2014

College Students' Online Speech: Searching for the Appropriate Standards Within First Amendment Case Principles

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CARDOZO LAW REVIEW
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COLLEGE STUDENTS' ONLINE SPEECH: SEARCHING FOR THE APPROPRIATE STANDARDS WITHIN FIRST AMENDMENT CASE PRINCIPLES

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INTRODUCTION

College student free speech cases, particularly as applied to student online speech challenges, suffer from conflicting legal principles. This paper highlights empirically noted problems in resolving disputes between a college student's free speech rights and a public college's authority to maintain order and campus safety. In Part I of this paper, the authors present the established legal principles from two foundational cases addressing issues of student speech in the educational context. In Part II, the authors demonstrate how courts have used PK12 education cases and public employment cases as sources that address legal principles for college student speech cases—particularly to resolve college students' speech challenges with an online dimension. In Part III, the authors conclude that existing legal principles, ones largely derived from the PK12 education context, are insufficient to analyze some types of student collegiate speech cases. This thesis is supported when examining several cases involving college students, especially cases dealing with college students' online speech or expression. In resolving the legal framework problem, the authors suggest a modification of existing legal principles that accounts sufficiently for characteristics specific to the collegiate learning space.[1]

PART I. FREE SPEECH PRINCIPLES FROM FOUNDATIONAL EDUCATION LAW CASES

Two Supreme Court cases dealing with secondary students, *Tinker v. Des Moines Independent Community School District*[2] and *Hazelwood School District v. Kuhlmeier*,[3] have played significant roles in shaping the legal framework for how many courts handle public college students' speech claims.

Tinker is one of the foundational cases in analyzing student free speech. Students in the *Tinker* case planned to wear black armbands as a silent protest to the ongoing hostilities occurring in the Vietnam War. In anticipation of the protest, the school principals in the Des Moines

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[1] This paper builds on an earlier piece that explores frameworks to examine college student free speech cases. *See* Jeffrey C. Sun, Neal H. Hutchens & James D. Breslin, *A (Virtual) Land of Confusion with College Students' Online Speech: Introducing the Curricular Nexus Test*, 16 U. PA. J. CONST. L. 49 (2013).

[2] 393 U.S. 503 (1969).

[3] 484 U.S. 260 (1988).

School District banned armbands in the school.[4] The Supreme Court ruled that the policy prohibiting the armbands violated the students' free speech. The Court crafted a principle of school disruption as the operative authority for schools to regulate student speech. That is, school officials may regulate student speech when the questioned speech reasonably leads school officials to forecast substantial disruption of or material interference with school activities or if speech encroaches upon the rights of others.[5] Thus, this analysis relies on the independence of the student's speech from either school-sponsored activities or based on some learning activity such as an internship.

While Tinker presented an issue of students' independent speech (i.e., not school sponsored speech), a subsequent case, *Hazelwood School District v. Kuhlmeier*, brought forward a challenge involving an instructional environment in the context of a journalism class. In *Hazelwood*, a public high school principal removed selected articles from the student newspaper. As part of a journalism class, students wrote articles for the school newspaper dealing with student pregnancy and parental divorce to which the principal objected. Drawing a distinction between the type of independent student speech at issue in *Tinker*, the Court concluded that a school may place greater restrictions on student speech when it involves school-sponsored expressive activities.[6]

The Court rationalized that when expressive activities take place in which "students, parents, and members of the public might reasonably perceive [them] to bear the imprimatur of the school," then these activities reflect instructional components and are attributed to the school curriculum.[7] Today, this legal rule serves as a short-hand heuristic for school administrators that they have authority over student speech when it is school sponsored. In *Hazelwood*, the Court established the rule that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[8] While not in complete agreement, multiple courts have extended the legal standards announced in *Hazelwood* to collegiate settings.[9]

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

5 *Id.* at 740.

6 *Id.* at 271–72.

7 *Id.* at 271.

8 *Id.* at 273.

9 *See, e.g.*, Brown v. Li, 308 F.3d 939, 952 (9th Cir. 2002) (stating "*Hazelwood* provides a workable standard for evaluating a university student's First Amendment claim stemming from curricular speech."); Heenan v. Rhodes, 757 F. Supp.2d 1229, 1237–38 (M.D. Ala. 2010) (noting that "the law in *Hazelwood* has been adopted by other courts faced with the question of what protections are due student expression that touches upon internal school matters of pedagogical

PART II. FREE SPEECH PRINCIPLES: NOT QUITE SUFFICIENT FOR COLLEGE STUDENTS' ONLINE EXPRESSIONS

Although *Tinker* and *Hazelwood* offer guidance on free speech principles to follow, these cases present challenges in their application for courts and college administrators when addressing the parameters of institutional authority over college students' speech, including for online settings. We briefly discuss two difficulties emergent from the case law in student speech.

A. Distinguishing Between the PK12 and Postsecondary Environments

Courts, at times, struggle to apply the legal principles derived from *Tinker* (i.e., independent student speech) and *Hazelwood* (i.e., school-sponsored speech) in a manner that sufficiently comports with the purposes of the college environment, which of course, is substantially different from that at the PK12 level. While not an online student speech case, *Hosty v. Carter*[10] illustrates judicial troubles with applying First Amendment principles from PK12 cases to higher education. In *Hosty*, the Seventh Circuit for the U.S. Court of Appeals applied *Hazelwood*, the high school newspaper case, to a dispute arising between student leaders of a college newspaper at a state university and administrators at the institution. When the college newspaper staff refused to issue a requested retraction, a university administrator intervened and asked the newspaper printer to proceed only after the administrator had reviewed and approved issues of the paper.[11] The newspaper staff filed a First Amendment speech rights claim against the public university.

In the initial case, a federal district court granted summary judgment to all the defendants except one—the administrator who sought prior approval of the newspaper printing. Then, on an interlocutory appeal addressing the administrator's denial of summary judgment (i.e., *Hosty I*), the federal appellate court reviewed the First Amendment claim indicating that *Hazelwood* did not provide the appropriate legal framework for a college newspaper.[12] However, such

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and curricular concern").

[10] Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005) ("*Hosty II*").

[11] *Id.*

[12] *Id.* at 949.

an application of *Hazelwood* was clearly relied upon when the case was appealed en banc (i.e., *Hosty II*). At that time, the full panel of the Seventh Circuit adopted *Hazelwood* as the operative framework.[13] The en banc panel found the situation in *Hazelwood* involving a high school student newspaper funded and operated by a public school as indistinguishable from the *Hosty* case, which involved a college student newspaper subsidized by a university.[14] In light of that application in *Hosty II*, a public college or university could restrict student speech when an administrator or instructor's justification is reasonably related to a legitimate pedagogical purpose.[15]

Indeed, this application of *Hazelwood* stretches the authority of college administrators and fails to recognize the maturity and journalistic autonomy that college newspapers try to espouse.[16] The importation of *Hazelwood* extends to student speech beyond college student newspapers. For example, in *Heenan v. Rhodes*,[17] a nursing student was dismissed allegedly in retaliation for her critical comments about the nursing program's student evaluation and dismissal systems.[18] After being dismissed, she sued for First and Fourteenth Amendment violations. The court explained in its analysis that *Hazelwood* "has been adopted by other courts faced with the question of what protections are due student expression that touches upon internal school matters of pedagogical and curricular concern."[19] Recently, Professors Jeffrey Sun and Neal Hutchens along with James Breslin drew attention to the concerns about the *Heenan* case.[20] They write: "[T]he court [in *Heenan*] appeared to suggest that even in relation to any of the student's speech taking place outside of an instructional context, the *Hazelwood* standards should apply merely because the content of the speech addressed pedagogical and curricular issues related to the nursing program."[21] Simply put, it is possible, within some jurisdictions, to have a very broad interpretation of the reach of college administrator authority over student speech involving content that is only somewhat

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13 412 F.3d 731.

14 *Id*.

15 *Id*.

16 Several states have responded to the *Hosty II* decision. For instance, California, Colorado, Illinois, and Oregon have enacted legislation declaring student media as designated public forums. *See, e.g.*, CAL. EDUC. CODE § 48907 (2014); COLO. REV. STAT. § 22-1-120.1 (2014); 110 ILL. COMP STAT. 13/1, ET SEQ. (2014); ORE. REV. STAT. § 351.649 (2014).

17 757 F. Supp. 2d 1229 (M.D. Ala. 2010); 761 F. Supp.2d 1318 (M.D. Ala. 2011) (denying motion to alter or amend judgment).

18 757 F. Supp. 2d at 1232–1235.

19 *Id*. at 1238. The court did issue an amended opinion to make clear that independent student speech was protected, but the court in its opinion was clearly struggling with application of the student speech legal principles to a college environment.

20 Sun, Hutchens & Breslin, *supra* note 1.

21 *Id*. at 69.

related to the learning within an academic program. Given this extension of administrative authority, the application of *Hazelwood* to college student speech claims raises important questions and concerns.

B. Distinguishing Between the Workplace and Collegiate Experiences

Compounding the complication arising from the importation of PK12 education law principles to college settings, courts have also drawn on other First Amendment related principles to apply to student speech. Notably, when addressing questions of college students' speech rights within certain learning environments, courts have drawn on the public employee speech line of cases for the operative framework. In brief form, *Garcetti v. Ceballos*[22] offered the holding that public employees hold no protected speech rights over expressions made pursuant to carrying out one's official duties. That is, when a public employer engages in speech pursuant to carrying out his or her official duties, then such speech is ineligible for First Amendment protection.[23] The *Garcetti* decision offered a new legal wrinkle to the public employee speech claim standards. The case created a bright-line regarding when public employee speech is eligible or ineligible for First Amendment protection. Further, when speech takes place outside of the realm of carrying out official duties, as revealed in cases such as *Pickering v. Board of Education*,[24] *Connick v. Myers*,[25] and *Lane v. Franks*,[26] the analysis centers on whether the speech addressed a matter of public concern. Even if addressing a public concern, a governmental employer can still proffer justifications, such as the need for efficiency in operation, for restricting employee speech made in a private capacity.

One of the early college student online speech cases illustrates the application of the public employee framework. In *Snyder v. Millersville University*,[27] a college student in a teacher education program posted critical comments about her school-aged students viewing her MySpace page and her training placement including disparaging remarks about the lead teacher who was supervising her. In addition, she posted a

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[22] 547 U.S. 410 (2006).

[23] Recently, the U.S. Supreme Court in *Lane v. Franks* clarified the *Garcetti* ruling to emphasize that a court's inquiry in public employee speech cases examines whether the speech at issue falls ordinarily within the scope of the public employee's duties. 134 S. Ct. 2369, 2379–80 (2014). As the *Lane* court observed, some courts have extended *Garcetti* in error to include speech that merely concerns the challenged public employee's duties, which would, in practice, unintentionally stifle expressions such as a public employee's truthful testimony under oath. *Id*.

[24] 391 U.S. 563 (1968).

[25] 461 U.S. 138 (1983).

[26] 134 S. Ct. 2369 (2014).

[27] Snyder v. Millersville Univ., No. 07-1660, 2008 WL 5093140 (E.D. Pa. Dec. 3, 2008).

photo of her with the caption "drunken pirate."[28] The student-teacher had also discussed her MySpace page with students at the training placement school. Because of those postings, as well as other deficiencies, the school discontinued Snyder as a student-teacher. In light of that decision, Snyder was unable to complete her requirements for state certification as a teacher, and she could not obtain the degree in education that she was pursuing. As a result, Snyder sued the university for First Amendment speech violations and constitutional due process claims.

In examining this case, the federal district court observed that Snyder's environment was more akin to an apprenticeship model than a student-university model and such analysis was consistent in other jurisdictions that have examined college students' practice-based learning. As such, the court determined that Snyder was performing functions and duties more akin to an employee than a college student. Looking to the public employee framework, the court determined that the speech was personal in nature and not a matter of public concern. Thus, the student-teacher could not sustain a First Amendment claim. The *Snyder* case, as noted, represents another kind of importation of legal standards to assess college student speech claims. Rather than looking to PK12 settings, in cases involving student practica and internships, courts have looked to the legal standards applicable in a workplace setting. Similar to the cases that place overreliance on PK12 legal standards, the cases using the public employee legal standards to analyze college students' free speech rights, particularly in matters involving students' online speech, have not been tailored to the unique circumstances and concerns of a higher education context. While the PK12 framework cases reflect a heavy hand signaling oversight and authority over students as children, the public employee framework cases reflect little tolerance for actions in the workplace, instead treating students as trained professionals, who have the knowledge and experience required in an employment setting. Suffice it to say, neither properly supports the middle ground appropriate to a collegiate setting.

PART III. PRESENTING A COLLEGIATE LEARNING SPACE INQUIRY

The collegiate learning space warrants a different analysis. As noted earlier, the PK12 education speech cases and public employee speech cases do not fully appreciate the context of higher education. Past legal rules have offered some insight, but as a whole, they serve as poor heuristic guides for college administrators. In a pending piece by

[28] *Id.* at *5–*6.

Neal Hutchens, Jeffrey Sun, Joy Blanchard, and James Breslin, these academic scholars argue that courts should analyze speech cases of college students in internships and practica without overreliance on PK12 and public employee cases as the analytic framework.[29] Professionalism standards of academic programs have also come to light in several cases involving college students' online speech.[30] Collectively, these cases illustrate how courts have offered mixed messages in terms of classifying students, and how case outcomes seem disproportionate to, or not aligned with, a sound educational rationale. Further, Jeffrey Sun, Neal Hutchens, and James Breslin recently explained why legal principles generated from PK12 education law cases fail to articulate the nuanced differences between schools and colleges as learning places.[31] In light of these two pieces, this paper suggests a re-envisioning of the collegiate learning space with a more narrowly defined set of justifications for college administrators to limit student's speech.

Indeed, courts and college administrators should more thoughtfully and deliberately consider the nature of collegiate learning spaces which both affect, and are affected by, the quality of the student speech that they enable. Specifically, if college administrators wish to have greater authority over student speech, universities must present a more carefully articulated set of justifications in terms of how the student speech at issue arises to the educational institution's domain such as having a legitimate curricular or pedagogical concern.

In the past, courts have accepted a mere showing of some reasonable relationship between the student's speech and the educational environment. In those cases, that showing—without more—would suffice for college authority to curb student speech. This paper suggests that a more direct relationship be articulated. That is, college officials should be required to present a far more direct identification of the educational rationale and the college official's actions that would justify limiting a student's speech.

This proposal modifies expectations of college administrators, so they must demonstrate a direct connection. For example, cases applying *Hazelwood* would not simply forward how the speech is "reasonably related" to the pedagogical interest for the college to limit it. Instead, college officials must demonstrate a "directly related" application to the pedagogical interest in order to limit student speech.

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[29] Neal H. Hutchens, Jeffrey C. Sun, Joy Blanchard & James Breslin, *Employee or student? The First Amendment and student speech arising in practica and internships*, 306 EDUC. L. REP. 597 (2014).

[30] Yoder v. Univ. of Louisville, 526 Fed.Appx. 537 (6th Cir. 2013); Tatro v. Univ. of Minn., 816 N.W.2d 509 (Minn. 2012).

[31] Sun, Hutchens & Breslin, *supra* note 1, at 53–56.

The higher standard would recognize colleges and universities as places fostering dialogue and debate in a healthy manner. Equally important, it would not summarily shield administrators with rights to quash these opportunities of advancing the ideal that colleges and universities serve as the marketplace of ideas.

CONCLUSION

The preceding sections present a bit of irony. In one line of cases, courts applied PK12 education cases to the postsecondary educational setting. These cases make the learning environment of the PK12 educational sector largely akin to the higher education sector. Nonetheless, the literature and other cases are rich is discussion about how the maturity levels of students vary between these sectors and the differing educational missions of these contexts. Notably, these cases recognize that colleges are key places in society to advance debate and critical inquiry and foster open marketplaces of ideas in a way different than the inculcative and custodial functions of the PK12 environment.

Even more interesting, the line of cases using the PK12 education model to address postsecondary challenges is juxtaposed with the line of cases that apply the public employee speech framework to postsecondary student speech litigation. This second line of cases represent a noticeable shift toward thinking about postsecondary education in reference to the public workplace. Thus, the cases consider college students as akin to working professionals. The contrast is stark, yet neither is sufficient or fully appropriate. Accordingly, this paper advances a more nuanced approach, which responds to the unique nature of the collegiate learning space by requiring a more narrowly defined set of justifications for when college administrators may limit student's speech.