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*Special Edition:  
Legal Issues Facing  
Universities*



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## PROFILE OF THE GUEST EDITOR-IN-CHIEF

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Katherine E. Weathers received her undergraduate degree at University of Missouri-Columbia and Law degree from Saint Louis University School of Law. She spent 22 years in the United States Coast Guard, enlisting in July 1985 and retiring in July 2010 as a Commander. Her duty stations include Coast Guard Base Kodiak, AK; Coast Guard Cutter Gallatin (WHEC-721), Governor's Island, NY; Coast Guard Ninth District, Cleveland, OH; Marine Safety Office, Norfolk, VA; Naval Base Norfolk, VA; Coast Guard Maintenance & Logistics Command, Norfolk, VA; Coast Guard Atlantic Area Command, Portsmouth, VA; Coast Guard Eighth District, New Orleans, LA; Coast Guard Sector Upper Mississippi River, St. Louis, MO; Coast Guard Headquarters, Washington, D.C. In 1998, the Coast Guard selected Ms. Weathers to attend law school. Upon graduation in 2001, she attended Naval Justice School (NJS) in Newport, RI. Her assignments as a JAG Officer included work as a defense attorney at the Norfolk Naval Base; Chief, Claims & Litigation, Atlantic Area, Norfolk, VA; Operational Law Attorney, Portsmouth, VA; Director, Office of Legal Policy & Program Development, Washington, D.C.; and Special Courts-Martial Military Judge. She received a number of awards including the Coast Guard Good Conduct Medal, Coast Guard Achievement Medals, Coast Guard Commendation Medals, and the Meritorious Service Medal. Upon her retirement, in July 2010 she began her career in higher education in the role of Director of Student Conduct at Saint Louis University. The office underwent a name change in 2014 to the Office of Student Responsibility & Community Standards. Ms. Weathers' new role allows her the ability to work in an educational environment assisting students in understanding the impact of their decisions on themselves and on others. She works closely with the Title IX Coordinator in adjudicating cases implicating the University's Sexual Misconduct Policy. She has contributed significantly over the past four years to the revision of Saint Louis University's Sexual Misconduct Policy as a member of the Sexual Assault Policy Advisory Board. On a daily basis she works with and educates others on laws specific to higher education specifically FERPA, the Clery Act, and Title IX. In addition to the Sexual Assault Policy Advisory Board, she serves on the Behavioral Concerns Committee, the Bias-Incident Response Team, and the Student Veterans Success Task Force.

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## GUEST EDITOR-IN-CHIEF'S INTRODUCTION TO THE ISSUE

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Saint Louis University's Pre-Law Journal represents the finest of Saint Louis University's academic pursuits, collaborative efforts, and Jesuit mission focused works by our undergraduates. In this fourth edition, the Saint Louis University Pre-Law Journal provides articles on a multitude of issues that find a common theme of students' rights and responsibilities juxtaposed with universities' rights and responsibilities. This edition's authors discuss topics that are important to students because they impact the educational climate in which the students learn. Covering an array of topics, I believe readers will find the articles thought provoking and insightful.

Christina Lam and Cody Gordon both discuss the First Amendment on college campuses today. Lam begins the journal with the complex issue regarding a University's right to ban anonymous speech. She discusses specifically Yik Yak, the ubiquitous social media site that is dependent upon the campus community to self-police the postings. Lam looks at whether a university has a legal right to ban sites such as Yik Yak from the campus community in order to protect the community from harmful postings. Cody Gordon's article takes the reader on a freedom of speech historical ride providing context to how we arrived to where we are today. His article following Lam's demonstrates that the reliance and focus on communication via social media sites may contribute to the perception that students are apathetic when it comes to protecting the more traditional forms of speech on a college campus. Gordon's article implores students to not take their freedom of speech for granted and to challenge universities who have become too comfortable with placing restrictions on students' speech.

Edwin Oluoch tackles the timely and difficult issue of discrimination on college campuses. Oluoch provides the legal argument as to why student organizations must comply with their university's non-discrimination policies. He argues, however, that the use of hidden discrimination practices by student organizations, specifically the Greek Community, frequently occurs. Oluoch discusses a perceived tendency by some fraternities and sororities to practice subtle discriminatory behaviors in order to exclude certain students. The behavior, he argues, abuses and circumvents universities' nondiscrimination policies and the responsibility lies then with the universities to ensure all students have access to all student organizations.

Ian McMath provides an in-depth look at university admissions practices and the case law that supports the use of a "plus" policy, but proscribes a quota system. McMath explains that universities may use race as a factor in admissions to further a compelling interest: obtaining the educational benefits of a diverse student body, however, those programs must be narrowly tailored to obtain the educational benefits of diversity. McMath explains that the courts will use a strict scrutiny analysis in determining whether a university's admissions program is constitutional.

Emma Geiger's article examines the Campus Accountability and Safety Act (CASA); legislation introduced earlier this year in Congress by Senator Claire McCaskill that would amend current federal law in an effort to address sexual violence on college campuses. Geiger discusses the Act's stick, the civil penalty provision, as a hopeful measure to persuade universities to prevent, respond, and reduce sexual assaults. She argues that although there is a dearth of case law available to review in this area, a combination of case law and publications supports a determination that universities are willing to settle cases out of court as a cost of doing business. Geiger explains that language in CASA may provide the teeth needed to nudge universities to develop institutionalized sexual assault prevention and response plans including the hiring of necessary staff. She argues that CASA's civil penalty language will get the attention of most universities as long as the term, "operational expenses" is defined in a broad sense creating a significant monetary penalty for failing to comply with federal law. Geiger concludes with a passionate argument that while universities must continue to address the needs of sexual assault victims, prevention is ultimately where universities should be focusing their efforts in order to reduce victimization in the first place.

Megan McGinn continues the discussion around allegations of sexual assaults on college campuses. Megan discusses how current federal guidelines, specifically the April 2011, Dear Colleague Letter, issued by the Department of Education's Office of Civil Rights, negatively impacts students accused of sexual assault. She argues that universities are under increased pressure to quickly resolve sexual assault cases and that an accused's right to due process is often denied in order to meet these federal guidelines. McGinn discusses how private institutions are not under the same requirement as public institutions to provide due process rights. She provides case law to make her argument and suggests that university policies differing from those found in a court of law demonstrate how accused students are treated unfairly, such as, the denial of a right to an attorney, the denial of the right to cross-examine the accuser, use of a preponderance of evidence standard, and the lack of the right to an appeal. McGinn argues that due process rights must be provided to an accused because of the significant impact these cases have on a student found responsible; i.e., most will be suspended or expelled from their university. McGinn writes that the Foundation for Individual Rights in Education (FIRE) and Stop Abusive and Violent Environments (SAVE) are two organizations who continue to speak out for due process rights for accused students.

Kevin Kosman concludes the issue with his article on the complexity of the use of the word "amateur" to describe college athletes, specifically those students who play football and men's basketball in the "five power conferences." Kosman explains that amateurism in these high-profit college sports is becoming more and more difficult for the NCAA to defend, while the consequences of ending amateurism may result in significant negative consequences, not the least being noncompliance with Title IX. Kosman discusses the case law impacting collegiate athletics, focusing on the recent *O'Bannon v. NCAA* case, in which a District Judge found that certain actions by the NCAA violated the Sherman Anti-Trust Act. However, Kosman goes on to

argue, that recent changes made by the “Power Five”, such as allowing aid to student athletes to exceed the cost of attendance, may make court determinations moot as certain universities appear to be already moving away from “amateur” sports. Kosman warns, however, that those universities choosing to change athletics without considering the impact of Title IX, may be doing so at their own peril.

In summary, the works selected for this Pre-Law Journal demonstrate the high level of scholarly work our undergraduate students at Saint Louis University are achieving. The journal provides readers the opportunity to learn about interesting, impactful, and complex legal issues addressing universities across the country. The articles provide readers a chance to see students choosing to engage in research and writing because they desire to learn more about themselves and their world while also educating others through publication. I would like to thank Janet O’Hallaron and Joyce LaFontain for their hard work in continuing to bring this journal to fruition and for providing the undergraduate students this wonderful educational opportunity.

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## Yik Yak Under Attack:

### Can Universities and Colleges Legally Ban an Anonymous Speech Platform?

Christina Lam

#### YIK YAK AND ITS LEGAL PROBLEMS

Yik Yak has become wildly popular, especially on college campuses, since it launched in November 2013.<sup>1</sup> The free app serves as a forum to anonymously view or post messages, or Yaks, within a ten-mile radius.<sup>2</sup> Yaks range widely in terms of content, from helpful study tips such as “Stretch. Take a walk. Go to the airport. Get on a plane. Never return” to important questions like “What time does Qdoba open?” Many Yaks are witticisms on typically collegiate things: a bad final, a bad roommate, a bad hangover. The problem lies in other kinds of Yaks: cyber-bullying, racial slurs, and threats of violence. Yik Yak’s “Terms and Conditions” attempt to address these problems. For example, users must be at least 17 years old and must agree not to “defame, abuse, harass, stalk, threaten, or otherwise violate the legal rights of others, use racially or ethnically offensive language, or discuss or incite illegal activity.”<sup>3</sup> Yik Yak reserves the right to terminate accounts and remove posts.<sup>4</sup> Yik Yak can, and has, traced Yaks, providing law enforcement with users’ IP addresses and geo-location data.<sup>5</sup> For example, in November 2014, a University of North Carolina freshman was arrested and charged for posting a bomb threat.<sup>6</sup> The

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<sup>1</sup> Carmel DeAmicis, *Yik Yak’s growth flatlined after funding, but why?*, GIGAOM (13 Feb. 2015), <https://gigaom.com/2015/02/13/yik-yaks-growth-flatlined-after-funding-but-why/>.

<sup>2</sup> *Legal*, YIK YAK, <http://www.yikyakapp.com/legal/> (last visited Apr. 24, 2015).

<sup>3</sup> *Terms*, YIK YAK, <http://www.yikyakapp.com/legal/> (last visited Apr. 24, 2015).

<sup>4</sup> *Legal*, supra note 2.

<sup>5</sup> Miller Kern, *Yik Yak Users Can Still Be Traced, Despite the Anonymous Account*, BALL STATE DAILY (Oct. 7, 2014), <http://www.ballstatedaily.com/article/2014/10/yik-yak-users-can-still-be-traced>.

<sup>6</sup> Sarah Brown, *Student Arrested After False Bomb Threat on Yik Yak*, DAILYTARHEEL.COM (Nov. 21, 2014) <http://www.dailytarheel.com/article/2014/11/student-arrested-after-false-bomb-threat-on-yik-yak>.

nature of Yik Yak, however, makes it very difficult for consistent and swift enforcement of the rules and, ultimately, it is up to users to police the app. If five users down-vote a Yak, it immediately disappears. Also, users can easily “flag” yaks as inappropriate or take snapshots of offensive Yaks and email it to the app’s managers.

Colleges and universities have grappled with devising meaningful legal solutions to the problems associated with Yik Yak on campus. Many universities have discussed banning the app or taking other approaches in the interest of maintaining a safe and respectful environment, but have been largely unsuccessful. For example, Norwich University, Utica College in New York, and Saint Louis University banned it from their schools’ wireless networks. However, this merely makes it inconvenient, not impossible, for people to use Yik Yak on campus; students are still able to access it through their phone’s independent data plan.<sup>7</sup> If a university or college is willing and able to fully ban Yik Yak on campus, then there are grounds for legal action against them.

If it bans Yik Yak, a university’s or college’s status as “public” or “private” will be highly relevant to their legal problems. Public educational institutions are agencies of state and local governments and, as a result, are required to adhere to the Constitution’s restraints on governmental power.<sup>8</sup> Private educational institutions, however, exercise their right to “free assembly” and so are not subject to these restraints.<sup>9</sup> There is a simple explanation for this distinction: the Framers of our Constitution intended to limit the reach of the government in order to protect individual rights.<sup>10</sup> Therefore, the Constitution of the United States only restricts

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<sup>7</sup> Nathaniel Cary, *Clemson Considers Banning Anonymous App Yik Yak*, GREENVILLE ONLINE (Jan. 8, 2015).

<sup>8</sup> *See* *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961)

<sup>9</sup> Greg Lukianoff, *Liberty University, Free Speech, and the Private University*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (June 3, 2009), <https://www.thefire.org/liberty-university-free-speech-and-the-private-university/>.

<sup>10</sup> Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 563 (2008).

state action, not that of private entities.<sup>11</sup> Specifically, Title 42 of the U.S. Code, section 1983 imposes liability on every person who “under the color of state law” causes the deprivation of a federally protected right.<sup>12</sup>

Articulating an acceptable definition of state action is challenging. The Supreme Court has stressed that ultimate determinations of whether a set of circumstances constitutes state action requires a case-by-case inquiry. “Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance.”<sup>13</sup> While one inclusive standard does not exist, it is possible to formulate guidelines that are relevant to identifying state action. Actions of any state agent or agency will constitute state action.<sup>14</sup> It is not required that state action precede the acts of the private individuals or private institutions.<sup>15</sup> Furthermore, state action does not have to be the direct cause of those private actions that violate individual rights.<sup>16</sup> State action must, however, directly relate to the specific constitutional violations.<sup>17</sup>

#### YIK YAK AT PUBLIC COLLEGES AND UNIVERSITIES

The First Amendment bars state actors from “abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble...”<sup>18</sup> As state agents, all public colleges and universities are legally obligated to respect their students’ constitutional rights, including their First Amendment rights to speak and assemble freely. These rights, however, are not

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 564.

<sup>13</sup> *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

<sup>14</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Ex parte Virginia*, 100 U.S. 339 (1880).

<sup>15</sup> *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1971); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970).

<sup>16</sup> *Legislative State Action and Indiana Private Universities*, 9 VAL. U. L. REV. 611, 615 (1975).

<sup>17</sup> *Id.*

<sup>18</sup> U.S. CONST. amend. I.

without exception.<sup>19</sup> First, the government may generally restrict the time, place, or manner of speech if the restrictions are unrelated to what the speech says and leave people with enough alternative ways of expressing their views. "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."<sup>20</sup> Time, place, and manner restrictions must be content neutral, narrowly tailored, serve a significant governmental interest, and leave open ample alternative channels for communication.<sup>21</sup> Second, "there are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem."<sup>22</sup> "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words --- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace."<sup>23</sup>

While a majority of Yaks on public college and university campuses are protected speech, some are not. Still, as long as at least some Yaks are protected speech, the overbreadth doctrine bars public colleges and universities from banning Yik Yak. A prohibition on speech is overly broad, and thereby beyond what the U.S. Constitution permits, if in proscribing unprotected speech, it also proscribes protected speech.<sup>24</sup>

#### YIK YAK AT PRIVATE COLLEGES AND UNIVERSITIES

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<sup>19</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>20</sup> *Grayned v. The City of Rockford*, 408 U.S. 104, 116 (1972).

<sup>21</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

<sup>22</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

<sup>23</sup> *Id.* at 572.

<sup>24</sup> *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 483 (1989); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

The courts do not recognize private colleges and universities as state actors, and thus they are not legally obligated to honor students' constitutional rights.<sup>25</sup> Many litigants have attempted to subject private institutions to the Constitution on the grounds that state action is involved in funding, tax exemptions and grant programs.<sup>26</sup> These attempts, however, have been almost universally unsuccessful. As a result, private universities are not as severely barred from banning Yik Yak. Still, contract considerations and state constitutions would impede private universities' attempts to ban Yik Yak.

The contractual relationship between universities and their students is a prevalent judicial tool for settling legal disputes between them.<sup>27</sup> According to contract law, explicit contractual provisions may be accompanied by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances" and "the meaning of [the promisor's] words and acts is found by relating them to the usage of the past."<sup>28</sup> As one court explained, "it is held generally in the United States that 'the basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.'"<sup>29</sup> In interpreting that contract and the ambiguities and contradictions within it, another court described the most commonly used method: "The proper standard for interpreting the contractual terms is that of 'reasonable expectation—what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.'"<sup>30</sup> Also, traditional contract law

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<sup>25</sup> Greg Lukianoff, *Liberty University, Free Speech, and the Private University*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (June 3, 2009), <https://www.thefire.org/liberty-university-free-speech-and-the-private-university/>.

<sup>26</sup> See *Blackman v. Fisk University*, 443 F.2d 121 (6th Cir. 1971); *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970); *Brown v. Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Rowe v. Chandler*, 332 F. Supp. 336 (D. Kan. 1971).

<sup>27</sup> See Jonathan Flagg Butcher, *Contract Law and the Student-University Relationship*, 48 IND. L. J. 253 (1973).

<sup>28</sup> WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 35 (5th ed. 2013).

<sup>29</sup> *Corso v. Creighton University*, 731 F.2d 529, 531 (8th Cir. 1984).

<sup>30</sup> *Mangla v. Brown University*, 135 F.3d 80, 83 (1st Cir. 1998).

provides that any ambiguities in a standardized contract should be interpreted against the drafter.<sup>31</sup>

Many private universities and colleges present themselves as environments rich with the freedom that academic inquiry requires. Yale, Harvard, Stanford, and many others make extensive promises of free speech in their promotional literature, handbooks, contracts with professors, and in their presentations to prospective students, donors, and alumni. Consequently, it would be a violation of contract for these schools to persuade students to attend and receive donations based on promises of freedom and then deliver repression, censorship, and viewpoint discrimination in any form, including banning Yik Yak. The Constitution protects the right of freedom of association, but it does not protect the right to defraud, lie, fraudulently induce, and otherwise misrepresent an institution.<sup>32</sup>

In addition to contract law, state constitutions would thwart private colleges' and universities' attempts to ban Yik Yak. In *PruneYard Shopping Center v. Robbins*, a group of high school students who were distributing political material and soliciting petition signatures was excluded from a private shopping center.<sup>33</sup> The students sought an injunction in state court to prevent further exclusions.<sup>34</sup> The California Supreme Court sided with the students, holding that they had a state constitutional right of access to the shopping center to engage in expressive activity.<sup>35</sup> The shopping center argued that the California Court's ruling was inconsistent with the decision in *Lloyd v. Tanner*, which held that the First Amendment of the Constitution of the United States does not guarantee individuals a right to free expression on the premises of a

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<sup>31</sup> Butcher, *supra* note 27, at 265.

<sup>32</sup> Greg Lukianoff, *Liberty University, Free Speech, and the Private University*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (June 3, 2009), <https://www.thefire.org/liberty-university-free-speech-and-the-private-university/>.

<sup>33</sup> *PruneYard Shopping Center v. Robbins*, 446 U.S. 74, 77 (1980).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 78.

private shopping center.<sup>36</sup> The Court rejected the argument, emphasizing that the state had a “sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the federal Constitution.”<sup>37</sup> The shopping center also argued that the California Court’s decision, in denying it the right to exclude others from its premises, violated its property rights under the Fifth and Fourteenth Amendments of the Constitution.<sup>38</sup> The Court also rejected this argument, arguing that it is well established that “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense.”<sup>39</sup> The Court held that permitting appellees to exercise state protected rights of free expression and petition on shopping center property clearly does not amount to an infringement of appellants’ property rights because there is no evidence that suggests that preventing the property owners from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center.<sup>40</sup> PruneYard was identified as a large commercial complex and open to the public at large.<sup>41</sup> The decision of the California Supreme Court makes it clear that PruneYard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions. Appellees, however, were orderly, and they limited their activity to the common areas of the shopping center.

*PruneYard* was applied to educational settings in *State v. Schmid*.<sup>42</sup> The defendant, who was not a student, had been charged with criminal trespass for distributing political material on the Princeton University campus in violation of Princeton regulations.<sup>43</sup> The New Jersey court declined to rely on the federal First Amendment, instead deciding the case on state constitutional

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<sup>36</sup> *Id.* at 80–81.

<sup>37</sup> *Id.* at 81.

<sup>38</sup> 446 U.S. at 82–83.

<sup>39</sup> *Id.* (citing *Armstrong v. United States*, 364 U.S. 40, 48 (1960)).

<sup>40</sup> *Id.* at 83.

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

<sup>42</sup> *State v. Schmid*, 423 A.2d 615 (N.J. 1980).

<sup>43</sup> *Id.* at 617–618.

grounds.<sup>44</sup> It held that, even without a finding of state action, Princeton had a state constitutional obligation to protect Schmid's expressional rights.<sup>45</sup> *Schmid* therefore recognizes that state constitutions, many of which contain free speech protections, serve as legal barrier for private colleges and universities attempting to ban Yik Yak.

## CONCLUSION

Much of the speech posted on Yik Yak is constitutionally protected, but a small amount of it is not, such as defamation, true threats, and speech that incites imminent illegal action. Anyone defamed by speech expressed through Yik Yak or harmed in some way by speech that falls into one of these categories has the right to sue the perpetrators in court. However, given that free speech is historically an important American value, college administrators would likely face substantial legal challenges should they attempt to ban Yik Yak in its entirety.

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<sup>44</sup> *Id.* at 633.

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

## **The First Amendment and Its Purpose on College Campuses**

Cody Gordon

The First Amendment right of students on college campuses is a challenging topic of discussion for school administrations across the country. Every institution within the United States contains its own subset of laws that inhibit certain activities students are allowed to enjoy. At the same time, these college handbooks are to abide by the First Amendment of the Constitution and preserve for future generations the civil liberties of college students. With constitutional law permeating public and private institutions, finding an ideal balance between the two has always been a challenge for administrations. It has caused university administrators confusion when approaching First Amendment issues on campus. While some issues may be viewed as more black and white, others fall into grey areas and are judged and acted upon in the larger context of time, campus demographics, culture, regional and national politics, and other factors that drive campus decision making.<sup>46</sup> Ultimately, the decisions college administrations face regarding free speech should champion the individual and unique mind of each student, voice the opinion of the minority as well as the majority, and be a platform for unabridged discussion. This mission should stay constant across the board, whether in a public or private institution. Because in some cases we find in the ad hoc implementation of school policies from college handbooks that overstep boundaries, it creates fear of punishment and barriers should a student express an adamant belief. These barriers still exist due to influences from the 1950's and 60's (namely, the Cold War) along with a system that limits students' access to participation in robust and free expression of ideas and beliefs. A barrier placed in the way of a college student's

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<sup>46</sup> THE FIRST AMENDMENT ON CAMPUS 6 (Lee E. Bird et al. eds. 2006).

freedom of expression is understood to be one of the highest violations of the First Amendment, clearly stated by the US Supreme Court in 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 future of our nation.<sup>47</sup>

Expressing oneself and having the skills to debate, critically analyze, and take up a position are necessary and invaluable tools for students when they step out into the “real world”. Because of the rapid development of social media, as well as the increasing scope of criticism that schools face, has the margin of free speech been reduced for students? Drafted to protect the voice and beliefs of the public figure, the First Amendment is one of the most widely-referenced provisions of the Constitution. Colleges may legally regulate certain speech due to stipulations outlined in college handbooks, but they are legally obliged to adhere to the First Amendment of the Constitution. However, while it would be an exaggeration to say that college administrators censor certain aspects of students’ free speech outright, the potential damage that students believe they could suffer from participating in open dialogue is real. It was estimated in a 2012 report that 65% of 392 colleges surveyed have policies that severely restrict speech protected by the First Amendment.<sup>48</sup> While this was not the case for the generation that took to the streets to protest, legislation written on a national level during the 1950’s and 1960’s trickled down into college administrations’ policies, which were adhered to simply due to the fear of Communism.

The genesis of many constitutionally controversial acts was in part due to the ostensible “Red Scare”. Communism was making waves and the United States was willing to do whatever it took to contain its spread. With its influence growing, legislators adopted stricter interpretations of the constitution and a heavier hand on cases dealing with suspected Communist

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<sup>47</sup> GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE 37 (2012).

<sup>48</sup> *Id.*

activities. In *Schenck v. United States*, the Supreme Court would hear one of the first freedom of expression cases.<sup>49</sup> Charles Schenck distributed socialist pamphlets, violating the Espionage Act.<sup>50</sup> Schenck appealed to the Supreme Court, whereupon they ruled that a clear and present danger test was needed to decide if he violated the Espionage act.<sup>51</sup> A clear and present danger test questioned whether the words used would be used in such circumstances and were of such a nature as to create a danger that would bring about substantive evils that Congress has the right to prevent.<sup>52</sup> The Supreme Court affirmed the decision on reasoning that the circumstance in which the language was presented caused enough fear to possibly cause lawlessness.<sup>53</sup> Because the clear and present danger test left too much room for personal bias and ideological ideals, it was abandoned and the court steered away from such a strict interpretation.<sup>54</sup> Instead, they adopted a preferred freedoms doctrine, which applied special scrutiny to laws that aimed at restricting freedom of expression. With the preferred freedoms doctrine, the court implemented the Clear and Probable Danger Test, which was derived from the clear and present danger test used in *Schenck v. United States* to weigh future decisions regarding freedom of expression. However, it was still not enough, and in 1954, Congress would pass a controversial law that challenged the boundaries of the First Amendment.

In 1954, Congress passed the Internal Security Act, which became a tool for the American government to condemn and harass Communism and the Communist Party.<sup>55</sup> The act was used in many ways to keep tabs and investigate numerous organizations including the

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<sup>49</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>50</sup> *Id.* at 49.

<sup>51</sup> *Id.* at 52.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> LEE EPSTEIN & THOMAS G. WALK, *CONSTITUTIONAL LAW: RIGHTS, LIBERTIES AND Justice* (2013).

<sup>55</sup> See *Congress Passes Communist Control Act*, HISTORY.COM, <http://www.history.com/this-day-in-history/congress-passes-communist-control-act> (last visited Apr. 24, 2015).

ACLU, labor unions, and the NAACP.<sup>56</sup> While the Internal Scrutiny Act itself was precedent for not condoning intolerant political movements, it created a body of precedent that would affect First Amendment issues within college administrations. It dealt with controversial freedoms of expression issues such as “free speech zones,” time, place and manner restrictions, and permissible and impermissible speech on college campuses.

The case of *Healy v. James* engendered unambiguous guidelines between permissible and impermissible speech that can be conducted on college campuses.<sup>57</sup> The Petitioner was a member of the Students for a Democratic Society (SDS), a club denied recognition by the school.<sup>58</sup> The school denied the group access to bulletin boards and any use of campus resources or property.<sup>59</sup> The president claimed that the refusal of recognition was based on the fact the SDS has a philosophy of disruption and violence that is in conflict with the college’s declaration of student rights.<sup>9</sup> The burden of proof was upon the college to provide the direct link between the imminent advocacy of violence or lawlessness that would otherwise disrupt and substantially affect the opportunity of other students to obtain an education and or openly repudiate the academic reputation of the College.<sup>60</sup> In conclusion, because the SDS chapter at the university was not directly affiliated with the national organization, one could not establish a reasonable cause to think they would abide by philosophies or would intend to commit any type of danger or harm to interrupt the education of others or disturb the peace.<sup>61</sup> Furthermore, the court decided that public and private schools are not enclaves immune from the sweeping power of the Constitution which brought the same scope of review to private and public schools.<sup>62</sup> However,

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

<sup>57</sup> *Healy v. James*, 408 U.S. 169 (1972).

<sup>58</sup> *Id.* at 170.

<sup>59</sup> *Id.* at 176.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 172–73.

<sup>62</sup> 408 U.S. at 180.

due to the dichotomy between public and private schools, private schools have enjoyed more liberties than public administrations.

Generally, students attending public institutions enjoy constitutional rights as well as any other rights highlighted in the college handbook. Because public universities are “acting under color of government,”<sup>63</sup> they behave similarly to any other arm of the government. Private universities operate behind a different veil, operating under a different contract that explicitly creates a relationship between the student and the university. Therefore private institutions, to a degree, enjoy sovereignty separate from constitutional law and are therefore free to choose how to restrict certain freedoms. However, this begs the question, is it really possible to sign away your First Amendment rights?

Speech codes, which are found in most college handbooks today, outline the regulations and guidelines to just about everything you can and cannot do when it comes to expressing your beliefs. Via time, place, manner, and content restrictions, administrations have a firm grip on the process of expressing an individual’s ideas, creating a difficult situation for the judicial system to discern if someone’s First Amendment rights have been violated. For example, in *Papish v University of Missouri*, a student was expelled for handing out newspapers on the university campus depicting the Statue of Liberty and the goddess of justice being raped by policemen with a caption stating, . . .With Liberty and Justice for All.”<sup>64</sup> Papish was in violation of the board of curators’ bylaw part B of article V, requiring students, “to observe generally accepted standards of conduct.”<sup>65</sup> As a result, the petitioner was stripped of her given credits for one course in which she had a passing grade.<sup>66</sup> The petitioner appealed the decision and it was affirmed by the

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<sup>63</sup> THE FIRST AMENDMENT ON CAMPUS (Lee E. Bird et al. eds. 2006).

<sup>64</sup> *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667, 667–68 (1973).

<sup>65</sup> *Id.* at 668.

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

Supreme Court that it was an impermissible violation of her First Amendment free speech rights since the mere dissemination of ideas on a state university cannot be proscribed in the name of “conventions of decency.”<sup>67</sup> While the original intent of the depiction was to bring awareness to the justiciability of the law, it could not be deemed obscene under the Roth Jacob Ellis-Memoirs Standard, which found that the dominant theme of the message must contribute some type of redeeming social importance, instead of the individualistic details of the information.<sup>68</sup> Furthermore, the degree to which the newspaper may have incited any type of threat or danger to the community was far below the bar of reasonable doubt.

While schools do have an obligation to establish regulations in order to maintain a functional and harmonious community, they should not do so in a way that does not obstruct the process of expression. Mediating the balance of constitutional law and administration protocol has influenced the college handbook containing speech codes, addressing the appropriate ways for expressing one's opinions, beliefs, and ideals. Academic freedom, for example, came about in the 1940 *Statement on Principles on Academic Freedom and Tenure*. It originally would begin as a provision to protect teachers' right to teach certain intellectual expressions in the interest of advancing the truth, but it eventually transformed into a broader interpretation of applying First Amendment rights to students on college campuses. The balancing test, a constitutional doctrine in which the court weighs the rights of an individual as guaranteed by the Constitution with the rights of a state to protect its citizens from the invasion of their rights, is used in cases involving freedom of speech and equal protection.<sup>69</sup> For example, in *State v. Schmid*, Chris Schmid was arrested on the campus of Princeton University for passing out political literature for the Labor Party in violation of a campus regulation that prohibited outsiders from soliciting on the

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<sup>67</sup> *Id.* at 670.

<sup>68</sup> LEE EPSTEIN & THOMAS G. WALK, *CONSTITUTIONAL LAW: RIGHTS, LIBERTIES AND JUSTICE* (2013).

<sup>69</sup> *THE FIRST AMENDMENT ON CAMPUS* (Lee E. Bird et al. eds. 2006).

Princeton campus.<sup>70</sup> Schmid was convicted of trespassing and appealed his conviction, claiming his arrest violated state and federal laws of free speech.<sup>71</sup> The supreme court of New Jersey overturned his conviction using the balance test, saying that the campus of Princeton, despite being a private university, could not totally eliminate Schmid's constitutional rights of free speech and assembly.<sup>72</sup> These are but two examples of provisions in place to protect student First Amendment rights, but applying these doctrines and many others to the fact of the matter can be difficult.

A more recent example comes from Texas Tech University. In 2003, Trevor Smith wished to protest against the Iraq war.<sup>73</sup> He filed it with the school and in return he was offered a twenty-foot-wide "free speech gazebo."<sup>74</sup> The twenty-foot-wide free speech zone was the one place on the campus where all 28,000 students of Texas Tech could voice their opinions.<sup>75</sup> Even more, notification would have to be sent 6 business days in advance in order to reserve the spot.<sup>76</sup> With a space so small, the question could be asked, if all the students on campus wished to participate in the demonstration, how could you fit 28,000 students in a space no larger than a psychology 101 lecture hall? Trevor posed this question, and after receiving heavy criticism,<sup>77</sup> Texas Tech decided to expand the free speech zone, but it was not enough.<sup>78</sup> Trevor would file a lawsuit, resulting in the 2004 decision of *Roberts v Haragan*, overturning Texas's free speech

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<sup>70</sup> State v. Schmid, 423 A.2d 615, 616–17 (N.J. 1980).

<sup>71</sup> *Id.* at 618.

<sup>72</sup> *Id.* at 632–33.

<sup>73</sup> *Lawsuit Challenges Speech Code and "Free Speech Gazebo" at Texas Tech*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (June 12, 2003), <https://www.thefire.org/lawsuit-challenges-speech-code-and-free-speech-gazebo-at-texas-tech/>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Civil Liberties Groups Seek to Topple Texas Tech's Free-Speech Policy*, FIRST AMENDMENT CENTER (June 13, 2003), <http://www.firstamendmentcenter.org/civil-liberties-groups-seek-to-topple-texas-techs-free-speech-policy>.

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

zone and declaring the entire campus available for free speech activities.<sup>79</sup> Another example occurred in 2010 at Range Community College. The free speech zone policy included a waiver you had to sign binding yourself along with your “heirs, successors, [and] executors” to indemnify the college if you were harmed.<sup>80</sup> It also forbade the handing out of pamphlets or material within the zone unless a passerby actually went up and asked for the information. It is undeniable that without some type of system in place, college administrations would be left vulnerable to exceptions to the First Amendment such as libel, slander, sexual or racial harassment, true threats of violence etc. It is also true that free speech is a fragile idea, easily broken and misconstrued. Even though Americans have the freedom to say and write what they want, this does not indemnify the people from the consequences potentially resulting from words or expressions. However via draconian limitations put into effect by college administrations, students are effectively barred from creating a community of inclusive ideas.

While falsehoods fall under unprotected speech, truthful speech is protected, and the act of admonishing truthful speech shuts down the promulgation of information. Quarantining free speech goes on to create an environment that abates debate and punishes the expression of opinions on college campuses that are otherwise supposed to make students more efficient. It is a domino effect, and the dominoes continue to fall to this day, affecting many minds of this generation. While something must be done, it is hard to say what can be done in order to reach out to others, engage in debate, and share ideas across a wide spectrum of groups that would otherwise remain sequestered from evolving ideas. The administrations of today have become too comfortable with the standard that has been set, and students have become too apathetic to the reality that freedom of speech is a big deal. It is the responsibility of students to ensure to

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

<sup>80</sup> GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE 37 (2012).

administrations that free speech is a topical issue that we as growing minds do not take for granted.

## **Principles of Nondiscrimination With Regard to Student Organizations**

Edwin Oluoch

Involvement in student organizations helps students develop both personally and professionally. Student organizations are varied and may be classified differently. It may be required for student organizations to abide by university regulations, which may include a non-discriminatory policy. However, due to the very nature of the student organization, there may be loopholes to circumvent this requirement, and hence some student organizations may functionally not be in compliance.

Student organizations range from those that emphasize public interest advocacy and professional development to those that serve the particular interests of members.<sup>81</sup> Five broad categories emerge. The first category is the academic or subject based student organization such as the Chemistry Club, Society for Biochemistry Students, Theology club, Society for African American Studies, and such other similar clubs. The second category is the academic club with a national organizational framework, normally Greek academic clubs such as Beta Beta Beta (“Triple Beta”), a Biology honors society, Phi Alpha Delta (“PAD”), a pre-law honors society, and Alpha Epsilon Delta (“AED”), a pre-med honors society. The third category of student organizations contains other honors societies that are not linked to any particular subject. These include Sigma Phi Epsilon, a transfer student honors society, among others. The fourth category is the Greek sorority or fraternity. The fifth category is the student cultural organization. The principle of nondiscrimination applies to all of these categories of student organizations. The question is: if some student organizations flout this principle of nondiscrimination, do universities have a right to deregister them?

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<sup>81</sup> *Student Groups*, MORITZ L. SCH., <http://moritzlaw.osu.edu/campus-life/student-groups/> (last visited Apr. 17, 2015).

Federal laws that prohibit discrimination include the Equal Protection clause of the 14<sup>th</sup> Amendment, Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972.<sup>82</sup> Additionally, various state laws prohibit discrimination based on personal characteristics that include race, color, religion, national origin, and sex by any group or organization that receives state or federal funding.<sup>83</sup>

In many universities, student organizations are required to comply with federal, state and local laws and university policy in their operations. Nondiscrimination policies are an institution's way of maintaining compliance with federal and state laws. Several universities have outlined this need for compliance explicitly. At Ohio State University, student organizations are required to adopt a statement of nondiscrimination.<sup>84</sup> For most student organizations, that statement prohibits discrimination on the bases of age, color, disability, gender identity or expression, national origin, race, religion, sexual orientation, or veteran status.<sup>85</sup> Student organizations formed to foster or affirm the religious beliefs of the members have adopted nondiscrimination statements that are consistent with their beliefs.<sup>86</sup>

At Vanderbilt university in Nashville, Tennessee, the student organization registration process requires the submission of a constitution or bylaws, which must include a statement of purpose, criteria for membership, rules of procedure, and names and contact information for officers and advisers.<sup>87</sup> During this registration process, the organization must affirm that it does not discriminate unlawfully or in violation of university policy, as per the "Equal Opportunity"

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<sup>82</sup> Missy Burgess, *Student Organizations and Nondiscrimination Statements: Balancing Student Involvement and Inclusion*, 78 THE BULLETIN, no. 6, Nov 2010, available at <http://www.acui.org/publications/bulletin/article.aspx?issue=22645&id=13821>.

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

<sup>84</sup> *Student Groups*, *supra* note 81.

<sup>85</sup> *Id.*

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

<sup>87</sup> *Student Handbook: Student Engagement*, VANDERBILT UNIVERSITY [http://www.vanderbilt.edu/student\\_handbook/student-engagement/](http://www.vanderbilt.edu/student_handbook/student-engagement/) (last visited Apr. 17, 2015).

section of the university's "Policies and Regulations".<sup>88</sup> The registered student organizations must be open to all students as members and must permit all members in good standing to seek leadership posts. Single-sex organizations are permissible to the extent allowed under Title IX of the Education Amendments Act of 1972.<sup>89</sup>

Fraternities and sororities at Vanderbilt must register annually with Student Organizations.<sup>90</sup> Greek advisers help with both registration and coordination of activities. The advisors serve as liaisons between the University and the Greek student groups, and with the sororities' and fraternities' national organizations.<sup>91</sup>

The National Pan-Hellenic Council (NPHC) and the Inter-Fraternity Council (IFC), which govern the activities of the Greek social organizations at various universities, are made up of representatives of registered national sororities and fraternities.<sup>92</sup> At Vanderbilt, fraternities and sororities must be members of the Inter-fraternity, Pan-Hellenic, or National Pan-Hellenic Councils which have governing responsibilities and accountability authority over their member groups.<sup>93</sup> Corrective actions may be taken for sororities and fraternities by the IFC, the PHC and NPHC for violations of fraternity, sorority or university policies. Violation of university policy also falls under the Office of Student Accountability, Community Standards, and Academic Integrity.<sup>94</sup>

IFC and PHC conduct the recruitment of their member groups whereas NPHC groups administer their own recruitment programs.<sup>95</sup> To be eligible for sorority and fraternity

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

<sup>89</sup> Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 (2012).

<sup>90</sup> *Student Handbook: Student Engagement, supra* note 87.

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

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Student Handbook: Student Engagement, supra* note 87.

membership, students must have carried and passed 12 semester hours, and achieved a minimum cumulative 2.5 GPA average.<sup>96</sup>

To receive approval as a student organization at Seton Hall University Law School in New Jersey, an organization must present a written constitution and bylaws which ensure full compliance with the university's non-discriminatory policy.<sup>97</sup>

Observation shows that while discrimination is not overtly evident in sororities and fraternities, the secrecy that surrounds the recruitment of new members presents a window through which discriminatory practices could be applied without being noticed by the student organization's body or the university's administration. Whether that secrecy is abused by some remains a question to be tackled in matters that involve the principle of nondiscrimination. Certain sororities and fraternities tend to have a majority of predominantly a certain ethnicity, with just a few members from other ethnicities. Whether this is deliberate or a coincidence becomes a blurred line, and therein dwells the possibility of subtle discrimination which university administrations need to tackle.

Cultural student organizations, while having predominantly one ethnic group, tend to include members from other ethnic groups who are interested in that particular student organization's culture, and generally still adhere to the principles of non-discrimination. One author notes that as college education expands, there is need for institutions to provide an open, welcome, and inclusive climate for all students.<sup>98</sup> Scholars have documented that students learn and grow intellectually in their college experience particularly through involvement in student

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<sup>96</sup> *Id.*

<sup>97</sup> *Student Organizations*, SETON HALL U. L. SCH., [http://law.shu.edu/student\\_organizations/](http://law.shu.edu/student_organizations/) (last visited Apr. 17, 2015).

<sup>98</sup> Burgess, *supra* note 82.

organizations.<sup>99</sup> The issue in many institutions then becomes what happens when opportunities for involvement in student organizations are not open to all students. These are the challenges that face student organizations and whether they are required to accept institutional nondiscrimination statements in order to be officially registered at the institutions.<sup>100</sup> This issue came to the spotlight in the ruling by the U.S. Supreme Court in the case *Christian Legal Society* (“CLS”) v. *Martinez*. Typically the background of a case like this is a debate between religious student organizations and their first amendment rights on one hand, and gay, lesbian, bisexual, or transgender (GLBT) students and their 14<sup>th</sup> amendment right to equal protection on the other hand.<sup>101</sup>

In the case of *CLS v Martinez* (often referred to as “the Hastings case”), CLS at the University of California, Hastings College of Law, had been a registered student organization for the 1994-2004 school years.<sup>102</sup> When CLS sought travel funds from the university in 2004, they were told that the organization’s bylaws were no longer consistent with the university’s “all-comers” policy for membership and officers.<sup>103</sup> To remain a registered student organization, CLS was told to adjust their bylaws to comply with the institution’s policy.<sup>104</sup> That year the organization existed without official university recognition.<sup>105</sup>

In a ruling in favor of the University of California, Justice Ruth Bader Ginsburg summarized the case by narrowing it down to the question: “May a public law school condition its official recognition of a student group - and the attendant use of school funds and facilities - on the organization’s agreement to open eligibility for membership and leadership to all

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

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

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

<sup>102</sup> *Id.*

<sup>103</sup> *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 710 (2010).

<sup>104</sup> *Id.*

<sup>105</sup> Burgess, *supra* note 82.

students?”<sup>106</sup> She stated that CLS had felt that the “all-comers” policy at the university was a violation of its First Amendment freedoms of speech, religion and association.<sup>107</sup> From the university’s perspective, CLS was seeking a special exception from the university’s open-access requirement for all student organizations, which they felt was designed to further the university’s mission.<sup>108</sup> In a summary of the Supreme Court’s 5-4 split decision, Ginsburg stated that:

In accord with the District Court and Court of Appeals, we reject CLS’s First Amendment challenge. Compliance with Hastings’ all-comers policy, we conclude, is a reasonable, viewpoint-neutral condition on access to the student-organization forum. In requiring CLS—in common with all other student organizations—to choose between welcoming all students and forgoing the benefits of official recognition, we hold, Hastings did not transgress constitutional limitations.<sup>109</sup>

She went on to note that CLS did not argue they were treated any differently than any other recognized student organization, but rather were requesting a special exception from policy.<sup>110</sup> She noted that the First Amendment allowed CLS to have freedom of expression in its group’s activities, but did not allow the group to seek exception to this policy.<sup>111</sup> Justice John Paul Stevens offered a concurring opinion that, in this case, although the policy may more frequently be applied to religious student organizations, there is no evidence that it was designed to harm these groups.<sup>112</sup> He stated that because in this case the student organization program is a limited public forum, the college has the right to create the nondiscriminatory policy, as long as it applies it equally to all groups.<sup>113</sup>

Overt discrimination is easy to deal with within the policy framework because it can be confronted and corrective action taken, such as deregistration. However, subtle discrimination is

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<sup>106</sup> 561 U.S. at 668.

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

<sup>108</sup> Burgess, *supra* note 82.

<sup>109</sup> 561 U.S. at 669.

<sup>110</sup> *Id.* at 668.

<sup>111</sup> Burgess, *supra* note 82.

<sup>112</sup> 561 U.S. at 700 (Stevens, J., concurring).

<sup>113</sup> Burgess, *supra* note 82.

not only hard to pinpoint but hard to rectify, too. The question then becomes how vigilant universities need to be to ensure that their nondiscriminatory policies are not circumvented by registered student organizations that benefit from activity fees of all students.

In the first category of subject based student organizations, it is difficult to apply any form of discrimination, since they are based on subject interest and in some cases overall GPA. The same rationale applies to the second and third categories which are comprised of the academic student clubs with a national framework and the honor societies with a national framework, respectively. The fifth category, which involves student cultural organizations, often welcomes any individual interested in that culture, although there is potential for exclusion here due to the very nature of the group focusing on a single culture.

As for the sororities and fraternities, the secrecy and lack of openness to non-members in their recruitment strategy provides room for potential abuse and circumvention of the nondiscriminatory policies that most universities have in place. It is up to the universities to design a framework that closes this loophole and ensures access to student organizations for all students.

## Affirmative Action and the American University

Ian McMath

*“Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”—Justice Sandra Day O’Connor, majority opinion in Grutter v. Bollinger.<sup>114</sup>*

### INTRODUCTION

The United States of America prides itself as being a nation built on moral values. Americans are taught in history textbooks and folklore that they are a part of a free and just society. Despite proclamations from American statesmen and anecdotes of noble intention, the character of the United States is one that leaves freedom and justice unequally enjoyed. “We the people” in the preamble of the Constitution represented landowning Anglo-Saxon men—not women, not African slaves who were only considered three-fifths of a person,<sup>115</sup> and certainly not Native Americans.<sup>116</sup> The worldview of that era perpetuated distributive injustice of those groups for nearly two centuries. The Civil Rights Movement of the 1960s was the first serious national effort to end discrimination and to right injustices.

In addition to their traditional role as fonts of knowledge and incubators of ideas, colleges and universities are repositories of social and cultural capital and are gateways to future economic mobility. Access of marginalized groups to these institutions was, therefore, identified as central to meeting the goal of equal opportunity. By viewing litigation between students and universities, this article offers insight into the efforts of admissions policy-makers to rectify

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<sup>114</sup> Grutter v. Bollinger, 539 U.S. 306, 332 (2003).

<sup>115</sup> The Three-fifths Compromise of 1787 was a debate between Southern and Northern States concerning how to census slaves for purposes of that State’s legislative representation and taxes.

<sup>116</sup> Oscar Handlin, *United States: Government and Society: Constitutional Framework*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/616563/United-States/78019/Transportation#toc233792> (last visited Apr. 22, 2015).

historic injustice in pertinent Supreme Court cases: *Regents of the University of California v. Bakke* (1978), *Hopwood v. State of Texas* (1994), and companion cases *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003). First, foundational affirmative action policy of the United States government is introduced to provide background into the policy's development. Second, the grey area of past discrimination will be discussed. Finally, the cases and their mutual influences will be viewed.

#### AFFIRMATIVE ACTION LEGISLATION

Provisions limiting government power, such as those articulated in the Bill of Rights, are sometimes referred to as “positive” policy actions—regulations that prompt government inaction.<sup>117</sup> The philosophy of individual empowerment that enjoined the passage of such legislation has endured in America. By the middle of the twentieth century, however, civil society movements such as the 1955 Montgomery Bus Boycott and 1965 Voting Rights Movement and figures like Reverend Martin Luther King Jr. articulated that blatant social injustice must no longer be tolerated. The growth of a more demographically balanced society became the logical impetus for a “... government of the people by the people for the people,” as enunciated by President Abraham Lincoln during his 1863 dedication address at Gettysburg.<sup>118</sup> Ironically, to achieve this, “negative”—or power expansive—statutes had to be implemented. Contrary to the spirit of limiting central powers and obliging inaction of the government in State and personal affairs to foster justice pursuant to the Bill of Rights, civil rights initiatives increased federal power to achieve the same aim of greater good and justice for all.

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<sup>117</sup> Manual Valesquez et. al, *Rights*, SANTA CLARA UNIV. (Aug. 2014), <http://www.scu.edu/ethics/practicing/decision/rights.html>.

<sup>118</sup> *The Gettysburg Address*, ABRAHAM LINCOLN ONLINE, <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> (last visited Apr. 12, 2015).

President John F. Kennedy's Executive Order 10925, titled *Establishing the President's Committee on Equal Employment Opportunity*<sup>119</sup> and the enactment of the Civil Rights Act of 1964 outlawed discrimination on the basis of race, color, religion, sex, or national origin. The federal government could enforce these laws either directly through its inherent police power or indirectly through adjudication of private disputes.<sup>120</sup> Those who failed to demonstrate efforts toward racial integration were penalized either monetarily by the blocking of federal grants, by injunctions against abuse of office, or the award of damages in private litigation.<sup>121</sup>

The term *affirmative action* first appeared in President John F. Kennedy's Executive Order 10925. The order stated that it is a, "...plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons," going on to specify that selections should be made, "without regard to race, creed, color, or national origin, [for those persons] employed or seeking employment with the Federal Government and on government contracts..."<sup>122</sup> The justification for establishing affirmative action was, "correcting the effects of past discrimination... [and] preventing future discrimination."<sup>123</sup>

#### WHAT CONSTITUTED PAST DISCRIMINATION?

Practical problems exist in the detection of discrimination and the subsequent provision of litigation to prove discrimination and proving it to a court. Discrimination may take the form of isolated instances of bigotry or may reside in the overall subconscious, oppressing minority groups across multiple social strata via legal regimes or established practices developed under such a prejudice mindset, ultimately to make a distinction in favor of or against a person or thing

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<sup>119</sup> Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

<sup>120</sup> CHRISTOPHER EDLEY, NOT ALL BLACK AND WHITE 52–54 (1992).

<sup>121</sup> *Id.* at 53.

<sup>122</sup> Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

<sup>123</sup> EDLEY, *supra* note 120, at 78.

based on race, age, gender, nationality, or handicap.<sup>124</sup> An additional difficulty lies in the measurement of relative severity of discriminatory practices. People of color and women have differing grievances wrought upon them with various severities.<sup>125</sup> To what extent can present day institutions be held responsible for remedying societal wrongs inherited from the past? Proponents of the proposition maintain that the temporary practice of affirmative action will open social and economic opportunities for the dispossessed.<sup>126</sup> Opponents maintain that such provisions will only inflame racial tensions, reduce meritocratic standards, and unduly harm innocent members of the majority; some such views are expressed by plaintiffs in the following cases.<sup>127</sup>

The grey area concerning the best way to address this issue is vast, deep, and impossible to plumb. Some voices assert that affirmative action measures are insufficient to right past wrongs, while others say they go too far and create new injuries.<sup>128</sup> Some states have outlawed affirmative action initiatives altogether, such as Washington,<sup>129</sup> California,<sup>130</sup> and Florida.<sup>131</sup> In *Parents Involved v Seattle School District* (2007) Chief Justice John Roberts stated, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>132</sup>

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<sup>124</sup> *Discrimination Law and Legal Definition*, USLEGAL, <http://definitions.uslegal.com/d/discrimination/> (last visited Apr. 12, 2015).

<sup>125</sup> For instance, the slavery and inequality of Africans Americans, the cultural marginalization and physical relocation of Native Americans, the discrimination of Latin Americans, and the social subordination of the female are all wrongs that are not possible to categorize or compare.

<sup>126</sup> Nina Totenburg, *Supreme Court Returns to Affirmative Action in Michigan Case*, NPR (Oct. 15, 2013, 2:48 AM) <http://www.npr.org/2013/10/15/232046290/supreme-court-returns-to-affirmative-action-in-michigan-case>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See Paul Guppy, *A Citizen's Guide to Initiative 200: The Washington State Civil Rights Initiative*, WASH. POL'Y CENT. (Sept. 1998), <https://www.washingtonpolicy.org/publications/brief/citizens-guide-initiative-200-washington-state-civil-rights-initiative>.

<sup>130</sup> See Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335 (1997).

<sup>131</sup> See *Affirmative Action: State Action*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 2014), <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx>.

<sup>132</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 748 (2007).

Despite the great disagreement in the establishment of parameters to address these social imbalances, there is at least an agreement in the mood of the public that injustices were committed against these minority groups in the past.<sup>133</sup> However, the proposition that the status quo has a moral duty to attempt remediation has remained hotly debated.<sup>134</sup> The following Supreme Court cases represent efforts to navigate these difficult waters.

#### REGENTS OF UNIVERSITY OF CALIFORNIA V. BAKKE

The 1978 Supreme Court case of *Regents of University of California v. Bakke*<sup>135</sup> is a landmark case in that it set the precedent for affirmative action procedures to be taken into account not only by higher education admissions offices, but also for governmental agencies, private companies, and non-profit organizations.<sup>136</sup> The case addressed the constitutionality of a special quota reserved for racial minority candidates at the University of California at Davis medical school.<sup>137</sup> The plaintiff, a white male, had been denied admission for two consecutive years.<sup>138</sup> He instituted an action for declaratory and injunctive relief against the Regents of the University, alleging the admissions process to be in violation of the Equal Protection Clause of the Fourteenth Amendment—also a provision of the California Constitution—and of Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in any program receiving federal financial assistance.<sup>139</sup> In accordance with the schools admission policy, there were 100 available places in the class, 16 of those were special admission reserved for members of certain minority races, while the remaining 84 general admissions places could qualify for applicants of

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<sup>133</sup> KUL B. RAI & JOHN W. CRITZER, AFFIRMATIVE ACTION AND THE University 18–19 (2000).

<sup>134</sup> GARY ORFIELD ET AL., HIGHER EDUCATION AND THE COLOR Line 59 (2005).

<sup>135</sup> *University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>136</sup> MICHAEL A. OLIVAS, SUING ALMA MATER: HIGHER EDUCATION AND THE COURTS 73 (2013).

<sup>137</sup> 438 U.S. at 265.

<sup>138</sup> *Id.* at 276.

<sup>139</sup> *Id.* at 277–78.

any race.<sup>140</sup> Of those admitted through the special admissions policy, many had substantially lower entrance examination scores compared to the plaintiff.<sup>141</sup>

Bakke was eventually admitted to the medical program and the special admission policy quota was deemed to be in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.<sup>142</sup> The special admissions category of 16 special seats was not only deemed unlawful, but race was deemed to be in general an unlawful practice for considering admissions.<sup>143</sup> The court did, however, conclude that race could be considered a “plus” if it was considered among other factors in a competitive admissions process.<sup>144</sup> This “strict scrutiny” strategy approach melding race or gender with other criteria became a trend generally advocated by Justice Lewis Powell.<sup>145</sup> He wrote in a concurring opinion that equal protection practices should have five tiers of scrutiny to help demonstrate compelling interest: “(1) True strict scrutiny for racial and ethnic classifications that exclude and stigmatize; (2) less strict scrutiny for affirmative action racial preferences; (3) intermediate scrutiny for classifications affecting gender and illegitimacy; (4) heightened rational scrutiny for the mentally retarded...(5) traditional rational scrutiny for conventional economic and welfare regulation.”<sup>146</sup>

#### HOPWOOD V. THE STATE OF TEXAS

In the 1994 case of *Hopwood v The State of Texas*,<sup>147</sup> Cheryl Hopwood applied to the University of Texas Law School (UTLS). Her GPA, LSAT, and alma mater landed her in the “discretionary admit” category, putting her on the wait list. Ultimately she and the 3 other

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<sup>140</sup> *Id.* at 289.

<sup>141</sup> *Id.* at 277.

<sup>142</sup> 438 U.S. at 320.

<sup>143</sup> *Id.* at 319–20.

<sup>144</sup> *Id.* at 318–19.

<sup>145</sup> *Id.* at 320.

<sup>146</sup> AFFIRMATIVE ACTION AND THE CONSTITUTION 198 (Gabriel J. Chin ed. 1998).

<sup>147</sup> *Hopwood v. Texas*, 861 F.Supp. 551, 553 (W.D. Tex. 1994).

Caucasian plaintiffs of the case were not admitted to the Law School.<sup>148</sup> At the district court level *Bakke* was considered as the controlling precedent.<sup>149</sup> The court found that the race related criteria in the admissions process were fairly balanced with other competitive considerations and were aimed to achieve a satisfactory level of diversity on campus with the goal of fostering an enhanced learning experience, and therefore constitutional.<sup>150</sup> The court could not find by a preponderance of the evidence that admission would have been granted to the plaintiffs had the admissions process not included the racial “plus.”<sup>151</sup>

However, upon appeal the Fifth Circuit saw the case in a different light. “[W]e see the case law as sufficiently established that the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional...”<sup>152</sup> In this case, it seems that the lower court simply ignored the Supreme Court’s ruling in *Bakke*.

Fifth Circuit Judge Jacques Wiener chided the overreaching of his colleagues for not following *Bakke*: “...Be that as it may, this position... is both overly broad and unnecessary to the disposition of this case... If *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court should make the pronouncement.”<sup>153</sup> The panel essentially claimed preceding precedents such as *Bakke* to be too ambiguous, thereby causing confusion to be associated with court rulings concerning minority-friendly admissions criteria. Ironically, while Hopwood never gained admission to UTLS, the number of minority students who matriculated to the UTLS program that year was lower even than white students admitted off the wait list.<sup>154</sup>

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<sup>148</sup> MICHAEL A. OLIVAS, *SUING ALMA MATER: HIGHER EDUCATION AND THE COURTS* 79 (2013).

<sup>149</sup> *Id.*

<sup>150</sup> *Hopwood v. Texas*, 861 F.Supp. 551, 570–71 (1996).

<sup>151</sup> *Id.*

<sup>152</sup> MICHAEL A. OLIVAS, *SUING ALMA MATER: HIGHER EDUCATION AND THE COURTS* 79 (2013).

<sup>153</sup> *Id.* at 80.

<sup>154</sup> *Id.*

The contradiction with *Bakke* prompted institutions of higher education across the nation to question whether their own policies were constitutional against the Fifth Circuit's *Hopwood v. the State of Texas* precedent. From the admissions office to scholarship funds, the constitutionality of policies designed for minorities and minority student groups were brought into question by the opposing precedents. The Texas legislature passed Texas House Bill 588 in 1997, or the Top Ten Percent Rule, as a reaction to the conundrum.<sup>155</sup> The law guarantees public university admission to all Texas public high school students in the academic top ten percent of their graduating class.<sup>156</sup>

#### GRUTTER V. BOLLINGER AND GRATZ V. BOLLINGER

The 2003 Supreme Court combined the cases of *Grutter v. Bollinger*<sup>157</sup> and *Gratz v. Bollinger*<sup>158</sup> to clarify what is and what is not a constitutional admissions policy. In *Grutter v. Bollinger* a Caucasian applicant to the University of Michigan Law School was rejected.<sup>159</sup> The plaintiff claimed that the “plus” given to minority applicants amounted to a racial quota, which had been shown to be unlawful in *Bakke* and other precedents.<sup>160</sup> The Supreme Court upheld the university's decision, which found the law school's admission “plus” policy to be holistic, fair, constitutional, and was not tantamount to a racial quota.<sup>161</sup>

Rather than imposing quotas, the law school admissions program focused on academic ability and a flexible assessment of applicants' talents, experiences, and potential to contribute to

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<sup>155</sup> See *Tribpedia: Top Ten Percent Rule*, THE TEXAS TRIBUNE, <http://www.utexas.edu/student/admissions/research/HB588Law.html> (last visited Apr. 22, 2015).

<sup>156</sup> Diversity could then be impartially achieved assuming public schools represented the demographic diversity of their supporting communities and that all groups have access.

<sup>157</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>158</sup> *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>159</sup> *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

<sup>160</sup> *Id.* at 317.

<sup>161</sup> *Id.* at 343–44.

the learning of those around them.<sup>162</sup> It did not define diversity solely in terms of race and ethnicity but considered these as "plus" factors affecting diversity.<sup>163</sup> The Court found that the Equal Protection Clause did not prohibit this narrowly tailored use of race in admissions decisions to further the school's compelling interest in obtaining the educational benefits that flow from diversity.<sup>164</sup> The goal of attaining a "critical mass" of underrepresented minority students did not transform the program into a quota.<sup>165</sup>

In *Gratz v Bollinger*, two Caucasians brought a class action suit after being denied admission to the University of Michigan College of Literature, Science, and the Arts in 1995 and 1997, despite being qualified applicants.<sup>166</sup> The Office of Undergraduate Admission factored high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race into admissions procedures.<sup>167</sup> African-Americans, Hispanics, and Native Americans were considered underrepresented minorities and as a policy were provided an automatic twenty point bonus on a one-hundred point scale—one hundred points guaranteeing admission.<sup>168</sup> To provide context, a perfect SAT score was worth 12 bonus points.<sup>169</sup> The court ruled 6-3 against the university, finding that the admissions procedures did not comply with the Equal Protection Clause of the Fourteenth Amendment and amounted to a quota system because race was automatically awarded points, and was not instead part of a more narrow scrutiny process.<sup>170</sup>

These landmark decisions affirmed *California v Bakke* and clarified the Supreme Court's

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<sup>162</sup> *Id.* at 315.

<sup>163</sup> *Id.* at 315–16.

<sup>164</sup> 539 U.S. at 343–44.

<sup>165</sup> *Id.* at 335–36.

<sup>166</sup> *Gratz v. Bollinger*, 539 U.S. 244, 244 (2003).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 245–47.

position that a racial “plus”—when scrutinized among other competitive factors to achieve a “critical mass,”—is constitutional, whereas automatic preference solely because of race is not. The precedent was strengthened in *Fisher v University of Texas*.<sup>171</sup> In that case the plaintiff was denied undergraduate admission to the University of Texas at Austin and brought suit believing the reason for her rejection to be due to unfair policy giving preference to people of color.<sup>172</sup> She did not meet the aforementioned Top Ten Percent Rule, and hence was subject to the scrutiny of the regular admissions process, which included a racial ‘plus.’<sup>173</sup> In 2009 the District Court upheld the university’s decision,<sup>174</sup> and on appeal the Fifth Circuit affirmed but without addressing whether strict scrutiny was constitutional.<sup>175</sup> The Supreme Court granted certiorari in 2012 and upheld the university’s admission policy and returned the case to the lower courts to uphold strict scrutiny as constitutional.<sup>176</sup>

#### CONCLUSION

While questions concerning the ethics and strategy of remediation for past discrimination continue to be passionately discussed, the momentum of the Civil Rights era legislation has indeed reduced inequality for minority groups. Yet the legacy of historic institutionalized discrimination is still apparent in the United States today. As long as that is so, the Supreme Court will almost certainly continue to uphold as constitutional pro-diversity mechanisms for higher education admission policy. Justice Sandra Day O’Connor’s majority opinion in *Grutter v Bollinger* stresses that, “25 years from now, the use of racial preferences will no longer be necessary.”<sup>177</sup> Managing sociological behavior takes time. The hope is that the mechanisms will

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<sup>171</sup> *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013).

<sup>172</sup> *Id.* at 2417.

<sup>173</sup> *Fisher v. University of Texas*, 631 F.3d 213, 227 (5th Cir. 2011).

<sup>174</sup> *Id.* at 217.

<sup>175</sup> *Id.* at 247.

<sup>176</sup> *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013).

<sup>177</sup> *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

eventually achieve a “critical mass” or “cloud” of historically dispossessed groups that will grow traction for upward mobility from the social and economic benefits of higher education. In an ideal future, higher education admissions offices in America might chose to implement racial plus among a multiplicity of other factors while scrutinizing applicants, but for purposes of fostering diversity in the student body rather than as reparation for past injustice.

## Potential Consequences of the Campus Accountability and Safety Act

Emma Geiger

### INTRODUCTION

Throughout our country's history there have been many legal efforts to overcome sexual discrimination in the classroom, workplace, and home. Victories like the Civil Rights Act of 1965, Title IX and the Education Amendments of 1972, and the lesser known Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act have shown that it is possible to use legal mandates to mend the gap between genders. However, the issue of sexual harassment is still alive and well in the United States.

The issue of sexual harassment has never been a simple one. The legal system has never had an easy time defining matters of humanity like life, death, and now consensual sex. One 2007 study found that one in five women enrolled in some institution of higher education are sexually harassed during their time as a student.<sup>178</sup> There have been studies done with different sample sizes and different methods, but the main message of these studies is that sexual harassment is a serious and widespread issue within colleges and universities.<sup>179</sup> All young women are at risk, but the mix of alcohol and substance abuse, close-quarters, and independence contributes to the current college culture that perpetuates sexual harassment.

The 113<sup>th</sup> Congress is currently debating the bipartisan Campus Accountability and Safety Act (CASA) proposed by Missouri Senator Claire McCaskill. CASA will not cure our nation of the problem of sexual assault, but it attempts to change the way sexual assault cases are

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<sup>178</sup> CHRISTOPHER P. KREBS ET AL., NAT'L INST. OF JUST., THE CAMPUS SEXUAL ASSAULT STUDY xviii (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

<sup>179</sup> See U.S. DEPARTMENT OF JUSTICE, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013 (2014), available at <http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>. See also STAFF OF S. COMM. ON FIN. AND CONTRACTING OVERSIGHT, SEXUAL VIOLENCE ON CAMPUS (2014), available at <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>; see also U.S. DEPT. OF JUST., SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT (2005), available at <https://www.ncjrs.gov/pdffiles1/nij/205521.pdf>.

handled by institutions of higher learning through the creation of advocates for the victims and implementation of harsher penalties for universities who fail to comply with federal guidelines.

While doing research for this article I was shocked by how few cases I found associated with Title IX. I later found out that this was because these cases were settled out of court. I only found three cases against a university where the judge ruled in favor of the student. I am sure that there are more than three, but I spent hours searching for cases and only found three. Only one had damages on the record because the other two were remanded to the lower courts where they were settled and sealed. My goal was to examine the penalties put in place by CASA, and then to compare the potential CASA fines to damages awarded in current Title IX cases against universities. I only found one comparable case. With less than ten percent of victims reporting their harassment, and the tendency to seal all cases regarding this unsavory topic there is little to no way to truly understand the scope of the issue nor the process or fairness of its interaction with the legal system.<sup>180</sup>

In this article, I will examine the potential effectiveness of this bill by analyzing the penalties it presents. I will introduce CASA, explain this issue, compare the penalties between CASA and a past case, and offer my opinion of the Campus Accountability and Safety Act.

## LEGISLATION

### A. Title IX

Title IX is part of the Educational Amendments of 1972. Overall, Title IX prohibits the discrimination on the basis of sex in any federally-funded program.<sup>181</sup> As of May 2014, there are

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<sup>180</sup> See U.S. DEPT. OF JUST., *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* (2000), available at <http://eric.ed.gov/?id=ED449712>.

<sup>181</sup> *Title IX and the education amendments of 1972*, U.S. DEPT. OF JUST. (Dec. 31, 2014), <http://www.justice.gov/crt/about/cor/coord/titleix.php>.

55 schools with open Title IX Investigations.<sup>182</sup> In this paper, I will address the Title IX cases that are brought by a student against a University for mishandling or purposely infringing victims' rights in sexual harassment claims that are brought to the attention of the college or university.

## B. The Campus Safety and Accountability Act (CASA)

Upon an initial reading of the Campus Accountability and Safety Act, it appears to offer reasonable and thoughtful solutions to the issues surrounding sexual assault on college campuses. These include the establishment of a “confidential advisor” whose role would be to serve as an advocate and private resource for victims, the installment of college-specific websites with information like phone numbers of local authorities, maps to local medical facilities, information on pending sexual assault investigations, and the creation of an annual anonymous survey to collect more accurate, campus-specific data.<sup>183</sup> These are just a few of the many new ideas CASA presents to start addressing this out-of-control issue.

### THE ISSUE

The question that lingers after that first read-through of CASA is, “How?” How will CASA persuade higher education institutions to spend hundreds of thousands of dollars hiring new employees and creating programs, especially when the goal of CASA—increased reporting and prosecution of sexual assault cases—may bring these institutions negative press.

The penalty for noncompliance is stated as such: “The Secretary of Education may impose a civil penalty of not more than one percent of an institution’s operating budget, as defined by the Secretary of Education, each year that the institution of higher education fails to

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<sup>182</sup> *U.S. Department of Education Releases List of Higher Education Institutions With Open Title IX Sexual Violence Investigations*, U.S. DEPT. OF EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>.

<sup>183</sup> Campus Accountability and Safety Act, S. 2692, 113th Cong. (2014).

carry out the requirements...”<sup>184</sup> The individual penalty per section then goes into more specific details regarding the section that it is addressing. It also states that this one percent fine can be compounded for multiple violations. A college or university could potentially pay much more than one percent of its operating budget if it fails to meet CASA’s requirements.

To analyze the effectiveness of CASA, one must compare the current penalties institutions face to the penalties that would be levied if the bill were in place. To do this, the term “operating budget” must be defined. When I contacted a representative from Senator McCaskill’s office about this ambiguous language, he said that the Department of Education would be defining the term “operating budget” in the future. This makes it nearly impossible to say if there would be a difference in the monetary penalties for violating the requirements specified in the CASA.

#### COMPARISON

I will use the 1993 case of *Lisa Mann v. University of Cincinnati* as an example to illustrate this point.<sup>185</sup> Lisa Mann was a student attending the University of Cincinnati when she filed suit against the university stating that university employees “sexually harassed her and improperly took unfavorable academic actions against her.”<sup>186</sup> Ms. Mann also alleged that she suffered emotional distress as a direct result of the employees’ actions. Ms. Mann refused to sign a release for the attorney for the University of Cincinnati to see her medical records. The university’s attorney subpoenaed the records and read them before Ms. Mann had a chance to counter the subpoena and before the subpoena was enacted. This violated Ms. Mann’s right to privacy.

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<sup>184</sup> *Id.* at § 124 (b)(2)(A).

<sup>185</sup> *Mann v. University of Cincinnati*, 824 F. Supp. 1190 (S.D. Ohio 1993).

<sup>186</sup> *Id.* at 1192.

During an appeal by Ms. Mann, the court awarded her \$2,500 in punitive damages and \$3,307.45 as reimbursement for her attorney fees.<sup>187</sup> The University of Cincinnati not only failed to provide any assistance to its victimized student, but also violated her rights. Though CASA was not in place in 1993, we can assume from the underhanded actions of the university in this case that there would have been a violation of the new confidentiality measurements in the Campus Accountability and Safety Act. The University of Cincinnati showed a lack of respect or concern for its student. If this university chose not to follow Title IX, then why would they abide by CASA? I am making the assumption that if this law was passed in 1993, the University of Cincinnati would have not have followed the guidelines set by CASA.

Upon finding a case that, I believe, is comparable to the cases in which the Campus Accountability and Safety Act would impose penalties to if passed, I could now compare current damages being paid with the total amount a school may pay under CASA. Violations of Title IX and the Civil Rights Act will result in punitive damages for the defendant if they are found liable, but, as we can see from *Mann v. University of Cincinnati*, those punitive damages are not all that compelling. A mere sum of \$2,500 will not impact a university, no matter its size.

There are programs and federal guidelines to prevent sexual harassment and institutional sexism, but it has become glaringly clear that these guidelines are not effective. CASA proposes new guidelines that are different and well thought out, but they are still just guidelines like the ones that have been implemented before. There is only one thing that might make them more effective than their predecessors: monetary punishment. The sad truth is that many schools have demonstrated that the cost of a settlement is the cost of doing business. Until that is changed – until the cost is too high to pay – we cannot expect anything else. The definition of a school’s “operating budget” will decide how much money is at stake and how effective CASA can be.

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<sup>187</sup> *Id.* at 1206.

I searched to determine what the term “operating budget” might end up looking like. I found the 2014 University of Cincinnati Budget spreadsheet to stay with the university that this case revolves around.<sup>188</sup>

To compare the 1993 punitive damages in *Mann v. University of Cincinnati* to the University’s 2014 budget, I adjusted for inflation. \$2,500 in 1993 would be \$4,095.78 in 2014.<sup>189</sup> Going forward, the punitive damages awarded in *Mann v. University of Cincinnati* will be referred to as the 2014 inflation-adjusted number (\$4,095.78).

The 2014 University of Cincinnati budget includes \$1,106,673,000 in total resources and \$1,103,683,000 in total expenditures, leaving a surplus of \$2,990,000.<sup>190</sup>

CASA states that the Secretary of Education may impose a penalty of not more than one percent of the college’s “operating budget.”<sup>191</sup> If we define the operating budget as the total resources a college has before its expenditures, then the penalty could be up to \$11,066,730. However, if the operating budget was something more similar to the surplus then the penalty could only be up to \$29,900. This is a dramatic difference. Without a hard and fast definition for an operating budget *before* CASA is passed, it is impossible to truly assess its potential effects on colleges and universities.

#### ANALYSIS

We have seen that these institutions will not roll over and do what the government asks without a stiff and enforceable penalty. I am not targeting universities; I am simply stating that (1) the guidelines the government puts forth will cost these schools a lot of time and money if

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<sup>188</sup> *University Current Funds Budget Plan FY: 2013-2014*, U. OF CINCINNATI (June 25, 2013), <http://www.uc.edu/content/dam/uc/af/budgetfinsvcs/docs/budgetbookfy14.pdf>.

<sup>189</sup> *CPI Inflation Calculator*, CPI INFLATION CALCULATOR, <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=2500&year1=1993&year2=2014> (last visited Apr. 17, 2015) (this website was used for calculating the inflation).

<sup>190</sup> *University Current Funds Budget Plan FY: 2013-2014*, *supra* note 188 at 16.

<sup>191</sup> Campus Accountability and Safety Act, S. 2692, 113th Cong § 124 (b)(2)(A) (2014).

they are carried out, (2) this issue has had federal intervention efforts before, and (3) those interventions have not decreased the number of students being sexually assaulted. The reader may draw his or her own conclusion.

I believe that the operating budget would be most effective if the budget were the total resources before the expenditures because CASA must be larger than a cost of doing business for the college or university. Businesses factor legal expenses into their budgets for the year. To work, the penalties in CASA must be larger than those predicted expenses. The Federal Government uses civil penalties to keep businesses from harming the public. Colleges might not be traditional business, but they have to maneuver large sums of money, meet the needs of their consumers, market their product, and offer competitive wages to faculty. In July 2014, a civil penalty of \$4 billion was placed on Citigroup for misleading their investors.<sup>192</sup> That was the price determined to be large enough to deter the actions of this company and companies alike. Basing the operating budget on the total resources of a college or university would make sure that the penalty would be seen as a penalty for their actions instead of the cost of doing business.

It may seem aggressive to have such steep penalties for such seemingly minor infractions (like not creating a website or a universal plan for handling accusations), but in order to ensure successful desegregation of public schools, the Little Rock Nine were escorted into school by armed guards. Sometimes you have to be aggressive to spark an institutional change.

Eleven million dollars sounds like an exorbitant amount of money for the University of Cincinnati to pay, but CASA does not say that the penalty will be exactly one percent. The Campus Accountability and Safety Act gives the Secretary of Education the power to fine *up to*

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<sup>192</sup> Justice Department, *Federal and State Partners Secure Record \$7 Billion Global Settlement With Citigroup for Misleading Investors About Securities Containing Toxic Mortgages*, U.S. DEPT. OF JUST. (July 14, 2015), <http://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement>.

one percent of the operating budget.<sup>193</sup> This gives the Secretary of Education the discretion to fine an amount that he or she sees fit to deter the action from ever happening again by setting an example. Even though the Secretary of Education may not impose the whole one percent fine, it is still a possibility – a possibility that may have enough punch to scare the schools from attempting to elude the new laws in the first place.

Consequences influence the way we make decisions. For example, if there were no threat of a natural disaster, then people would not buy home insurance. If there were no threat of real economic damages, a school might not spend their resources creating preventative sexual harassment programs. We are not motivated to spend money and time and energy doing something that will not directly benefit us. If an institution of higher education could pay a mere \$29,900 instead of creating new jobs, filling those jobs with salary workers, hiring people to develop programing, and developing new policies, they *would* pay the money because the cost is not high enough to be worth doing all of those tasks. If the price were \$11,066,730, those tasks would be worth it.

In *Mann v. University of Cincinnati*, the university only had to pay \$4,095.78 in damages.<sup>194</sup> There is no way of knowing from year to year what the surplus will look like for a university. In 2014, one percent of the surplus for this university's budget was \$29,900, but in future years it may be closer to the punitive damages found in *Mann v. University of Cincinnati* or even below that. The total resources and the surplus will both vary year to year, but the total resources will always be large enough to make an impact.

#### RECOMMENDATIONS

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<sup>193</sup> Campus Accountability and Safety Act, S. 2692, 113th Cong § 124 (b)(2)(A) (2014).

<sup>194</sup> *Mann v. University of Cincinnati*, 824 F. Supp. 1190, 1206 (S.D. Ohio 1993).

Instead of settling sexual harassment behind closed doors, these cases should be handled transparently. It is possible to keep a student's confidentiality without pretending sexual assault does not occur. The way to prevent these assaults is to make the issue something discussible—something that is not shameful. Make sure men and women of the university are aware of the contributors to sexual assault like alcohol, substance abuse, and walking alone at night.

What about preventing the issue? The majority of the programs and institutions that are in place deal with victims instead of people at risk. Almost 20% of women experience attempted or completed sexual assault between the ages of 18-24.<sup>195</sup> Victims of sexual assault experience life-long issues as a result: greater risk of heart disease and stroke,<sup>196</sup> strained relationships with family, friends, and intimate partners, post-traumatic stress disorder, and chronic depression.<sup>197</sup> There are mental and physical health issues that will follow victims for the rest of their lives, so why is there such an emphasis on helping the abused instead of preventing the abuse in the first place? You should be able to trust that your college will put your health above saving money, but, as of now, that is not always the case.

#### CONCLUSION

The definition of an operating budget in the Campus Accountability and Safety Act should have been clarified before CASA was introduced to Congress. If the operating budget is representative of the university's total revenue, it will be taken more seriously. If it is taken seriously, it is more likely to be implemented and maintained. CASA's interventions target the victim and the victim's rights throughout the process of reporting the assault or harassment. From thereon a domino effect ensues: the victims are less scared to come forward so more

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<sup>195</sup> *Sexual Violence: Facts at a Glance*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2012), <http://www.cdc.gov/ViolencePrevention/pdf/SV-DataSheet-a.pdf>.

<sup>196</sup> *Id.*

<sup>197</sup> *Sexual Violence: Consequences*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 19, 2015), <http://www.cdc.gov/violenceprevention/sexualviolence/consequences.html>.

information is known about the sexual assault, more victims have the confidence to go to a school employee who can help them launch an investigation with the school and the police, and finally sexual harassment might become something that can be debated and discussed comfortably and with concrete information. There is potential in this bill, but the political tendency to leave room for interpretation makes the future of CASA unpredictable. If Senator McCaskill's goal is to keep college women from being sexually assaulted, I do not see a reason to use ambiguous language as opposed to clearly stating the punishments that lie ahead for universities who put their own success before the safety of their students.

I believe the Campus Accountability and Safety Act, if passed, could be effective in its goal to have more women come forward and be taken care of in the result of a sexual assault. The "operating budget" is the buzzword that will decide if CASA is different from the rest. It will decide if CASA is an ineffective federal law or if it is a set of guidelines to uniformly and systematically change the way sexual harassment cases are handled at a university level. In the future, I hope to see a shift to sexual harassment policies based on prevention and open communication about sexuality in young adults on college campuses.

## **Is There Too Little Due Process for Sexual Assault Cases in Private Universities?**

Megan McGinn

### INTRODUCTION

Many private universities handle conduct procedures within the universities, including sexual assault. These procedures include due process for the accused. Due process is the legal requirement that the state must respect all legal rights that are owed to a person. A violation of due process is a violation of the constitution. The Fifth Amendment has a due process clause that states: “Nor shall any person be deprived of life, liberty, or property, without due process of law...” which is similar to the fourteenth amendment as well.<sup>198</sup> However, private universities do not apply the standards of the Constitution because only state actors are bound by the due process requirement and private universities do not fall under these conditions.<sup>199</sup> Upon entering a university, a student typically signs a document stating that he or she understands the institution’s rules and regulations. These documents are legal contracts and they govern a student’s relationship with the school.<sup>200</sup> This means that private universities can handle disciplinary actions at their own discretion. In the documents signed by students, there is a section for sexual misconduct and the consequences that will be enforced within the university. Issues have arisen because many students accused of sexual assault have not received proper due process in the conduct proceedings. This article will argue that because these accusations have such severe and lasting consequences, the accused should be granted proper due process in university hearings.

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<sup>198</sup> U.S. CONST. amend. V, § 2.

<sup>199</sup> See Ronald B. Standler, *Legal Right to Have an Attorney at College Disciplinary Hearings in the USA* (Apr. 9, 2011), [www.rbs2.com/eatty.pdf](http://www.rbs2.com/eatty.pdf).

<sup>200</sup> *An Overview: The Private University and Due Process*, 1970 DUKE L.J. 804–06 (1970).

This article will show that the due process in universities is inadequate and that there is a strong need for a uniform law. First, the lack of due process within several universities will be shown. Court cases upholding the right to due process in universities will also be brought to light. Next, the Dear Colleague Letter that defined the rules and procedures that universities should follow is explained. This letter's policies violated due process rights in a variety of ways that will be discussed. Universities have taken these regulations and further hindered a student's right to a fair trial and stripped their right of due process. In response, groups such as Stop Abusive and Violent Environments and the Foundation for Individual Rights in Education, have argued against this lack of due process and the Dear Colleague Letter that was issued. These groups' arguments will be discussed further along with university cases that they have supported. Then, attorneys who have aided students accused of sexual assault and their reasons for doing so will be explained. The argument for the need of uniform due process in sexual assault cases will be made clear.

#### BACKGROUND

Because most private schools employ contract law, they are not required to follow the due process clause of the Constitution, but can follow their own disciplinary proceedings that are implemented within the school. There has been much scrutiny over the new proceedings that have been implemented in the past years because of the number of shortcomings they entail, including lack of due process. The Columbia University Senate created an Office of Sexual Misconduct Prevention and Education which enacted a Sexual Misconduct Policy and Disciplinary Procedure during the fall of 2000.<sup>201</sup> This policy fails to exercise proper due process in a number of ways. This policy does not afford the accused the right to be present during

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<sup>201</sup> Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653–54 (2011).

testimony, to cross-examine witnesses, to have an attorney present during hearings, or to have a transcript of the proceeding.<sup>202</sup> The case of *Donohue v. Baker* held that the accused has a right to cross-examine the accuser.<sup>203</sup> Witness credibility was called in to question, yet he was not allowed cross-examination even though it would have been pertinent to the case.<sup>204</sup> In this case, because the accused's due process rights were violated and because of the possibility of expulsion, he should have had the rights that would have been granted in a regular court of law. The lack of due process is especially serious since the accused could face prosecution outside the university as well as expulsion.

A case that swept across universities nationwide was the Duke Lacrosse case. Three lacrosse players were wrongfully accused of sexual assault by an exotic dancer in 2006.<sup>205</sup> The injustice occurred not only in Duke University itself, but in the prosecutor's office as well. The district attorney was disbarred after this case for a serious miscarriage of justice. The accuser, Crystal Magnum fabricated the story and the district attorney acted unethically when pursuing charges.<sup>206</sup> The prosecutor not only failed to disclose DNA evidence, but he violated the process that was due for the accused students.<sup>207</sup> This year-long process defamed the students and failed to give them an adequate trial due to the misconduct of the attorney. This case is a strong example of the injustice that many students face when accused of sexual assault. More often than not, their due process rights are violated and are not granted a proper trial. This case further shows that even in a court of law, the due process rights of individuals can be infringed upon.

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<sup>202</sup> *Id.*

<sup>203</sup> *Donohue v. Baker*, 976 F.Supp. 136, 149 (N.D.N.Y. 1997) .

<sup>204</sup> *Id.* at 147.

<sup>205</sup> Robert Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to 'Do Justice'*, 76 DUKE L.J. 1337 (2007).

<sup>206</sup> *Id.* at 1338.

<sup>207</sup> *Id.*

Over the past few years, university disciplinary proceedings have become stricter. A “Dear Colleague Letter” was issued by the United States Department of Education’s Office for Civil Rights in April of 2011 explaining that the requirements of Title IX now covered sexual assault because sexual assault constitutes a form of sexual harassment.<sup>208</sup> The Dear Colleague Letter states that a school must take immediate action to determine what occurred. Many schools have rushed to take immediate action and have not granted proper due process in their haste to start the proceedings.

The Dear Colleague Letter caused universities to change how they handled sexual assault cases. The burden of proof, which is beyond a reasonable doubt in a regular court of law, was lowered to a preponderance of the evidence.<sup>209</sup> This means that if the scales are tipped just over fifty percent, the defendant is supposed to be found guilty. The letter also states that it is strongly against allowing the accused to cross-examine the accuser, which is part of due process.<sup>210</sup> Furthermore, the Dear Colleague Letter violated much of a person’s due process rights that should be granted in disciplinary proceedings. A case that exemplifies these issues is *Wells v. Xavier University*. Wells was an athlete at Xavier University who was accused of sexual assault in 2012.<sup>211</sup> The school expelled him shortly after he was brought up by the disciplinary board. The accuser did not want to press charges against Wells, but later investigation by the prosecutor showed a severe lack of evidence.<sup>212</sup> When the prosecutor asked Xavier University to hold off on the disciplinary proceedings, Xavier refused and then found Wells guilty of violating the code of student conduct.<sup>213</sup> Wells sued in federal court for gender discrimination under Title IX and for

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<sup>208</sup> U.S. DEPT. OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 1 (2011), available at [www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Wells v. Xavier University*, 7 F. Supp. 3d 746, 747 (S.D. Ohio 2014).

<sup>212</sup> *Id.* at 748.

<sup>213</sup> *Id.*

libel.<sup>214</sup> The U.S District Court Judge upheld Wells's lawsuit because the court believed Xavier's disciplinary process had violated his contract and had violated his Title IX's rights.<sup>215</sup> This case was one of many in which accused male students sued their school for wrongful violation of their due process rights.

Courts enforce due process rights and require universities to provide some due process. However, this is not adequately outlined. Contract law allows universities a broad range of discretion on how they want to handle sexual assault cases. The Dear Colleague Letter complicated this because it obligates universities to respond immediately and protect the victim from any more traumatic experience.<sup>216</sup> In addition, the Family Educational Rights and Privacy Act (FERPA) restricts the information that can be admitted in sexual assault hearings.<sup>217</sup> Both the accused and the accuser should have access to any information that will be admitted in the hearing, but FERPA restricts some information to protect the right to privacy. For example, the letter states that the accused should not have access to communication between the accuser and a counselor or access to the accuser's sexual history.<sup>218</sup> The Dear Colleague Letter also gives the university the discretion to permit either party an attorney or not.

Because private universities operate under contract law rather than constitutional law, each school can implement their own disciplinary proceedings. There have been many instances in schools where these new proceedings have stripped students accused of sexual assault of their due process rights. Private universities offer less protection for due process than public universities do. In *Cloud v. Trustees of Boston University*, a student, Cloud, could not effectively

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 752

<sup>216</sup> U.S. DEPT. OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 4 (2011), available at [www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf).

<sup>217</sup> Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 505–06 (2012).

<sup>218</sup> *Id.*

cross-examine a witness because the witness refused to state her identity.<sup>219</sup> Also, past criminal proceedings were given as prejudicial character evidence and the panel was suspected of being prejudiced.<sup>220</sup> When Cloud brought a suit against the school for violation of due process rights, the court found in favor of the school since the school “acted in good faith and on reasonable grounds.”<sup>221</sup> This means that it is incredibly hard for a student to show that a university acted unfairly, since the university operates under its own policies.

The line for due process is blurred again at Cornell University. Cornell uses an independent investigator to ask the accuser questions as well as disregarding the right to an attorney for the accused.<sup>222</sup> The right to an attorney is a fundamental due process right that many colleges are stripping the accused of. Yale University created an addition to this policy in which the accused cannot introduce evidence.<sup>223</sup> In addition, Stanford created the Alternative Review Process which changed the disciplinary proceedings to not include a unanimous vote from the board.<sup>224</sup> These violations of due process rights are a few that have come up across the country in many private institutions.

The Dear Colleague Letter has caused college attorneys to establish a system to investigate such a serious offense without law enforcement. In a regular court of law, proper due process rights would let the accused attorney enter evidence such as text messages, physical evidence, etc. In addition, law enforcement or prosecutors do not have to file charges if the story

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<sup>219</sup> *Cloud v. Trustees of Boston University*, 720 F.2d. 721, 725 (1st Cir. 1983).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 724.

<sup>222</sup> KC Johnson, *The War on Due Process*, 28 ACAD. QUESTIONS 22, 26, available at <http://link.springer.com/article/10.1007/s12129-015-9475-2>.

<sup>223</sup> *Id.*

<sup>224</sup> Kathleen J. Sullivan, *Senate Approves New Student Disciplinary Process for Sexual Assault and Harassment Cases*, STANFORD REP. (May 3, 2013), <http://news.stanford.edu/news/2013/may/faculty-senate-two-030313.html>.

does not add up, but universities do not have that power.<sup>225</sup> They must follow through with the complaint. This puts pressure on the university to find guilt. The University of Georgia expelled a student accused of sexual assault in 2012. The student claimed he was denied due process because he was not given a hearing nor was he allowed to question his accuser.<sup>226</sup> Without a hearing, the university still found the student guilty based on the preponderance of the evidence.<sup>227</sup> The Dear Colleague Letter states that the due process granted to the accuser should not restrict or delay the accuser's protections, and universities like Georgia have made hurried decisions.<sup>228</sup>

Groups have spoken out against the Dear Colleague Letter, stating that this letter grants no due process for college sexual assault cases. Professors have also raised issues with the disciplinary proceedings at the universities where they teach. For example, a group of professors at Harvard Law School petitioned for the sexual misconduct policy to change because the due process rights were violated in the university hearings.<sup>229</sup> One group in particular, Stop Abusive and Violent Environments (SAVE), has spoken out against it. First, SAVE believes that lowering the burden of proof does not allow for the presumption of innocence, but it almost guarantees expulsion without legal counsel.<sup>230</sup> The president of SAVE, Everett Bartlett, stood up for a student who was accused of sexual assault at the University Of North Dakota.<sup>231</sup> Caleb Warner was accused and was brought before the panel of judges at the university. However, he was not

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<sup>225</sup> KC Johnson, *College Attorneys Face the War on Due Process*, MINDING THE CAMPUS (June 27, 2014), available at <http://www.mindingthecampus.com/2014/06/college-attorneys-face-the-war-on-due-process/>.

<sup>226</sup> Polina Marinova, *Student Accused of Rape Expelled; Claims UGA Denied Due Process*, THE RED & BLACK (Nov. 28, 2012), [http://www.redandblack.com/news/student-accused-of-rape-expelled-claims-uga-denied-due-process/article\\_5383b38e-39c4-11e2-8540-001a4bcf6878.html](http://www.redandblack.com/news/student-accused-of-rape-expelled-claims-uga-denied-due-process/article_5383b38e-39c4-11e2-8540-001a4bcf6878.html).

<sup>227</sup> *Id.*

<sup>228</sup> U.S. DEPT. OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 4 (2011), available at [www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf](http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf).

<sup>229</sup> Duff McDonald, *Pro Due Process Does Not Equate to Pro Rape*, N.Y. OBSERVER (Oct. 24, 2014), <http://observer.com/2014/10/pro-due-process-does-not-equate-to-pro-rape/>.

<sup>230</sup> Garth Kant, *No Due Process for College Rape Trials?*, STOP ABUSIVE AND VIOLENT ENVIRONMENTS (Apr. 5, 2013), <http://www.saveservices.org/2013/04/no-due-process-for-college-rape-trials/>.

<sup>231</sup> *Id.*

allowed a lawyer present at the hearing.<sup>232</sup> The university found him guilty, even though the police department actually filed a suit against the accuser for filing a false report. Caleb was banned from all college campuses and the university did not open up the case until eighteen months later.<sup>233</sup> In addition, the Foundation for Individual Rights in Education (FIRE) released to the public the details of how the university had handled Caleb's case. They showed the serious violation of due process rights, and only then did the University of North Dakota reopen the case.<sup>234</sup>

The Foundation for Individual Rights in Education has moved for the Office for Civil Rights to change the policy issued in the letter. FIRE is an organization that aims to protect students' individual rights, which include due process rights. They strive to "protect the unprotected and to educate the public and communities of concerned Americans about the threats to these rights on our campuses and about the means to preserve them."<sup>235</sup> In the case concerning Caleb Warner, FIRE made known the injustice that he underwent. Along with various civil rights organizations, FIRE issued a letter requesting the policies mandated by the Dear Colleague letter be changed.<sup>236</sup> They asked that the Office for Civil Rights allow for the accused to have a chance at an appeal since these accusations and verdicts have such a catastrophic impact on the future of the accused.<sup>237</sup> The letter also points out the precedent set by the Supreme Court that when an individual's name, reputation, honor, or integrity are changed, due process should be granted to

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<sup>232</sup> Robert Shibley, *Caleb Warner Not Returning to University of North Dakota*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Oct. 31, 2011), available at <http://www.thefire.org/caleb-warner-not-returning-to-university-of-north-dakota/>.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Mission*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, <http://www.thefire.org/about-us/mission/> (last visited Apr. 22, 2015).

<sup>236</sup> Garth Kant, *No Due Process for College Rape Trials?*, STOP ABUSIVE AND VIOLENT ENVIRONMENTS, (Apr. 5, 2013), <http://www.saveservices.org/2013/04/no-due-process-for-college-rape-trials/>.

<sup>237</sup> *Id.*

protect against unfair or mistaken findings.<sup>238</sup> Universities fail to meet this precedent. Robert Shibley, Vice President of FIRE, wrote about an incident at Occidental College. A male student was found guilty of sexual assault within the university, even though police did not find any crime.<sup>239</sup> The small amount of evidence presented actually indicated that both parties consented.<sup>240</sup> This case shows the lack of due process because by the definition of incapacitation, neither party would be able to consent. However, the accused was presumed guilty and actions were only brought up against him.

Attorneys have represented those accused of sexual assault and who they believe were not granted proper due process within the university. In a particular article, two attorneys who have worked against the injustice done by university are discussed.<sup>241</sup> There have been people who have questioned these attorneys as to why they would defend those accused of such a crime. The answer is that the real issue lies within how the university handled such complaints. Andrew Miltenberg, an attorney who represents students accused of sexual misconduct, not only defends them, but often sues on their behalf.<sup>242</sup> His first case was a lawsuit against Vassar College for violation of Title IX. An international student was accused of sexual assault and was not given a proper hearing, but was expelled soon after.<sup>243</sup> In the cases that the law firm Nesenoff & Miltenberg take on, it is believed these men are innocent and went through university hearings that not only defamed them, but had devastating consequences for the accused. At the University of Tennessee at Chattanooga, a wrestler was, at first, found not guilty of sexual misconduct in

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<sup>238</sup> *Id.*

<sup>239</sup> Robert Shibley, *Sexual Assault Injustice at Occidental College Railroads Accused Student*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (June 4, 2014), <http://www.thefire.org/sexual-assault-injustice-at-occidental-college-railroads-accused-student/>.

<sup>240</sup> *Id.*

<sup>241</sup> Duff McDonald, *Pro Due Process Does Not Equate to Pro Rape*, N.Y. OBSERVER (Oct. 24, 2014), <http://observer.com/2014/10/pro-due-process-does-not-equate-to-pro-rape/>.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

the university proceedings.<sup>244</sup> Then, with no new evidence, testimony, or appeal, the judicial officer changed her mind and found him guilty and he was expelled.<sup>245</sup> This case shows how much power the university disciplinary panel has. They do not have to answer to state law or federal law with these cases.

## CONCLUSION

The issue of due process in private university sexual assault cases has swelled over the past few years. More and more accused students are coming forward claiming that their university violated their due process rights under Title IX. The way that universities have handled these cases has called into question the fairness of these policies. After the Dear Colleague Letter was implemented in 2011, the standard of proof was lowered among other restrictions, and has made it extremely hard for the accused to receive a fair trial. The immediate response required by the letter has created rushed trials and hurried verdicts. The many cases outlined show the different violations that accused students have faced in universities across the country. From not being granted a lawyer to not being able to introduce evidence or cross examine witnesses, the deck has been stacked against these students. Even when law enforcement found no guilt, universities have been reluctant to revisit cases or dismiss charges. Many organizations have spoken out against these injustices, such as Students against Violent Environments and the Foundation of Individual Rights in Education. Both of these organizations believe students should have proper due process within the private university. SAVE has published a letter, along with thirteen other organizations, asking for this directive to be withdrawn. FIRE holds that universities fail to meet the requirement that when a person's

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<sup>244</sup> Ward Gosset & Claire Wiseman, *UTC Wrestler Expelled Over Sexual Misconduct Finding*, TIMES FREE PRESS (Dec. 4, 2014), <http://www.timesfreepress.com/news/local/story/2014/dec/04/utc-dismisses-wrestler-after-sexual-misconduct-inv/276881/>.

<sup>245</sup> *Id.*

reputation and standing are challenged by accusations of sexual assault, due process should protect against unfair findings. Attorneys have represented those students who have been tried without proper due process in the university setting. Due process is a fundamental right that individuals accused of such a serious crime deserve in order to be tried fairly.

## Possible Complications With the End of Amateurism in Big-Time College Athletics

Kevin Kosman

### INTRODUCTION

When asked about the Baylor University Bears' football playoff chances in the 2014-15 season, the team's quarterback responded, "That question is really above my pay grade. All I'm not paid to do is play."<sup>246</sup> However, the era of big-time, high-profile Division I amateur athletics may be quickly coming to an end. There is little argument that Division I NCAA football and men's basketball are extremely lucrative and popular sporting events. However, despite enormous support staffs and facilities that rival those of their professional counterparts, until recently all NCAA Division I athletes under NCAA rules were not allowed receive any compensation for their play over a full "grant-in-aid", which is described as the cost of "tuition and fees, room and board, and required course-related books."<sup>247</sup> The supposed tradition of amateurism, however, has increasingly come under fire both in the courts and in the media. This article will show that amateurism at the pinnacle of college athletics is becoming untenable and indefensible. As amateurism ends, however, the legal and financial problems which many athletic programs across the country face will likely be exacerbated, and the financial and skill gap separating the top men's basketball and football teams from the rest of the NCAA will expand.

### BACKGROUND

In 2009, Ed O'Bannon, a former Division I basketball player from the UCLA 1995 championship team, filed a law suit against the NCAA, Electronic Arts Inc., and the Collegiate

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<sup>246</sup> *College Football Quotes of the Year*, ESPN (Dec. 24, 2014), [http://espn.go.com/college-football/story/\\_/id/12036303/steve-spurrier-art-briles-dominate-college-football-quotes-year](http://espn.go.com/college-football/story/_/id/12036303/steve-spurrier-art-briles-dominate-college-football-quotes-year).

<sup>247</sup> NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2014-45 NCAA DIVISION I MANUAL § 15.02.5 (July 2014), available at <http://www.ncaapublications.com/productdownloads/D115.pdf>.

Licensing Company on behalf of a group of current and former Division I student-athletes.<sup>248</sup>

The suit alleged that the NCAA's rules unjustly "bar student-athletes from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes' names, images, and likenesses in videogames, live game telecasts, and other footage."<sup>249</sup> This past August, District Judge Claudia Wilkins ruled in favor of O'Bannon, finding the NCAA's rules to be in violation of the Sherman Antitrust Act.<sup>250</sup> The O'Bannon decision, however, has not been the only recent shock to the traditional amateurism of big-time NCAA sports.

Antitrust and competition practice lawyer Jeffrey L. Kessler, who has previously represented the players' associations from the four major American professional sports leagues, filed a suit in the United States District Court of New Jersey on behalf of a group of "four current top-tier college football and men's basketball players, along with the class member who the players seek to represent" against the NCAA and the five "power conferences." (Big Ten, Big Twelve, Atlantic Coast, Pacific Twelve, and Southeastern Conferences).<sup>251</sup> Kessler claims that the defendants have "entered into what amounts to cartel agreements with the avowed purpose and effect of placing a ceiling on the compensation that may be paid to these athletes for their services."<sup>252</sup> Like the complaint in *O'Bannon*, Kessler argues that the NCAA rules violate the Sherman Antitrust Act, albeit on a larger scale.<sup>253</sup> Kessler argues that the NCAA's claims that the NCAA rules which restrict player compensation during the athletic career to "full grants-in-

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<sup>248</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F.Supp.3d 955 (N.D. Cal. 2014).

<sup>249</sup> *Id.* at 963.

<sup>250</sup> *Id.* at 1009. Passed in 1890 and codified at 15 U.S.C §§ 1-7, the Sherman Antitrust Act grants the state the power to regulate activities that may restrict interstate commerce and competition in the market space. *See* 15 U.S.C. §§ 1-7 (2012).

<sup>251</sup> Complaint and Jury Demand at 2, *Jenkins v. Nat'l Collegiate Athletic Ass'n*, No. 3:14-01678, (D.N.J. 2014), available at [http://a.espncdn.com/pdf/2014/0317/NCAA\\_lawsuit.pdf](http://a.espncdn.com/pdf/2014/0317/NCAA_lawsuit.pdf).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 3.

aid,” as well as the restrictions in player recruiting and the punishment of schools who do not abide by NCAA rules, constitute illegal price-fixing agreements and an unreasonable restraint on trade.<sup>254</sup>

While the NCAA has historically claimed that it promotes amateurism as a means of protecting the “student” aspect of student-athletics, it has traditionally had difficulty defending its arguments. In the 1984 case, *NCAA v. Board of Regents of the University Oklahoma*, the Supreme Court determined that the NCAA has “ample latitude” in preserving the amateurism tradition of college athletics.<sup>255</sup> Nevertheless, the Court found the NCAA’s rules restricting the various member universities’ ability to respond to consumer preference by increasing the amount of televised athletic events, the NCAA had violated the Sherman Antitrust Act.<sup>256</sup> The NCAA has also tried to claim that the amateurism found in Division I basketball and football is a necessary aspect of their brand. However, in *O’Bannon*, the Supreme Court found that the statistics presented by the NCAA were improperly prepared and agreed with the defendants that it is not necessarily true that college athletics owe their popularity to their amateurism, but instead that popularity could be more clearly attributed to regionalism.<sup>257</sup> Similarly, a map compiled by the New York Times which delineated the fan bases of Division I college football teams based upon the “likes” of the teams’ Facebook pages, found that most teams fans are primarily based in the same geographical region as the institution itself.<sup>258</sup>

The NCAA has also in the past attempted to defend its amateurism as a means of protecting the “student” aspect of the student-athletics. The claim that high-profile, Division I

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<sup>254</sup> *Id.* at 11–18.

<sup>255</sup> *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 120 (1984).

<sup>256</sup> *Id.*

<sup>257</sup> *O’Bannon*, 7 F. Supp.3d at 977–78.

<sup>258</sup> N.C.A.A. Fan Map: How the Country Roots for College Football, N. Y. TIMES (Oct. 3, 2014), <http://www.nytimes.com/interactive/2014/10/03/upshot/ncaa-football-map.html>.

college football and men's basketball players are normal students has increasingly come under fire in recent years. In *O'Bannon v. NCAA*, the NCAA claimed that amateurism is a means of ensuring that the athletes do not develop any resentment of other students.<sup>259</sup> However, as the court recognized, the NCAA was not able to show how student-athletes getting paid for their services would be different from students who held jobs or were already financially well-off while tending university. Furthermore, it is doubtful that college athletics today is amateur in anything more than name. Division I football and men's basketball coaches are some of the highest-paid state employees in the country<sup>260</sup> and have access to facilities and support staffs the rival those of their professional counterparts.<sup>261</sup> Furthermore, the time restrictions and lax standards put upon student-athletes often result in them failing to live what would be considered the life of a normal college student. One instructor at UNC-Chapel Hill admitted that many Division I football players at the school were underprepared for collegiate educational standards.<sup>262</sup> Furthermore, the regional director of the National Federal Labor Relations Board in Chicago stated while determining the Northwestern University Football Team's right to unionize that NCAA athletes often must spend nearly 50 hours a week on athletics instead of the 20 mandated by the NCAA.<sup>263</sup> John Roush, president of Centre College and former Division I football coach and athlete has gone as far as to say that, "In Division I sports, the time of these

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<sup>259</sup> *O'Bannon*, 7 F. Supp.3d at 980.

<sup>260</sup> *How College Coaches Dominate State Budgets: By the Numbers*, THE WEEK (May 10, 2013), <http://www.thefiscaltimes.com/Articles/2013/05/13/Highest-Paid-Public-Employee-in-Your-State-Probably-a-College-Coach>.

<sup>261</sup> Allen L. Sack, *College Sports and the Myth of Amateurism*, CHRISTIAN SCIENCE MONITOR (Mar. 17, 2003), <http://www.csmonitor.com/2003/0317/p09s03-coop.html>.

<sup>262</sup> *CNN Analysis: Some College Athletes Play like Adults, Read like 5th-Graders*, CNN (Jan. 8, 2014), <http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/index.html>.

<sup>263</sup> Ben Strauss & Steve Eder, *College Players Granted Right to Form Union*, N. Y. TIMES (Mar. 26, 2014), <http://www.nytimes.com/2014/03/27/sports/ncaafotball/national-labor-relations-board-rules-northwestern-players-are-employees-and-can-unionize.html>.

young men and women is owned by the coach who is under so much pressure to win that it goes against reason."<sup>264</sup>

Finally, it has also been shown that Division I men's basketball and football present unique markets that are not replicated anywhere else in the world. The NCAA claimed in *O'Bannon* that if students do not want to abide by the rule of the NCAA, they could play in semi-professional leagues, European leagues, or other inter-collegiate sports organizations such as the National Association of Intercollegiate Athletics.<sup>265</sup> However, the court did not accept this argument when it determined that none of these possibilities offered the same opportunities, namely, the ability to play professional sports, as Division I NCAA athletics.<sup>266</sup> For example, according to NFL.com, in the 2014 draft the SEC had 49 players selected in the draft, the PAC-12 had 34, the Big 10 had 20, The Big 12 had 17, the ACC had 42, and the independent University of Notre Dame had 8 players drafted.<sup>267</sup> In other words, 170 out of 256, or just over 66 percent of all NFL draftees played in the power conferences or Notre Dame.

#### POSSIBLE COMPLICATIONS

Even if Kessler's case against the NCAA fails, the days of college amateurism may still be over. This past August, the NCAA adopted a new Division I structure which grants a greater amount of autonomy to the Division I schools. The schools are now semi-autonomously governed a board consisting of 10 Football Bowl Series presidents, five Football Championship Series presidents, five Division I presidents from non-football schools, one athlete, one athletic

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<sup>264</sup> Brad Wolverton, *Athletes' Hours Renew Debate over College Sports*, THE CHRONICLE OF HIGHER EDUC. (Jan. 25, 2008) <http://chronicle.com/article/Athletes-Hours-Renew-Debate/22003>.

<sup>265</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F.Supp.3d 955 (N.D. Cal. 2014).

<sup>266</sup> *Id.* at 967–968.

<sup>267</sup> Mike Huguenin, *ACC at 2014 NFL Draft: How Conference Fared Among 'Power 5'*, NFL.COM (May 13, 2014), <http://www.nfl.com/news/story/0ap2000000350053/article/acc-at-2014-nfl-draft-how-conference-fared-among-power-5> (click on the tabs across the top of the article to view the results for each particular conference).

director, one faculty athletics representative, and one senior women's representative.<sup>268</sup> On August 7, 2014, the NCAA Division I board of Directors voted 16-2 to allow the power conferences greater autonomy in writing their own rules, including the amount of aid that could be granted to students.<sup>269</sup> Already, on January 18, 2015, the Power Five voted to allow grants in aid to extend to cover the full cost of attendance to the member institution.<sup>270</sup> While other Division I schools may choose to accept the rule made by the power conferences, it is not required. Other potential changes that may be proposed by the Power Five include four-year scholarships for student-athletes, increased access to agents for student-athletes, and even, possibly, collective bargaining for student-athletes.

All of this suggests that the end of amateurism in big-time college athletics is coming to an end. Whether through the courts or through the new autonomy of the major conferences, the changes to the collegiate athletics are likely to produce a new series of legal challenges for universities throughout the country. Perhaps one of the most obvious difficulties under the new rules will be Universities' ability to comply with Title IX of the 1971 Civil Rights Act. Title IX prohibits gender discrimination in collegiate athletics among institutions which receive federal funds. Under Title IX, institutions must provide equal: (1) athletic financial assistance, (2) equivalence in other athletic benefits and opportunities, (3) effective accommodation of student interests and abilities to both sexes.<sup>271</sup> For years, the budgets for Division-IA men's basketball and football programs have dwarfed those of other collegiate athletics. Indeed, according to the National Women's Law Center, in 2012 the typical Division I-Football Bowl Subdivision, the

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<sup>268</sup> Jon Solomon, *NCAA Adopts New Division I Model Giving Power 5 Autonomy*, CBSSPORTS.COM (Aug. 7, 2014), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24651709/ncaa-adopts-new-division-i-model-giving-power-5-autonomy>.

<sup>269</sup> *Id.*

<sup>270</sup> Mitch Sherman, *Full Cost of Attendance Passes 79-1*, ESPN.COM (Feb. 17, 2015), [http://espn.go.com/college-sports/story/\\_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins](http://espn.go.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins).

<sup>271</sup> See Title IX and Intercollegiate Athletics, 44 Fed. Reg. 239 (Dec. 11, 1979), available at <http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

highest level of collegiate football, School spent roughly two and half times as much money on football than on all women's sports in total.<sup>272</sup> This is despite that fact that the median deficit run for Division I FBS Football from 2006 was \$7,265,000.<sup>273</sup> Many have voiced concerns that the funding for female athletics has not come from the lowering the budgets of these large revenue-producing sports, but from non-revenue producing male athletics. With the end of amateurism, one can only suspect that the Division I football and basketball budgets will increase, as colleges are forced to compete with each other for star recruits. Small universities, especially Division I-FCS, non-power conference teams, will undoubtedly have difficulty maintaining high-level programs while providing equal funding and opportunity to female athletes.

The ramifications of Kessler's suit and the new autonomy rules may inhibit smaller schools' ability to compete on the same level as big name schools. During the BCS era, including this past year's playoff system, no team outside of the five major power conferences has appeared in the Bowl Championship Series National Championship game, the championship for the Football Bowl Subdivision.<sup>274</sup> While there is arguably more parity among NCAA Division I men's basketball, in the past fifteen years the only non-Power Five team to win the NCAA Tournament has been the University of Connecticut, which beside the 2013-14 season played in the old Big East Conference.<sup>275</sup> Prior to its break up in 2013, the Big East had automatically qualified for football bowl games along with the Power Five conferences. The lack of competition among the Power Five, and Notre Dame, and Division I has not gone unnoticed.

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<sup>272</sup> *Debunking the Myths about Title IX and Athletics*, NAT'L WOMEN'S L. CENTER (Jan. 30, 2012), <http://www.nwlc.org/resource/debunking-myths-about-title-ix-and-athletics>.

<sup>273</sup> JAY COAKLEY, *SPORTS IN SOCIETY: ISSUES AND CONTROVERSIES*, 493 (10th ed. 2008).

<sup>274</sup> Brett Lissenden, *NCAA Football: The Flaws of the Bowl Championship Series System*, BLEACHER REPORT (Aug. 29, 2011) <http://bleacherreport.com/articles/826500-ncaa-football-the-flaws-of-the-bowl-championship-series-system>.

<sup>275</sup> *Championship History*, NAT'L COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.com/history/basketball-men/d1> (last visited Apr. 15, 2015).

From 2009 to 2012, Mark Shurtleff, then the attorney general of Utah, threatened to bring an antitrust suit against the NCAA calling for an end to the automatic qualification of the Power Five conferences and a more transparent means of choosing the BCS bowl teams.<sup>276</sup> While these complaints may fall flat in light of the move to a playoff system this past year, the new system still continues to favor power conference teams. Playoff teams, for example, are chosen by a selection committee “based on strength of schedule, head-to-head results against common opponents, championships won and other factors.”<sup>277</sup> The committee, itself, includes “former coaches, student-athletes, administrators, journalists and current athletics directors.”<sup>278</sup> Both the strength of schedule criteria, and, arguably, the bias of former coaches and journalists, favor the Power Five.

With the relaxing of NCAA regulations, group of five and Division II may no longer be able to afford to compete with the larger, more successful schools. In 2008, for example, when money made from student fees, booster’s donations, the university foundation, and the university president’s office was subtracted from the total income of major athletic departments in 2008, it became apparent that many big-time programs can only be sustained solely by the revenue they generate.<sup>279</sup> With the end of the NCAA cartel, these schools will most likely not be able to afford cost of paying, protecting, and winning-over student-athletes from the Power Five. As a result, the existing gap between the Power Five and the rest of Division I FBS, and Division I FCS will continue to grow, and in my opinion, grow rapidly. Similarly, in the 2010-11 season, Power Five

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<sup>276</sup> Dennis Dodd, *Utah Attorney General Forges on Suing BCS despite Expected Changes*, CBSSPORTS.COM (Mar. 22, 2012), <http://www.cbssports.com/general/writer/dennis-dodd/17971289/utah-attorney-general-forges-on-suing-bcs-despite-expected-changes>.

<sup>277</sup> *Frequently Asked Questions and Answers About the College Football Playoff*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/frequently-asked-questions> (last visited Apr. 15, 2015).

<sup>278</sup> *Id.*

<sup>279</sup> JAY COAKLEY, *SPORTS IN SOCIETY: ISSUES AND CONTROVERSIES*, 493 (10th ed. 2008).

school Duke University spent over \$13 million on men's basketball, while Xavier, which was member of the Atlantic 10 the time, spent roughly \$1.3 million.<sup>280</sup>

#### CONCLUSION

In upcoming years, we may begin to see drastic changes to big-time college athletics. As we have seen, the courts have considerably weakened the already shaky "latitude" they had given to the NCAA in *Regents*. Kessler's lawsuit poses a significant challenge to the "powers that be" in collegiate sports. Even if he falls short, though, with the new autonomy rules for the Power Five schools will be free to aggressively offer star recruits greater financial packages in attempts to win them over. Players will likely exercise significantly more rights as they're allowed to interact with agents or even possibly unionize, as has been attempted at Northwestern University.<sup>281</sup> As seen in the NFL and NBA, the more rights these athletes have to negotiate with the administration of their teams, the sooner will see arms races and bidding wars as teams attempt to ensure their success. Those who cling to the "amateurism" of the sports will surely be disappointed, but at the same time we must question how amateur these sports really were. Perhaps it is time to recognize that the NCAA, and many of its institutions, have historically benefitted greatly from collegiate athletes. While the future may hold difficult times in store for smaller schools and lesser athletes, it is at least hopeful that it holds greater financial security and freedoms for athletes as well.

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<sup>280</sup> *How Much Does Your Favorite College Spend on Basketball?*, CINCINNATI BUS. COURIER (Oct. 12, 2012), <http://www.bizjournals.com/cincinnati/news/2012/10/12/college-basketball-spending-doesnt.html>.

<sup>281</sup> Ben Strauss, *Still Awaiting Union Ruling, Northwestern Players Focus on Field*, N.Y. TIMES (Nov. 28, 2014), <http://www.nytimes.com/2014/11/29/sports/ncaafootball/-still-awaiting-union-ruling-athletes-focus-on-field-.html>.