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## Censorship by Crying Wolf: Misclassifying Student Speech as Threats

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# Censorship by Crying Wolf: Misclassifying Student and Faculty Speech as Threats

SUSAN KRUTH\*

*Freedom of expression is at risk at colleges and universities across the country. While campus administrators employ a number of strategies to censor speech they disfavor, this piece explores the trend of justifying censorship and punishment of expression by labeling it a “threat” and citing concerns about safety. In contrast to the kind of speech the Supreme Court has defined as a “true threat,” the expression at issue in the cases discussed here poses no safety risk, comprising political commentary, jokes, and pop culture references. Its punishment both trivializes actual dangers and chills campus discourse. Accordingly, it is imperative that students, professors, and free speech advocates work to reverse this trend and ensure institutions’ adherence to longstanding free speech principles.*

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#### INTRODUCTION

In recent years, American public colleges have demonstrated a troubling willingness to censor student and faculty speech protected by the First Amendment by labeling it a “threat” to the safety of the campus community.<sup>1</sup> The vast discrepancy between the legal standards that govern “true threats” and “intimidation” and the student and faculty speech at issue suggests that in too many instances, public college administrators may be invoking heightened anxiety about violence on campus to justify silencing criticism, dissent, or simply inconvenient or unwanted expression.

While ostensibly acting to protect their community, campus administrators who claim extralegal authority to censor in the name of safety are no more justified in doing so than those motivated by more picayune reasons and are no less legally and morally culpable. Indeed, given the democratic and social importance of protecting freedom of expression in academia,<sup>2</sup> campus censorship driven by a

<sup>1</sup> See *infra* Part II.

<sup>2</sup> The Supreme Court cast the essentiality of free inquiry and expression on campus in unequivocal terms in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the

misguided or pretextual assessment of the “threat” presented by protected student or faculty speech is particularly harmful. To avoid chilling campus speech, trivializing real threats, and teaching a generation of students the wrong lesson about the necessary balance between civil liberties and safety, American college administrators must reacquaint themselves with the narrow application of the true threat exception and respond to unwanted or disagreeable speech with common sense and principle.

### I. DEFINING “THREATS”

In American jurisprudence, the comparatively broad protection afforded to speech by the First Amendment has certain limited exceptions, including “true threats” and “intimidation.”<sup>3</sup> In *Virginia v. Black*, the Supreme Court of the United States defined “true threats” as “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>4</sup>

In *Black*, the Court was careful to distinguish true threats from protected speech like the “political hyperbole” at issue in *Watts v. United States*.<sup>5</sup> The Court also made clear in *Black* that the speaker “need not actually intend to carry out the threat” in order for the speech at issue to lose First Amendment protection.<sup>6</sup> The Court reasoned that the speaker’s intent to fulfill the threat was less significant than the speaker’s intent to communicate the threat because of the harm inflicted by the communication itself, reasoning that “a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’”<sup>7</sup> In defining “intimidation” as “a type of true

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future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”).

<sup>3</sup> *Virginia v. Black*, 538 U.S. 343, 358–60 (2003).

<sup>4</sup> *Id.* at 359.

<sup>5</sup> *Id.* In *Watts*, the Court found that an anti-war comment uttered at a political rally—“If they ever make me carry a rifle the first man I want to get in my sights is L. B. J.”—was protected by the First Amendment. *See Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

<sup>6</sup> *Black*, 538 U.S. at 360.

<sup>7</sup> *Id.*

threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death,” the Court similarly seemed to place primary focus not on the speaker’s intent to actually commit an act of violence, but rather on the speaker’s intent to instill the fear of such an act in the victim.<sup>8</sup>

The Court demonstrated the limits of the “true threats” and “intimidation” exceptions in *Black*, a case involving prosecutions under a Virginia statute that declared any cross burning in public or on another person’s property to be “prima facie evidence of an intent to intimidate a person or group of persons.”<sup>9</sup> While acknowledging that “when a cross burning is used to intimidate, few if any messages are more powerful,”<sup>10</sup> the Court struck down the statute’s prima facie provision because it failed to account for the potentially transformative differences of intent presented by various instances of cross burning.<sup>11</sup> For example, the Virginia statute’s prima facie provision effectively criminalized burning a cross for a stage production and also forbade Ku Klux Klan members from burning the cross at their rallies to communicate a message of solidarity, despite the lack of an intent to threaten others with either form of cross burning.<sup>12</sup> By denying prosecutors and judges the ability to consider the context and purpose of each individual act, the provision threatened protected expression because it “ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate.”<sup>13</sup> The Court concluded that this flaw “chill[ed] constitutionally protected political speech because of the possibility that a State will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.”<sup>14</sup>

Following *Black*, however, federal appellate courts have reached different conclusions about whether laws prohibiting threats must require a speaker to possess a subjective intent to threaten. The Courts of Appeals for the Third, Fourth, Sixth, and Eighth Circuits

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 347–48.

<sup>10</sup> *Id.* at 357.

<sup>11</sup> *Id.* at 364–65.

<sup>12</sup> *Id.* at 365–66.

<sup>13</sup> *Id.* at 367.

<sup>14</sup> *Id.* at 365.

each found that *Black* does not mandate such a requirement.<sup>15</sup> The Ninth Circuit, however, reached the opposite conclusion, holding in *United States v. Cassel* that “only *intentional* threats are criminally punishable consistently with the First Amendment.”<sup>16</sup> The Ninth Circuit also observed in a later case, *United States v. Bagdasarian*, that “[a] statement that the speaker does not intend as a threat is afforded constitutional protection and cannot be held criminal.”<sup>17</sup>

A recent case appeared to present the Supreme Court with the opportunity to address and resolve the conflict over *Black*’s requirements. In *Elonis v. United States*,<sup>18</sup> the Supreme Court considered the conviction of a man found guilty of making threats against his ex-wife and others under a federal statute criminalizing the transmission of “any communication containing any threat to kidnap any person or any threat to injure the person of another” in interstate commerce.<sup>19</sup> On appeal, petitioner Anthony Douglas Elonis argued that the Government failed to prove that he intended the Facebook posts at issue to communicate a threat; in turn, the Government argued that no such showing was necessary.<sup>20</sup> In reversing Elonis’ conviction, the Court’s majority, led by Chief Justice John Roberts, rested its conclusion on the fact that Elonis was found guilty on a jury instruction “premised solely on how his posts would be understood by a reasonable person”:

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<sup>15</sup> See *United States v. Elonis*, 730 F.3d 321, 332 (3d Cir. 2013), *rev’d*, 135 S. Ct. 2001 (2015) (“*Black* does not say that the true threats exception requires a subjective intent to threaten.”); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012) (“A careful reading . . . does not, in our opinion, lead to the conclusion that *Black* introduced a specific-intent-to-threaten requirement . . . .”); *United States v. Jeffries*, 692 F.3d 473, 479–80 (6th Cir. 2012) (“[*Black*] says nothing about imposing a subjective standard on other threat-prohibiting statutes, and indeed had no occasion to do so: the Virginia law itself required subjective ‘intent.’ The problem in *Black* thus did not turn on subjective versus objective standards for construing threats. It turned on overbreadth—that the statute lacked any standard at all.”); *United States v. Mabie*, 663 F.3d 322, 332 (8th Cir. 2011) (“[W]e have adopted an objective test for determining whether a communication is a true threat. This objective test, which has been applied repeatedly since *Black*, does not consider the subjective intent of the speaker.”).

<sup>16</sup> *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005).

<sup>17</sup> *United States v. Bagdasarian*, 652 F.3d 1113, 1122 (9th Cir. 2011).

<sup>18</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2007 (2015).

<sup>19</sup> 18 U.S.C. § 875(c) (2012).

<sup>20</sup> *Elonis*, 135 S. Ct. at 2008.

The jury was instructed that the Government need prove only that a reasonable person would regard *Elonis*'s communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding "took deep and early root in American soil" and Congress left it intact here: Under Section 875(c), "wrongdoing must be conscious to be criminal."<sup>21</sup>

The Court's decision left the question of whether a showing of recklessness is sufficient to support a conviction under the statute unresolved, and thus the First Amendment issues implicated by the criminalization of threats persist.<sup>22</sup>

Despite the continuing uncertainty following *Elonis*, the Court's decision confirmed that the federal threat statute at issue "is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."<sup>23</sup> And other decisions regarding allegedly threatening expression prior to *Black* provide further illustration of the contours of the true threat exception and the relevant factors in ascertaining the limits of First Amendment protection.

In *Watts*, for example, the Court paid particular attention to the context in which the anti-war comment was made and evaluated it by reference to related commentary.<sup>24</sup> Noting that the "[t]he language of the political arena . . . is often vituperative, abusive, and inexact," the Court concluded that "[t]aken in context," the comment was simply "a kind of very crude offensive method of stating a political opposition to the President."<sup>25</sup> The Court even granted weight to the "expressly conditional nature" of the speaker's formulation (*if* he was ever made to carry a rifle, [*then*] he would target the President), as well as the reaction of those around him.<sup>26</sup>

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<sup>21</sup> *Id.* at 2011–12 (citation omitted).

<sup>22</sup> *Id.* at 2012.

<sup>23</sup> *Id.*

<sup>24</sup> *See* *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam).

<sup>25</sup> *Id.* at 708 (approving the speaker's own characterization of his comment).

<sup>26</sup> *Id.*

In *Madsen v. Women's Health Center*, the Court observed that a state court order prohibiting anti-abortion protesters from approaching an abortion clinic impermissibly burdened free expression in the absence of evidence “that the protesters’ speech is independently proscribable (*i.e.*, ‘fighting words’ or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm.”<sup>27</sup> The question of how to determine whether speech was sufficiently “infused with violence” to justify the provision was not explored, but the *Madsen* Court indicated that the expression in question must be more than the simply “insulting, and even outrageous, speech” that the First Amendment protects.<sup>28</sup>

In sum, *Black*’s formulations remain definitive for determining when otherwise protected expression may be prohibited as a “true threat” or intimidation.

## II. CENSORSHIP BY CRYING WOLF: MISCLASSIFYING STUDENT AND FACULTY SPEECH AS THREATS

Public college administrators consistently silence protected student and faculty speech by misclassifying expression both inside and outside of the classroom as actionable “threats.” The examples discussed in detail below are representative of the range of campus censorship of speech as “threats” reported to the Foundation for Individual Rights in Education (“FIRE”), a nonpartisan, nonprofit organization dedicated to defending student and faculty civil liberties on American campuses.

Seemingly motivated by differing impulses—the desire to quiet a persistent student or faculty critic, or to simply avoid negative publicity or controversy—each example involves investigation or punishment of plainly protected speech that fails to rise anywhere near the standards for true threats and intimidation announced by the Supreme Court in *Black*.

While it is axiomatic that anecdotes do not constitute data, FIRE’s case archives nevertheless demonstrate that the abuse of the true threats doctrine by administrators at public colleges is a persistent phenomenon.<sup>29</sup> Given the repeated documented instances of

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<sup>27</sup> *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 774 (1994).

<sup>28</sup> *Id.* (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

<sup>29</sup> See generally FIRE’s case archives, available at <https://www.thefire.org/cases/?limit=all>.



campus speech misclassified as threats, and the fact that FIRE's awareness of such instances is necessarily limited to those reported by the victims or the media, it is reasonable to estimate that more such abuses simply go unreported.

*A. Hayden Barnes, Valdosta State University*

In the Spring of 2007, former Valdosta State University ("VSU") student Hayden Barnes was expelled for posting a satirical, cut-and-paste collage on his personal Facebook page that was deemed a threat by the university president.<sup>30</sup> The collage criticized former VSU President Ronald Zaccari's plan to spend \$30 million dollars' worth of student fees to construct parking garages on campus.<sup>31</sup>

Barnes was a vocal critic of the parking deck's construction in the months prior to his expulsion in May 2007.<sup>32</sup> He registered his opposition in a variety of ways, posting flyers and sending emails to Zaccari, the student newspaper, student and faculty government, and the Board of Regents of the University System of Georgia.<sup>33</sup> Barnes proposed that Zaccari spend the money earmarked for the parking garage on what he perceived to be more environmentally friendly measures.<sup>34</sup> Angered by Barnes' persistent criticism, and embarrassed to have been contacted about Barnes' communications by members of the Board of Regents, Zaccari summoned Barnes to a meeting in his office.<sup>35</sup> Zaccari lambasted Barnes, telling him he "could not forgive" him and asking him, "Who do you think you are?"<sup>36</sup> Despite the admonishment, Barnes continued to advocate against the parking garage.<sup>37</sup> In response, Zaccari redoubled his efforts to silence Barnes.<sup>38</sup> Zaccari monitored Barnes' personal Face-

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<sup>30</sup> Complaint for Declaratory and Injunctive Relief and Damages at 2, *Barnes v. Zaccari*, 669 F.3d 1295 (2012) (No. 1-08-cv-00077-CAP) [hereinafter *Complaint*].

<sup>31</sup> *Barnes v. Zaccari*, 669 F.3d 1295, 1299 (11th Cir. 2012).

<sup>32</sup> *Id.*

<sup>33</sup> *Complaint*, *supra* note 30, at 3; *Barnes*, 669 F.3d at 1299.

<sup>34</sup> *Barnes*, 669 F.3d at 1299.

<sup>35</sup> *Complaint*, *supra* note 30, at 11–12.

<sup>36</sup> *Id.* at 12.

<sup>37</sup> *Id.* at 13.

<sup>38</sup> *Id.* at 13–14.

book page and seized upon the opportunity he perceived in the collage, which included pictures of Zaccari, a parking deck, and the caption “S.A.V.E.—Zaccari Memorial Parking Garage.”<sup>39</sup>

Internal documents and depositions obtained during the course of the subsequent civil rights litigation filed by Barnes in January 2008 indicate that Zaccari was repeatedly told by senior VSU officials that Barnes did *not* present a threat to himself, others, or the campus.<sup>40</sup> Nevertheless, Zaccari personally ordered that Barnes be “administratively withdraw[n]” from campus—*i.e.*, expelled.<sup>41</sup> Barnes was notified of his expulsion by a letter slipped under his dormitory door.<sup>42</sup> Signed by Zaccari and attached to a print out of Barnes’ Facebook collage, the letter informed Barnes that because of “recent activities directed towards me by you,” including “the attached threatening document,” Barnes was “considered to present a clear and present danger to this campus.”<sup>43</sup> Barnes’ expulsion was effective immediately, and if he sought readmission, he would be required to present proof from a psychiatrist that he did not present “a danger to [himself] or others” and to receive therapy while enrolled at VSU.<sup>44</sup>

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<sup>39</sup> *Id.* at 10, 13–14.

<sup>40</sup> *Barnes v. Zaccari*, 669 F.3d 1295, 1300–01 (11th Cir. 2012) (“Over the next two weeks, Zaccari convened no less than five meetings about Barnes. At these meetings, Zaccari characterized Barnes’s behavior as threatening. No one on his staff agreed with his assessment. Two mental health professionals, McMillan and the Director of the VSU counseling center, Dr. Victor Morgan, repeatedly told Zaccari that Barnes was not a threat to himself or others. Other university officials agreed among themselves that Zaccari was overreacting. . . . Zaccari explored several other avenues to remove Barnes from campus. These included a mental health withdrawal and a disorderly conduct charge. VSU’s mental health withdrawal policy requires a mental health professional to recommend that the student be withdrawn because he or she represents a danger to himself or others. This policy guarantees the student an informal hearing before the withdrawal and the opportunity to present pertinent evidence on his behalf. Zaccari’s staff consistently said this policy did not apply to Barnes because he was not a threat. Zaccari also looked into bringing a disorderly conduct charge against Barnes under the VSU Student Code of Conduct. But this charge also requires a hearing where the student can present evidence on his behalf. Zaccari ultimately rejected these options as too ‘cumbersome.’” (citations omitted) (footnotes omitted)).

<sup>41</sup> *Id.* at 1301.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

After being expelled, Barnes appealed the decision to the Board of Regents for the University System of Georgia.<sup>45</sup> Despite producing the required certification from a psychiatrist, the Board did not reverse Barnes' expulsion until January 17, 2008—a week after he filed suit in federal court alleging a violation of his rights to free speech and due process, among other claims.<sup>46</sup> In July 2012, the Eleventh Circuit held that Zaccari could not avail himself of qualified immunity because he ignored Barnes' "clearly established constitutional right to notice and a hearing before being removed from VSU."<sup>47</sup> In January 2015, the Eleventh Circuit again found in Barnes' favor, ruling that his First Amendment retaliation claim against Zaccari had been improperly dismissed by the federal district court.<sup>48</sup> In July 2015, the lawsuit concluded with the announcement of a \$900,000 settlement payment to Barnes.<sup>49</sup>

#### B. *Young Conservatives of Texas, Lone Star College–Tomball*

In September 2008, the Young Conservatives of Texas ("YCT"), a registered student organization at Lone Star College–Tomball in Texas, distributed flyers during a "club rush" event where organizations recruit new student members and increase awareness of their presence on campus.<sup>50</sup> Adorned by the club's logo, the flyers read:

##### Top Ten Gun Safety Tips

10. Always keep your gun pointed in a safe direction, such as at a Hippy or a Communist.

9. Dumb children might get a hold of your guns and shoot each other. If your children are dumb, put them up for adoption to protect your guns.

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1301–02.

<sup>47</sup> *Id.* at 1309.

<sup>48</sup> *Barnes v. Zaccari*, 592 F. App'x 859, 868 (11th Cir. 2015).

<sup>49</sup> Settlement Agreement and General Release at 2, *Barnes v. Zaccari*, (No. 7:12-cv-0089-HL), <https://www.thefire.org/settlement-agreement-in-barnes-v-zaccari-et-al>.

<sup>50</sup> "Top Ten Gun Safety Tips" Censored at Lone Star College in Texas, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Oct. 20, 2008), <https://www.thefire.org/top-ten-gun-safety-tips-censored-at-lone-star-college-in-texas-2>.

8. No matter how responsible he seems, never give your gun to a monkey
7. If guns make you nervous, drink a bottle of whiskey before heading to the range
6. While unholstering your weapon, it's customary to say "Excuse me while I whip this out."
5. Don't load your gun unless you are ready to shoot something or are just feeling generally angry.
4. If your gun misfires, never look down the barrel to inspect it.
3. Never us[e] your gun to pistol whip someone. That could mar the finish.
2. No matter how excited you are about buying your first gun, do not run around yelling "I have a gun! I have a gun!"
1. And the most important rule of gun safety: Don't piss me off.

**Join us for an informational meeting Monday, September 15th at 4 p.m. in the commons area.**

**If you have any questions or would like to join please contact either Rob Comer (President) at 832-372-7192 or Joshua Pantano (VP) at 281-352-8088.<sup>51</sup>**

Shannon Marino, the college's program manager for student activities, informed YCT President Robert Comer that the flyers were "inappropriate" and confiscated them.<sup>52</sup> After Comer complained about the violation of his expressive rights, he was invited to speak

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<sup>51</sup> Letter from Adam Kissel, Dir., Individual Rights Def. Program, to Dr. Raymond Hawkins, President, Lone Star Coll.-Tomball (Sept. 26, 2008), <https://www.thefire.org/fire-letter-to-lone-star-college-tomball-president-raymond-hawkins>.

<sup>52</sup> "Top Ten Gun Safety Tips" Censored at Lone Star College in Texas, *supra* note 50.

with Dean of Student Development E. Edward Albracht.<sup>53</sup> Referencing the 2007 mass shooting at Virginia Polytechnic Institute and State University (“Virginia Tech”), Albracht agreed with Marino that the flyers were inappropriate.<sup>54</sup> Later that week, Marino informed Comer that the college’s attorneys were reviewing the flyers to determine if the organization would be allowed to retain official recognition.<sup>55</sup> She told Comer that the organization would likely be placed on “probation” for the school year because of the flyer.<sup>56</sup>

FIRE wrote to remind the college of its First Amendment obligations, pointing out that the flyer’s text was plainly protected speech:

Equally troubling is Albracht’s invocation of the Virginia Tech shootings as a reason to ban satirical material that refers to guns or gun violence. The First Amendment does permit the prohibition of “true threats,” which the Supreme Court has held are “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). The plainly unserious “Top Ten” list expresses no such intent.<sup>57</sup>

In response, the college’s general counsel replied that “[t]he mention of firearms and weapons on college campuses” is inherently a “material interference with the operation of the school or the rights of others” because such language “brings fear and concern to students, faculty and staff.”<sup>58</sup> Continuing, he argued that “the tragedy of Virginia Tech cannot be underestimated when it comes to

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<sup>53</sup> *See id.*

<sup>54</sup> *Id.*

<sup>55</sup> *See id.*

<sup>56</sup> *Id.*

<sup>57</sup> Letter from Adam Kissel to Dr. Raymond Hawkins, *supra* note 51.

<sup>58</sup> *See* E-mail from Brian S. Nelson, Gen. Counsel, Lone Star Coll. Sys. to Adam Kissel, Dir., Individual Rights Def. Program, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Oct. 14, 2008, 11:58 PM), <http://www.thefire.org/index.php/article/9815.html>.

speech relating to firearms—however ‘satirical and humorous’ the speech may be perceived by some.”<sup>59</sup>

*C. Professor Francis Schmidt, Bergen Community College*

In January 2014, Bergen Community College (“BCC”) professor Francis Schmidt posted a picture of his daughter in a yoga pose on his Google+ page.<sup>60</sup> In the picture, his daughter wears a T-shirt emblazoned with “I will take what is mine with fire & blood,” a phrase from the popular HBO television series “Game of Thrones.”<sup>61</sup> Schmidt’s post was automatically sent, via email, to those in his Google+ “circles”—including a BCC dean, who reported it to other administrators as a possible threat.<sup>62</sup>

Following the dean’s report, Schmidt was summoned to a meeting with senior BCC administrators, including a college security officer, to explain his “threatening email.”<sup>63</sup> *Inside Higher Ed* reported that at the meeting, Schmidt was asked by BCC’s executive director for human resources about the phrase on his daughter’s T-shirt, and, in apparent disbelief, asked Schmidt to Google the phrase.<sup>64</sup> When the search returned roughly 4 million matches in reference to the show, Schmidt asked how it could have sparked such a disproportionate response.<sup>65</sup> In reply, the security officer told Schmidt “that ‘fire’ could be a kind of proxy for ‘AK-47s.’”<sup>66</sup>

Despite Schmidt’s explanation and the subsequent verification of the context of the phrase via the search engine results, Schmidt was informed in an email sent after the meeting that he was being disciplined for the post.<sup>67</sup> He was immediately placed on leave without pay and was required to undergo a psychiatric evaluation before

<sup>59</sup> *Id.*

<sup>60</sup> Greg Lukianoff, ‘Game of Thrones’ Quote Deemed Too Threatening for NJ Community College, THE HUFFINGTON POST (Apr. 17, 2014), [http://www.huffingtonpost.com/greg-lukianoff/game-of-thrones-quote-dee\\_b\\_5168111.html](http://www.huffingtonpost.com/greg-lukianoff/game-of-thrones-quote-dee_b_5168111.html).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Colleen Flaherty, *Jersey Impasse*, INSIDE HIGHER ED (Apr. 16, 2014), <https://www.insidehighered.com/news/2014/04/16/bergen-community-college-faculty-and-president-conflict-over-many-issues>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

being allowed to return to campus.<sup>68</sup> Upon his return, BCC used the fact of the discipline to justify placing onerous restrictions on Schmidt's expression moving forward.<sup>69</sup> An official reprimand was added to his personnel file, and Schmidt was warned that he would be subject to "suspension and/or termination" for making "disparaging" remarks about the institution or otherwise acted in a way BCC administrators deemed "unbecoming."<sup>70</sup>

Schmidt's suspension may be placed in context by reference to his relationship to the institution.<sup>71</sup> Schmidt was an active member in the faculty union, which issued a vote of no-confidence in college leadership in April 2014, following Schmidt's discipline.<sup>72</sup> At the time of Schmidt's discipline in January 2014, the faculty union had been working without a contract for nearly six months.<sup>73</sup> A week before posting the photo, Schmidt had filed a grievance against the college, complaining that he had been denied a sabbatical and alleging unfair employment practices.<sup>74</sup> Schmidt believed he was targeted as a result of his participation in debates concerning the union and the administration.<sup>75</sup>

FIRE issued a national press release alerting the media to Schmidt's ordeal<sup>76</sup> and secured Schmidt the assistance of counsel.<sup>77</sup> Facing the prospect of a First Amendment lawsuit, BCC cleared the

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<sup>68</sup> *Id.*

<sup>69</sup> *Victory: College Backtracks After Punishing Professor for 'Game of Thrones' Picture*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Oct. 28, 2014), <https://www.thefire.org/victory-college-backtracks-punishing-professor-game-thrones-picture>.

<sup>70</sup> *Id.*

<sup>71</sup> Jay Hathaway, *Professor Suspended Over "Threatening" Game of Thrones T-Shirt*, GAWKER (Apr. 17, 2014), <http://gawker.com/professor-suspended-over-threatening-game-of-thrones-1564357810>.

<sup>72</sup> *Id.*

<sup>73</sup> See Ricardo Montero-Hernandez, Editorial, *My Last Letter: A Pleading Cry for Peace*, 22 THE TORCH 8 (2014).

<sup>74</sup> *Victory: College Backtracks After Punishing Professor for 'Game of Thrones' Picture*, *supra* note 69.

<sup>75</sup> See Lukianoff, *supra* note 60.

<sup>76</sup> See, e.g., Sarah McLaughlin, *Bergen Administrators Fear 'Game of Thrones' Quote, Censor Professor*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Apr. 16, 2014), <https://www.thefire.org/bergen-administrators-fear-game-of-thrones-quote-censor-professor>.

<sup>77</sup> *Victory: College Backtracks After Punishing Professor for 'Game of Thrones' Picture*, *supra* note 69.

warning and reprimand from Schmidt's file in September 2014.<sup>78</sup> In a letter to Schmidt, BCC admitted that Schmidt's punishment "may have lacked basis" and "potentially violated" the First Amendment: "Lest there be any doubt, BCC recognizes and respects that you are free to exercise your constitutional rights, including your right to freedom of speech and expression, even to the extent that you may disparage BCC and/or its officials."<sup>79</sup> The letter confirmed that moving forward, Schmidt would "be in good standing with BCC as if the Incident never occurred, and BCC's records shall so reflect."<sup>80</sup>

*D. Professor James Miller, University of Wisconsin–Stout*

In September 2011, Professor James Miller of the University of Wisconsin–Stout affixed a homemade poster near his office door.<sup>81</sup> The poster included a picture of the actor Nathan Fillion in his role as Captain Malcolm Reynolds in the science-fiction television series *Firefly*, and a line from the character: "You don't know me, son, so let me explain this to you once: If I ever kill you, you'll be awake. You'll be facing me. And you'll be armed."<sup>82</sup>

A few days after the poster was hung, Stout's chief of police, Lisa A. Walter, removed it and informed Miller via email that she had done so because the text "refer[red] to killing."<sup>83</sup> In reply, Miller asked that Walter "respect [his] first amendment rights," to which Walter responded that "the poster [could] be interpreted as a threat."<sup>84</sup> Walter told Miller that he could face criminal charges for "disorderly conduct" for reposting the poster or related posters in the future.<sup>85</sup>

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Andy Chalk, *University Threatens Criminal Charges Over "Firefly" Poster*, THE ESCAPIST (Sept. 26, 2011), <http://www.escapistmagazine.com/news/view/113318-University-Threatens-Criminal-Charges-Over-Firefly-Poster>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *UW-Stout Chancellor Doubles Down on Censorship of 'Firefly' and Anti-Fascism Posters*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Sept. 28, 2011), <https://www.thefire.org/uw-stout-chancellor-doubles-down-on-censorship-of-firefly-and-anti-fascism-posters-2>.

<sup>85</sup> Chalk, *supra* note 81.



Feeling challenged by Walter's warning, Miller soon put up a new poster on his office door.<sup>86</sup> Marked by an image of a stick-figure police officer beating someone with a baton, the new poster stated: "Warning: Fascism. Fascism can cause blunt head trauma and/or violent death. Keep fascism away from children and pets."<sup>87</sup> Walter removed this poster as well, telling Miller via email that the poster had been taken down for presenting a "threat," as it "depict[ed] violence and mention[ed] violence and death."<sup>88</sup> Walter further informed Miller that the decision to take down the poster had been made by the university's "threat assessment team."<sup>89</sup> A dean of the college scheduled a meeting with Miller soon thereafter to discuss "the concerns raised by the campus threat assessment team."<sup>90</sup>

Concerned, Miller contacted FIRE, which in turn contacted Stout Chancellor Charles W. Sorensen.<sup>91</sup> FIRE explained that the posters did not constitute a true threat, nor would they cause a reasonable person to predict a disruption of the educational environment.<sup>92</sup> Sorensen did not reply, but instead defended Walter's treatment of Miller in an email to all faculty and staff.<sup>93</sup> FIRE issued a press release expressing deep concern about the threat to free expression and academic freedom presented by the Stout administration's failure to rectify Miller's treatment.<sup>94</sup> In response, many *Fire-*

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Letter from Adam Kissel, Vice President of Programs, Found. for Individual Rights in Educ., to Charles W. Sorensen, Chancellor, Univ. of Wis.-Stout (Sept. 21, 2011), <https://www.thefire.org/fire-letter-to-uw-stout-chancellor-charles-w-sorensen-september-21-2011>.

<sup>93</sup> Email from Charles W. Sorensen, Chancellor, Univ. of Wis.-Stout, to faculty and staff (Sept. 27, 2011, 4:01 PM), <https://www.thefire.org/email-from-university-of-wisconsin-stout-chancellor-charles-w-sorensen-to-all-faculty-and-staff-september-27-2011>.

<sup>94</sup> *UW-Stout Chancellor Doubles Down on Censorship of 'Firefly' and Anti-Fascism Posters*, *supra* note 84.

*fly* fans wrote to Sorensen to complain about the university's actions.<sup>95</sup> The incident attracted national media attention and statements of support from *Firefly* cast members and author Neil Gaiman.<sup>96</sup> Under scrutiny, Stout administrators announced that the university had abandoned its case against Miller, would handle similar cases differently moving forward, and would plan First Amendment workshops to be held in the future.<sup>97</sup>

E. *Professor Hyung-il Jung, University of Central Florida*

In April 2013, Professor Hyung-il Jung of the University of Central Florida ("UCF") was teaching an accounting class in preparation for an upcoming exam.<sup>98</sup> As the students tired of the exam review work, the *Orlando Sentinel* reported that Jung stated: "This question is very difficult. It looks like you guys are being slowly suffocated by these questions. Am I on a killing spree or what?"<sup>99</sup> A student in the classroom reported the remark to UCF administrators.<sup>100</sup>

In response, Jung was placed on administrative leave in an official letter of reprimand.<sup>101</sup> During that time, UCF informed him that he was barred from "all . . . university duties," was not allowed to enter campus, and was forbidden from "contact of any nature, with

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<sup>95</sup> *See id.*

<sup>96</sup> *University of Wisconsin – Stout: Censorship, Referral to Threat Assessment Team, and Threat of Criminal Charges after Professor Puts Posters Outside Office Door*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <https://www.thefire.org/cases/university-of-wisconsin-stout-censorship-referral-to-threat-assessment-team-and-threat-of-criminal-charges-after-professor-puts-posters-outside-office-door> (last visited Jan. 20, 2017).

<sup>97</sup> *University of Wisconsin-Stout Statement from Chancellor Sorensen, Provost Julie Furst-Bowe, and Vice Chancellor Ed Nieskes to Students, Faculty, and Staff*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Oct. 4, 2011), <https://www.thefire.org/university-of-wisconsin-stout-statement-from-chancellor-sorensen-provost-julie-furst-bowe-and-vice-chancellor-ed-nieskes-to-students-faculty-and-staff>.

<sup>98</sup> Denise-Marie Ordway, *UCF instructor placed on leave after 'killing spree' comment*, ORLANDO SENTINEL (Apr. 25, 2013), [http://articles.orlandosentinel.com/2013-04-25/news/os-ucf-instructor-killing-sprees-comment-20130425\\_1\\_killing-sprees-ucf-spokesman-chad-binette-rosen-college](http://articles.orlandosentinel.com/2013-04-25/news/os-ucf-instructor-killing-sprees-comment-20130425_1_killing-sprees-ucf-spokesman-chad-binette-rosen-college).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

any students, for any reason.”<sup>102</sup> UCF further notified Jung that he would be required to undergo a “thorough mental health evaluation” and produce a statement from a mental health professional certifying that he did not present a “threat to [himself] or to the university community.”<sup>103</sup> The *Sentinel* reported that while UCF police investigated the “threat,” twenty of Jung’s students sent a letter to the administration complaining about Jung’s punishment and pointing out that the statement was intended to be a joke and was generally received as such.<sup>104</sup>

FIRE wrote to UCF in Jung’s defense, making clear that his statement did not constitute a threat and could not reasonably be taken as such.<sup>105</sup> Days later, UCF notified Jung that he would no longer need to undergo a mental health evaluation.<sup>106</sup> Jung was reinstated after three weeks.<sup>107</sup>

#### F. Professor Tim McGettigan, Colorado State University–Pueblo

In January 2014, Professor Tim McGettigan of Colorado State University–Pueblo sent an email to students and faculty comparing impending staff cuts to the Ludlow Massacre, a 1914 incident involving the massacre of striking coal miners in Ludlow, Colorado.<sup>108</sup> McGettigan, an outspoken critic of the administration, encouraged students to protest the possibility of the loss of fifty Colorado State University (“CSU”) staffers, announced by CSU–Pueblo President Lesley Di Mare in December 2013, and likened the impact of the layoffs to the 1914 massacre.<sup>109</sup>

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<sup>102</sup> Letter from Dr. Abraham Pizam, Dean, Univ. of Cent. Fla., to Dr. Hyung-II Jung, Professor, Univ. of Cent. Fla. (Apr. 24, 2013), <https://d28htnjz2elwuj.cloudfront.net/pdfs/7abb1167c686a0f58babf1f82c7c3bd4.pdf>.

<sup>103</sup> *Id.*

<sup>104</sup> Ordway, *supra* note 98.

<sup>105</sup> *University of Central Florida: Professor Suspended for In-Class Joke*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <https://www.thefire.org/cases/university-of-central-florida-professor-suspended-for-in-class-joke> (last visited Jan. 20, 2017).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Scott Jaschik, *Is Citing History a Threat?*, INSIDE HIGHER ED (Jan. 20, 2014), <https://www.insidehighered.com/news/2014/01/20/colorado-state-removes-email-account-professor-who-criticized-cuts>.

<sup>109</sup> *Id.*

In response, the administration found McGettigan in violation of university policy prohibiting the “[u]se of electronic communications to intimidate, threaten, or harass other individuals.”<sup>110</sup> McGettigan’s email access was immediately suspended.<sup>111</sup> Asked by *Inside Higher Ed* about the punishment, Di Mare invoked the specter of school shootings:

Considering the lessons we’ve all learned from Columbine, Virginia Tech, and more recently Arapahoe High School, I can only say that the security of our students, faculty, and staff are our top priority . . . CSU–Pueblo is facing some budget challenges right now, which has sparked impassioned criticism and debate across our campus community. That’s entirely appropriate, and everyone on campus—no matter how you feel about the challenges at hand—should be able to engage in that activity in an environment that is free of intimidation, harassment, and threats.<sup>112</sup>

In a letter to President Di Mare, FIRE noted that McGettigan’s email did not constitute unprotected speech and could not reasonably be deemed a threat, intimidation, or harassment.<sup>113</sup> Even though the institution’s general counsel responded that McGettigan’s First Amendment rights had not been violated, McGettigan’s email access was partially restored soon thereafter.<sup>114</sup> In January 2015, McGettigan filed a federal lawsuit against the university, arguing that the punishment and a subsequent revocation of a previously

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> Letter from Peter Bonilla, Dir., Individual Rights Def. Program, to Lesley A. Di Mare, President, Colo. State Univ. – Pueblo, Found. for Individual Rights in Educ. (Jan. 21, 2014), <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2014/01/Letter-from-FIRE-to-Colorado-State-University-Pueblo-President-Lesley-A.-Di-Mare.pdf>.

<sup>114</sup> Letter from Michael D. Nosler, Gen. Counsel, Colo. State Univ. Sys., to Peter Bonilla, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ. (Jan. 31, 2014), <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2015/01/Letter-from-CSU-Pueblo-General-Counsel-Michael-D.-Nosler-to-FIRE-1-31-14.pdf>.

granted sabbatical constituted retaliation.<sup>115</sup> The lawsuit is ongoing.<sup>116</sup>

*G. Professor Chester Kulis, Oakton Community College*

In May 2015, Professor Chester Kulis of Oakton Community College (“OCC”) sent an email to colleagues and staff that read: “Have a happy MAY DAY when workers across the world celebrate their struggle for union rights and remember the Haymarket riot in Chicago.”<sup>117</sup> Kulis, an adjunct faculty member and a frequent advocate for adjunct faculty organizing, referenced the 1886 Haymarket Riot and International Workers’ Day in part to signify his opposition to policies enacted by OCC President Margaret B. Lee, who was one of many OCC faculty and staff to receive the email.<sup>118</sup> Kulis’ email was titled “May Day – The Antidote to the Peg Lee Gala,” in reference to a forthcoming event hosted by OCC to celebrate Lee’s impending retirement.<sup>119</sup>

Days after sending the email, Philip H. Gerner III, OCC’s general counsel, sent Kulis a letter warning that any similar communications in the future would result in legal action.<sup>120</sup> Because the Haymarket Riot “involved a bomb-throwing incident at a striking workers’ rally in Chicago which resulted in 11 deaths and more than 70 people injured,” Gerner wrote to Kulis, “[y]our reference to ‘remember the Haymarket riot’ was clearly threatening the President that you could resort to violence against the President and the College campus.”<sup>121</sup>

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<sup>115</sup> *McGettigan v. Di Mare*, No. 15-cv-00097-PAB-KLM, 2016 WL 1170221, at \*7 (D. Colo. 2016).

<sup>116</sup> *Id.* at \*10.

<sup>117</sup> Lee V. Gaines, *Oakton College Says Email by Former Adjunct Teacher Was Threatening*, CHI. TRIB. (June 17, 2015), <http://www.chicagotribune.com/suburbs/des-plaines/news/ct-nnw-oakton-haymarket-riot-reference-tl-0618-2015-0611-story.html>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Letter from Philip H. Gerner III, Attorney, Robbins Schwartz, to Chester Kulis, Professor, Oakton Cmty. Coll. (May 7, 2015), <http://www.thefire.org/letter-from-occ-attorneys-to-chester-kulis>.

FIRE wrote OCC administrators, asking the college to disavow the letter and rescind any threat of legal action against Kulis on the basis of his email.<sup>122</sup> FIRE's letter explained:

Kulis's brief email is entirely protected by the First Amendment, and the charge that it was "clearly threatening" to anyone in the OCC community is without merit and wholly detached from our legal system's understanding of what constitutes a true threat. . . . Kulis's email invoking a historical event in the context of his ongoing labor activism cannot by any reasonable reading be considered threatening or intimidating in this regard.<sup>123</sup>

Despite the clarity of the legal precedent, OCC's lawyers reiterated their assertion that Kulis' email constituted a true threat.<sup>124</sup> In response to FIRE, OCC's attorneys claimed that because Lee was one of the recipients of Kulis' email, "she interpreted the communication as a threat against her personally."<sup>125</sup>

*H. Bell v. Itawamba County School Board, United States Court of Appeals for the Fifth Circuit*

In February 2016, the Supreme Court denied certiorari in the case of *Bell v. Itawamba County School Board*, leaving in place an *en banc* decision by the United States Court of Appeals for the Fifth Circuit that essentially condoned the use of a broader definition of "threat" in the context of high school students' speech.<sup>126</sup> The Fifth Circuit's decision and the Supreme Court's failure to review and overturn it leave students particularly vulnerable to punishment for

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<sup>122</sup> Letter from Ari Z. Cohn, Senior Program Officer, Legal and Public Advocacy, and Peter Bonilla, Dir., Individual Rights Def. Program, to Margaret B. Lee, President, Oakton Cmty. Coll. (May 22, 2015), <https://www.thefire.org/fire-letter-to-oakton-community-college>.

<sup>123</sup> *Id.*

<sup>124</sup> Letter from Catherine R. Locallo, Attorney, Robbins Schwartz, to Peter Bonilla, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ. (June 1, 2015), <https://www.thefire.org/response-to-fire-from-catherine-r-locallo>.

<sup>125</sup> *Id.*

<sup>126</sup> *Bell v. Itawamba Cty. Sch. Bd.*, 84 U.S.L.W. 3478 (U.S. Feb. 29, 2016).

constitutionally protected expression under the guise that it is threatening.

*Bell v. Itawamba* centers on a rap recording that plaintiff Taylor Bell created and uploaded to Facebook and YouTube in January 2011.<sup>127</sup> Bell's lyrics alleged sexual misconduct by two coaches at his school and contained what the Fifth Circuit described as "at least four instances of threatening, harassing, and intimidating language against the two coaches".<sup>128</sup>

1. "betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack";
2. "Run up on T-Bizzle / I'm going to hit you with my rueger";
3. "you fucking with the wrong one / going to get a pistol down your mouth / Boww"; and
4. "middle fingers up if you want to cap that nigga / middle fingers up / he get no mercy nigga".<sup>129</sup>

Bell explained in his disciplinary hearing that his intention was to "increase awareness of the situation"—that is, the coaches' alleged misconduct—not to threaten the coaches.<sup>130</sup> Nevertheless, he was suspended for seven days, banned from school functions, and placed in an alternative school for the remaining six weeks of the grading period.<sup>131</sup> On appeal, the school board affirmed that Bell had "threatened, harassed, and intimidated school employees."<sup>132</sup>

Bell filed suit against the school board, alleging it had violated his right to free expression under the First Amendment.<sup>133</sup> The district court found for the school board, reasoning that because school officials could reasonably foresee the lyrics causing disruption at

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<sup>127</sup> *Bell v. Itawamba Cty. Sch. Bd.*, 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012), *aff'd en banc*, 799 F.3d 379 (5th Cir. 2015).

<sup>128</sup> *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 384–85 (5th Cir. 2015) (en banc).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 386.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 387.

<sup>133</sup> *Id.*

Bell's school, they could lawfully punish Bell under *Tinker v. Des Moines Independent Community School District*, even though the speech occurred outside of school.<sup>134</sup>

The district court agreed with the school board that Bell's lyrics were threatening, but it also emphasized the idea that students' opinions of the coaches would change in light of Bell's allegations—thus creating a disturbance.<sup>135</sup> One coach “perceived that students were wary of him,” while another “testified that his teaching style has also been adversely affected out of fear students suspect him of inappropriate behavior.”<sup>136</sup> In other words, the fact that Bell discussed such serious matters of public concern effectively gave the court an excuse to avoid a careful analysis of whether Bell's speech constitutes a true threat under *Watts* and *Black*. This is precisely the opposite of how First Amendment protections should apply; matters of public concern should be, if anything, more strongly protected.<sup>137</sup>

The United States Court of Appeals for the Fifth Circuit reversed the lower court's decision, acknowledging that “hyperbolic and violent language is a commonly used narrative device in rap, which functions to convey emotion and meaning—not to make real threats of violence.”<sup>138</sup> The court also rejected the contention that the coaches' having to take special care to avoid suspicion constituted disruption as contemplated by *Tinker*.<sup>139</sup>

In August 2015, however, the case was reheard by the Fifth Circuit *en banc*, resulting in another finding for the school board.<sup>140</sup> The

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<sup>134</sup> *Bell*, 859 F. Supp. 2d at 840; *see generally* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). The Supreme Court wrote in *Tinker* that although students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” *Tinker* at 506, 513.

<sup>135</sup> *Bell*, 859 F. Supp. 2d at 840.

<sup>136</sup> *Id.*

<sup>137</sup> *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 409–10 (5th Cir. 2015) (*en banc*) (Dennis, J., dissenting) (finding that because of the “public import” of the “serious issue of alleged teacher sexual misconduct toward minor students,” Bell's rap should be “entitled to ‘special protection’ against censorship”).

<sup>138</sup> *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 301 (5th Cir. 2014), *vacated by* 799 F.3d 379 (5th Cir. 2015) (*en banc*).

<sup>139</sup> *Id.* at 296.

<sup>140</sup> *Bell*, 799 F.3d at 380.



court found that “off-campus speech directed intentionally at the school community and reasonably understood by school officials to be threatening, harassing, and intimidating to a teacher” was not protected speech,<sup>141</sup> that Bell intended for students to hear his rap,<sup>142</sup> and that his lyrics constituted threats “as a layperson would understand the term.”<sup>143</sup> It stated that it was “unnecessary to decide whether Bell’s speech also constitute[d] a ‘true threat’ under *Watts*.”<sup>144</sup>

In contrast, the dissenting judges criticized the majority’s “decision to proclaim an entirely new, content-based restriction on students’ First Amendment rights,” which applies to speech that falls short of “true threats” but “that its invented layperson might consider ‘threatening,’ ‘harassing,’ or ‘intimidating.’”<sup>145</sup> A layperson’s sense of what constitutes a threat—like his sense of what constitutes obscenity or fighting words, for example—may be far broader than what the Supreme Court has defined as punishable threats.<sup>146</sup>

While the court rests its holding on *Tinker*, a case involving high school and junior high school students, many courts have erroneously extended the holdings of high school cases to college cases.<sup>147</sup> Therefore, this intrusion into Bell’s First Amendment rights threatens freedom of expression not only for secondary school students but also for college students, who are overwhelmingly adults and should enjoy full First Amendment protection on public college campuses.

### I. *Yik Yak, University of Mary Washington*

Campus community members’ concerns over threats have prompted a focus on anonymous speech, particularly anonymous social media like the smartphone application Yik Yak.<sup>148</sup> In 2015, students at the University of Mary Washington (“UMW”) requested

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<sup>141</sup> *Id.* at 383.

<sup>142</sup> *Id.* at 385.

<sup>143</sup> *Id.* at 396.

<sup>144</sup> *Id.* at 400.

<sup>145</sup> *Id.* at 415–16.

<sup>146</sup> *See id.* at 416.

<sup>147</sup> *See, e.g.,* Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005), Milward v. Shaheen, 148 F. Supp. 3d 1341, 1347 (M.D. Fla. 2015).

<sup>148</sup> *See, e.g.,* Josh Logue, *Who Should Prevent Social Media Harassment?*, INSIDE HIGHER ED (Oct. 22, 2015), <https://www.insidehighered.com/news/2015/>

that the university attempt to block the app on campus in response to so-called threats,<sup>149</sup> but the context of their requests revealed a failure to distinguish between true threats that warrant police involvement and insults that may not be punished by a public institution such as UMW.<sup>150</sup>

The controversy at UMW began in the Fall of 2014, when students posted critical and strongly worded remarks on Yik Yak in response to advocacy by the then-president of the student group Feminists United on Campus (“FUC”).<sup>151</sup> In November 2014, a small number of members of the university’s men’s rugby club were recorded at an off-campus party singing a song with lyrics that some found objectionable.<sup>152</sup> Though critics of the chant characterized it as “advocat[ing] violence against women,” the song purported to be a cautionary tale against having sex with a dead prostitute.<sup>153</sup> Subsequently, FUC complained about the chant to the university.<sup>154</sup> Despite the fact that most rugby club members did not attend the party and that most at the party were not men’s rugby club

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10/22/colleges-face-new-pressure-monitor-social-media-site-yik-yak. Yik Yak allows users to post anonymous comments, or “yaks,” and view other posts from users in their geographical vicinity.

<sup>149</sup> Feminists United on Campus, *et al.*, First Amended Administrative Complaint to U.S. Dep’t of Educ., Office for Civil Rights (July 20, 2015), *available at* <https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2015/10/UMWAmendedComplaint.pdf> [hereinafter Administrative Complaint].

<sup>150</sup> *See id.*; *see also* Erin Gloria Ryan, *Entire College Rugby Team Suspended Over Recorded ‘Fuck a Whore’ Chant*, JEZEBEL (Mar. 23, 2015, 2:30 PM), <http://jezebel.com/entire-college-rugby-team-suspended-over-recorded-fuck-1692488876> (“‘The University of Mary Washington is a public institution and is therefore legally bound to respect the First Amendment rights of its students and faculty members,’ FIRE attorney Will Creeley told me last week. ‘Exceptions to the First Amendment are limited to a narrow subset of precisely defined categories, and the Supreme Court has made clear that there’s no First Amendment exception for speech that is simply offensive . . . .’”).

<sup>151</sup> Administrative Complaint, *supra* note 149, at ¶¶ 20–21 (“[D]erogatory Yaks were posted about ‘the feminists’ and Feminists United using insulting and offensive words, such as ‘I fucking hate feminists and sour vaginas.’”).

<sup>152</sup> *Id.* at ¶ 24.

<sup>153</sup> *Id.*; *see also* Ryan, *supra* note 150 (stating the chant originates from a song called “Walking Down Canal Street” which mentions catching an STD from having sex with a dead prostitute).

<sup>154</sup> Administrative Complaint, *supra* note 149, at ¶ 26.

members, UMW dissolved the entire men's rugby club in March 2015.<sup>155</sup> Criticism of FUC on Yik Yak and in other forums reportedly intensified thereafter.<sup>156</sup>

The university president published a statement saying that “[u]niversity policies prohibit discrimination, harassment, threats, and derogatory statements of any form.”<sup>157</sup> The First Amendment prohibits UMW from punishing statements that are simply “derogatory” with no determination that they fall into an unprotected category of speech such as true threats, but this statement set the stage for students to demand an institutional response to constitutionally protected speech.<sup>158</sup>

In its complaint to the Department of Education's Office for Civil Rights (“OCR”),<sup>159</sup> FUC alleged that in violation of Title IX, UMW failed to take sufficient steps to eliminate a hostile environment created by students posting negative messages about FUC on Yik Yak.<sup>160</sup>

FUC alleged that its members had “been threatened hundreds of times.”<sup>161</sup> Yet the supposedly threatening messages ranged from pop culture references to profane but plainly protected insults—they were not “serious expression[s] of an intent to commit an act of unlawful violence.”<sup>162</sup> For example, the complaint alleged FUC members were described as “femicunts, feminazis, cunts, bitches, hoes, and dikes.”<sup>163</sup> One individual rhetorically asked, “Can we euthanize whoever caused this bullshit?”<sup>164</sup> Another referenced a sketch by comedy troupe The Whitest Kids U' Know, writing: “Gonna tie

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<sup>155</sup> Ryan, *supra* note 150.

<sup>156</sup> Administrative Complaint, *supra* note 149, at ¶ 43.

<sup>157</sup> Rick Hurley, *President Responds to Club Sport Conduct Code Violation*, UNIV. OF MARY WASHINGTON (Mar. 19, 2015), <https://web.archive.org/web/20160430181056/http://president.umw.edu/blog/2015/03/a-message-from-president-hurley>.

<sup>158</sup> See Logue, *supra* note 149.

<sup>159</sup> The Office for Civil Rights enforces Title IX of the Education Amendments of 1972, which forbids sex discrimination in educational programs that receive federal funding. See U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last visited Aug. 14, 2016).

<sup>160</sup> Administrative Complaint, *supra* note 149, at ¶¶ 3–5.

<sup>161</sup> *Id.* at ¶ 48.

<sup>162</sup> *Virginia v. Black*, 538 U.S. 343, 359 (2003).

<sup>163</sup> Administrative Complaint, *supra* note 149, at ¶¶ 44.

<sup>164</sup> *Id.*

these feminists to the radiator and [g]rape [sic] them in the mouth.”<sup>165</sup>

Of those in FUC’s complaint, the statement that most arguably constitutes a true threat read: “Dandy’s about to kill a bitch . . . or two.”<sup>166</sup> But as in *Virginia v. Black*, even this statement must be considered along with “all of the contextual factors that are necessary to decide whether” the remark was meant to communicate a true threat or intimidation.<sup>167</sup>

UMW declined FUC’s “request[] that the administration . . . address the problem with Yik Yak [by] having the app disabled at UMW or banning Yik Yak from the school Wi-Fi.”<sup>168</sup> UMW President Richard Hurley explained: “[A]s a public university, UMW is obligated to comply with all federal laws—not just Title IX. The First Amendment prohibits prior restraints on speech, and banning Yik Yak is tantamount to a content-based prohibition on speech.”<sup>169</sup> FUC then amended its complaint, arguing that Hurley’s defense of UMW was “disparaging” and constituted prohibited retaliation.<sup>170</sup> OCR said it would investigate the allegations in the original complaint as well as the additional allegation against Hurley.<sup>171</sup>

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<sup>165</sup> *Id.*; see WKUKofficial, *Whitest Kids U’ Know – Grapist*, YOUTUBE (Mar. 14, 2012), <https://www.youtube.com/watch?v=SZoiJM1vlf&t=2m00s>.

<sup>166</sup> Administrative Complaint, *supra* note 149, at ¶ 44.

<sup>167</sup> *Black*, 538 U.S. at 367. In April 2015, FUC member Grace Mann was murdered; her housemate was ultimately found guilty of the crime. Peggy Fox, *Man found guilty of murdering UMW student*, WUSA9 (May 4, 2015, 10:46 PM), <http://www.wusa9.com/news/local/virginia/closing-arguments-begin-in-umw-murder-trial/170709634>. While tragic, there has been no evidence presented that her death was connected to the “Yaks” aimed at her and her peers. William D. Cohan, *Putting the Heat on Yik Yak After a Killing on Campus*, N.Y. TIMES (Jan. 6, 2016), <http://www.nytimes.com/2016/01/07/business/dealbook/07db-streetscene.html>.

<sup>168</sup> Administrative Complaint, *supra* note 149, at ¶¶ 98–99.

<sup>169</sup> Letter from Richard Hurley, President, Univ. of Mary Washington, to Eleanor Smeal, President, Feminist Majority Foundation (June 8, 2015), [http://www.fredericksburg.com/news/education/umw-president-richard-hurley-s-letter-to-feminist-majority-foundation/article\\_91ad966c-0e14-11e5-b5b2-e3469289a8dd.html](http://www.fredericksburg.com/news/education/umw-president-richard-hurley-s-letter-to-feminist-majority-foundation/article_91ad966c-0e14-11e5-b5b2-e3469289a8dd.html).

<sup>170</sup> Letter from Michael Hing, Supervisory Attorney, D.C. Office, Office for Civil Rights, to Lisa J. Banks, Katz, Marshall & Banks, LLP (Oct. 13, 2015), <http://static.politico.com/8e/a9/7776b73d49b3ba439972d0708b92/office-for-civil-rights-complaint-notification-letter.pdf>.

<sup>171</sup> *Id.*

Investigations like this incentivize institutions to take action against students expressing themselves based on bare accusations, with no real determination of whether the expression at issue constitutes “true threats” or other unprotected speech.

In contrast, several incidents involving actual threats via Yik Yak on college campuses have ended in cooperation between Yik Yak administrators and law enforcement, leading to an arrest of the individuals making the threats. A student at Oklahoma State University, for example, was arrested in April 2015 in connection with a “Yak” that read: “School shooting on campus this Friday. You have been warned.”<sup>172</sup> A former Pennsylvania State University student was sentenced in May 2015 to jail time after posting on Yik Yak, “I am going to kill everyone in Penn State main on Monday.”<sup>173</sup> An Emory University student was arrested in October 2015 after police concluded she posted, “I’m shooting up the school. Tomorrow. Stay in your rooms. The ones on the quad are the ones who will go first.”<sup>174</sup> In the same month, a Texas A&M student was arrested because he allegedly posted on Yik Yak, “THIS IS NOT A JOKE! DON’T GO TO CAMPUS BETWEEN 7 AND 730 THIS WILL BE MY ONLY WARNING.”<sup>175</sup> Many more students have been arrested on suspicion of similar threats.<sup>176</sup>

These cases stand as examples both of the kind of language that can be punished as a true threat and of the fact that in cases where students’ safety is truly at risk, police can obtain the information

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<sup>172</sup> Rebecca Cantrell, *Oklahoma State student arrested for making ‘threats of mass violence,’* KFOR.COM (Apr. 21, 2015, 10:22 PM), <http://kfor.com/2015/04/21/oklahoma-state-student-arrested-for-making-threats-of-mass-violence>.

<sup>173</sup> Zach Berger, *Former Penn State Student Behind HUB Shooting Threat Sentenced,* STATECOLLEGE.COM (May 29, 2015, 3:15 PM), <http://www.statecollege.com/news/local-news/former-penn-state-student-behind-hub-shooting-threat-sentenced,1464182>.

<sup>174</sup> T. Rees Shapiro, *Emory University student arrested for shooting threat posted on Yik Yak,* WASH. POST: GRADE POINT (Oct. 13, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/10/13/emory-university-student-arrested-for-shooting-threat-posted-on-yik-yak>.

<sup>175</sup> Alexander Smith, *Texas A&M University Student Arrested After Yik Yak Threat,* NBC NEWS (Oct. 21, 2015, 5:35 AM), <http://www.nbcnews.com/news/us-news/texas-m-university-student-arrested-after-yik-yak-threat-n448306>.

<sup>176</sup> Alexandra Svokos, *Yik Yak Threats Lead To Charges For Students,* HUFFINGTON POST (Dec. 25, 2014, 1:03 PM), [http://www.huffingtonpost.com/2014/11/25/yik-yak-threats-college\\_n\\_6214794.html](http://www.huffingtonpost.com/2014/11/25/yik-yak-threats-college_n_6214794.html).

necessary to take action against the perpetrator without limiting the expression of students who have done nothing wrong.

*J. Daniel Perrone, St. John's University*

In 2015, St. John's University student Daniel Perrone wrote a work of fiction about a school shooting for a class titled "Graduate Fiction Workshop: The Monstrous."<sup>177</sup> The university reported him to the police.<sup>178</sup> Perrone was ultimately cleared of wrongdoing by the New York Police Department.<sup>179</sup> But St. John's decision to subject a student to a police investigation and several hours of questioning, despite the fact that the work was plainly fiction within the scope of the class and the assignment, risks chilling a substantial amount of student speech.

A coalition of free speech organizations, led by the New York Civil Liberties Union and including FIRE, wrote to St. John's in April 2016 asking the university to publish a policy that clearly protects student fiction writers from similar repercussions.<sup>180</sup> St. John's had previously declined to take this step upon request from Perrone himself.<sup>181</sup> Without such a policy, students and faculty will be forced to choose between avoiding all topics that might be disturbing—even if exploring hypotheticals and made-up worlds—or potentially being the target of a police interrogation.<sup>182</sup> The risk of being reported simply for a serious response to a class assignment is incompatible with St. John's assertion that it is "committed to standards promoting speech and expression that foster the responsible exchange of ideas and opinions which enables the pursuit of knowledge and truth."<sup>183</sup> Although St. John's is not bound by the First Amendment, it is legally and morally obligated to uphold the

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<sup>177</sup> Letter from Mariko Hirose, Senior Staff Attorney, N.Y. Civil Liberties Union, *et al.*, to Robert A. Mangione, Provost, St. John's Univ., *et al.* (Apr. 6, 2016), <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/04/07155652/00048317.pdf>.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *See id.*

<sup>183</sup> St. John's University, *Policy 1009 – Speech and Expression*, <http://www.stjohns.edu/about/administrative-offices/human-resources/hr-policy-manual/policy-1009-speech-and-expression>.

promises it makes to its students.<sup>184</sup> The university's response also runs contrary to common sense and the very purpose of a fiction-writing class, particularly given that Perrone's piece even "included a disclaimer at the outset that its contents do not reflect the intentions of the author."<sup>185</sup>

The coalition letter explained to St. John's that "[s]ome of the greatest writings in literature, from Vladimir Nabokov to Edgar Allan Poe to Toni Morrison to Cormac McCarthy have the capacity to be deeply disturbing."<sup>186</sup> Further, "because we live in difficult times it is even more important for schools to have clear, transparent policies that respect the difference between threats to campus security and creative writing."<sup>187</sup> Finally, the letter observed that "[c]reative writing programs around the country, including those that have experienced tragedies like Virginia Tech," have instituted policies that properly make that distinction, allowing students to "be free to explore the various themes of our modern lives, including the truly disturbing and tragic ones, in their creative writing without fear of a police encounter."<sup>188</sup>

### III. PROBLEMS PRESENTED AND POSSIBLE SOLUTIONS

A review of representative examples of student and faculty speech mislabeled as threats indicates that an administrative desire to silence criticism or opposition is a common motivation for this type of censorship.<sup>189</sup> Equally common are obvious misrepresentations of the content of speech at issue, or an apparent disregard for obvious contextual factors that would mitigate the speech's content.

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<sup>184</sup> FIRE's *Guide to Due Process and Campus Justice – Full Text, Part III: Procedural Fairness at Private Universities*, FOUND. FOR INDIVIDUAL RIGHTS 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/#\\_RefHeading\\_2508\\_2127946742](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/#_RefHeading_2508_2127946742) ("The legal requirement that universities actually give students the rights they promise stems from a variety of doctrines, above all from the law of contracts. The basic principle of contract law is also one that lies at the heart of morality: People have to live up to their reciprocal promises.").

<sup>185</sup> Letter from Mariko Hirose, *supra* note 177.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See *supra* Section II.

At times, students, professors, and administrators have even abandoned legal, moral, and practical obligations to protect expression in order to simply avoid discomfort.<sup>190</sup>

Whatever the cause, the problem is serious: Misclassifying protected student and faculty speech as threats threatens the First Amendment, teaches students and faculty the wrong lesson about their rights on campus, betrays the purpose of higher education, trivializes real harms, and produces a chilling effect on the speech of others.

Given the fact that these misclassifications subvert applicable legal doctrine, targeted lawsuits in defense of silenced students and faculty may be necessary in order to reset the incentives administrators currently face. Repeated denials of qualified immunity to administrative censors in a series of lawsuits might impact the risk management calculus undertaken by administrators, their counsel, and institutional insurers in such a way that the protection of student and faculty speech rights would trump other competing interests. Moreover, such denials of qualified immunity would be especially appropriate in cases arising out of student speech like that of Hayden Barnes, Young Conservatives of Texas, or Daniel Perrone—speech that could not reasonably be interpreted as “a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>191</sup>

While lawsuits may be necessary to motivate administrators at many institutions to protect free speech, precise and carefully crafted policies are necessary to maintain any freedoms that are won. As demonstrated by cases like *Bell v. Itawamba*, though the Supreme Court has enumerated specific categories of unprotected speech, including threats, a layperson’s guess at what each of those labels includes is likely not to line up with what a public institution may legally punish under the First Amendment.<sup>192</sup> It is not sufficient to prohibit undefined or amorphous categories of potentially harmful expression and then rely on every current and future administrator to fairly and evenly apply school policy. Instead, college policies

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<sup>190</sup> See, e.g., *supra* Section J.

<sup>191</sup> *Virginia v. Black*, 538 U.S. at 343, 359 (2003).

<sup>192</sup> See generally *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 416 (5th Cir. 2015) (en banc) (Dennis, J., dissenting).



should prohibit unprotected categories of speech and define them with boundaries that mirror those established by the Supreme Court.

Unfortunately, administrative efforts to censor are often prompted or facilitated by student calls for censorship like those at the University of Mary Washington.<sup>193</sup> Accordingly, a critical element of minimizing overreactions to non-threatening speech is teaching campus communities about both the legal options that already exist to address real threats and the harmful practical results of “crying wolf.” As demonstrated by the cases where students threatened violence on campus via Yik Yak, law enforcement is empowered to take more effective steps than campus administrators can to keep students safe.<sup>194</sup> After all, a suspension will not keep a potential shooter from campus—a prison sentence will. The fact that law enforcement is so often *not* called in despite supposed threats to safety suggests that administrators’ citing to these concerns as justification for censorship is, at least in some cases, disingenuous.

Additionally, if overzealous administrators continue to punish protected speech under the guise of responding to threats, students will increasingly find themselves less informed about issues that are highly relevant to them, such as Taylor Bell’s allegations of wrongdoing by his high school’s coaches. Campus community members will not hear warnings meant to prevent history from repeating, as all references to past tragedies will be interpreted as an intent to reenact them—as was the case with Professors Tim McGettigan and Chester Kulis.<sup>195</sup> Even commemorative sentiments like “Never forget September 11th” may not be safe.

At the same time, students will be dissuaded from being outspoken on the issues that they are most passionate about, lest their passion cross an unarticulated line determined by administrators’ whims.<sup>196</sup> Such a result is harmful to students’ sense of civic responsibility and harmful to any well-functioning democracy. Students will also be left without opportunities to receive professional feedback on projects that explore upsetting ideas or push the envelope

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<sup>193</sup> See *supra* Section I.

<sup>194</sup> See generally *supra* notes 172–176.

<sup>195</sup> See *supra* Sections F, G.

<sup>196</sup> See, e.g., *supra* Section J.

as long as they are burdened with the fear that doing so may prompt their institutions to react as St. John's did, by involving the police.<sup>197</sup>

Students and professors who value students' personal and intellectual development must demand unfettered discourse at their institutions. With moral pressure from free speech advocates and legal and financial pressure from courts, public institutions and private institutions that have advertised themselves as bastions of free speech will have little choice but to uphold First Amendment principles and enact policies that allow the institution to respond effectively to true threats while fully protecting students' rights.

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<sup>197</sup> See generally *id.*