Social Media: The Real Campus Speech Zone

A Learning Resource Informing Institutional Responses and Educational Efforts[1]

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1. Overview

Free speech issues in higher education have typically and traditionally focused on the physical presence of individuals on campus — the faculty member in the classroom, the traveling preacher setting up on the campus quad, or the student protest in the hallways of the administration building. But times have changed. Much of today's campus speech happens online versus "IRL," and campus constituents need to think critically about how this new, boundless speech zone impacts community on campus.

With online platforms hosting multiple types of speech and speakers that can affect members of the campus community and beyond, colleges and universities are faced with diverse challenges when it comes to online speech and expression, especially when it involves some form of social media, including: which platforms are most relevant for particular issues; the public nature (or anonymity) of speech sources; when and how institutional leaders should respond to social media postings or content and who leads the response. Likewise, depending on the situation and what is expressed online, different members of the campus community may expect very different responses from institutional leaders. Generational considerations, as well as racial, ethnic, and other identity-based factors, may also come into play. Additionally, effective action in response to online speech that raises concerns or causes disruption often requires coordination across multiple units within a college or university, a muscle that many bureaucratic organizations have not developed sufficiently. The constantly changing nature of technology and emergent social media platforms also means that institutions must operate in real-time to new variations in how individuals engage with social media. Novel issues around social media arise at a rate that stresses our colleges and universities and other social institutions, such as the courts, to keep pace.

The purpose of this learning resource is to help campus members learn more about and reflect on key topics involving the intersections of social media, free speech and expression, and to identify resources that may be useful, especially for training the broader campus community. While the learning resource provides relevant legal standards related to speech and expression via social media (see Part 2), it is focused on more than free speech rights and seeks to offer points for reflection as institutional stakeholders consider how to prepare their community and support individuals and groups that are negatively impacted by social media, even if the speech or expression at issue is legally protected (see Part 3). Additionally, while the resource is intended for use at both public and private institutions, much of the consideration around relevant legal issues is focused on the First Amendment, which has applications for public colleges and universities but not for their private counterparts.

Social Media: The Real Campus Speech Zone
A Learning Resource Informing Institutional Responses and Educational Efforts

Issues around social media provide an opportunity for campuses to promote reflection and learning around topics that include developing empathy and recognizing the humanity in others no matter the medium of communication, helping members of the campus community to consider the current and future impact on themselves and others in terms of their social media activity, and considering ways to engage in civil discourse that is respectful, an area where social media has especially exacerbated challenges. Along with information, the learning resource also contains possible activities and reflection scenarios that could be incorporated into educational activities for students, faculty, staff, or others.

This learning resource was produced with support from the University of California National Center for Free Speech and Civic Engagement. Users of this learning resource are encouraged to use all or portions of the document, including alongside other resources, as useful and informative for their work with multiple campus stakeholder groups. In doing so, please provide attribution to the report and its authors and to the support for the creation of the document provided by the UC National Center for Free Speech and Civic Engagement. Our hope is that this learning resource can be used to enrich educational offerings provided to a range of individuals affiliated with campus and help inform the design of institutional policy and practice related to social media and free expression. As you continue to review this resource you will find that centering on professional development with faculty, staff, and administration is recommended as a starting point. Those educational opportunities will provide campus constituents the opportunity to think about how free speech education can be woven into their work and delivered to students and other key audiences.

2. The Legal Context and Social Media

Issues related to social media are certainly not confined to assessing relevant legal standards, as developed in Part 3 of this learning resource. However, legal standards, especially ones connected to free speech and expression, are often an important part of navigating social media challenges that can occur on campus. This section provides an overview of some key legal standards dealing with speech and expression that are often pertinent to social media concerns in higher education.

2.1 The First Amendment, State Laws, and Other General Legal Standards Related to Speech and Expression on Campus and on Social Media

For public colleges and universities, the First Amendment serves as an important source for the speech and expressive legal rights of members of the campus community — students, staff, and faculty. First Amendment speech protections apply as well to members of the general public who access our physical campuses or may interact virtually with institutions, such as through social media accounts. While social media may have created new free speech challenges or amplified existing ones for colleges and universities, courts still turn to established First Amendment legal rules when analyzing speech issues arising on social media.

Under what is called the "state action" doctrine, the First Amendment only applies to governmental actors, which includes *public colleges and universities*. Only in very specific circumstances — when they are considered acting for or under the direction of the government — can First Amendment speech rules apply to private (non-governmental) actors. Important legal standards, such as ones based on contract law, can affect the authority of private higher education institutions to regulate speech on campus, but, unlike their public peers, private colleges and universities are not subject to First Amendment standards in regulating speech on campus, including on social media.

Besides the First Amendment, other federal legal standards and laws may implicate speech rights, including, potentially, in social media contexts. These standards may also apply to private colleges and universities in addition to public ones. For example, free speech rights do not allow individuals to engage in conduct that violates civil rights laws that prohibit harassment in educational settings and in the workplace. Legal standards dealing with intellectual property extend to college and university trademarks or logos and can apply to speech or expressive activity, including on social media platforms. Federal collective bargaining law, which provides protection for speech related to unionizing activity, applies to private higher education, with collective bargaining standards in public colleges and universities subject to state law.

As non-governmental actors, First Amendment speech protections do not apply to private colleges and universities. However, many private colleges and universities have adopted speech and expression standards similar to those existing under the First Amendment when it comes to students, staff, and employees (see Educational Efforts in Part 3). Rather than the First Amendment, institutional policies and standards related to speech and expression may trigger legal protections through contracts. At least one state, California, has a law (often called the Leonard Law) that requires non-religious, private institutions in the state to provide students with the same speech and expressive protections that are provided under the First Amendment to students at public colleges and universities.

Besides the First Amendment and other federal legal standards, states may also have laws in place that are important in determining the available rights of speakers at public colleges and universities. For example, in recent years, several states have passed legislation that provides speech guarantees to students (and sometimes members of the general public) at public colleges and universities, such as abolishing use of "speech zones" in open campus areas (for just one recent example, see how Georgia in 2022 banned use of free speech zones at public institutions to open many outdoor campus spaces for speech and expression). Besides laws dealing directly with free speech on campus, states have laws that prohibit governmental employees, including those in public colleges and universities, from using governmental resources, such as email addresses or institutional computers, to engage in partisan political activity.

Institutional policies and standards, which must be in alignment with state and federal legal standards, are very important sources to understand how speech rights operate on a public college or university campus. For instance, the First Amendment does not require public colleges and universities to operate and provide resources for a system of officially-recognized student organizations. But, once a public college or university opts to have officially recognized student organizations, there are First Amendment standards that apply. Namely, institutional officials must be even-handed in the treatment of student groups through the enforcement of reasonable rules and not engage in viewpoint discrimination so as to disfavor particular groups and single them out for enforcement or discipline while letting other student organizations ignore such standards (See, for example, *Board of Regents of University of Wisconsin System v. Southworth*, 2000).

Possible Activity: Have participants locate speech and expression policies from both public and private colleges and universities and/or policies specifically related to social media.

- **What are the similarities or differences, if any, between the policies at public and private institutions?**
- **What about any differences among the policies at public colleges and universities? What about any differences among private institutions and their policies?**
- **What elements or standards do participants think make for good campus policies related to speech and expression, including in relation to potential issues involving social media?**
- **Are there any located policies that seem to contradict the legal standards that apply to free speech?**
- **Should institutions have specific social media policies that are distinct from general campus policies related to speech and expression?**

2.2 First Amendment Speech Exceptions. And What about "Hate Speech"?

The First Amendment provides broad protections for free speech, but these are not absolute. As pointed out, conduct that violates civil rights laws, such as Title IX or Title VI, is not protected free speech under the First Amendment (these laws can also apply to non-governmental actors). The U.S. Supreme Court has recognized several types of speech that are not protected under the First Amendment, including speech that constitutes **incitement to imminent lawless action**, a **true threat**, what are known as **fighting words**, **obscenity**, **defamation**, **speech made to further a criminal act**, or willfully and knowingly giving **false testimony (perjury)** in a court proceeding.

Incitement to Imminent Lawless Action. This is a category of speech that the U.S. Supreme Court has recognized as unprotected by the First Amendment (*Brandenburg v. Ohio*, 1969), but the kinds of speech that satisfy this exception are very narrow. Speech that qualifies under this category is aimed at producing immediate unlawful action and is likely to incite or to produce such action. Advocacy of unlawful action at some unspecified point in the future is likely to be protected. In *Hess v. Indiana* (1973), for example, the Supreme Court ruled that speech by a professor during a protest stating, "We'll take the fucking street later," or, "We'll take the fucking street again," was protected speech. The incitement to imminent lawless action category of unprotected speech is restricted to very specific circumstances, which could apply in the context of social media. Given the immediacy of social media when content is posted, there can exist questions of when speech made on social media that seems to call for immediate unlawful action could potentially fall under the incitement exception to the First Amendment. Still, this exception to First Amendment protection for speech and expression is very limited, and the strict interpretation given to this area of exception would also apply to social

media postings. Vague social media postings related to unlawful action, even if troubling, that failed to meet the narrow requirements of incitement to imminent lawless action are likely eligible for First Amendment speech protection. However, and as covered later in this document, even if speech turns out to be protected under the First Amendment, college and university officials are not prohibited from taking needed action to protect health and safety while assessing whether speech, including on social media, is engaged in unlawful activity.

True Threats. True threats are not protected under the First Amendment. The issue of when speech that individuals may interpret as threatening or harmful but that may not rise to a level that would be a "true threat" under the First Amendment has created tension at many colleges and universities, including, and perhaps especially, in relation to social media. A location-based social media platform, such as Yik Yak, can further create concerns that social media messages raising threat concerns could be viewed as actionable threats. In the 2023 case *Counterman v. Colorado*, the U.S. Supreme Court ruled that to establish a true threat requires that an individual actually intended harm with their speech (that is, the requirement of a **subjective test** that an individual intended to make a threat) or that the individual showed recklessness and, "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." With this standard, the Supreme Court rejected the use of an **objective test** (i.e., whether an ordinary, reasonable person familiar with the context of the speech would conclude that it was intended as a threat) for establishing a true threat. It is important to keep in mind that when a potential threat is present, including on social media, public colleges and universities are permitted to take appropriate action to protect the safety of individuals, such as temporarily barring someone from campus, to determine whether an actionable threat exists and represents speech unprotected by the First Amendment.

"Hate Speech" and the First Amendment

In considering true threat, it is also helpful to think about the concept of **hate speech** or **assaultive speech**. These terms have been used to capture or describe speech that can indeed be psychologically harmful to individuals, including students. On some campuses, students and others have advocated for hate speech to be included in the conduct code in order to punish those that have used assaultive speech. But courts have not recognized hate speech as a special category of speech exempt from First Amendment protection unless it further qualifies as a type of speech that does not qualify for constitutional speech protection, such as a true threat or speech that qualifies as unlawful harassment or discrimination. Outside of constituting a true threat or meeting legal standards to constitute legally prohibited discrimination or harassment, some forms of hate speech, including on social media, may often be protected under the First Amendment.

However, the fact that speech is protected by the First Amendment does not mean that institutions are without recourse. Based on their educational missions, institutions have a responsibility to work with and provide support to students who have suffered harm caused by hateful speech (see Part 3). There is also an educative role to work with students who may have engaged in speech that others find harmful or objectionable. In doing so, however, institutions must be careful not to create the impression that students have no option but to follow institutional directions or that students could suffer punitive action.

Additionally, it is important to note that while courts have not concluded that hate speech is unprotected by the First Amendment, some scholars and advocates *(see, for example, articles on "racialized assaultive speech")* have contended that public higher education institutions should have greater leeway to regulate "assaultive" or "hate" speech than is often assumed by institutional leaders.

Fighting Words. The fighting words doctrine refers to speech directed at individuals that is likely to result in violence from those against whom the speech is directed. In *Chaplinsky v. New Hampshire* (1942), the U.S. Supreme Court upheld the conviction of an individual who was reported to have stated to a government official, "'you are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.'" Since *Chaplinsky* was decided, the Supreme Court has narrowed the concept of fighting words that can be excluded from First Amendment protection. In *Texas v. Johnson* (1989), for instance, the Supreme Court, in deciding that the burning of the U.S. flag as a form of protest was protected expression under the First Amendment, described fighting words as a "direct personal insult or an invitation to exchange fisticuffs." While *Chaplinsky* and the fighting words doctrine have not been explicitly overruled, later Supreme Court decisions like *Texas v. Johnson* have cast doubt over the continued applicability of the fighting words doctrine as a basis to restrict speech. Additionally, even in the context of fighting words, the Supreme Court — in striking down a city ordinance that made it illegal to place a burning cross or swastikas in locations intended to provoke "anger, alarm, or resentment" — declared that the government could not engage in viewpoint discrimination, even in the regulation of a speech category not protected by the First Amendment. At a minimum, the fighting words doctrine is very narrow. It is also important to note that the potential

reaction of an audience to a speaker is not a sufficient basis to censor speech. The idea of **Heckler's Veto** refers to the notion of the government imposing restrictions on speech because of concerns over how the speech will be received by listeners. In general, courts have held that such a heckler's veto is not a permissible reason to prohibit or stop speech and certainly that a heckler's veto is at odds with the aims of the First Amendment to protect free speech and expression.

Defamation. This occurs when someone writes (**libel**) or says (**slander**) something to others that is presented as fact when the individual knows (or should have known) the information to be untrue. The target of these statements may then claim the false statements have resulted in harm, such as damage to one's reputation. Defamation is a civil wrong (a **tort**) with the standards needed to prove defamation established by state law, with specific requirements differing from state to state. The U.S. Supreme Court has established that in the case of individuals who are public figures, such as elected officials, an individual suing for defamation must establish that the statements were made with "actual malice" (*N.Y. Times Co. v. Sullivan*, 1964). Another limitation on defamation is that sometimes speech may be considered a privileged communication, such as comments made during legislative proceedings, so as not to be subject to a defamation claim, at least unless the statements were made with actual malice. Among the defenses to a defamation claim is the response that the statements were true or at least substantially true. At a college or university, some positions, such as institutional leaders or coaches in high-profile sports, likely qualify as public figures, and professors and other administrators may as well.

2.3 The Importance of Forum Analysis, Government Speech, and Social Media

In general, in analyzing free speech issues arising on public college and university campuses, courts often turn to what is known as forum analysis. The kind of "forum" in which speech occurs is often important in how courts analyze the speech protections available and the extent to which a public college or university can regulate various spaces, both physical and virtual.

Some places, such as public parks and sidewalks, are called **traditional public forums** and are places that, by long-standing tradition, are recognized as areas for free speech and expression. The government may also take action to create such open forums, resulting in what is called a **designated public forum**. In a traditional or designated public forum, a speech-based regulation is only allowed under the First Amendment if the government can show that it serves a compelling governmental interest and that the restriction is as least restrictive as needed to achieve this interest. As to regulations not focused on the content of the speech, the government may put in place rules related to **time, place, and manner** that are narrowly tailored to serve a significant governmental interest and that leave open ample alternative channels of communication. Some states have also passed laws that direct institutions to make open campus spaces generally available for student speech, and in some states, to members of the public.

The government, including public colleges and universities, may also create forums that are limited to certain topics or to certain groups, such as students. In this type of forum, often referred to as a **limited public forum**, a public college or university is able to impose rules that are reasonable in light of the purpose of the forum and that do not discriminate on the views of the speaker. For example, many public colleges and universities make various resources available to registered or recognized student organizations as a way to support students in their interests and activities. In doing so, a public college or university may exclude non-student organizations from participation in this type of forum that is only open to students. However, regulations imposed on student organizations a part of the forum must be reasonable in relation to the purposes of the forum, and institutional officials may not engage in viewpoint discrimination in the treatment of student groups (e.g., institutions could not favor campus Democrats over campus Republicans, or vice versa, based on the views of the respective organizations).

Public colleges and universities can create forums using social media pages that are open for public comments. In creating such forums, an institution may opt to focus on a specific topic (a type of limited public forum) and is able to delete off-topic comments, but it could violate First Amendment standards for deleting or blocking comments based only on the views expressed.

Reflection Scenario: Student Organization's Social Media Postings

A public university has a policy that officially-recognized student organizations can use official university logos and images in items such as t-shirts or mugs. An officially recognized student organization at the university is pushing for the abolition of a state law that imposes restrictions on marijuana use. The organization has an active social media presence. In creating pages that appear on its social media, the organization has made use of official university logos and images that student groups are able to incorporate into their activities. A state legislator has become aware of the group and noticed the use of university logos on the organization's social media pages. The legislator, upset over seeing institutional images used for a cause that they find objectionable, has made contact with the institution to object to the university's images being used to support this cause.

What should be the response of the university? Is it okay to make the student organization stop using official images based on the objections of the legislator? After considering these questions, read more here about what a federal appeals court decided with a similar scenario that took place at Iowa State University.

2.4 Social Media or Online Speech by Students Raising Academic, Professionalism Concerns

Some campus spaces, such as classrooms, are not viewed as open forums for speech, including by students. But, even with classroom speech, restrictions on student speech still must be reasonable and should not discriminate on the basis of viewpoint. Courts have recognized, however, that student speech that takes place in a classroom can be subject to heightened regulation, even if such speech would be subject to very limited control in other situations. In courses, instructors and institutions at public colleges and universities are permitted to impose standards related to professionalism and collegiality that an institution could not impose in other settings. Such restrictions can apply in both physical and online courses.

Reflection Scenario: Online Classroom Speech

A student enrolled in an online course has a requirement to respond to an online discussion board that includes comments and reflections of other students. The instructor's syllabus has language that sets out standards for engagement and communication in the class, stating that students are expected to be respectful in their interactions with other students and the instructor, including on the course online discussion board. The student has responded harshly to posts by several students, such as stating, "This is the stupidest thing I've ever seen on a class discussion board", "You obviously didn't read the materials assigned for this lesson" or "I will never get back the minutes of my life wasted reading this discussion post." The instructor arranged a meeting with the student to explain that such comments were disruptive and interfered with the learning of other students. The student responded that the comments were protected by the First Amendment and that they could especially say whatever they wanted on an online discussion board since it wasn't in a classroom.

Is the student correct about the First Amendment protecting the speech? What about the comments being made on an online course discussion board and not in a physical classroom? Assuming that the instructor held all students to the same standards announced in the syllabus, are the instructor and the institution able to prohibit the student from engaging in this type of speech? For a legal decision from a federal district court with a similar set of facts, one in which the court ruled that the student's speech could be restricted, see *Harrell v. Southern Oregon University* (2009).

Outside the classroom, academic programs are permitted to enforce professionalism standards on students, but courts have placed limits under the First Amendment on how far such professionalism standards can extend in terms of restricting students' speech. For instance, if a student enrolled in a teacher education program were to make a social media post including disparaging comments about elementary students from their placement class, then such expression could potentially subject the student to academic consequences based on violating professionalism standards. Or, if a student in a health professions program made derogatory social media remarks about individuals served in a clinic where the student was conducting a placement, such speech could likely be subject to regulation by program faculty on professionalism grounds.

An issue that has arisen, including and especially with social media, involves a determination of whether particular assertions of professionalism standards are legitimate extensions of academic decision-making and are not an impermissible infringement on students' First Amendment rights. In general, academic authority over students and their speech outside the classroom based on professionalism standards is strengthened when standards are aligned with nationally established professional or ethical standards of the profession. Academic programs and students should be wary of attempting to police students for professionalism standards that are not tied to such ethical and professionalism codes, such as attempting to impose standards for dress or hairstyle, as doing so may be more likely to be viewed by courts as an exercise of the personal preferences of faculty rather than the use of legitimate academic judgment to promote the established ethical and professionalism standards of a profession.

Reflection Scenario: Student's Social Media Posts, Professionalism Standards

A student in a pharmacy graduate degree program at a public university has posted comments and images on social media that some would consider sexually suggestive. The social media postings were not related to a class or to the completion of any clinical placements or internships. As such, the student made the social media posts purely in a private capacity, and the images did not violate any state or federal laws. An anonymous individual complained to administrators in the health professions program, claiming that the posts were not professional and did not represent the school or the student's future profession in an appropriate way. After school officials became aware of the postings, they warned the student to remove them, stating that the postings were unprofessional. The student did not do so, and the school eventually threatened to expel the student from the program for failing to adhere to the professionalism standards of the pharmacy profession, though it did not rely on a specific provision tied to national standards and, instead, referred to general language in the student handbook that pharmacy students are expected to display a high level of professionalism.

Can the university take this action under the First Amendment? To what extent (or not) is the action taken against the student based on a legitimate exercise of academic judgment? Should the university take action against the student, even if such action is legally permissible? See this story for an incident with similar facts to the above scenario (See also this article). While involving a high school student and not addressing the types of professionalism issues presented in the scenario, see *Mahanoy Area School District v. B.L.* (2021) for one of the U.S. Supreme Court's most recent decisions involving students and online speech. For a case where a state supreme court upheld the disciplining of a student for their online speech on professionalism grounds, see *Tatro v. University of Minnesota* (2011) (a potential activity is to consider how similar or different the facts from this case are to the above scenario). In working through the scenario, in this evolving area of law consider the need for various institutional partners, including legal counsel, to collaborate on designing institutional policies and practices that are legally sound and are also in alignment with the institution's mission and values, such as commitments to free expression.

2.5 Social Media or Online Speech by Staff, Faculty

Issues involving social media by faculty or staff may also raise questions over the speech rights of employees versus institutional authority to regulate such speech. In the case of faculty, as covered more below, alongside general free speech protections, their social media activity may implicate questions related to academic freedom. For employees at private colleges and universities, which are non-governmental actors, their speech rights (including on social media) are not protected by the First Amendment. Other sources, such as collective bargaining agreements, may provide some types of legal protection for employee speech rights in private higher education, but they are not covered by the First Amendment. In contrast, First Amendment speech protections may apply to employees at public colleges and universities.

As to public higher education employees and the First Amendment, what about when a staff member posts on social media outside of their job duties and as a private citizen? In this situation, the staff member, speaking in an individual capacity as a private citizen, is potentially entitled to First Amendment protection for the speech. When a public employee speaks in this type of private capacity, courts conduct a balancing test to determine whether the speech is on what is known as a matter of **public concern** and, if so, whether the public employer can offer a sufficient reason why the speech should not receive First Amendment protection.

In contrast to when a public employee is engaged in speech in a private citizen capacity, the U.S. Supreme Court has greatly restricted any First Amendment speech rights when a public employee speaks as part of carrying out their official job duties (as noted below, special academic freedom considerations may come into play with faculty). The U.S. Supreme Court has ruled (see *Garcetti v. Ceballos*, 2006)that when public employees engage in speech as part of carrying out their official employment duties, then they are not entitled to First Amendment protection for such speech. This standard means that a staff member of a public institution posting on social media as part of their job duties would, in general, not be protected by the First Amendment.

Given the distinct differences in how the First Amendment can protect employees for their speech as private citizens versus lack of protection for their speech in carrying out their job duties, it is important for staff at public colleges and universities to be aware of when they are speaking as an employee on social media and when they are engaged in private citizen speech outside of their employment duties. For example, staff members should exercise care in making sure that their private views are shared on their private social media accounts and not on institutionally controlled social media accounts. Additionally, when commenting on a personal social media account the staff member might consider refraining from making reference to their university role or position to avoid conflating personal opinion from the position of the university.

For faculty at both public and private colleges and universities, **academic freedom** considerations may raise special considerations in how institutions navigate responses to issues involving social media. Academic freedom represents a concept that has developed along dual lines, both as a professional concept in higher education (as represented by the adoption of institutional academic freedom standards, many of which track AAUP standards on academic freedom) and as a protected right under the First Amendment.[4]

As a professional concept, academic freedom applies to both public and private higher education. Tenure was devised as a way to provide economic security to faculty members to protect their academic freedom. Now, of course, the majority of those in faculty positions are employed in non-tenure-stream positions, but colleges and universities still hold to academic freedom as a core value in higher education. Additionally, at many colleges and universities, there are individuals in staff positions (such as in student affairs) who may also teach classes for their institutions, which triggers questions as to when academic freedom principles should apply to their teaching, which could extend to social media activity. In general, what exactly are the academic freedom standards, policies, and

[4] Issues related to academic freedom are often nuanced. As institutions engage in deeper learning around social media, it may also present an opportunity for greater examination of academic freedom principles or complement other campus conversations related to academic freedom. Alongside drawing from campus experts, conversations and learning around social media and academic freedom will need to be supplemented with resources that examine academic freedom as a professional concept in higher education and as one with a First Amendment dimension. For more on the professional and First Amendment facets of academic freedom, see, for example, Neal Hutchens and Frank Fernandez (2023), *Academic Freedom as a Professional, Constitutional, and Human Right*. In Laura Perna (Ed.) *Higher Education: Handbook of Theory and Research* (volume 38). Springer. https://doi.org/10.1007/978-3-030-94844-3_2-1

guiding principles at your institution? Where are these standards located? To what kinds of faculty speech do these standards apply, such as in teaching, research, and service? When might social media speech and expression implicate academic freedom protections recognized and valued by the institution?

Not all forms of faculty speech or expression fall under the umbrella of academic freedom. However, institutions should reflect carefully on how general freedom of speech and expression standards also extend to faculty (as with all employees) in addition to ones related to academic freedom. Consideration of social media issues provides an opportunity for multiple parts of the campus community to consider the application of academic freedom standards grounded in institutional policy and practice.

For public colleges and universities, academic freedom considerations may also take on a First Amendment dimension. In the same legal decision (*Garcetti v. Ceballos*, 2006) where the U.S. Supreme Court ruled that public employees do not possess First Amendment speech protections for speech made in carrying out their official job duties, the Court expressly stated that it was not deciding if some type of First Amendment academic freedom exception should exist for professors at public colleges and universities in carrying out their job duties, such as in teaching, research, and institutional service. As such, it remains an open question to the extent to which public higher education faculty members at public colleges and universities possess First Amendment rights for teaching and research and possibly for their service activities. While still not fully decided, multiple federal appeals courts have now ruled that professors at public colleges and universities have First Amendment rights for speech made in carrying out their job duties, at least in relation to teaching and scholarship.

These decisions have not been uniform and have also sparked disagreement, particularly in one case where a federal appeals court ruled that a professor could refuse to use a student's pronouns consistent with the student's gender identity in class. The issue of First Amendment speech rights for faculty in their teaching and research has been the subject of ongoing litigation in Florida, where faculty members and students have challenged the state's legal ban on teaching topics related to Critical Race Theory (CRT) or related lines of critical scholarship or other topics related to diversity. This and other legal cases will help to further clarify exactly what First Amendment rights related to academic freedom that faculty members at public colleges and universities have in carrying out their official job duties. While multiple courts have recognized that public higher education faculty members possess First Amendment rights in carrying out their job duties, this does not mean that any such rights are without limits. Courts have employed a balancing test that weighs the interests of the professor to engage in the speech—such as commenting on an issue of public concern—and the interests of the institution to regulate the speech.

Just as with staff, when faculty members in public higher education are speaking in a private citizen capacity, they have First Amendment rights for their speech. However, the line between when professors are speaking in their capacity as an employee or as a private citizen can sometimes be blurry. For example, a professor may use a social media account, such as Twitter, to share their views on topics and may also use it as a way to share information about their research or with students and others about things happening in their class, such as thanking a guest lecturer.

College and university leaders are often asked to respond or to take action when an employee makes a social media posting that offends, is somehow objectionable to members of the campus, and/or sparks disapproval from constituents beyond the institution. At times, along with the volume of pushback over a particular social media post, influential individuals, such as donors or state elected officials, may push college or university leaders to take action, with calls often made to fire an individual for offensive speech. As part of formulating how to respond to social media posts that raise concerns or complaints, public institutions should take into account the First Amendment speech protections that exist for all employees as private citizens and protections that multiple courts have also recognized for faculty in carrying out their job duties. For both public and private colleges and universities, officials should look to be guided by their commitments to free expression and to academic freedom as expressed in institutional policies and mission statements, even while endeavoring to also hold true to their commitments in such areas as inclusivity and social justice.

Possible Activity: Consider the state of First Amendment speech rights for employees in higher education, both at public and private colleges and universities. Among the topics for discussion, here are some issues for possible conversation:

- What do you think of the U.S. Supreme Court's ruling that public employees (including staff members at public colleges and universities) do not have First Amendment rights for speech made in carrying out their professional job duties?
- Are courts that have ruled that faculty at public colleges and universities have First Amendment rights for their teaching and research (and maybe service) making a good or reasonable interpretation of First Amendment standards and of academic freedom?
- The public employee speech standards deny First Amendment protection to staff for speech made in carrying out their official job duties, but some staff, such as in student affairs, are often at the center of contested and high-profile incidents that arise on campuses. Are there steps or policies that institutions should have in place to help ensure the fair and equitable treatment of staff for their speech made in carrying out their job duties?
- While private colleges and universities are not subject to First Amendment speech standards in the treatment of employees, what types of standards or policies should they have in place for both staff and faculty?

Reflection Scenario: Social Media Post By Professor

A faculty member at a public university consistently makes social media postings that are offensive and degrading to women and to members of the LGBTQ community. Below are some of the comments made and materials shared by the professor:

- "Geniuses are overwhelmingly male because they combine outlier IQ with moderately low Agreeableness and moderately low Conscientiousness"
- Sharing an article titled, "Are Women Destroying Academia? Probably."
- In response to a post about the sexual habits of young women, stating, "I just dropped my freshman son off at Purdue earlier today," … "those girls are really showing off their legs! And I could see girls sitting alone just hoping for a friend—even a female friend, maybe. Parents don't realize that college is a jungle full of hungry predators."

In response to complaints and concerns over these and other postings, university officials have responded that they consider the professor's comments to be vile but cannot fire the faculty member based on the First Amendment. The university's provost also issued a statement describing the professor's views as "stunningly ignorant, more consistent with someone who lived in the 18th century than the 21st." Despite concluding that the speech is protected by the First Amendment, the university has said that any students who wish may transfer out of the professor's classes. The university has also instituted a grading policy where assignments are submitted anonymously to the professor for grading purposes. Additionally, the university is conducting a review to determine if the professor has shown bias in grading in previous courses.

What do you think of the university's response to complaints over the professor's speech? Should the university be able to fire the professor? In thinking about a response, consider other types of social media postings that have resulted in calls to fire university employees. For instance, calls for dismissal came after a professor (at a private university) made a controversial tweet about Queen Elizabeth II's death that later was removed by Twitter. Under what circumstances should a public university be able to discipline or fire an employee for their social media postings, including professors? What about the standards that private universities, which are not bound by the First Amendment, should adopt? When should an institution respond publicly (see below for section on institutional speech) when an employee makes a controversial social media posting, especially when it goes "viral"?

2.6 Social Media and When the Institution Speaks

Unlike a forum that exists for students' or others' speech, there are multiple instances when a college or university engages in institutional speech (i.e., when it is the speaker), including on social media. A previous section considered how the Supreme Court has ruled that public employees (including at colleges and universities) do not possess First Amendment rights for speech made in carrying out their official job duties (as covered in the section, it is an open question whether an academic freedom exception exists for professors, but the standards do cover other university employees). Part of the logic of courts for permitting public employers (including colleges and universities) to exercise control over speech by public employees in carrying out their job duties is that such speech is really for and by the public employer, such as a public college or university. On a daily basis, colleges and universities engage in institutional speech (courts refer to what is known as the government speech doctrine for this type of speech), such as making public announcements or issuing institutional standards or policies. Courts have ruled that a governmental unit (like a public college or university) is able to engage in speech and messaging. For instance, in the scenario presented in the section on social media speech by faculty and staff, a university's provost responded very strongly in an official university statement to problematic speech made by a professor as a private citizen outside their job duties. As an official authorized to speak for the institution, the university, through the provost, could speak out disapprovingly of the faculty member's speech, even though the institution had decided that the professor's speech was protected by the First Amendment.

In the social media context (as in other settings), questions and issues may arise as to when a social media posting represents the speech of an institution. For example, an institutional leader may make a social media posting on an account maintained by the institution, but confusion may exist over if the views are those only of the official or represent institutional speech. Similarly, units or departments at a college or university maintain social media accounts. What happens when the social media account for an academic department has comments that run contrary to or in opposition to official

university positions or statements? Unlike social media speech by an individual in their private citizen capacity, an institution is likely to possess substantially more authority to regulate these types of social media accounts that are maintained by the college and university and are considered speech by the institution. Institutions often maintain policies regarding social media accounts, and employees need to be informed about and educated on relevant standards to be followed in maintaining social media accounts (see Educational Efforts in Part 3).

As pointed out in the previous section on the importance of forums and First Amendment speech rights on campus, if a university maintains a social media account and then allows comments by individuals, then a type of forum may exist in relation to such comments. If such a forum has been created for individuals to share their views, then, under forum standards, a public college or university may not be able to remove comments that are on-topic but with which university officials disagree. Officials may, however, ensure that comments are relevant to the forum (for example, if a social media account is focused on a university's e-sports team and its competitions and activities, then comments made about politics or other social controversies may be off-topic and legitimately removed).

Possible Activity: Colleges and universities are often called upon to speak about events taking place inside and outside of the campus community. Deciding if and when to do so is a complicated calculation: who should speak? What should the message say? What will the impact be? The University of California National Center for Free Speech and Civic Engagement hosted a conversation about these and other questions related to institutional speech. Along with Michelle Deutchman, Executive Director of the Center, the conversation featured Cerri Banks (an accomplished educational leader who served at multiple institutional institutions, including Mount Holyoke, Skidmore, and Syracuse, but who sadly passed away in 2022) and Sigal Ben-Porath, a leading scholar who serves as Professor of Education at the University of Pennsylvania.

Social media issues can often raise questions around when institutions should weigh in on various controversies. After watching the conversation, consider with your colleagues about issues related to institutional speech, including:

(1) When is it appropriate for the Institution to speak on an issue? Or, as advanced in some model legislation and in proposed bills, such as in Ohio, should institutions stay silent on "controversial" matters?

(2) Who should be involved in crafting various institutional messages?

3. Educational Engagement, Incident Response, & Assessment

Legal standards are key in informing how institutions respond to issues involving speech and expression that can arise on social media, but compliance with legal rules is only part of what should go into how colleges and universities prepare for and navigate issues involving social media. Intersections of social media and speech and expression provide an opportunity for dialogue and education for the campus community (students, employees, alumni, trustees) that goes beyond an understanding of legal rules. This part of the learning resource offers suggestions for how institutions can integrate considerations of social media standards, including relevant legal rules, into broader opportunities for holistic engagement on speech and expression issues that arise in relation to social media. Even better, such conversations could be embedded in larger opportunities for campus discourse on topics that implicate matters of free speech and expression, including and beyond social media contexts.

Rather than intended as simply prescriptive, this part of the learning resource is meant to provide suggestions and points for consideration in how campus standards related to social media are crafted and communicated with campus members. Even more importantly, this part of the learning resource along with the overview of legal standards is meant to aid institutions in their efforts to create learning communities in and out of the classroom to engage in meaningful exploration and dialogue around social media and free speech and other compelling values and goals, such as:

- Developing thoughtful and empathetic attitudes in social media engagement,
- Learning to evaluate social media sources for mis- and dis-information efforts,
- Promoting campus conversations around free speech (including not only opportunities to understand current legal rules, but also to question and critique existing standards), and
- Exploring intersections around social media and free speech and efforts to foster inclusiveness, diversity, and equity on our campuses and beyond.

3.1 Social Media Standards as a Starting Point for Broader Learning and Conversations

Campus-based guidelines or policies relevant to social media provide one entry point that can be used to educate and promote engagement among the greater campus community. As part of this engagement process, campus leaders may choose to launch free speech websites or initiate "speech and expression on campus" communication campaigns as a means of proactively sharing social media standards with campus constituents.

Having policies or guidelines to reference during educational opportunities can help members of the campus community understand the standards and expectations related to social media usage; being able to reference relevant campus guidelines or policies during campus-based events helps the community better understand how and why the institution may respond to issues arising on social media.

Deciding whether to develop a stand-alone social media standard (versus embedding social media standards in existing policies or guidelines) is a decision that should be approached thoughtfully and with meaningful input from multiple campus constituents. Likewise, social media issues, especially when involving speech viewed as controversial or problematic, can raise important legal considerations (see Part 2) and accompanying campus policies or guidelines must adhere to governing legal standards. As part of the decision-making process, campus leaders might consider vetting their policies and practices against incidents that have occurred on other campuses. A team of campus professionals might be asked to conduct a tabletop exercise and answer, "how will our policies, standards, and procedures serve us if this situation were to occur on our campus?" In conducting such reviews, institutions may move to craft one or more separate social media policies, or they may conclude that other student and employee policies sufficiently incorporate issues that can arise related to social media. Whatever the approach taken, alongside making sure that policies are legally sound, colleges and universities will want to ensure that policies and practices are applied consistently and in alignment with institutional values and standards.

Due to the legal landscape or other considerations, campuses may prefer guidelines over policies. For this document, we are using the term guideline as a document or source that may include references to rules or policies that must be followed but that also incorporates suggestions (i.e., these are parts of guidelines that allow for discretion on the part of a social media user to adopt the guidance given) for sound social media usage. In contrast, a formal campus rule or policy sets out standards that social media users must follow. With the use of guidelines, it is important that institutions do not hold out suggested practices for responsible use as binding and also demonstrate impartiality in how the guidelines are used across campus. As an example of guidance, institutions may opt to issue guidelines for **university-related accounts** or for employees running **university-affiliated accounts**, with these types of social media accounts distinct from private social media accounts that students or employees may have. These guidelines may also offer suggestions or educational content for individuals to consider when using their private social media accounts in a private citizen capacity.

Below are a few examples of campuses that provide such guidelines for institutional-related accounts. A helpful exercise could be for campus working or learning groups to compare and contrast the approaches taken in these and other guidelines around social media issues:

- Marymount University
- Michigan State University
- Stanford University
- University of Georgia
- Brown University
- University of Michigan

Other campuses have adopted **policy**, although note that some specifically carve out First Amendment protections and some blend policy and guidelines. See these examples of campus-based social media standards:

- Berkeley College (student-specific; note reference to program-specific policies)
- Kansas State University
- University of Houston
- Wesleyan College

Special Note: When debating policy decision on campus, it is not uncommon for individuals to ask about accountability or enforcement. These are important considerations. To that end, it is recommended that institutions specifically explore (1) how they will educate their community on unprotected speech versus hate speech (explored later in this section and covered in Part 2) and (2) monitoring of social media accounts.

Institutional actors, likely through a contracted third party, have the ability to monitor social media activity that potentially impacts the institution. Given the volume of social media postings and the potential to identify an issue in a proactive way before it goes "viral," such monitoring may represent a prudent strategy. However, monitoring social media activity, in relation to mentions or posts that implicate the institution or members associated with it, should be done in a way that does not unfairly target or single out individuals and groups on campus. For instance, what safeguards does a third-party provider put in place to avoid "flagging" content that could unfairly highlight members of campus or others on the basis of race or affiliation (e.g., student athletes, political affiliation).

These links are provided as examples, and institutions, within the boundaries of guiding legal rules, must determine what approach and what types of guidance and content are best suited for their unique campus contexts. No matter its final form, institutions should follow a process that includes multiple stakeholders and reinforces institutional commitments to free speech and that also respects and includes consideration of how other values should inform and guide social media use.

3.2 Educating the Educators

This section focuses on helping faculty, staff, students, and administrators envision what effective educational activities around social media and free speech could look like on campus. By thoughtfully weaving educational touchpoints throughout the campus engagement experience, awareness and competence will certainly grow within all communities. Episodic educational opportunities for all campus constituents should aim to reduce conflict and could result in more productive speech—in person and online. The overall goal is that educational opportunities aimed at balancing speech rights and respect for differences in opinions and experiences will ultimately help combat divisiveness and misinformation on campus and, ideally, provide models and tools helpful for the larger society.

Before focusing on students' understanding of free speech and expression, generally and in social media contexts, it is important to consider how prepared faculty and staff are to negotiate the opportunities and challenges that come with free speech. **When posed with the question, "Whose job is it to educate students about free speech?... The correct response is, "It is everyone's job."** There are seemingly unlimited opportunities to proactively educate and engage students with respect to speech and expression rights, but the faculty, staff, and administrators responsible for establishing and facilitating campus community should be properly prepared to educate on, and respond to, social media-based free speech incidents. As one baseline, the overview of legal standards provided in Part 2 can be used as a resource (there are certainly others available as well) to help foster educational efforts for faculty, staff, and administrators around the First Amendment and other standards that must guide the formulation of institutional policies and practices.

Campus leaders who aim to elevate free speech and expression education need to prioritize education and learning for staff and faculty. Integrating this topic into new employee onboarding is a reasonable starting point; but given the nuanced nature of free speech issues reported across the country and the challenges that can arise with social media, it is prudent to consider a more robust plan for education. Consider general, episodic, *and* role-specific professional development for your community. Here is a list of possible touchpoints:

- New faculty/new employee onboarding
- New supervisor training (consider re-education after a certain time period)
- Senior leadership, deans, and directors (consider re-education after a certain time period)
- Department chairs and directors, as well as graduate program directors

- Employees responsible for conduct/behavioral review and/or adjudication (e.g., human resource intervention, professional standard reviews, etc.)
- Employees responsible for campus-based social media accounts
- Employees responsible for admissions or hiring
- Employees responsible for event space or planning programmatic efforts
- Employees who make campus policy decisions, or interpret campus policy
- Employees who serve on the response of resource teams (e.g., threat assessment, bias incident response, etc.)

Providing professional development to these individuals (and others deemed integral to the effort) that is high quality and provides opportunities for deep reflection and learning will prepare them to educate others on free speech and communicate the university's position on individual expression. The educational offering should help them envision and navigate incidents in the early moments and know how to effectively communicate possible incidents to appropriate campus leadership or support offices. It is important that consistent content is provided across all audiences so campus responses may be contextually relevant but also equitable.

Below is a sample outline for such educational offerings. Along with the materials provided or linked to in this resource, or other available resources or partners external to campus, institutions should not neglect to draw from the expertise of staff and faculty on campus, a strategy that may also help to increase overall engagement and help tailor sessions to events that have specifically arisen at that particular institution. Importantly, the focus should be on deep learning and reflection and not a superficial coverage of content. Try to avoid a cursory examination of legal standards without a more in-depth consideration of how social media issues play out on campus, including how individuals of color and women are far more often the targets of racist, harmful, and negative speech and social media activity, a state of affairs that should guide institutional practice, even when such speech may be legally protected:

1. Legal basics of free speech and expression
    - 1.1 Protected speech
    - 1.2 Unprotected speech
2. Related campus policy and/or guidelines related to free speech, expression and DEI
3. Navigating the intersection of free speech and diversity, equity and inclusion
    - 3.1 Real impact of hateful speech
    - 3.2 What can be done about hate speech?
    - 3.3 Ways to respond without chilling speech…
    - 3.4 Turning tense moments into educational ones
4. Scenarios (e.g., tabletop exercises)—include those that address in-person events, expression events (i.e., postings or protests), and online speech that impacts the campus community
    - 4.1 Punitive vs restorative responses
5. What is my role in this?
    - 5.1 Proactive efforts (provide time to allow for creative thinking about how programmatic or pedagogical shifts could be made)
    - 5.2 Reactive efforts (include reporting expectations & related campus teams/departments that can assist)
6. Who are my partners?
    - 6.1 Proactive partnerships
    - 6.2 Reactive partnerships (include resources for them as well as those involved in the incident)

3.3 Embedding Educational Opportunities for Students

After implementing outreach and educational planning focused on the campus workforce, a next step could be asking faculty and staff to think creatively about how to situate free expression education within their daily work with students and others. Campuses often find themselves reacting to free speech incidents versus building a culture that understands free speech and how it intersects with campus values such as diversity and inclusion. An ideal way to get "upstream" on this usual state of affairs is to get explicit about how a campus culture can be defined, built, and continually reinforced as a place where individual perspectives are welcomed and difference of perspective is anticipated and respectfully negotiated. This approach will come with tension and campus constituents will have to understand that is a key part of the intersectionality and integration of free speech and campus values.

Here are a few examples of points in the campus experience where faculty and staff might productively cultivate learning and dialogue around issues of free speech and social media:

Admissions. Many who work in Admissions have fielded a complaint about an applicant or admitted student who posted something offensive on a social media platform. Most of these complaints demand that the prospective student not be admitted or that an admissions offer be reversed. These situations create stress for those involved and a proactive approach can help create clarity and consistency.

A single solution does not exist for this situation, but there are a few proactive measures that could help employees assess and respond more effectively.

- Campus Tours: Educating and preparing campus tour guides to talk about campus values sets an important tone. Admissions leaders should consider the key messages and help tour guides develop language that will effectively explain how the campus approaches free speech, viewpoint diversity, and inclusion. Also, consider how tour guides will frame free speech or expressive acts that occur during tours. Are tours re-routed when there is a protest, or when someone paints a controversial message on the free expression wall? To be truly proactive and education-centered with respect to free speech, these scenarios must be carefully considered.
- Position Statement: Admissions leaders should address social media and other free speech activities on their websites. Explicitly explain the university's position related to in-person and online expressive acts and articulate a review process if speech may not be protected. A statement of this type provides an opportunity to convey university values and provides a clear response for staff to share with complainants.
- Defined Review Process: Trained admissions leaders should be able to quickly determine whether identified expressive content is problematic. When there is reason for concern, having an established and consistent process for review with appropriate campus content experts is critical. If the content is problematic, prescribed processes should exist for addressing an applicant versus an admitted student.

Classrooms. Much like the physical campus, the boundaries of the classroom have greyed. Faculty are wise to think broadly about how free speech issues can arise in class and how they might be proactive in setting expectations and cultivating a sense of civility, respect, and community. Again, there is no clear guidance as much of this is discipline-specific and pedagogically driven but here are some considerations:

- Syllabus Statement & Classroom Climate: Faculty should consider including language on their course syllabi that outlines expectations for free speech and the exchange of ideas. Here is an example of such a statement:

> I aim for my class to be a place where students can express themselves about the topics we discuss—open inquiry, voice doubt, or assert beliefs. This class is also a place for learning which requires open-mindedness and personal reflection. In these settings, it is important that all of us pay attention to the effect and intention of what is said and what is shared. It is important that we do not demean others or assume offensive motives—instead, seek to understand and learn from one another.

It is important to not only include it on the syllabus but to review it and often reference it when classroom topics can benefit from multiple perspectives. Faculty encouraging students to share differing opinions is highly educational and will foster a stronger sense of community among students.

- E-tools: Faculty using online learning management tools and other e-tools (e.g., Google Docs, social media, etc.) should consider how student posts can contribute to or detract from learning outcomes. Faculty have the privilege of setting classroom expectations, and wield a fair amount of control, but should be mindful that they cannot infringe on the speech rights of their students. Also, consider whether e-tools used for course delivery are official university accounts as this may have an impact on whether inappropriate behavior in those spaces can be formally addressed by the university.
- Courses: Academic leaders should consider whether a specific course related to free speech and expression is germane to their curriculum. Certain academic programs would likely benefit from such an approach, either as a required course in the core curriculum or as an elective. On some campuses, programs like Internet studies and social media studies have started to establish themselves and provide a rich source of expertise.

Libraries. Where does one go to learn about something new? The library. Who does one ask to help them find diverse sources to inform their learning? The librarian. Librarians can be incredible educational partners when it comes to creating a campus culture that values free speech and expression. There is an active conversation in professional library circles about their role in addressing disinformation that is admittedly complex, but more immediately campus librarians may have opportunities to reinforce campus values and offer skill-building. Some examples to consider:

- Social Media Skill Building: Most students (and many others) get their news and daily information from social media sites. Learning how to vet sources and verify information is a skill that librarians can teach. If library leaders want to go further, they might consider partnering with other campus departments to offer a series of workshops. For instance, a partnership with Orientation leadership could produce a session that overviews the digital ecosystem and how various social media platforms are used (academically and otherwise). This could be offered to students and parents alike, and campus policies and responsible use guidance could be integrated.

- Community Discussions: Librarians can partner with other campus departments and experts to host community discussions around contentious issues actively debated on campus. Holding space and effectively facilitating difficult conversations will help encourage a respectful exchange of positions on topics. As an example, if an issue is creating tension on campus, library leadership could invite campus experts with opposing views to host a discussion. During and after the discussion, the librarians could provide attendees with resources on identifying misinformation and vetting sources, as well as reputable sources for further inquiry into the topic at hand.

Career Services. Looking for employment has drastically shifted in the era of social media, as has researching possible employees. To that end, the professionals focused on career development have an important educational role to play with students and employees. It is important to consider how effective the campus is at getting career development professionals in front of students early in their academic careers. Doing so allows them to consider their social media engagement and begin to build an online presence that will help them achieve their career and life goals. Here are a few ideas for consideration:

- Social Media Presence in College: Partnerships with First-Year Experience programs and other structured academic programs can get staff from Career Services in front of students to talk about responsible and thoughtful social media engagement. This is an opportunity for the university to continue to message that free speech is a value but remind students that what you say matters now and to future employers and other audiences, that the freedom to speak can also be balanced with thoughtfulness about what individuals really want to say and express on social media.
- Role of Social Media in Hiring: As students progress in their academic careers, they will begin to focus on the hiring process and what they need to do to get the job. Hopefully, they attended a first-year social media presence discussion and put the advice to work, but career development professionals can later help students understand how their social media will be reviewed to make hiring decisions in various industries (public and private).

These are simply some examples of opportunities colleges and universities have to reinforce free speech and expression in a diverse community and to engage students to think seriously about why and how they use social media and how they want others to view and potentially be impacted by their social media activity. Conducting workshops where faculty and staff can brainstorm ideas (individual and systemic) could be a helpful exercise to elevate the free speech and expression competence and culture. There is an important educational role for institutions to work with students on how they can effectively engage in class, with campus community members, and on social media—including how to evaluate online sources and research as a means of forming their own perspective. Campus and department leadership can explore how their programs and educational interventions can include an opportunity to address free speech and expression.

Special note: It is important to think about the work of building campus competence and culture as everyone's job. Many campuses have relied on specific units—student affairs or diversity and inclusion offices—to lead the education and response efforts related to social media free speech incidents. By compartmentalizing the responsibilities and work, campuses are at risk of placing this work primarily on staff that often work without tenure or labor protections. Additionally, women and minoritized individuals are more highly represented in these units which creates another layer of inequity that should be taken into account.

3.4 Educating Students, Student Employees, and Student Leaders

As mentioned previously, many pieces written about free speech incidents in higher education ultimately recommend educating students. If these pieces go further, they often point toward new-student orientation or first-year experience as the avenue of sharing information. There is a current effort, the Free Speech on Campus Act, to legislate such an approach. The challenge with this approach lies in its effectiveness. That is not to say that orientation is not an effective offering, but instead to highlight the sheer amount of information shared during orientation (often occurring before students have experienced life on campus) can be overwhelming and almost always needs to be re-explained or re-distributed to students and families alike.

Sharing information at orientation is important and a key element in the continuum of educational opportunities available to faculty, staff, and administration. But learning about the campus position on free speech on an admissions tour and again at an orientation is just the beginning. Students need to more fully understand how this information applies to them, how it will challenge them, and how they can balance their sense of self and convictions with an expectation of respect and inclusion situated within the campus community. To do this deeper work, campuses and their students can benefit from re-engaging this conversation in the various contexts in which students exist on campus and highlight that these freedoms apply in person and throughout the digital ecosystem in which students engage.

It is important for university leadership to think more broadly when it comes to educational outreach to students. Here is a starter list of some additional opportunities:

- Provide onboard training for all on-campus employment positions
- Provide a visible university website on free speech—including university statement on free speech, expectations related to balancing free speech and diversity, equity, and inclusion values, educational materials for department use, and information on campus resources
- Launch specific communication campaigns about speech on campus—specifically, send these through the digital ecosystem used by campus constituents

- Educate undergraduate and graduate student government leadership, as well as representatives to governance bodies and committees
- Educate student organization leaders, specific students serving in key roles within registered student organizations and those with event planning and social media/communications responsibilities
- Educate student-athletes
- Educate fraternity and sorority leadership
- Educate campus tour guides, orientation leaders, and any university ambassadors
- Educate cultural centers leaders
- Educate those responsible for conduct/behavioral review and/or adjudication, including alternate dispute resolution options to encourage dialogue
- Integrate into first-year experience programs/curriculum
- Integrate into residential advisor training curriculum
- Integrate into well-being courses or programs

There are specific nationally-recognized student organizations that focus on free speech and effective dialogue. BridgeUSA and Toastmasters are examples of organizations that can help students build their dialogue and debate skills. Honing these interpersonal skills helps them define their position on key issues, understand there are different perspectives, and how to civilly negotiate such differences in person and online. Similar organizations can be cultivated locally or campuses can tap into a resource like #ListenFirst Coalition to learn about local organizations that could offer resources or guidance.

3.5 Educating Others: Board Members, Alumni, and Parents

When a controversial incident occurs and centers on free speech, campuses will likely hear from their extended campus constituents such as board members, alumni, and parents. Most certainly there will be differing opinions about the incident and what should be done. These moments will be navigated more easily (although they will never be easy) if campus and university leaders have developed clarity on position, disseminated the information thoroughly, and educated and trained their faculty and staff. By taking the extra step of providing proactive communication and education to extended campus community members, leaders equip individuals with information that allows them to help in these critical moments.

When informed board members or alumni learn of a controversy on their campus, they are able to rely on their knowledge of the university's position and approach to free speech and expression challenges. Often these are community members who are active on social media and hold influence in your

community—to that end, if properly prepared they can be allies and help reduce rumors and outrage in the wake of an incident. Parents hold a similar level of influence and investment, and campuses may have external collaborators (e.g., religious/spiritual leaders) that would appreciate being invited to educational opportunities.

3.6 Incident Assessment & Response

Free speech and expression incidents are often complicated—*very complicated*. Much of the complication is not necessarily the legal analysis, but instead how to support the community members impacted by what has occurred. And to be clear, this support is often needed by those engaged on both sides of a contentious issue and furthermore will be provided by faculty and staff that hold personal opinions and feelings.

> Consider the example of a first-year, white student who posts a highly offensive, racist remark on social media and the post goes viral among the student body. Students, especially students of color who feel targeted, will be outraged and want the institution to respond—they will need faculty and staff guidance, as well as clarity of the institution's response. The student who made the post may respond in any number of ways—they will need guidance on their response and their rights, as well as other support. The faculty and staff tapped to work with the students involved may also feel personally targeted and distressed, but also feel pressure to stay neutral and provide support in the wake of the incident. This quick example only depicts the most immediate moments and doesn't delve into all of the possible ripples that may come—media interest, protests and demand letters, legislator inquiries, parent engagement, and personal attorneys among calls for the student's expulsion.

The gnarly work is managing very legitimate and real human reactions in the wake of a social media incident (which also reinforces why en masse education and skill building are critical). Where does one turn for support when they are a victim of a social media incident? Where does one turn for support in helping others involved in a social media incident? These are both very important questions for campus leaders and supervisors to explore and answer for those they serve on campus. The University of California Irvine has developed extensive documents that outline key steps to take when faculty and/or staff are targeted. These documents may serve as a good template for other campus communities.

Colleges and universities should consider professionalism and ethical standards that guide their institutional responses. For instance, is a complaint or notification that comes from certain individuals, such as donors or state officials, still channeled in the same manner and under the same procedures as a complaint that might come from a member of campus, such as an employee or student? No matter the perceived status or influence of the individual making the complaint or raising a question over a social media posting, the institution should have standards and practices in place that ensure the

fair and consistent treatment of individuals. These standards should also apply equally to the person raising an issue about a social media posting by someone connected to the institution or the person who has engaged in speech or expression on social media.

This section explores different approaches campuses may use to respond to social media-related incidents. Institutions should formulate a plan and related protocols to efficiently address incidents in accordance with institutional policies, practices, and culture. It is important to note that sometimes **no response** is the appropriate action for some incidents and at other times campuses need to employ many or all of the approaches reviewed below.

3.7 Triage and Response Teams

Typically, campuses maintain intervention teams that can be a valuable resource when someone is involved in a social media incident. Because social media incidents often involve protected speech, these teams are helpful because they do not typically wield adjudication power, but they can triage situations and bring appropriate campus resources to bear.

Incident Response Teams. These teams (some campuses host Bias Response Teams) are established to bring campus-based resources together to respond to critical incidents (more broadly defined) and/or bias-specific incidents. This is not an emergency response team designed for life-threatening events nor one to assess threats to self or others, but instead, a team that can assess events that bring about (or have the potential to bring about) community disruption and/or create a risk to institutional reputation. These teams are most successful when they focus on support for individuals and thoughtfully uphold First Amendment or other speech rights. Team members are wise to use campus networks to ascertain good information about the incident versus responding to inference or emotions in the heat of the moment.

Usually, the team conducts a threshold inquiry (e.g., protected versus unprotected speech) that often requires understanding the context in which the social media posting arose. The incident or bias response team should be prepared to do this analysis. For instance, does the post involve a faculty or staff member posting in their employee capacity or as a private citizen? Is the post (or postings) made on an official social media platform for the institution or by someone on a private social media account? The answers to these initial questions can influence the steps in response. For example, if a posting is made on an official university account, then there are likely institutional content guidelines and policies for such official university accounts while keeping in mind that an institutional social media site could create some kind of forum for private individuals to offer comments that could be subject to First Amendment protection (see Part 2). If the posting is made on a private social media account, then further assessment may be needed to determine whether the post was made by someone affiliated with the campus, such as an employee or a student. As covered in Part 2, specific

First Amendment protections may exist for speech made in a private citizen capacity, including by institutional employees.

An effective incident response team would communicate and convene quickly once they are aware of an incident. The team would work across areas to collect valid information about what occurred, who has responded, who should be engaged, what campus policies/procedures are in play, and what should be communicated to whom. As an example, imagine that a student records a highly offensive video about their professor and airdrops it to the entire class. The video then is uploaded to social media and starts to spread among the broader campus community. The incident response team would convene to gather facts and work to effectively support the faculty member and the students in the class, all the while keeping the president and other key campus leaders updated. They would also need to work directly with the student who made and shared the video to determine if a conduct referral is appropriate and support them (e.g., some students may feel remorse after posting racist and hateful content, no matter if the speech is protected, and have questions about next steps, including any restorative actions that could be taken). Lastly, the team would need to provide key information to the university communications team so they could craft campus communications and respond to external inquiries (e.g., social media, general media, legislators, families).

Incident response teams are typically comprised of senior-level representatives from academic affairs, student affairs, diversity, equity & inclusion, human resources, and university communications. They often consult with general counsel if they need legal guidance, but well-trained teams can often conduct threshold analysis without formal legal guidance. Each campus needs to determine the appropriate composition for their team, but it is important that there is shared leadership so work doesn't fall to any one area that may not have the positional power needed to effectively respond or direct response.

Behavioral Intervention Teams. While an incident response team is designed to work with the broader community, a behavioral intervention team focuses on individuals (faculty, staff, and students) who may be a threat to the community or create significant disruption to the campus community. Some campuses refer to these teams as Threat Assessment Teams, but they tend to have a more expansive role than the name implies. In the example above, the student involved may be referred to a behavioral intervention team for assessment and outreach. Behavioral intervention teams often include staff with clinical training (e.g., medical and/or psychological) so as to consider the holistic health of the individual they are supporting. Effective behavioral intervention teams maintain contact points for public safety offices and officials to be able to engage in needed threat assessment and to protect health and safety.

These teams typically communicate and convene when they are aware of a community member in distress or acting in a disruptive manner. The team gathers appropriate information related to the community members and, if necessary, works directly with them to see what support can be offered. Even if an individual engages in speech on social media that turns out not to raise any kind of actual

threat and is protected under the First Amendment, institutions are in no way prevented from using a behavioral/threat assessment team to establish the actual status of any threat that may exist. Protecting the health and safety of individuals on campus and beyond is of singular significance.

These teams manifest differently based on-campus organization and culture. Membership might include professionals from the following areas: dean of students, human resources, academic affairs, counseling, health services, police department, and risk management/emergency management. Much like an incident response team (and maybe more so), these teams are likely to need access to the general counsel's office for consultation on certain cases.

3.8 Referral Options

Referrals of individuals and groups involved in and affected by social media postings can take multiple forms. Even if dealing with speech that turns out protected by the First Amendment, as covered, colleges and universities are permitted to take steps to assess that a social media posting does not represent a threat to health and safety. That process of assessment—typically led by one of the aforementioned teams—can help faculty and staff more efficiently refer those in need of support or campus-based resources.

For individuals negatively impacted by social media posting or postings, even if the speech is protected, institutions should be proactive in reaching out to affected individuals or groups to provide support. Some individuals may need ongoing and extensive institutional support if they are the target of mis- or dis-information efforts or of some other type of campaign that seeks to attack individuals through social media. These unfortunate experiences can leave individuals targeted by large numbers of social media users, general media outlets, and others, and institutions should not leave affected individuals to navigate a response without meaningful institutional support.

For individuals associated with an institution who have posted racist or hateful speech through social media, even if such speech is protected by the First Amendment, institutions still have a potential educative role to engage with students who may regret their comments and the harm caused and may have had to deal with the consequences for engaging in the speech (such as the loss of internships or employment opportunities). In this process, institutional leaders should take care to not use institutional authority in an undue manner (such as has been found to be the case by some courts in relation to how some bias response teams have responded to incidents).

For individuals mentioned in both scenarios above, multiple referrals could be made. Examples of possible referrals for support and guidance include:

- Counseling or employee assistance office
- Dean of students office (case manager support)
- Academic deans offices (advising & student success support)
- Legal resources
- Campus police or public safety
- Cultural center(s) or employee resource groups
- Spiritual & religious leaders

In sum, institutions should be ready to engage with and often refer to multiple parties in the aftermath of a social media incident. Sometimes that may be referring and holding individuals accountable for violation of law or policy. But more likely colleges and universities should be ready to engage and support individuals negatively impacted by a social media incident and, beyond employee and student conduct protocols, be ready to seek constructive engagement with individuals affiliated with campus who have posted racist or hateful speech, even while taking care to respect individual's First Amendment rights.

3.9 Communication

While teams are convened and referrals are made, there will likely be a very public call for answers or specific institutional responses. Social media often generates more public interest because of the speed with which information, misinformation, concern, and outrage can grow. Institutions or individuals in the campus community can get "called out" online or garner media calls within minutes of learning of a social media incident. Campus leaders should consider how to handle the pressure and questions that will ensue: what will the institution do? Why hasn't the individual been fired or expelled? How can the university justify harboring a racist when you say you value inclusion?

To prepare for such incidents, campus leaders are wise to enact communication plans based on circumstance and grounded in institutional values. These communication plans might include concepts such as: how best to initiate internal communication, who should be the voice of the institution, and when to issue a formal institutional statement. Even as institutions evaluate a situation, and avoid a rush to judgment, it is important to have pre-emptively considered the individuals or offices that should be brought into conversations to help guide response and to communicate within campus and beyond. Offices can vary depending on the circumstances, but units that often need to be included are communications, general counsel, academic affairs, student affairs, diversity and inclusion, and, possibly, police/public safety. These units are also often found at the incident response team table, so integrating communications into the teams' role is a common and efficient model.

University communicators should carefully consider consistency and fairness in using institutional voice to respond to an issue involving social media. It is important that colleges and universities hold to their campus mission, values, and leadership positions in responding to social media incidents. In recent years, some campuses have developed statement protocols aimed at providing clarity regarding when their leaders will issue statements. One example of this emergent practice can be found at DePauw University.

Institutional leaders may decide that a need exists to respond with the institutional voice, even if, for instance, the social media speech or activity may be legally protected and has originated from employees in their private citizen capacities or from students. However, in using the institutional voice, leaders should be mindful of the consequences and of the messages intended to be communicated, including the attention that could be brought to individuals associated with the institution, including faculty, staff, and students. While it may be important to provide updates to the campus community and beyond, it is imperative that institutions adhere to their own campus policies and to relevant legal standards protecting free speech and expression. The response of institutional leaders provides an important way to model how organizations and institutions should respond to and navigate social media challenges, including how to avoid dehumanizing individuals even while rejecting social media posts and activities that may be at odds with institutional values.

4. Additional Resources for Consideration for Educational Efforts

- American Association of State Colleges and Universities' Constructive Dialogue: Fostering Trust, Curiosity, and Deeper Learning in the Classroom
- American Civil Liberty Union's information on Campus Speech
- American Civil Liberty Union's guide on federal employee speech
- American Council on Education's Inclusion and Freedom of Expression Resources
- Bipartisan Policy Center's *Campus Free Expression: A New Roadmap*
- Boyer 2030 Commission report: The Equity-Excellence Imperative (section on Freedom of Speech and Expression in Supportive Campus Cultures)
- Harvard Kennedy School's *Mis\information Review*
- Listen First Project
- Pen America's *Online Harassment Field Manual*
- University of Wisconsin-Madison Discussion Project