

MEMORANDUM

TO: KANSAS BOARD OF REGENTS
FROM: SOCIAL MEDIA WORKGROUP
DATE: APRIL 8, 2014

Please find attached the following:

Recommended revisions to the Board's policy on the misuse of social media;

and,

Report of the Workgroup on the social media policy.

These documents are presented by the Workgroup in fulfillment of its charge from the Board of Regents to review the Board's policy on the misuse of social media, to honor the Board's goal in creating the policy while considering ways to address the concerns that have been expressed, and to make any recommended revisions to the policy that will refine and clarify its provisions. The Workgroup was charged to complete its work by April 16, 2014, which has been done.

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KBOR Policy

Chapter II: Governance – State Universities

F. Other

7. Social Media Policy

SOCIAL MEDIA

In keeping with the Kansas Board of Regents' commitment to the principles of academic freedom, the Board supports the responsible use of existing and emerging communications technologies, including social media, to serve the teaching, research, and public service missions of Kansas universities. Each university shall adopt guidelines to advise all university employees on use of social media. The guidelines shall encourage the responsible use of social media by all employees.

Social media means any facility for online publication and commentary.

The guidelines shall suggest ways in which social media technologies may be used to serve the university's mission and shall encourage these uses. In doing so, the guidelines shall strive to assure all employees that existing protections for academic freedom and other expression remain in place in the following:

- i the content of any academic research and other scholarly activities;
- ii the content of any academic instruction;
- iii the content of any statements, debate, or expressions made as part of shared governance at a university whether made by a group or employee; or,
- iv in general, any communication via social media that is consistent with First Amendment protections and that is otherwise permissible under the law.

The guidelines shall remind employees that their authorship of content on social media may violate existing law or policy and may be addressed through university disciplinary processes if, for example, it:

- i is directed to inciting or producing imminent violence or other breach of the peace and is likely to incite or produce such action;
- ii violates existing university or Board of Regents policies;

- iii discloses without lawful authority any confidential student information, protected health care information, personnel records, personal financial information, or confidential research data.

The guidelines also shall advise employees that when using social media to speak as a citizen they should be mindful of the balance struck by the 1940 Statement of Principles of the American Association of University Professors:

College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

These guidelines shall recognize the rights and responsibilities of all employees, including faculty and staff, to speak on matters of public concern as private citizens, if they choose to do so.

This policy on use of social media shall apply prospectively from its date of adoption by the Kansas Board of Regents.

Report of the Kansas Board of Regents Work Group on the Social Media Policy April 8, 2014

The Workgroup was charged by the Kansas Board of Regents to “Review the Board’s policy on improper use of social media.” It was further charged to “honor the Board’s goal in creating the policy while considering ways to address the concerns that have been expressed.” Finally, the Workgroup was charged with presenting to the Board “any recommended revisions to the policy that will refine and clarify its provisions by April 16, 2014.”

In fulfillment of its charge, the Workgroup today presents its recommended revisions of the Board’s social media policy to the Board’s Governance Committee. This Report is also presented to explain and support the rationale of the Workgroup for its recommended revisions.

Overview

The mission of Kansas universities is “to meet the educational needs of a diverse population and multifaceted society by providing teaching, research and service.”¹ Our recommendations for revisions are based on this mission, the conditions necessary to fulfill it, and the particular responsibilities of faculty and staff in serving it. As faculty and staff members, we embrace our responsibilities to Kansas universities and to the people of Kansas.

The core responsibility of faculty and staff is to serve the mission of the universities by preserving, developing, and disseminating knowledge. To fulfill the university mission, university faculty and teaching staff must be allowed to freely communicate ideas and must evaluate ideas on the basis of scholarly standards and not on such other grounds as expedience, popularity, political ideology, or the fashion of the day. Open exchange of ideas is essential to the universities’ mission, and evaluation of ideas on their merits is essential to faculty and staff responsibilities.

University faculty and staff take this mission and these responsibilities very seriously, even passionately. Some aspects of the Social Media Policy are intensely controversial because they appear to contradict these important and deeply-felt responsibilities. Provision 2 would authorize discipline for expressions that are made pursuant to official duties and are “contrary to the best interests of the university.” Since “official duties” within a university include teaching and research, this provision would allow disciplinary control over the core areas of professional speech traditionally protected by the principles of academic freedom. Provision 4 would authorize discipline for speech that “adversely affects the university’s ability to efficiently provide services.” Both provisions appear to authorize discipline of faculty and staff for ideas on grounds other than the scientific, literary, artistic, or other scholarly merit of these ideas. They

¹ Kansas Board of Regents, “Missions,” <http://www.kansasregents.org/missions>.

authorize the use of administrative efficiency, or even merely avoiding controversy, as a standard for judging ideas and imposing discipline. Although efficiency is to be valued, it is not related to the scientific, literary, or artistic merit of ideas and is not a valid basis for limiting the expression of ideas in a higher education setting.

Although the language of Provisions 2 and 4 is taken from Supreme Court decisions, these decisions addressed employee speech outside of the higher education context, and this language has served to confuse and concern faculty and staff rather than reassure them. The critical question is how these generic standards should be applied within the unique higher education context. Disciplinary control over employee expression that may be appropriate in other governmental agencies is contrary to the university's mission and faculty and staff responsibilities. Examples of social media use that may be seen as contrary to the interests or efficiency of the university include a scientific critique that jeopardizes a grant, a scientific publication that arouses a powerful interest group campaign to reduce legislative funding, a political blog post that offends some colleagues or members of the public, or an email that criticizes a dean's academic-policy decisions. Yet these expressions are precisely the sort that should be protected as serving the mission of the university, if not its narrow, short-term interests.

Because the free exchange of ideas is essential to the university mission, and because the responsibility to evaluate ideas on their merits is so deeply felt by faculty and staff, we believe the controversy over the Social Media Policy will not diminish until the Policy is revised to assure faculty and staff that traditional protections for scholarly expression remain broad and are academically appropriate. A narrow definition of the term "social media" will not suffice, as these technologies are used in carrying out all aspects of the university's mission.

The Work Group is charged with addressing concerns that have been expressed about the existing Social Media policy. Many members of the Work Group, and many faculty and staff who submitted comments on our draft proposal, believe that there should be no social media policy at all. These faculty and staff believe that speech using social media should be treated no differently than other forms of speech, therefore existing laws and policies are sufficient.

The Work Group is also charged with recommending amendments to the existing policy. This report summarizes specific concerns about the existing policy and recommends revisions to address these concerns.

This report proceeds as follows:

- 1) *The University Mission, the Free Exchange of Ideas, and Academic Responsibility.*
The mission of Kansas universities is to preserve, advance, and disseminate knowledge.

The free exchange of ideas and the responsibility to evaluate ideas on their merits are essential to fulfilling this mission. (p. 4)

- 2) ***The First Amendment and Speech by Public University Faculty and Staff.*** *The U.S. Constitution's First Amendment, as interpreted by the courts, affirms the unique mission of the universities and protects academic freedom and responsibility. Where the constitutional protection for public employee speech is unclear or falls short of the protection appropriate for speech in a higher education setting, university policies have ensured a higher level of protection.* (p. 7)
- 3) ***Social Media in Service of the University Mission.*** *Social media technologies are powerful and essential tools for serving the university mission. The challenges associated with these technologies are best met by offering information and advice rather than imposing discipline.* (p. 11)
- 4) ***Other Universities' Policies on Use of Social Media.*** *Other universities' policies on the use of social media reflect the principles outlined in this report. No university imposes a disciplinary standard other than existing law or policy, except for standards imposed on official university expressions (e.g., official Twitter feeds). Many universities offer information and advice on social media "best practices" and the requirements of existing law.* (p. 12)
- 5) **Recommended Revisions to the Social Media Policy** (p. 13)
- 6) **Conclusion** (p. 16)

Appendix: summary of university social media policies nationwide

I. The University Mission, the Free Exchange of Ideas, and Academic Responsibility

The Work Group’s recommendations are based on the university mission and the principles of academic freedom and responsibility that serve it. These principles support some kinds of restraint on faculty and staff expression but forbid other kinds of restraint. Our recommended revisions to the Social Media Policy would ensure that only academically appropriate restraints are placed on uses of social media. In this section of the report we summarize these principles and their implications.

The mission

Kansas universities have an important public mission: the advancement of knowledge and public higher education.² The Kansas Board of Regents has a rich history of supporting Kansas universities and this mission. In carrying out the university mission, faculty and staff serve the public and ultimately are accountable to the public.

This mission, and faculty and staff responsibilities in serving it, are different than in other public agencies. The universities’ mission is to foster the discussion, critique, and dissemination of ideas. In other public agencies, employees may be required to speak for the agency consistently with the agency’s directives. Universities are different. Their mission requires faculty and teaching staff not to commit to a particular governmental message or policy but to engage in the free exchange of ideas, subject to professional standards and methods.

Academic freedom

The university mission is served by the principles of academic freedom and responsibility. We emphasize *responsibility*. Academic freedom has never meant that faculty and staff teachers may say or write anything they want without concern for sanction, and we return to these responsibilities shortly.

The principles of academic freedom and responsibility, first developed in the United States in 1915, protect “full freedom in research and in the publication of the results,” “freedom in the

² Kansas Board of Regents, “Missions,” <http://www.kansasregents.org/missions>.

classroom in discussing their subject,” and freedom from “institutional censorship and discipline” when speaking or writing as a citizen.³

The principles of academic freedom protect the free exchange of ideas outside of the university as well as within.⁴ Freedom of speech outside the university, as a citizen, is a necessary element of the freedom of inquiry and teaching. As a leading scholar observed, “A university is a quintessential marketplace of ideas. It would therefore contradict the very function of a university to punish a professor for extramural speech on the ground that it interferes with workplace efficiency. That is, free inquiry and dissent, not uniformity and political orthodoxy, are the essential components of a healthy - and efficient - academic workplace. A university that allows free expression is efficient; one that stifles it is not.”⁵

Academic responsibility

Academic freedom is accompanied by responsibility, including the obligation to critically examine ideas and engage in peer review based on shared professional standards. Peer review is a necessary and valuable restraint on the professional publication of ideas and choices about whom to hire, promote, or dismiss. In rare cases it leads to sanctions for speech or writings that violate shared professional standards. In every Kansas university, peer review is an active, ongoing process resulting in improvements in the quality of published ideas, teaching practices, and faculty.

In peer review, academic responsibility includes a strict obligation not to use criteria other than professional standards. The faculty of Kansas universities are deeply committed to honoring this obligation. Thus, scientific ideas are to be judged by scientific criteria, not religious dogma; literary expression by literary criteria, not popular taste. Occasionally the ideas of scholars are controversial, but controversy or the disruptions resulting from it are not legitimate academic bases for evaluating an expression. Whether an idea is controversial or whether others are disruptive in response to an idea are matters that, on their own, have no legitimate places in deciding whether the speaker or writer should be sanctioned.

Basing evaluation of a scholar not on academic grounds but on whether his or her ideas are controversial would authorize a “heckler’s veto” over the expression of ideas. Any interest group

³ American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, <http://www.aaup.org/file/principles-academic-freedom-tenure.pdf>. The first statement of these principles is found in American Association of University Professors, 1915 Declaration of Principles on Academic Freedom and Tenure, <http://www.aaup.org/file/1915-Declaration-of-Principles-on-Academic-Freedom-and-Academic-Tenure.pdf>.

⁴ American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, <http://www.aaup.org/file/principles-academic-freedom-tenure.pdf>.

⁵ Marjorie Heins, “Priests of Our Democracy,” The University of Michigan’s Davis, Markert, Nickerson Lecture on Academic and Intellectual Freedom, Oct. 23, 2013. <http://www.fepproject.org/commentaries/DavisMarkertLecture.html>.

could censor ideas or cause disciplinary action in response to a scholar's ideas by mounting a campaign of controversy or disruption. This is not merely a hypothetical possibility. In the past decade particular groups have severely disrupted a number of university laboratories in response to scientists' research.⁶ To shut down these laboratories because some members of the public have taken offense would undermine the very purpose and mission of universities.

The principles outlined above are widely accepted and endorsed by the American Association of University Professors and each of the universities in Kansas, as well as by all major American universities. Protection for academic freedom is a condition for accreditation.⁷

Some aspects of the Social Media Policy are intensely controversial because they appear to contradict these important and deeply-felt responsibilities. Provision 2 would authorize discipline for expressions that are made pursuant to official duties and are "contrary to the best interests of the university." Provision 4 would authorize discipline for speech that "adversely affects the university's ability to efficiently provide services." These provisions appear to authorize discipline of faculty and staff for their ideas on grounds other than the scientific, literary, artistic, or other scholarly merit of the ideas in question. They authorize the use of administrative efficiency, or even merely avoiding controversy, as a standard for judging ideas and imposing discipline. Examples of social media use that may be seen as contrary to the interests or efficiency of the university include a scientific critique that jeopardizes a grant, a scientific publication that arouses a powerful interest group campaign to reduce legislative funding, a political blog post that offends some colleagues or members of the public, or an email that criticizes a dean's academic-policy decisions. Yet these expressions are precisely the sort that should be protected as serving the mission of the university, if not its narrow, short-term interests. Although efficiency is to be valued, it is not related to the scientific, literary, or artistic merit of ideas and is not a valid basis for limiting the evaluation of ideas on their merits.

⁶ Matthew R. Bailey, Barbara A. Rich, and B. Taylor Bennett, "Crisis Planning to Manage Risks Posed by Animal Rights Extremists," *ILAR Journal* 51(2):138-48 (2010); John Illman, "Animal Rights Violence Spreads Fear Through U.K. Research Community," *Journal of the National Cancer Institute*, 97(21): 1565-66 (2005). Michael Conn and James Parker, "Winners and Losers in the Animal Research Wars," *American Scientist* 96(3): 184 (2008). <http://www.americanscientist.org/issues/num2/2008/3/winners-and-losers-in-the-animal-research-wars/2>. "Animal Rights Extremists Target the University of California," Anti-Defamation League (May 12, 2011), <http://archive.adl.org/nr/exeres/fe4f2992-54b2-4e4e-84c5-4c6a9596a7de.db7611a2-02cd-43af-8147-649e26813571.frameless.html>.

⁷ Higher Learning Commission, A Commission of the North Central Association, *Criteria for Accreditation*, Criterion 2D, <http://policy.ncahlc.org/Policies/criteria-for-accreditation.html>.

II. The First Amendment and Speech by Public University Faculty and Staff

Key parts of the Social Media Policy are based on judicial decisions that authorize discipline of public employees for their speech in some circumstances. Specifically, the Supreme Court held in *Garcetti* that when public employees speak “pursuant to job duties” their speech is not protected by the First Amendment, but the Court deferred until later whether this decision applies in higher education.⁸ In *Pickering*, the Court held that when public employees speak as citizens they may be disciplined if the consequences of their speech disrupt their agency sufficiently to outweigh their interest in the speech.⁹

These decisions addressed employee speech in government agencies where the agency mission is not to advance knowledge through free expression of ideas and scholarly evaluation of ideas. *Garcetti* addressed the speech of a deputy prosecutor; *Pickering* addressed the speech of a public schoolteacher. How the standards announced in these decisions should apply in the context of public universities depends on a clear understanding of the university mission and the particular responsibilities of faculty and staff. For example, a federal court recently upheld the demotion of Rex Duke, a university police officer who was second in command of the department, for posting on his personal Facebook page, after the reelection of President Obama, a Confederate flag along with the words “It’s time for the second revolution.” In applying the *Pickering* balancing test in this case, the court observed that “a genuine potential for speech to harm a police department’s reputation also justifies an employer taking action before that harm is realized,” thus authorizing Duke’s demotion from a command-level position.¹⁰

While sharp restrictions on the political expression of command-level police officers may be consistent with First Amendment protections for such officers, the higher education setting is different. In academic settings, the right to freedom of expression and the interest of the university must be interpreted in light of the special academic mission. As a federal appellate court declared, public “employees can be arrayed on a spectrum, from university professors at one end to policemen at the other. State inhibition of academic freedom is strongly disfavored. In polar contrast is the discipline demanded of, and freedom correspondingly denied to policemen.”¹¹

⁸ *Garcetti v. Ceballos* 547 US 410 (2006).

⁹ *Pickering v. Board of Education* 391 U.S. 563 (1968).

¹⁰ *Duke v. Hamil*, <http://hr.cch.com/eld/c4ac697a7bca1000b9c4e0db5501c0ed01.pdf> (U.S. District Court for the Northern District of Georgia, Atlanta Division), Feb. 4, 2014.

¹¹ *Joyner v. Lancaster* 815 F.2d 20 (1987).

The special mission of universities

The Supreme Court has long recognized the special mission of universities and, therefore, constitutional protection for academic freedom. In 1957, the Court struck down a legislative investigation of a professor for his political expressions and declared:

“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 future of our Nation.... Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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.”¹²

Likewise, in 1967, the Court declared:

“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”¹³

The right to speak as a citizen and the Pickering balancing test

University faculty and staff have a First Amendment right to speak as a citizen on matters of public concern. This right is subject to a balancing test announced by the Supreme Court in *Pickering v. Board of Education* “between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”¹⁴ This has been interpreted to allow a public employer in some agency settings to sanction an employee on the basis of disruption, or even loss of the agency’s reputation, that occurs in response to the employee’s expression.

¹² *Sweezy v. New Hampshire* 354 U.S. 234 (1957), p. 250.

¹³ *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), p. 603, quoting *Shelton v. Tucker* and *U.S. v. Associated Press*.

¹⁴ *Pickering v. Board of Education*, 391 U.S. 563 (1968), p. 568.

In the higher education setting, the *Pickering* test must take into account the unique mission of public universities and the particular responsibilities of faculty and staff. This is because while “other public employers, such as a district attorney’s office, do not profess to promote their employees’ professional free speech as a fundamental mission,” the free exchange of ideas is central to the university mission and so “professorial speech that implicates academic freedom rights should absolutely enjoy a stronger presumption of First Amendment protection than the speech of other public employees.”¹⁵

A federal appellate court recently observed that striking the appropriate balance in academic speech cases “is likely to be particularly subtle and difficult” because both “the nature and strength” of the public interest in the speech and the “interests of an employing academic institution” are difficult for non-specialists to assess.¹⁶

In sum, in the university setting, “efficiency” under the *Pickering* test must be understood in light of the particular mission of public universities and their commitment to the free exchange of ideas. Likewise, the weighting of faculty and staff rights must be based on their particular roles and responsibilities, and, in the case of scholars and teachers, the value of the free exchange of ideas and the responsibility to evaluate ideas on the basis of professional standards. For both reasons, restrictions on public employee expression that may be constitutionally acceptable in some agency settings would not be acceptable in higher education.

We are concerned that the Social Media Policy’s 4th provision does not clearly specify that Kansas universities and their faculty and staff have strong constitutional interests in preserving the free exchange of ideas, and this lack of clarity helps to explain why faculty and staff have been so vexed by this provision. The 4th provision’s use of language from judicial decisions outside of the context of higher education serves to confuse faculty and staff about the meaning of this generic standard in the higher education context. As Professor Richard Levy reported to the Work Group, in First Amendment law, “Under the vagueness doctrine, any policy regulating the use of social media must clearly define what speech is prohibited so as to provide fair notice and prevent discriminatory enforcement.”¹⁷ In our view, and the view of many faculty and staff who have raised concerns to us, the meaning of the 4th provision in the context of higher education is not clear. For example, if the *Pickering* standard authorizes discipline of a university police officer for an anti-

¹⁵ Ailsa Chang, “Resuscitating the Constitutional ‘Theory’ of Academic Freedom: A Search for a Standard Beyond *Pickering* and *Connick*,” *Stanford Law Review* 53:915-966 (2001), p. 964.

¹⁶ *Demers v. Austin* 729 F.3d 1011 (2013).

¹⁷ Richard E. Levy, Memorandum to Kansas Board of Regents Social Media Policy Work Group, January 29, 2014, p. 8.

Obama Facebook post,¹⁸ does it also authorize punishment of a professor for a similar post? Our recommended revisions offer a solution to this problem.

Speech “pursuant to official duties”

The Social Media Policy’s 2nd provision is based on a Supreme Court decision, *Garcetti v. Ceballos*, holding that public employees have no First Amendment protection from discipline for expressions made “pursuant to official duties.”¹⁹ **In public universities, speech that is “pursuant to official duties” includes the core areas of research, teaching and shared governance, and so whether *Garcetti* applies in higher education is a critical question. The *Garcetti* court specifically declined to extend its ruling to employment in higher education. Several federal appellate courts have extended *Garcetti* to speech by university employees, “but those cases do not seem to involve academic teaching or scholarship.”²⁰ There is wide consensus in higher education that speech in higher education in the areas of research, teaching, and shared governance should be constitutionally protected. Two federal appellate courts have ruled that there is a higher education exception to the *Garcetti* rule, and in these appellate circuits the First Amendment continues to protect public university employees’ speech in the areas of research, teaching, and shared governance.²¹ In the most recent of these decisions, the court declared, “*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed ‘pursuant to the official duties’ of a teacher and professor.”²²**

With these recent decisions, in the view of two leading commentators, “the tide appears to have turned” in favor of continued constitutional protection for speech “pursuant to official duties” within higher education.²³ In our view, the principles of academic freedom would require protection from sanction for expressions in the areas of research, teaching, and shared governance, whether or not the First Amendment is interpreted to offer this protection.

¹⁸ *Duke v. Hamil*, <http://hr.cch.com/eld/c4ac697a7bca1000b9c4e0db5501c0ed01.pdf> (U.S. District Court for the Northern District of Georgia, Atlanta Division), Feb. 4, 2014.

¹⁹ *Garcetti v. Ceballos* 547 US 410 (2006).

²⁰ Richard E. Levy, Memorandum to Kansas Board of Regents Social Media Policy Work Group, January 29, 2014, p. 6, citing *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008); *Gorum v. Sessoms*, 561 F.3d 179 (3rd Cir. 2009); *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012).

²¹ *Demers v. Austin*, 729 F.3d 1011 (9th Cir. 2013); *Adams v. Trustees of Univ. of N. Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011).

²² *Demers v. Austin*, 729 F.3d 1011 (9th Cir. 2013), 1020.

²³ Thomas Sullivan and Lawrence White, “For Faculty Free Speech, the Tide is Turning,” *Chronicle of Higher Education*, Sept. 30, 2013.

III. Social Media in Service of the University Mission

Giving a narrow definition to the term “social media” in the Policy will not suffice to address the concerns summarized above. Social media are powerful tools of communication that allow rapid communication among individuals and to broad audiences. These tools, like other improvements in the means of communication, are especially useful in higher education. In fulfilling the research mission, faculty and staff use social media to propose and develop research plans; conduct research and share data; submit research findings for peer review and conduct peer review; publish the results of research; and as a means of gathering data and as a topic of research.²⁴ In fulfilling the teaching mission, faculty and staff use these technologies to make teaching materials available to students, communicate with students, foster active student engagement in the learning process, facilitate student creativity and expression, and conduct evaluations.²⁵ In fulfilling the public service mission, faculty and staff use these technologies in myriad ways to translate the results of research for public audiences, facilitate extension education, contribute to economic development through the transfer of technology, and contribute to the advance of democracy.

Social media present new challenges, too. Many more members of the general public may read a blog or other online posting than are ever likely to read an academic research article or book. A writer’s message may be quickly and widely re-posted in ways he or she never expected or intended. For example, using Twitter or Facebook, any individual may type a short note, press a button, and thereby send a message that is permanently available and which may be copied thousands of times.²⁶

It is important to remember, however, that advances in communication technologies have always contributed to controversy. The printing press increased the availability of controversial ideas to a mass audience, and scandals resulting from this powerful but old technology still occur. Thus, several universities, including the University of North Carolina, have faced sharp controversy

²⁴ See, e.g., Laura Bonetta, “Scientists Enter the Blogosphere,” *Cell* 129: 443-45 (2007); Apoorva Mandavilli, “Peer review: Trial by Twitter,” *Nature* 469, 286-287 (2011); Ian Rowlands, David Nicholas, Bill Russell, Nicholas Canty, Anthony Watkinson, “Social Media Use in the Research Workflow,” *Learned Publishing* 24(3): 183-95 (2011); John Wihbey, “Interrogating the Network: The Year in Social Media Research,” *Nieman Journalism Lab* <http://www.niemanlab.org/2013/12/interrogating-the-network-the-year-in-social-media-research/>.

²⁵ L. Johnson, S. Adams Becker, V. Estrada, A. Freeman, *NMC Horizon Report: 2014 Higher Education Edition*. Austin, TX: The New Media Consortium (2014); David M. Perry, “Go Where the Students Are,” *Chronicle of Higher Education*, April 29, 2013; National Survey of Student Engagement, *A Fresh Look at Student Engagement—Annual Results 2013*, Bloomington, IN: Indiana University Center for Postsecondary Research (2013), p. 23; Henry Jenkins with Katie Clinton, Ravi Purushotma, Alice J. Robison, Margaret Weigel, “Confronting the Challenges of Participatory Culture: Media Education for the 21st Century,” The John D. and Catherine T. MacArthur Foundation, http://www.macfound.org/media/article_pdfs/JENKINS_WHITE_PAPER.PDF.

²⁶ Robert O’Neil, *Academic Freedom in the Wired World* (Cambridge, MA: Harvard University Press, 2008); Robert O’Neil, “Controversial Weblogs and Academic Freedom,” *The Chronicle of Higher Education* (January 16, 2004); Peter Schmidt, “One Email, Much Outrage,” *The Chronicle of Higher Education*, (March 10, 2014).

over their selections of a “common book.”²⁷ These controversies included calls for reductions in university funding.

The utility of social media and the challenges accompanying its use justify efforts to offer information and advice about these unintended consequences and about how best to use social media to serve the university mission. They do not justify restrictions other than those applied to any other form of communication.

IV. Other Universities’ Policies on Use of Social Media

The Work Group examined the social media policies of public and private universities across the country. *We found no policy that imposed on these uses a disciplinary standard other than existing law and policy, except for disciplinary standards imposed on uses that are official university expressions (like official “twitter feeds”).* Instead, universities used their policies to offer information and advice for faculty and staff on how to use social media effectively and how to avoid unintended consequences (and how to respond if a mistake is made). The appendix contains a list of university policies that were studied by the Work Group.

It is also important to note that existing Kansas university policies grant authority to enforce professional standards of conduct and to sanction faculty members and employees for misconduct. This includes the authority to deny and revoke tenure for failure to meet professional standards. It also includes the authority to sanction for direct incitement of imminent violence; release of confidential information without lawful authority; discrimination and harassment in violation of equal protection law; and professional misconduct. Existing Board of Regents and university policies establish procedures for addressing violations of these laws and policies, and authorize discipline, up to and including dismissal, for these violations. No additional disciplinary authority is necessary for addressing violations that are done through social media. For example, an instance of unlawful harassment is equally in violation of law and policy if done by letter or by social media. An incitement to imminent violence is equally punishable if done by bullhorn or a tweet.

²⁷ See, e.g., Eric Ferreri, “Legislators: UNC Book Choice Offensive, Dishonest,” *Chapel Hill Herald*, July 17, 2003, p. 1. The controversy is summarized in Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom* (New Haven, CT: Yale University Press, 2009), pp. 2-4; “SC Legislators Want to Punish 2 Colleges for Homosexuality Books,” <http://www.wistv.com/story/24769620/sc-legislators-want-to-punish-2-colleges-in-budget>.

V. Recommended Revisions to the Social Media Policy

- A. *The Goal of the Policy:* As explained in its charge to the Workgroup, the Board’s goal was “to craft a policy on the use of social media that recognizes the values of these media to the special mission of public universities in advancing knowledge, teaching, and serving the public, that respects the First Amendment and Procedural Due Process rights of individuals as employees and citizens, and at the same time respects the rights of the universities as employers.” The Workgroup prepared revisions to the policy with the intent to meet this goal. It is the conclusion of the Workgroup that its recommended revisions fulfill this goal, as well as appropriately addressing the concerns that were expressed about the original policy.
- B. *Language of the Policy Addressed by the Workgroup:* The revisions being recommended by the Workgroup address the language currently in the Board Policy Manual at Chapter II: Governance – State Universities, Part C, Paragraph 6, Section b, beginning with the second paragraph of that section and continuing through the end of that section. The Workgroup is not recommending any changes to the current first paragraph of that section. If the Board were to approve and adopt the Workgroup’s recommended revisions, Section b would consist of only the current first paragraph.
- C. *New Location of the Policy:* The first revision is to remove the policy from Chapter II, Part C, Paragraph 6: Suspensions, Terminations and Dismissals. The recommended new location for the policy is Chapter II, Part F, (new) Paragraph 8: Social Media. The Board’s goal is better served by creating a new section for this policy that will not instantly be viewed from the perspective of suspending, terminating, or dismissing anyone. A policy merely entitled, “Social Media,” located in an “Other” section of the Board’s Policy Manual would allow the policy to be read and understood from the perspective that it is a social media policy and not another kind of policy.
- D. *Opening Paragraph:* The second revision is the opening paragraph. The revised language makes clear the Board’s commitment to academic freedom, the First Amendment, and the responsible use of social media and other emerging technology to serve in the fulfillment of university missions. Essentially, this revised paragraph is a restatement of the Board’s goal for this policy. The opening paragraph concludes with a direction to each university to adopt their own individual guidelines on the use of social media. This revised opening paragraph is an affirmation of values.
- E. *Definition of Social Media:* The third revision is the definition of “social media.” Specific examples of social media have been removed because it is not necessary to include them.

Company names and specific technology may have some relevance in describing what is meant by social media, but due to the speed of how things change in this field, such examples may not remain relevant over time. The recommendation definition of social media is accurate and inclusive of current and future types of social media.

F. *Guidelines for University Social Media Policies:* The purpose of the fourth revision of the policy is to describe the guidelines to be followed by each university. The guidelines in this section describe four specific uses of social media that are exempt from being interpreted as a misuse of social media. The first two exempt uses relate directly to the Board's stated purpose for this policy, "advancing knowledge [and] teaching." The third exemption specifically refers to shared governance and is intended to keep the tradition of shared governance strong and alive. The Board has always supported shared governance at each university and, while not specifically mentioned in the Board's policy goal, is undoubtedly considered in the intent of that goal. The fourth exemption refers to the Board's goal of "serving the public" and in respecting "the First Amendment and Procedural Due Process rights of individuals as employees and as citizens," and also respecting "the rights of the universities as employers." The fourth exemption is really stating that a university policy on social media cannot define the misuse of social media as a use that is permissible under the First Amendment or other law. This does not create a new right for employees, nor does it take away any authority from a university as an employer. It simply acknowledges that there are legal protections already in existence which cannot be changed by university policy.

G. *Legal Restrictions on the Use of Social Media:* The fifth revision to the policy reminds employees that there are, indeed, legal restrictions on the use of social media. Three specific examples of the misuse of social media are described:

(1) The first example is the same as that currently in the policy at (b)(i), although the language has been revised to be more consistent with case law on the subject.

(2) The second example is intended to address the current policy content at (b)(ii) and (b)(iv), as well as the paragraph in the policy immediately following these two sections (the balancing test language). This is the language in the current policy that has drawn the most criticism. The language of the second example ("violates existing employee policies addressing professional misconduct") is an acknowledgment that current Board policy, as well as current policies at each university, already describe conduct that can result in the suspension, termination or dismissal of a university employee. There is nothing in these existing policies that would prohibit or interfere with a university from taking appropriate action against an employee for misuse of social media. Social media may require the use of emerging technology, but harassment (for example) can be dealt with under current

policy whether it occurs in person, through the mail, or with the use of social media. It is not necessary to create a new policy to address each new means by which someone can be harassed. It follows that it is also unnecessary to create a new policy to address each new means by which an employee can engage in misconduct. The existing authority and rights of universities as employer are also intact and undiminished without the need to create a new policy for each new development. With regard to the “balancing test” language in the current policy (referred to above), this language is not a necessary or even appropriate part of policy content. The inclusion of this language in the policy has the effect of causing employees to second guess what they do with social media. It creates confusion. It does nothing to help those who must abide by the policy in understanding what the policy means and how the policy may be applied. It serves no useful purpose. The content of this paragraph is more properly the content of a conversation between a university and its legal counsel when deciding how to handle a particular case. That conversation will occur and will include all relevant factors, regardless of the content of the policy. A policy should describe its instructions, but it should not dictate how those instructions are to be applied to actual situations. The exercise of judgment is an integral part of the authority and rights of a university as employer. A policy should not take away this ability to exercise judgment, unless the desire is to have a zero-tolerance policy (which is the ultimate method for eliminating the exercise of judgment).

(3) The third example of misuse of social media in the revision is the same as in the current policy at (b)(iii), except for the addition of the word “lawful.” This word has been added to make it clear that any authority relied on when disclosing confidential information must be proper authority. This keeps the burden of making sure a disclosure of confidential information is actually proper on the person making the disclosure.

(H) *Employee’s use of Social Media as a Citizen:* The sixth and final revision to the policy is a specific acknowledgment and affirmation that employees using social media as citizens do so with special obligations. Social media guidelines developed by each university are directed by this revision to advise employees of these obligations as described in the language quoted from the AAUP 1940 Statement of Principles. The language in this Statement supports the idea that a university employee is responsible and can be held accountable when speaking for being “accurate,” for exercising “appropriate restraint,” for showing “respect for the opinions of others,” and for making “every effort to indicate that they are not speaking for the institution.” This quoted language is from the 1940 Statement and is applicable regardless of the method used by the employee to make an expression. Speaking through social media does not create a new kind of speech. Speech is speech and the use of social media is already covered by well settled rights and responsibilities.

VI. Conclusion

The only real difference between the revised policy and the current policy is the perspective from which the Board's Goal is addressed. The Workgroup believes it is crucial for a successful policy's message to be affirming, to eliminate needless worry and concern, to point out that there are specific uses of social media that are not protected speech (but because that type of speech is not protected in any form, not just because it is expressed through social media), and that affirms individual responsibility as the key in assuring against the misuse of social media. Regardless of the tone of any social media policy, nothing will ever work – much less be accepted – unless the language in the policy is both respectful and reliant on individual responsibility.

The revised policy is one that is written to reassure people, without changing anything that already exists. It does not create new rights nor does it enlarge existing rights, the revised policy merely affirms rights. In addition, no university authority to take appropriate action if social media is misused is restricted, removed, or in any way compromised by the revised policy. The revised policy merely affirms existing authority.

In conclusion, the recommended revisions to the policy fully meets the Board's Goal in creating a social media policy. It also meets this Goal without being divisive or becoming a source of conflict. Indeed, the response to this revised policy from university employees across Kansas has been favorable and supportive.

The Workgroup recommends that the revised policy be accepted by the Kansas Board of Regents as its Social Media Policy.

Appendix. Summary of University Social Media Policies

This memo summarizes social media policies at various universities. Only statements that apply university-wide were included. Thus, various university extension services and athletic departments have guidelines for their employees (or athletes); these are not included here. Public universities (Table 1 below) are the major public institutions in their states (e.g., Colorado-Boulder, Colorado State) or their policies influenced the development of other university policies (e.g., Ball State University). Private universities (Table 2) are the major private institutions.

The tables highlight several key features of social media policies. The following is a brief summary of these features, along with examples of text, to clarify the meaning of the dimensions highlighted in the tables.

1. Officially promulgated policy versus informal guidelines. Statements take the form of either *official “policy”* or *informal “guidelines.”* The former are adopted through the University’s formal rulemaking process. The latter are presented as informal guidance. The vast majority of statements take the form of informal guidelines. The formal policies typically apply exclusively to official university social media accounts or expressions on behalf of the university.

Example of formal policy text: “This policy will apply to social media accounts created by University employees for the official business purposes of the University, including Colorado State University faculty, groups, departments, programs, entities, etc.” –Colorado State University, Policy ID #4-11182009-1, *Social Media Policy*

Example of informal guidelines text: “In an effort to educate our employees about the benefits and risks of social media similar to the education provided to our students on this subject to minimize personal and future career risk, suggested guidelines for use of social media are provided below.” –University of Iowa, *Social Media Use on the Internet: A Guide for University of Iowa Employees*

2. Advisory versus disciplinary. Statements on social media typically offer advice or guidance; virtually none announces disciplinary sanctions or disciplinary processes other than those associated with other clearly established policies. This is true of both informal guidelines and officially promulgated policies.

Example of advice in informal guidelines: “Be conversational - and accurate. It’s social media. Write the posts in a conversational tone – one person to another. But, while the tone of the posts should be casual, the content should be checked (and double-checked) for spelling, accuracy, correct links, appropriateness and timeliness/relevancy. Always consider the potential outcomes of posts – what could it mean to the reputation of UNL, your boss, and you.” –University of Nebraska, *Social Media Guidelines*

Example of advice in a formal policy: “Be respectful: Understand that content contributed to a social media site could encourage comments or discussion of opposing ideas. Responses should be considered carefully in light of how they would reflect on the poster and/or the university and its institutional voice.” –Ball State University, *Social Media Policy*

- 3. Reminders of existing legal standards.** Virtually no policy or guidelines declares new limits on expression beyond those in existing laws. Many offer reminders of existing laws that implicate expression.

Example: “Maintain Confidentiality. Do not post confidential or proprietary information about the University of Michigan, its students, its alumni or your fellow employees. Use good ethical judgment and follow university policies and federal requirements, such as the Health Insurance Portability and Accountability Act (HIPAA) of 1996 and the Family Educational Rights and Privacy Act (FERPA). Review www.med.umich.edu/news/newsroom/privacy.htm for HIPAA requirements and www.ogc.umich.edu/faq_student.html for FERPA. Review <http://spg.umich.edu/pdf/601.07-0.pdf> for more on your responsibility as a U-M employee.” –University of Michigan, *Guidelines for the Use of Social Media*

- 4. Application to expression by employees speaking for the university or speaking as citizens.** Some policies and guidelines offer advice for both *official expression on behalf of the university* and *expression by individual employees speaking as citizens*. Other policies and guidelines apply exclusively to official expression on behalf of the university.

Example: “Does IU’s Social Media Guidelines apply to my personal accounts on Facebook, Twitter, etc.?” No. The policy only applies to accounts that represent the University in an official capacity.” –Indiana University, *Social Media Guidelines*

- 5. Implications for freedom of expression and academic freedom.** Some policies and guidelines affirm a commitment to free exchange of ideas.

Example: “Personal accounts with Social Media Outlets for private use are not governed by this policy. The University reaffirms its commitment to freedom of speech as guaranteed by the First Amendment to the United States Constitution. Accordingly, nothing in this policy is intended to limit any speech or conduct protected by the First Amendment.” –Purdue University, *Policy VII.C.2, University-Sponsored Social Media Outlets*

Table 1. Public Universities

University	Officially promulgated policy	Informal guidelines	Advisory	Disciplinary	Addresses official expression on behalf of the University	Addresses private expression by faculty and staff	Declares new legal limits on expression	Reminds of existing legal standards (e.g., FERPA, copyright, EEO , etc.)
Alabama		✓	✓		✓	✓		✓
Alaska		✓	✓		✓	✓		✓
Arizona		✓	✓		✓	✓		✓
Arizona State		✓	✓		✓			
Arkansas		✓	✓		✓			✓
Ball State	✓		✓		✓	✓		✓
California system	✓							✓
Colorado-Boulder		✓	✓		✓	✓		✓
Colorado State	✓		✓		✓	✓ (tangentially)*		✓
Conn.	<i>Guidelines under development</i>							
Delaware	✓		✓		✓	✓		✓
Florida	✓		✓		✓	✓		✓
Florida State		✓	✓		✓	✓		✓
Georgia		✓	✓		✓	✓ (tangentially)*		
Hawaii-Manoa	<i>No policy found</i>							
Idaho	✓				✓			✓

*These tangential references urge employees to make clear that they are not speaking in their official capacity when they engage in private expression.

University	Officially promulgated policy	Informal guidelines	Advisory	Disciplinary	Addresses official expression on behalf of the University	Addresses private expression by faculty and staff	Declares new legal limits on expression	Reminds of existing legal standards (e.g., FERPA, copyright, EEO , etc.)
Illinois-Urbana								
Indiana		✓	✓		✓			✓
Iowa		✓	✓		✓	✓		
Iowa State	No policy found							
Kentucky	✓			✓*	✓			✓
Louisiana State	No policy found							
Maine		✓	✓		✓			✓
Maryland	No policy found							
Massachusetts-Amherst	No policy found							
Michigan		✓	✓		✓	✓		✓
Michigan State		✓	✓		✓			✓
Minnesota		✓	✓		✓			✓
Mississippi	No policy							
Missouri		✓	✓		✓	✓		✓
Montana		✓			✓			✓
Nebraska		✓	✓		✓			
Nevada-Reno		✓	✓		✓			
New Hamp.		✓	✓		✓			
New Mexico		✓	✓		✓	✓		✓
North Carolina-Chapel Hill	No policy found							

* Discipline limited to violations of existing laws or university policies.

University	Officially promulgated policy	Informal guidelines	Advisory	Disciplinary	Addresses official expression on behalf of the University	Addresses private expression by faculty and staff	Declares new legal limits on expression	Reminds of existing legal standards (e.g., FERPA, copyright, EEO , etc.)
North Dakota		✓	✓		✓	✓		✓
Ohio State		✓	✓		✓			
Oklahoma		✓		✓	✓	✓		✓
Oklahoma State		✓	✓			✓		✓
Oregon	<i>No policy found</i>							
Penn State		✓	✓		✓	✓ (tangentially) [†]		✓
Purdue	✓		✓		✓			✓
Rhode Island	<i>No policy found</i>							
Rutgers		✓	✓		✓			✓
South Carolina		✓	✓		✓	✓		✓
South Dakota	✓		✓		✓			✓
SUNY	✓		✓		✓			✓
Tennessee		✓	✓		✓	✓		✓
Texas		✓	✓		✓			✓
Texas A&M		✓	✓		✓			
Utah		✓	✓	✓ [‡]	✓			
Vermont	✓				✓			✓

[†] These tangential references urge employees to make clear that they are not speaking in their official capacity when they engage in private expression.

[‡] Disciplinary comments limited to official university “page administrators.”

University	Officially promulgated policy	Informal guidelines	Advisory	Disciplinary	Addresses official expression on behalf of the University	Addresses private expression by faculty and staff	Declares new legal limits on expression	Reminds of existing legal standards (e.g., FERPA, copyright, EEO , etc.)
Virginia	<i>No policy found</i>							
Washington-Seattle		✓	✓		✓			✓
West Virginia	✓		✓		✓	✓		✓
Wisconsin		✓	✓		✓	✓		✓
Wyoming	<i>No policy found</i>							

Table 2. Private Universities

University	Officially promulgated "policy"	Informal guidelines	Advisory	Disciplinary	Addresses official expression on behalf of the University	Addresses private expression	Declares new legal limits on expression	Reminds of existing legal standards (e.g., FERPA, copyright, EEO, etc.)
Brown		✓	✓		✓	✓		✓
Chicago	✓		✓	✓	✓	✓ tangentially		✓
Columbia	No policy							
Cornell		✓	✓		✓	✓		✓
Duke		✓	✓		✓			
Emory		✓	✓		✓			
Georgetown	No policy							
Harvard		✓	✓		✓	✓		✓
New York University		✓	✓		✓	✓		✓
Northwestern	No policy							
Notre Dame		✓	✓		✓			✓
Pennsylvania		✓	✓		✓			✓
Princeton	✓		✓		✓			✓
Southern California		✓	✓		✓			
Stanford		✓	✓		✓	✓		✓
Tufts	✓		✓		✓			✓
Vanderbilt		✓	✓		✓	✓		✓
Washington University-St. Louis		✓	✓		✓			✓
Yale	No policy							