Chapter One: Free Speech

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In March of 2015, University of Oklahoma President David Boren immediately suspended two students and closed the Sigma Alpha Epsilon fraternity for the singing and recording of a racist song, and posting it surreptitiously on YouTube, without recourse to internal disciplinary measures. First Amendment absolutists cried “foul.” At first horrified by their sons’ behavior, the students’ parents later hired attorneys. But President Boren, once a senator, and nearing retirement, held his ground and even noted that the fraternity would not be allowed back on campus “while I am president.” While debate raged over the appropriateness of his decision, news reports about long-standing patterns of discriminatory activities at the University of Oklahoma, as well as many other higher educational institutions, began to make headlines. President Obama, while acknowledging how the behavior was in a long line of “stupid” racist and sexist acts, signaling recognition of a distinction between the speech and the actual acts, nonetheless applauded President Boren’s declarative response. The students publicly apologized for their actions, but as of this writing President Boren’s decision still stands.

It might seem odd that of all the institutions in U.S. society, higher education is the one against which we make an argument for restricting speech. Higher education’s mission rests on the support of essential values, such as freedom of expression and unfettered inquiry. Academic freedom, often misunderstood by many faculties as belonging to the individual, belongs legally to the institution a faculty member represents. Still, this principle acts as a vital bulwark against government intrusion into colleges and universities, public and private. It was established to preserve not just any speech, but speech that goes directly to the heart of the academic enterprise. Over the years, the Supreme Court has elevated the posture of corporate, commercial, and campaign speech. It is therefore reassuring that it has carved out a preserve for higher education as well, even if faculties continue to press for those rights to apply to individuals as well as the institutions for which they work.

The questions that the Internet has raised about free speech in higher education stretch well beyond headline-grabbing incidents such as the one at the University of Oklahoma. They begin with the function of the network systems: how those systems operate technically to support institutional missions and what policies are necessary to maintain the integrity of the enterprise. For example, most research institutions, and state institutions in particular, have information technology policies that
reserve the right of the institution to monitor network traffic or stored content under prescribed circumstances — such as a properly served legal warrant, or when there is a reasonable suspicion of a violation of law or policy — but otherwise declare that, as a practice, the institution will not monitor its network systems for content.

As the former director of information technology policy at Cornell University, I can speak firsthand to the living experience of this kind of policy. When I assumed the role in 2001, I was not the first. Steve Worona and Margie Hodges-Shaw pioneered IT policy direction, beginning with Cornell’s involvement in the Computer Worm incident in 1988. Robert Morris, a Cornell University graduate student, released the worm on the pre-Internet network systems from a computer at the Massachusetts Institute of Technology. In addition to the distinction for being the first person charged with and found guilty of the then-new Computer Fraud and Abuse Act of 1986, Morris was the subject of a Cornell University internal report on the incident. One outcome of that report was to expel him from the Computer Science program. Nevertheless, while becoming wealthy as a software developer, Robert Morris completed a doctoral program at Harvard and is now a tenured professor at the Massachusetts Institute of Technology. The other outcome was more long lasting for the university: the establishment of institutional policy around the use of computers and network systems. Although not the first university to create such policy — that distinction goes to the University of Michigan, under the direction of Dr. Virginia Rezmierski — Cornell University issued an early and enduring form of an acceptable use policy, under the name “Abuse of Computers and Network Systems,” in 1990.

Abuse of Computers and Network Systems set the mold for more than a generation of higher education’s institutional information technology policy. Including the oft-repeated line, “Legitimate use of a computer or network system does not extend to whatever an individual is capable of doing with it,” this policy set out three principles: privacy, security, and appropriate use of finite resources. Three years later, in conjunction with the establishment of Cornell University’s Policy Office, that foundational policy became incorporated into some of the first university-wide policies that comprised the original Cornell University Policy Library. Responsible Use of Electronic Communications, in retrospect, acted as something of an “all but the kitchen sink” repository of rules regarding password use and a select list of violations — such as copyright infringement and harassment — that later policy revisions would give to the Code of Conduct. All of these provisions bound the user to institutional imperatives. Tucked away in the hodge-podge was a striking provision,
however, that bound the university to specific behaviors in terms of network monitoring.

A second generation of IT policy development separated the hodgepodge out and back into the distinct areas of privacy and security, and added web conventions to the framework. In that configuration, the provision binding the university to rules about monitoring became a separate policy in the privacy family. The policy, inelegantly entitled, “Access to Information Technology Data and Monitoring Network Transmissions,” has a section worth quoting in full:

> Information technology data will be disclosed only according to the procedures outlined in this policy.

> Cornell University does not monitor the content of network traffic except for legal, policy, or contractual compliance; in the case of a health or safety emergency; or for the maintenance and technical security of the network.

> The university reserves the right to restrict the use of its information technology resources and to remove or limit access to information technology resources.

Three key concepts arise from this policy. The first is that certain and specific rules bind the institution regarding release of information technology data. Information technology data is not all electronic data, but only the network or system’s data that such devices create automatically in the course of their functionality. For networking, it includes source and destination Internet Protocol addresses, time stamps, and the amount of data measured in bytes; for systems, it includes the application name, time of creation and use, and bytes used. Often referred to as “metadata,” this type of data is to be differentiated from “content,” even though it can provide a great deal of information about content. (A fuller explanation and analysis of the relationship between metadata and content will be given in the chapter on privacy.) The institutional steward of that data — in Cornell’s case, the Chief Information Officer and Vice President of Information Technologies — is the highest-level administrative authority allowed to release the data either internally or to a third party under the prescribed circumstances named in the statement.

The second principle is the master concept that goes to the free speech principle: Cornell University (as an example of the many institutions that use this language or have this type of policy) does not monitor content except under certain extraordinary circumstances. This statement
intersects what one scholar, Neil Richards, has called "intellectual privacy" with unfettered speech. Separated by legal categories of privacy and speech, I would argue that this one core concept that intertwines qualities of both personal autonomy and free expression is essential to the academic enterprise. As such, this core supports institutional missions of teaching, research, and service.

The third principle, reserved rights, must be understood in the context of the other two. A private institution in particular — which Cornell University is, notwithstanding its contract colleges with the State University of New York — has legal as well as mission-related purposes for which a reserved right is necessary. The exception to section 230 of the Communications Decency Act, intellectual property, jumps quickly to mind in conjunction with the responsibilities that the university has under the Digital Millennium Copyright Act to remove content alleged to be infringing copyright expeditiously from its servers. Moreover, even though the rule of section 230 might be raised as a defense to defamatory material, it should remain within the authority of the institution to take down content if that content might cause the institution’s reputation harm. Here I do not refer to a faculty’s post or a student’s complaint about the institution on his or her Facebook page, but administrative pages, for example offensive comments posted on a Facebook profile of the institution.

All of which brings us back to the Oklahoma case. Three issues distinguished this case from standard First Amendment jurisprudence as it developed in the last half of the twentieth century: substantive nature of the speech being rooted in race-based American slave history; the scope and amplification of that speech on the Internet; and the fact that it was set within an institution of higher education. First, and the most controversial of positions I intend to take in this analysis, is that the subject matter of the speech in the Oklahoma case matters, especially in combination with the other two factors. Brandenburg v. Ohio, the 1969 case that established the rule that repugnant speech is to be tolerated in a public setting, revolved around Nazi, anti-Semitic speech. While repugnant indeed, together with all other "hate speech" that subsequent cases, such as RAV v. City of St. Paul, have allowed, anti-Semitic speech does not touch the deepest nerve in U.S. history, whereas, for obvious historical reasons, African-American racism does, particularly when harkening back to the horrific measures that unreconstructed Southern white racists took to re-establish race-based social relations in the post-Civil War period. Lynching for African-American men, and rape for women, represented the violent underpinnings of systematic economic, social, political, legal, and ideological discrimination and disenfranchisement of ex-slaves and many subsequent generations of
their families. It is therefore no accident that a song making jolly of lynching, using derogatory characterizations grounded in skin color, and the pride exhibited by white’s exclusion of black people would understandably go to the reputational core of a reformist-minded university president such as Boren.

Reputation, among the deepest fault lines in American culture, is not the only consideration that distinguishes higher education from a general public setting; its missions matter uniquely. While the Supreme Court does not speak squarely on this point, some circuit case law does. In fact, the case cited by many respected legal scholars who objected to President Boren’s decision contains the seeds of his defense. In *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*, the Fourth Circuit found in favor of the fraternity chastised by the university for its derogatory depiction of an African-American woman in a university-sponsored skit. A superficial glance at this decision goes to free speech proponents, but a deeper reading of this 1993 case differentiates it from the contemporary Oklahoma incident. Importantly, George Mason University student affairs staff sponsored the skit as a part of a traditional “Derby Day,” a far cry from the Oklahoma fraternity activity acting on its own accord. Although unquestionably demeaning, the depiction of an African-American woman in hair curlers and with pillow-induced exaggerated breasts and buttocks, first, is more sexist than racist, and second, does not rise to the same level of violence, fear, and threat that lynching does. Consequently, the fraternity won the case and free speech enthusiasts continue to celebrate this case as decisive for the protection of racist speech in higher education.

Judge Francis D. Murnaghan, Jr., of the Fourth Circuit agreed with the majority in this case but not for the same reasons that underpinned the decision. In fact, his concurrence is an argument for institutional authority in higher education to limit speech when it challenges institutional social order and missions. Therefore, it warrants a deep reading to illuminate distinctions that apply to the Oklahoma case. “By holding that the First Amendment prohibits any action by a public university to prevent or punish offensive conduct like that at issue, the majority goes much further than necessary, going beyond the facts of the instant case in order to reach a conclusion unsupported by First Amendment jurisprudence ... forbidding the skit or requiring substantial amendment was not beyond its power.” His analysis is significant enough to quote at length:

> The University does have greater authority to regulate expressive conduct within its confines as a result of the unique nature of the educational forum. *Tinker v. Des Moines Independent Community*
School District, 393 U.S. 503, 513, 89 S.Ct. 733, 740, 21 L.Ed.2d 731 (1969) (holding that expressive activity in a school setting can only be restricted if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"); see also Grayned v. City of Rockford, 408 U.S. 104, 117-118, 92 S.Ct. 2294, 2304, 33 L.Ed.2d 222 (1972) (stating that the Court had never "suggested that students, teachers, or anyone else has an absolute right to use all parts of a school building or its immediate environs for his [or her] unlimited expressive purposes"); cf. Widmar v. Vincent, 454 U.S. 263, 276-277, 102 S.Ct. 269, 277-278, 70 L.Ed.2d 440 (1981).

He continued:

Certainly, the most fundamental concern of a university is to provide the optimum conditions for learning. The majority concedes "the University certainly has a substantial interest in maintaining an educational environment free of discrimination and racism, and in providing gender-neutral education." Therefore, the University must have some leeway to regulate conduct which counters that interest, and thereby infringes upon the right of other students to learn. See Tinker, 393 U.S. at 513, 89 S.Ct. at 749; cf. R.A.V., ___ 112 S.Ct. at 2565 (Stevens, J. concurring) ("A selective proscription of unprotected expression designed to protect 'certain persons or groups' would be constitutional if it were based on a legitimate determination that the harm created by the regulated expression differs from that created by the unregulated expression").

By concluding that a university must be allowed to regulate expressive conduct which runs directly counter to its mission, I do not mean to imply that a university has the unrestricted power to silence entirely certain perspectives. I wholeheartedly believe that the free exchange of ideas and debate are fundamental to a place of learning. Yet, they comprise only part of a university's mission and must be balanced against a university's other interests, especially those interests that rise to the level of constitutional significance.

Thus, institutional missions, special for the education sector and unique for higher education, represent a separate and distinctive factor to weigh into the analysis.

A third factor further distinguishes the Oklahoma case. Exposure on the Internet not only exacerbated the situation but also qualitatively altered the circumstances. Had fellow fraternity members confined the incident
to their own crowd, either nothing more would have come from the matter — which can be understood as the state of play for the numerous other activities of this kind that probabilistically occur frequently across U.S. academic institutions — or due process would have been the more likely next step, perhaps resulting in an educational intervention. The Internet raised the matter to the world’s stage, however. Not only did Boren have the reputation of the institution to consider, and the African-American students in particular — especially given their numbers among Oklahoma’s NCAA profile in football and basketball — but also the incendiary nature of the incident raised the potential likelihood of social unrest and disorder on the campus. Once the video went viral, offended students erupted. Twitter and Facebook featured posts calling for protests at the site of the fraternity specifically. The possibility of real violence loomed around campus. Boren’s decisive and unequivocal actions may have helped to prevent physical confrontations, damage to person and property, and to quell ongoing unrest that would have been a detriment to the academic missions of the institution.

Thus scope, amplification, and immediacy of the video on the Internet shifted the First Amendment perspective from its rule to its exceptions. Beginning with Oliver Wendell Holmes’ anti-speech opinion in the 1919 Schenck v. United States case, First Amendment jurisprudence has wrestled with limitations on the rule. Although Holmes later all but repudiated his majority opinion as his thinking on the matter of speech matured after the immediate anxieties that the United States’ engagement in the First World War produced, he nonetheless initiated the “clear and present danger” test. Subsequent cases refined that test throughout a century of case law, more or less, to one defined as “immanent lawless action” in the Brandenburg decision. Equally well known, and applicable, is the “fight words” standard of Chaplinsky v. New Hampshire.

Should the Oklahoma incident ever make its way through the courts, it can be expected that arguments supporting Boren will be made using these decisions. A higher education carve out along the lines of Judge Mumaghan’s concurrence in the 1993 Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University will also be taken into consideration. Insofar as First Amendment absolutists extol higher education’s role in upholding free speech as an example to society, it must be remembered that this “song” was not sung at a conference or institutionally sponsored program on race in the United States. It was sung on a privately rented bus. The expelled students probably had no expectation that it would be captured and shared with the world via the Internet. There is the rub. As everyone from Scott McNealy to Mark Zuckerberg are fond of telling us,
we should all be prepared to have our expectations of privacy shifted in the digital age. And yet some markers remain the same, for example the jurisdiction of colleges and universities to take judicial administrative action against students, even when their activities occur off campus. It is the person, not just the location of the activity, that counts in institutional Codes of Conduct. Thus, the Internet factor will make for novel case law. Shrouded by the explosive nature of the actions themselves, as well as the responses on both sides, the weight of this factor remains understated in discourse surrounding this case. Rancid, racist speech, reputation, and higher education’s unique missions all play a part. But in the end, the Internet was the star character in this drama. It explains not only how the story became a national issue, but also why Boren rightfully made his decision.

Simultaneously with the Oklahoma case have been some very high profile cases involving faculty and social networking — with significant institutional pushbacks. If the faculty person is an established, tenured member of the community, and unless he or she violates some other law or institutional policy, the accepted theory and practice is that those posts remain without institutional hindrance. CIOs frequently receive requests from complainants, who find offensive posts on institutional servers, to take down the material. When there is nothing more than offense to the individual, those requests result in a gentle education on the institutional policy. Similarly, when students or their parents contact university officials requesting that the institution block sites with offensive posts concerning their son or daughter, for example gossip sites that cater to campus environments (e.g., JuicyCampus.com, CollegeACB.com or YikYak), student affairs or information technology personnel explain the futility of such efforts and frequently enhance both student and parental understanding of the commitment to free speech. It is the rare institution that, as a statement of objection to the quality of discord that these sites create, decides to block their campus network. The content, of course, remains available on any other data network. Often the gesture matters more than the result. This observation holds true especially for religious or mission-driven institutions.

Dust ups about electronic disclosures often revolve around the absence of policy rather than its presence. Perhaps the most famous of them occurred at the institution upon which all eyes fall in higher education: Harvard. In March of 2013, an anonymous tip disclosed the search of resident deans’ email accounts. Harvard’s Dean of the College approved of them in the midst of an investigation into whom among residential deans had tipped off the Boston Globe about a Harvard student’s academic integrity scandal. The extent of the disclosure was
limited to email headers, not full body content. Moreover, the search was confined to seeking the “forwarded” message to the Boston Globe reporter who broke the story. Also, the residential “deans” upon whom this search was commenced were not faculty by definition, but fell into an employment category for which a policy gap existed. Faculty policy, such as it was, did not apply to them. By extension to other non-academic employees, network transmission disclosure policy was absent across the campus.

The Dean of Harvard College, a tenured member of the faculty, stepped down weeks after the story broke, although it was reported that before the event she had been in discussions about returning to her department. Even though every story such as this one loves a villain, it would misplace responsibility to heap it all upon her. Without policy, and in the heat of the moment, it is very difficult for all the players in this kind of drama to know their lines or when to enter or exit the stage. Before Cornell University had clear policy on the disclosure of email, for example, I frequently fielded calls from director-level personnel around campus asking for access to a subordinate’s account. More often than not, the requester cited performance issues — not violations of law or policy — such as “spending too much time on Facebook.” Borrowing from my colleague Steve McDonald, a first-generation drafter of information technology policy, I would suggest that the supervisor treat the matter as if the employee were reading a physical copy of the Bible. The result in most cases was that, upon reflection, they did not call back. They treated the issue as one of performance, not one about the use of the Internet.

Once Cornell established a disclosure of email policy, naming the highest-level authority for each constituency, i.e., for faculty (provost), staff (vice president of human resources), and students (vice president of students), the calls finally stopped. Likewise, so did frantic calls from network administrators who were often caught in the middle. A supervisor for the employee in question might also be the supervisor of the network administrator. Without clear rules in place about the circumstances and process for a disclosure, the administrator would not know whether he or she should obey their supervisor or hold to some other institutional principle. In this type of case, information technology policy that offers the combination of privacy and free speech — for staff as well as faculty — is everybody’s best friend, because it eliminates the ambiguity that can often lead to maelstrom in the workplace.

Not that these events are confined to C-level supervisors and employees on a distributed campus. I am aware of one case where a provost got caught up in a highly charged issue with some faculty and requested that
the CIO use technical staff to access some faculty emails. As is the duty of a CIO, especially in an era in which there is so much for everyone to learn about the appropriate use of such technologies, they asked about the circumstances of the request instead of blindly obeying the request. When the CIO learned that it was a matter that did not trip the threshold of the policy we had spent years formulating, the CIO advised the provost against the request. Wisely, the provost took the CIO’s advice. This is a tale with many lessons. Even seasoned administrative officials can sometimes get caught up emotionally in ways that validate the reason and legitimacy of policy — even among the highest offices of an institution. Would that the Dean of Harvard College in the spring of 2013 had had such institutional parameters and counsel.

How college and universities contend with faculty content on the Internet, other than institutional servers, is yet another matter. For full-time and tenured faculty, the issues go straight to freedom of speech, notions of “academic freedom,” and employment law. There is perhaps no institution that has attracted more attention to this issue than the University of Kansas. In late 2013, the Kansas Board of Regents reacted sharply when administrators lifted a sanction against a faculty member for posting what some considered an objectionable “tweet,” for failure to identify a clear policy violation. In response, The Board drafted a social media policy that painted a broad stroke for the administration to judge offensive or objectionable content, even for faculty members, without any reference to existing law or national faculty association policies that demarcated research as deserving of special consideration. Media coverage and faculty input on revisions of that policy would appear to have created a stalemate. While the Board included standard text regarding protection of speech from the 1940 American Association of University Professors’ statement, so too did they maintain the broad stroke language in their final, promulgated version. The proof of this concept may be in the pudding of another test case. While broad, vague language is an obvious trigger in free speech cases, it would not be the first time that such policy statements have the practical effect of making administrators more, rather than less, cautious to test it.

One question that emerges from this episode is whether a social media policy is necessary at all. If anything that violates law or policy in physical space constitutes a violation on the Internet, or in the use of institutional information technologies, then a specific social media policy may not be necessary. Many institutions have taken this approach and instead issued guidelines that help students, staff, and faculty not only to understand the application of law and policy to the Internet, but also to help members of their community to navigate cyberspace with intelligence and aplomb.
Many good examples of these guidelines or educational materials exist. As the author of the first guide to the use of Facebook, when it was still limited to Ivy League institutions, I can attest to the value of educating, rather than dictating, to users. For younger people, at least, appealing to their self-interest proved more effective than the fear of punishment. Questions about who has the right to create an institutional profile on a social media platform such as Facebook, or how and in what ways all members of the institutional community may contribute positively to its reputation, make for sound, robust, social media policies, while avoiding the kind of turmoil that the University of Kansas faced in restating existing law and policy in a way that did not create faculty discontent.

Not that such discontent can ever be avoided entirely. More recently, in the spring of 2015, the case of the University of Illinois at Urbana-Champaign’s withdrawal of Steven Salaita’s tenured-faculty appointment at the eleventh hour of his hire, over Twitter posts harshly criticizing Israel, is an example. The institution deployed a procedural pretext — the fact that the Board had yet to formally approve his appointment, a pro forma action in almost all faculty appointments — to revoke the appointment even though courses, classrooms, and texts were already in place for the upcoming fall semester. Notwithstanding the procedural pretext, administrators made their reasoning transparent: the tweets elicited concern that Professor Salaita did not meet some unspecified “civility” qualifications. Thus, the institution cited no specific policy on social media in withdrawing the appointment. Professor Salaita subsequently objected to this treatment and has since brought a case against the university for violating constitutional free speech and due process rights, as well as breach of contract. In a procedural twist of his own, Salaita added John Doe defendants: people whom he alleges prejudiced his case among Board members. Salaita was successful in a separate motion for the disclosure of emails that go to the identification of potential defendants in the John Doe aspect of his claim.

An analysis of this case based solely on media reports highlights salient issues of Internet disruption of academic norms. Professor Salaita’s harsh words are hardly the first uttered by a professor. Higher education is historically rife, if not built on, racial, class, ethnic, sexual, and innumerable other categorical prejudices, as well as, paradoxically, the tools and environment for up-ending them. What brought this example to headlines is the ultra public means in which those sentiments were uttered via the Internet. What had once been said in hallways, at conferences and even classrooms, or in the comfort of faculty lounges after one too many aperitifs, are now on display for all the world to see, to ponder, and to react publicly. Thus, once again, the scope and amplification of speech
on the Internet not only multiplies quantitatively but also reflects qualitatively upon the speaker, as speech reverberates among multitudes of diverse, opinionated, and equally expressive listeners.

Just as in the Oklahoma calculus, the Internet dimension must be taken into account in the University of Illinois at Urbana-Champaign’s equation. The much-touted 1940 AAUP position on freedom of speech grants special consideration for expression surrounding a faculty member’s research. In this case, Professor Salaita’s research is in Native American studies, not Israel or the Middle East. It would appear as if speech related to Israel would be in judgment of his temperament and character, and not specifically protected even by a non-binding policy of a faculty association. As of this writing, that association has censured the University for reneging a approval, although media reports suggest that the controversy continues even among the faculty community. In the meantime, Professor Salaita has taken a position at the American University of Beirut without dropping his suit.

What will be interesting to watch is how and in what ways both sides, the University and the plaintiff, address — or not — the Internet dimension of the case. Perhaps, like temperament and character, there is something not entirely calculable about its impact on cases such as this one. No matter how much either side might choose to portray its effects — Free speech! Fit with the community! Harm to institutional reputation! — no one can deny that the Internet plays a contributing role. A case such as this one, once through the courts, may shed some light on those effects. It would not entirely surprise if the Internet has the ultimate effect of providing a counterforce to higher educational institutions that bear the weight of that speech. In other words, courts may find for colleges and universities in these cases by giving them the legal advantage to balance the expressive, communicative, and technological advantage of the Internet.

A case that received only minimal attention between the Kansas and Salaita affairs demonstrates this balance. In January of 2014, Timothy McGettigan, a professor of sociology at Colorado State University at Pueblo, upset over proposed budget cuts, encouraged the community to engage in a protest. The email message he sent to initiate the protest had the subject line, “Children of Ludlow,” referring to a massacre of coal miners one hundred years ago. In the body of the message, he compared contemporary administrative actions to the historical atrocity mine owners created. With neither notice nor due process, the administration locked Professor McGettigan out of his email account. McGettigan took the matter to the press. Administrators explained that in
light of violent campus events — including the incident at Virginia Tech in 2007 — their actions demonstrated prudence. Eventually, the matters resolved with no disciplinary actions, no court battles, and the restoration of access to the professor's email account.

In the absence of national policy on these kinds of facts, one refers again to the American Association of University Professors for guidance. First in 1997, then more fully in 2004, and finally updated most recently in 2014, the AAUP issued a statement on academic freedom in electronic mediums. Section 7 explicitly calls out the circumstances and process by which administrators would terminate a faculty member’s access to accounts. Suspension is not explicitly addressed, but one might assume that under emergency circumstances suspension might also be a category that warrants procedural attention, as the McGettigan case suggests. There are so many factors in play. Government statistics note that violence on campus has risen continuously every decade in a century of maintaining data, although more recent studies have shown that the increase is in sudden decline, reflecting the same pattern as society at large. Incidents such as Virginia Tech, among others, are all too real and leave a lasting effect on the higher education community, not least on administrators that must sharpen their efforts to balance complex and shifting factors in order to make appropriate business- and mission-aligned decisions, often on the spur of the moment.

The rise in violence on campuses, and the rise in the use of information technologies as a vehicle for expression, occur in tandem with heightened concern over relations between administration and faculty, particularly at small campuses such as Pueblo. These issues may exacerbate and compound the problematic nature of incidents. Without knowing more about specific campus environments, including the personalities of the players, it is difficult to determine whether in any one particular case an association to Virginia Tech, for example, is an appropriate consideration or one used inappropriately as a cover. The hyperbole of a coal mine massacre meets the hyperbole of the particularly horrific incidents at Virginia Tech. But is an analogy to a coal mine worker's massacre hyperbole, or evidence of heightened mental instability in a person whose behavior has already come under concern within a community? In this case, it would appear to be the former, and not altogether surprising for anyone familiar with the rhetoric of those whose academic work connects them hyperbolically to historical incidents. Because the administration soon rectified the situation and returned email access to Professor McGettigan, it would appear that what may have been a rhetorical excess of their own — a harkening to Virginia Tech — was soon corrected. What might have saved the
institution and Professor McGettigan from publicity is if a policy on suspension had been in place prior to the incident. Such a policy drains incidents of the uncertainties and suspicion, at least a little, about motivation, personality, and power struggles between administrators and faculty.

The experience of a small, historically Catholic women's college further demonstrates how the paucity of information technology policy reflects deeper internal tensions. A decade after most institutions established policy on mass electronic communications — such as which office issues emergency messages, or on whose authority should a mass email be distributed to all campus, or only to specific constituencies — this college had demurred in creating such a policy. In part the hesitation was due to the existence of constituent lists that acted as a persistent vehicle of communication for the community. For many, that vehicle had become a part of the culture and traditions of the place. The communications covered a wide swath of subjects ranging from innocent announcements about Pi Day to raging rants on any variety of political issues. Unfortunately, for some, the constant profusion of messages also became a distraction, if not an irritation. The lack of any differentiation, except in subject line, among marketing events, sending out random expressions, and issuing institutional business messages, widened the gulf between those who wished the lists to continue and those who did not. While this state of play continued for some time even after identification of the issue, it did not come to a head until a number of other institutional crises put it in bold relief.

In the spring of 2015, changes in the senior management, specifically president and CFO, brought to light what many had feared was bubbling under the surface: a serious structural deficiency. Working with her senior management team, the new president devised an economic plan for the institution to right its course financially. Simultaneously, the CFO encouraged the review of information technology policy on mass communications. Before the formal announcement on economic adjustments, many members of the faculty were anxious. The timing of the two initiatives could not have been less propitious. Understandably, some faculty suggested there was an intentional connection between the two events. The administration hosted two public sessions on the policy, and tempers ran hot, particularly the first night. The second session had more focus, but the underlying issues could not be avoided. To date the issue of the email policy remains unresolved. Perhaps it will wait until there is a fuller playing out of the more serious issues at hand. What is notable is that email became the flashpoint for deeper structural matters that threatened fundamental viability.
Less is publicly known about how administrations treat adjunct faculty or non-academic staff. Two reasons may account for the absence of information, at least in terms of national journalistic reports. One is the manner in which an administration may handle an adjunct’s appointment. Without union representation, an administration may safely skirt the question of whether its decisions regarding hiring and firing of an adjunct is or is not related to speech, whether on the Internet or not! The capricious manner in which administrations tend to treat adjuncts, by virtue of their position in employment law generally, places that group of employees in persistent risk of lacking clarity about the causes for a renewal of a semester or year-long contract. For staff, the question may at least be more translucent. Institutional employment policies may provide more protection in terms of termination processes — even in at-will states — than for adjuncts, although the ultimate security of an employee’s position is not too much better than that of the adjunct.

One case stands out to illuminate some parameters of this Wild West environment. Even though it is not about a college or a university, the National Labor Relations Board found in a case about an employee of an emergency medical business that speech on a social networking site, in this case Facebook, related directly to employment (and not defamation of character of an employer or supervisor) cannot be cause for termination. That ruling is in alignment with existing rulings about workplace speech that predates the Internet; the Board simply applied that rule to the social-networking site. Of course, once again, employees broadcast their discontent with their employer at their peril. In this case, the court could easily redress the employer because they had expressly fired the worker for discussing employment related issues (workplace schedules and assignments) on Facebook. But another employer, armed with knowledge of this decision, could be far more coy in declaring the reason to be something other, a layoff or simply by making life difficult for the employee, whom they hope to move on to other employment. Complicated cases on the question of intent have long been litigated in courts and within the NLRB. The problem is that they are much more difficult to litigate, and for many employees they present such a challenge that few are willing to go the proverbial distance to set precedent.

Finally, it is worth mentioning another reason that public airing of non-academic employee issues related to Internet speech is not advisable: the power of the separation agreement contract. For some staff, being offered the choice between fifteen seconds (Internet time) in the sun and a payout is hardly a choice at all, but rather the means by which the staff
member made a transition out of one position and into another. The protections and association camaraderie full-time and especially tenured faculty enjoy is not a part of the nonacademic experience. The higher the staff position, the greater the protection built into work contracts, although most staff do not even have that protection in the case of ongoing tensions with supervisors or leadership. Reputational harm or fear of litigation can sometimes be enough for an institution to offer a staff member a buyout. With provisions that include a prohibition from even mentioning the existence of the contract, it is very difficult to know the degree to which these contracts are the means that both private and public institutions use effectively to stifle non-academic staff speech.

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A major component making the Oklahoma case so unusual was that — at least since the Berkeley Free Speech Movement of 1964-65 — students ordinarily possess, and exercise, the greatest latitude in free speech in higher education. The Civil Rights and Anti-Vietnam War protests stretched policy and norms to unprecedented extents, so that students could and continue to speak out about administration or faculty. Once the Internet became public, that latitude took on new dimensions in both academic and social life. For example, the (in)famous site RateMyProfessors.com now functions as an information commons nationally to evaluate faculty. At the time of its establishment, it shocked many an instructor who had either never had the pleasure of hearing what students were probably long saying “behind their back,” or had institutional insulation in the internal evaluation process. Just as the victims of the anonymous gossip sites focused on students have introduced scope and amplification to what might otherwise have been confined to a bathroom stall, faculty who had not established good teaching skills or rapport with students, by scorning student criticism and resting on the laurels of their ultimate power to grade, found a critical post was student revenge served cold on a public website. The anonymous nature of it makes it almost impossible to trace identity, reducing very significantly — almost to zero — any response to the defamation, at the same time that it loosened the restraints on civil discourse.

A variation on RateMyProfessors.com, CourseHero.com, trades in course content. As a result, more legal issues than defamation and libel animate its reputation in the academy. A professor’s copyright leads the list. Many students use this site, as fraternities were purported to do over the years, by maintaining filing cabinets of term papers, homework assignments, and tests. To do so is in violation of copyright, however, when the student neither owns nor has permission to post the content. The Digital Millennium Copyright Act, once the scourge of some faculty who
objected to having to limit both electronic and hard copy reserves along fair use and licensed bounds, suddenly became the recourse that some took to get their content off the site.

This site also raises the question of the role that an Academic Integrity Policy can play in the professor’s setting of rules about Internet use in a class. While a professor cannot do or say much about what students do on their own time and with the Internet, which does not cross the boundaries of law such as copyright, a professor can make rules about the academic instruction that includes the Internet, just as the rules establish boundaries in physical space. If the professor makes it clear that a student is not to use an instructor’s guide to complete homework assignments, or post any of the course material on a third-party website, or take verbatim notes and sell them on the streets, a violation rings the Academic Integrity Policy bell and renders the student ripe for disciplinary measures. No doubt enforcement might be difficult, especially with material posted online, but it is just as important for the professor to establish clear rules and authority about how to manage the course, together with more traditional discussions about cheating and plagiarism, and to set the tone of his or her relationship with students. Clear rules and respect could be a powerful deterrent.

Students have a facility for creating enough problems for and among themselves. It is well known that at many research universities students maintain complex intranet file-share programs that not only house petabytes of entertainment software that infringes on copyright, but also hordes of textbooks, instructor’s manuals, old tests, term papers, and essays available easily through a simple search and download. In using these materials, students not only infringe on the copyright of songs, videos, and gaming software, textbooks and other educational print material, but also fly straight in the face of academic integrity violations. In the creation of an academic integrity site designed to address digital media, I talked with a student who admitted using the Cornell University intranet file-share systems to access an instructor’s manual to complete an engineering homework assignment. Having promised not to sit in judgment, but just to listen, he explained to me the pressure he was under to do well in school, that the work was overwhelming, and once it got so late the night before the assignment was due, he could not resist the temptation to resort to the quick solution of calling up the instructor’s manual for the answer. He appeared in every other respect to be what we used to call an “upstanding young man,” having worked hard in high school, been among a handful of students from the state of Colorado to attend Cornell that year, involved in service work, polite, and “clean cut.” (He came to my attention because his case had already been
adjudicated.) What struck me about his story was not the temptation, but the relative ease with which he had access to the materials. That ready access made the temptation all the more difficult to resist. If I had been in the same situation (were that I could even begin to study engineering!) as an 18-year-old, might not I have made the same decision? I can’t answer that question. I am a long way from being 18. More to the point, I never had teachers’ manuals available to me so easily.

This situation is not rare. Disciplinary action is probably taken in a low percentage compared to the number of occurrences. I make this unscientific judgment based on conversations I have had with many students and some faculty. Scores of books and articles have discussed the challenge of academic integrity in the digital age. The technical facility to cut and paste caused a tremendous surge in plagiarism a decade ago; new technical tools and programs such as TurnItIn, which track this practice, have helped address and educate both faculty and students about it. Term paper mills are well documented by higher education journalists. CourseHero, and sites like it, continue to exist, even if faculty monitoring of those sites and corrective action in classroom rules have counterbalanced its effects to some extent. The unsanctioned access to instructors’ manuals presents another type of challenge. In many cases, detection may be difficult because the classes to which they apply tend to be very large, and teaching assistants manage grading. Therefore, even a seasoned faculty member, who may become suspicious of a pattern of perfect scores — where in years past such perfection was unusual or unique — might not even be aware of the trend, since they are not looking at those scores in the first place.

Detection in those cases is best observed in the breach. In one case with which I am familiar, an assistant professor of chemical engineering became aware of the problem when teaching assistants brought to her attention the fact that scores of students in a class of over 200 had the wrong answer in a problem set ... precisely the answer that was incorrect in the teaching manual, too! The professor told me about it in confidence, because, outside of invalidating the homework assignment, she did not report it to the chair of her department or bring forward the students’ names for disciplinary process. She explained that she was a young professor, with young children, made to teach the large classes by a seniority system, while also pursuing her research and scholarship for promotion and tenure. Not only did she not have the time to do it, she was equally concerned that if she did, she would gain only lukewarm support from her department, and very likely suffer greatly in terms of student evaluations. Ironically, those evaluations are also used in the promotion and tenure process. Adding it all up, she decided not to
pursue it. Whether one agrees with her or not, most would see how the circumstances made it a difficult choice.

Having brought forward these examples of violations of law and policy, now let us revisit the basic question with which we began: In the name of free speech, as well as privacy, is it better for an institution to maintain a policy of not monitoring its network for content? Alternatively, to the degree that technology has expanded speech in dimensions that violate law and policy, should an institution be able to use technology to reset the balance of law and policy, technology and social norms? Retroactive measures, such as plagiarism detection systems, are insufficient. An institution should be able to monitor its network and systems proactively in order to police laws and policies such as copyright and academic integrity. Indeed, it is ultimately to the benefit of the students to do so. If all-too-ready availability of these materials contributes to the temptation to infringe copyright or to cheat on assignments or tests, then the institution should assist the students in their citizenship, ethical, and scholastic development by creating distance from the temptation that monitoring would help achieve. Even if available on the Internet, at least it is not the institution that contributes to the conundrum that the students face.

Many mission-specific institutions, in fact, make exactly this argument as the rationale for their decision to monitor networks. While I have represented the dominant position for most universities in the United States, public and private, on network monitoring, and probably the majority of colleges as well, there nonetheless exist many private institutions that have chosen to manage their networks with a greater degree of control over the content. Diversity is the distinctive quality of higher education in the United States. No other developed country has the range of choice in colleges due, in large part, to the relatively unique history of immigration from other countries and traditions. Higher education often plays an important role in the assimilation process for immigrants. Hence mission-specific institutions make up a large part of the higher education landscape. Because technology reflects, as well as shapes, culture in mission-specific schools, which are often informed by religion and other culturally protective perspectives on adolescent and early adult development, they are well within their rights as private networks to do what they like in terms of monitoring for content. As a matter of advice, one would only hope that the institution is transparent about the practice.

As for making this argument in the majority of higher education, and for public institutions overall, one must weigh carefully the benefits against
the disadvantages of content monitoring. Recourse to established principles of pedagogy is the best place to start. Most colleges and universities assume the “freedom with responsibility” position. This position holds that overprotection of students defeats the purpose of college, which is in creating an environment where youth have a relatively insulated environment in which to make and learn from mistakes. Internet experiences of traditional age students bear this theory out. Content-owner monitoring of the Internet has and continues to expose students to consequences for file sharing that results in infringement. When the Recording Industry Association of America (RIAA) maintained a program of suing students for common infringement practices on campus networks, the consequences were considerable. Families became involved as the legal clock ticked, and the money spent to end the legal process rose to thousands of dollars.

If this is the case on the Internet, why shouldn’t a college or university not monitor its network for infringements and address its own valued principle — academic integrity — in the process? As director of information technology at Cornell University, I had a front row seat to the definitive answer to this question. Some years ago, when the RIAA assumed an aggressive role in pushing colleges and universities to take action on this front, one measure was to support technologies that monitor networks. Audible Magic™ emerged early on the market. Encouraged, if not pressured, by the content industry to consider the option, the Vice President for Information Technologies, Polley McClure, invited the company and her senior staff to a demonstration. A very polite, petite, and soft-spoken person — but a steel magnolia underneath — Vice President McClure sat quietly through the entire presentation, one filled with high moral overtones and slick technologies that used digital fingerprints to “deep-six” matched content and gave administrators the option of sending a notice to trace the traffic to a person. Promises of seamless operational performance and a very favorable price point made it almost irresistible.

At the end of the pitch, Vice President McClure complimented the sales team on their presentation and their product. She acknowledged its benefits. At that point she quietly demurred, however, by stating that her hands were tied in making the decision. As an officer of the university, she had to abide by its policy. Cornell University had a provision in its information technology policy that prohibited the monitoring of content on the network as a practice. In my recollection of that moment, the sales team stood deflated and dumbfounded. With nothing more to say, every one stood up, shook hands, and out the door we went.