of associations.¹⁹¹

188. *Riley v. California*, 134 S. Ct. 2473, 2489 (2014).

189. See Katherine J. Strandburg, *Freedom of Association in a Networked World*, 49 B.C. L. Rev. 741, 800 (2008) (noting, in the context of *Kyllo v. United States*, that "[i]n the case of relational surveillance of traffic data, network analysis produces knowledge which, like the thermal image in *Kyllo*, is embedded in the data, yet not available without applying the technology. The Court in *Kyllo* specifically rejected the proposition that an investigating tool that was a means of processing data rather than collecting it could not constitute a search.").

190. *Id.* at 794.

191. *Id.* at 748–49. Strandburg goes on to recommend that any program of "relational surveillance" would need to meet a strict scrutiny standard, meaning that it must "serve a legitimate and compelling government interest and its methodology must be sufficiently accurate and narrowly tailored to that interest in light of the extent to which it is likely to expose protected expressive and intimate associations." *Id.* at 748–49. The focus of the inquiry would be on the likelihood that even a single occasion of the surveillance would "disclose membership in expressive associations," as well as on its "susceptibility to misuse as a means to target unpopular organizations or political opponents" – dangers that are omnipresent in the context of social media surveillance. *Id.* at 802–03.



CONCLUSION AND RECOMMENDATIONS

Social media has helped spark protests and even revolutions across the globe, from protests in Ferguson, MO, after the shooting of Michael Brown, to Women's Marches across the globe after President Trump's inauguration, to uprisings in Egypt to Turkey.¹⁹² It has become an extraordinary organizing tool that has allowed movements to take shape and change the national and international landscape at unprecedented speed.¹⁹³ Indeed, it is an irreplaceable forum for communication of all kinds – personal, political, artistic, and more.¹⁹⁴

In light of this wealth of information, it is no surprise that law enforcement agencies and other government entities have found Facebook, Twitter, Instagram, and other social media sites to be rich sources of data to mine for a variety of purposes. To be sure, much of the information on social media is public by design – it is precisely that public nature that makes it so valuable. But its public nature does not render it either constitutionally defenseless or undeserving of protection through policy.

This Essay has suggested some ways that the First, Fourth, and Fourteenth Amendments could be brought to bear to constrain unfettered law enforcement access to social media. In the meantime, some policy prescriptions would help relieve the pressure while the courts are working through these challenges.

(1) Publicly Available Policies and Practices. A 2016 study by the Brennan Center revealed that of the 150+ police departments that

192. Erin Carson, *How Facebook, Twitter Jumpstarted the Women's March*, CNET (Apr. 20, 2017, 3:46 PM), <https://www.cnet.com/news/facebook-twitter-instagram-womens-march/>; Sam Gustin, *Social Media Sparked, Accelerated Egypt's Revolutionary Fire*, WIRED (Feb. 11, 2011, 2:56 PM), <https://www.wired.com/2011/02/egypts-revolutionary-fire/>; Selena Larson, *Facebook is Playing an Increasingly Important Role in Activism*, CNNtech (Feb. 17, 2017, 12:38 PM), <http://money.cnn.com/2017/02/17/technology/womens-march-facebook-activism/index.html>; Carlos Lozada, *Twitter and Facebook Help Spark Protest Movements. Then They Undermine Them.*, WASH. POST (May 25, 2017), https://www.washingtonpost.com/news/book-party/wp/2017/05/25/twitter-and-facebook-help-spark-protest-movements-then-they-undermine-them/?utm_term=.80ae40fc337e; *They Helped Make Twitter Matter in Ferguson Protests*, N.Y. TIMES (Aug. 10, 2015), <https://www.nytimes.com/2015/08/11/us/twitter-black-lives-matter-ferguson-protests.html>.

193. Bijan Stephen, *Social Media Helps Black Lives Matter Fight the Power*, WIRED (Nov. 2015), <https://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/>.

194. Homero Gil de Zúñiga, Logan Molyneux, & Pei Zhang, *Social Media, Political Expression, and Political Participation: Panel Analysis of Lagged and Concurrent Relationships*, 64(4) J. COMM. 612 (2014); Elizabeth Kulze, *Instagram is Now One of the Most Common Forms of Artistic Expression*, VOCATIV (Jan. 13, 2015, 4:43 PM), <http://www.vocativ.com/culture/art-culture/instagram-artists/index.html>.

used social media monitoring software, only eighteen had publicly available policies detailing how social media is used for investigative or intelligence purposes. All law enforcement agencies engaging in social media monitoring – whether through third-party analytic tools or more focused efforts – should have a publicly available policy describing their use of social media. The policy should detail (1) who is authorized to access social media, (2) how the information obtained may be used, (3) how long it is stored, (4) with whom it may be shared, (5) the protections in place to protect privacy, speech, and association, and (6) what training is provided to officers or detectives who access social media as part of their law enforcement work. It should also set out mechanism and schedule to conduct publicly available audits of the department’s use of social media.

(2) Safeguarding of Constitutional Values. The policy should specify that law enforcement agents may not target people on the basis of impermissible factors, including First Amendment-protected speech and membership in a protected category, such as race, religion, or ethnicity. The provisions of the Handschu Agreement, the product of a lawsuit against the NYPD for engaging in discriminatory surveillance, may be helpful in this regard.¹⁹⁵ The Handschu agreement states, among other things, that investigations should “not be based solely on activities protected by the First Amendment” and “[should] not intrude upon rights of expression or association in a manner that discriminates on the basis of race, religion or ethnicity.”

(3) Use of Undercover Accounts or Personae on Social Media. Law enforcement should use undercover online personae with extreme caution. As in the real world, an officer should engage in undercover interactions only during a predicated investigation, only where no less intrusive means are available, and only where the information sought could not be obtained through other methods. This condition could be given teeth by requiring the officer to demonstrate these facts to

195. See, e.g., *Revised Settlement Enhances Protections From Discriminatory NYPD Surveillance of American Muslims*, N.Y.C.L. UNION (Mar. 6, 2017), <https://www.aclu.org/news/revised-settlement-enhances-protections-discriminatory-nypd-surveillance-american-muslims>. Among other things, the Handschu agreement states that investigations should “not be based solely on activities protected by the First Amendment” and “[should] not intrude upon rights of expression or association in a manner that discriminates on the basis of race, religion or ethnicity.” Revised Handschu Guidelines § II, *Handschu v. Special Servs. Div.*, No. 71-cv-2203 (CSH) (S.D.N.Y. Mar. 13, 2017), <https://www.clearinghouse.net/chDocs/public/NS-NY-0005-0005.pdf>.



the prosecutor's office in his or her jurisdiction and to obtain an opinion approving their use or confirming that the information sought will contribute materially to prosecuting the case. Online undercover work must also be closely monitored to safeguard the safety and privacy of third parties who might unsuspectingly interact with the undercover officer.

The Handschu agreement may be useful in this context as well. The agreement specifies that requests to use undercovers or confidential informants must "be in writing and must include a description of the facts on which the investigation is based and the role of the undercover," with time limits on how long an undercover or informant may be used.¹⁹⁶ The agreement also prohibits undercover officers from "engaging in any conduct the sole purpose of which is to disrupt the lawful exercise of political activity, from instigating unlawful acts or engaging in unlawful or unauthorized investigative activities."¹⁹⁷

(4) Prohibitions on Monitoring Juveniles. Finally, in light of rules preventing law enforcement officers from interviewing minors without notifying their parents, officers should be prohibited from connecting with juveniles online, whether undercover or not.

These policies would go a significant way towards establishing practical, workable guardrails around access for law enforcement purposes while ensuring that social media continues to play a rich, catalyzing role in modern-day communications and organizing.

196. §§ VII(3)(a)(i), VII(3)(a)(ii).

197. § VII(3)(a)(iii).



“Fake News,” No News, and the Needs of Local Communities

CAROL PAULI*

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INTRODUCTION

Speaking truth to power requires having some truth to speak. But those with less power face barriers in accessing truth – at least at the everyday level of accurate information about their own communities. Local newsrooms keep downsizing and closing, and public trust in local reporting is at risk of being weakened by a President who repeatedly calls the media “fake news.” Although people have increasing Internet access, what they find online is a raucous marketplace where accuracy vies with accusation and reason competes against unprocessed data and disinformation. Ironically, citizens trying to track down something true may not know that their own tracks

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are being recorded, followed, and measured, their own data captured and compiled for the use of others, largely unseen.

The phrase, “speak truth to power,” is often credited to a Quaker booklet by that name,¹ which was published during the “Red Scare” of the 1950s, when the national conversation was dominated by accusations and suspicions. In today’s politically heated climate, its warnings are worth reading. The authors wrote that the country, in response to its own fear, was adopting tyrannical measures that undermined its democracy at home and its moral leadership in the world.² The authors decried “the shocking extent to which the appeal to hatred has become commercially and legislatively profitable in America.”³

The Quaker authors had in mind an ancient truth – that “love endures and overcomes” – and they were convinced that this truth is accessible to all.⁴ This article addresses truth at a more immediate and mundane level. It is concerned with the accurate information that local communities need in order to thrive.

The article proceeds in three steps. Part I reviews one way community needs were addressed when the first large-scale electronic communication technology entered individual homes in the form of radio and television. In those days, broadcasters had an affirmative duty to ascertain the problems of the communities they served and to provide programming that would address those problems. Part II reviews the current, growing gap in community information caused by uneven access to the Internet and by the misinformation and distrust that have arisen online in the current polarized political climate. Part III proposes exploring two avenues to help ground communities in factual information: harness the data-gathering done by Internet service providers, creating a new way to ascertain local community needs, and enlist community colleges in initiatives to report local news.

1. STEPHEN G. CARY ET AL., *SPEAK TRUTH TO POWER: A QUAKER SEARCH FOR AN ALTERNATIVE TO VIOLENCE* (1955), https://www.afsc.org/sites/afsc.civicactions.net/files/documents/Speak_Truth_to_Power.pdf. Although this publication is sometimes cited as the origin of the phrase, the document, itself, cites an earlier use among Quakers, formally known as members of the Religious Society of Friends: “Our title, *Speak Truth to Power*, taken from a charge given to Eighteenth Century Friends suggests the effort that is made to speak from the deepest insight of the Quaker faith, as this faith is understood by those who prepared this study.” *Id.* at iv.

2. *Id.* at 8.

3. *Id.* at 17.

4. CARY, *supra* note 1, at iv.



I. BROADCAST: ASCERTAINMENT OF COMMUNITY NEEDS

From its early years, broadcasting technology required government regulation. Broadcast signals, traveling on the electromagnetic spectrum, can reach audiences effectively only if they are free of interference from nearby signals.⁵ Because the spectrum is limited, potential broadcast frequencies are scarce, so a broadcaster has to license a frequency in a particular community and keep the range of the broadcast signal within a limited geographic radius.⁶ Licensing imposes a prior restraint on a broadcaster's speech, but in this context, the First Amendment was interpreted as protecting, not the broadcaster's right to free speech, but the "collective right" of the audience to receive information. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."⁷ Obtaining a broadcast license required serving the public interest.⁸

Broadcasters were to operate as trustees for "the public interest, convenience, and necessity."⁹ Reflecting that interest in its licensing and renewal process, the Federal Communications Commission ("FCC") adopted a policy of favoring stations whose programming aired more than one viewpoint.¹⁰ Eventually, this policy became codified under what came to be known as the "Fairness Doctrine."¹¹ It required licensees to devote air time to controversial public issues and to seek out and broadcast contrasting viewpoints.¹² A station that failed to meet this requirement might be required to broadcast a viewpoint that it had excluded previously, and it risked losing its license.¹³

In addition, FCC regulations appealed to the values of communities and civic engagement¹⁴ by imposing an affirmative obligation on each broadcast license applicant to determine the problems of its com-

5. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994).

6. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969).

7. *Id.* at 390.

8. 47 U.S.C. § 307 (2012).

9. *See, e.g.*, 47 U.S.C. § 309 (2012) (providing that the FCC shall examine each broadcast license application and, "if the Commission . . . shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.").

10. KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES 2 (2011).

11. *Id.*

12. *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10,416, 10,426 (July 25, 1964).

13. RUANE, *supra* note 10, at 3.

14. Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 4 (2009).



munity.¹⁵ The FCC prescribed a process in guidelines that it adopted in 1971. The broadcaster had to gather data to determine the minority, racial, or ethnic composition of the community.¹⁶ Then high-level members of the broadcast enterprise¹⁷ had to consult, in a dialogue,¹⁸ with leaders of the significant community groups.¹⁹

Talks with community leaders were not sufficient, however. The broadcaster also had to survey a random sampling of the general public.²⁰ As the FCC noted, "Groups with the greatest problems and needs may be the least organized and have the fewest recognized spokesmen. Therefore, additional efforts may be necessary to identify their leaders so as to better establish dialogue with such groups and better ascertain their problems."²¹ Problems were presumed to exist,²² and if they were not uncovered, the broadcaster was expected to craft "more imaginative, searching or more precise questioning."²³

The purpose of ascertainment was not to gather program suggestions from the public; that was the broadcaster's area of expertise. Instead, the broadcaster was expected to evaluate the importance of a problem and the number of people affected by it.²⁴ Then the broadcaster was charged with making a good-faith effort to use programming to address those problems.²⁵ Factual news broadcasts were seen as a contribution, but they were not enough to meet the requirement of serving the public.²⁶

The ascertainment requirement gave audience members leverage in getting the attention and cooperation of broadcasters,²⁷ allowing organized groups to intervene in licensing decisions²⁸ by presenting

15. *In re* Primer on Ascertainment of Cmty. Problems by Broad. Applicants, 27 F.C.C.2d 650 app. b (1971) [hereinafter *Primer on Ascertainment*].

16. *Id.* (Question & Answer 9).

17. *Id.* (Question & Answer 11(a)).

18. *Id.* (Question & Answer 12).

19. *Id.* (Question & Answer 4).

20. *Id.* (Question & Answer 13(b)).

21. *Id.* (Question & Answer 13(a)).

22. *Id.* (Question & Answer 19).

23. *In re* Camden, 18 F.C.C.2d 412, 421 (1969).

24. *Primer on Ascertainment*, *supra* note 15, at app. b (Question & Answer 27) (pointing out, for example, that a hospital inadequacy affecting only a small percentage of a community might still be more important than a beautification program affecting almost everyone).

25. *In re* Primer on Ascertainment of Cmty. Problems by Broad. Applicants, 27 F.C.C.2d 650 app. b (1971).

26. *Id.* (Question & Answer 33).

27. William C. Canby, Jr., *Programming in Response to the Community: The Broadcast Consumer and the First Amendment*, 55 TEX. L. REV. 67, 68 (1976).

28. Office of Comm'n of the United Church of Christ v. FCC, 425 F.2d 543, 544 (D.C. Cir. 1969).

evidence against a broadcaster for the FCC to investigate in the public interest.²⁹ A broadcast applicant could not merely assume, for example, that a New Jersey community's need for FM broadcasting was just like the need in other states the broadcaster served.³⁰ An applicant could not meet the ascertainment obligation by merely talking with friends,³¹ overlooking the needs of poor people who made up twenty percent of the population,³² or failing to interview leaders of the black community where the entire community was more than half black.³³

As cable and other communication systems advanced, they weakened the technological “scarcity” rationale for regulation, broadcasters pressed for independence from government rules. The FCC re-examined the Fairness Doctrine in the 1980s, amid President Ronald Reagan's program of deregulation, and it agreed with the broadcasters.³⁴ FCC Chairman Mark Fowler went so far as to paint the Fairness Doctrine as an Orwellian kind of government repression: “Put simply, I believe we are at the end of regulating broadcasting under the trusteeship model. . . . [I]t is ‘Big Brother,’ and it must cease.”³⁵ The FCC began to favor letting the marketplace determine broadcast content.³⁶ In 1987, the FCC repealed most of its Fairness Doctrine regulations.³⁷ Instead of formal ascertainment, stations must explain in their license application how they will determine their communities' problems.³⁸

With this change, broadcast audience members lost their ability to petition for a voice in a local station's planning. In the eyes of opponents, rather than being a consumer of information, the audience member became “simply a product sold to the advertiser.”³⁹ Critics of

29. *Id.* at 546.

30. *Henry v. FCC*, 302 F.2d 191, 193 (D.C. Cir. 1961) (“The instant program proposals were drawn up on the basis of the principals' apparent belief — unsubstantiated by inquiry, insofar as the record shows — that Elizabeth's needs duplicated those of Alameda, California, and Berwyn, Illinois . . .”).

31. *In re Cowles*, 37 F.C.C.2d 405, 406, 407 (1972).

32. *Bamford v. FCC*, 535 F.2d 78, 83 (1976).

33. *In re Town & Country Radio, Inc.* 53 F.C.C.2d 401, 404 (1975).

34. Rosel H. Hyde, *FCC Action Repealing the Fairness Doctrine: A Revolution in Broadcast Regulation*, 38 SYRACUSE L. REV. 1175, 1185 (1987).

35. Erwin G. Krasnow & Jack N. Goodman, *The Public Interest Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 616 (1998).

36. RUANE, *supra* note 13, at 6.

37. Hyde, *supra* note 34, at 1175.

38. STEVEN WALDMAN ET AL., FED. COMM'NS COMM'N, *THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE* 29 (2011), https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

39. Kurt A. Wimmer, *Deregulation and the Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform*, 8 HASTINGS COMM. & ENT. L.J. 329, 464 (1986).



deregulation warned that advertisers would especially court the affluent, especially the “young, white, high-income demographic.”⁴⁰ Even though minorities would consume more television, the market would exclude them because of their lack of “monetary clout.”⁴¹ Over the next decade, informational broadcast programming increased⁴² but its quality, especially on radio, declined.⁴³

II. A GROWING INFORMATION GAP

Despite the skyrocketing growth of information technology today, a large segment of society is “information poor.”⁴⁴ Information inequality has been defined as a “multifaceted disparity between individuals, communities, or nations in mobilizing society’s information resources for the benefit of their lives and development.”⁴⁵ Beginning in the 1990s, its study has been “one of the fastest growing areas of research.”⁴⁶ Scholars in diverse fields have examined such factors as: the characteristics of low-income communities, the economics of the news media, and disparities in the uptake and use of information by high- and low-income segments of the population.⁴⁷

Concerns about the needs of low-income communities are heightened by the growing income disparity in the United States. The gap between wealthy families and lower- and middle-income families is higher than ever,⁴⁸ as poor Americans slide into severe poverty.⁴⁹

40. *Id.* at 465.

41. *Id.* at 475.

42. Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a “Chilling Effect”?* *Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279, 300 (1997).

43. *Id.*

44. Liangzhi Yu, *How Poor Informationally Are the Information Poor?*, 66 J. DOCUMENTATION 906, 907 (2010) [hereinafter *Information Poor*].

45. Liangzhi Yu, *The Divided Views of the Information and Digital Divides: A Call for Integrative Theories of Information Inequality*, 37 J. INFO. SCI. 660, 661 (2011) [hereinafter *Divided Views*].

46. Yu, *Information Poor*, *supra* note 44, at 908.

47. See generally Yu, *Information Poor*, *supra* note 44 (surveying the findings of various researchers); Alistair S. Duff, *Needing NoDI (Normal Democratic Information)? The Problem of Information Poverty in Post-Industrial Society*, 18 INFO. COMM. & SOC. 63 (2015) (discussing academia and theoretical perspectives).

48. Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed in the U.S. Since the Great Recession, by Race, Ethnicity and Income*, PEW RES. CTR. (Nov. 1, 2017), <http://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/>.

49. Kristin Bialik, *Americans Deepest in Poverty Lost More Ground in 2016*, PEW RES. CTR. (Oct. 6, 2017), <http://www.pewresearch.org/fact-tank/2017/10/06/americans-deepest-in-poverty-lost-more-ground-in-2016/> (showing that 45.6% of poor individuals have incomes below half of the poverty threshold, the highest level in twenty years, even while the overall poverty rate recovered to nearly the level seen before the 2008 recession).

Some researchers have proposed that poor communities lack information because residents, often distrustful of those outside their small social networks, avoid the discomfort of asking for the information they most need.⁵⁰ They would rather forego available information than to risk revealing their critical need for it.⁵¹

Information poverty may result in missed opportunities that may come to light only when the needed information is supplied. For example, many high-achieving low-income high school students appear to be unaware of generous scholarships they could get from top colleges.⁵² Researchers in one project learned this when they intervened. They located qualifying students by combining data on top-scoring students on the SAT and ACT college assessments with their high schools and neighborhoods.⁵³ The students they targeted scored in the top ten percent of test takers and had estimated family income in the bottom third.⁵⁴ Researchers supplied them with information about the actual expenses of top colleges, where financial aid can bring the final cost down below the level at the lower-tier schools to which these students had applied.⁵⁵ As a result, these students were fifty-six percent more likely than a control group to apply to a college that was better, as measured by graduation rates and instructional spending.⁵⁶ Before this intervention, students had not realized their opportunities. In fact, surveys revealed that some students had not realized that a liberal arts college taught more than art and more than liberals.⁵⁷

A. Lagging Internet Access

To the extent that low-income people may conceal their information needs in order to avoid the risk of asking embarrassing questions,

50. Yu, *Divided Views*, *supra* note 45, at 664.

51. Elfreda A. Chatman, *The Impoverished Life-World of Outsiders*, 47 J. AM. SOC'Y FOR INFO. SCI. 193, 197 (1996) (“[W]e engage in self-protective behaviors to keep others from sensing our need. These behaviors are meant to hide our true crisis in an effort to appear normal and to exhibit acceptable coping behaviors.”).

52. Caroline Hoxby & Sarah Turner, *What High-Achieving Low-Income Students Know About College* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 20861, 2015), <http://www.nber.org/papers/w20861.pdf>.

53. Caroline M. Hoxby & Christopher Avery, *The Missing “One-Offs”: The Hidden Supply of High-Achieving, Low-Income Students* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 18586, 2012), <http://www.nber.org/papers/w18586>.

54. Hoxby & Turner, *supra* note 52, at 2.

55. *Id.*

56. *Id.* at 3.

57. *Id.* at 6.



the Internet would seem to be an excellent remedy. But Internet access remains limited, especially in low-income communities. Broadband access at home seemed to reach a plateau from 2013 to 2015, when the number of adults with access declined, but the drop was offset by a slight increase in “smartphone-only” adults, who access the Internet only via phone and do not have traditional broadband service.⁵⁸

This plateau contrasts with broadcasting. Within twenty years of their arrivals in the marketplace, radio and television were nearly universally adopted by poor and wealthy households alike.⁵⁹ One reason is that both technologies required only a one-time expense for the purchase of a receiver. High-speed Internet service, or “broadband,” however, represents an ongoing expense. Adoption has been slower, especially among those already marginalized by poverty, old age, disability, language barrier, or recent immigration.⁶⁰

A Pew survey found that roughly half of the adults surveyed said their decision-making would be helped “a lot” if they had unlimited data plans for their cellphones or more reliable Internet service at home.⁶¹ However, even consumers who are highly motivated to get Internet service may find it beyond their means.⁶² For example, an estimated five million households with school-age children lack broadband access, even though it is increasingly essential for success in school.⁶³ The rate of non-connection is highest among low-income families, especially those that are black or Hispanic.⁶⁴ This means that children in these households, to keep up with peers, must get to librar-

58. John B. Horrigan & Maeve Duggan, *Home Broadband 2015: The Share of Americans with Broadband at Home has Plateaued, and More Rely Only on their Smartphones for Online Access*, PEW RES. CTR. 2 (Dec. 21, 2015), <http://www.pewinternet.org/files/2015/12/Broadband-adoption-full.pdf>.

59. Mark Lloyd et al., *Understanding a Diverse America's Critical Information Needs, in THE COMMUNICATION CRISIS IN AMERICA, AND HOW TO FIX IT* 53–54 (Mark Lloyd & Lewis A. Friedland eds., 2016).

60. *Id.* at 57.

61. John B. Horrigan, *How People Approach Facts and Information*, PEW RES. CTR. 17 (Sept. 11, 2017), http://assets.pewresearch.org/wp-content/uploads/sites/14/2017/09/12135404/PI_2017.09.11_FactsAndInfo_FINAL.pdf

62. See, e.g., Cecilia Kang, *Bridging a Digital Divide that Leaves Schoolchildren Behind*, N.Y. TIMES (Feb. 23, 2016), <https://www.nytimes.com/2016/02/23/technology/fcc-internet-access-school.html>.

63. John B. Horrigan, *The Numbers Behind the Broadband “Homework Gap,”* PEW RES. CTR., (Apr. 20, 2015), <http://www.pewresearch.org/fact-tank/2015/04/20/the-numbers-behind-the-broadband-homework-gap/>.

64. *Id.* (showing that the average rate of broadband access among families with school-age children is 82.5%, and that the lowest rates are 53.6% and 54.8% among black and Hispanic households, respectively, with annual incomes under \$25,000).



ies, use WiFi on school buses, or linger in wireless hot spots long into the evening in order to read homework materials and upload assignments throughout their school years.⁶⁵

B. Lack of Community Reporting

Access to the Internet can help, but it does not guarantee access to information.⁶⁶ A 2011 survey found that Americans used the Internet as their main source of local information when they were checking on businesses and restaurants, for example.⁶⁷ When checking on local government, however, they may find information scant.⁶⁸ Many of the community newspaper reporters who once made their living attending meetings and conducting interviews have seen their newspapers close. Despite the expanding number of news outlets on the Internet, there is not much original reporting. For example, a week-long study of local news in Baltimore – which included everything from blogs to radio talk shows – found that ninety-five percent of the news was based on stories from the traditional news media, primarily the *Baltimore Sun*.⁶⁹

Increasingly, small communities have no daily news coverage, a trend that prompted the Columbia Journalism Review to create a growing online map of “news deserts.”⁷⁰ Lack of local newspapers is correlated with a lower rate of voting,⁷¹ and the loss of a newspaper may herald a falling off of other forms of civic engagement.⁷² Local radio has also declined from fifty all-news stations in the 1980s to 30 in

65. See, e.g., Kang, *supra* note 62.

66. Gary Burnett et al., *Normative Behavior and Information: The Social Aspects of Information Access*, 30 LIBR. & INFO. SCI. RES. 56, 57–58 (2008) (“[I]t is a common, but mistaken assumption that access to technology equals access to information.”).

67. PEW RESEARCH CENTER, HOW PEOPLE LEARN ABOUT THEIR LOCAL COMMUNITY 2 (2011), https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/129/original/Pew_Knight_Local_News_Report_FINAL.pdf.

68. Peter M. Shane, *Democratic Information Communities*, 6 I/S: J. L. & POL’Y FOR INFO. SOC’Y 95, 98 (2010) (“Many Americans would undoubtedly find it easier to track developments in the U.S. Environmental Protection Agency (EPA) than in their own city council, or to learn the facts of a salmonella outbreak across the country, as compared to finding out the health inspection results for local restaurants.”)

69. WALDMAN ET AL., *supra* note 38, at 123.

70. Evan Applegate & Cynthia Hoffman, *America’s Growing News Deserts*, COLUM. JOURNALISM REV., https://www.cjr.org/local_news/american-news-deserts-donuts-local.php (last visited Feb. 20, 2018).

71. Jackie Filla & Martin Johnson, *Local News Outlets and Political Participation*, 45 URB. AFF. REV. 679, 688 (2010).

72. Lee Shaker, *Dead Newspapers and Citizens’ Civic Engagement*, 31 POL. COMM. 131, 142 (pointing to an above-normal decline in civic engagement indicators in both Denver and Seattle following closures of the cities’ newspapers, the *Rocky Mountain News* and *Post-Intelligencer*).



2010.⁷³ Local television reporting has weakened as well. Reporters once developed a “beat,” cultivated sources, and became familiar with the issues and terminology of a segment of the community. Now, due to newsroom cutbacks, the “beat” reporter may simply be the person who receives a government press release and must quickly rewrite it as a story.⁷⁴ More than 500 local stations broadcast no local news at all.⁷⁵ The shortage of local, professional reporting “is likely to lead to more government waste, more local corruption, worse schools, a less-informed electorate, and other serious problems in communities.”⁷⁶

The loss of local news has also created a gulf between small communities and the national news media. When people have no experience with a hometown reporter, who knows their streets and covers the schools and puts their children’s achievements in the paper, then it’s easier to believe that the news media make up an alien force, possibly treacherous and arrogant. As one columnist put it, “far too many Americans don’t have a local press that understands them, and thus all their news comes with a heap of condescension.”⁷⁷

Where local reporting exists, low-income communities are likely to get less news coverage because residents are less able to afford the subscriptions or attract the advertising interest that the newsroom needs to support itself.⁷⁸ People with low buying power get less content – both in terms of the amount of information prepared for them and the quality of information.⁷⁹ When journalists do endeavor to cover low-income communities, most do not know what kinds of information poor people need.⁸⁰ One venerable sociologist of the news media, Herbert Gans, made an effort:

Need would suggest stories about available work at decent wages; crime-free areas with vacant housing; stores selling high-quality goods at low prices; and helpful services that are not punitive. Those still on welfare have to find out which welfare offices are useful in helping recipients obtain jobs, which clinics and emergency rooms

73. WALDMAN ET AL., *supra* note 38, at 10.

74. *Id.* at 86.

75. *Id.* at 100.

76. *Id.* at 345.

77. Salena Zito, *Opinion: Why All Your News Now Comes with a Heap of Condescension*, N.Y. POST (Feb. 23, 2017), <https://nypost.com/2017/02/23/why-all-your-news-now-comes-with-a-heap-of-condescension/>.

78. James T. Hamilton & Fiona Morgan, *Bridging the Content Gap in Low-Income Communities*, in THE COMMUNICATION CRISIS IN AMERICA AND HOW TO FIX IT 185 (Mark Lloyd & Lewis A. Friedland eds., 2016).

79. *Id.* at 183.

80. HERBERT J. GANS, DEMOCRACY AND THE NEWS 103 (2003).

supply the best medical care, and more generally, which agencies serving the poor humiliate them the least.⁸¹

Another scholar proposes that “the information-poor – the dispossessed of the information land – are short of certain kinds of democracy-pertaining information.”⁸² He includes voter registration and election procedures, names of public officials, and the platforms and philosophies of political parties.⁸³ The Knight Foundation lists information that is needed “to coordinate collective activity, to achieve public accountability, to solve problems, and to create connectedness.”⁸⁴

But some of the information that low-income people need may be the same information that government and business have incentives to withhold. They may lose money if they publicize programs or benefits that low-income people can participate in.⁸⁵ Simply put, it doesn't pay to serve the poor – and it may pay *not* to.

C. Polarization

Large broadcast media companies once reduced political polarization in the United States,⁸⁶ but they have lost their influence.⁸⁷ As the Internet has lowered the cost of distributing an idea, more speakers have crowded more varied ideas into the marketplace, just as predicted,⁸⁸ and audiences can more easily focus on whatever agrees with their prejudices,⁸⁹ even the most inaccurate⁹⁰ and alarming voices.⁹¹ Republicans and Democrats have intensely negative views – not only of each other's parties – but also of each other, so that close friendships tend to form within each political party rather than across party

81. *Id.* at 103–04.

82. Alistair S. Duff, *Needing NoDI (Normal Democratic Information)? The Problem of Information Poverty in Post-Industrial Society*, 18 INFO., COMM. & SOC. 63, 68 (2015).

83. *Id.* at 68–69.

84. Shane, *supra* note 68, at 99.

85. Hamilton & Morgan, *supra* note 78, at 184.

86. Yphtach Lelkes et al., *The Hostile Audience: The Effect of Access to Broadband Internet on Partisan Affect*, 61 AM. J. POL. SCI. 5, 17 (2017).

87. ROBERT FARIS ET AL., BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y AT HARV. UNIV., *PARTISANSHIP, PROPAGANDA, AND DISINFORMATION: ONLINE MEDIA AND THE 2016 U.S. PRESIDENTIAL ELECTION 25* (2017), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:33759251>.

88. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1826 (1995).

89. *Id.* at 1835.

90. *Id.* at 1838.

91. *Id.* at 1837.

lines.⁹² Scholars wondered twenty years ago, “What will happen when the KKK becomes able to conveniently send its views to hundreds of thousands of supporters throughout the country . . . ?”⁹³ Today, we are beginning to find out.

The change in the political conversation has been asymmetrical: an evolving,⁹⁴ “discrete and relatively insular right-wing media ecosystem,”⁹⁵ which has hollowed out the political center-right and replaced it with more extreme voices,⁹⁶ seemingly impervious to traditional demands for accountability from media critics and fact checkers.⁹⁷ In contrast to professional news organizations, striving to abide by objectivity standards,⁹⁸ readers encounter fringe sites characterized by sensationalistic and misleading reporting,⁹⁹ which is especially pronounced among the far-right newcomers to the media scene.¹⁰⁰

The polarizing impact of the Internet in this regard has been documented by researchers at a state level. States differ in their approaches to broadband. Although the 1996 Communications Act encouraged the growth of telecommunication, it allows state and local governments to require “fair and reasonable compensation” for the use of public rights of way.¹⁰¹ So local regulations vary in the restrictiveness they impose on broadband development, ranging from those who charge fees for rights-of-way to those who offer tax incentives, instead. These policy choices appear to be independent of the educational levels, wealth, and political leanings of the voters.¹⁰² Political scientists compared the variations in broadband access to voting patterns, and they concluded that “access to broadband Internet heightens partisan animus by increasing partisans’ exposure to imbalanced partisan rhetoric.”¹⁰³

92. PEW RESEARCH CENTER, THE PARTISAN DIVIDE ON POLITICAL VALUES GROWS EVEN WIDER 66 (2017), <http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/10/05162647/10-05-2017-Political-landscape-release.pdf>.

93. Volokh, *supra* note 88, at 1848.

94. PEW RESEARCH CENTER, *supra* note 92, at 37 (describing the asymmetry of the political polarization as having deeper roots and an earlier start than the Trump candidacy).

95. *Id.* at 17.

96. *Id.* at 18.

97. *Id.* at 16.

98. *Id.* at 69.

99. *Id.* at 68.

100. PEW RESEARCH CENTER, *supra* note 92, at 67–69.

101. 47 U.S.C. § 253(c) (2012).

102. Lelkes et al., *supra* note 86, at 7–8.

103. *Id.* at 17.



D. Misinformation

An ongoing exchange of opposing rhetoric is arguably the stuff of democracy, but the same cannot be said about intentional disinformation – or “fake news.” The fact that anyone can post content on the Internet allows for “the rapid dissemination of unsubstantiated rumors and conspiracy theories that often elicit rapid, large, but naïve social responses.”¹⁰⁴ The problem is so pervasive that the World Economic Forum has listed it as a threat to human society.¹⁰⁵

“Fake news” exists, not in the errors of journalists striving to abide by objectivity standards,¹⁰⁶ but in the exaggerated headlines of disinformation and clickbait. During the 2016 presidential election, falsehoods were found on both sides of the political divide, but especially on such right-wing sites as Breitbart, the Daily Caller, and Fox News,¹⁰⁷ where mixtures of facts and falsehoods echoed and sowed confusion.¹⁰⁸ Then, when faced with overwhelmingly negative coverage in the media,¹⁰⁹ President Trump appropriated the term and labeled the mainstream stories “fake news.”¹¹⁰

The President’s war with the press has been good for the bottom line of big, national news organizations, increasing subscriptions for the New York Times and Washington Post, for example.¹¹¹ But the press war hurts local news organizations, already weak financially, when state and local officials attack them by picking up the “fake news” cry.¹¹²

104. Michela Del Vicario et al., *The Spreading of Misinformation Online*, 113 PROC. NAT’L ACAD. SCI. 554, 554 (2016).

105. *Id.*

106. FARIS, *supra* note 87, at 69.

107. *Id.* at 21.

108. Michael Barthel, Amy Mitchell & Jesse Holcomb, *Many Americans Believe Fake News Is Sowing Confusion*, PEW RES. CTR. (Dec. 15, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/13/2016/12/14154753/PJ_2016.12.15_fake-news_FINAL.pdf.

109. Thomas E. Patterson, *News Coverage of Donald Trump’s First 100 Days*, HARVARD KENNEDY SCHOOL SHORENSTEIN CENTER ON MEDIA, POLITICS AND PUBLIC POLICY (May 2017) (finding that, among stories that had a clear positive or negative tone, 80 percent were negative toward the President during his first one hundred days in office) <https://shorensteincenter.org/wp-content/uploads/2017/05/News-Coverage-of-Trump-100-Days-5-2017.pdf?x78124>.

110. See Angie Drobnic Holan, *The Media’s Definition of Fake News vs. Donald Trump’s*, POLITIFACT (Oct. 18, 2017 2:11 PM) <http://www.politifact.com/truth-o-meter/article/2017/oct/18/deciding-whats-fake-medias-definition-fake-news-vs/>.

111. Jonathan Peters, *Trump and Trickle Down Press Persecution*, COLUM. JOURNALISM REV., https://www.cjr.org/local_news/trump-and-trickle-down-press-persecution.php (last visited Feb. 16, 2018).

112. *Id.* (recounting two incidents: (1) a Tennessee state representative who used the term against a CBS affiliate that reported his unpaid traffic tickets and his bill to shield the names of

In realm of disinformation, the already marginalized again are especially vulnerable. Lower-income people use the Internet primarily for socializing and entertainment,¹¹³ and they often use Facebook, where a disproportionate amount of attention is directed to blatantly false reporting.¹¹⁴ During the election campaign, an analysis by BuzzFeed found that the top fraudulent news stories on Facebook got more engagement than the top stories from professional news outlets such as the Washington Post and the New York Times.¹¹⁵ In addition, low-income people are often targeted for false stories exactly because their lower level of information makes them more susceptible to believing and relaying them.¹¹⁶

III. ASCERTAINMENT 2.0

At one time, to determine community needs, broadcasters had to ask their communities. This meant acknowledging the existence of various groups within a broadcast radius, meeting with the leaders, and becoming familiar with the existing, sometimes informal, lines of organization. This was a worthwhile endeavor, as one news director remembers:

You listened to what people were talking about and hearing, what they wanted to discuss. That gave you an idea of what the stories were. The problem with newsrooms today is that we live in a bubble Local stations as a whole can do a better job of being in touch with their communities. The ascertainment requirement forced them to do so.¹¹⁷

Still, even first-hand conversations may leave unanswered questions. When asked, people do not always know what they need, or they may not express it in the same ways as those who are asking the question or those who are able to answer. For example, legal aid workers have learned that people may know very well that they have trouble with a landlord or that they have stopped getting government

those who have such tickets, and (2) a Colorado state senator who used the term against a local newspaper that criticized him for cancelling a hearing on a Freedom of Information bill).

113. Katherine Ognyanova, *Researching Community Information Needs*, in *THE COMMUNICATION CRISIS IN AM. & HOW TO FIX IT* 31, 36 (Mark Lloyd & Lewis A. Friedland eds. 2016).

114. FARIS, *supra* note 87, at 15.

115. Suzanne Nossel, *Fraudulent News and the Threat to Free Expression*, in *FAKING NEWS: FRAUDULENT NEWS AND THE FIGHT FOR TRUTH* 8, 11 (2007), <https://pen.org/wp-content/uploads/2017/11/2017-Faking-News-11.2.pdf>.

116. Hamilton & Morgan, *supra* note 78, at 184.

117. WALDMAN ET AL., *supra* note 38, at 282.



benefits, but they may not see their problems as legal ones. Thus, when asked, they may say that they do not need a lawyer.¹¹⁸

Nowadays, technology offers new insights into people's needs. As marketers know, people reveal what they need in other ways as they go about their daily lives, doing such common tasks as making phone calls, using social media or searching the Internet.¹¹⁹ Websites and search engines quietly gather, store, process, and sell data amassed from cell phone locations, Internet browsing, social media posting, and more.¹²⁰ Some third-party information may even be accessed, without a warrant, by the government, reversing the basic premise of democracy: Rather than a transparent government, accountable to its citizens, the citizen is rendered transparent.¹²¹

Among those gathering information are Internet service providers, or ISPs. Consumers may be aware that the sites they access online are tracking their visits and preferences, but they are unlikely to associate Internet content with their ISP any more than they blame the content of a letter on the Post Office.¹²² In the last days of the Obama administration, the FCC adopted a rule to extend privacy protections to broadband Internet access service; the protections would be similar to those that had applied to telephone calls under the 1934 Communications Act.¹²³ As then-FCC Chairman Tom Wheeler argued,

Seldom do we stop to realize that our Internet Service Provider – or ISP – is collecting information about us every time we go online. Your ISP handles all of your network traffic. That means it has a broad view of all of your unencrypted online activity – when you are online, the websites you visit, and the apps you use.¹²⁴

118. Latonia Haney Keith, *Poverty, the Great Unequalizer: Improving the Delivery System for Civil Legal Aid*, 66 CATH. U. L. REV. 55, 100 (2016).

119. DANIEL CASTRO, CTR. FOR DATA INNOVATION, THE RISE OF DATA POVERTY IN AMERICA 4 (2014), <http://www2.datainnovation.org/2014-data-poverty.pdf>.

120. Joel R. Reidenberg, *The Transparent Citizen*, 47 LOY. U. CHI. L.J. 436, 440–44 (2015) (summarizing dozens of examples of everyday exposure of a person's data, ranging from parking tickets to house value and floor plan to DNA to the location of the person's blue jeans bearing a factory-inserted radio-frequency chip.).

121. *Id.* at 452 (“The transparent citizen makes it possible for government to act ‘sub rosa’ through private intermediaries. Instead of seeking to collect information itself, government agencies buy data inexpensively from the commercial marketplace.”).

122. *Id.* at 387.

123. Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 Fed. Reg. 87,274 (Dec. 2, 2016) (to be codified at 47 C.F.R. pt. 64).

124. Tom Wheeler, *Protecting Privacy for Broadband Consumers*, FCC BLOG (Oct. 6, 2016, 11:55 AM), <https://www.fcc.gov/news-events/blog/2016/10/06/protecting-privacy-broadband-consumers>.



But the new rule was short lived. It was struck down by a joint U.S. House and Senate resolution, passed along party lines under the Congressional Review Act, and signed by President Trump.¹²⁵ Supporters of the repeal argued that ISPs already are blocked from viewing encrypted matter, which is the norm for email and commercial transactions. In addition, supporters said, Internet users can protect their privacy by transmitting material through a virtual public network (VPN).¹²⁶ But technology scholar Nick Feamster at Princeton University questioned those assurances by pointing out that many messages are not encrypted and that even encryption can expose portions of a transmission, such as its initial connection to a domain. In addition, VPN requires the proper configuration in order to protect privacy, and mobile devices generally don't support VPNs.¹²⁷ Wheeler had accounted for these objections earlier:

If you have a mobile device, your provider can track your physical location throughout the day in real time. Even when data is encrypted, your broadband provider can piece together significant amounts of information about you – including private information such as a chronic medical condition or financial problems – based on your online activity.¹²⁸

Others argued that basic privacy should not require so much sophistication and effort by Internet users,¹²⁹ and they called on Congress to take some action to provide legal privacy protection as the default for consumers.¹³⁰

Lost in the debate over individual privacy is a discussion about the economic value of the data that the ISP gathers,¹³¹ above its

125. S.J. Res. 34, 115th Cong. (2017) (enacted).

126. John Eggerton, *Privacy Expert: ISP Access to Info is Already Limited*, BROADCASTING & CABLE, <http://www.broadcastingcable.com/news/washington/bill-targets-shell-companies-identified-60-minutes-piece/147438> (last visited February 18, 2018).

127. Nick Feamster, *What Your ISP (Probably) Knows About You*, FREEDOM TO TINKER (Mar. 4, 2016), <https://freedom-to-tinker.com/2016/03/04/what-your-isp-probably-knows-about-you/>.

128. Wheeler, *supra* note 124.

129. Klint Finley, *VPNs Won't Save You From Congress' Internet Privacy Giveaway*, WIRED (Mar. 28, 2017, 7:00 AM), <https://www.wired.com/2017/03/vpns-wont-save-congress-internet-privacy-giveaway/>.

130. Editorial Board, Opinion, *Congress Voted to Repeal Web Privacy Rules. Now Congress Should Replace Them*, WASH. POST (Mar. 30, 2017), https://www.washingtonpost.com/opinions/congress-voted-to-repeal-web-privacy-rules-now-congress-should-replace-them/2017/03/30/5076e226-14a6-11e7-ada0-1489b735b3a3_story.html.

131. See, e.g., Michael P. Johnson, *Data, Analytics and Community-Based Organizations: Transforming Data to Decisions for Community Development*, 11 I/S: J.L. & POL'Y FOR INFO. Soc'y 49, 60 (2015) (citing a projected big-data market of more than \$16 billion in 2015).



monthly charge to customers.¹³² Also lost is the potential social value of that data to the local government that granted the license or franchise for the ISP to use public lands and rights-of-way. Some of that data might be useful in ascertaining the needs of the community members who, often unwittingly, provided it. Besides being sold to advertisers, some of that data could be returned to the community.

A. Community Data

Although the Internet is worldwide, it is carried on wires and cables, or transmitted from towers, that are physically located in a community.¹³³ Over these lines, data – the gold of the Internet age¹³⁴ – flows from individual consumers to advertisers and such intermediaries as data brokers and analytic firms, who monetize it.¹³⁵ Federal regulation bars state and local governments from imposing burdens on ISPs that might discourage the nationwide deployment of broadband.¹³⁶ But the FCC should allow localities to harvest some public benefit from broadband's presence. For example, the FCC could allow local governments to use their authority over rights of way to require that selected ISP-gathered data be made available through an intermediary, such as state university researchers. To safeguard individual privacy, the data would be aggregated and anonymized and handled according to the protocols of the university institutional review boards, which are already experienced in meeting privacy and ethics standards.

The usefulness of data in the public interest is already being demonstrated by large cities that are posting sets of their own records. For instance, the District of Columbia allows citizens to search city databases for such information as doctors' licenses, available library books, meeting facilities, and grant opportunities. Philadelphia's school district publishes data sets on demographics, student perform-

132. BroadbandNow Team, *How Much Does Data Really Cost an ISP?* BROADBANDNOW (June 23, 2016), <https://broadbandnow.com/report/much-data-really-cost-isps/> (pointing to a dramatic decline in the cost of delivering a gigabyte and estimating that cost to be far less than the standard twenty cents).

133. Olivier Sylvain, *Broadband Localism*, 73 OHIO ST. L.J. 795, 802 (2012).

134. W. Gregory Voss, *Internet, New Technologies, and Value: Taking Share of Economic Surveillance a Review of (and Discussion Around) Valerie-Laure Benabou & Judith Rochfeld, A Qui Profite Le Clic? Le Partage De La Valeur A L'ere du Numerique* 2017 U. ILL. J.L. TECH. & POL'Y 469, 471 (2017).

135. *Id.* at 471–72.

136. In the Matter of Restoring Internet Freedom, WC17-108, 2018 WL 305638, at *70–71 (OHMSV Jan. 4, 2018).



ance, and teacher pay. This information can help parents make decisions about schooling their children.¹³⁷ For the city of Boston, Harvard University and the University of Massachusetts have created an interactive map that can display layers of spatial data about neighborhoods, including tax assessments, 911 calls, ethnicity, and measures of social cohesion. The map uses open-source software, so it can be adapted by other communities.

Some cities gather data to enhance their own performance. Seattle used its crime data to forecast which neighborhoods were most at risk of gun violence on a given day so police could arrange their patrolling to be cost efficient.¹³⁸ New Orleans used U.S. Census data¹³⁹ to map the homes most at risk for fire deaths, so the city could focus on those households in a door-to-door program installing free smoke alarms.¹⁴⁰ Baltimore saw its infant mortality rate fall twenty-eight percent in three years after the state used available data to target areas with the most trouble and tailor programs of prenatal care and education to residents there.¹⁴¹

Consumer data from ISPs might do more, perhaps even allowing communities to anticipate the needs of residents. This is what marketers do,¹⁴² as in the legendary example of the Target store that was sending ads for maternity products to a high school student. Her father was irate, but then he learned what the Target algorithm had already deduced from her shopping habits: she was pregnant.¹⁴³ Other

137. CASTRO, *supra* note 119, at 5.

138. Jessica Casey, *Seattle's Predictive Policing Program*, DATA-SMART CITY SOLUTIONS (Apr. 11, 2013), <http://datasmart.ash.harvard.edu/news/article/using-predictive-policing-to-reduce-crime-rate-189>.

139. The American Community Survey provides social, economic, housing, and demographic profiles of neighborhoods. *American Community Survey*, U.S. CENSUS, <https://www.census.gov/acs/www/data/data-tables-and-tools/> (last visited May 8, 2018).

140. Katherine Hillenbrand, *Predicting Fire Risk: From New Orleans to a Nationwide Tool*, DATA-SMART CITY SOLUTIONS (June 9, 2016), <http://datasmart.ash.harvard.edu/news/article/predicting-fire-risk-from-new-orleans-to-a-nationwide-tool-846>.

141. Charles Chieppo, *Maryland's Data-Driven Approach to Reducing Infant Mortality*, GOVERNING THE STATES & LOCALITIES (Apr. 2, 2014), <http://www.governing.com/blogs/bfc/col-maryland-governor-martin-omalleydata-driven-approach-reducing-infant-mortality.html>.

142. See, e.g., Christina Binkley, *How Fashion Retailers Know Exactly What You Want*, WALL ST. J., Apr. 30, 2015, at 2 (reporting that “[a] typical apparel retailer maintains about 4 terabytes of data today (enough to fill nearly one million books), compared with 180 gigabytes in 2008 . . .”).

143. Kashmir Hill, *How Target Figured Out a Teen Girl Was Pregnant Before Her Father Did*, FORBES (Feb. 16, 2012, 11:02 AM), <https://www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/#3fb63d116668> (reporting that pregnant women tend to buy such products as unscented lotions and vitamin supplements at specific points in their pregnancies).



researchers analyzing the sentiments expressed in more than 180,000 tweets found a way to predict the prevalence of asthma in a given region in the United States.¹⁴⁴ Still others used Google searches related to flu symptoms in order to predict the peak of flu outbreaks seven weeks in advance.¹⁴⁵ “Google Flu Trends” continues to share data with academic institutions.¹⁴⁶ Accurately anticipating other community health needs would have obvious benefits.

New data could further expand the kinds of needs that a university’s researchers might forecast. The researchers could publicize what they learned through local public libraries and public media – the institutions most trusted for “creating, organizing, analyzing, and disseminating information for reasons other than short-term economic gain.”¹⁴⁷ Based on their ongoing experiences with interpreting and using community data, local governments could specify and periodically review the kinds of data most needed to serve the public interest.

In ascertaining community needs, this effort would still leave gaps. Because low-income communities have less Internet access, they would still be less represented in ISP-gathered data. Such communities may slip into what one analyst calls a “data desert,” an area excluded from data gathering and, thereby, deprived of the social and economic benefits that could follow from more community self-knowledge.¹⁴⁸ Political ads and calls to action may even be targeted to avoid them.¹⁴⁹ The next recommendation would address at least some of these deficiencies.

B. Community Knowledge

A second measure would be to enlist community colleges in responding to the danger of rampant misinformation and the need for a shared, factual reality.¹⁵⁰ Community colleges have demonstrated that

144. Hongying Dai, Brian R. Lee, & Jianqiang Hao, *Predicting Asthma Prevalence by Linking Social Media Data and Traditional Surveys*, 669 ANNALS AM. ACAD. POL. & SOC. SCI. 75, 87–88 (2017).

145. Harrison Wein, *Forecasting Flu Outbreaks*, NIH RES. MATTERS (Dec. 10, 2012), <https://www.nih.gov/news-events/nih-research-matters/forecasting-flu-outbreaks>.

146. The Flu Trends Team, *The Next Chapter for Flu Trends*, GOOGLE RES. BLOG (Aug. 20, 2015), <https://research.googleblog.com/2015/08/the-next-chapter-for-flu-trends.html>.

147. Shane, *supra* note 68, at 112.

148. CASTRO, *supra* note 119, at 2.

149. Hamilton & Morgan, *supra* note 78, at 185–86.

150. Nossel, *supra* note 115, at 4 (“If left unchecked, the continued spread of fraudulent news and the erosion of public trust in the news media pose a significant and multidimensional risk to American civic discourse and democracy . . .”).

they can respond to national needs at a local level. After the events of September 11, 2001, community colleges expanded their training for first responders, adding programs in such areas as cybersecurity, terrorism, hazardous materials, and airport security.¹⁵¹ They now credential close to eighty percent of the country's police, eighty-six percent of firefighters, and eighty-four percent of emergency medical technicians.¹⁵²

A new community college initiative could respond to the critical need for accurate information. This move would augment current programs based at four-year institutions. For instance, the Knight Foundation has an initiative to rebuild trust in democratic institutions, primarily the press.¹⁵³ Among its first projects is a Duke University program to expand the availability of fact-checking tools for journalists and the public.¹⁵⁴ In addition, the FCC has recommended private funding of "residencies" for recent journalism graduates, so they can supervise current students in year-round, consistent coverage of their communities.¹⁵⁵

Community colleges offer a number of advantages over four-year institutions in covering local news, especially for low-income communities. Community colleges enroll low-income students at a higher rate than four-year colleges.¹⁵⁶ These students often have jobs and dependents¹⁵⁷ and already live in the community, so they have an investment in its future. A journalism course or program of courses would serve as a natural continuation of media literacy courses, which increasingly are required by state legislatures to help students sort accurate from inaccurate information online.¹⁵⁸ It could build on

151. American Association of Community Colleges, *First Responders: Community Colleges on the Front Line of Security* viii (2006), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.381.5407&rep=rep1&type=pdf>.

152. *Id.* at 1 (citing National Center for Education Statistics data from 2003).

153. *Knight Foundation Announces Major Trust, Media and Democracy Initiative to Build a Stronger Future for Journalism*, KNIGHT FOUND. 1 (Sept. 25, 2017), <https://knightfoundation.org/press/releases/knight-foundation-announces-major-trust-media-and-democracy-initiative-to-build-a-stronger-future-for-journalism>.

154. *Id.* at 3.

155. WALDMAN ET AL., *supra* note 38–44, at 355.

156. Stephen Provasnik & Michael Planty, *Community Colleges: Special Supplement to The Condition of Education 2008*, U.S. DEP'T OF EDUC. 15 (Aug. 2008), <https://nces.ed.gov/pubs2008/2008033.pdf>.

157. Christopher M. Mullin, *When Less Is More: Prioritizing Open Access*, AM. ASS'N OF CMTY. COLLS. 5 (Oct. 2017), https://www.aacc.nche.edu/wp-content/uploads/2017/10/Prioritizing_Access_Final.pdf.

158. *See, e.g., Legislative Activity Across the Country*, MEDIA LITERACY NOW, <https://medialiteracynow.org/your-state-legislation/> (last visited Feb. 24, 2018).



courses that several universities have launched on debunking false information.¹⁵⁹

In part because of their role in training and supporting first-responders, many community colleges have excellent communication capabilities. Approximately twenty percent have radio and television broadcast facilities.¹⁶⁰ Furthermore, interest in efforts like this appears to be high in historically underserved communities. The Pew Research Center, categorizing American attitudes toward information, found that those “eager and willing” to learn about news and information sources were predominantly people of color: thirty-one percent Hispanic and twenty-one percent black.¹⁶¹ While more than fifty-five percent of white adults said they would like training in finding trustworthy information online, and the number jumped to seventy percent among black adults and seventy-five percent among Hispanics.¹⁶²

Community college journalism initiatives would bolster news reporting in local communities. Although student reporting would not initially replace the expertise of seasoned beat reporters, it would still engage students in interviewing sources, accurately quoting sources, double-checking facts, acknowledging errors, and publishing corrections. It would give both students and the community a renewed first-hand experience with the routines of journalism and a re-acquaintance with its values. The experience would enable students and community members to better evaluate sources of information at the distant national level and determine whether “fake news” accusations are accurate and to what degree and where.

CONCLUSION

Local communities once had a way to ensure that the information transmitted on the public airwaves responded to their problems. Broadcasters had to listen to them and consider what they had to say. Today, a community’s problems may be detectable – and perhaps

159. Michael Rosenwald, *Making Media Literacy Great Again*, COLUM. JOURNALISM REV., https://www.cjr.org/special_report/media-literacy-trump-fake-news.php (last visited Feb. 24, 2018).

160. American Association of Community Colleges, *supra* note 151 at 6.

161. Horrigan, *supra* note 61, at 14.

162. John B. Horrigan & John Gramlich, *Many Americans, Especially Blacks and Hispanics, Are Hungry for Help as They Sort Through Information*, PEW RES. CTR. (Nov. 29, 2017), <http://www.pewresearch.org/fact-tank/2017/11/29/many-americans-especially-blacks-and-hispanics-are-hungry-for-help-as-they-sort-through-information/>.



even predictable – through the data that is continuously available to Internet service providers. Information gathered in this way is used to target the marketing of advertisers and political parties. It could also serve the public good. This article has proposed ways for communities to have and develop more information at home. It has proposed opening more data to state universities for projects that would to serve community needs. It has also proposed enlisting community colleges in journalism projects to encourage ongoing original reporting and the development of community information.

“Speaking truth to power,” at any level, evokes an image of a smaller party, armed only with a good grasp of reality, confronting a threatening force. Here, that force may be the anger and rumors that circulate in the teeming and disrupted marketplace of today’s information age. Finding a foundation of facts is essential if people are to live together in communities. A shared reality is also a small start toward what the authors of *Speak Truth to Power* had in mind: a renewed trust among Americans, which they saw as essential to democracy.¹⁶³

163. CARY ET AL., *supra* note 1, at 16 (“[W]ithout trust a free society cannot exist.”).



ESSAY

The Challenge of Free Speech on Campus

ERWIN CHEMERINSKY*

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INTRODUCTION

Controversies over freedom of speech on campus are nothing new, but they are arising now with great frequency. The general principles are clear, though novel and difficult questions are constantly arising.

In early 2017, provocateur Milo Yiannopoulos was scheduled to speak at UC Berkeley. As with many campuses, the university had taken steps to ensure that the event would take place despite vigorous student protests. Other University of California campuses sent police reinforcements, a wide perimeter was established around the venue, and barricades were set up to create a safety zone between protestors and those who were attending the event.

But then Berkeley faced something that other campuses had not previously experienced: 150 black-clad rioters associated with the anarchist group “Black Bloc” – many of whom were wearing masks, helmets, body armor, and who were armed with poles, sticks, and commercial grade fire-works. They ignited fires, hurled Molotov cocktails, destroyed barricades, smashed windows, and attacked individuals. An ordinary student protest had become an unmanageable riot, which continued into the city of Berkeley, overwhelming campus

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efforts and forcing cancellation of the event.¹ President Donald Trump then tweeted that Berkeley had infringed free speech and might lose federal funds.²

The transformation of heated controversies into violent events continued in March 2017, when one person was shot after Yiannopoulos spoke at the University of Washington, despite the campus spending almost \$75,000 on extra security.³ That same month Professor Allison Stanger of Middlebury College was seriously injured when protestors, angry that Charles Murray had been invited to speak on campus, attacked her and Murray while trying to leave the campus.⁴ Sixty-seven students were later disciplined, although none were suspended or expelled.⁵

Matters became even more disturbing and tragic late August 2017, when white nationalist Richard Spencer was scheduled to speak at a “Unite the Right” rally in Charlottesville.⁶ The night before the rally several hundred torch-bearing white nationalists marched on the main quadrangle of the University of Virginia grounds, shouting “you will not replace us” and “Jew will not replace us.”⁷ When counter-protestors engaged the group, marchers threw their torches toward students and a brawl ensued.⁸ The next day groups converged, with self-styled militia members dressed in full camouflage and outfitted with semiautomatic rifles and pistols.⁹ Many white nationalists carried

1. Madison Park & Kyung Lah, *Berkeley Protests of Yiannopoulos Caused \$100,000 in Damage*, CNN (Feb. 2, 2017), <https://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html>.

2. Susan Svruga & Brian Murphy, *Trump Lashes Back at Berkeley After Violent Protests Block Speech by Breitbart Writer Milo Yiannopoulos*, WASH. POST (Feb. 2, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/02/01/berkeley-cancels-speech-by-breitbart-writer-milo-amid-intense-protests/?utm_term=.04e50e71f00b.

3. Daniel Gilbert, *Milo Yiannopoulos at UW: A speech, a Shooting and \$75,000 in Police Overtime*, SEATTLE TIMES (Mar. 26, 2017), <https://www.seattletimes.com/seattle-news/crime/milo-yiannopoulos-at-uw-a-speech-a-shooting-and-75000-in-police-overtime/>.

4. Allison Stanger, *Understanding the Angry Mob at Middlebury That Gave Me a Concussion*, N.Y. TIMES (Mar. 13, 2017), <https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html>.

5. Stephanie Saul, *Dozens of Middlebury Students Are Disciplined for Charles Murray Protest*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html>.

6. See Hawes Spencer & Sheryl Gay Stolberg, *White Nationalist March on University of Virginia*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/white-nationalists-rally-charlottesville-virginia.html>.

7. Joe Heim, *Recounting a Day of Rage, Hate, Violence and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.829170c4c067.

8. See Spencer, *supra* note 6.

9. Heim, *supra* note 7.



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large shields and long wooden clubs.¹⁰ They charged through a line of counter-protestors, swinging sticks, punching, and spraying chemicals.¹¹ Not long after police ordered the groups to disperse, a member of the white nationalist group drove a car into a crowd killing Heather Heyer.¹²

Soon thereafter, Spencer was able to speak at the University of Florida, but only after extensive campus security efforts and a declaration of a state of emergency by the governor.¹³ He also spoke at both Auburn and Michigan State after federal judges prevented each university from denying him access; at MSU one-hundred officers in riot gear broke up fights and made arrests.¹⁴ Spencer initially sued The Ohio State University for refusing him access, but dropped the lawsuit when the campus sought evidence exploring whether Spencer was coordinating with others who were planning violence at the event.¹⁵ The university claimed that, at previous events, Spencer and other event organizers “only feigned cooperation with local officials on safety matters while drawing up secret military-style plans to disobey law enforcement or campus directives if their event was limited in ways they deemed unacceptable.”¹⁶

In the summer of 2017, conservative student groups announced that they were going to stage a “Free Speech Week” at UC Berkeley to include provocative speakers such as Ben Shapiro, Milo Yiannopoulos, Steve Bannon, Ann Coulter and others. Shapiro came and gave an address in a large campus auditorium and Yiannopoulos appeared for fifteen minutes on campus. The rest of free speech week was canceled at the last minute by the student organizers. Nonethe-

10. *Id.*

11. *Id.*

12. *Id.*

13. Matt Pearce & Les Neuhaus, *White Nationalist Richard Spencer to Noisy Florida Protestors: You Didn't Shut Me Down*, L.A. TIMES (Oct. 19, 2017, 1:55 PM), <http://www.latimes.com/nation/la-na-florida-spencer-speech-20171019-story.html>.

14. See David Jesse & RJ Wolcott, *Fistfights, Arrests at Michigan State University Before Richard Spencer Takes Stage*, DETROIT FREE PRESS (last updated Mar. 5, 2018, 9:20 PM), <https://www.freep.com/story/news/local/michigan/2018/03/05/richard-spencer-michigan-state-university/395079002/>; Travis M. Andrews, *Federal Judge Stops Auburn From Canceling White Nationalist Richard Spencer Speech*, WASH. POST (Apr. 19, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/04/19/federal-judge-stops-auburn-from-canceling-white-nationalists-speech-violence-erupts/?utm_term=.e05e6dc2ec0b.

15. *Richard Spencer to Drop Ohio State Lawsuit*, CINCINNATI (Mar. 6, 2018), <https://www.cincinnati.com/story/news/2018/03/06/richard-spencer-drop-ohio-state-lawsuit/401291002/>.

16. *Id.*; Lori Falce, *Ohio State Responds to Spencer Suit, Cites Safety as Reason for Denial*, CTR. TIMES DAILY (Jan. 7, 2017), <https://www.cincinnati.com/story/news/2018/03/06/richard-spencer-drop-ohio-state-lawsuit/401291002/>.

less, Berkeley spent over \$3.9 million for security for the anticipated events.¹⁷

The core of freedom of speech is that *all* ideas and views can be expressed. The Supreme Court repeatedly has made clear that the government never can prevent, punish or deny benefits for speech based on its viewpoint, even if the speech is deeply offensive. As many have observed, we don't need freedom of speech to protect the messages we like; we would let those happen anyway.

Current college students are often ambivalent, or even hostile, to the idea of free speech on campus. I worry that the commitment to free speech among students and faculty is waning. In my seminars the last two years, I was surprised by how much the students wanted campuses to stop offensive speech and trusted campus officials to have the power to do so. A 2015 survey by the Pew Research Institute said that four in ten college students believe that the government should be able to prevent people from publicly making statements that are offensive to minority groups.¹⁸ The most recent studies demonstrate that students continue to wrestle with how best to value free speech and inclusivity, with more than half of students valuing diversity and inclusivity above free speech, more than half supporting bans on hate speech, and almost a third supporting restrictions on offensive speech.¹⁹

In September 2017, University of California, Berkeley Chancellor Carol Christ convened a forum on campus on free speech that included several faculty speakers – including me – that was attended by a large audience. Several faculty and students, to resounding applause, declared that Chancellor Christ should refuse to allow hateful speakers like Milo Yiannopoulos and Ann Coulter on campus. Towards the end of the discussion I said:

Be clear that if Chancellor Christ were to exclude speakers based on their viewpoint, she would get sued and lose. The speakers would

17. Frances Dinkelspiel, *UC Berkeley Spent Close to \$4M on Security In Just One Month In 2017*, BERKELEYSIDE (Feb. 6, 2018), <http://www.berkeleyside.com/2018/02/06/uc-berkeley-spent-close-4m-security-just-one-month-2017>.

18. Jacob Poushter, *40% of Millennials OK with limiting speech offensive to minorities*, PEW RES. CTR. (Nov. 20, 2015), <http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/>.

19. Niraj Chokshi, *What College Students Really Think About Free Speech*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/us/college-students-free-speech.html>; *Free Expression on Campus: What College Students Think About First Amendment Issues*, KNIGHT FOUND. (Mar. 11, 2018), <https://www.knightfoundation.org/reports/free-expression-on-campus-what-college-students-think-about-first-amendment-issues>.

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get an injunction and be allowed to speak. They would recover attorneys' fees and maybe money damages. They would be portrayed as victims. And since they would get to speak anyway, nothing would be gained.

No one applauded.

As I look at what is happening on the Berkeley campus and across the country, I realize that the context is new, but the underlying law and principles are well established. Disputes over free speech on campus have long occurred, but there are ways in which this is different. Usually in the past, it was students who wanted to speak and campus administrators who tried to stop the demonstrations. Now it often is about outside speakers and outside disruptors, like antifa. The campus is just the place for their battle. This was true at UC Berkeley at the end of January when antifa's violence forced the cancellation of Yiannopoulos' planned speech and it was true at the University of Virginia when white supremacist groups marched on campus. Also, as is occurring on the Berkeley campus, it is now often students and faculty calling for preventing the speakers, while campus officials are steadfastly protecting freedom of expression.

While teaching an undergraduate class at the University of California, Irvine Chancellor Howard Gillman and I realized that the students' desire to restrict hurtful speech came from laudable instincts. This is the first generation of college students to be taught from a young age that bullying is wrong and they have internalized this message. Many spoke powerfully of instances where they or the friends had suffered from hurtful speech and bullying. They want to make campuses inclusive for all and they know that hate speech causes great harm, especially among those who have been traditionally under-represented in higher education.

I worry, too, that students do not realize how much speech has been essential for the advancement of rights and equality. There would not have been a Nineteenth Amendment, which gave women the right to vote, without the women's suffrage movement and its widespread demonstrations. The civil rights protests of the 1960s – lunch counter sit-ins, the march on Selma, demonstrations on campuses – were essential to bringing about the end to segregation. Those events, though, are ancient history for my students. I worry that today's college students equate freedom of speech more with the vitriol of Yik-Yak than the anti-Viet Nam War protests that I participated in when I was in college. I was surprised by how little our students knew



about the history of free speech, including of times like McCarthyism, when faculty and students suffered greatly from the lack of protection for expression and academic freedom.

In this essay, I want to address a specific question: why must campuses tolerate hate speech?²⁰ There is no doubt that hate speech causes great harms. Many prominent scholars have argued that hate speech conveys nothing useful to the marketplace of ideas and, in fact, by silencing its victims, limits the exchange of ideas and undermines a university's obligation to provide an environment conducive to the learning of all students.²¹ They have powerfully described the great harms that hate speech inflict on those who have traditionally been excluded and underrepresented on campuses.

By the early 1990s over 350 colleges and universities adopted hate speech codes. A number of these were challenged in court. But everyone to be considered was declared unconstitutional.²²

One of the most prominent examples involved the University of Michigan. The University of Michigan was motivated to devise a hate speech code after some truly horrendous events on campus.²³ In 1987, flyers were distributed that declared "open season" on blacks. Blacks were referred to as "saucer lips, porch monkeys, and jigaboos." A student disc jockey allowed racist jokes to be broadcast on the campus radio station. Student demonstrations were interrupted by the display of a KKK uniform out of a nearby dorm window. Another flyer proclaimed, "Niggers get off campus" and "Darkies don't belong in classrooms – they belong hanging from trees." The university had to respond to such horrific expression.

The challenge was how to translate the natural desire to eliminate such egregious examples into a policy that was consistent with the First Amendment. This proved extremely difficult.

20. My views on this topic are described in much more detail in ERWIN CHEREMINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* (2017).

21. See, e.g., Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445 (1987); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C. R.-C. L. L. REV. 133 (1982) (all favoring restrictions on hate speech).

22. See, e.g., *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1173–74, 1181 (E.D. Wis. 1991) (holding Wisconsin's hate speech code unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989).

23. These facts are found in *Doe*, 721 F. Supp. at 854.

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The policy adopted by the University of Michigan in 1988 prohibited:

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that:
 - a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
 - b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
 - c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.²⁴

Shortly after the promulgation of the policy in the fall of 1988, the University Office of Affirmative Action issued an interpretive guide (Guide) entitled *What Students Should Know about Discrimination and Discriminatory Harassment by Students in the University Environment*. It gave many examples of what was prohibited, including:

- (A) A flyer containing racist threats distributed in a residence hall.
- (B) Racist graffiti written on the door of an Asian student's study carrel.
- (C) A male student makes remarks in class like "[w]omen just aren't as good in this field as men," thus creating a hostile learning atmosphere for female classmates.
- (D) Students in a residence hall have a floor party and invite everyone on their floor except one person because they think she might be a lesbian.
- (E) A black student is confronted and racially insulted by two white students in a cafeteria.
- (F) Male students leave pornographic pictures and jokes on the desk of a female graduate student.
- (G) Two men demand that their roommate in the residence hall move out and be tested for AIDS.²⁵

24. *Id.* at 856.

25. *Id.* at 858.



As Professor Kent Greenawalt observed, “the University of Michigan code . . . was broad in its scope and seemed to reach into the realm of obnoxious ideas civilly expressed.”²⁶

Soon after its adoption, this code was used not against the kinds of purely hateful slurs that inspired its passage, but against people who were expressing opinions that others objected to. Complaints were filed against a student for stating that Jewish people used the Holocaust to justify Israel’s policies toward the Palestinians. Another student found himself facing punishment for saying that he had heard that minorities had a difficult time in a particular course. A graduate student in Social Work was subjected to formal disciplinary procedures for asserting that homosexuality was a disease.²⁷ As the court noted, “[o]n at least three separate occasions, students were disciplined or threatened with discipline for comments made in a classroom setting.”²⁸

The individual who eventually challenged the policy in federal court was a graduate student who claimed the campus hate speech code put him at risk of punishment for studying certain controversial theories in his field of biopsychology, including the study of individual and group differences in personality traits and cognitive abilities.²⁹

A federal judge struck down the policy on the grounds that the standards for punishment – “stigmatizing” or “demeaning” speech, for example – were so broad and vague that it was “simply impossible to discern any limitation” on the policy’s scope and reach.³⁰ A person saying anything controversial or critical could be at risk for punishment. The court explained: “[t]he operative words in the cause section required that language must “stigmatize” or “victimize” an individual. However, both of these terms are general and elude precise definition. Moreover, it is clear that the fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests.”³¹

This ruling was not an isolated outcome. Between 1989 and 1995, other courts examined university speech codes, and in every case the codes were deemed unconstitutional. A federal district court struck

26. KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 75 (1995).

27. *See id.* at 76; *Doe*, 721 F. Supp. at 861.

28. *Doe*, 721 F. Supp. at 861.

29. *Id.* at 858.

30. *See id.* at 867.

31. *Id.* at 867.

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down the University of Wisconsin's hate speech code.³² The code provided that the university may discipline a student in non-academic matters in the following situations.

For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:

1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.³³

The federal district court found that the regulation was unconstitutionally overbroad and vague, mostly because a great deal of speech that people might consider "demeaning" was clearly protected by the First Amendment.³⁴

When in 1991 George Mason University imposed sanctions on a fraternity after it conducted an "ugly woman contest" with racist and sexist overtones, the United States Court of Appeals struck down the sanctions, explaining that the First Amendment protected even offensive and juvenile forms of expression. The court declared:

We agree wholeheartedly that it is the University officials' responsibility, even their obligation, to achieve the goals they have set. On the other hand, a public university has many constitutionally permissible means to protect female and minority students. We must emphasize, as have other courts, that "the manner of [its action] cannot consist of selective limitations upon speech."³⁵

The invalidation of hate speech codes was not limited to those adopted by public universities where the First Amendment applies. In May 1990, the Stanford Student Conduct Legislative Council adopted a student conduct code drafted by law professor and constitutional scholar Thomas Grey. The code prohibited "discriminatory harassment," including "personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation or national and

32. *UWM Post, Inc.*, 774 F. Supp. at 1163.

33. *Id.* at 1166.

34. *Id.* at 1172-73.

35. *IOTA XI Ch. of Sigma Chi Fraternity v. Geo. Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993).



ethnic origin.”³⁶ Personal vilification was defined as intentional, personally directed “fighting words or non-verbal symbols” that “are commonly understood to convey direct and visceral hatred or contempt for human beings” on the basis of their membership in those groups.³⁷

In February 1995, a California Superior Court judge invalidated the Stanford code as violating a California statute, the Leonard Law, which provides that:

[N]o private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech . . . that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment.³⁸

The court declared:

Defendants’ Speech Code does violate Plaintiffs’ [First] Amendment rights since the Speech Code proscribes more than just “fighting words” as defined in *Chaplinsky*, and the later lines of case law.

To this extent, therefore, Defendants’ Speech Code is overbroad.

In addition, however, the Speech Code also targets the content of certain speech [and] . . . is an impermissible content-based regulation.³⁹

The motivations behind the desire to punish hateful speech are laudable. However, to date, the legal and definitional challenges that arise when these motivations are translated into workable codes have proven impossible to overcome. After watching so many universities lose in court, some, such as the University of Pennsylvania, withdrew their hate speech codes; others, such as Yale, said that they would not be enforced.⁴⁰

I do not doubt that hate speech causes great harms, as persuasively expressed by scholars such as Professors Delgado, Lawrence, Matsuda, and Waldron. I believe that colleges and universities must act to protect students from harm, especially students of color, women, those of minority religions, and gays and lesbians. But the First

36. *Corry v. Leland Stan. Junior Univ.*, No. 704309 (Santa Clara Cnty., Feb. 27, 1995).

37. ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 47 (2017).

38. *Id.* See also CAL. EDUC. CODE, § 94367(a); *Stanford University Speech Code Violates First Amendment*, 16 No. 12 ENT. L. REP. 21 (1995).

39. ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 47–48 (2017). See also *Stanford University Speech Code Violates First Amendment*, 16 No. 12 ENT. L. REP. 21 (1995).

40. See TIMOTHY C. SHIELL, *CAMPUS HATE SPEECH ON TRIAL* 4 (2d ed. 2009).

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Amendment clearly prohibits public colleges and universities from pursuing this goal by passing hate speech codes.

This is the law. But why should this be the law? After all, many countries punish speech that disparages or incites hatred against a person or group on the basis of their race, religion, sex, ethnicity, or sexual orientation. Even if public colleges and universities are limited by these First Amendment restrictions, it might be argued that there are still good reasons why private colleges and universities should be encouraged to adopt such codes.

I think not. First, decades and decades of efforts – by state governments, local municipalities, and campuses – have demonstrated that all such codes are impermissibly vague and overbroad and thus risk punishment based on political viewpoint or worldview. Any rule that seeks to punish people for their speech – whether in a public or a private university – must be specific about what is prohibited and what is allowed. Otherwise, too many people will be afraid to say anything controversial for fear that they will be singled out for arbitrary (or ideologically-based) punishment based on unclear standards. But there are no examples of codes that are sufficiently specific and that apply only to unprotected speech. The Michigan code, described above, prohibited “any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed”⁴¹ Likewise, the Stanford hate speech code provided that “[s]peech or other expression constitutes harassment by vilification if it: (a) is intended to insult or stigmatize an individual or individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.”⁴² The University of Wisconsin code prohibited speech that was “demeaning” based on “race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals.” Professor Jeremy Waldron’s definition of hate speech, quoted above is that hate speech is “[t]he use of words which are deliberately abusive and/or insulting and/or threatening and/or demeaning directed at members of vulnerable minorities, calculated to stir up hatred against them.”⁴³

41. *Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E. D. Mich. 1989).

42. Lawrence, *supra* note 21, at 450. The Stanford Code, too, was invalidated when challenged. See *Stanford University Speech Code Violates First Amendment*, 16 No. 12 ENT. L. REP. 21 (1995).

43. JEREMY WALDRON, *THE HARM IN HATE SPEECH* 8–9 (2012).



The sweep of such codes is intentionally broad, but that means that they inevitably prohibit the expression of ideas that might be seen as “stigmatizing” or “demeaning” or “insulting.” These concepts are not only inherently vague; they are also inherently politically charged. Much of what we debate as a society – and much of what is debated on college campuses – relates to whether certain forms of expression should be considered demeaning or insulting, and disagreements often run deep. Many strong anti-racism and anti-sexism advocates make powerful arguments for why seemingly innocuous speech acts, and many forms of cultural expression, should be considered exclusionary and demeaning. In fact, some embrace the view that cultural reproduction of racism and patriarchy is ubiquitous because it is built into the very foundation of our social order. Some opponents of these positions claim the critics are too quick to find oppression, or that they are humorless, or that their concerns are sometimes legitimate but overstated. Others argue that what the critics consider demeaning (e.g., sexualized depictions of women or certain examples of cultural appropriation) should actually be viewed as empowering. The arguments are endless.

Given this, any hate speech code can, in theory, either lead to the punishment of extraordinary numbers of people (who may not suspect they are demeaning anyone) or can result in a refusal to punish many speech acts that could be considered stigmatizing. The upshot is that people will inevitably be punished for their political views, with results being arbitrary and often surprising. Given the definitional problems, how could it be otherwise? What should a campus do when gay and lesbian students complain that they are demeaned by a Christian student’s expression of a belief in heterosexual conceptions of marriage – deny that it is demeaning or punish the student? Justice Clarence Thomas believes that affirmative action programs stigmatize minorities on the basis of race and “stamp minorities with a badge of inferiority.”⁴⁴ Could a student’s advocacy of affirmative action be taken as violating such prohibitions? What of Laura Kipnis’ argument that overly-protective approaches to sex on campus actually stigmatize women?⁴⁵ Or the claim that much anti-racism rhetoric demeans

44. *Grutter v. Bollinger*, 509 U.S. 306, 373 (2003) (Thomas, J., dissenting).

45. Christine Smallwood, *Laura Kipnis’s Battle Against Vulnerability: The Northwestern University Professor Strengthens Her Polemic Against Campus Sexual Culture*, *NEW YORKER* (Apr. 2, 2017), <https://www.newyorker.com/culture/persons-of-interest/laura-kipniss-battle-against-vulnerability>.



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whites?⁴⁶ Unfortunately, these challenges are inherent to the entire enterprise and cannot be solved with better definitions.

This brings me to my second argument against such codes: they are often used to punish the speech of minorities and others who were not the intended targets of such efforts. Vague and overbroad laws inherently risk discriminatory enforcement and that is exactly what has happened with hate speech codes. As Professor Nadine Strossen observes: “[o]ne ironic, even tragic, result of this discretion is that members of minority groups themselves – the very people whom the law is intended to protect – are likely targets of punishment. For example, among the first individuals prosecuted under the British Race Relations Act of 1965 were black power leaders.”⁴⁷ Although the English law was adopted in part as a response to a rise in anti-Semitic instances on campus, it was used against those who advocated on behalf of Israel on the ground that Zionism should be regarded as a form of racism under the United Nations resolution.⁴⁸

That has also been the experience with hate speech codes in the United States. As Professor Henry Louis Gates notes:

During the years in which Michigan’s speech code was enforced, more than twenty blacks were charged – by whites – with racist speech. [N]ot a single instance of white racist speech was punished A full disciplinary hearing was conducted only in the case of a black social work student who was charged with saying, in a class discussion of research projects, that he believed that homosexuality was an illness, and that he was developing a social work approach to move homosexuals toward heterosexuality.⁴⁹

As we look at experience around the world there are many examples of unexpected and politically-charged applications of hate speech codes. In 2006, individuals in Sweden were convicted for distributing leaflets to high school students saying homosexuality was a “deviant sexual proclivity,” had “a morally destructive effect on the substance of society” and was responsible for the development of H.I.V. and

46. Vann R. Newkirk II, *The Myth of Reverse Racism*, ATLANTIC (Aug. 5, 2017), <https://www.theatlantic.com/education/archive/2017/08/myth-of-reverse-racism/535689/>.

47. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1990 DUKE L.J. 484, 556 (1990) (discussing how judicial and prosecutorial discretion can undermine the goal of combating racism when implementing laws that censor racist speech).

48. *Bollinger*, 509 U.S. at 557.

49. HENRY LOUIS GATES ET AL., *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 45 (1994).



AIDS.⁵⁰ In 2009, a member of the Belgian Parliament was convicted of distributing leaflets with the slogans: “Stand up against the Islamification of Belgium,” “Stop the sham integration policy” and “Send non-European job-seekers home.”⁵¹ The European Court of Human Rights affirmed these convictions, rejecting defenses based on freedom of speech.⁵² In Poland, a Catholic magazine was fined \$11,000 for inciting “contempt, hostility and malice” by comparing a woman’s abortion to the medical experiments at Auschwitz.⁵³ In 2008, film star Brigitte Bardot was convicted by French authorities for placing online a letter to Nicolas Sarkozy in which she complained about the Islamic practice of ritual animal slaughter. It was her fifth conviction for hate speech.⁵⁴ In 2011, Scottish football fan Stephen Birrell was sentenced to eight months in prison for insulting Celtic fans, Catholics and the Pope on a Facebook page. During sentencing, the sheriff, Bill Totten, told Birrell that his views would not be tolerated by “the right-thinking people of Glasgow and Scotland.”⁵⁵

Protecting free speech is necessary because the alternative – granting government expanded powers to punish speakers they don’t like – creates even more harm in society. Even if one is successful at punishing exactly the hateful speaker one hoped to punish the entire process risks making martyrs and rallying support for those sanctioned. Moreover, as Professor Strossen notes, these bans can stultify “the candid intergroup dialogue concerning racism and other forms of bias that constitutes an essential precondition for reducing discrimination” and “generate litigation and other forms of controversy that will exacerbate intergroup tensions.”⁵⁶

Finally, and most importantly, while advocates for speech codes claim that hate speech plays no part in the legitimate expression of ideas, we believe it is inevitable that the act of censoring words will lead to the censoring of ideas. It is tempting to say that campuses at

50. *Vejdeland & Others v. Sweden*, App. No. 1813/07, Eur. Ct. H.R., Judgment, ¶ 15 (Feb. 9, 2012), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-109046"\]}](http://hudoc.echr.coe.int/eng#{).

51. *Féret v. Belgium*, App. No. 15615/07, Eur. Ct. H.R., Judgment, ¶ 41 (July 16, 2009), [http://hudoc.echr.coe.int/eng#{"itemid":\["001-93626"\]}](http://hudoc.echr.coe.int/eng#{).

52. *Vejdeland*, *supra* note 50, at ¶ 60; *Féret*, *supra* note 51, at ¶ 82.

53. See Vanessa Gera, *Polish Court Fines Catholic Magazine for Comparing Woman Who Sought Abortion to Nazis*, CANADIAN PRESS (Sept. 23, 2009).

54. See *Bardot Fined Over Racial Hatred*, BBC NEWS: ENTERTAINMENT (June 3, 2008), <http://news.bbc.co.uk/2/hi/entertainment/7434193.stm>.

55. See *Internet Bigot Stephen Birrell Jailed For Eight Months*, BBC NEWS (Oct. 17, 2011), <http://www.bbc.com/news/uk-scotland-glasgow-west-15333744>.

56. Strossen, *supra* note 47, at 561.

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the very least should be able to prohibit epithets; words like “nigger” and “faggot” cause great harm. But it is not difficult to imagine contexts – in scholarly analysis, popular culture, or casual conversation – where the use of any such word would be considered appropriate. As Justice Harlan eloquently explained: “[w]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”⁵⁷ Ultimately, hate speech codes inescapably ban the expression of unpopular ideas and views, and that is never acceptable on college campuses.

CONCLUSION

American society is more polarized than it has been any time since Reconstruction. These deep divisions inevitably play themselves out on college campuses. But ultimately the solution is not to trust campus officials to suppress speech. It is imperative that colleges and universities create inclusive learning environments for all students. This, though, cannot come by suppressing speech. The law is clear that a public university may not exclude a speaker based on his or her views, nor may students or faculty be punished for the views that they express.

Although there is a right of speakers to express hateful messages on campus, that does not mean that campus officials should silently tolerate such speech. It is important that campus officials denounce hate when it occurs and explain why it is inconsistent with the type of community we desire. After a recent incident of hate speech in my law school, I immediately sent a message to all students, faculty, and staff strongly condemning the expression of hate and expressing how it was inconsistent with the community we are and aspire to be.

Having seen the enormous time and money invested by the Berkeley campus to deal with the appearances of Ben Shapiro and Milo Yiannopoulos, I cannot help but wish this went on someplace else. But I know that Berkeley, especially because of its history with the free speech movement of the 1960s, is a unique place for expression. This is why it is so important that the campus did all that it can

57. *Cohen v. California*, 403 U.S. 15, 26 (1971).



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to ensure freedom of speech. It is also why this campus has the chance to be a model for other schools in upholding the principle that all ideas and views can be expressed at colleges and universities.



ESSAY

Interpreting Constitutional Provisions in Tandem

KIEL BRENNAN-MARQUEZ*

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INTRODUCTION

It is common, in both academic and judicial discussion, to hear participants draw reference to First Amendment values when crafting Fourth Amendment arguments. In 2014, for example, Chief Justice Roberts – writing for a unanimous Court – extolled the importance of robust protections for smart phone searches, given that phones today contain records of our most intimate “interests [and] concerns,”¹ as well as comprehensive data about location and movement.² Similarly, in 2012, Justice Sotomayor spoke (in concurrence) of the “familial, political, professional, religious, and sexual associations” revealed by GPS tracking, an observation that became the factual linchpin of her

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1. *Riley v. California*, 134 S. Ct. 2473, 2490 (2014).

2. *See id.* (“Historic location information is a standard feature on many smart phones and can reconstruct someone’s specific movements down to the minute, not only around town but also within a particular building.”).



view that prolonged GPS surveillance amounts to a Fourth Amendment “search.”³

These types of statements echo decades of scholarly commentary,⁴ and they find support among lower courts. With an eye toward the First Amendment, trial and appellate judges have pushed back against bulk metadata collection,⁵ as well as warrantless seizures of communication and location records.⁶ Furthermore, holdings like these hearken back to foundational Supreme Court cases from the pre-digital age, such as *Berger v. New York*,⁷ which invalidated a wire-tapping statute that permitted warrants to issue without probable cause; *NAACP v. Alabama*,⁸ which forbade the compulsory publication of membership lists; and *DOJ v. Reporters’ Committee for Freedom of Press*,⁹ which limited the permissible scope of disclosure of

3. *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring). For another example of work drawing the same connection between *Riley* and *Jones*, see Margot Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465, 479 (2015).

4. For especially lucid statements of this normative position – which thoroughly canvass the past literature – see Katherine J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 MD. L. REV. 614 (2009); Neil Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 400 (2008) (lamenting the fact that “government access to records and private papers” has historically been conceptualized as an exclusively “Fourth rather than [] First Amendment [problem]” – and calling for greater conceptual unity between the two); Stephen E. Henderson, *Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search*, 56 MERCER L. REV. 507, 524–28 (2005). For background on the historical connection between the First and Fourth Amendments, see Part I of Kiel Brennan-Marquez, *The Constitutional Limits of Private Surveillance*, KAN. L. REV. (forthcoming 2018).

5. See *ACLU v. Clapper*, 785 F.3d 787, 824 (2d Cir. 2015) (expounding the “weighty constitutional issues” that new technological developments raise in the surveillance area). See also *Klayman v. Obama*, 957 F. Supp. 2d 1, 30–32 (D.D.C. 2013) (arguing that technological advances – allowing the government glean First Amendment-sensitive information via bulk metadata collection and analysis – requires limiting the reach of *Smith v. Maryland*).

6. See *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) (holding that warrantless seizures of user email subvert reasonable expectations of privacy and violate the Fourth Amendment), *vacated on other grounds*; *United States v. DiTomasso*, 56 F. Supp. 3d 584, 591–92 (S.D.N.Y. 2014) (same); *United States v. Maynard*, 615 F.3d 544, 562–63 (D.C. Cir. 2010) (holding that people have a reasonable expectation of privacy in location data, because it “can reveal preferences, alignments, associations, personal ails, and foibles”) (internal citations omitted). See also *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002) (holding that warrants for the seizure of bookstore records are subject to heightened scrutiny due to their First Amendment implications); *In re Search of www.disruptj20.org*, 2017 WL 4569548 (D.C. Super. Ct. Oct. 10, 2017) (limiting the scope of webhost provider’s obligation under a warrant for IP addresses and other information – sought and received by the Department of Justice – on the grounds that the warrant, as written, could allow the government to “rummage through the information contained on [the target’s] website and discover the identity of, or access communications by, individuals not participating in alleged criminal activity, particularly those persons who were engaging in protected First Amendment activities.”).

7. *Berger v. New York*, 388 U.S. 41 (1967).

8. *NAACP v. Alabama*, 357 U.S. 449 (1958).

9. *DOJ v. Reporters’ Comm. for Freedom of Press*, 489 U.S. 749 (1989).

criminal records. While these cases concerned distinct legal questions, all three drew a link between privacy interests, on one hand, and individual expression and political participation, on the other.

At some level, the impulse to conceptualize Fourth Amendment rules in tandem with First Amendment values is so familiar that it hardly even registers as distinctive. That constraints on law enforcement power – and surveillance power, in particular – should take their cues from expressive, associational, and democratic principles verges on self-evident. Yet the practice remains curiously undertheorized. What does it mean to interpret discrete constitutional provisions “in tandem”? It comes as little surprise, of course, that discrete constitutional provisions sometimes come into contact, and when that happens, that harmonization becomes necessary. That dynamic is true (at least potentially) of every legal text. But to say that courts should avoid sowing *conflict* between discrete constitutional provisions tells us little, if anything, about the proper approach.¹⁰ Intra-textual harmony takes different forms. What kind of analytic relationship – what sort of harmony – should courts be aiming for?

I. TWO APPROACHES TO INTRA-CONSTITUTIONAL HARMONY

On this front, I see two options,¹¹ and they pull in opposite directions. The first option, which I will call “jurisdictional approach,” is to taxonomize grievance-types and assign them to separate constitutional domains. A good example is the relationship between the Fourth Amendment and the Equal Protection Clause. In *United States v. Whren*,¹² the Court held that the question of when police may perform searches and seizures – the Fourth Amendment issue – is orthogonal to the question of “intentional[] discriminat[ion]” by individual officers.¹³ In short, if the police lacked cause to search as they searched

10. A good example is the relationship between the Establishment Clause and the Free Exercise Clause. When the state takes steps to ensure that laws do not disadvantage religion, thereby complying with its Free Exercise obligations, there is always a risk of unduly *favoring* religious groups. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017) (explaining that the state is simultaneously obligated (1) to avoid religious establishment and (2) not to hamper religious exercise, but also that the two aims “limit[]” one another).

11. In fact, there may be *more* than two options, but for present purposes, I leave at two; both for simplicity’s sake, given the limited room for analysis, and because I suspect – without having thought it through exhaustively, so don’t quote me here – that other options, to the extent they exist, can ultimately be transposed into versions of these two.

12. *Whren v. United States*, 517 U.S. 806 (1996).

13. *Id.* at 813.



or to seize what they seized, you have a Fourth Amendment claim. And if the police targeted you based on a protected trait, you have a Fourteenth Amendment claim (and depending on the facts, of course, you may have both). But the two claims are conceptually distinct, and they run perpendicular.

The second option, which I will call the “gestalt approach,” is to incorporate values endogenous to one constitutional domain into the interpretation of another. Here, unlike with the jurisdictional approach, the point is not analytic purity, but normative pluralism – to arrive at an integrated view of constitutional value. This is the approach on display in the interpreting-the-Fourth-Amendment-through-the-First logic above. When judges fashion limits on police power with an eye toward expressive, associational, and democratic values, the idea is that First Amendment principles should *influence* Fourth Amendment doctrine. The vision, in other words, is one of overlap rather than flush edges; a porous boundary, not a rigid one.

My goal here is not to decry the use of the gestalt approach in the context of First and Fourth Amendment values. Like many others, I believe the assemblage of questions raised by law enforcement activity generally, and by surveillance in particular, lends itself to the infusion of criminal procedure with First Amendment values.

The question is why. Given that two approaches to intra-constitutional harmonization are available – in theory, certainly, but also in practice – what justifies the adoption of one over the other? By what *criteria* should a court choose the gestalt approach over the jurisdictional approach, or vice versa? After all, one can easily imagine a world in which courts respond to the fact that surveillance can imperil expressive, associational, and democratic values by requiring litigants to raise actual First Amendment grievances, and concluding – as in *Whren* – that such grievances, even if meritorious, should have no bearing on the distinctively *Fourth* Amendment question of when police need to secure warrants. Likewise, one can imagine a version of *Whren* that comes out the other way, holding that intentional discrimination should matter in assessing the reasonableness of a search or seizure under the Fourth Amendment, even if it could also form the (potential) basis of an Equal Protection claim.¹⁴

14. In fact, this is exactly what commentators critical of the *Whren* decision have called for. See, e.g., Kevin R. Johnson, Essay, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebel-*



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In short, nothing *requires* the use of either the jurisdictional approach or the gestalt approach. It is an interpretive choice – and one with important consequences. So, how to choose? Are there interpretive principles that courts might use to navigate the decision, quite apart from either the particular values at play or the policy preferences of specific judges?

II. THREE PRINCIPLES FOR DECIDING BETWEEN THEM

In the rest of this Essay, I explore three possible answers to this question. The first is that courts should adopt the rights-maximizing approach; the second is that courts should adopt the most efficient approach; and the third is that courts should adopt the approach that renders constitutional adjudication, as an enterprise, more majestic than technocratic.

The first two answers, I conclude, are appealing but somewhat unstable: they supply no reason to favor one approach over the other in principle. Instead, they offer metrics that could help courts assess the decision case by case, domain by domain. The third answer, by contrast, *does* supply a reason to favor one approach over the other in principle – namely, the gestalt approach. I close by suggesting that (1) this may be a virtue of the third answer, (2) the “anti-technocratic” view of constitutional law may have implications beyond the specific question of intra-textual harmonization, and (3) further work on this front is warranted.¹⁵

A. Rights-Maximization

One means of distinguishing the jurisdictional approach from the gestalt approach would be to ask: which approach tends, in practice, to vindicate the largest number of meritorious grievances? Take *Whren*. One of the reasons that case continues to inspire such widespread revulsion is that it seems, in practice, to shut down colorable accusations of racial profiling.¹⁶ It’s all well and good, one might say, for the Court to announce that *in theory*, victims of racial profiling can

lious Lawyering, 98 GEO. L.J. 1005 (2010); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997).

15. In fact – to the point of further work being warranted – I don’t even mean to imply that these three answers are exhaustive. There could be others. But given the limited space, I thought these most merited exploration.

16. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 67–72, 108–09 (2010).



always bring Equal Protection suits against particular officers, but realistically, the likelihood of those suits coming to fruition is vanishingly small – because of the evidentiary hurdles involved; because challenges against the police disproportionately come in the form of suppression hearings that leave no room for Equal Protection claims; etc. Thus (the reasoning goes), the Court’s rigid bifurcation of Fourth and Fourteenth Amendments operates in practice to shield unconstitutional conduct from redress.

For someone – and I confess to being such a person – who views *Whren* this way, it might be tempting to conclude that courts should adopt the gestalt approach on the grounds of rights-maximization. The idea would be, by allowing the values of one domain (here, those of Equal Protection) to influence the doctrinal texture of another domain (here, the Fourth Amendment’s “reasonableness” requirement), courts would multiply opportunities for the enforcement of rights. And this provides a reason, *ceteris paribus*, to favor the gestalt approach over the jurisdictional one.

Appealing, sure – but there’s a wrinkle. Put simply, allowing the values of one constitutional domain to influence the operation of another does *not* always tend to maximize rights. One clear counterexample is the Court’s treatment of Free Exercise vis-à-vis Equal Protection. In *Employment Division v. Smith* the Court held – in a controversial opinion that inspired public outrage and resulted in the passage of the Religious Freedom Restoration Act – that generally-applicable laws, even when they frustrate religious exercise, are not susceptible to a Free Exercise challenge unless they are specifically *aimed* at hampering religion.¹⁷ In reaching this conclusion, Justice Scalia (writing for the majority) argued that his analysis explicitly drew strength from Equal Protection principles, which have long insulated “race-neutral laws that [merely] have the effect of disproportionately disadvantaging a particular racial group” from heightened scrutiny.¹⁸ Whether the *Smith* Court was *right* to so read the Free Exercise and Equal Protection Clauses – in tandem, subject to the gestalt approach – is a matter of fierce and ongoing dispute.¹⁹ For our purposes, the point is simply that (1) *Smith* plainly is an instance of

17. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

18. *Id.* at 886 n.3.

19. For background on this debate, see Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B. C. L. REV. 275, 283–84, nn. 36–40 (2006) (compiling arguments and sources).



gestalt interpretation, but also (2) one that constricts rights rather than expanding them.²⁰

B. Adjudicative Efficiency

Another means of distinguishing the jurisdictional approach from the gestalt approach would be to focus on which one is more efficient at identifying and resolving constitutional problems. When it comes, say, to assessing the First Amendment implications of police surveillance, it just seems *easier* to allow that question to infiltrate and inform the Fourth Amendment analysis, considering that the remedies available in a hypothetical First Amendment suit – limiting police surveillance capabilities – would likely be similar, in substance, to the probable cause and warrant requirement. In other words, imagine if, contra the growing trend, courts decided to strip all First Amendment-style reasoning out of Fourth Amendment jurisprudence, and instead require plaintiffs to raise First Amendment challenges to law enforcement surveillance directly. Would such challenges, when successful, have meaningfully different practical effects than successful Fourth Amendment challenges to the same police practices? If not, then perhaps it makes little sense to bifurcate the two instead of consolidating them.

Put slightly differently, the gestalt approach can be imagined as a species of joinder. Sure – one might think – if courts had infinite resources and cared about splitting conceptual hairs, they should, in theory, require litigants to bring Fourth Amendment and First Amendment challenges separately. But in the real world, why bother? At a practical level, this kind of wooden bifurcation – as required by the jurisdictional approach – serves only to confuse the issues and to deter important litigation from getting off the ground. Hence, the gestalt approach should win the day.

As with the first answer, there is something undeniably appealing about this logic – but also a caveat. The premise here, of course, is

20. Indeed, for many critics of *Smith*, the whole point is that the Court should have adopted the jurisdictional approach *on rights-maximizing grounds*. The idea, in other words, is that equality grievances and Free Exercise grievances should be afforded their own domains, so as to increase constitutional protection for people of religious faith. On this view, when laws target religion, that poses an equal protection problem (because religion is a protected class), but even laws that implicate religious exercise incidentally would also be suspect, under certain circumstances, on Free Exercise grounds. When the *See, e.g.,* Jesse Choper, *The Rise and the Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651 (1991) (arguing, along these lines, for a view of Free Exercise that overflows the requirements of equality).



that adjudicating an issue through Vehicle One will be functionally similar, if not identical, to adjudicating the same issue through Vehicle Two. Yet that premise easily comes under strain. Imagine, for example, a hypothetical First Amendment challenge to the NYPD's patrol patterns in certain areas of Brooklyn. The theory is that by patrolling intensively during the day, the NYPD is chilling association – and all of its concomitant democratic values – in places like parks. Under existing First Amendment doctrine, this challenge would face a tough road. But its fate would ultimately depend on the facts. Are police targeting particular areas *because of* the impact of association? Are the parks and other public places subject to targeting those that play host to a disproportionately large share of political activity? Is there any evidence about the origins, or the official purpose, of the program? And so forth.

The point, however, is not about the viability of this hypothetical First Amendment suit. The point is that if the same claim were raised in the context of a Fourth Amendment challenge, there is no way it would prevail. If a defendant, facing prosecution based on evidence in a public space like a park, were to argue that police should be constrained from patrolling in public spaces – given the practice's clear First Amendment implications – the claim would be dismissed out of hand. For Fourth Amendment purposes, the police are allowed to patrol as much (or little) as they like in public – full stop. Of course, this does not mean the First Amendment challenge, qua First Amendment challenge, is doomed. What it *does* mean, however, is that presenting the First Amendment question through the vehicle of a Fourth Amendment suit may well distort, rather than clarify, the constitutional inquiry. And if did, the overall landscape of constitutional adjudication would be less efficient for it.

C. Anti-Technocracy

A final means of distinguishing the jurisdictional approach from the gestalt approach would be to focus on the theory of constitutionalism each instantiates. The jurisdictional approach imagines the Constitution as a checklist of requirements and prohibitions, each to be enforced in its own province, without spillover. The gestalt approach, by contrast, imagines the Constitution as an integrated vision of public value – a pattern of interwoven norms that breathes practical life to the ideal of limited government and self-rule.



Interpreting Constitutional Provisions in Tandem

Both conceptions of the Constitution ring familiar. The document *is* a checklist of requirements and prohibitions, and it also codifies an integrated vision of public value. In closing, however, I want to suggest that the integrated view has a performative aspect that the checklist view lacks. The gestalt approach renders constitutional law a grander enterprise than other, more quotidian forms of legal dispute-resolution. It casts the interpretive practice as one in which all of us, as observer-participants in the project of popular sovereignty, can share – rather than a technical undertaking to be understood and pursued exclusively by lawyers and judges.²¹

Perhaps the point, like many legal arguments, is best conveyed by analogy. In a short *per curiam* opinion in 2014, the Supreme Court reversed a decision by the Fifth Circuit dismissing, without leave to amend, a retaliation suit against a police department solely because the plaintiffs – ex-employees of the department – failed to explicitly invoke § 1983 in their complaint.²² To so penalize this omission, the Court held, would elevate form over substance. It would confuse an “imperfect statement of the legal theory supporting the claim” with a genuine legal deficiency.²³

This holding is far from remarkable; if anything, the remarkable thing is that the Fifth Circuit, like the district court before it, managed to view the issue differently.²⁴ But in spite of its modesty, the holding reflects an important and enduring principle: that constitutional law – the adjudication of basic rights – is not some kind of lawyer’s parlor game, buttressed by technicality. It is not a frivolity. It is not a conceit. It is not an effort, as Christopher Schmidt recently put it, that can be reduced to “craft[ing] elegant, clean doctrine,” if doing so comes at the expense of our “share[d] . . . project of giving meaning to the Constitution.”²⁵

Working out exactly what this principle means, let alone exactly how it applies to the distinction between jurisdictional *v.* gestalt approaches to intra-constitutional harmony, lies beyond the scope of this

21. See generally Kiel Brennan-Marquez & Paul Kahn, *Statutes and Democratic Self-Authorship*, 56 WM. & MARY L. REV. 115 (2014) (arguing, with regard to both statutory and constitutional interpretation, that popular sovereignty depends on the ability of the we, the people to see legal outcomes as the product of our collective will).

22. See *Johnson v. City of Shelby*, 135 S. Ct. 346, 346 (2014).

23. *Id.* at 346.

24. See *Johnson v. City of Shelby*, 743 F.3d 59 (5th Cir. 2013).

25. Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 625 (2016).



brief essay. More work lies in store. For now, the point is simply that if doctrinal pristineness is a virtue, it is an exclusively instrumental one; it is a virtue to the extent it renders constitutional law relatable to the observer-participants who are, after all, its subjects and its authors.²⁶ And the risk – in general, but here specifically instantiated in the jurisdictional approach – is that pristineness will be mistaken for an end in itself. That the law will be clear, perhaps painstakingly so; but it will no longer be our own.

26. See Brennan-Marquez & Kahn, *supra* note 21, at 173–77 (2014) (explaining that popular sovereignty – rule by the people – requires us, as a polity, to be able to see legal outcomes as the product of our own will).



NOTE

He Say, She Say: *Utah v. Strieff* and the Role of Narrative in Judicial Decisions

DANIELLE HAYES*

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INTRODUCTION

Four hours.¹ That’s how long Michael Brown’s eighteen-year-old dead body lay in the street.² Under the Missouri summer sun.³ Face

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1. Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, NY TIMES (Aug. 23, 2014), <https://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html>.

2. *Id.*

3. *Id.*



down.⁴ Blood streaming from his head.⁵ In the middle of a neighborhood street.⁶ Dead. For four hours.

The murder of Michael Brown by Ferguson police officer Darren Wilson sparked outrage not only in Ferguson, but across the country.⁷ Widespread social media attention,⁸ in addition to complaints from Ferguson residents, led the Justice Department to open an investigation into the practices of the Ferguson Police Department.⁹ The report (“Ferguson Report”) revealed patterns of unconstitutional policing, including search and seizure techniques that violated the Fourth Amendment.¹⁰ The report also revealed that these practices disproportionately affected African Americans and were often the result of discriminatory intent.¹¹ One of the unconstitutional practices uncovered by the Ferguson Report was a pattern of systemic unlawful Terry stops.¹² Police officers would stop individuals on the street, often without reasonable suspicion, and immediately run a warrant check in hopes of finding an outstanding warrant which would provide a lawful reason to search the person.¹³ As the Justice Department noted in the report, it is unlawful to detain someone without reasonable suspicion; however, Ferguson police officers engaged in this practice so frequently that they had a name for it, “ped check.”¹⁴

4. *Id.*

5. *Id.*

6. *Id.*

7. Josh Hafner, *How Michael Brown's Death, Two Years Ago, Pushed #BlackLivesMatter Into a Movement*, USA TODAY (Aug. 8, 2016, 7:50 PM), <http://www.usatoday.com/story/news/nation-now/2016/08/08/how-michael-browns-death-two-years-ago-pushed-blacklivesmatter-into-movement/88424366/>.

8. *Id.* (explaining that the social media attention surrounding the events in Ferguson helped bring the #BlackLivesMatter movement to national prominence).

9. Matt Pearce, *Back Story: What Happened in Michael Brown Shooting in Ferguson, Mo.*, LA TIMES (Nov. 24, 2014, 6:29 PM), <http://www.latimes.com/nation/la-na-back-story-ferguson-shooting-story.html>.

10. U.S. DEP'T OF JUST. CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T 1 (2015).

11. *Id.* at 2.

12. A “Terry stop” refers to an encounter between police officers and civilians where officers may stop an individual on the street, based on their suspicion that the person is involved in criminal activity. Indeed, the encounter between Officer Wilson and Michael Brown would be characterized as a Terry stop. Officer Wilson heard a report about a convenience store theft and approached Michael Brown and a friend, who were walking in the street, when he realized that Brown fit the description of the suspect in the theft. See *What Happened in Ferguson?*, NY TIMES (Aug. 10, 2015), <https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

13. INVESTIGATION OF THE FERGUSON POLICE DEP'T, *supra* note 10, at 16–17.

14. *Id.* at 16–18; see also David Blake, *Rethinking Officer Safety Tactics During Pedestrian Stops*, POLICEONE (Jan. 10, 2014), <https://www.policeone.com/Officer-Safety/articles/6722458->

A year after the Ferguson Report, this particular practice was brought to national attention again, in the Supreme Court case of *Utah v. Strieff*.¹⁵ In *Strieff*, Salt Lake City Officer Douglas Fackrell observed Edward Strieff leave a house that he suspected of narcotics activity.¹⁶ Officer Fackrell detained Strieff in a nearby convenience store parking lot and immediately ran a warrant check, which revealed an outstanding warrant for a traffic violation.¹⁷ He then arrested Strieff pursuant to the warrant, searched him, and uncovered drugs.¹⁸ The issue in this case was whether the drugs should be suppressed, pursuant to the exclusionary rule, because the officer detained Strieff without reasonable suspicion,¹⁹ resulting in the drugs being obtained due to an unlawful stop.²⁰ The Supreme Court reasoned that suppressing the evidence would not serve the exclusionary rule's deterrent purpose²¹ because the officer's "mistake," in unlawfully detaining Strieff, was neither purposeful nor flagrant.²² Additionally, the Court explained that suppression wasn't warranted in this case, because Officer Fackrell's "mistake" was an isolated incident, not part of any systemic misconduct.²³

This Note challenges two of the Court's main assertions in *Strieff*: (1) that the officer's conduct was not part of systemic police misconduct and (2) that excluding the evidence in this or similar situations would not serve a deterrent purpose. By applying the exclusionary rule more consistently, and not creating exceptions to limit its applica-

Rethinking-officer-safety-tactics-during-pedestrian-stops/ (describing pedestrian stops or "ped checks").

15. See generally *Utah v. Strieff*, 136 S. Ct. 2056 (2016).

16. *Id.* at 2059–60 (Officer Fackrell investigated suspected narcotics activity in the house based on an anonymous tip that was called in to the drug-tip line.).

17. *Id.* at 2060.

18. *Id.*

19. Officer Fackrell suspected the house of drug trafficking due to the short nature of people's visits. *Id.* at 2059. However, he "lacked a sufficient basis to conclude that Strieff was a short-time visitor" because he did not know what time Strieff entered the house. *Id.* at 2063.

20. *Id.* at 2060.

21. There are three main rationales that explain the Court's purpose when applying the exclusionary rule: judicial integrity, constitutional privilege, and deterrence. Merry C. Johnson, *Discovering Arrest Warrants During Illegal Traffic Stops: The Lower Courts' Wrong Turn In The Exclusionary Rule Attenuation Analysis*, 85 Miss. L.J. 225, 232 (2016). Under the judicial integrity rationale, evidence should be excluded because admitting illegally obtained evidence amounts to the courts endorsing illegal conducts. See *id.* at 232. Under the constitutional privilege rationale, excluding evidence is proper because it serves as a remedy for the violation of a Fourth Amendment right. See *id.* Under the deterrence rationale, the Court reasoned that the disincentive of excluding illegally obtained evidence would compel officials not to violate the Fourth Amendment. See *id.*

22. *Strieff*, 136 S. Ct. at 2063.

23. *Id.*



tion, the rule would have more of a deterrent effect. This Note argues that the exclusionary rule is ineffective because courts have created a narrative that gives biased levels of deference to police officers when determining whether to exclude illegally obtained evidence. This narrative allows the Court to create numerous exceptions to the exclusionary rule in order to justify police misconduct; and the Court is able to create these exceptions due to the transition from a judicial integrity to a deterrence rationale. This Note suggests that Justice Sotomayor's dissent in *Strieff* provides a framework for a more effective exclusionary rule and illustrates the harmful effects of the Court's current narrative.

Part I analyzes the competing narratives between the majority opinion and Justice Sotomayor's dissent and challenges the Court's assertion that Officer Fackrell's conduct was not part of any systemic misconduct. This Part also explains how the coherence of the majority narrative depends on the existence of exceptions to the exclusionary rule. Part II highlights the correlation between the Court's creation of exceptions to the exclusionary rule and the Court's transition from a judicial integrity to a deterrence rationale and explains how this transition was necessary to justify the Court's narrative. Part III challenges the Court's assertion in *Strieff* that excluding evidence in this or similar situations would not serve a deterrent effect. This Part also uses theories of deterrence to demonstrate how the Court's use of the deterrence rationale – to justify its narrative – actually makes the exclusionary rule a less effective deterrent of officer misconduct. Part IV suggests that, to combat this narrative, courts acknowledge the vulnerability of civilians when interacting with officers. Adopting such a perspective will allow for a more balanced adjudication of Fourth Amendment interactions that implicate the exclusionary rule.

I. JUSTIFYING THE NARRATIVE

A. Competing Narratives

In *Strieff*, the majority declines to suppress the unlawfully obtained evidence because the officer accidentally broke the law.²⁴ To make this point, the majority creates a narrative that focuses on justifying the officer's misconduct. Judges often use narrative in their opinions to paint a picture that supports their decision; this is called

24. *Id.* (“Officer Fackrell’s decision to initiate the stop was mistaken.”). However, when an officer detains someone absent a lawful reason, that is an unlawful stop.

narrative coherence.²⁵ Particularly in cases where the facts are subject to multiple interpretations, judgment will often be based on how the facts are interpreted, i.e. the narrative that is used.²⁶ For narrative to be effective, there must be internal and external coherence or consistency. Internal coherence refers to the structure of the story and how well the parts of the narrative fit together in a way that is consistent.²⁷ External coherence refers to the way that the narrative being used relates to current social norms and how it fits within a broader cultural context.²⁸ This Note argues that the narrative portrayed informs the rationale that is used to determine whether exclusion is necessary.

The majority opinion begins by outlining reasons why it would appear that Officer Fackrell had reason to stop Strieff. It explains that the officer had been observing the house and witnessed people leaving only a few minutes after entering the house, which raised his suspicion that the occupants might be dealing drugs.²⁹ The way that this first paragraph is set up, providing reasons for Officer Fackrell's suspicion of the house, might lead the reader to believe that he had reasonable suspicion to stop Strieff. However, this is an example of narrative being used to justify a particular outcome and the majority's attempt to justify a suspicion-less stop without actually saying that it was justified. The officer did not have reasonable suspicion because he did not know how long Strieff had been in the house even though the short periods of time were the reason Officer Fackrell became suspicious of the house in the first place.³⁰

The majority glosses over the fact that the officer lacked reasonable suspicion to conduct the stop stating "we assume without deciding (because the State conceded that point) that the officer lacked reasonable suspicion to stop Strieff."³¹ Instead the majority focuses on the fact that the warrant was valid and upon discovery of the warrant, Officer Fackrell "had an obligation to arrest Strieff."³² The minimiza-

25. Chris Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 *LEGAL COMM. & RHETORIC* 67, 67–68 (2013) (illustrating how the Justices used different versions of a narrative to come to different conclusions in *Scott v. Harris*).

26. *Id.* at 69 (explaining that when facts are open to multiple interpretations, they are viewed in interpretative frameworks and often judgment will turn on how the facts are interpreted, and the narrative that is used).

27. *Id.* at 71.

28. *Id.*

29. *Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2016).

30. *Id.* at 2063.

31. *Id.* at 2062.

32. *Id.*



tion of the unlawful nature of the stop illustrates the internal coherence of the majority's narrative. At every opportunity, the majority consistently glosses over the officer's misconduct and focuses on the discovery of the warrant. This de-emphasis on the officer's initial misconduct and over-emphasis on Strieff's warrant perpetuates a narrative that favors the officer when the Court is deciding whether to suppress. Indeed, the majority refers to Officer Fackrell's misconduct as "good faith mistakes,"³³ even though Fackrell admitted his sole purpose for stopping Strieff was to conduct an investigatory seizure despite having no basis for that action.³⁴ Therefore, the officer's violation of Strieff's Fourth Amendment rights was not a "good faith mistake," but an intentional decision. This use of language, characterizing officer misconduct as negligent or mistaken, legitimizes the concept that the courts should permit and not punish police misconduct because it was only a mistake. However, not holding officers responsible for their wrongdoing, while at the same time punishing civilians for illegal conduct leads down a dangerous path that ultimately promotes misconduct because officers know it will be tolerated.

Justice Sotomayor's dissent provides a contrasting example of narrative coherence. It begins by providing a real life example of the majority's decision, explaining "[t]his case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants – even if you are doing nothing wrong."³⁵ In stark contrast to the majority opinion, Justice Sotomayor does not describe the officer's conduct as mistaken or negligent, but she calls it what it is – an illegal stop.³⁶ Instead of glossing over the officer's unlawful conduct, Sotomayor focuses on it, explaining that his actions are the very reason why the drugs should be excluded because he discovered the drugs by exploiting his wrongdoing.³⁷ In other words, he used the illegal stop and subsequent warrant check to provide himself with a means for searching Strieff because it was highly foreseeable that Strieff would have an outstanding warrant.³⁸ By tackling the illegality of Officer Fackrell's conduct head on, Justice Sotomayor is able

33. *Id.* at 2063.

34. *Id.* at 2072 (Kagan, J., dissenting).

35. *Id.* at 2064 (Sotomayor, J., dissenting).

36. *Id.* at 2065.

37. *Id.* at 2066.

38. *Id.* at 2066 (explaining that discovery of the warrant was anticipated because Salt Lake City had over one hundred and eighty thousand misdemeanor warrants in their system).

to engage in an honest analysis that illustrates the harmful effects of giving officers license to search for contraband after unlawfully stopping someone.

B. Consequences of the Majority's Narrative

One of the most glaring examples of these harmful effects can be found in the Ferguson Report. Officers in Ferguson would stop individuals on the street and immediately run a warrant check because they knew there was a high probability that the person would have an outstanding warrant,³⁹ which would provide the officer with justification to search.⁴⁰ In fact, this practice of policing was so common, that Ferguson officers had a name for it “ped checks,” which officers used to refer to instances where they stopped individuals without reasonable suspicion, often times just to see if the person had an outstanding warrant.⁴¹ The Justice Department condemned this practice in the Ferguson Report as an unconstitutional pattern of policing, explaining that it is unlawful to detain an individual without reasonable, articulable suspicion of a crime.⁴² However, only one year later in *Strieff*, the Supreme Court seemingly validates this practice by characterizing Officer Fackrell's conduct as negligent at most.⁴³ The majority justifies this decision by explaining that the incident in *Strieff* was not part of any “systemic or recurrent police misconduct.”⁴⁴ Justice Sotomayor chastises the majority for insisting that *Strieff* was an isolated event and points to Justice Department investigations in New Orleans, Ferguson and Newark that illustrate a pattern of police using the common occurrence of outstanding warrants to stop pedestrians without cause.⁴⁵ For example in Newark, New Jersey officers stopped 52,235 pedestrians and checked for outstanding warrants on 39,308 of those stopped.⁴⁶ After analyzing these pedestrian stops, the Justice

39. In a town of about 21,000 people (as of December 2014) there were 16,000 outstanding warrants. INVESTIGATION OF THE FERGUSON POLICE DEP'T, *supra* note 10, at 6, 55.

40. *Id.* at 17–18.

41. *Id.* In October 2012, officers stopped a man for a broken taillight even though the man had just fixed the light and knew it was operating properly and one officer stated “let's see how many tickets you're going to get.” In Ferguson, officers routinely stopped people for no reason other than “an officer's desire to check whether the subject had a municipal arrest warrant pending.”

42. *Id.* at 17.

43. *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016).

44. *Id.*

45. *Id.* at 2068 (Sotomayor, J., dissenting).

46. INVESTIGATION OF THE NEWARK POLICE DEP'T, *supra* note 10, at 8, 19 n.15 (2014).



Department reported that approximately ninety-three percent of these stops were unsupported by reasonable suspicion.⁴⁷

Officer Fackrell's conduct in *Strieff* was eerily similar to that of the officers in Ferguson, which the Justice Department condemned. At the time of the incident, the state of Utah had over 180,000 outstanding warrants in its system and Salt Lake County had a backlog of outstanding warrants "so large that it faced the potential of civil liability."⁴⁸ This is akin to Ferguson, where in a city of 21,000 people there were 16,000 outstanding warrants at the time of the Ferguson Report.⁴⁹ Additionally, the Supreme Court of Utah admitted that it is a common practice for Salt Lake City officers to run warrant checks on pedestrians they have stopped without reasonable suspicion.⁵⁰ Although Salt Lake City officers don't have a cute pet name for their practice like the officers in Ferguson, it is clear that the conduct which the majority condoned in *Strieff* is identical to the conduct that the Justice Department condemned in the Ferguson Report. The majority's contention that *Strieff* was an isolated incident is simply untrue.

In fact, the problem with using outstanding warrants, after an unconstitutional stop, as a device to obtain tainted evidence is exacerbated when placed against the purported deterrence purpose of the exclusionary rule. The value of deterrence depends upon the strength of the incentive to commit the forbidden act.⁵¹ Because the discovery of outstanding warrants in certain communities (like Ferguson) is foreseeable, the incentive to make unconstitutional detentions that will lead to the discovery of outstanding warrants is strong. In these instances, the *Strieff* rule does not serve the purpose of deterrence because the incentive to commit unconstitutional detentions is stronger. Thus, as Justice Sotomayor warns in her dissent, admitting evidence that was obtained as a result of this systemic misconduct, encourages officers to engage in this unlawful behavior,⁵² and ulti-

47. *Id.* at 9 n.7. In the majority of these stops, officers documented the individuals as loitering or wandering without any indication of criminal activity. It was also common practice for officers to conduct warrant checks on individuals simply for being present in high-crime areas.

48. *Utah v. Strieff*, 136 S. Ct. 2056, 2066 (2016).

49. INVESTIGATION OF THE FERGUSON POLICE DEP'T, *supra* note 10, at 6, 55.

50. *See State v. Topanotes*, 76 P.3d 1159, 1160 (Utah 2003).

51. Michael Kimberly, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 YALE L.J. 177, 182 (2008).

52. *See Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting) ("when we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner.")



mately inhibits the purpose of the exclusionary rule to deter misconduct.

Furthermore, as Justice Sotomayor explains, this type of policing has a disproportionate impact on communities of color.⁵³ She states “it is no secret that people of color” are victims of suspicion-less stops at disproportionate rates and that these civilian-officer interactions too often end in tragedy.⁵⁴ For example in *Floyd v. City of New York*,⁵⁵ the stop and frisk policy of the NYPD,⁵⁶ which is a similar reiteration of the conduct in *Strieff* and Ferguson, was struck down due to its unconstitutional discriminatory nature.⁵⁷ Of the 4.4 million Terry stops conducted from 2004-2012, under stop and frisk, 52% of the individuals were Black, 31% were Hispanic and 10% were White.⁵⁸ This is extremely disproportionate to the demographics of New York City, where 23% of the population is Black, 29% Hispanic and 33% White.⁵⁹ Between 2004 and 2009 as the number of stops per year rose from 314,000 to 576,000, the percentage of times which the officer failed to state a specific suspected crime rose from 1% to 36%.⁶⁰ In fact, out of the 4.4 million stops, 88% of the time the suspicion turned out to be misplaced.⁶¹ The court struck down the NYPD’s stop and frisk policy on the basis of the Fourteenth Amendment Equal Protection Clause because the policy impermissibly targeted racially defined groups, becoming a form of racial profiling.⁶² The policy was also struck down on the basis of the Fourth Amendment because the city acted with deliberate indifference to the police department conducting unconstitutional stops and frisks.⁶³ Yet in the face of overwhelming evidence, the majority in *Strieff* completely ignores this racialized component of Fourth Amendment searches and

53. *Id.* at 2070 (Sotomayor, J., dissenting).

54. *Id.*

55. *See* *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

56. *Id.* at 556. Stop and frisk refers to a police tactic used by the NYPD where officers would stop individuals on the street and conduct a search on that person, frisking them for contraband.

57. *Id.* at 562.

58. *Id.* at 559. *See also* Michelle Ye Hee Lee, *Trump’s False Claim that Stop and Frisk in NYC Wasn’t Ruled Unconstitutional*, WASH. POST (Sept. 28, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/09/28/trumps-false-claim-that-stop-and-frisk-was-not-ruled-unconstitutional/?utm_term=.650cc35d6227.

59. *Floyd*, 959 F. Supp. 2d at 559.

60. *Id.* at 575.

61. *Id.* at 573 (explaining that “88% of the 4.4 million stops resulted in no further law enforcement action”).

62. *Id.* at 562.

63. *Id.*



condones conduct that has been proven to disproportionately discriminate against people of color.⁶⁴ Critical race theorist Devon Carbado further explains how the colorblind narrative that the Court uses in Fourth Amendment cases is particularly dangerous for people of color.⁶⁵

In his article, *Eracing the Fourth Amendment*, Devon Carbado challenges the Court's racial neutrality within the Fourth Amendment context.⁶⁶ Carbado basically argues that because the Court has chosen to adopt a colorblind model, where it ignores the role of race in police interactions with civilians,⁶⁷ the Court legitimizes police practices that target people of color and "reproduces racial inequities in the context of policing."⁶⁸ The way that the Court effectuates this race neutrality is by adopting a narrative he calls the "perpetrator perspective."⁶⁹ Underlying the Court's perpetrator perspective are two erroneous beliefs: "(1) the notion that how people interact with and respond to the police is neither affected by nor mediated through race; and (2) the idea that whether and how the police engage people is not a function of race."⁷⁰ In contrast to the perpetrator perspective, Carbado states that a victim perspective specifically acknowledges race and recognizes that people of color are often victims of police abuse.⁷¹ In practice, the perpetrator perspective plays out like this: race is presumed to not be a factor in police interactions and will only be mentioned in judicial decisions if an officer is explicitly racist.⁷² Otherwise officers are presumed "good" and "their racial interactions with people on the street are presumed constitutional."⁷³ This has the resulting effect of people of color being more likely to experience the Fourth Amendment as a tool used for coercive control rather than a constitutional protection.⁷⁴

64. See *Utah v. Strieff*, 136 S. Ct. 2056, 2068–69 (Sotomayor, J., dissenting) (citing evidence from numerous Justice Department reports establishing these warrant checks as a pattern of unconstitutional behavior and explaining how these unlawful stops can have "severe consequences").

65. See Devin W. Carbado, *Eracing the Fourth Amendment*, 100 MICH. L. REV. 946, 964–67 (2002).

66. *Id.* at 968.

67. *Id.* at 968–69.

68. *Id.* at 967–68.

69. *Id.* at 968.

70. *Id.*

71. *Id.* at 970.

72. *Id.* at 968.

73. *Id.* at 968–69.

74. *Id.* at 969.

This perpetrator perspective that the Court operates under is dangerous because it creates a narrative that gives biased levels of deference to officers. Unless it can be proven that an officer is explicitly racist, the officer's actions (no matter how unconstitutional) are justified⁷⁵ in a way that inherently blames the civilian and insists that he was somehow deserving of the treatment he received because this was a "good cop." For example in *Utah v. Strieff*, although the officer clearly lacked reasonable suspicion to stop Strieff,⁷⁶ the majority's entire decision is set up in a way that justifies his actions, describing his conduct as negligent at most.⁷⁷ Although, in *Strieff*, the defendant was white, this narrative becomes particularly dangerous when the civilian is a person of color. If the Court believes that race doesn't play a role in how people react to police, then the Court is likely to believe the "furtive movement" justification that was given for a large percentage of the NYPD stop and frisk incidents (which were found to be unconstitutional),⁷⁸ instead of understanding that black people have been socialized to be nervous around police due to centuries of mistreatment.⁷⁹ As Judge Posner once said, "[w]hether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you."⁸⁰ However, because the perpetrator perspective does not recognize these racial realities and only acknowledges race when there is an explicitly racist motive, Fourth Amendment practices that target people of color continue to be legitimized by the Court.⁸¹

In the *Strieff* decision, the majority is again operating under the perpetrator perspective. Instead of acknowledging that Officer Fackrell's conduct was part of systemic officer misconduct that took place in Salt Lake City and that his conduct was disturbingly similar to the behavior that led to racial tensions in Ferguson, Missouri, the Court justifies his actions. The majority states that Officer Fackrell's

75. See Carbado, *supra* note 65, at 968.

76. *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016).

77. *Id.*

78. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013) (when officers were asked what actions constituted a furtive movement, they gave broad general descriptions of everyday behavior that is not constitutionally sufficient to support a Terry stop).

79. Carbado, *supra* note 65, at 969 ("as a historical matter, people of color have not been the beneficiaries of effective law enforcement.").

80. *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005).

81. Carbado, *supra* note 65, at 965–66.

“mistake” was an isolated incident,⁸² explicitly ignoring all the evidence to the contrary. This purposeful avoidance that the majority engages in is necessary to stick to the colorblind model that the Court has adhered to for so long. However, by ignoring this racialized component, the Court legitimizes the very misconduct that it purports to deter. In stark contrast to the majority, Justice Sotomayor does not operate under the perpetrator perspective, instead she uses what Carbado calls a victim perspective, which is explicitly race conscious and recognizes that people of color are particularly vulnerable to police abuse.⁸³ Not only does Justice Sotomayor call out the officer’s actions for what they were, an unconstitutional stop that occurs on a systemic level, but she also takes pains to acknowledge how this misconduct specifically harms people of color.⁸⁴

C. How The Perpetrator Perspective Depends On Exceptions

The Court’s ability to operate under the perpetrator perspective depends on the existence of numerous exceptions to the exclusionary rule. The majority opinion explains that, in an effort to avoid suppression, the Court has created several exceptions to the exclusionary rule because it should only be applied “where its deterrence benefits outweigh its substantial costs.”⁸⁵ This basically means that in order to portray a narrative where an officer’s conduct – though violative of the Fourth Amendment – is justified, the conduct must fit within an exception to the exclusionary rule. So it is clear that the narrative does not work unless there are numerous exceptions to excuse officer misconduct.

In *Strieff*, the court used the attenuation exception, which allows illegally obtained evidence when the connection between the unlawful police conduct and the evidence is remote or has been interrupted by an intervening circumstance.⁸⁶ The majority opinion admits that Officer Fackrell lacked reasonable suspicion to detain Strieff,⁸⁷ which makes the stop unconstitutional. However, if the majority ended the

82. *Strieff*, 136 S. Ct. at 2063 (calling the officer’s conduct “an isolated instance of negligence”).

83. Carbado, *supra* note 65, at 970.

84. *Strieff*, 136 S. Ct. at 2068–71 (Sotomayor, J., dissenting).

85. *Id.* at 2061.

86. *Id.*

87. *See id.* at 2063 (explaining that Officer Fackrell “lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction.”); *Id.* at 2059 (calling the stop “an unconstitutional investigatory stop”).

analysis at that step there would be no way to justify the misconduct and the evidence would have to be suppressed. Therefore, to avoid suppression, the majority must make the officer's conduct fit an exception.

The attenuation exception has three factors and throughout its analysis of these factors, the majority uses the perpetrator perspective to justify the officer's actions.⁸⁸ The three factors are: (1) the amount of time elapsed (the temporal proximity) between the illegal action and seizure of the evidence (2) the presence of intervening factors and (3) the purpose and flagrancy of the misconduct.⁸⁹ The majority concedes that the temporal proximity favored suppression because the officer found the drugs only minutes after illegally stopping the defendant.⁹⁰ As for the second factor, the majority found that it "strongly favor[ed] the State because the warrant was valid, predated Officer Fackrell's investigation, and was entirely unconnected with the stop."⁹¹ This is a prime example of the majority using an exception to further the perpetrator perspective. The majority stresses that the warrant was "entirely unconnected with the stop" and in another part of the opinion calls it "untainted;"⁹² however, the warrant was only discovered as the result of an unconstitutional stop, making it directly connected to the stop and thereby tainting it. Finally, the majority finds that Officer Fackrell's conduct was not at all flagrant or purposeful but that he only made good faith mistakes that were at most negligent by stopping the defendant without reasonable suspicion.⁹³ This is another example of the perpetrator perspective at work because, by characterizing the officer's misconduct as "good faith mistakes" instead of calling it an unconstitutional stop, the majority gives legitimacy to the conduct. Furthermore, the officer's conduct was clearly purposeful because he admitted that his sole reason for stopping Strieff was investigative,⁹⁴ even though he had not been observing Strieff long enough to suspect him of a crime.⁹⁵ *Strieff* is one very convincing example of how the perpetrator perspective relies on ex-

88. *Id.* at 2062–63.

89. *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975).

90. *Strieff*, 136 S. Ct. at 2062.

91. *Id.*

92. *Id.*

93. *Id.* at 2063.

94. *Id.* at 2066.

95. *Id.* at 2067. Justice Sotomayor further illustrates how the warrant check was purposeful by explaining "[a] warrant check of a pedestrian on a sidewalk . . . is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing.'"



ceptions to the exclusionary rule in order to justify officer misconduct. A more intriguing piece to this puzzle is the fact that in order to create so many exceptions to justify its narrative, the Court had to change the rationales which explain use of the exclusionary rule.

II. THE EXCLUSIONARY RULE IN TRANSITION

In 1961, the Supreme Court expanded the exclusionary rule making it applicable to the states.⁹⁶ In *Mapp v. Ohio*, the Court stressed that the exclusionary rule was necessary to protect judicial integrity and ensure that the courts were not complicit in law breaking.⁹⁷ Almost immediately after the *Mapp* decision, researchers began to study the effects of the exclusionary rule. In 1963, Nagel surveyed police chiefs and prosecutors and asked whether police compliance with the exclusionary rule had increased between 1960-1963.⁹⁸ Nagel concluded that compliance increased seventy-five percent in states without the exclusionary rule prior to *Mapp* and fifty-seven percent in states that had their own exclusionary rule before *Mapp*.⁹⁹ In 1966, Katz surveyed prosecutors, defense attorneys and judges and concluded that exclusion was effective in reducing the number of illegal searches.¹⁰⁰ Thus, the studies conducted right after *Mapp* suggested that the exclusionary rule was an effective deterrent of police misconduct.

Meanwhile, during the 1960s, the Court expanded the reach of the exclusionary rule. The Court held that the exclusionary rule applied to the fruits of an unreasonable search¹⁰¹ as well as to other forms of evidence such as fingerprinting.¹⁰² The early 1970s brought the next round of studies to test the deterrent effect of the exclusionary rule, as it had been expanded in the previous decade. In 1970, Oaks studied the arrest and conviction numbers in Cincinnati before and after *Mapp*.¹⁰³ His hypothesis was that if the exclusionary rule

96. *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961). Prior to *Mapp*, the exclusionary rule was only applicable to federal law enforcement.

97. *Id.* at 659.

98. Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1373 (2008).

99. *Id.*

100. *Id.*

101. *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963).

102. *Davis v. Mississippi*, 394 U.S. 721, 724 (1969).

103. Christopher Totten & Sutham Cobkit, *The Knock-And-Announce Rule and Police Searches After Hudson v. Michigan: Can Alternative Deterrents Effectively Replace Exclusion for Rule Violations?*, 15 NEW CRIM. L. R. 414, 428–29 (2012).

was effective in deterring misconduct then arrest and conviction numbers would have decreased because the rule would have deterred officers from conducting illegal searches.¹⁰⁴ Oaks concluded that the rule was ineffective because arrest and conviction numbers did not decrease.¹⁰⁵ However, in 1973, Canon tested Oaks findings in fourteen U.S. cities and found that the number of arrests decreased substantially after *Mapp*.¹⁰⁶ Canon also surveyed prosecutors and police administrators and they reported a substantial rise in the amount of search warrant applications as well as changes in police procedures that limited the application of searches incident to arrest.¹⁰⁷ Canon's findings refuted Oaks' study and indicated that the decrease in arrests "could reflect the fact that the exclusionary rule had more of a deterrent effect [when tested on a larger scale]."¹⁰⁸

The correlation between the case law and the studies conducted during the Court's expansion of the exclusionary rule suggest that the rule was an effective deterrent of police misconduct when the Court was operating under a judicial integrity rationale. However, in 1974 the Court began shifting to a deterrence rationale.¹⁰⁹ The Court explained that the suppression of evidence is a significant impediment to the judicial process and therefore is best applied when it will function as a deterrent.¹¹⁰ The case law from the 1970s into the late 1990s shows that after the Court began relying on a deterrence rationale, the Court also limited application of the exclusionary rule by crafting numerous exceptions. In the years following this shift, the Court held that the exclusionary rule didn't apply in tax proceedings,¹¹¹ federal habeas proceedings,¹¹² deportation proceedings,¹¹³ and parole revocations hearings.¹¹⁴ The Court also carved out good faith/reasonable re-

104. *Id.* at 429.

105. *Id.*

106. *Id.* at 430–31.

107. *Id.* at 431.

108. *Id.* at 430. Canon explained "the evidence . . . does not support a conclusion that the exclusionary rule had no impact on [search and seizure arrests] following its imposition." *Id.* at 430, n.68. *But see id.* at 430–31 (acknowledging that it was unclear exactly what role "the adoption of the exclusionary rule played in these findings.").

109. *United States v. Calandra*, 414 U.S. 338, 347 (1974) (explaining that "the rule's prime purpose is to deter future unlawful police [mis]conduct.").

110. *See id.* at 348–49 ("the application of the rule has been restricted to areas where its remedial objectives are though most efficaciously served . . . [i]t is evident that this extension of the exclusionary rule would seriously impede the grand jury.").

111. *United States v. Janis*, 428 U.S. 433, 454 (1976).

112. *Stone v. Powell*, 428 U.S. 465, 493–94 (1976).

113. *Immigr. & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

114. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 369 (1998).



liance exceptions, holding that the exclusionary rule does not apply when the officer relied in good faith: on a statute or precedent subsequently overturned,¹¹⁵ on a subsequently invalidated search warrant,¹¹⁶ or incorrect data due to a clerical error.¹¹⁷

Studies conducted after this shift from judicial integrity to deterrence reveal the effect of the Court's exceptions to the exclusionary rule.¹¹⁸ In 1980, Loewenthal published his study that asked officers whether they thought a case, where the court condemned the officer's conduct but didn't apply the exclusionary rule, imposed a legal obligation.¹¹⁹ The officers responded that, in their opinion, the case imposed no legal obligation.¹²⁰ This study illustrates that once the Court stopped applying the exclusionary rule consistently, it failed to deter because officers didn't think it imposed any obligation. In 1986, Akers and Kaduce reported that nineteen percent of officers confessed to carrying out searches of "questionable constitutionality" once a month.¹²¹ In 1991, Heffernan and Lovely tested officers on the lawfulness of six different search and seizure scenarios¹²² and only fifty-seven percent of the officers correctly assessed the lawfulness of the scenario.¹²³ Heffernan and Lovely's study reveals that forty-three percent, almost half of the officers tested, did not know what the law required of them when effectuating a search or seizure. In 1998, Perin concluded that the exclusionary rule fails to deter police misconduct.¹²⁴ The Akers and Heffernan studies suggest that, after the exclusionary rule was applied under a deterrence rationale and exceptions were created, officers were confused about what was constitutionally required of them, which inhibited the rule's ability to deter misconduct.

115. *United States v. Peltier*, 422 U.S. 531, 542 (1975).

116. *United States v. Leon*, 468 U.S. 897, 922 (1984).

117. *Arizona v. Evans*, 514 U.S. 1, 15-16 (1995).

118. *But see* Totten & Cobkit, *supra* note 103, at 431-32. In 1987, Orfield concluded that the rule had substantial deterrent effect. In 1992, Orfield again concluded that the exclusionary rule was a successful deterrent. *Id.* at 432.

119. Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 *UMKC L. REV.* 24, 29 (1980).

120. *Id.*

121. Totten & Cobkit, *supra* note 103, at 433.

122. The "[o]fficers were not told that the scenarios were based on Supreme Court opinions." William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 *U. MICH. J.L. REFORM* 311, 327 (1991).

123. *Id.* at 332-33.

124. Totten & Cobkit, *supra* note 103, at 433-34.

The new millennium brought some of the more drastic exceptions to the exclusionary rule. In *Hudson v. Michigan*, the Court held that the exclusionary rule does not apply to evidence obtained as a result of a knock and announce violation.¹²⁵ In *Herring v. United States*, the Court held that the exclusionary rule does not apply when the officer reasonably relied on a clerical mistake by another law enforcement official.¹²⁶ In 2012, police chiefs in 250 major U.S. cities were surveyed about the *Hudson* knock and announce exception.¹²⁷ The majority of respondents said that internal discipline is significant in deterring Fourth Amendment violations, yet the majority also reported that their departments lacked internal discipline on Fourth Amendment violations.¹²⁸ This study illustrates the disconnect between the case law and police practices in deterring police misconduct.

A quick review of these studies indicates that the exclusionary rule was most effective as a deterrent when the Court was operating under a judicial integrity rationale.¹²⁹ The majority of the studies conducted in the 1960s and early 1970s indicate that the exclusionary rule was an effective deterrent.¹³⁰ The one study that came to an opposite conclusion was quickly refuted after it was tested on a larger scale.¹³¹ Therefore, the consensus was the exclusionary rule deterred police misconduct.

However, once the Court began shifting to a deterrence rationale in 1974, the Court also began creating exceptions that limited application of the exclusionary rule.¹³² The studies conducted after the Court

125. *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). The knock-and-announce rule requires officers to notify the occupants of a dwelling of their presence and their authority to enter before entering the dwelling. Totten & Cobkit, *supra* note 103, at 419.

126. *Herring v. United States*, 555 U.S. 135, 137 (2009).

127. Totten & Cobkit, *supra* note 103, at 417, 436.

128. *Id.* at 419.

129. Although the studies show more correlation than causation, they do indicate that the exclusionary rule was a more effective deterrent while it was operating under a judicial integrity rationale.

130. Alschuler, *supra* note 98 (explaining that Nagel's study in 1963 and Katz's study in 1966 concluded that the exclusionary rule was an effective deterrent); Totten & Cobkit, *supra* note 103, at 430–31 (explaining that the arrest decrease in Canon's study could have been the result of the exclusionary rule's deterrent effect but unable to conclusively determine exactly what role the exclusionary rule played in the findings).

131. Totten & Cobkit, *supra* note 103, at 430 (explaining that Canon's study tested Oaks' 1970 findings on a larger scale and came to the opposite conclusion of Oaks' study).

132. *United States v. Janis*, 428 U.S. 433, 454 (1976) (holding that the exclusionary rule does not apply to federal tax proceedings); *Stone v. Powell*, 428 U.S. 465, 494 (1976) (holding that the exclusionary rule does not apply to federal habeas proceedings); *Immigr. & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984) (holding that the exclusionary rule does not apply to deportation proceedings).



began operating under a deterrence rationale provide somewhat of a mixed bag of results. Some studies concluded that the rule was effective as a deterrent,¹³³ while the majority of the studies conducted during this time concluded that it was not.¹³⁴ These inconclusive results can be seen as a consequence of the Court's confusing exclusionary rule jurisprudence. However, the trend seems to indicate that the exclusionary rule was a better deterrent of police misconduct when the Court was operating under a judicial integrity rationale rather than a deterrence rationale.

There is a distinct correlation between the case law creating exceptions and the transition from the judicial integrity rationale to the deterrence rationale. In 1974 when the Court declared that "the rule's prime purpose is to deter" the Court created an exception for grand jury proceedings;¹³⁵ since that time the Court has continued heavy reliance on the deterrence rationale¹³⁶ and continued creating exceptions.¹³⁷ The reason for the correlation between the exceptions and the shift in rationales is that under the judicial integrity rationale courts cannot admit illegally obtained evidence because doing so would amount to the courts condoning illegal conduct.¹³⁸ It does not matter if the officer's conduct was a good faith mistake or if the evidence was obtained a reasonable amount of time after the misconduct, if the evidence was obtained unlawfully, then it must be excluded under the judicial integrity rationale.¹³⁹ Whereas under the deterrence rationale, there is room to make allowances for certain types of behavior if the Court believes that condemning such behavior would

133. Totten & Cobkit, *supra* note 103, at 431–33 (explaining that Orfield's 1987 and 1992 studies both concluded that the exclusionary rule was an effective deterrent).

134. *Id.* at 433–35 (explaining that Heffernan & Lovely's study concluded that one third of officers commit unintentional mistakes, Akers & Kaduce's study revealed that nineteen percent of officers committed searches of questionable constitutionality, and Perrin's study concluded that the exclusionary rule was an ineffective deterrent).

135. *United States v. Calandra*, 414 U.S. 338, 347, 351 (1974).

136. *Janis*, 428 U.S. at 446 ("[T]he 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.'"); *Powell*, 428 U.S. at 486 ("The primary justification for the exclusionary rule then is the deterrence of police [mis]conduct.").

137. *Janis*, 428 U.S. at 454 (creating an exception for federal tax proceedings); *Powell*, 428 U.S. at 494 (creating an exception for federal habeas proceedings).

138. See Kenworthy Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMPIRICAL LEGAL STUD. 149, 150 (2012) (explaining that under a judicial integrity rationale, "introducing [unlawfully obtained] evidence would 'dirty the hands' of the court that used it.").

139. *Id.* at 150 ("[t]he integrity principle requires exclusion whether or not doing so would deter future such searches.").



not serve a deterrent purpose.¹⁴⁰ Thus, it appears that under the deterrence rationale, application of the exclusionary rule depends more on how the wrongful act is framed than the fact that the act is wrongful.

In other words, if the judicial integrity rationale requires that unlawfully obtained evidence be excluded regardless of the circumstance, then such a rationale cannot support a narrative that excuses certain behavior. The rationale that the Court applies and the narrative that it uses are two sides of the same coin. This point can be illustrated by comparing the language and narratives employed when the Court applied a judicial integrity rationale versus a deterrence rationale. For example in *Mapp*, the Court unabashedly condemns the officers' unlawful entry of the defendant's home, explaining that they knew they could not enter the home without a search warrant, yet they "continu[ed] in their defiance of the law."¹⁴¹ The Court stresses that suppression is necessary due to the "imperative of judicial integrity."¹⁴² Responding to critics of the exclusionary rule, the Court explains if a criminal goes free due to suppression, "it is the law that sets him free[] [and] [n]othing can destroy a government more quickly than its failure to observe its own laws."¹⁴³ The narrative portrayed in *Mapp* indicates that the Court is not reluctant to apply the exclusionary rule, but sees it as a necessary precaution to ensure the integrity of the courts and the rule of law. In comparison, the Court in *Strieff* does not condemn the officer's unlawful conduct but refers to it as "good-faith mistakes."¹⁴⁴ Quite the opposite from *Mapp*, the Court is very reluctant to apply the exclusionary rule, describing suppression as a "last resort" and explaining that "several exceptions" have been created to avoid this result.¹⁴⁵ The narrative used in *Strieff* reveals that, under a deterrence rationale, exclusion will only be tolerated if it will prevent future misconduct, which leads the Court to create exceptions and justify misconduct in order to suppress in as few cases as possible. The irony of using the exclusionary rule in this manner, as the next section explains, is that by creating so many exceptions the

140. *United States v. Leon*, 468 U.S. 897, 908 (1984) ("[T]he application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."); *Calandra*, 414 U.S. at 351 (declining to exclude because "it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further [the deterrent objective].").

141. *Mapp v. Ohio*, 367 U.S. 643, 644 (1961).

142. *Id.* at 659.

143. *Id.*

144. *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016).

145. *Id.* at 2061.



Court inhibits the exclusionary rule's ability to promote institutional change.

III. HOW THE EXCEPTIONS UNDERCUT THE DETERRENT EFFECT

In *Strieff*, the majority held that excluding the unlawfully obtained evidence would not deter future misconduct because the officer's conduct was merely a mistake and was not part of any systemic conduct.¹⁴⁶ As established earlier, Officer Fackrell's conduct was both purposeful and part of a pattern of unconstitutional policing that took place not only in Salt Lake City, but in numerous other cities throughout the country.¹⁴⁷ This Part aims to prove why suppressing the evidence would in fact have a deterrent effect and why the Court's current application of the exclusionary rule, which depends on numerous exceptions to justify misconduct, actually makes the rule ineffective.

The exclusionary rule is an ineffective deterrent because the exceptions, which were created once the Court switched to a deterrence rationale, dilute the penalty for misconduct, which prevents the rule from operating as a punishment.¹⁴⁸ As the case law demonstrates, as soon as the Court began shifting to a deterrence rationale more and more exceptions were created.¹⁴⁹ In fact, the case that began the shift created an exception. In *U.S. v. Calandra*, where the Court announced that the deterrence rationale would be the primary focus, the Court held that the exclusionary rule did not apply in grand jury proceedings.¹⁵⁰ The numerous exceptions to the exclusionary rule undercut its ability to deter because they cause the rule to be applied inconsistently and express the message that misconduct is permitted.¹⁵¹

146. *Id.* at 2063.

147. *See supra* text accompanying notes 45–47.

148. Sharon L. Davies, *The Penalty of Exclusion - A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1281 (2000) (explaining that when a sanction is set too low it does not deliver the message that the conduct is wrongful).

149. The Court began the shift in 1974 (*United States v. Calandra*) and by 1976 three more exceptions had been created (*United States v. Janis*, *Stone v. Powell*, *United States v. Peltier*).

150. *United States v. Calandra*, 414 U.S. 338, 354 (1974).

151. Kit Kinports, *Culpability, Deterrence and the Exclusionary Rule*, 21 WM. & MARY BILL OF RTS. J. 821, 846 (2013) (explaining that creating exceptions for negligent violations hinders the exclusionary rule's ability to effectively deter misconduct at an institutional level).

A good example of this is Professor Loewenthal's study of police officers¹⁵² after the now overturned *Wolf* decision, which held that Fourth Amendment violations by state police officers were not subject to exclusion.¹⁵³ Although the decision clearly held that Fourth Amendment rights were enforceable against the states,¹⁵⁴ most officers stated that they didn't think the decision imposed any legal obligation on them because the evidence would still be admitted.¹⁵⁵ Thus, Loewenthal concluded that "to police, the [application] of the exclusionary rule is a prerequisite for the imposition of a legal obligation."¹⁵⁶ This study acutely demonstrates the issue with crafting numerous exceptions to prevent application of the exclusionary rule, yet expecting it to deter misconduct. Suppression (the penalty which is supposed to deter misconduct) is such a low possibility due to the breadth of exceptions, which poke so many holes in the exclusionary rule that there seems to be more ways illegally obtained evidence will be included rather than excluded.¹⁵⁷ Thus the victim perspective under a judicial integrity rationale is a more effective deterrent because it does not require the existence of numerous exceptions.

The theory of deterrence states that in order to effectively deter misconduct punishment must be certain.¹⁵⁸ According to Cesar Beccaria, who is considered the original deterrence theorist, "[c]ertain punishment is a much more effective deterrent than severe punishment."¹⁵⁹ Punishment that is consistent successfully deters misconduct because it makes a stronger impression.¹⁶⁰ According to Bentham, another preeminent scholar on deterrence theory, human behavior is motivated by the attainment of pleasure and the avoidance of pain.¹⁶¹ Individuals behave in such a way as to maximize their pleasure, while incurring the least amount of pain;¹⁶² which basically

152. Loewenthal, *supra* note 119, at 29.

153. *Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

154. *Id.* at 27.

155. Loewenthal, *supra* note 119, at 29.

156. *Id.*

157. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469 n.39 (1996) (describing the Court's numerous exceptions to the exclusionary rule as "inclusionary rules"); Chris Slogobin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 375-76 (1999) (describing the exclusionary rule as "today's swiss cheese exclusionary rule" due to its numerous exceptions).

158. Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765, 769 (2010).

159. *Id.*

160. *Id.*

161. *Id.* at 770.

162. *Id.*

means that individuals are motivated by the consequences of their actions. This means that when an individual wants to engage in prohibited conduct, if the chance of punishment is not certain, the individual will do the prohibited act. In this example, engaging in the prohibited act maximizes pleasure while incurring the least amount of pain because due to the uncertainty of the punishment, the possible consequence does not outweigh the prohibited act.

As the studies indicate, once the Court started creating exceptions to the exclusionary rule, sometimes the rule was found to be an effective deterrent and other times it was not.¹⁶³ The exceptions caused the exclusionary rule to be inconsistent in its ability to deter misconduct; whereas before deterrence was the main rationale, studies consistently showed that the rule was an effective deterrent.¹⁶⁴ This inconsistency is the result of the switch in the Court's narrative. When the Court switched to a narrative that justified misconduct – rather than condemning it – it needed a means for the justification; so the Court transitioned from a judicial integrity rationale to deterrence because judicial integrity would not support exceptions that justified misconduct. Once the Court began applying various exceptions to the exclusionary rule, punishment became uncertain. For example, even though the conduct violated the Fourth Amendment, courts could still admit the evidence resulting from the unlawful conduct depending on whether an exception applies.¹⁶⁵ The issue of inconsistency becomes particularly acute when considering that different courts have different interpretations about how to apply an exception or whether an exception even applies. For example, in *Strieff*, the trial court, the state supreme court, and the United States Supreme Court interpreted the attenuation exception to the exclusionary rule, yet they came to drastically different conclusions; and the inconsistency becomes heightened when considering how differently the dissents applied the exception.¹⁶⁶ The trial court held that the valid arrest

163. See *supra* notes 132–34.

164. See *supra* notes 129–30.

165. *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016) (holding that the stop was unlawful but admitting the evidence under the attenuation exception).

166. The three factors to determine whether the attenuation exception applies are: (1) the amount of time elapsed (the temporal proximity) between the illegal action and seizure of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the misconduct. *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975). The Supreme Court and the state supreme court disagreed over whether the attenuation exception applied and what type of conduct is sufficient to break the causal link between the unlawful conduct and discovery of the evidence. *Strieff*, 136 S. Ct. at 2061.

warrant was an “extraordinary intervening circumstance” that attenuated the connection between the unlawful stop and discovery of the contraband.¹⁶⁷ The state supreme court disagreed holding that the arrest warrant was not an intervening circumstance because only a voluntary act of a defendant’s free will can attenuate the connection between an unlawful stop and the discovery of contraband.¹⁶⁸ The United States Supreme Court explained that the state supreme court erred in its understanding of what constituted an intervening circumstance and held that the arrest warrant qualified as an intervening circumstance.¹⁶⁹ The *Strieff* decision is an example of the inherent inconsistencies in applying exceptions to the exclusionary rule: two courts with the same facts and the same guidelines for applying the exception will apply it in different ways depending on who is interpreting the facts – and more importantly what perspective they are operating under.

Applying the concept of consistency to the exclusionary rule, the rule does not provide certainty because the exceptions poke holes into what the rule requires. Because the requirements are unknown, application of the rule is uncertain or can vary depending on the slightest detail. Thus, if officers are motivated by consequences, consistent with Bentham’s utility hypothesis,¹⁷⁰ then they are unlikely to be deterred from conducting an illegal search because the possibility of consequence is too uncertain to influence behavior. However, under a judicial integrity rationale, this inconsistency is absent because there are not as many exceptions. Courts exclude illegally obtained evidence under a judicial integrity rationale because courts cannot con-

Furthermore, Justice Kagan, in her dissent, disagrees with the majority over the application of the second and third factors. For the second factor, Justice Kagan explains that the warrant did not break the causal chain between the illegal stop and discovery of the drugs because for an event to be intervening it has to be unforeseeable. *Strieff*, 136 S. Ct. at 2073 (Kagan, J., dissenting). However, discovery of the warrant in this case was eminently foreseeable because checking for warrants after detaining an individual is a common practice of the Salt Lake City Police Department and there are a “staggering” number of outstanding warrants in the city. *Id.* at 2073. For the third factor, Justice Kagan explains that the misconduct was flagrant because the decision to stop Strieff was a “calculated decision,” Officer Fackrell acknowledged at the suppression hearing that he purposefully stopped Strieff for investigatory purposes despite having no legally sufficient basis for that action. *Id.* at 2072. Justice Kagan’s application of the factors further illustrates the inherent inconsistencies with exceptions; the exception may or may not apply depending on who is interpreting the facts.

167. *Id.* at 2056.

168. *Id.*

169. *Id.* at 2061.

170. Paternoster, *supra* note 158, at 770.



done constitutional violations.¹⁷¹ Therefore, the particular circumstances of the case tend to be irrelevant because admissibility is not contingent on whether an exception applies. If the evidence was illegally obtained, admitting it will taint the courts, therefore it must be excluded.¹⁷² Punishment is certain, therefore it is a more effective deterrent because officers know what the consequence will be before engaging in the prohibited act.

Additionally, once the Court shifts to deterrence, they begin to look at individual officer culpability. The majority perspective is that the exclusionary rule exists to deter, therefore, suppression is only appropriate when the misconduct is in most need of deterrence, meaning when it is purposeful or flagrant.¹⁷³ Basically, the rationale is that it is counterproductive to punish an officer if the violation occurred through no fault of his own because he can't be deterred from committing a mistake.¹⁷⁴ However, focusing on culpability only exacerbates the exclusionary rule's issue with uncertainty because culpability is a subjective inquiry. To determine whether a particular officer's conduct was flagrant, courts will often examine culpability, which can lead into an inquiry into that officer's experience, motives, and mental state.¹⁷⁵ These factors are going to be different for each officer and if application of the exclusionary rule depends on the outcome of that analysis, then it will always be inconsistent. The inconsistency and uncertainty of focusing on culpability inhibits the exclusionary rule's ability to deter. This is because decreasing the probability of the sanction lowers the cost of committing the violation, which increases the likelihood that officers will commit violations.¹⁷⁶ Thus an exception for "good faith mistakes" makes them costless and "removes any reason for taking steps to avoid them."¹⁷⁷

A majority of the exceptions to the exclusionary rule deal with good faith or culpability in some sense. The Court has held that the exclusionary rule does not apply when the officer relies in good faith

171. The basis of the judicial integrity rationale is that if courts were to allow illegally obtained evidence, it would make them complicit in the wrongdoing. *See Bilz, supra* note 138.

172. *Id.*

173. *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016).

174. *Id.*

175. *Kinports, supra* note 151, at 841 (explaining that the Court in *Leon* claimed to be using an objective standard but actually began a subjective inquiry that turned on the particular officer's state of mind).

176. *Id.* at 845.

177. *Id.*



on a subsequently invalidated statute, precedent,¹⁷⁸ or search warrant.¹⁷⁹ The Court has also created exceptions for situations where an officer relies in good faith on incorrect computer data resulting from the court's clerical error¹⁸⁰ as well as a law enforcement error.¹⁸¹ In the Court's most recent good faith cases, *Herring* and *Davis*, critics caution of the danger of the Court's reliance on culpability in determining whether to apply the exclusionary rule. In his critique of *Herring*, Tracey Maclin argues that *Herring* limited application of the exclusionary rule to situations where the Fourth Amendment violation is particularly egregious.¹⁸² In his *Davis* dissent, Justice Breyer explains that the Court has placed determinative weight on the culpability of the individual officer.¹⁸³

Focusing on the flagrancy of individual officer conduct is actually counterproductive to the goal of deterring officer misconduct because it hinders the exclusionary rule's ability to effect institutional change.¹⁸⁴ Organizational theory, which is a deterrence model, posits that the culture and structure of an institution frames the way that the agents of that institution behave.¹⁸⁵ Under organizational theory, the conduct of individuals cannot be changed if the culture of the institution is not changed first. Therefore the exclusionary rule will be an ineffective deterrent of officer misconduct unless the rule is also aimed at fixing systemic problems in police culture.¹⁸⁶ However, if no consequence follows from negligent violations of individuals then police departments have no incentive to adjust institutional culture to prevent these violations.¹⁸⁷ Exclusion is more likely to lead to positive social change when it achieves its goals "primarily through long-term guidance and habit formation rather than push-pull deterrence."¹⁸⁸ Therefore a rule that focuses on the individual officer and ignores the opportunity to rectify systemic misconduct is dangerous because it al-

178. *United States v. Peltier*, 422 U.S. 531, 542 (1975).

179. *United States v. Leon*, 468 U.S. 897, 922 (1984).

180. *Arizona v. Evans*, 514 U.S. 1, 15–16 (1995).

181. *Herring v. United States*, 555 U.S. 135, 137 (2009).

182. Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take out the Fourth Amendment Exclusionary Rule*, 81 *Miss. L.J.* 1183, 1190 (2012).

183. *Id.* at 1189.

184. Kinports, *supra* note 151.

185. *Id.* at 833.

186. *Id.* at 834.

187. *Id.* at 846 (explaining that if no consequence follows from negligent violations then police departments have no incentive to adjust institutional culture to prevent these violations).

188. Alschuler, *supra* note 98, at 1372.

lows courts room to craft a narrative that will make the misconduct fit within an exception.

IV. CHANGING THE NARRATIVE

In order to make the exclusionary rule more effective, the Court should turn back to using the judicial integrity rationale. And because the narrative that the Court adopts informs the version of the rule that is applied, the Court must also adopt a narrative that acknowledges systemic police abuse when it comes to Fourth Amendment interactions. This is where Justice Sotomayor's dissent is instructive. Similar to Justice Sotomayor's dissent, the Court should adopt a victim perspective when deciding Fourth Amendment cases. The victim perspective is explicitly race conscious, meaning that it focuses on the "coercive and disciplinary ways in which race structures the interaction between officers and nonwhite persons."¹⁸⁹ By adopting a race conscious perspective, the Court can recognize that often times officers who are aren't explicitly racist are working under a system that provides them with, or enforces, racist policing tactics and policies, like the NYPD stop and frisk policy or the "ped check" system in Ferguson. This would result in decisions that do not legitimize harmful police practices, unlike the Court's *Strieff* decision. An example of a court adopting a victim perspective can be found in a recent Massachusetts Supreme Court ruling.¹⁹⁰ In *Commonwealth v. Warren*, the court held that, due to the Boston Police Department's record of bias against black men, flight is insufficient to constitute reasonable suspicion that would justify a Terry stop.¹⁹¹ The court reasoned that, although flight can be a factor in the reasonable suspicion analysis, in situations where black males are disproportionately and repeatedly targeted for Terry stops, flight is not probative of guilt.¹⁹² This is the perfect example of a court adopting a race conscious perspective. Instead of ignoring the role that race plays in Fourth Amendment interactions, the Massachusetts explicitly recognized these racial considerations, relying on Boston police data and a 2014 report by the

189. Devon W. Carbado, *Erasing the Fourth Amendment*, 100 MICH. L. REV. 946, 970 (2002).

190. *Commonwealth v. Warren*, 475 Mass. 530 (2016).

191. Hillary Hanson, *Massachusetts Court Rules Black Men May Have Good Reason to Flee Police*, HUFFPOST (Sept. 21, 2016, 3:19 PM), http://www.huffingtonpost.com/entry/massachusetts-court-black-men-flee-police_us_57e2bb50e4b08d73b82ee7b1; *Warren*, 475 Mass. at 538.

192. Zeninor Enwemeka, *Mass. High Court Says Black Men May Have Legitimate Reason to Flee Police*, WBUR NEWS (Sept. 20, 2016), <http://www.wbur.org/news/2016/09/20/mass-high-court-black-men-may-have-legitimate-reason-to-flee-police>; *Warren*, 475 Mass. at 539–40.



Massachusetts ACLU.¹⁹³ Not only did the court acknowledge racial realities, but they took the necessary further step of incorporating this information into their opinion and making a decision that reflected these realities. *Commonwealth v. Warren* serves as a model for how courts adopting a race-conscious perspective can positively influence Fourth Amendment jurisprudence.

Once the Court adopts a race-conscious perspective, then the next step of using the judicial integrity rationale will come naturally because under the judicial integrity rationale the court cannot be complicit in legitimizing official misconduct. However, in order to prevent application of the exclusionary rule from becoming a form of strict liability, the Court should embrace a hybrid approach that uses the judicial integrity rationale while retaining deterrent principles. In other words, when deciding whether exclusion is necessary the Court should ask whether admitting the evidence would amount to the Court condoning the misconduct that obtained the evidence. Then the Court should ask, whether application would deter future misconduct. However, in asking this question, the Court should acknowledge the distinction between specific and general deterrence.¹⁹⁴ For example, punishing an insane offender may not deter that specific offender or other insane offenders.¹⁹⁵ However, punishing all offenders, including the insane when it is warranted, will deter offenders who would be inclined to violate the law were it not for the “consistent threat of punishment backed by general enforcement of the law.”¹⁹⁶ Basically in evaluating the deterrent effect of applying the exclusionary rule, the Court should focus not on the exclusionary rule’s effect on the individual officer (or the individual officer’s specific conduct), but on its ability for institutional change.

Furthermore, in order for the exclusionary rule to effectively make institutional change, not only does it require consistent application but it must also exact some sort of personal cost on officers who repeatedly violate the Fourth Amendment. The personal cost cannot be punitive just for punitive sake, but it must focus on behavioral change.¹⁹⁷ Some options for disciplinary actions, include having sanc-

193. Enwemeka, *supra* note 192; *Warren*, 475 Mass. at 539–40.

194. David Gray, *A Spectacular Non Sequitur: The Supreme Court’s Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 6 (2013).

195. *Id.*

196. *Id.*

197. DARREL W. STEPHENS, POLICE DISCIPLINE: A CASE FOR CHANGE, NAT’L INST. OF JUST. 6 (2011), <https://www.ncjrs.gov/pdffiles1/nij/234052.pdf>.



tions written into employment contracts. For example, the sanction for various types of misconduct, particularly repeat offenses would be decreased pay. The reasoning behind this type of sanction is that if officers know at the outset that violating Fourth Amendment procedures can negatively affect their pay they may be more careful during their Fourth Amendment encounters. Departments should have a disciplinary matrix that describes the range of penalties for various offenses.¹⁹⁸ This matrix should be available for public access and when an officer is not disciplined according to the matrix, then an independent civilian review board should review the decision. Additionally, regular trainings must be included at every step of the officer's career to ensure that officers understand what is required of them and have the necessary skills to effectively do their jobs.¹⁹⁹ Another option that incorporates training into disciplinary action is the education based discipline (EBD) model, which requires that the offending officer take part in various training to address the misconduct at issue.²⁰⁰ The purpose of EBD is to create a remedial plan designed to correct the misconduct and ensure that it does not happen again.²⁰¹ A combination of these disciplinary models would accomplish both goals of: (1) creating a sanction that exacts a personal cost on offending officers and (2) ensuring that the focus is on behavioral change.

CONCLUSION

The Fourth Amendment impacts our daily lives in a way that few other amendments do because it governs our everyday officer-civilian interactions. Because the Fourth Amendment plays such a critical role in our everyday lives, it is crucial that Fourth Amendment jurisprudence reflect the realities of our society. By changing from a perpetrator perspective to a race conscious perspective, the Court can make decisions that acknowledge racial realities and don't legitimize harmful police practices. Adopting this perspective is key to increasing the effectiveness of the exclusionary rule. As the studies indicated, the exclusionary rule loses its deterrent effect as more exceptions are created because the punishment for misconduct is applied inconsistently if at all. The exceptions are created as a result of

198. SHIELDED FROM JUST.: POLICE BRUTALITY AND ACCOUNTABILITY IN THE U.S.: SUMMARY AND RECOMMENDATIONS: INVESTIGATION AND DISCIPLINE (1998), HUMAN RTS. WATCH, <https://www.hrw.org/legacy/reports98/police/uspo12.htm>.

199. STEPHENS, *supra* note 197, at 3.

200. *Id.* at 12.

201. *Id.*



operating under the perpetrator perspective because the only way to justify conduct that is admittedly unlawful is to find a way to excuse it. Because the exceptions can only survive under the deterrence rationale, the transition must be two-fold: both a switch to a race-conscious perspective and the judicial integrity rationale are required. When the Court solely uses the deterrence rationale, the narrative becomes one of excusing the officer's conduct unless it is particularly egregious, which results in less application of the exclusionary rule and ultimately its ineffectiveness. Therefore, if the Court turns back to the original rationale of judicial integrity and the goal of ensuring that the courts do not become involved in perpetrating injustice, it will be able to engage in a more honest analysis that acknowledges certain inequalities, i.e. the victim perspective.





NOTE

Trigger Fingers Turn to Twitter Fingers: The Evolution of the *Tinker* Standard and its Impact on Cyberbullying Amongst Adolescents

KRISTOPHER L. JILES*

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INTRODUCTION

Consider the following scenarios: in the first, there is a dispute between two students in a public school – let’s call them Charlie and Michael. This is not the first altercation between the students; Michael teases and ridicules Charlie on a daily basis. In this scenario, Charlie decided to retaliate against Michael’s incessant ridicule by pushing Michael away from him. A fight, once verbal, becomes physical. Within seconds, school administration officials arrive to stop the disruption, separating the two boys. Following the incident, as one would expect, school authorities discipline the students; both are suspended. This first scenario represents the school’s discretionary authority to deal with altercations that disrupt the normal course of school activities and substantially impact the normal school day.

Next, consider the same scenario, except prior to the altercation there was communication between Charlie and Michael on the social media website, Facebook. Michael sent various public messages to Charlie threatening that when he saw him in school, the two would engage in a fight. Charlie saw, but did not respond to the messages sent by Michael. Charlie was aware that there would likely be a dispute between the two when he arrived at school. When Charlie arrives to school, a fight ensues, and both students are suspended. Both scenarios depict situations where the direct dispute between the students occurs while the students are on-campus, irrespective of whether the issue had its origin on-campus or off-campus. This scenario, like the first, represents a public school’s ability to regulate on-campus conduct, despite the fact that it began off-campus; the substantial disruption to the school environment is present in this scenario, like in the first scenario.

In one final scenario, Michael sends a public message via Facebook threatening bodily harm to Charlie when they see one another. Michael is teasing and harassing Charlie over Facebook, just as he would in-person. Michael responds to Charlie’s comments with further threats to engage in a physical altercation with him. A third-party student views these public posts on Facebook, submits the messages to a school administrator, who then suspends the students for their actions. Since this matter is squarely off-campus, across cyberspace, does the school have the same discretion to deal with issues without there actually being an articulable effect on the school environment? What is the extent to which a school can punish stu-



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dents for behavior that occurs off-campus and over social media? At what point do concerns for public safety in public schools override the rights guaranteed by the First Amendment? Each of these considerations are to be addressed in this Note; discussing First Amendment student speech jurisprudence and the emergence of social media and technology in the digital age.

The right to free speech in the context of primary and secondary education in the United States has long been recognized by the Supreme Court.¹ Since *Tinker v. Des Moines Independent Community School District* in 1969, the first decision to uphold students' First Amendment protections in school, there have been various cases that challenge the law it established.²

In *Tinker*, the Court stated that “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 accompany an unpopular viewpoint.”³ Moreover, the Court held that a student retained their First Amendment rights so long as their speech does not “materially and substantially interfere” with the operation of the school.⁴ Courts continue to apply the *Tinker* standard to student speech issues.⁵ However, technological advancements and the rise of social media are of particular concern to the First Amendment protections with regard to student speech.⁶ With the rise of such advancements ushering in social media outlets such as Facebook, Twitter, Instagram and instant messaging, the question of whether constitutional protections can keep up with

1. See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (“[S]tudents do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”); see also Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 *DRAKE L. REV.* 527 (2000).

2. Lee C. Baxter, *The Unrealistic Geographical Limitations of the Supreme Court's School-Speech Precedents: Tinker in the Internet Age*, 75 *MONT. L. REV.* 103, 106–07 (2014); see, e.g., *Morse v. Frederick*, 551 U.S. 393 (2007) (holding that even in the absence of substantial and material disruption, schools may restrict student expression that they reasonably interpret as promoting illegal drug use); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that schools may also regulate school-sponsored speech that a reasonable observer would view as the schools own speech, on the basis of any legitimate pedagogical concern); *Sch. District. No. 403 v. Fraser*, 478 U.S. 675 (1986) (school officials may limit student speech which is “lewd, vulgar, indecent and plainly offensive”).

3. *Tinker*, 393 U.S. at 509.

4. *Id.*

5. Chemerinsky, *supra* note 1, at 228.

6. Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 *FLA. L. REV.* 1028 (2008); Emily E. Smith, *The Applicability of the Tinker Test to Off-Campus Cyber Speech: Policy Implications*, *COMMONWEALTH EDUC. POL'Y. INT.* 2 (2015).



developing means of communication becomes increasingly relevant.⁷ Students now have the ability to seemingly interrupt school activity across cyberspace at the touch of their fingertips.⁸ As a result of these technological advancements, the boundaries protecting student speech has become unclear because the internet is neither a tangible medium, like a banner or school newspaper, nor is it heard at a school assembly.

Courts are currently grappling with whether a school has the ability to regulate and punish students for their expression within the school walls.⁹ Many of the modern conflicts that the State wishes to regulate occur across social media platforms or outside boundaries of the schoolhouse gate in the form of cyberbullying.¹⁰ The birth of the digital age has made internet use a universal part of students' daily lives.¹¹ The court has recognized this phenomenon and there is a plethora of cases that deal with a school's ability to punish a student for their expression outside of the school setting.¹² While some circuits rely on *Tinker* to justify punishing students for off-campus conduct, others who have developed their own tests require certain jurisdictional standards to be met, in addition to *Tinker*, in order to assist the court in making a sound determination of whether the State has the ability to regulate such activities.¹³

Currently, various circuits are split as to the standard that should be applied to justify intrusion by the school administrators in purely off-campus speech.¹⁴ Explained in more detail in the passages to come, the Fourth Circuit has held that a "sufficient nexus test" must be completed, in which the Court must analyze whether a student's off-campus speech was tied closely enough to the school to permit

7. *Id.* at 1029.

8. *Id.*

9. Baxter, *supra* note 2, at 106-07.

10. Daniel Marcus-Toll, *Tinker Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 *FORDHAM L. REV.* 3395, 3399 (2014).

11. Baxter, *supra* note 2, at 104.

12. *See, e.g.*, *C.R. v. Eugene Sch. Dist.*, 835 F.3d 1142 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2117 (2017); *Wynar v. Douglas County Sch. Dist.*, 728 F.3d 1062 (9th Cir. 2013); *LaVine v. Blaine Sch. District.*, 257 F.3d 981 (9th Cir. 2001).

13. *See generally* *Doninger v. Niehof*, 527 F.3d 41, 48 (2d Cir. 2008) (holding that a school system was justified in barring a student's candidacy for class secretary because of remarks made at a school-sponsored event by considering whether it was reasonably foreseeable that the off-campus speech would end up on school grounds); *Wynar*, 738 F.3d at 1068.

14. *Wynar*, 738 F.3d at 1068.

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such regulation.¹⁵ Alternatively, the Eighth Circuit has held that courts implement a “reasonable foreseeability” test in order to determine whether it was reasonably foreseeable that off-campus speech would reach the school and cause a substantial disruption to the school environment.¹⁶ Most recently, the Ninth Circuit refused to join in the circuit split by applying both the sufficient nexus test and the reasonable foreseeability test when upholding a school’s punishment of a student for off-campus conduct.¹⁷ There has yet to be a decision outlining an appropriate standard, leading to some confusion.

In an era of unprecedented technological advancement, social networking, and round-the-clock news, the legal framework regarding off-campus speech is in desperate need of clarification and reformation. Many incidents concerning off-campus student speech arise from cyberbullying. “Cyberbullying” has been defined as “willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”¹⁸ Cyberbullying may consist of “covert, psychological bullying, conveyed through electronic medium, such as cell phones, web-logs, and websites, and online chat rooms.”¹⁹ Parents, educators, and lawmakers are concerned about the impact that cyberbullying has on the lives of our children. Cyberbullying has become growing issues for public schools.²⁰ As social networking sites continue to rise in popularity, the technology becomes more easily assessable to youth, allowing bullying to move to the internet and occur in a consistent manner that is readily available to anyone.²¹ Studies

15. See, e.g., *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011) (finding that where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators’ good faith efforts to address the problem).

16. See, e.g., *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754 (8th Cir. 2011) (holding that *Tinker* applies to off-campus student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting); see also *S.J.W. v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012) (holding that a student’s speech was appropriately regulated by a school district where posts made by a student “could reasonably be expected to reach the school or impact the environment”).

17. *C.R.*, 835 F.3d at 1155 (holding that a school district does not violate the First Amendment rights of a student when it punished him for bullying two younger, disabled students off campus with taunts including sexual overtones. Courts applied both the nexus and reasonable foreseeability test, concluding that both tests were met).

18. Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Bullying, Cyberbullying, and Sexual Orientation*, CYBERBULLYING RES. CTR., http://cyberbullying.org/cyberbullying_sexual_orientation_fact_sheet.pdf (last visited Mar. 3, 2018).

19. MERLE HOROWITZ & DOROTHY M. BOLLINGER, *CYBERBULLYING IN SOCIAL MEDIA WITHIN EDUCATIONAL INSTITUTIONS: FEATURING STUDENT, EMPLOYEE, AND PARENT INFORMATION* 24 (2014).

20. Baxter, *supra* note 2, at 104.

21. Kupczynski et. al., *The Prevalence of Cyberbullying Among Ethnic Groups of High School Students*, INTL. J. EDUC. RES. 49 (2013).



have shown that the emotional distress of cyberbullying can lead to negative impacts and increases in depression, embarrassment, and fear, amongst youth.²²

While cyberbullying and traditional bullying are generally similar, there are distinct differences between the two. Online bullying is very similar to bullying in a personal context because both of the behaviors include the harassment, humiliation, teasing and aggression that comes from the experience.²³ Moreover, cyberbullying shares common characteristics with traditional bullying: “it is aggressive, it involves an imbalance between the players, and the bullying is repeated over a period of time.”²⁴ However, while traditional bullying usually involves a physically stronger bully and a weaker victim, cyberbullying does not necessarily have this dynamic because, an otherwise powerless child, can subject an older or physically stronger child to fear or abuse that they would be unable to assert in person.²⁵

The concept of cyberbullying is very vast: while it can be clear-cut, such as sending cruel phone messages or posting on web sites, other acts are less obvious such as impersonating a victim or posting personal information or videos designed to hurt or embarrass another child.²⁶ Because a cyberbully is often cloaked by anonymity, they have the ability to say more harsh and destructive things than a traditional bully and further subject a victim to torment or fear.²⁷ Cyberbullies may take on the identities of others, so that the victim may not know that who the bully is or why they are being bullied.²⁸ Additionally, because of the pervasive nature of the internet, one act of cyberbullying has the ability to spread over and over again to thousands of people and cause more damage.²⁹ For example, degrading comments posted online are accessible to people across the globe, including relatives, friends, and future employers.³⁰

22. *Id.* at 50.

23. Elizabeth Landau, *When Bullying Goes High-Tech*, CNN HEALTH (Apr. 15, 2013), <http://www.cnn.com/2013/02/27/health/cyberbullying-online-bully-victims/>.

24. Kathy Zande, *When the School Bully Attacks in the Living Room: Using Tinker to Regulate Off-Campus Student Bullying*, 13 BARRY L. REV. 103, 109 (2009).

25. *Id.*

26. Michael Nuccitelli, *Cyberbullying and Academic Impact*, EDUCATION NEWS (Nov. 4, 2013), <http://www.educationviews.org/cyberbullying-academic-impact/>.

27. Zande, *supra* note 24, at 109.

28. Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 651 (2011).

29. Zande, *supra* note 24, at 109.

30. *Id.*

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Moreover, there are instances in which cyberbullying transcends cyberspace, such as injecting violent behavior into the school environment.³¹ However, unlike victims of traditional bullying, cyberbullying victims not only have to worry about receive abuse in the classroom, but also via their smart phones, computers, and tablets.³² While some argue that a victim of cyberbullying could escape by turning off his cellphone or signing out of his social media account, technology has become so entangled in the lives of teenagers, as a means for accomplishing everyday tasks, logging off is not always a viable option.³³ In an effort to stop instances of violence on campus, it is important that a school district has the ability to monitor and regulate cyberbullying in order to forecast and remedy situations. The standard decided by the Court will certainly have an impact on the State's ability to punish students for their acts on the internet. While there is vast support amongst commenters for giving the school discretion to deal with cyberbullying between students, some argue that there should be a more concrete standard for administrators to follow in order to ensure that they are not infringing on the First Amendment rights of students.³⁴ One of the primary concerns for public schools is that regulating cyberbullying policies will run afoul the First Amendment and interfere with the ability of students to exercise their free speech rights.³⁵ Without any further jurisprudence, administrators will be weary of intervening in online student disputes out of fear of a lawsuit.

Recognizing the need for judicial consistency in determining whether a student is able to exercise their constitutional rights outside of the school context, the Supreme Court will likely have to decide on the controversial circuit split. This Note argues that the Supreme Court should adopt the Eighth Circuit's sufficient nexus test because the standard requires the additional causal element between the conduct and the school, necessitating that there be a nexus the speech would reach the school and substantially interfere with the operation of the school. Moreover, this Note argues that the reasonable foreseeability test places a lighter burden on the state to prove that student speech should be placed under school regulation, which in effect allows for most student speech to be subject to *Tinker* — a result not

31. Landau, *supra* note 23.

32. Zande, *supra* note 24, at 110.

33. *Id.*

34. *Id.* at 130.

35. See Goodno, *supra* note 28, at 656–57.



intended from the seminal Supreme Court decision. I argue that the reasonable foreseeability test alone is not enough to protect the constitutional interest in student speech. Alternatively, the sufficient nexus test will allow schools to better tackle the issue of cyberbullying and out-of-school conduct by students while still protecting constitutional interests because of the recent findings that cyberbullying has resulted in substantial disruptions to school operations. In terms of the impact of this decision on the Court, it will be the first time in which the Supreme Court has recognized the pivotal role that *Tinker* continues to serve within the evolving educational scope.

Part I will provide a brief background of First Amendment protections for students by introducing *Tinker* and discussing limitations that *Tinker* has in the digital age of social media platforms such as Facebook and Twitter. Part II will address the current circuit split between the Fourth and Eighth circuits on the test that should be applied to determine if a school district has the ability to punish a student for their off-campus speech, while also discussing the benefits and drawbacks of each approach. Part III will demonstrate instances in which courts either refuse to adopt a standard that should apply or simply avoid the circuit split by applying both tests, thus highlighting the need for judicial consistency and focusing on the role of the Supreme Court in deciding which test should apply. In conclusion, this Note will delve into why the sufficient nexus test should be the test adopted by the Supreme Court when dealing with off-campus speech cases, and the long-term implications that such increased protection will have on students in public schools across the nation.

I. FREE SPEECH AND STUDENTS: THE HISTORY BEHIND CONSTITUTIONAL PROTECTION FOR STUDENT SPEECH

This Part discusses the free speech rights generally, while focusing on the rights, both granted and limited, to schools when it comes to regulating student speech. Part I.A will provide an overview of the First Amendment Free Speech Clause. Part I.B will address the development of the *Tinker* standard for regulation of student speech and the subsequent jurisprudence and judicial deference to school administration following. Part I.C will look into the geographical limitations that *Tinker* presents in the digital age.



A. Freedom of Speech: An Overview

This section will look into the scope of the First Amendment's Free Speech Clause and the introduction of student speech. Moreover, this section will introduce the seminal *Tinker* decision, specifically looking at how the standard has been used in subsequent cases.

Freedom of speech has long been recognized as a fundamental right protected by the First Amendment of the United States Constitution.³⁶ However, under certain circumstances, the protections granted under the First Amendment may be subject to various limitations.³⁷ Under the express terms of the First Amendment's free speech clause, government actors are prohibited from impairing the free speech rights of the public.³⁸ The First Amendment applies not only to the federal government, but to state government actors, through the Due Process Clause of the Fourteenth Amendment.³⁹ Public schools are considered state actors that are applicable to First Amendment scrutiny.⁴⁰ Moreover, the Supreme Court has stated that the government may not prohibit the expression of an idea simply because persons in society may find it offensive or disagreeable.⁴¹ The most important First Amendment principle is that of content neutrality, meaning that the government may not curtail expression because of its content, particularly because of the viewpoint it expresses.⁴² The rationale behind this principle is that the First Amendment establishes a marketplace of ideas, where all ideas, both good and bad can compete, and that the remedy for bad speech is more speech instead of enforced silence.⁴³ Another principle emphasizes the rights of the individual to have free speech because it is essential to their self-expression, personhood, and autonomy.⁴⁴

36. U.S. CONST. amend. I.

37. See *Elonis v. United States*, 135 S. Ct. 2001, 2024 (2015) (Thomas, J., dissenting).

38. See U.S. CONST. amend. I; see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) ("As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear.").

39. See *Virginia v. Black*, 538 U.S. 343, 358 (2003).

40. See generally *Morse v. Frederick*, 551 U.S. 393 (2007) (discussing a student who brought a First Amendment claim against public school administration for refusing to allow him to carry banner promoting illegal drug use).

41. Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377, 381 (2006) (citing *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

42. *Id.* at 382.

43. *Id.*

44. Marcus-Toll, *supra* note 10, at 3403.



Free Speech rights under the First Amendment are not absolute.⁴⁵ Laws that restrict speech usually are grouped into two classes: content-based and content-neutral restrictions.⁴⁶ Content-based restrictions limit communication because of the express message conveyed.⁴⁷ As a general matter, content-based regulations have a presumption of unconstitutionality, subjecting them to strict judicial scrutiny.⁴⁸ On the other hand, content-neutral restrictions, limit expression without regard for the speaker's message.⁴⁹ Content-neutral regulations raise less Constitutional concerns therefore they are usually given an intermediate level of scrutiny by courts.⁵⁰ Generally, a regulation will be deemed to be neutral, even if it has an incidental effect on some speakers and not others, so long as it serves purposes unrelated to the content of the expression.⁵¹

With this overview of free speech and the constitutional limits on speech restriction, one will be able to better understand the contours of student speech as we discuss *Tinker* and its progeny. The reason being, that many of the cases used within this analysis involve examples in which a school district is able to regulate the content of a student speech, using the *Tinker* standard in order to pass constitutional muster. As we will see, in order for school actions to survive First Amendment Scrutiny, the School District must illustrate that it had the authority to reach the off-campus speech and that the imposition of discipline complied with the standard set in *Tinker*. Moreover, an understanding of the First Amendment protections is necessary for the overarching argument in determining the appropriate standard to apply to off-campus student speech regulation by school districts.

45. See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that a school district may infringe on students' First Amendment rights if the speech causes a substantial disruption to the school environment.)

46. See generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983) (noting that the distinction between content-based and content-neutral restrictions is the most "pervasively employed doctrine in the jurisprudence of free expression").

47. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987).

48. *Id.* at 56.

49. *Id.* at 48.

50. Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 420-21 (2011).

51. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

B. The Development of the Tinker Standard and Subsequent Judicial Deference

It is well established that the First Amendment right to freedom of speech extends to students in public school. *Tinker v. Des Moines Independent Community School District* is a landmark decision and is the most influential Supreme Court case protecting the constitutional rights of students.⁵² In *Tinker*, the plaintiff filed a suit against school officials when they disciplined them for wearing black armbands to school in protest of the Vietnam War.⁵³ School officials discovered the plan and adopted a policy that prohibited the wearing of armbands in school.⁵⁴ Mary Beth Tinker and two of her brothers decided against the policy and wore the armbands in protest of the war anyway.⁵⁵ Upon their arrival at school, the Tinkers were suspended and they subsequently brought a suit against the Des Moines School District.⁵⁶

The Supreme Court reversed and remanded the district court's dismissal of the complaint.⁵⁷ While the Court most notably held that "students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Court also recognized that in determining whether schools can discipline on-campus speech, they must balance the interest of the State and school official's authority to control conduct in the schools against the fundamental constitutional safeguards of the students.⁵⁸ Although the *Tinker* decision held that schools do not possess absolute authority over their students, students also do not have the absolute right to constitutionally protected expression in school.⁵⁹ In fact, the Court held that a student retained their First Amendment rights so long as their speech does not "materially and substantially interfere" with the operation of the school.⁶⁰ The Court found in *Tinker* that the restricted activity did not materially and substantially interfere with the work of the school.⁶¹ Accord-

52. Chemerinsky, *supra* note 1, at 527; Baxter, *supra* note 2, at 103.

53. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 514.

58. *Id.* at 506–07.

59. *Id.* at 511.

60. *Id.* at 513.

61. *See id.* at 509 (“[O]ur independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.”).



ingly, the Court held that their expression was entitled to protection under the First Amendment.⁶² It is important to note that while this decision reflects the reality of technological limits in 1969, the development of the digital age, including social media and instant messaging, have drastically impacted the way that *Tinker* can be applied in a modern context.⁶³

Although *Tinker* had developed a “substantial disruption” test to determine the ability of the schools to discipline student conduct, the seminal case left unclear what constituted a substantial disruption.⁶⁴ In his dissenting opinion, Justice Black took issue with the majority’s holding that the students’ speech did not interfere with the ability to complete schoolwork.⁶⁵ Justice Black opined that the school officials were justified in disciplining the students because their speech had “diverted” other students’ attention from their classwork, and that any diversion from assigned classwork should be sufficient to allow school officials to regulate or discipline student speech.⁶⁶ Therefore, the scope of “substantial disruption” was a somewhat disputed issue among members of the Court. Moreover, the *Tinker* decision left open questions about the scope of “the school environment” that is a increasingly relevant question when considering student speech in the digital age. This second issue will be discussed in detail later.

In the three decades following the *Tinker* decision, there have been virtually no furtherance of student speech protections.⁶⁷ The court has never explicitly outlined the contours of the substantial disruption standard or more succinctly defined the phrase “substantial disruption.” Moreover, following the decision, the Court has shown immense deference to the State and schools when it comes to regulating student expression: the school winning virtually every constitutional claim regarding students’ rights.⁶⁸ There have been only three

62. *Id.*

63. *See generally id.* at 509–10.

64. Marcus-Toll, *supra* note 10, at 3409.

65. As a preliminary matter, Justice Black viewed John Tinker’s expression as considerably more incendiary. Justice Black proceeded to argue that courts should defer to school officials in determining and administering appropriate discipline. Decreased deference to school officials necessarily diminished discipline, thereby corroding the public school system. Indeed, to Justice Black, the *Tinker* majority’s rule essentially ceded control of public education to students. *Id.* at 3408.

66. *See Tinker*, 393 U.S. at 524–26 (Black, J., dissenting).

67. Chemerinsky, *supra* note 1, at 528.

68. *Id.*; *see, e.g.*, *Ingraham v. Wright*, 430 U.S. 651 (1977) (Court rejected that students have a right to procedural due process before the imposition of corporal punishment); *New Jersey v. TLO*, 469 U.S. 325 (1985) (Court rejected Fourth Amendment claims by students and upheld the

Supreme Court cases concerning student speech in primary education, excluding cases involving religious expression: *Bethel School District No. 403 v. Fraser*, *Hazelwood School District v. Kuhlmeier*, and *Morse v. Frederick*.⁶⁹ All of the decisions represented exceptions to the general *Tinker* rule. In all three cases, the Court rejected student's First Amendment claims in favor of the schools' regulation of speech when it comes to the issues of lewd speech and conduct and school-sponsored speech.⁷⁰ Given such judicial deference to the school system despite the *Tinker* test, this begs the question as to whether *Tinker* is still relevant in protecting the constitutional interests of students.⁷¹

C. Geographical Limitations of *Tinker*

While the *Tinker* Court did not wish to expressly limit their holding to specifically the classroom setting; explaining that the standard also applied to speech taking place in the cafeteria or on the campus during authorized hours, it is challenging to read the school's authority over off-campus speech into traditional *Tinker* analysis.⁷² Moreover, because the Court specifically focused on the "special characteristics of the school environment" in the *Tinker* decision, the holding of the case did not initially consider off-campus speech.⁷³ Although the Court used clear language describing the physical location of student speech protections — the space located within "the school-house gate" — it also broadened the scope of the ruling beyond simply the classroom. The Court emphasized that the constitutional rights of minors in public schools are different from the rights of adults in other settings; identifying the inculcation of fundamental values, including the teaching of socially appropriate behavior, as a proper function of the public-school system.⁷⁴

Irrespective of the inherent geographical limitations set by the *Tinker* decision, some courts have ignored these limitations and ap-

ability of schools to search students without probable cause and subject them to random drug testing).

69. *See* Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (upholding the suspension of a student for their speech at a school assembly, concluding that schools could restrict student speech that was offensively lewd or vulgar, even if that speech did not cause a *Tinker* disruption); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (holding that schools properly had the authority to exercise editorial control over the content of their newspapers as long as the censorship was related to "legitimate pedagogical concerns").

70. *Fraser*, 478 U.S. at 686–87.

71. Chemerinsky, *supra* note 1, at 529.

72. Baxter, *supra* note 2, at 106–07.

73. *Id.* at 106.

74. *Id.*



plied the standard without regard for where the speech originated.⁷⁵ The “substantial disruption” standard developed by the Supreme Court in *Tinker* has emerged as the preferred method of analysis to determine whether public schools may regulate off-campus student speech.⁷⁶ Under the “substantial disruption” standard, if student speech causes a substantial disruption to school activities, or if school officials could reasonably predict such a disruption, then the speech may be regulated.⁷⁷ For example, in *LaVine v. Blaine School District*, the Ninth Circuit upheld a school’s emergency expulsion of a student who wrote a graphic poem about killing his classmates.⁷⁸ Despite the fact that the speech being regulation did not originate on campus, the court analyzed the school’s actions under *Tinker’s* substantial disruption standard and upheld the suspension because the poem could reasonably be seen as a “cry for help” from a student who was “intending to inflict harm on himself or others.” This rationale in this case deviated away from *Tinker’s* geographical-based holding.⁷⁹

While the decision specifically applied to student speech while in the classroom, it also extended to areas such the hallway, the playground, and other similar areas surrounding the traditional school environment. The geographical limitation to the *Tinker* decision makes many wonder whether school districts should be able to regulate speech that occurs off campus; in fact, *Tinker* left open whether the substantial disruption test is applicable outside of the “special characteristics” of the school environment.⁸⁰ To complicate matters further, with the introduction of the internet, many altercations with students

75. See, e.g. *LaVine v. Blaine Sch. District*, 257 F.3d 981, 981 (9th Cir. 2001) (holding that the school did not violate the student’s free speech rights when it expelled him on the basis of a poem that he wrote from the perspective of a school shooter. The court avoided using either of the tests to come to their decisions, preferring to stand for the blanket proposition that while the location of the speech can make a difference, not all off-campus speech is beyond the reach of school officials); see also *O.Z. v. Bd. of Trustees of Long Beach Unified Sch. Dist.*, No. CV 08-5671 ODW, 2008 WL 4396895, at *4 (C.D. Cal. 2008) (applying *Tinker* where a student created a video off campus depicting a graphic dramatization of a teacher’s murder and later posted it online).

76. Marcus-Toll, *supra* note 10, at 3400–01.

77. *Id.* at 3401.

78. Baxter, *supra* note 2, at 112.

79. *Id.*

80. “*Tinker’s* wording is arguably broad enough to support its application in the off-campus setting. The *Tinker* Court, however, did not expressly contemplate that possibility. Rather, the Court justified school authority to regulate student speech based on the ‘special characteristics’ of the school environment and the role of school officials to control student conduct. Accordingly, while students enjoy free speech rights in the classroom, cafeteria, playing field, or on campus during authorized hours, school officials may regulate student expression in those areas if it causes substantial disruption.” Marcus-Toll, *supra* note 10, at 3407–08.



begin online and make their way into the school setting. The jurisdictional predicate of the *Tinker* decision presents an exclusive issue to schools in a modern era, where social media and technological advancements thrive. While certain courts have been able to adopt *Tinker* without special attention to where the speech originated, it is important to determine whether *Tinker's* holding should be applied to speech that is purely off-campus in nature, and if so, what is the test that should be adopted to determine whether a school district has the ability to bring a school within the jurisdiction of *Tinker*.

D. Should *Tinker* Apply to Off-Campus Speech?

Some courts have held that that off-campus speech should not be subjected to analysis under *Tinker* even if the speech makes its way to campus by another student or a third party.⁸¹ For example, in *Thomas v. Board of Education*, the Second Circuit refused to apply *Tinker* to an offensive student newspaper article that was published and distributed off campus, holding that the article was beyond the reach of school administrators.⁸² Moreover, the Fifth Circuit held that speech that occurs off campus that accidentally makes its way to campus does not fall within *Tinker* analysis.⁸³ The case law dealing with the refusal to apply *Tinker* to off-campus speech illustrates the traditional view that schools should not be able to regulate speech that occurs outside of the school environment. While the prevailing school of thought is that *Tinker* alone should not be used to regulate off-campus, there have been instances in which courts have applied the standard without regard to the geographical origin of the speech.⁸⁴ In instances where courts bypass the jurisdictional predicate of *Tinker*, they generally do

81. *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1966).

82. *See id.* at 1057 (“[S]chool authority regulat[ing] indecent language aimed at school children can of course be abused, but school officials are not the final arbiters of their authority, nor do they have limitless discretion to apply their own notions of indecency.”).

83. *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615, 618–20 (5th Cir. 2004) (holding that a student’s speech was protected because the student “never intended” for the drawing to reach the school, describing its introduction to the school community as “accidental and unintentional”).

84. Absent Supreme Court jurisprudence on the matter, scholars noted that courts generally take one of three approaches when deciding cyber student speech cases. The first approach is the *Tinker* substantial disruption test, wherein courts analyze whether speech created on-or off-campus, but accessed on-campus, creates substantial disruption to the school environment. Second, courts have adopted the approach that all Internet speech created off-campus is protected because it occurred off-campus. Finally, courts have adopted the *Tinker* substantial disruption test without regard to whether the speech was created or accessed on-or off-campus. *See Alexander G. Tuniski, Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 153–55 (2003).



not give their reasoning to do so and choose not to consider the issue. This conflict further depicts the current uncertainty as to the school's jurisdiction over off-campus student speech under *Tinker*, and exemplifies the need for courts to adopt a clear standard to govern future cases dealing with this issue. Since it has been articulated that *Tinker* did not expressly extend to off-campus speech, would allowing discipline for off-campus conduct relying solely on *Tinker* be unconstitutional? Part II addresses this concern; discussing the methods that have been adopted by the states in terms of addressing off-campus speech and the development of the *Tinker* standard, focusing specifically on the two distinct tests adopted by the Fourth and Eighth Circuits.

II. CIRCUIT SPLIT: THE REASONABLE FORESEEABILITY AND SUFFICIENT NEXUS TESTS

This Part delves into the primary legal issue: the current circuit split between the Fourth Circuit and the Eighth Circuit in determining the adequate test that should apply when regulating off-campus speech. This Part will discuss the case law in which these tests were promulgated and will also delve into the core distinctions between the two standards; emphasizing the need for the Supreme Court to address the split between the circuits. Moreover, this Part will discuss both of these standards in detail (both Part II.A and Part II.B respectively) and will also discuss (in Part II.C) court subsequent rulings that avoid adding to the circuit split by attempting to meet both standards instead of applying just one. The refusal of courts to speak on the clear circuit split is indicative of the fact that this issue may soon come before the Supreme Court to decide.

In the digital age, many conflicts involving student speech are becoming more indirect.⁸⁵ Cyberbullying is a good example of this phenomenon.⁸⁶ No longer does a person have to be within the walls of the school in order to substantially disrupt the operation of a school.⁸⁷ In fact, this can be done remotely over cyberspace using social media and instant messaging technology.⁸⁸ Various circuits have adopted

85. See generally Richard Donegan, *Bullying and Cyberbullying: History, Statistics, Law, Prevention and Analysis*, 3 ELON J. OF UNDERGRADUATE RES. IN COMM. 33–34 (Spring 2012), available at <https://www.elon.edu/docs/e-web/academics/communications/research/vol3no1/04doneganejspring12.pdf>.

86. See generally *id.*

87. *Id.*

88. *Id.*

tests that, once fulfilled, will allow schools the ability to regulate off-campus speech under the traditional *Tinker* substantial disruption analysis.⁸⁹ However, the legal framework governing off-campus speech is currently in a state of disarray.⁹⁰ The Supreme Court has never specifically addressed the issue, and lower courts apply inconsistent tests to determine whether off-campus speech should be regulated by *Tinker*.⁹¹ For example, the Fourth Circuit held in *Kowalski v. Berkeley County Schools*, that a “sufficient nexus test” be completed, in which the Court must analyze whether a student’s off-campus speech was tied closely enough to the school interference to permit such regulation under *Tinker*,⁹² while the Eighth Circuit has held in *D.J.M. v. Hannibal Public School District* that the Court implement a “reasonable foreseeability” test in order to determine whether it was reasonably foreseeable that off-campus speech would reach the school.⁹³ In the most recent case to address this issue, *C.R. v. Eugene School District*, the Ninth Circuit refused to join in the circuit split, applying both tests, and determining that under either test, disciplining the student for his off-campus speech did not violate the First Amendment.⁹⁴

A. The Fourth Circuit’s Sufficient Nexus Test

Tinker analysis has been extended to student speech that has not occurred on campus, but had a sufficient nexus with the school to make regulation of the speech permissible under the Constitution.⁹⁵ For example, the Fourth Circuit held that a school district was correct in disciplining a student who used the Internet to orchestrate a targeted attack on a classmate, although the activity did not take place on campus.⁹⁶ In *Kowalski*, a student used their home computer to post a derogatory rumor about another student on Myspace.⁹⁷ Subsequently, the school administration suspended the student from school

89. The substantial disruption analysis asks if the “conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

90. Barry P. McDonald, *Regulating Student Cyberspeech*, 77 MO. L. REV. 727, 737 (2012).

91. Daniel Marcus-Toll, *supra* note 10, at 3433–37.

92. *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011) (2011).

93. *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 766 (8th Cir. 2011).

94. *C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142, 1153 (2016).

95. *Kowalski*, 652 F.3d at 565.

96. *Id.* at 567.

97. *Id.*



for ten days and issued her a ninety day “social suspension” which prevented her from attending school events that she was not directly involved in.⁹⁸ Considering factors such as the “targeted, defamatory nature of the student’s speech, and the long-term impact that the post had on the targeted student, the court held that the nexus of the expression was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body’s well-being.⁹⁹ Moreover, the court held that *Tinker* could be applied in this case because of the fact that her speech interfered with the work and discipline of the school.¹⁰⁰

Due to the growth of the internet, many courts have added additional tests to determine whether off-campus student speech will fall under *Tinker* analysis.¹⁰¹ The “sufficient nexus approach” examines whether there is a significant relation between the speech and the school.¹⁰² If there is no such nexus, then the school would not be able to restrict the off-campus speech, applying more stringent First Amendment principles.¹⁰³ Another factor added by the Second Circuit is that there must be a foreseeable risk that there will be a substantial disruption and that it is reasonably foreseeable that the speech will arrive on campus.¹⁰⁴ The court in *Kowalski* did not address both prongs of the Second Circuit’s *Doninger* analysis, by holding that it was enough that there was sufficient nexus between the off-campus speech and the on-campus interference. The court did not analyze the specific consequences of having reasonable foreseeability that the speech would reach campus.

Although the Fourth Circuit in *Kowalski* did not dismiss the possibility that the foreseeability argument may be enough to permit limitations on off-campus speech in future cases, there is disagreement amongst scholars about whether off-campus internet speech can be regulated if there is only a reasonable foreseeability that the expression will reach the campus.¹⁰⁵ However, this test has been the primary

98. *Id.* at 567–68.

99. *Id.* at 573–74.

100. See, e.g., Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 882 (2008) (stating that students should not be accountable for speech that occurs off-campus, which is brought on campus by another student).

101. *Id.* at 756.

102. *Id.*

103. See generally *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011).

104. *Id.* at 207.

105. *Id.* at 208–09.

method used by the Fourth Circuit in order to determine whether to bring off-campus speech under regulation.

B. The Eighth Circuit's Reasonable Foreseeability Test

As an alternative to the Fourth Circuit's sufficient nexus test, some courts have applied a reasonable foreseeability test in order to determine whether off-campus speech will be subject to *Tinker*. In *D.J.M. v. Hannibal Public School District*, the Eighth Circuit held that *Tinker* applied to off-campus student speech where it is reasonably foreseeable that the speech will reach the school community and cause a substantial disruption to the educational setting.¹⁰⁶ In *D.J.M.*, a student sent instant messages to a school friend, from his home, threatening to obtain a gun and shoot students at his school.¹⁰⁷ Using the *Tinker* analysis, the Eighth Circuit determined that the student's speech was not protected because it was "reasonably foreseeable" that their speech "would be brought to the attention of school authorities and create a risk of substantial disruption within the school environment," and because the speech did actually cause substantial disruption, the school had the power to punish the student.¹⁰⁸

However, the Third Circuit rejected the notion that foreseeability can be the only element considered in making the determination about whether the school has the ability to regulate off-campus speech.¹⁰⁹ In *Layshock v. Hermitage School District*, a student created a webpage that made fun of the school principal.¹¹⁰ The website was assessable to students who had been asked to become "friends" of the webpage.¹¹¹ While the school conceded that there was no substantial disruption at all, they argued that it was reasonably foreseeable that the speech would reach the campus.¹¹² The court held that because there was no substantial disruption, the school did not have the ability to punish the off-campus expressive conduct.

106. *Id.* at 216.

107. Emily E. Smith, *The Applicability of the Tinker Test to Off-Campus Cyber-Speech: Policy Implications*, CEPI Educ. L. Newsl., Aug. 2015, at 6.

108. *Id.* at 2-3.

109. *LaVine v. Blaine Sch. Dist.*, 257 F.3d. 981, 983 (9th Cir. 2001).

110. *Id.* at 990.

111. *See generally id.* at 981.

112. *Wynar v. Douglas County Sch. Dist.*, 728 F.3d. 1062, 1064 (9th Cir. 2013); Elizabeth Shaver, *Denying Certiorari in Bell v. Itawamba County School Board: A Missed Opportunity to Clarify Students' First Amendment Rights in the Digital Age*, 82 BROOK. L. REV. 1539, 1569 (2017).



The primary distinction between this standard and the sufficient nexus standard is that it places a lighter burden on the school district to find a relationship between the off-campus speech and its ability to substantially disrupt the school. Under the Foreseeability analysis, school administrators should evaluate how the student shared the speech considering factors such as: (a) whether the speech was posted on a public or private site; (b) whether it was sent to members of the community or the school system; and (c) whether it was accessed on school property.¹¹³ The fundamental question when using reasonable foreseeability analysis is whether the student could have reasonably expected the speech to remain private, or whether it was reasonably foreseeable that the speech would reach the school's campus.¹¹⁴ If the administrator finds that the speech passes the reasonable foreseeability threshold, then the next step is to apply the *Tinker* substantial disruption test to determine whether to regulate the speech.

C. Dodging the Divide: Refusal of Sister Circuits to Adopt an Appropriate Standard

The Ninth Circuit has played a significant role in deciding cases involving student speech. The manner in which the court has extended *Tinker*, and has applied, or refused to apply, the “sufficient nexus” and “reasonable foreseeability” tests, warrants analysis. What is the rationale behind the various holdings? Does *Tinker* require further steps be fulfilled in order to regulate off-campus conduct? This section will discuss the various holdings, and will underscore the need for judicial consistency when it comes to the scope of the *Tinker* decision and determining the appropriate standard for off-campus speech.

In 2001, the Ninth Circuit tackled the issue of state regulation of off-campus student speech in *LaVine v. Blaine School District*. In *LaVine*, a student was expelled for the contents of a poem that alluded to a student committing a school shooting.¹¹⁵ The court in this case held that the school did not violate the student's free speech rights when it expelled him based on the poem's violent content. In this case, the court rested on *Tinker* solely for determining that the poem, though written off-campus, substantially interfered with the school to warrant regulation.¹¹⁶ The court noted that while location of the speech is im-

113. *Id.*

114. *Wynar*, 728 F.3d at 1068.

115. *Id.* at 1069.

116. *Id.*



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portant, not all off-campus speech is beyond the reach of school officials.¹¹⁷ The issue with this holding is that it further blurred the lines of the *Tinker* holding, making it very unclear whether *Tinker*, alone, was extended to speech irrespective of its origin. This view is inconsistent with traditional notions of *Tinker* that refers specifically to activities that occur on the school grounds as a jurisdictional predicate to school regulation under the First Amendment.

Furthermore, in 2013, the Ninth Circuit became the fifth federal circuit to address the issue of whether a students' off-campus electronic speech may be regulated. In *Wynar v. Douglas County School District*, the Ninth Circuit held that school officials had the authority to discipline a student that sent "a string of increasingly violent and threatening instant messages . . . bragging about his weapons, threatening to shoot specific classmates, intimating that he would 'take out' other people at the school on a specific date, and invoking the image of the Virginia Tech massacre."¹¹⁸ The Ninth Circuit reviewed the earlier decisions of various circuits when addressing the scope of authority issue, covering *Kowalski*, *Lee Summit*, *Wiesniewski*, *Snyder*, and its own precedent when making their determination.¹¹⁹ As previously discussed, the Ninth Circuit interpreted *Kowalski* as establishing a "nexus" test and *Lee's Summit* as establishing a test requiring that the speech be "reasonably foreseeable [to] will reach the school community."¹²⁰ Ultimately, the Ninth Circuit declined to adopt the positions of its sister courts, noting the difficulty in articulating "a global standard for the myriad of circumstances involving off-campus speech."¹²¹ Moreover, the Ninth Circuit expressed "reluctan[ce] to . . . craft a one-size fits-all approach."¹²² The court in *Wynar* effectively dodged the issue of scope of authority, instead relying on the content of the student's speech in determining that the school could regulate speech "when faced with an identifiable threat of school violence." Notably, the Ninth Circuit also analyzed the student's speech under the "right of others" prong originally articulated in *Tinker*. The court recognized that this standard was scarcely applied by federal circuit courts, but held that it was appropriate for the context of this

117. *C.R. v. Eugene Sch. Dist.* 4J, 835 F.3d 1142, 1155 (9th Cir. 2016).

118. *Id.* at 1146.

119. *Id.*

120. *Id.* at 1151.

121. Laura Fishwick, *Student Free Speech Rights on the Internet: Summary of the Recent Case Law*, HARV. J.L. & TECH. (2012).

122. *Id.*



case, given that the regulated speech threatened a school shooting. *Wynar* was an example of the Ninth Circuit finding a way around addressing the controversy and further highlighting the need for a specific standard.

Most recently, in *C.R. v. Eugene School District 4J*, the court applied both the reasonable foreseeability and the sufficient nexus tests and determined that the school district did not violate a student's rights.¹²³ In *C.R.*, a student was suspended for sexually harassing two younger disabled students a few hundred feet away from the school grounds.¹²⁴ Of significance is the fact that it is unclear as to whether the incident occurred on school grounds because there was no visible boundary to indicate whether the school property ended.¹²⁵ In applying both tests, the court held that the school district had the authority to discipline the off-campus speech because the harassment at issue was both closely tied to the school and administrators could also reasonably expect students to discuss the harassment in school. Refusing to add to the circuit split by choosing between the two tests, the Ninth Circuit effectively dodged the issue of deciding between which test was more adequate for dealing with off-campus conduct. The importance of this case cannot be understated. Here again we see a missed opportunity to adequately decide the appropriate threshold requirement for applying the *Tinker* standard.

With the refusal of each individual circuit to adopt a standard, the question as to how a school district should regulate student speech persists. Such a blatant circuit split is likely to gain the attention of the Supreme Court. The next section outlines how I believe the Supreme Court should rule on this split and discusses the constitutional and social (with specific regard to cyberbullying in schools) impacts of the decision.

III. ANALYSIS: WHICH TEST SHOULD BE ADOPTED?

After evaluating both circuits' tests and their application in relevant case law, I argue that the sufficient nexus test is the most adequate test to use in balancing the student's privacy interests guaranteed in *Tinker* and the interest of the school district in deterring

123. *Id.*

124. Taylor Feldman, *Freedom of Speech for Students in the Digital Era: Time for an Update*, LOYOLA UNIV., <https://www.luc.edu/media/lucedu/law/centers/childlaw/childed/pdfs/2015studentpapers/Feldman.pdf> (last visited Feb. 25, 2018).

125. *Id.*



any future disruption on the campus. There are two factors that must be balanced: the constitutional rights provided for student speech stemming from *Tinker*, and the ability for a school district to regulate the harmful off-campus speech that also substantially disrupts the school environment. The sufficient nexus approach strikes the appropriate balance because in order to bring off-campus speech within the regulation of the school district, there must be some significant relationship to the school. Conversely, the Eighth Circuit's reasonable foreseeability test relies merely on a reasonableness standard which arguably provides too much deference to schools in determining which off-campus matters will cause a reach the school environment.

Deciding between the two competing tests is particularly complex because many courts have failed to address this key distinction between the Fourth Circuit and Eighth Circuit approach; in many instances, if one test is met, then the other is also satisfied. However, resting solely on a reasonable foreseeability would inappropriately bring almost all communication off-campus between students under the regulation of the school district and will fail to serve the purpose of targeting key issues that *Tinker* was meant to address in the school environment. In the *Tinker* decision, the Court made clear that schools could not forbid student expression simply because they wanted to avoid controversy. Furthermore, the school must show that the action was not caused by discomfort with a particular viewpoint. Certainly, if it is determined that there is a sufficient nexus between the off-campus speech and the school, considering factors similar to *Kowalski* ("targeted, defamatory nature of the student's speech, and the long-term impact that the post had on the targeted student"), then the reasonable foreseeability test would also be met because the actions are directly connected with the school environment. This is evidenced by the fact that, despite requiring a threshold showing of a nexus before they will apply the *Tinker* standard, few courts have found that a "sufficient nexus" does not exist between online speech and a school when applying the "reasonable foreseeability" test. However, the reciprocal is not true: merely because there is a foreseeability that the off-campus speech may reach the campus and cause a substantial disruption does not create a de facto sufficient nexus between the speech and the school to justify preemptive regulation of the speech.



Reasonable Foreseeability Test Unconstitutionally Extends School's Discretion

As previously addressed, the sufficient nexus and reasonable foreseeability tests are preliminary tests used by courts to determine whether to apply *Tinker* to off-campus student speech. While recent courts have avoided the question of which test to apply, no court has held that the reasonable foreseeability test, alone, would suffice. Merely because it is reasonably foreseeable that off campus speech will cause a disruption on campus does not always mean that there is a sufficient nexus between the off-campus speech and a substantial disruption to the school environment. Moreover, under the reasonable foreseeability test, the “substantial disruption” requirement depicted in *Tinker* does not actually have to occur — it must only be foreseeable that the speech will reach the campus. While there has never been a burden under *Tinker* that the substantial disruption must occur in order for the school to regulate the activity, in effort to combat issues before they occur, it is important to note the deference given to the school under this standard; the school has the ability to make the determination as to whether they feel as though speech creates a substantial disruption and can thus regulate the activity before the issue occurs. Only a minority of courts have adopted this standard, and it leaves off-campus student speech at its most vulnerable point: open to discretionary regulation by the school district. Remember that the only issue that one is concerned with when it comes to the regulation of off-campus speech under this test is whether the student could have reasonably expected the speech to remain private, or whether it was reasonably foreseeable that the speech would reach the school’s campus.

If the court were to adopt a reasonableness analysis for governing off-campus speech, then school districts would then have a wider discretion to regulate the activities of students, potentially infringing on their First Amendment protections. Remember, both the reasonable foreseeability and sufficient nexus tests are preliminary tests that are used by courts to determine whether off-campus speech will fall under *Tinker* analysis. As stated previously, there has been great deference to the school district when cases fall under *Tinker*. The Court in *Tinker* could not have intended to allow schools to regulate all student expression that occurs anywhere simply because it happens to disrupt school activities. Therefore, a broad test which gives greater defer-



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ence to school officials to regulate speech simply because it impacts the school should not be constitutionally permissible. There may be instances in which a student's speech may cause a substantial disruption to school grounds but does not have a sufficient nexus to the school. For example, a student uploads a post discussing a controversial topic that causes a disruption at the school, but is unrelated to the school or its students. Allowing a school to punish that student may result in serious constitutional issues. I believe that these issues would arise under the reasonable foreseeability standard. Not only are we giving too much discretion to the school under this standard, but we are allowing schools to have too much power to regulate off-campus conduct. If the Court adopts this test as the standard that schools use to regulate student speech, then they will have the power to regulate speech that may not have a close relationship with the school at all. In fact, it would go against the long-standing *Tinker* principle that school districts should not be able to regulate opinions simply because they are unpopular ones.

Resting solely on the reasonable foreseeability test, it is likely that many more constitutional issues would arise, specifically in regards to what information is not assessable to school regulation given the pervasive nature of social media. The issue with applying the reasonable foreseeability test is that there is generally always a foreseeable chance that student cyber-speech can reach and disrupt the campus due to the Internet's omnipresence, all it takes is a wireless connection. Given the current uncertainty over the off-campus free speech of students, and the different approaches adopted by courts to handle this issue, it is in the best interest of the school administrators, students, and the Court to set forth a standard that would require more than just a reasonableness test to determine whether to bring the speech under *Tinker* analysis. As mentioned previously in this Note, under *Tinker* the Court has already given wide discretion to the school district to regulate student speech that substantially interferes with the school environment. Therefore, if we also give them wide discretion to bring off campus speech within the reach of the school using the reasonable foreseeability test, the school's power to regulate off-campus conduct may become unlimited. Specifically, almost all speech online would reasonably make its way back to the school because of the ability to share information that is posted online so freely. To impose content-based regulations on student speech without a stricter test (like the sufficient nexus test) would leave student speech



at the discretion of school administrators. The very purpose behind creating the sufficient nexus test was to provide a medium for schools to regulate speech that occurs off-campus, extending the traditional “substantial disruption” *Tinker* doctrine.

With complete deference given to the school under the reasonable foreseeability standard, the threat of cyberbullying between students at a school would certainly fall under the umbrella of state jurisdiction. However, if this is the uniform standard adopted by the Court, then cyberbullying would not be the only genre of speech that would wall within the boundaries of regulation by the school. Without any additional safeguards, it is likely that it will be up to the school to regulate student speech in the growing technological age. On the other hand, with the sufficient nexus test, the school has the additional burden of showing that the off-campus speech is so related to the pedagogical interests of the school, to warrant regulation. In the case of cyberbullying, these interests are nearly almost fulfilled. Schools have an interest in the safety of their students, both on and off-campus. The nature of cyberbullying today grants the ability to impact students both in the school environment and in their own homes and, especially if the conflict is between two students, should be subject to regulation by the school. Cyberbullying falls under a category by which the school always has an interest in regulating for the sake of student safety, and would likely always meet the threshold of the sufficient nexus test. Moreover, the sufficient nexus test will not provide the school with the discretion to regulate all student speech, just that speech that they are able to prove has a direct relationship with the school.

CONCLUSION

In light of the current state of technology and social media, it is essential that schools have the ability to forecast and prevent potential incidences from occurring on campus. Cyberbullying has become a pervasive culture due to the introduction of outlets such as Facebook, Twitter, and Instagram, and, as a result, make us question the relevance of *Tinker* when it comes to speech that has originated off-campus. The impacts of cyberbullying are widespread: according to the 2011 survey results from the Center for Disease Control (CDC), more than 15,000 students did not go to school because they felt unsafe, almost 15,000 students carried weapons to school, and over seven percent were threatened or injured with weapons on school grounds.



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While schools should be provided with some leeway to handle these situations, they should not have a burden as low as “reasonableness” to justify regulation. On the contrary, there should be a substantial relationship between the speech and the school to warrant that the school should take some disciplinary actions against the student for exercising their constitutionally protected right to speech.

This is not to say that adopting the sufficient nexus test will completely alleviate cyberbullying, especially given the additional issues of anonymity and “sharing” features located on various social media sites, but this standard strikes the appropriate chord in ensuring that the school can regulate student speech when necessary without completely having the discretion to bring speech under *Tinker* analysis although the holding did not call for off-campus student speech regulation. The Court will have to weigh these considerations when deciding on the correct standard for the regulation of off campus student speech. There is evidence that shows that traditional bullying can result in a decrease in academic performance, and cyberbullying has the potential to multiply these effects by the infinite number of places in which students experience technology. As technology becomes more integrated into academic curricula, these issues and concerns will become even more vast, further showing why a decision needs to be made to combat these future issues.





COMMENT

“Get That Son of a ***** Off the Field”:¹ Regulating Student-Athlete Protest Speech in Public University Sports Facilities

MONIQUE T. CURRY*

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INTRODUCTION

The need for social activists in America – whose history is drenched with prejudicial ideologies that devised the division of per-

1. At a rally for Republican candidate, Luther Strange, in late September 2017, President Donald Trump viciously expressed his discontent with the NFL players who took a knee during the national anthem to protest racial injustice in America. He stated: “Wouldn’t you love to see one of these NFL owners, when somebody disrespects our flag, to say, ‘Get that son of a bitch off the field right now. Out! He’s fired. He’s fired!’” Sophie Tatum, *Trump: NFL Owners Should Fire Players Who Protest the National Anthem*, CNN (Sept. 23, 2017, 4:05 PM), <http://www.cnn.com/2017/09/22/politics/donald-trump-alabama-nfl/index.html>.

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sons by race, gender, and class where one is superior to the rest – is pressing.² So pressing that modern social activists need not resemble those from earlier decades by marching in the streets with picket signs; even a modest display of protest such as kneeling during the playing of the national anthem at a sporting event would suffice.

On August 27, 2016, now-former San Francisco 49ers' quarterback, Colin Kaepernick, ignited a movement that highlighted America's need for social activists. When the national anthem played at a pre-season game, as it has at the beginning of every National Football League (NFL) game since World War II,³ the entire stadium rose to their feet to salute the flag – a symbol of freedoms afforded to every person in the United States of America – all except Kaepernick. He sat. In the post-game interview, he stated that his action was a means to protest police brutality and racial injustice: "I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color. There are bodies in the street and people getting paid leave and getting away with murder."⁴

For many athletes around the country, Kaepernick's words and display sparked a call to action. Student-athletes from twenty-two public colleges and universities demonstrated solidarity by emulating the national anthem protest of Kaepernick on their respective home turfs and began to "take a knee" during the national anthem.⁵ A few

2. The pressing nature comes from society's strong concern for the state of the American democracy. At the 2016 State of the Union, then-President Barack Obama addressed America's concern for the state of the American democratic system in light of the 2016 presidential front-runner, Donald Trump, who holds extremely conservative ideas. Obama stated: "America's destiny . . . is imperiled by a political system festering in malice, gridlock and in the grip of the rich and the powerful." Stephen Collinson, *State of the Union: Barack Obama Sells Optimism to Nervous Nation*, CNN (Jan. 13, 2016, 11:37 AM), <http://www.cnn.com/2016/01/12/politics/state-of-the-union-2016-highlights/index.html>.

3. Stef. W. Kight, *The History of Singing the National Anthem Before NFL Games*, AX-IO, <https://www.axios.com/the-history-of-singing-the-national-anthem-before-nfl-games-1513305769-97a4edd0-6748-432d-b1cc-2b377848e712.html> (last visited Jan. 17, 2018). During World War II, the rendition of the national anthem had become a ceremonial prelude to NFL games. After World War II, NFL Commissioner at the time, Elmer Layden, stated: "[w]e must not drop it simply because the war is over. We should never forget what it stands for." AJ Willingham, *The National Anthem in Sports (Spoiler: it Wasn't Always This Way)*, CNN (Sept. 25, 2017, 5:02 PM), <http://www.cnn.com/2017/09/25/us/nfl-national-anthem-trump-kaepernick-history-trnd/index.html>.

4. Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NFL (Aug. 28, 2016, 4:33 PM), <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem>.

5. "The Kaepernick effect" has led over thirty football players across the country to protest racial injustice during the national anthem. Football players from state institutions such as University of Nebraska, Tulsa University, Indiana State University, and Dickson State University, have taken a knee in the 2016 season during the national anthem. Lindsay Gibbs, *Tracking*

student-athletes demonstrated solidarity with Kaepernick by raising their fists, imitating the black power salute at the 1968 Olympics.⁶ Ordinarily, these displays would be protected symbolic speech as they occur in public universities, where freedom of expression reigns. But the public forum doctrine gives universities a means to limit such protests.

This Comment explores the public forum doctrine as it applies to student-athlete protest speech in public university stadiums, arenas, and other areas used for sporting purposes.⁷ This Comment concludes that while public university sports facilities are public spaces in which protest discourse may generally be protected, student-athletes may be forced to seek alternatives to protect these expressions, because their unique status precludes them from the expressive conduct protections ordinarily afforded to others in such spaces.

Under the current application of the public forum doctrine, stadiums and arenas are limited public forums – public spaces not ordinarily open for speech purposes but open to speech for a limited purpose either impliedly or by government designation (here, the university administration).⁸ These spaces are subject to time, place, and manner restrictions where the government may regulate speech provided the restrictions are reasonable and viewpoint neutral.⁹ Since sports facilities such as stadiums and arenas exist for the primary purpose of public display and performance of sporting activities, it is reasonable to assume that, at least in many instances, the forum may be limited in

the Kaepernick Effect: The Anthem Protests are Spreading, THINKPROGRESS (Sept. 20, 2016), <https://thinkprogress.org/national-anthem-sports-protest-tracker-kaepernick-284ff1d1ab3e#.393zrd3ko>.

6. See Associated Press, *National Anthem Protests Spread to College Football, WNBA*, FOX NEWS SPORTS (Sept. 28, 2016), <http://www.foxnews.com/sports/2016/09/25/national-anthem-protests-spread-to-college-football-wnba.html>; Ben Cosgrove, *The Black Power Salute That Rocked the 1968 Olympics*, TIME (Sept. 27, 2014), <http://time.com/3880999/black-power-salute-tommie-smith-and-john-carlos-at-the-1968-olympics/>. See ESPN Staff, *Rewind to 1968, The Black Power Salute*, ESPN (Aug. 2, 2012), <http://en.espn.co.uk/olympic-sports/sport/story/162053.html>; A. Dimond, *Iconic Olympic Moments: The Black Power Salute*, BLEACHER REP. (July 24, 2008), <http://bleacherreport.com/articles/40675-iconic-olympic-moments-the-black-power-salute>, explaining the similar nature of the national anthem protests and the black power salute. Smith and Carlos decided to raise a fist to protest the institutional racism ongoing in America, in the midst of the Civil Rights Movement and just months after the assassination of civil rights activist, Dr. Martin Luther King, Jr.

7. Public universities are the primary focus of this Comment because public universities, contrary to private universities, are bound by the constraints of the First Amendment.

8. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

9. *Id.*



nature to sport-related speech.¹⁰ Accordingly, student-athlete activism and protest speech in sports facilities can be restricted under this doctrine.

However, a careful examination of such spaces reveals a plethora of non-sport related speech such as political, religious and commercial speech, undermining assertions of the limited nature of permitted speech in such facilities. The presence of such a variety of speech reveals the space's true nature – for general expression. As such, these spaces are necessarily non-limited public forums,¹¹ despite case law to the contrary.¹² Furthermore, a university's acquiescence to the various types of non-sport-related speech present supports the conclusion that public university sports facilities are non-limited public forums, thereby subject to the appropriate restrictions.

As a result, public university sports facilities permit expressive conduct such as protest speech. Although protest speech is permitted in public university sporting facilities, it may not be so for the student-athletes participating in the athletic event. Student-athletes subject themselves to limited First Amendment rights by voluntarily participating in school athletics. Accordingly, a public university may restrict protest speech or compel speech opposite of that being protested if the student-athletes' conduct is likely to materially disrupt team unity, the coach's authority or the team's on-field success, which protest speech may.

Part I of this Comment explains the public forum doctrine and policies generally, and examines the limitations on speech within a public university campus. Additionally, it analyzes public universities' sports facilities under the public forum doctrine, dissects and examines the courts' erroneous characterization of university sports facilities as limited or nonpublic forums. Further, this Part concludes that sports facilities are public forums due to the presence of, and acquiescence to, the various types of speech that occur within those spaces and are therefore subject to the appropriate restrictions.

10. Certainly, when a sporting facility is used for non-sporting events such as a concert, the permitted speech varies. However, this Comment focuses on such forums when used for their primary purpose of displaying and performing sporting activities.

11. Throughout this Comment, I use the term "non-limited public forums" to describe forums uniquely distinct from limited public forums because there are seemingly no limitations on speech yet they resemble general designated public forums, despite the absence of formal designation. See *infra* Part I for further explanation.

12. *Infra* Part I, which discusses the leading cases that characterize sporting facilities as limited or nonpublic forums.



Part II of this Comment examines expressive conduct, such as physical protest expression, that may occur within a public university sports facility. This Part discusses the types of speech restrictions appropriate for protest speech and examines the compulsory nature of some of those restrictions. This Part concludes that while protest speech is a protected form of speech in a public university sports facility, a university may compel student-athlete speech due to the nature of the relationship between a student-athlete and administration.

Lastly, Part III discusses the importance of student-athlete protest speech and examines the social climate that led to the outbreak of student-athlete protests. It also presents two alternatives to protect student-athlete speech and expression within university sports facilities in the face of faulty forum characterization and other constitutional limitations: judicial interpretation and state legislation.

I. PUBLIC FORUM DOCTRINE AND THE PUBLIC UNIVERSITY

The First Amendment provides that: “Congress shall make no law . . . abridging the freedom of speech.”¹³ The touchstone of the First Amendment is the ability to speak freely without the fear of government persecution.¹⁴ This right encompasses written and oral speech as well as symbolic expression of ideas through art, dance, music, and by other means. Despite the seeming absolute nature of the language of the First Amendment, the right to speak is not absolute. Governments can limit the time, place, and manner of speaking and can limit what is said, provided it meets certain standards set by the Court.¹⁵ Among the doctrines influencing the power of government to regulate speech is “the public forum doctrine” – where the speech occurs.¹⁶ Under the public forum approach to freedom of expression, the particular nature of the space where the expressive activity occurs affects the restrictions the government may impose.¹⁷ The Court has

13. U.S. CONST. amend. I.

14. See Christopher J. Kaufman, *Unsportsmanlike Conduct: 15-yard Penalty and Loss of Free Speech in Public University Sports Stadiums*, 57 U. KAN. L. REV. 1235, 1241 (2009).

15. STEVEN JAMAR, *CONSTITUTIONAL LAW: POWER, LIBERTY, EQUALITY* 897 (Wolters Kluwer ed., 2017).

16. “Even protected speech is not equally permissible in all places and at all times.” *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985).

17. See *id.* at 799–800. (“Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker’s activities.”).



developed (and continues to develop) the public forum doctrine as a way to distinguish the sorts of permissible government regulations of speech on government-owned property.

Under the public forum doctrine, there are three levels of forums, each with somewhat different rules with respect to what government restrictions on speech are permitted: (1) traditional or quintessential public forums such as public sidewalks and parks; (2) designated and limited public forums such as government-owned auditorium dedicated to certain purposes such as musical performances; and (3) non-public forums such as governmental offices and other government-owned spaces not generally open to the public.¹⁸

The first type of forum the Court recognized was the traditional public forum in 1939, in the seminal cases, *Hague v. CIO* and *Schneider v. State of New Jersey*. Traditional public forums are defined by the objective characteristics of the property, such as whether it is historically associated with free exercise of expressive activities.¹⁹ For example, sidewalks, public streets and parks are traditional public forums under the First Amendment.²⁰ In traditional public forums, the government's ability to restrict speech is limited. The government may only impose reasonable time, place, and manner restrictions provided there are ample alternatives of communication.²¹ Any other restrictions on expressive activity, such as those based on the content expressed, must be narrowly tailored to achieving a compelling state interest.²²

Historically, the Court has preserved streets and parks as public forums because "they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."²³ In *Hague*, the Court found that an ordinance which prohibited public meetings in a street without a city permit was unconstitutional after local police refused to allow union members to

18. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983); *see also* *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

19. *See* *Ark. Educ. Television Com'n v. Forbes*, 523 U.S. 666, 677 (1998) (stating that the criteria for a traditional public forum is whether, "by long tradition or by government fiat," the property has been "devoted to assembly and debate"); *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) ("Such use of the streets and public places has, from ancient times, been a part of the privileges and immunities, rights and liberties of citizens.").

20. *Hague*, 307 U.S. at 515.

21. *U.S. v. Grace*, 461 U.S. 171, 177 (1983).

22. *Perry*, 460 U.S. at 45.

23. *Hague*, 307 U.S. at 515.

gather outside of the organization's headquarters to discuss labor reform.²⁴ Similarly, in *Schneider v. State of New Jersey*, the Court struck down an ordinance that banned the distribution of leaflets on city streets and sidewalks created as an effort to prevent littering and keep streets clean.²⁵ The Court sought to protect people's free speech rights on city streets and sidewalks by finding that the burden to clean the streets was an indirect consequence that "results from the constitutional protection of the freedom of speech and press."²⁶

By distinct contrast, certain publicly-owned spaces are deemed nonpublic forums. A nonpublic forum is any government property that is not open to the public for speech purposes. In this type of forum, the government has the broadest power to restrict expression. In a nonpublic forum, the state has rights similar to those of a private property owner to "preserve the property under its control for the use to which it is lawfully dedicated."²⁷ Within a nonpublic forum, the government may restrict speech so long as the regulation is viewpoint neutral and reasonable.²⁸

The Court has found many types of government spaces to be nonpublic forums such as jailhouses, public hospitals, and military bases.²⁹ These spaces are typically administrative and operational in nature, which differ from traditional public forums, which have historically been used for expressive speech.³⁰

Courtrooms, for example, are administrative and operational in nature, and therefore nonpublic forums.³¹ While speech is the main focus within a courtroom, the purpose of such speech is only to aid in the administration of justice.³² Accordingly, lawyers, as the main speakers in the courtroom, cannot speak freely. Lawyers are re-

24. *Id.* at 516, 518.

25. *Schneider v. State of New Jersey*, 308 U.S. 147, 165 (1939).

26. *Id.* at 162.

27. *U.S. v. Grace*, 461 U.S. 171, 178 (1983) (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966))

28. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

29. *See Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 130 (1977) (asserting that a prison is not a public forum for its inmates, because the exercise of these rights would conflict with the "legitimate operational considerations of the institution."); *Greer v. Spock*, 424 U.S. 828, 838, n.10 (1976) (stating that a military base was not a public forum despite the fact that civilian speakers and entertainers are invited).

30. *See Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939).

31. "The courtroom is a nonpublic forum, where the First Amendment rights of everyone (attorneys included) are at their constitutional nadir." *Mezibov v. Allen*, 411 F.3d 712, 718 (6th Cir. 2005); *see Huminski v. Corsones*, 396 F.3d 53, 90 (2nd Cir. 2004); *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998); *Berner v. Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997).

32. *Huminski*, 396 F.3d at 91.



stricted by procedural and evidentiary rules, legal precedent and largely by the presiding judge's discretion.³³ A lawyer's speech in the courtroom is also restricted to speech that is beneficial to his client.³⁴

Furthermore, public access to courtrooms does not transform the space into a public forum. A publicly owned or operated space does not become a "public forum" for speech purposes simply because members of the public are permitted to come and go at will.³⁵ For instance, certain court proceedings are open to public access mainly because of the benefits court transparency has on self-governance and other reasons unrelated to speech.³⁶ In a like manner, public post offices, while open to the public at large for ordinary postal transactions, are generally not public forums.³⁷ Thus, open to the public does not necessitate open to the public for speech purposes.

Between the traditional public forum and the nonpublic forum lies a middle ground – the designated and limited public forum. The touchstone for determining whether government property is a designated public forum, as opposed to a limited public forum (whether by designation or impliedly), is the government's intent in establishing and maintaining the property.³⁸ A designated public forum is a place that was not traditionally open for speech purposes but rather one where the government has intentionally opened for expressive activity.³⁹ In a designated public forum, any restriction on speech must be narrowly tailored to achieve a compelling state interest if the restriction is more than just time, place or manner, similar to restrictions on speech in a traditional public forum.⁴⁰

The Court has declared many governmentally designated public spaces as public forums. In 1966, in *Brown v. Louisiana*, the Court considered a public library as a public forum to overturn the convic-

33. *Mezibov*, 411 F.3d at 717 (stating that the speech of a lawyer in court and in motion papers is "tightly cabined by various procedural and evidentiary rules, along with the heavy hand of judicial discretion").

34. *Id.* at 719.

35. *Greer v. Spock*, 424 U.S. 828, 836 (1976).

36. David S. Ardia, *Court Transparency and the First Amendment*, 38 *CARDOZO L. REV.* 835, 900 (2017).

37. *See, e.g., U.S. v. Bjerke*, 796 F.2d 643, 650 (3d Cir. 1986) (finding that solicitation on postal premises could be a hindrance to the post office's ordinary purpose and could therefore be restricted).

38. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

39. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) ("A government entity may create a designated public forum if government property that has not traditionally been regarded as a public forum is intentionally opened for that purpose."); *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Cornelius*, 473 U.S. at 802.

40. *Pleasant Grove City*, 555 U.S. at 469.

tions of a few civil rights activists who engaged in a silent sit-in at a segregated public library.⁴¹ Five African American men sat silently in a racially segregated public library after requesting a book from the librarian.⁴² Within ten to fifteen minutes, a local sheriff asked them to leave.⁴³ When they refused to leave, they were arrested “for not leaving a public building when asked to do so by an officer.”⁴⁴ The Court acknowledged that a public library, though a place typically for quiet learning, is not a public place exempt from peaceful protest demonstrations.⁴⁵

Less than ten years later, the Court further developed this idea of a designated public forum in *Southeastern Promotions Ltd. v. Conrad*, when the Court prohibited a city from barring a production of the musical “Hair” from a municipal theater.⁴⁶ The city wanted to prevent Southern Promotions from presenting the musical production “Hair” at a municipal theater within the city because others have reported that the production consisted of nudity and obscenity.⁴⁷ The Court found that the theater and auditorium were public forums designated for expressive activity by design and dedication.⁴⁸ Justice Douglas echoed this idea in his concurring opinion stating: “A municipal theater is no less a forum for the expression of ideas than is a public park, or a sidewalk.”⁴⁹ Therefore, by government designation, a place or channel of communication becomes a public forum “for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.”⁵⁰

On the other hand, the government may consider a public space to be a limited public forum by express designation or by implication. First, a limited public forum is created when the government designates a public space as a public forum but imposes limitations on

41. *Brown v. Louisiana*, 383 U.S. 131, 142 (1966).

42. *Id.* at 136.

43. *Id.* at 137.

44. *Id.*

45. *See id.* at 146 (“The constitutional protection for conduct in a public building undertaken to desegregate governmental services provided therein derives from both the First Amendment guarantees of freedom of speech, petition and assembly . . .”).

46. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (prohibiting the city’s bar of the production on the basis that such prohibition was a prior restraint).

47. *Id.* at 547–48.

48. *Id.* at 555; *see Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802–03 (1985) (finding that courts may look to whether the property was “designed for and dedicated to expressive activities”).

49. *Southeastern Promotions, Ltd.*, 420 U.S. at 563 (Douglas, J., concurring).

50. *Cornelius*, 473 U.S. at 802.



permitted speech within that forum. The government can open a public space that is not a traditional public forum for speech and can limit the availability of that designated space to some speakers or for speech of a certain type.

A limited public forum exists when the government does not *intentionally* designate a public space for limited speech purposes, but generally allows a specific type of speech or speakers. In a limited public forum, the limitations on speech are inferred from the actual practice and use permitted by the governmental owner. In such forum, speech restrictions are upheld only if they are reasonable and viewpoint neutral.⁵¹

The distinction between a limited and designated public forum is the muddiest area of the public forum doctrine because courts sometimes use them distinctly and other times interchangeably.⁵² Conceptually they can be separated, as done above, but the courts are not as precise and consistent in terminology as this Comment seeks to be. The imprecise and inconsistent use of terminology makes determining the appropriate standard of review for a particular space difficult and subject to dispute.⁵³ For example, a limited public forum can sometimes appear to be like a nonpublic forum when a particular type of speech is banned entirely. As a result, a court may erroneously apply the standard of review for a nonpublic forum, resulting in minimal First Amendment protections.⁵⁴ Thus, speech in a designated public forum, if mistakenly referred to as a limited public forum, faces the risk of losing its virtually full protection, as the restrictions in a designated public forum are akin to those applied in a traditional forum.⁵⁵ And in effect, it will be afforded only limited protections.

This Comment seeks to alleviate some of the confusion by making strict but necessary distinctions between forums. This Comment uses the term “non-limited public forum” to describe forums uniquely

51. *Rosenberger v. Rector & Visitors of the Uni. of Va.*, 515 U.S. 819, 829 (1995).

52. Stephen Douglas Bonney, *The University Campus as Public Forum: The Legacy of Widmar v. Vincent*, 81 UMKC L. REV. 545, 550 (2013).

53. Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2161 (2009) [hereinafter “Strict Scrutiny”]. The use of imprecise terminology leads to inconsistent forum analysis.

54. See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1182 n.96 (4th ed. 2011) (“It is possible the Court is collapsing this [non-public forum] category into ‘limited public forums,’ but the problem is that it confuses places open to some speech with those closed to all speech activities.”).

55. “The implications of which of these concepts [from *Perry*] should govern the middle forum are substantial: one elevates the middle forum to a status equivalent to the traditional public forum, while the other protects speech no more than in nonpublic for[um].” *Strict Scrutiny*, *supra* note 53, at 2146.



distinct from limited public forums because there are seemingly no limitations on speech yet they resemble general designated public forums, despite the absence of formal designation. That is, a non-limited public forum is a public forum by nature. It is not traditionally open for speech purposes and lacks formal government designation, however the nature of the space permits speech of all types, contrary to a regular limited public forum. Thus, the nature of the space resembles a designated public forum and should be subject to the same restrictions – narrowly tailored to achieve a compelling state interest.

Public universities consist of all types of public forums, including non-limited public forums. Public universities are said to be “microcosm[s] of the community, and . . . contain a variety of for[ums].”⁵⁶ “Much like a small city, college campuses cater to a variety of pursuits including education, relaxation, athletic competition, and commercial business, among others.”⁵⁷ In catering to each pursuit, the campus of a state university consists of school grounds, classrooms, lecture halls and stadiums – all of which have characteristics of different forums. Each area of the campus has different attributes, thus different forum rules.

First, school university grounds have physical aspects that resemble a traditional public forum. For example, the public has continual access to open areas at all times.⁵⁸ In fact, there are certain spaces in which schools encourage individuals to gather and relax in the open.⁵⁹ For instance, open fields or university sidewalks. Those areas are generally subject to the same standard of review as any other traditional public forum.

A university classroom however, is a limited public forum by government designation, and therefore subject to reasonable, viewpoint neutral restrictions. The college classroom, fundamentally, is a “marketplace of ideas.”⁶⁰ Thus, for a free trade of ideas to occur, students must be allowed to speak and act freely upon their beliefs.⁶¹ For example, in *West Virginia State Board of Education v. Barnette*, a state

56. Nathan Kellum, *If It Looks Like a Duck . . . Traditional Public Status of Open Areas on Public Universities*, 33 HASTINGS CONST. L.Q. 1, 36 (2005).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Healy v. James*, 408 U.S. 169, 180–81 (1972).

61. *See Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (“Moreover, the capacity of a group or individual “to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.”); *Healy*, 408 U.S. at 171.



law requiring students to salute the flag during the Pledge of Allegiance was declared unconstitutional because the law required students to involuntarily accept a patriotic belief.⁶²

Public universities also have spaces, other than the classroom, that are limited public forums where the university may impose more restrictions on speech. In *Widmar*, the Court considered whether a public university may close the student center meeting room to a student group desiring to use the facilities for religious worship and religious discussion.⁶³ The university had a long practice of letting students use university meeting rooms for student group activities.⁶⁴ A university religious group named Cornerstone regularly sought and received permission to conduct its meetings in University facilities until the university decided otherwise based on a regulation that prohibited the use of University buildings or grounds “for purposes of religious worship or religious teaching.”⁶⁵ The Court found that the student center meeting room, where Cornerstone regularly conducted their meetings, was a limited public forum, which could be restricted to students for limited purposes.⁶⁶

Even nonphysical areas within a public university campus can be considered limited public forums, regardless of specific designation as such. In *Rosenberger*, University of Virginia’s Student Activities Fund, which funds printing costs for a variety of student publications, was found to be a limited public forum.⁶⁷ The University of Virginia refused to grant a Christian student organization funding because the organization’s newspaper expressed a particular religious belief that the university did not want to be construed as their own.⁶⁸ The Court determined that the Student Activities Fund was a limited public forum “more in a metaphysical than in a spatial or geographic sense”

62. *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Although the constitutional issue in *Barnette* involved a secondary school rather than a public university, as this Comment deals with, nor was it analyzed using the public forum doctrine, this case best illustrates the necessity for students to speak and act freely upon their beliefs in an educational setting to facilitate the classroom as a “marketplace of ideas.”

63. *Widmar*, 454 U.S. at 264–65.

64. *Id.* at 265.

65. *Id.*

66. *Id.* at 267. However, the Court ultimately held that the university could not allow students to meet for academic, social, or political purposes, but not for religious purposes.

67. *Rosenberger v. Rector and Visitors of the Uni. of Va.*, 515 U.S. 819, 829–30 (1995).

68. Specifically, because the newspaper “primarily promote[d] or manifest[ed] a particular belief(s) in or about a deity or an ultimate reality.” *Id.* at 825.



which could regulate speech based on its general subject matter – religion – but not in the perspective on that subject matter.⁶⁹

In *Christian Legal Society v. Martinez*, a group of students were barred from excluding other students from their organization on the basis that the organization was a limited public forum.⁷⁰ The students argued that included in their right to association is the negative right to not associate with any particular group of people they choose.⁷¹ However, the University had an all-comers policy, which required that all student organizations be open to all students and therefore denied the society access to the school-sponsored forums because the student organization did not comply with the all-comers policy.⁷² Relying on the public forum doctrine, the Court held that the University’s all-comers policy was a reasonable, viewpoint neutral condition on access to the student-organization forum, consistent with that of a limited public forum.⁷³ Therefore, the policy was upheld.⁷⁴

Other areas of the university campus that are considered limited public forums include auditoriums and lecture halls. In one instance, a university removed a politically adamant attendee from a lecture on the war in Iraq at the community college’s lecture hall on the basis that the lecture hall was a limited public forum, where a university may restrict exclusive viewpoints.⁷⁵

Likewise, sports facilities on public university campuses – similar to sports facilities in general – are most often deemed limited public forums or nonpublic forums, where administration is permitted to restrict speech such as protest speech. In *Int’l Soc. of Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority*, the court held that the sports facility where professional teams, New York Giants and the Cosmos Soccer Club, play – the Meadowlands Sports Complex, was not designed, built, intended, or used as a public forum.⁷⁶ A religious organization challenged the New Jersey Sports and

69. *Id.* at 829–30.

70. *See* *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 673–74 (2010).

71. *Id.* at 679–80.

72. *Id.* at 667–68.

73. *Id.* at 697.

74. *Id.* at 698.

75. *See* *Hickok v. Orange Cty. Cmty. Coll.*, 472 F. Supp. 2d 469, 475 (S.D.N.Y. 2006) (“The College’s policy of prohibiting events if they “take . . . sides,”[. . .] is a “blanket exclusion” as it does not discriminate against any speaker’s viewpoint to the advantage of another speaker’s viewpoint. Under this policy, the College would not hold an event promoting the exclusive viewpoints advocated by the Republican, Democratic, or Green parties.”).

76. *Int’l Soc. for Krishna Consciousness, Inc. v. N.J. Sports and Exposition Auth.*, 691 F.2d 155, 158 (3d Cir. 1982).



Exposition Authority's policy that prohibited outside organizations from soliciting money at the stadium in the Meadowlands Sports Complex.⁷⁷ Even though the stadium was used primarily for Giants and Cosmos games, while occasionally used for religious conventions and commencement programs, the court decided that a stadium was distinguishable from a theatre or auditorium, without basis.⁷⁸ The court reasoned that the stadium complex was distinguishable from designated public forums like theatres and auditoriums, which are designed "for the primary purpose of public communication . . . and . . . as a place for the exchange of views," while the stadium was designed only as a commercial venture to bring economic benefits to Northern New Jersey.⁷⁹

Likewise, in *Hubbard Broadcasting Inc. v. Metropolitan Sports Facilities Commission*, the government-owned Metrodome – home of the professional sports teams, Minnesota Twins and Minnesota Vikings – was not a public forum because it was only intended to provide sports facilities, not to serve as a space for freedom of expression.⁸⁰ The court specifically looked at whether advertising space within the Metrodome was a public forum rather than the Metrodome as a whole.⁸¹ The court concluded that the city did not intend to designate a public forum by selling advertising space on the scoreboard using a similar analysis to that used in *Krishna Consciousness*.⁸²

In a case that reached the opposite result, the court in *Stewart v. D.C. Armory Board* held that the stadium at issue may be a public forum based on its operation and designation.⁸³ If such were generally true, "[t]he public forum itself is likely limited only to the grandstand within the government-owned facility,"⁸⁴ which primarily

77. *Id.*

78. *Id.* at 158, 161. The court plainly stated that a stadium was distinguishable from a theatre or auditorium without providing any support although an argument can be made to the contrary, as a stadium, theatre, and auditorium are all used for entertainment purposes.

79. *Id.* at 161.

80. *Hubbard Broad, Inc. v. Metro. Sports Facilities Comm'n*, 797 F.2d 552, 555 (8th Cir. 1986).

81. *Id.*

82. *Id.* at 556 (using similar language as in *Krishna Consciousness* stating "[t]he Metrodome is not a place of public assembly intended for the communication of ideas or for the exchange of different points of view. Rather, it is a commercial venture by the city constructed to meet the need for a major sports facility.")

83. *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1021 (D.C. Cir. 1988) (*Stewart II*).

84. Nick DeSiato, *Silencing the Crowd: Regulating Free Speech in Professional Sports Facilities*, 20 MARO. SPORTS L. REV. 411, 423 (2010).



consists of speech and expression related to the sporting event. Thus, this is an illustration of a limited public forum by implication.

Although previous courts consider sporting facilities to be limited public forums or nonpublic forums, courts have repeatedly stated that the determinative factor for whether government-owned property is a public forum is the nature of the property or how it is used.⁸⁵

The variety of speech that pervades public university sports facilities calls into question the “limited” nature of the space. Sporting facilities exist primarily for the public consumption of sporting activities, thereby reasonably allowing sport-related speech. However, sporting facilities also consist of a variety of unrelated speech such as religious speech, political speech, and commercial speech. The overwhelming presence of speech, specifically that unrelated to the sporting activity, highlights the true nature of the space – for general expression.

First, sports facilities consist of speech related to the sporting contest. “Speech about sport is uniquely fit for this place” as it is what brought patrons to this place.⁸⁶ In most instances, the expressive speaker is a fan.⁸⁷ Many scholars refer to fan speech as cheering speech – “the expression that occurs at, and surrounds, sport.”⁸⁸ Cheering speech includes support, praise, and encouragement for the home team or opposition, trash-talking, and taunts toward the opposing team. It can be verbal, symbolic, or expressive. Cheering speech can be directed towards players, coaches, officials or other fans. It can be loud or even obnoxious.⁸⁹

Cheering speech takes on many forms, through expressive signs, t-shirts, and other paraphernalia. In today’s sports-crazed society, signs and t-shirts are almost unavoidable in a sports stadium.⁹⁰

Additionally, religious speech has found its way into the sports realm. In *Aubrey v. City of Cincinnati*, at the 1990 World Series, a

85. *Hubbard*, 797 F.2d at 554–55; *Int’l Soc. for Krishna Consciousness, Inc. v. New Jersey Sports & Exposition Auth.*, 691 F.2d 155, 158 (3d Cir. 1982) (“The extent to which the Government can control access depends on the nature of the relevant forum.”).

86. *See DeSiato*, *supra* note 84 at 423 (“A stadium, for example, is an outdoor, open space. It is generally open to the public, indiscriminately inviting patrons with tickets to be a spectator of the game.”). This would suggest that the property is designed for the use and enjoyment of the public. *See also* Howard M. Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 532 (2006).

87. *See Wasserman*, *supra* note 86 at 555. Sports fandom is an American phenomenon.

88. *Id.* at 527; Kaufman, *supra* note 14 at 1237.

89. Kaufman, *supra* note 114 at 1237.

90. Tim Layden, *We are What We Wear: How Sports Jerseys Became Ubiquitous in the U.S.*, SPORTS ILLUSTRATED (Feb. 1, 2016), <http://www.si.com/nfl/2016/02/01/mlb-nba-nhl-sports-jersys-rise-popularity>.



baseball fan brought a sign into the stadium that read “John 3:16,” a Christian bible verse.⁹¹ Moreover, former NFL quarterback, Tim Tebow, regularly displayed religious expression while a college quarterback at the University of Florida. Tebow was a talented collegiate player, known for his religious convictions. On game days, Tebow faithfully wore black eye patches that had “Philippians 4:13” written on them, a Christian bible verse, which reads, “I can do all things through Christ who strengthens me.”⁹² Further, Tim Tebow is widely-known for “tebowing” – kneeling in the end zone for prayer, an act he started while he was still at University of Florida.⁹³

Commercial speech has also found its way into the sports sphere. Most public universities with well-known sports programs have commercial speech throughout the stadium such as on-field advertisements from major beverage companies or jumbotrons and scoreboards sponsored by local businesses. Players even find themselves as walking billboards for certain large corporations. Many universities have sponsorship relationships with companies such as Nike and Under Armour, which supply apparel for the university’s athletic teams. The contract agreement requires that coaches, players and staff wear the brand exclusively to all practices, games, exhibitions, clinics and any team or university organized activities.⁹⁴ Therefore, on game days especially, the team jerseys convey commercial speech.

Moreover, political content pervades sports facilities. For example, stadiums and arenas have seen speech coming from the players, coaches, and staff such as wearing pink uniforms or armbands in the month of October to show support for breast cancer awareness. In 2014, Georgetown University’s men’s basketball team wore “I Can’t Breathe” t-shirts during pregame warmups, after the killing of Eric Garner, to accentuate the issue of police violence against African

91. Facility managers decided to confiscate the banner during the game. The court later found that the banner policy, permitting fans to hang signs only if they were in “good taste,” was substantially vague and overbroad. *Aubrey v. City of Cincinnati*, 815 F. Supp. 1100, 1104 (S.D. Ohio 1993).

92. Michael DiRocco, *Fans to Honor Tebow with Eye-Black*, JACKSONVILLE (Nov. 27, 2009 12:01 AM), <http://www.jacksonville.com/2016-03-05/stub-521>; see *Philippians* 4:13 (New King James).

93. *Tim Tebow Prevails in Trademarking “Tebowing,”* USA TODAY (Oct. 19, 2012, 09:28 PM), <http://www.usatoday.com/story/sports/nfl/2012/10/19/tim-tebow-trademarks-tebowing/1645333/>.

94. See, e.g., *Arizona State Nike Sponsorship Agreement*, <http://media.oregonlive.com/pac10/other/Arizona-State-Nike-Sponsorship.pdf> (last visited Jan. 10, 2018).

Americans in America.⁹⁵ While these displays illustrate political commentary through clothing, politics has invaded sport spaces for decades through song.⁹⁶ Dating back to the 1918 World Series and in response to World War I, baseball games have begun with a rendition of the “Star Spangled Banner.”⁹⁷ Nowadays, almost every sporting event, professional or amateur, starts with the playing of the national anthem.

The presence of various types of speech in a sporting facility, such as cheering speech, commercial speech, religious speech and political speech destroys the limited nature of that space. Because a public university sporting facility is used for not only sports-related speech, but other forms of expressive speech, the space can be reasonably construed as a public forum.

Furthermore, the court in *Krishna Consciousness*, even conceded that sporting facilities have a general expressive nature by stating that “once there, [patrons] are free to speak with anyone they choose and upon any topic, whether it be religion, politics, the merits of the Giants’ and Cosmos’ opponents, or a ‘hot tip in the fifth race.’ They are free to wave pennants or wear clothes that demonstrate a point of view.”⁹⁸ Thus, the overwhelming presence of unrelated speech in sports facilities qualifies the space to be a non-limited public forum.

Furthermore, acquiescence or failure to regulate the presence of unrelated speech and expression in a government-owned property is another way to create a non-limited public forum, despite the absence of formal designation or intent. In *Stewart v. D.C. Armory Board*, the court held that the stadium at issue may be a public forum when the authorities failed to regularly regulate the presence of religious banners in RFK Stadium in Washington, D.C.⁹⁹ The question presented to the court was whether a public stadium was a public forum for ex-

95. Eamonn Brennan, *Hoyas Latest to Don Protest Shirts*, ESPN (Dec. 10, 2014), http://www.espn.com/mens-college-basketball/story/_id/12012164/georgetown-hoyas-wear-breathe-t-shirts. The Notre Dame women’s basketball team also wore “I Can’t Breathe” shirts. See *Notre Dame Women Wear “I Can’t Breathe” T-shirts*, SAN DIEGO UNION TRIBUNE (Dec. 13, 2014, 10:11 AM), <http://www.sandiegouniontribune.com/sdut-notre-dame-women-wear-i-cant-breathe-t-shirts-2014dec13-story.html>.

96. The national anthem – a musical selection performed in the presence of the national flag — is a form of politics because it is a patriotic symbol, representing a love for the country, including the activities of our governing body.

97. DeSiato, *supra* note 84, at 432.

98. *Int’l Soc. for Krishna Consciousness, Inc. v. New Jersey Sports & Exposition Auth.*, 691 F.2d 155, 158 (3rd Cir. 1982).

99. *Stewart v. D.C. Armory Bd.* (Stewart I), 789 F. Supp. 402, 405 (D.D.C. 1992).



pressive conduct such as signage.¹⁰⁰ This inquiry required the court to look at the government's intent in establishing and maintaining the property. "Intent is not merely a matter of stated purpose; rather, it is . . . a matter to be inferred from a number of factors:" (1) the stated intent of the government in funding the facility, (2) the compatibility of the facility with the contested expressive activity, and (3) whether the facility utilized a consistent policy and practice in regulating such activity.¹⁰¹

One of the determining factors in deeming a stadium a public forum was the third factor, whether the facility utilized a consistent policy and practice in regulating such activity. The Armory Board stated that it had a consistent policy and practice since 1990 to remove signs that do not comply with its regulation, though there was evidence in the record to the contrary.¹⁰² As put by the appellate court, "mere statements of policy, if consistently contradicted by practice, are not dispositive."¹⁰³ The plaintiff, Stewart, had displayed those religious signs for several years, and the Armory Board, despite its policy of regulating non-event-related signs, failed to remove such signs in the past.¹⁰⁴ Despite the lack of objective indicia of intent to create a public forum, the court found the stadium to be a public forum because the stadium did not regulate the presence of expression unrelated to the stadium's intended purpose.¹⁰⁵

Similarly, in *Paulsen v. County of Nassau*, a county coliseum, home to a national hockey club, was found to be a public forum based on the county's failure to regulate unrelated speech.¹⁰⁶ Plaintiffs, Paulsen and Nesselroth, were members of the Christian Joy Fellowship organization, an evangelical group devoted to encouraging bible study.¹⁰⁷ They distributed religious leaflets to all those attending the "Judas Priest" rock concert.¹⁰⁸ County police officers addressed Paulsen stating that he was not permitted to distribute such material in the coliseum and asked him to leave the premise.¹⁰⁹ Paulsen refused, was

100. *Id.*

101. *Stewart v. D.C. Armory Bd. (Stewart II)*, 863 F.2d 1013, 1016-17 (D.C. Cir. 1988).

102. *Stewart I*, 789 F. Supp. at 405.

103. *Stewart II*, 863 F.2d at 1021.

104. *Stewart I*, 789 F. Supp. at 404.

105. *Id.* at 405.

106. *Paulsen v. County of Nassau*, 925 F.2d 65, 70 (2d Cir.1991).

107. *Id.* at 67.

108. *Id.*

109. *Id.*

arrested and his leaflets were confiscated.¹¹⁰ The question of whether the coliseum was a public forum was a matter of county intent. The court looked at the same three factors set up in *Stewart* to determine whether the county coliseum was a public forum. In addressing the three factors, one of the judges noted that the county failed to demonstrate a consistent practice of limiting noncommercial, expressive activity.¹¹¹ The court ruled that while the county had not intended the coliseum to be a public forum, the county's failure to limit expressive activity classified the coliseum as a public forum.¹¹²

Accordingly, a public university's sports facility can become a non-limited public forum when universities acquiesce to the various types of speech, such as religious and commercial speech, that occur within the space, therefore, subject to the same restrictions as a designated public forum. As such, the presence of, and acquiescence to, the various types of speech within a public university sports facility permits other types of speech, such as protest speech.

II. PROTEST SPEECH AS PROTECTED EXPRESSIVE CONDUCT

Political protest speech is a category of speech society and the Court believe is reasonable to protect because it expresses matters of public concern central to our democracy and limiting government power. Political protest speech can be form of expressive conduct such as the national anthem protests. Expressive conduct is conduct that communicates a message or idea.¹¹³ For instance, the conduct may be raising a fist to show black power or wearing a "Black Lives Matter" t-shirt. Mere conduct is not protected under freedom of expression; the conduct must be expressive. Conduct falls within First Amendment protections when "an intent to convey a particularized message was present, and [. . .] the likelihood was great that the message would be understood by those who viewed it."¹¹⁴

The seminal cases on expressive conduct, *Cohen v. California* and *United States v. O'Brien*, illustrate the distinction between regulating mere conduct versus conduct that is expressive. In *Cohen*, a nineteen-year-old man, walked into a courthouse wearing a jacket imprinted

110. *Id.*

111. *Id.* at 70.

112. *Id.*

113. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

114. *Id.*



“Fuck the Draft” to show his discontent with the Vietnam War.¹¹⁵ He was arrested for violating a California law that prohibited disturbing the peace by offensive conduct.¹¹⁶ Cohen was not being punished for his conduct of wearing the jacket, otherwise many others wearing jackets would likely be punished too. Instead, he was being punished only for the message expressed on the jacket. The Court held that it is impermissible for states to punish public use or display of expletives without a more specific and compelling reason than a general tendency to disturb the peace.¹¹⁷

In contrast to *Cohen*, in *United States v. O'Brien*, O'Brien publicly burned his draft registration card in front of a courthouse as a part of an anti-war protest.¹¹⁸ He was then arrested and convicted for destruction of a draft card.¹¹⁹ The Court found that the First Amendment protections did not apply because the government was not targeting O'Brien's message of anti-war; they were targeting the conduct of burning the draft card.¹²⁰ At that time, during the 1960s, possession of an intact draft card was necessary, pursuant to the Universal Military Training and Service Act – also called the Selective Service Act. Therefore, O'Brien was convicted for his conduct of burning the draft card, despite having an expressive purpose behind it.¹²¹

Protest speech is a form of expressive conduct as demonstrated in *Cohen* and, in the school context, in *Tinker v. Des Moines Independent Community School District*. In *Tinker*, students wore armbands to school to show their support for a truce in the Vietnam War.¹²² Disagreeing with the student's actions, the principal of the school sent the students home for their expression.¹²³ The Court subsequently found that the type of expression exhibited by these individuals was protected expression by their First Amendment right to free speech.¹²⁴

When the conduct conveys a message, the speech cannot be restricted based on its content. Otherwise, the appropriate standard of

115. *Cohen v. California*, 403 U.S. 15, 16 (1971).

116. *Id.*

117. *Id.* at 26.

118. *U.S. v. O'Brien*, 391 U.S. 367, 369–70 (1968).

119. *Id.* at 369.

120. *Id.* at 382.

121. *Id.* at 376.

122. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

123. *Id.*

124. *Id.* at 505–06.



review is strict scrutiny, where speech restrictions must be narrowly tailored to achieving a compelling interest.¹²⁵

Content-based regulations are those specifically targeting the topic or subject matter of the speech.¹²⁶ Regulations may be deemed to regulate content facially, based on governmental intent or purpose, or on how they are applied.¹²⁷ For instance, a regulation is content-based when the regulation cannot be justified without reference to the content of the regulated speech, the regulations were adopted by the government because of disagreement with the message the speech conveys, or the regulations are applied to improperly target content.¹²⁸ Content-based regulations are presumptively invalid.¹²⁹ On the other hand, laws that indiscriminately regulate speech based on its message are content-neutral and are subject to lesser scrutiny.¹³⁰

The Court in *Reed v. Town of Gilbert* dealt with the distinction between content based and content-neutral. In *Reed*, a town adopted a code prohibiting the display of outdoor signs without a permit.¹³¹ The code exempted categories of signs from that requirement.¹³² Each category, which were divided by the type of message conveyed, was subjected to different restrictions.¹³³ The Court found that this type of regulation, one related to the message conveyed, was content-based because it singled out specific subject matter for differential treatment.¹³⁴

A subset of content-based regulations is viewpoint regulations. “[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”¹³⁵ The Supreme Court reinforced the prohibition on viewpoint discrimination in its 2017 opinion, *Matal v. Tam*. In *Matal*, a rock-band, consisting of Asian-American members, filed a trademark application

125. JAMAR, *supra* note 15, at 902.

126. *Id.*

127. *Id.*

128. *Id.* On the contrary, restrictions on speech are permissible if it is content-neutral.

129. *Reed v. Town of Gilbert*, Ariz., 135 S. Ct. 2218, 2226 (2015).

130. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 643 (1994); *see e.g.*, *Ward v. Rock*, 491 U.S. 781, 803 (1989) (finding that a noise regulation designed to ensure that musical performances of any type did not disturb surrounding residents was content neutral and did not violate the First Amendment).

131. *Reed*, 135 S. Ct. at 2224.

132. *Id.*

133. *Id.* at 2224–25.

134. *Id.* at 2231.

135. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017).



with the Patent and Trademark Office to register their group name, The Slants.¹³⁶ The term “slants” is a derogatory term used for Asians. The band’s application was denied because it violated a federal law that prohibited trademarks that disparaged any persons.¹³⁷ The Court held that this provision was inconsistent with the protections of the Free Speech Clause of the First Amendment.¹³⁸ While the disparagement “clause evenhandedly prohibits disparagement of all groups . . . [i]t denies registration to any mark that is offensive to a substantial percentage of the members of any group.¹³⁹ But in the sense relevant here, that is viewpoint discrimination: offensiveness is a viewpoint.¹⁴⁰

Protest speech is typically a viewpoint because by definition, protests express disapproval of or objection to something.¹⁴¹ For example, the national anthem protests in public university sports stadiums and arena express a viewpoint: discontent with police conduct toward African Americans. Student-athletes express this viewpoint by “taking a knee” during the rendition of the national anthem. Historically, patrons in a sports facility stand for the national anthem to salute the flag, which represents the freedoms fought for all men¹⁴² in America.¹⁴³ However, when those freedoms do not apply to all people the same, specifically as it relates to police and race relations, it is reasonable to predict some will take action in opposition.

It is no secret that public universities allow speech that supports the message that the flag stands for, as the national anthem is played at the beginning of almost every sporting event and all those present are expected to stand in salute.¹⁴⁴ Thus, speech that opposes the message associated with the flag cannot be restricted or would otherwise be viewpoint discrimination. This restriction on speech would be similar to allowing cheering speech from the home-team but prohibiting boo-ing from the opposing team, simply because there are differing

136. *Matal*, 137 S. Ct. at 1751.

137. *Id.*

138. *Id.* at 1765.

139. *Id.* at 1763.

140. *Id.*

141. *Protest*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/protest> (last visited Mar. 12, 2018 8:25 AM).

142. The use of men in this context refers to all people, although it is widely-known that not all freedoms were extended the same to women and blacks in American history.

143. See 36 U.S.C. § 171 (1993) (requiring that “all present except those in uniform should stand at attention facing the flag with the right hand over the heart”). See Jane Hampton Cook, *5 Reasons We Stand for the Flag*, THE HILL (Sept. 29, 2017, 1:00 PM), <http://thehill.com/opinion/white-house/353087-5-reasons-we-stand-for-the-flag>.

144. § 171.



viewpoints on the same subject. While restrictions on viewpoint are presumptively unconstitutional, the government may restrict speech that is insulting or fighting words that tend to incite violence or an immediate breach of the peace.¹⁴⁵ However, speech may not be restricted simply because it is offensive or discomforting.¹⁴⁶ The national anthem protest by student-athletes may be offensive or discomforting to some, but is a silent protest that does not incite violence or cause a breach of the peace.¹⁴⁷

While public university sports facilities implicitly invite protest speech, this invitation does not automatically apply to student-athletes. The Supreme Court has found that because student-athletes voluntarily participate in school athletics, they subject themselves to higher constitutional limitations.¹⁴⁸ This limitation includes student-athletes' First Amendment rights.¹⁴⁹ For example, university administration may restrict student-athletes from protesting the national anthem, thereby requiring them to stand.

Requiring that student-athletes stand for the national anthem forcibly compels support for a different viewpoint. At the core of the First Amendment is the protection not only of the right to speak, but the right to refrain from speaking at all.¹⁵⁰ Compulsory speech is outside of the purviews of the First Amendment. To regulate the national anthem protest is identical to the compulsory flag salute in *West Virginia State Board of Education v. Barnette*,¹⁵¹ which the Court found to be invalid:

[T]he compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or

145. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

146. *Virginia v. Black*, 538 U.S. 343, 358 (2003); *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

147. *See e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

148. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995); *see also* Meg Penrose, *Outspoken: Social Media and the Modern College Athlete*, 12 J. MARSHALL REV. INTELL. PROP. L. 509, 514 (2013) (explaining that since there is no constitutional right to participate in school athletics, college coaches and state universities have long prohibited certain speech and conduct as part of the privilege of participating in state supported athletics).

149. *See Lowery v. Euverard*, 497 F.3d 584, 594 (6th Cir. 2007); *Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 772 (8th Cir. 2001). This principle extends to university students as well. Penrose, *supra* note 148 at 540.

150. *See W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

151. *Supra* note 62 for brief facts of the case.



other matters of opinion or force citizens to confess by word or act their faith therein.¹⁵²

Furthermore, “compelling the flag salute and pledge transcends constitutional limitations . . . [and] purpose of the First Amendment.”¹⁵³

However, given the nature of the relationship between student-athletes and administration,¹⁵⁴ such compulsion is likely permissible. A university may restrict, thereby compelling opposing speech, when there is a substantial likelihood that the student-athlete’s speech will materially disrupt the team’s objectives.¹⁵⁵ These objectives include team unity, discipline, and on-field success.¹⁵⁶

The national anthem protests for example, could disrupt any one of these objectives. First, disruption occurs when a team cannot function as a unit.¹⁵⁷ If all of the members of the team do not stand for the national anthem or all do not take a knee, the team may no longer function as a unit, thereby disrupting team unity. Additionally, the protests could disrupt the coach’s ability to maintain authority and discipline because “the coach’s will is paramount.”¹⁵⁸ Should a coach require a student-athlete to stand for the national anthem, any action to the contrary would go against the coach’s will. Lastly, the national anthem protests could affect the on-field success of the team if, for instance, it leads to star players being removed from the team or benched for insubordination to the coach’s will.

152. *Barnette*, 319 U.S. at 633, 642.

153. *Id.* at 642.

154. The nature of the school-athlete-administration relationship resembles the employer-employee relationship. *See Lowery v. Euverard*, 497 F.3d 584, 597 (6th Cir. 2007) (“Just as the government’s interest in running an effective workplace can in some circumstances outweigh employee speech rights . . . so too can an athletic league’s interest in enforcing its rules sometimes warrant curtailing the speech of its voluntary participants.”).

155. *Wildman v. Marshalltown Sch. Dist.*, 249 F.3d 768, 771 (8th Cir. 2001) (“[Coach is responsible for providing] an educational environment conducive to learning team unity and sportsmanship and free from disruptions and distractions that could hurt or stray the cohesiveness of the team.”); *e.g.*, *Doe v. Silsbee Indep. Sch. Dist.*, 402 Fed. Appx. 852, 852 (5th Cir. 2010) (upholding a cheerleader’s dismissal from the cheerleading team when she refused to cheer for her alleged rapists who played on the basketball team because her silence was a substantial disruption of the work of the school); *see also Wildman*, 249 F.3d at 772 (finding that a student-athlete’s letter to her teammates discussing discontent with her coach was not a violation of her First Amendment rights rather insubordination to the coach’s authority, a form of disruptive behavior).

156. *See Lowery*, 497 F.3d at 589 (discussing the goals of an athletic team by stating that “students may participate in extracurricular sports for any number of reasons: to develop discipline, to experience comradery and bonding with other students, for the sheer “love of the game,” etc. [. . .] However, the immediate goal of an athletic team is to win the game[.]”).

157. *See generally id.* at 599.

158. *Id.* at 589.



Student-athletes have been compelled to represent beliefs contrary to their protest efforts. In 2015, the University of Missouri's football team threatened to boycott all football-related activities until, then-university system president, Tim Wolfe, resigned or was fired.¹⁵⁹ This came in response to President Wolfe's handling of allegations and evidence of racism on campus.¹⁶⁰ The university stood to lose close to \$1 million had the team not played its upcoming game against Brigham Young University.¹⁶¹ In response to the boycott and the potential loss of significant revenue, state legislators proposed a bill that would strip athletic scholarships of those athletes who refused to play for reasons unrelated to health.¹⁶² This protest would disrupt on-field success, one of the team's objectives. Missouri state representative, Kurt Bahr, admitted that the bill was a direct reaction to the football team boycott, and added "if they're going to receive state money, there are going to be ramifications."¹⁶³

Although universities may constitutionally regulate protest speech and compel speech to the contrary, student-athlete protests and other activism initiatives must be protected via other viable alternatives.

III. STUDENT-ATHLETE PROTEST SPEECH IS WORTHY OF FIRST AMENDMENT PROTECTION

Student-athlete protest speech, like the national anthem protests for instance, is important and relevant speech worthy of protection. The social and political climate is so incongruent with the guarantees of the Constitution and principles on which this country stands that protest speech is the catalyst to necessary change.

For example, the national anthem protests served to call attention to police brutality that disproportionately affects African Americans. An important aspect of the social climate for one protesting racial in-

159. Two days later, President Wolfe resigned. Rohan Nadkarni & Alex Nieves, *Why Missouri's Football Team Joined a Protest Against School Administration*, SPORTS ILLUSTRATED, (Nov. 9, 2015), <http://www.si.com/college-football/2015/11/09/missouri-football-protest-racism-tim-wolfe>.

160. *Id.*

161. Marc Tracy & Ashley Southall, *Black Football Players Lend Heft to Protests at Missouri*, N.Y. TIMES, (Nov. 8, 2015), <https://www.nytimes.com/2015/11/09/us/missouri-football-players-boycott-in-protest-of-university-president.html>.

162. *A Proposed Missouri Bill Would Revoke Scholarships of Athletes Who Refuse to Play for any Reason Unrelated to Health*, SPORTS ILLUSTRATED, (Dec. 14, 2015), <http://www.si.com/college-football/2015/12/14/missouri-bill-revoke-scholarships-athletes-refuse-play>.

163. *Id.*



justice is the Black Lives Matter movement. The Black Lives Matter movement, created in 2012, after the killing of Trayvon Martin and his killer's acquittal, works to "(re)build" black liberation.¹⁶⁴ Although the Black Lives Matter movement advocates for the dismantling of all forms of systemic racism against blacks, one in particular is the extrajudicial killing of blacks by police.¹⁶⁵ Studies show that excessive use of force against African Americans is a regular occurrence.¹⁶⁶ In 2017, black people accounted for approximately twenty-seven percent of those killed and thirty-seven percent of those who were unarmed despite being only thirteen percent of the population.¹⁶⁷ A study of police killings in 2017 found that "[b]lack people were more likely to be killed by police, more likely to be unarmed and less likely to be threatening someone when killed."¹⁶⁸ In 2016, the United Nations released a report, the same week that two African Americans men were shot dead by police in America, stating that:

The killings . . . demonstrate a high level of structural and institutional racism. The United States is far from recognizing the same rights for all its citizens. It is time, now, for the U.S. Government to strongly assert that black lives matter and prevent any further killings as a matter of national priority.¹⁶⁹

Police brutality is an issue that has plagued African Americans for centuries, and student-athletes can use their influence and widespread audience in a public university sports facility to bring attention to the serious issue of systemic racism facing America.

Furthermore, speech made within the confines of a public university, in a classroom or a public university sports facility, have significant value in advancing ideologies. This idea is reinforced in *Shelton v. Tucker*: "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."¹⁷⁰ "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teach-

164. See BLACK LIVES MATTER: HERSTORY, <http://blacklivesmatter.com/about/> (last visited Jan. 10, 2018).

165. See *id.*

166. Jacques Baudrier, *UN Condemns This Week's Deadly Gun Violence in US*, UN NEWS, (July 8, 2016), http://www.un.org/apps/news/story.asp?NewsID=54418#.V_vKxWVpCRt.

167. Michael Harriot, *Here's How Many People the Police Killed in 2017*, THE ROOT, (Jan. 2, 2018, 11:26 AM), <https://www.theroot.com/heres-how-many-people-police-killed-in-2017-1821706614>.

168. 2017 POLICE VIOLENCE REPORT, <https://policeviolencereport.org> (last visited Jan. 07, 2018).

169. Baudrier, *supra* note 166.

170. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

ers concerned and that freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.¹⁷¹

Justice Holmes's notion of a university as a marketplace of ideas¹⁷² extends beyond the classroom, into all areas of a university campus.¹⁷³

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.¹⁷⁴

Furthermore, “[students] may not be confined to the expression of those sentiments that are officially approved.”¹⁷⁵

Since this nation values student speech and more broadly, speech that occurs on school grounds, student-athlete protest speech is worthy of protection. Student-athletes should not be reprimanded or penalized for speaking adamantly on social or political concerns that affect their country or communities. These brave student-athletes' interests can be protected by expanding constitutional court interpretation of student-athlete rights and state legislation.

First, the court-imposed limitations on student-athlete speech¹⁷⁶ should be expanded when the speech serves the public good.¹⁷⁷ Student-athlete political protests, like protest speech in general, have a societal benefit. Political protests engage the larger community, not only those in opposition of what is being protested, but also those in

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

172. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (establishing the notion of “free trade of ideas”).

173. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (Stating that “[t]he principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom” after examining *Shelton* and *Keyishian*).

174. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

175. *Tinker*, 393 U.S. at 511.

176. *See supra* Part I.

177. *See* Edmund Donnelly, Comment, *What Happens When Student-Athletes are the Ones who Blow the Whistle?: How Lowery v. Euverard Exposes a Deficiency in the First Amendment Rights of Student-Athletes*, 43 *NEW ENG. L. REV.* 943, 962 (2009) (suggesting that student-athletes' “limited rights could and should be expanded, since the student-athletes' whistleblower conduct could be seen as beneficial to society.”).



favor, in constructive discourse.¹⁷⁸ Most importantly, political protests hold government forces accountable for their actions. The effectiveness of political protests dates back to the eighteenth century.¹⁷⁹ For instance, the March on Washington for Jobs and Freedoms led by Dr. Martin Luther King Jr., where he gave his infamous “I Have a Dream” speech, is “credited with building support for the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.”¹⁸⁰ Thus, the social benefit that comes from political protests should be a heavily weighted factor in a court’s decision to limit student-athlete speech. Courts should use a balancing test between the disruption caused and the benefit provided before imposing a blanket restriction on student-athlete speech.

Additionally, state legislation can serve as a viable vehicle to protect student-athlete speech. In Illinois, State Senator Napoleon Harris III introduced legislation that would protect student freedom of speech called the Campus Demonstration Act.¹⁸¹ Senator Harris created this piece of legislation in response to University of Missouri’s administrations threat toward its football players to take away athletic scholarships as a result of protesting racial injustices. State Senator Harris believed that “universities should remain strongholds for progress and freedom of speech . . . and [a]ll students have the right to have their voices heard and no administration should be given the authority to silence them.”¹⁸² Illinois State Senator Harris apparently understands the importance of speech and its impact on our larger society.

Furthermore, California has passed legislation to protect students’ speech within public universities. In 1992, California Leonard Law was passed which states that universities cannot discipline students on the basis of speech that would otherwise be protected had it occurred in the public.¹⁸³

178. For example, the March on Washington for Jobs and Freedom in 1963 gave leaders of the movement an opportunity to meet with President Kennedy to discuss their goals. Sarah Begley, *5 Most Influential Protests in History*, TIME, (Mar. 12, 2015), <http://time.com/3741458/influential-protests/>.

179. Allyson Marks, *12 Protests That Changed History*, THE ODYSSEY, (Feb. 2, 2017), <https://www.theodysseyonline.com/protests-that-changed-history>.

180. *Id.*

181. *Harris Introduces Campus Demonstration Act*, ILL. ST. SENATOR NAPOLEON HARRIS III, (Feb. 2, 2016, 5:03 PM), <http://senatornapoleonharris.com/news/90-harris-introduces-the-campus-demonstration-act>.

182. *Id.*

183. Cal. Educ. Code § 66301.



CONCLUSION

For decades, sports have been a political arena to influence diplomatic, social and political relations.¹⁸⁴ “In fact, through integration, Title IX, antitrust cases and legislation, and athletes serving in the military, sports have been a sparkplug for debate about race, gender, judicial fairness, and patriotism.”¹⁸⁵ It is not unusual for athletes to use their influence and their platform to convey their message of social injustice toward African Americans in America.¹⁸⁶ One of the most well-known examples of student-athlete speech is the 1968 Olympics.¹⁸⁷ Olympic track stars, Tommie Smith and John Carlos, stunned the world when they raised their fist as a symbol of black power, during the Olympic Medal Ceremony. This act gave student-athletes the tenacity to be the social activists this country needs.

With the emergence of student-athlete activism, it is important to protect the interest of those individuals. This Comment explores how the free speech public forum doctrine should apply to protect student athletes’ freedom of expression. This Comment offers several suggestions to protect student-athlete protest speech given the university’s ability to compel speech from student-athletes. Student-athletes are protesting serious issues of today and their voices should be heard, expression should be seen, without any repercussions. These suggestions will bring the spirit of the First Amendment to public university sports spaces, where student-athletes can use their influence and widespread audience to highlight the issues of the world without fear of university persecution.

Given the social, economic, and political climate, the days of student-athlete activist is not over. Student-athlete protests will persist so long as there are injustices and inequality present in the world. Accordingly, student-athlete protest speech is worthy of protection and it lies in the hands of legislature.

184. See Mahita Gajanan, *Colin Kaepernick and a Brief History of Protest in Sports*, TIME, (Aug. 29, 2016), <http://time.com/4470998/athletes-protest-colin-kaepernick/>.

185. DeSiato, *supra* note 84, at 432.

186. Gajanan, *supra* note 184.

187. *Id.* John Carlos was a San Jose University student at the time.















