

RAP LYRICS, SCHOOLS, AND FREE SPEECH: EXAMINING THE LIMITS OF FREE SPEECH OF STUDENTS OUTSIDE OF SCHOOLS AND ON SOCIAL MEDIA

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I. INTRODUCTION

In 2011, a high school senior threatened to use a firearm to carry out violence against two of his teachers.¹ While many may find this disturbing, does the speech fall outside protection under the First Amendment? Would opinions change if the threat was part of a rap? Does it matter if the student posted the rap in a video on the Internet, off-campus? Does it matter that a student said it, as opposed to an adult? As this Comment illustrates, it does. While the content of speech is of central importance, context such as location and time are also crucial to define speech in light of constitutional rights. Campuses across the United States are dealing with what words and actions can mean and how to respond to them.² While there are two sides to every issue, the issue of what can or should be said has significant roots in American legal history.

The past year has been divisive in the world of “political correctness.” Both sides of the spectrum—those who attempt to always be politically correct and those who do not believe in censorship in any form—came out in full force either opposing or endorsing politically correct speech. Between sixty-eight and seventy-one percent of Americans think that censoring communication in the name of political correctness is a problem in America.³ Much of this debate stems from college campuses across the

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1. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 383, 384 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016).
2. See Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC (Sept. 2015), <http://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/>.
3. Thomas B. Edsall, Opinion, *Trump, Obama and the Assault on Political Correctness*, N.Y. TIMES (Dec. 23, 2015), http://www.nytimes.com/2015/12/23/opinion/trump-obama-and-the-assault-on-political-correctness.html?_r=0.

nation as various institutions are experiencing a movement, driven in large part by students, to rid campuses of “words, ideas, and subjects that might cause discomfort or give offense.”⁴ Institutions are now faced with a predicament—endure backlash for not protecting students from non-politically correct speech or criticism for doing exactly that.

Two terms that have arisen in the campus environment are “microaggressions” and “trigger warnings.”⁵ Microaggressions are words or small actions that on face value have no malicious intent, but are thought of as violent.⁶ For instance, it may be a microaggression “to ask an Asian American or Latino American ‘Where were you born?’ because this implies that he or she is not a real American.”⁷ Trigger warnings, another popular term, are notifications that professors are supposed to give ahead of time if something in the course might cause a strong emotional response.⁸ These two terms highlight a recent resurgence in political correctness, but one that should be differentiated from the political correctness movement in the 1980s and 1990s.⁹

The earlier movement was focused on restricting hate speech, while at the same time broadening academia by including more perspectives and ideologies.¹⁰ The current movement is about emotional well-being and protecting students from psychological harm.¹¹ To combat this, universities, such as the ten that comprise the University of California system of schools, are being trained on how to avoid these situations.¹² In a world revolving around social networking sites, how exactly schools are handling this problem becomes even more complicated.

When universities install campus speech policies, they are competing with the First Amendment right to free speech. While the discussion has focused primarily on these issues in the realm of higher education, many legal disputes revolve around the battles between students and their respective schools at the primary and secondary education levels. The most important case regarding free speech in schools is *Tinker v. Des Moines Independent Community School District*. There, the Supreme Court held that student conduct that disrupts classwork, causes substantial disorder, or invades others’ rights is not protected by the constitutional guarantee of

4. Lukianoff & Haidt, *supra* note 2.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

freedom of speech.¹³ The Court acknowledged that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁴ However, the idea of the “gate” becomes an issue when students use social networking sites as the outlet for their speech.

Schools are now regularly punishing students for online comments.¹⁵ While the punishment primarily targets cyber-bullies, other times, schools are punishing students for comments they may not like.¹⁶ As Internet privacy and security become increasingly relevant in today’s culture, there must be a focus on the freedom of speech aspect as well. While expressions online are important to protect, everything cannot be protected behind the barrier of the Internet. Moving forward, a standard that is easily understood and fair to all interests is critical for students and society.

This Comment addresses the issues of free speech in schools, specifically in regards to social networking sites usage. Part II provides a brief history of the freedom of speech and discusses how this freedom applies to the academic setting and the standards that are currently practiced. Part III argues why a countrywide policy regarding free speech at the primary, secondary, and collegiate level is necessary to ensure that all students are treated fairly and afforded their constitutional right to freedom of speech.

II. BACKGROUND

The First Amendment to the United States Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech”¹⁷ This is a widely-known part of the Constitution, but there are certain limitations. The freedom of speech has, over time, evolved and is not as simple as an all-encompassing phrase. Section A explains the limits and expansions of free speech throughout American jurisprudence. Section B specifically examines the cases surrounding students’ rights to freedom of speech. Section C examines modern speech codes in school. Section D examines social media’s role in the education system. Section E highlights the integration of social networking in everyday life. Finally, Section F provides a brief background of the newest case challenging notions of free speech in schools.

13. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969).

14. *Id.* at 506.

15. David R. Wheeler, *Do Students Still Have Free Speech in School?*, ATLANTIC (Apr. 2014), <http://www.theatlantic.com/education/archive/2014/04/do-students-still-have-free-speech-in-school/360266/>.

16. *Id.*

17. U.S. CONST. amend. I.

A. Brief History of Freedom of Speech

The case law and history surrounding freedom of speech is massive. The first case to examine is *Schenck v. United States*, where Justice Holmes set forth the “clear and present danger” standard for free speech.¹⁸ He wrote that the most stringent protection of free speech does not protect a man for falsely causing panic by shouting fire in a theatre, nor does it protect those “from an injunction against uttering words that may have all the effect of force.”¹⁹ This opinion reaffirmed the right that Congress has in preventing substantive evils.²⁰ *Schenck* laid a framework for future First Amendment cases.

Furthering the limit on speech, the Court upheld a New Hampshire statute that did not offer First Amendment protection to “fighting words.”²¹ Fighting words, the *Chaplinsky* Court reasoned, are words that by their “utterance inflict injury or tend to incite . . . an immediate breach of the peace . . . [and] are of such [little] social value . . . that any benefit . . . from them is [] outweighed by the social interest in order and morality.”²² The Court gave the “fighting words” standard a narrower meaning in *Terminiello v. City of Chicago*, when it ruled that speech that invites dispute is allowed as free speech so long as it is not likely to produce a clear and present danger of substantive evil that is more than public annoyance, inconvenience, or unrest.²³ In *Terminiello*, the Court noted that “[s]peech is often provocative and challenging,” which is why speech may hit “prejudices and preconceptions” that cause discomfort as it presses those previously held ideals.²⁴

In 1969, the Court overruled the “clear and present danger” standard in *Brandenburg v. Ohio*.²⁵ The Court wrote that a state cannot forbid speech unless it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁶ This is the current standard for free speech as it relates to violence. In *Cohen v. California*, Cohen was wearing a jacket that said “Fuck the Draft” in a Los Angeles courthouse, which led to a conviction under a California statute that prohibited the malicious and willful disturbance of the peace or quiet by

18. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

19. *Id.*

20. *See id.*

21. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

22. *Id.* at 572.

23. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

24. *Id.*

25. *See generally* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

26. *Id.* at 447.

offensive conduct.²⁷ The Court ruled that the First Amendment protects offensive and profane words.²⁸ The Court reasoned that the statute makes it impossible to distinguish offensive words from other offensive words and “the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.”²⁹ The Court was concerned that one cannot forbid particular words without running the risk of suppressing ideas in the process.³⁰

Whitney v. California illustrates why the preceding cases are not only important to education, but to society as a whole. While *Whitney* was overturned, Justice Brandeis’ concurrence is said to have “laid the democratic foundation for American free-speech jurisprudence” in one of the most important judicial opinions ever written on the freedom of speech.³¹ In part, Justice Brandeis stated:

It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.³²

Justice Brandeis continued, “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”³³ Keeping the words of Justice Brandeis in mind, the discussion turns to the educational system.

B. Freedom of Speech as Applied to Schools

The precedent for freedom of speech in schools is *Tinker v. Des Moines Independent Community School District*. In *Tinker*, a group of students wore black armbands in protest of the hostilities in Vietnam, and were subsequently suspended by the school until they returned without their armbands.³⁴ The Supreme Court held that, under the circumstances,

27. See *Cohen v. California*, 403 U.S. 15, 16 (1971).

28. *Id.* at 26.

29. *Id.* at 25.

30. *Id.* at 26.

31. Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 2008 SUP. CT. REV. 293, 307 (2008).

32. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

33. *Id.* at 377.

34. *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 504 (1969).

wearing armbands was not disruptive conduct and was closely akin to pure speech, which is entitled to comprehensive protection under the First Amendment.³⁵ The Court wrote that, in light of the special characteristics of the school environment, teachers and students are afforded First Amendment rights.³⁶ Further, both students and teachers do not shed these constitutional rights at the “schoolhouse gate.”³⁷ However, State and school officials must have the authority to “prescribe and control conduct in the schools,” as long as this regulation is “consistent with fundamental constitutional safeguards.”³⁸

The district court determined the school’s action “was reasonable because it was based upon [the] fear of . . . disturbance.”³⁹ School officials “must be able to show that its action was caused by something more than a . . . desire [for avoiding] the discomfort and unpleasantness of . . . unpopular viewpoint[s].”⁴⁰ Further, the conduct must “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”⁴¹ The Supreme Court did not find that the school authorities met this burden.⁴² Instead, the Court held that the “prohibition of . . . one particular opinion . . . without material and substantial interference with schoolwork or discipline . . . is not constitutionally permissible.”⁴³

The Court’s reasoning was that “state-operated schools [could] not be enclaves of totalitarianism,” nor can “[s]chool officials . . . possess absolute authority over . . . students.”⁴⁴ The Court further held that “[s]tudents in school as well as out of school are ‘persons’ under our Constitution . . . [and that] [i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”⁴⁵ Continuing its framework, the Court held that students’ rights are not extinguished upon entering the school.⁴⁶ Finally, the Court articulated the test for schools to determine what conduct can be disciplined:

35. *Id.* at 505–06.

36. *Id.* at 506.

37. *Id.*

38. *Id.*

39. *Id.* at 508.

40. *Id.* at 509.

41. *Id.*

42. *Id.* at 514.

43. *Id.* at 510.

44. *Id.* at 511.

45. *Id.*

46. *Id.* at 506.

But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.⁴⁷

As such, the school officials were not permitted to deny the students' form of expression.⁴⁸ While this case seemed to make a clear test for what speech is protected under the First Amendment in educational settings, other cases tested its applicability.

Bethel School Dist. No. 403 v. Fraser limited the *Tinker* standard.⁴⁹ In *Bethel*, a public high school student delivered a speech that was offensively lewd and indecent, which led to his suspension and removal of candidacy to speak at his graduation.⁵⁰ The Supreme Court distinguished *Tinker* by holding that under the First Amendment, school officials can determine that permitting vulgar and lewd speech would undermine the school's basic educational mission.⁵¹ The Court acknowledged limitations where the speech is sexually explicit and may reach children, because there is "an interest in protecting minors from exposure to vulgar and offensive spoken language."⁵² Further, it would be "wholly inconsistent with the 'fundamental values' of public school education" for a school to associate itself with vulgar speech and lewd conduct.⁵³ *Bethel* reaffirmed that constitutional rights of students in public schools are not automatically the same as the rights of adults in other, non-school settings.⁵⁴

C. Social Media's Impact on Schools and Student Speech

Thus far, the cases have been directly linked to school campuses; therefore, the next step before turning to the analysis is to examine what happens when the alleged misconduct occurs off campus. The Court in *Morse v. Frederick* examines how to apply *Tinker* in this scenario.⁵⁵ At a school sanctioned and supervised off-campus event, a school principal saw students hang a banner she believed promoted illegal drug use; the student who brought the banner refused to take the banner down, brought suit, and

47. *Id.* at 513.

48. *Id.* at 514.

49. *See generally* *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

50. *See generally id.*

51. *Id.* at 685.

52. *Id.* at 684.

53. *Id.* at 685.

54. *Id.* at 682.

55. *See generally* *Morse v. Frederick*, 551 U.S. 393 (2007).

was subsequently punished.⁵⁶ The Court explained the banner was directed toward the school, thus making it a school speech case.⁵⁷ The Court ruled in favor of the school by allowing restriction of student speech, if “that speech is reasonably viewed as promoting illegal drug use.”⁵⁸ Essentially, the Court held that students cannot “direct” their speech at schools.⁵⁹ Furthermore, there are other interests that a school may have in protecting its students. A banner near or facing a school is an easy case to determine that the speech is directed at the school, but Internet and social networking sites have made it more difficult to discern where the speech is directed.

In *J.S. ex rel. Snyder*, when a student created a fake social networking profile of her middle school principal, she was suspended, and she subsequently brought suit.⁶⁰ The fake profile contained “disturbing” content revolving around the principal.⁶¹ Examining only the off-campus versus the on-campus portion of the opinion, the Third Circuit declined to extend the *Fraser* exception to the case because it was off-campus speech.⁶² The court held that to extend this exception would set a precedent that allowed school officials to punish any speech by a student anywhere and at any time, so long as it is about the school or school official and is deemed offensive through the notice of a school official.⁶³ Neither the Supreme Court, nor the Third Circuit “ha[d] ever allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event that caused no substantial disruption at a school.”⁶⁴

In *Wynar v. Douglas County School District*, the Ninth Circuit held that messages about planning a school shooting were violent, threatening, and directed at a school.⁶⁵ The court found that the messages posed a

56. *See id.* at 396.

57. *Id.* at 401; *see also* *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615–20 (5th Cir. 2004). The Court of Appeals wrote that the standard set in *Tinker* is for speech “directed” at a campus or a purposefully communicated true threat. *Id.* The court goes on to say that school officials may regulate student speech when such speech would “substantially interfere with work of the school or impinge upon the rights of other students” or if the regulation “furthers an important or substantial government interest; if the interest is unrelated to the suppression of student expression; and if the incidental restrictions on First Amendment activities are no more than necessary to facilitate that interest.” *Id.* (internal quotation marks omitted).

58. *Morse*, 551 U.S. at 403.

59. *Id.*

60. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 920 (3d Cir. 2011).

61. *Id.* at 921.

62. *Id.* at 932.

63. *Id.* at 933. *See generally* *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260 (1988) (finding another exception to *Tinker* that school newspapers cannot be characterized as a forum for public expression and are thus subject to the regulations set forth by school officials in any reasonable manner).

64. *J.S. ex rel. Snyder*, 650 F.3d at 933.

65. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1064–65 (9th Cir. 2013).

substantial disruption to school activities.⁶⁶ The court also held that the threat of a school shooting infringes on the “rights of other students to be secure and to be let alone,” and was an invasion of the rights of others, a prong in *Tinker*.⁶⁷ The court found that the student should have reasonably foreseen the messages reaching campus and that “their nexus to the school could [not] have been more direct.”⁶⁸ The court acknowledged the challenges that social networking sites and other websites will present going forward, but chose not to “craft a one-size fits all approach.”⁶⁹ While it is common sense that the threat of a school shooting is not protected under the First Amendment, the issues facing the country going forward will not always be so simple.

D. Modern School Speech Codes

Speech codes implemented twenty years ago to combat racist and sexist speech at the University of Michigan, University of Wisconsin, and Stanford University have been failures, with no evidence showing that the speech they were intended to eliminate has decreased.⁷⁰ Other speech codes adopted during that time, which were challenged on First Amendment grounds, were deemed unconstitutional.⁷¹ These speech codes, although failures, demonstrate important First Amendment concepts.

1. *Problems with Speech Codes*

The Foundation for Individual Rights in Education (FIRE) is an organization whose mission is to “defend and sustain individual rights at America’s colleges and universities.”⁷² FIRE argues that “[f]reedom of speech is a fundamental American freedom and a human right,” a right that America’s universities should value and protect.⁷³ FIRE asserts that the intellectual vitality of a university depends on competition within a “marketplace of ideas.”⁷⁴ FIRE has found that this competition can be

66. *Id.* at 1071 (quoting *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 504 (1969)).

67. *Id.* at 1072.

68. *Id.* at 1069.

69. *See id.*

70. Conor Friedersdorf, *The Lessons of Bygone Free-Speech Fights*, ATLANTIC (Dec. 10, 2015), <http://www.theatlantic.com/politics/archive/2015/12/what-student-activists-can-learn-from-bygone-free-speech-fights/419178/>.

71. *Id.*

72. *Mission*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., <https://www.thefire.org/about-us/mission/> (last visited Nov. 11, 2016).

73. *Id.*

74. *Id.*

stifled “when students or faculty fear punishment for expressing views that may be unpopular with the public” or administrators in the university.⁷⁵

This rationale is similar to the reasoning of the Court in *Tinker*. The Court held that students cannot “be confined to the expression of those sentiments” that are approved by the State or by school officials.⁷⁶ Without “a specific showing of constitutionally valid reasons . . . students are entitled to the freedom of expression of their views.”⁷⁷ “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”⁷⁸ The Court also writes that the classroom is the “marketplace of ideas,” and that the “Nation’s future depends upon leaders [who are] trained through wide exposure . . . [in the] exchange of ideas . . . rather than . . . authoritative selection.”⁷⁹ The *Tinker* Court did not want to limit its ruling to the confines of schools; it also wanted to apply the ruling to intercommunication among students outside of classroom hours.⁸⁰

So, what are professors really doing when they use trigger warnings in their lectures? The use of trigger warnings in classrooms can be detrimental to students’ mental health. Universities are teaching students to be hypersensitive, a thinking that can damage careers, friendships, and mental health.⁸¹ Trigger warnings go against a basic tenet of psychology—exposing someone with an anxiety disorder to the thing that they fear to help them overcome it.⁸² Trigger warnings can create unhealthy mental habits for those without post-traumatic stress disorder (PTSD) or other anxiety disorders.⁸³ This instills in students the idea that because someone thinks something is dangerous, then so should everyone else.⁸⁴ This catastrophic rhetoric blows regular events completely out-of-proportion into a huge negative.⁸⁵ However, this is not to suggest that trigger warnings are void of value; rather, it is to advocate a more restrained use of trigger warnings.⁸⁶ The Court certainly did not expect its holding in *Tinker* to apply to trigger warnings or to words people may find offensive.

75. *Id.*

76. *See Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 511 (1969).

77. *Id.*

78. *Id.* at 512 (citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

79. *See id.*

80. *See id.*

81. *See Lukianoff & Haidt, supra* note 2.

82. *Id.*

83. *Id.*

84. *See id.*

85. *See id.*

86. *See* Kathleen Smith, *Warning: This Course May Cause Emotional Distress*, AM. PSYCHOL. ASS’N (July/Aug. 2014), <http://www.apa.org/monitor/2014/07-08/course-distress.aspx> (discussing

The Supreme Court and FIRE share the desire to protect the freedom of thought and exposure to a wide variety of ideas. Exposure to a multitude of differing opinions and values, even ones that people may disagree with, are of the utmost importance to society. Diversity is linked to innovation and economic prosperity.⁸⁷ Thus, universal speech policies that foster diverse ideas are crucial on all campuses. However, campuses should not have to become free-for-alls where no rules or boundaries are in place. There certainly are interests that must be considered, ranging from protecting students from assault or from discrimination based on age, sex, or race. Instead, a balance must be achieved—one that protects students without stepping on their rights.

2. *The Foundation for Individual Rights in Education Rating System*

It is difficult to determine whether university policies violate or impair students' right to freedom of speech. FIRE has compiled a database that will be used to examine the differences between good and bad policy. FIRE's "Speech Code Rating System applies equally to public and most private universities," with the caveat that private universities are not required to uphold the Constitution.⁸⁸ Rather, these private universities may be morally and possibly contractually bound "to uphold the fundamental principles of free speech and of academic freedom."⁸⁹ As private associations, private universities are allowed to prioritize other values above the right to free speech.⁹⁰ For purposes of the following examination, however, both public and private institutions will be held to the same standards. Institutions on the FIRE website are on a stoplight grading system.⁹¹ There are four different color codes: red, green, yellow, and gray.⁹² Only the red, green, and yellow institutions will be considered, as gray indicates that the institution has not been rated.

"Red light" institutions have "at least one policy that both clearly and substantially restricts freedom."⁹³ Clear restrictions "unambiguously

personal responsibility in managing material that may be upsetting and to practice regulating emotional responses to triggers).

87. Scott Page, *Diversity Powers Innovation*, CTR. FOR AM. PROGRESS 2 (Jan. 26, 2007), http://inclusive.nku.edu/content/dam/Inclusive/docs/diversity_powers_innovation.scot%20page.pdf.

88. *Using the Database*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., <https://www.thefire.org/spotlight/using-the-spotlight-database/> (last visited Nov. 11, 2016).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

infringe[] on what is or should be protected expression.”⁹⁴ At these institutions, “the threat[s] to free speech . . . [are] obvious on the face of the policy and does not depend on” the application of the policy.⁹⁵

A “yellow light” institution has policies that “restrict a more limited amount of protected expression.”⁹⁶ The vague wordings of these policies pose a risk of being “easily used to restrict protected expression.”⁹⁷ FIRE gives the example of a ban on posters with “references to alcohol or drugs . . . as unambiguously restrict[ing] speech . . . [based on] content and viewpoint” with a limited scope.⁹⁸ Policies banning “‘verbal abuse’ . . . is not a clear violation because ‘abuse’ might refer to unprotected speech,” but such policies could still be applied to prohibit a substantial amount of protected speech.⁹⁹ The “verbal abuse” policy ban is yellow because it depends on how the policy is applied.¹⁰⁰

When institutions’ policies do not place speech in serious peril, they receive a “green light” rating.¹⁰¹ This does not mean, however, that the institution “actively supports free expression”; rather, it indicates that FIRE is not “aware of any serious threats to . . . free speech rights” through policies at that institution.¹⁰² Schools should strive to be a green light institution. That is, having a policy that does not threaten freedom of expression.

There are a few important features apparent in bad or “red light” policies. These policies are often very vague and thus open to interpretation.¹⁰³ They seem to put an emphasis on communications between students rather than general speech.¹⁰⁴ “Red light” policies also do

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. See generally FOUND. FOR INDIVIDUAL RTS. IN EDUC., https://www.thefire.org/spotlight/?x=&y=&speech_code=Red&submit=GO (last visited Nov. 11, 2016) (listing campuses with red light policies).

104. See generally *Florida State University*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., <https://www.thefire.org/schools/florida-state-university/> (last visited Nov. 11, 2016) (providing speech code rating for Florida State University); *Chicago State University*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., <https://www.thefire.org/schools/chicago-state-university/> (last visited Nov. 11, 2016) [hereinafter *Chicago State University*] (providing speech code rating for Chicago State University).

not mention that students have rights to freedom of speech.¹⁰⁵ Rather, these policies seem to discourage students from using speech.¹⁰⁶

“Green light” policies also have similar characteristics among them. Good policies focus on freedoms and recognizing that the freedoms are a right.¹⁰⁷ These policies also recognize that there is no place for unlawful acts, which many of the “red light” policies do as well;¹⁰⁸ however, the poor policies provide more descriptive prohibitions instead of just plainly stating its rule.¹⁰⁹

E. Social Networking Sites in Today’s World

It is almost cliché to even acknowledge social networking sites’ impact on the world today. According to a 2015 report, 65% of adults say they used at least one social networking site—nearly a tenfold increase of users in the past decade.¹¹⁰ Similarly, 90% of young adults, aged 18-29, use social networking sites.¹¹¹ Men and women use social networking sites at similar rates, and there are no notable differences between racial or ethnic groups in terms of usage.¹¹² There are differences in rural areas and education levels: those in rural areas are less likely to use social networking sites and those with some college experience are more likely to use social networking sites than those with high school diplomas or less.¹¹³ Americans also spend more time on social networking sites than on any

105. See FOUND. FOR INDIVIDUAL RTS. IN EDUC., *supra* note 103.

106. See, e.g., *North Carolina Central University*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., <https://www.thefire.org/schools/north-carolina-central-university/> (last visited Nov. 11, 2016) (describing a responsibility to refrain from speaking or writing words in a manner that demeans, defames, offends, discriminates, or slanders).

107. See, e.g., *A-Z Policies: Academic Freedom*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., https://www.thefire.org/fire_speech-codes/duke-academic-freedom/ (last visited Nov. 11, 2016) (“Freedom of inquiry and the free exchange of ideas are essential for the fulfillment of the university’s mission. Academic freedom is a right and responsibility of students as well as faculty.”).

108. See FOUND. FOR INDIVIDUAL RTS. IN EDUC., https://www.thefire.org/spotlight/?x=&y=&speech_code=Green&submit=GO (last visited Nov. 11, 2016) (listing campuses with “green light” policies).

109. See, e.g., *Alabama A&M University*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., <https://www.thefire.org/schools/alabama-am-university/> (last visited Nov. 11, 2016) (listing examples of conduct prohibited by the policy).

110. ANDREW PERRIN, PEW RESEARCH CENTER, SOCIAL NETWORKING SITES USAGE: 2005-2015, at 2 (2015) http://www.pewinternet.org/files/2015/10/PI_2015-10-08_Social-Networking-Usage-2005-2015_FINAL.pdf.

111. *Id.* at 4.

112. *Id.* at 3.

113. *Id.*

other online activity.¹¹⁴ On an average day, 15% of Facebook users update their status, 10% send another user a private message, and 22% comment on another's post or status.¹¹⁵ Social media sites are no longer confined to a certain small demographic; their use is now omnipresent. Because of the widespread use of social networking in society, it is important to ensure that students are aware of any ramifications that can come from what they say, as well as the protections that they have.

F. A New Case for a New Model

Bell, a student at Itawamba Agricultural High School (Itawamba), posted a rap recording online that alleged teachers and coaches at his high school were guilty of misconduct against female students.¹¹⁶ The court stated that there were at least four instances of threatening, harassing, and intimidating language in the rap.¹¹⁷ Bell was suspended because his action violated the school district's administrative disciplinary policy that lists "[h]arassment, intimidation, or threatening other students and/or teachers as a . . . disruption."¹¹⁸ A disciplinary-committee conducted a hearing and ultimately recommended to the school board that the suspension be upheld and Bell transferred to an alternative school.¹¹⁹ In suspending Bell, the disciplinary committee determined that the issue of whether the lyrics were threats was vague, although the school board found them threatening and in violation of the school-district policy.¹²⁰ Thereafter, Bell's mother filed suit against the school board.¹²¹

The district court found the rap lyrics constituted harassment and intimidation of teachers.¹²² The court also found that the recording was a substantial disruption at school, as it was reasonably foreseeable that it would cause disruption.¹²³ The appellate court raised similar concerns in its analysis, stating that a substantial disruption was reasonably foreseeable because of the manner in which the speech was performed.¹²⁴ The school

114. KEITH HAMPTON, ET AL., PEW RESEARCH CENTER, SOCIAL NETWORKING SITES AND OUR LIVES 8 (2011), <http://www.pewinternet.org/files/old-media/Files/Reports/2011/PIP%20-%20Social%20networking%20sites%20and%20our%20lives.pdf>.

115. *Id.* at 3.

116. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 384 (5th Cir. 2015) *cert. denied*, 136 S. Ct. 1166 (2016).

117. *Id.*

118. *Id.* at 385 (internal quotation marks omitted).

119. *Id.* at 385–86.

120. *Id.* at 386.

121. *Id.* at 387.

122. *Id.* at 388.

123. *Id.*

124. *Bell*, 799 F.3d at 398.

officials could foresee the threatening, intimidating, and harassing language to cause a substantial disruption.¹²⁵ The court noted that the school district's policy demonstrated an awareness of *Tinker*'s "substantial disruption" standard.¹²⁶ Further, the court elaborated:

It equally goes without saying that threatening, harassing, and intimidating a teacher impedes, if not destroys, the ability to teach; it impedes, if not destroys, the ability to educate. It disrupts, if not destroys, the discipline necessary for an environment in which education can take place. In addition, it encourages and incites other students to engage in similar disruptive conduct. Moreover, it can even cause a teacher to leave that profession. In sum, it disrupts, if not destroys, the very mission for which schools exist—to educate. If there is to be education, such conduct cannot be permitted.¹²⁷

Perhaps most importantly, the court noted that schools and parents have failed to recognize warning signs and signals of violence through speech, which foreshadowed actual instances of violence.¹²⁸

Now, administrators have the duty to ensure that they are protecting the students within their schools, while simultaneously avoiding a violation of free speech.¹²⁹ Oftentimes, decisions are based on school policies. These policies can be burdensome on students and need to be based on law. One way to ensure that policy is fair to students is to base policy on a sound model policy that is accepted nationwide.

III. ANALYSIS

Tinker set forth an appropriate test for analyzing First Amendment claims in educational settings and courts should continue to utilize its holding. However, courts often face uncertainty in applying the *Tinker* test when they address varying campus speech policies. One school may have a policy that is extremely restrictive, while another school in the next town could have a very open policy.¹³⁰ While *Tinker* has given the nation a benchmark for what speech is and is not allowed on campuses, a more

125. *Id.*

126. *Id.* at 399.

127. *Id.* at 399–400.

128. *Id.* at 399.

129. *See id.* at 389–90.

130. *See, e.g.*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., *supra* note 108 (describing the students' academic freedom as a right and responsibility essential to the university's mission); *Chicago State University*, *supra* note 104 (describing the students' pledge to abide by a code that allows the university to "investigate allegations, conduct hearings and levy sanctions against any student found responsible . . .").

universally accepted speech code or policy should be put in place. Section A argues a countrywide campus speech policy is necessary; Section B offers an example policy, and Section C applies it to *Bell*.

A. The Need for a Countrywide Campus Speech Policy

Schools at both the primary and higher education level must face the reality that students will continue to utilize social media. Additionally, educators should not use social media as venues for punishment or chastisement. Social networking sites are going to introduce people to “discomfort and unpleasantness,” but that does not mean that schools should seek to protect and shelter students or others from these views. Instead, social networking sites should be promoted for their ability to allow students the opportunity to express themselves in a way never envisioned when *Tinker* was decided. Now, in the twenty-first century, campuses are reverting back to failed policies in order to “protect” their students. While colleges and secondary schools are different in nature, it would be practical to start holding students to a similar standard, one that is backed by *Tinker* precedent.

Education systems suffer when typically protected parts of speech are prohibited. The negative effects of speech restrictions are felt by the student body as a whole. Without the free exchange of thought, universities are creating shelters for students, only to set them up for failure once they leave. Universities, and even high schools and middle schools, should not be a shelter for students. Universities serve as the transition place into adulthood for many young Americans. The authors of *The Sheltering Campus: Why College Is Not Home*, A. Douglas Stone and Mary Schwab-Stone argue that the primary purpose of universities is education and the eventual transition to independent community living.¹³¹ However, some universities have given in to the notion that they should provide a continued home-like environment.¹³² When students clamor for “safe spaces,” they become dependent on administrators to handle their interactions and perceptions on campus.¹³³ This deters students from developing social skills and stifles “[i]ntellectual growth and flexibility.”¹³⁴ Students do not learn to be self-reliant and are over managed. This lack of autonomy is reminiscent of adolescence and fends off the challenges of accepting adult

131. *Id.*

132. A. Douglas Stone & Mary Schwab-Stone, *The Sheltering Campus: Why College is Not Home*, N.Y. TIMES (Feb. 5, 2016), http://www.nytimes.com/2016/02/07/education/edlife/adolescent-development-college-students.html?_r=0.

133. *Id.*

134. *Id.*

responsibilities.¹³⁵ Students should be forging their own ideas and growth, rather than remaining idle until an administrator tells them what they should or should not do.

Primary and secondary schools should also foster an environment of diverse ideas because many students still do not attend college. Approximately 31.6% of 2014 high school graduates were not enrolled in colleges or universities in October 2014.¹³⁶ High schools should not fear the consequences of exposing students to different ideas, for there is a large number of students who will immediately transition into adulthood. Adults in society do not have these protections that universities create and offer their students.

Student speech has also helped keep schools transparent.¹³⁷ With social networking sites, students now have an entirely new forum for communication. This forum is widely available, easily accessible, and can spread communications of all forms in a matter of seconds. This availability has led to problems for students. For example, David Wheeler explores these problems when he writes of a school class president being suspended for a tweet in which he made fun of the school football team.¹³⁸ He mentions another instance where twenty students were suspended for claiming on Twitter that a female teacher had flirted with a student.¹³⁹ Schools are prone to censor those who complain about school conditions.¹⁴⁰ Students should not be punished for their words online; rather, they should use these tools that they have available. Protecting the rights of these students online is crucial to the freedom of speech moving forward.

B. Proposed Speech Policy for Universal Application

While there could be a number of uniformity issues with applying such a broad policy, especially with regards to states and their operation of schools, this Comment argues that a model for schools should exist that allows schools to adopt or adapt for their specific needs. Accordingly, this model policy allows schools to craft rules for their situations. This flexibility is key to establishing some uniformity and an ability to rely on precedent for protections, both for the school and its students. First, it is important to determine the differences between good and bad policy. After

135. *Id.*

136. *College Enrollment and Work Activity of 2015 High School Graduates*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT. (Apr. 28, 2016), <http://www.bls.gov/news.release/hsgec.nr0.htm>.

137. *See* WHEELER, *supra* note 15.

138. *Id.*

139. *Id.*

140. *See id.*

distinguishing between policy that works and policy that does not, a model must be crafted and implemented.

In general, good policies respect the student, the institution, and the right to freedom of expression by using unambiguous terms. Crafting a good policy requires a clear and concise message that encourages free speech, while discouraging speech that is unlawful. The model should also be relatively easy to adapt into a wide variety of different school systems. Administrators should also insert their procedure for handling claims dealing with freedom of speech into the model as well as any other specific requirements for each school, such as posting policies. The ideal procedure is one that is fair to students and consistent with the model itself, although all situations where campuses police their students' speech present First Amendment issues.¹⁴¹ Finally, the model should account for changes in society today, especially concerning the role of social media. The model policy for student free speech is below.

RIGHTS AND RESPONSIBILITIES OF FREEDOM OF EXPRESSION

(1) Students have the right to freedom of expression and speech. [School name] supports this right and will uphold the freedom of expression and speech. [School name] is committed to supporting the exercise of this right guaranteed to individuals under the Constitution, federal law, and state law. These rights and responsibility extends to all members of the campus.

(2) Communication that is unlawful under the Constitution, federal law, and state law is prohibited. Communication that materially disrupts classwork, involves substantial disorder, or invades the rights of others is prohibited.

(3) These rights and responsibilities extend to students off-campus who direct their communications towards the campus. Illegal communications directed towards campus is prohibited.

(4) Students have the same right to freedom of expression and speech in their online communications within the school. The same rights and responsibilities extend to online communication.

141. See generally Kathy Ahn, *The Pendulum Swings Backwards: The Clery Act Must Be Amended to Address University Policies that Discourage Rape Reporting*, 31 WOMEN'S RTS. L. REP. 514 (2010); see also *FIRE's Guide to Due Process and Campus Justice*, FOUND. FOR INDIVIDUAL RTS. IN EDUC., <https://www.thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/#Contents3> (last visited Nov. 11, 2016) (describing policies and procedure that campuses may take in disciplinary actions).

Most important in the policy is the immediate recognition of students' right to freedom of expression and speech. This protection should be guaranteed for students, but it is also the same protection that should be granted to all members of a campus. Instead of listing speech and activities the school may wish to eliminate, the policy defers to law. The only prohibited communication that is specifically mentioned comes directly from *Tinker*. Section two borrows from *Tinker* when discussing prohibited conduct.¹⁴²

The policy needs to address online communication as well. Because of its intertwinement with society today, it is important to afford online communications the same protection and prohibitions that other communications enjoy. While communication cannot be directed at the school in a manner that is prohibited, the policy should allow students to be critical of the school without fear of repercussions. The next step is to determine the viability of this model policy.

C. Applying the New Policy to a New Case

The policy, while designed to be a strong venue for freedom of speech, would not protect Bell in this situation. The lyrics in his rap mention hitting a teacher with a “ruger [sic]” and putting “a pistol down [his] mouth.”¹⁴³ The context in which these lyrics come from is important. This is not a situation in which the lyrics were depicted as art. Rather, this is speech directed towards a school by specifically mentioning teachers and the acts that one would perform on them. In most other contexts, there would be much more hesitation to hold the speech to this standard, but the lyrics are a direct violation of section two in that it violates, at minimum, the precedent set by *Tinker*.

The song interfered with the operation of the school as the teachers were unable to perform their jobs in a normal manner.¹⁴⁴ Specifically mentioning teachers in a rap is not likely to get a student in trouble, neither is “calling them out” on some issues a student might have. But using words to depict violence, in a school setting, is not speech that deserves protection. The student intended for it to reach the public and the school itself. When the student used Facebook, where his other classmates are members, and specifically mentioned the teacher, it was reasonably foreseeable that his actions would reach the school. If Bell used the lyrics to depict the violent acts happening to other students, there would likely be

142. See *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 512.

143. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 384 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (2016).

144. See *id.*

an even harsher reaction to it. That situation is akin to *Wynar*, where the court held that planning a school shooting infringed the rights of other students to be secure and left alone.¹⁴⁵

Comparing the policy and the ruling, there are some similarities. The court relied on *Tinker* for its ruling, much like the proposed policy. The substantial disruption portion is also similar as both the court and policy treat the lyrics as such. The policy follows *Tinker* in that the disruption must be more than an “undifferentiated fear or apprehension of disturbance.”¹⁴⁶ The court follows the same policy reasoning in *Tinker* in its analysis as well. In short, the policy could have been substituted for the one in *Bell* and produced the same result. Policy that follows *Tinker* respects the freedom of expression and speech, while also limiting that speech in a way that is fair.

This situation is neither one where someone said something that upset a group of students, nor is this someone being offended at a set of particular words. This case is one where freedom of expression and speech cannot be the shield that one clings to. When students threaten others with violence, it becomes an issue for the entire school, not just those directly affected by it. Freedom of speech is not without its limitations, and the court reaffirms this by backing policy that acknowledges *Tinker*. There are bound to be continued issues with students and their rights regarding freedom of expression and speech, but giving students their full rights and not limiting them on an institutional level will be important to monitor going forward.

IV. CONCLUSION

The future of the political correctness movement is unclear. In October of 2015, a student wrote an opinion column for his student newspaper at Wesleyan, where he criticized the Black Lives Matter movement’s tactics and messaging.¹⁴⁷ The student, a self-proclaimed moderate, said that he was called a racist, and the paper he wrote for drew a lot of negative criticism.¹⁴⁸ The paper responded by apologizing and promising to make the paper “a safe space for the student of color community.”¹⁴⁹ Despite support from the administration, the student government halved funding for the newspaper.¹⁵⁰

145. *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1072 (9th Cir. 2013).

146. *Tinker*, 393 U.S. at 508.

147. See Catherine Rampell, Opinion, *Free Speech is Flunking out on College Campuses*, WASH. POST (Oct. 22, 2015), https://www.washingtonpost.com/opinions/free-speech-is-flunking-out-on-college-campuses/2015/10/22/124e7cd2-78f5-11e5-b9c1-f03c48c96ac2_story.html.

148. *Id.*

149. *Id.*

150. *Id.*

This demonstrates that perhaps the political correctness movement is not as powerful as believed. In this situation, administration supported its student newspaper and its rights, only through outside pressure did the student government respond. While there certainly are schools that restrict speech in a way that is fundamentally unfair to the student, this is not an epidemic. This problem might simply be louder than its actual effect. Students are always at the center of the noise and often leading the charge, and only when the noise cannot be ignored do administrators decide to change course. While being responsive to students is admirable, some ideals and behaviors should not be given in to. *Tinker* and its progeny show that there is precedent for protecting this right, even in the age of social networking sites. Limitations do exist, but they are for the safety and well-being of society as a whole. Protecting harassment or threatening speech was never intended, but neither was sheltering people from words they could possibly find offensive. A new model policy for others to follow is not going to solve all of the problems overnight, but it is a step to push back against the movement and protect students' rights.

