

# **SOCIAL MEDIA, ANONYMOUS SPEECH AND WHEN SOCIAL MEDIA BECOMES THE CRISIS**

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## **I. Introduction**

There may be no greater tool for effective, immediate, and tailored communication than social media. Consequently, social media has become a best practice for universities and colleges and seeking to reach prospective and current students, alumni and the larger university community. In fact, universities and colleges now rely on social media for academic technologies, emergency communication, event planning, recruiting, new student outreach, and library services, among many other purposes.

One notable aspect of social media is its ability to make information go viral. While social media marketers spend their lives trying to predict the next big story, one of the most fascinating aspects of social media is the unpredictability of trends. There is no blueprint for keeping your name in or out of the news. Therefore, while schools benefit from the proliferation of positive news stories, they also need to learn how to respond to negative ones.

Anonymous speech further complicates that response. Social media websites make it easy for people to post comments hiding behind usernames and websites that do not reveal their identity. Partly due to this ability to be anonymous, controversial topics take on a particular life of their own when they become a trend on social media.

In this session, we will discuss some of the options and challenges available to institutions when confronted with controversial speech, especially anonymous speech through social media that creates real-world dissension – and even harassment.

Attendees of this session should leave with:

- An understanding of the unique nature of social media and the impact it can have on institutions of higher education and their campus communities;

- A solid awareness of the legal issues presented by controversial speech, whether non-anonymous and local or anonymous and virtual, in both the public and private institution context;
- A framework for considering whether and how to monitor student social media use; and
- A specific action plan to help schools effectively plan for and respond to social media crises.

## II. Controversial and Anonymous Speech – on Campus and Beyond

### A. First Amendment / Free Speech

Not infrequently, institutions are faced with the complications of a controversial speaker who is scheduled to appear on campus. One prominent and nationally discussed example occurred in 2007, when President Ahmadinejad of the Islamic Republic of Iran was scheduled to speak at Columbia University. A tremendous controversy ensued, with many calling for the event to be canceled. Ultimately, the speech went forward after the institution imposed a number of conditions on the event and released a public statement citing the importance of academic programming, even when controversial.<sup>1</sup> It is also possible for the same or a similar controversy to arise over virtual events that are organized or sponsored by an institution – for example, using a broadcast platform (with web streaming) for a speaker from a remote location, or written comments on a university-sponsored website.

Events like this create challenges for any institution, and it may be tempting to give in to the “heckler’s veto” and restrict or cancel a controversial event or speaker.<sup>2</sup> Before deciding what to do, institutions should undertake an analysis of the relevant legal and policy considerations. The first step in this analysis is an understanding of the speaker’s speech rights, if any, and the institution’s right to restrict and/or respond to such speech.

#### *Public Institutions*

A public institution is bound by the First Amendment and will have substantial limitations on its ability to restrict speech. See Section II.B.(2)d., *infra*.

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<sup>1</sup> See statement at <http://www.columbia.edu/cu/news/07/09/ahmadinejad2.html>. In a similar vein, Yale’s president made a statement in 2014 at a Freshman Assembly urging students to avoid speaker policing. See <https://www.insidehighered.com/quicktakes/2014/08/25/yale-president-urges-freshmen-defend-free-expression>. This did not stop Yale from ultimately experiencing a great deal of protest when Ms. Ayaan Hirsi Ali, controversial women’s rights advocate and Muslim critic, was scheduled to speak at a campus event in September 2014. See <http://yaledailynews.com/blog/2014/09/16/hirsi-ali-addresses-over-300/>.

<sup>2</sup> The University of Michigan recently experienced controversy over a movie showing – it originally canceled a showing of “American Sniper” due to complaints, but then decided to show the movie at a separate event with educational programming to accompany the showing. See <http://www.freep.com/story/news/local/michigan/2015/04/08/university-of-michigan-american-sniper/25500371/>. Interestingly, University of Michigan replaced “American Sniper” with “Paddington” at the original event.

### *Private Institutions*

While a private institution is not a governmental actor and, therefore, not subject to the First Amendment, a private institution will still be subject to relevant state statutes or may have created rights through established policies. Additionally, private institutions are subject to various anti-discrimination laws – and, for those in states that have adopted them, bullying or cyberbullying statutes. The remainder of this subsection will relate to public institutions, but private institutions must review their policies and procedures to determine whether certain actions are permissible.

## **B. Forum Analysis**

The Supreme Court has long recognized that the First Amendment does not guarantee access to or use of property merely because it is owned or occupied by a public entity. See *U.S. Postal Svc. v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 101 S.Ct. 2676 (1981), quoting from *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211 (1976). A public institution may control access to and use of its property through policies and procedures that comport with the First Amendment requirements. Policies that are viewpoint-neutral and reasonable as time, place, and manner restrictions may be enforced.

(1) A public institution must consider whether it has created a forum – and, if so, what type of forum. If a college or university has a policy allowing student groups to sponsor speakers and use designated campus facilities (or designated campus web resources) for such speech events, then, more than likely, it will be held that the college or university has created a forum of some type. The type of forum created will depend on the nature of the institution’s designation (including consideration of past practice and stated limitations, such as in policy or facility/site rules/guidelines).

The forum created by the institution will heavily influence the control your institution can exercise over speech that takes place there. Inversely, the type of forum will also determine how responsible your institution may be for speech that occurs in that forum. Note that forum rules apply to physical and virtual spaces. So if your institution has created an online forum (such as an online bulletin board for student groups) or a conceptual forum (such as a program to provide funding for registered student organizations), the forum rules still apply there.

(2) There are several types of forum: public forum; non-public forum; designated public forum (which may be limited or open) – and, according to some, limited public forum. There is a great deal of nebulous ground in the articulations of the distinction between designated public forum and limited public forum – we will discuss the two as one category.

The full breadth of forum analysis and a complete analysis of the various discussions and debates about the forum categories (precisely how many are there? what

are the specific parameters of each?) is well beyond the scope of this session. We recommend the following articles for a more thorough discussion:

1. Lyrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975 (2011), available at <https://www.bu.edu/law/central/jd/organizations/journals/bulr/volume91n6/documents/LIDSKY.pdf>;
2. Derek Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481 (2005), available through the NACUA Legal Resources page; and
3. Eric Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments*, 38 J.C. & U.L. 451, 451-479 (2012), available through the NACUA Legal Resources page.

(a) *Public Forum*

A public forum is a space that has, by tradition or law, been held out as a place for use by the general public for speech and speech-related activities. In a public forum, a public entity cannot limit speech based on content, unless there is a compelling interest to do so, and then only by exercising narrowly tailored means to meet that interest (strict scrutiny). The public entity can also enforce content-neutral time, place, and manner restrictions in a public forum. Cases discussing a traditional public forum seem to limit the category to physical spaces held out for public use. Examples: public parks, town squares, and city sidewalks.

(b) *Non-public Forum*

A non-public forum is a space owned/controlled by a public entity but which is not traditionally made open to members of the public – these are spaces for the public institution to carry out its business and are not designed or designated for members of the public to use. Examples: classrooms, offices, and laboratories. In a non-public forum, a public institution can use reasonable means to achieve a reasonable purpose (rational basis test) and thereby regulate speech in the non-public forum. Speech regulation in a nonpublic forum must be reasonable in light of the purposes served by the forum. But any regulation cannot be a substitute for viewpoint-based discrimination.

(c) *Designated Public Forum & Limited Public Forum*

A designated public forum is created by designation of a government actor. If no limitations are placed on who may use it or what nature of speech it is designed to accommodate, then a lightly modified public forum standard would apply. If, however, the designation is limited to use by a certain population (such as the students of a public college or university) or for a certain purpose (such as public performances) or for both, then the government may act to protect, in a viewpoint-neutral way, those limitations. In creating the limited public forum, the public agency is relinquishing some (but not all)

control over the space. Examples might include: space set aside for registered student organizations to use for organization business; campus bulletin board set aside for campus community members to post anything of interest to the campus community; performance space; etc. A space may be a limited public forum on a temporary basis (or periodic basis) – such as where a campus building is allowed to be used for public events at certain times, but is otherwise held as a non-public space for business of the public entity. The Supreme Court has made clear that while content discrimination – i.e., restriction of discussion to certain topics – may be permissible to preserve the purpose of the limited public forum, viewpoint discrimination – i.e., favoring one viewpoint over another – is not permitted.<sup>3</sup>

### C. **Other Responses – Addressing Speech Outside the Public Forum**

Certainly where the social media outlet is one created by the public entity, public forum analysis has clear applicability. But what about the situation where a public agency is attempting to respond to speech on a social media site not of its creation and where the public agency did not actively seek to have the presence/controversy/publicity it is now dealing with?

It has been said that one of the best responses to distasteful speech is more speech. Institutions should consider a campus counter-message. The institution may wish to take a stand on the particular issue under discussion. Even if the controversial issue of the day is one on which the institution is not prepared to stake out a position, there are certainly many opportunities for the institution to nonetheless discuss the importance of open dialogue and debate, and the critical importance of free speech in our society.

Campuses facing a speech controversy should consider enlisting their media relations staff early into the process. Perhaps part of the campus response could be editorials by historians or constitutional scholars. Perhaps opportunities can be found for scholars to highlight the campus' acceptance of dialogue and debate as a part of the educational mission. At a minimum, campus media relations staff can be ready to provide responses to media and other requests.

Campuses will need to weigh their role when it comes to online, off-campus speech. On one hand, an anonymous threat to a student on a non-campus social media site may not appear to have anything to do with the institution. However, it may be a part of a larger pattern of bullying or harassment. Schools will need to weigh the benefits and drawbacks of referring the student to local law enforcement or contacting law enforcement on the student's behalf. The latter action is more likely to give the student an impression that the school takes such behavior seriously. On the other hand, this action and others like it may involve the campus in conduct that has nothing to do with the institution and over which the institution has no real or apparent control.

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<sup>3</sup> *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828-30, 115 S.Ct. 2510, 2516-17 (1995) (finding that the university's student activities fund was a 'metaphysical' limited public forum – as such, university's denial of funding for student organization's religious publication was viewpoint discrimination).

Where online, anonymous speech of a harassing or bullying nature is believed to be the work of a student that the campus can identify, the institution may wish to take disciplinary action. The ability to discipline that student may be constrained by considerations of free speech rights (is the speech protected or unprotected? is the campus disrupted by the speech?) and campus conduct rules (does the behavior violate a conduct provision?). The First Amendment permits governmental actors to restrict (1) true threats, defined as statements used to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals<sup>4</sup>; (2) fighting words that provoke immediate violence<sup>5</sup>; (3) obscenity<sup>6</sup>; (4) defamation<sup>7</sup>; and (5) speech that could result in a material and substantial disruption to the educational environment.<sup>8</sup> A full discussion of handling student non-anonymous speech is beyond the scope of this session. For a discussion of student speech cases, including recent cases dealing with off-campus and/or online speech, we refer you to Monica Barrett and Margaret Wu's March 2015 NACUA Conference Outline cited below and also to Denielle Burl's March 2011 NACUANote entitled *From Tinker to Twitter: Managing Student Speech on Social Media*, available at <http://www.nacua.org/nacualert/notes/socialmedia.pdf>.

### **III. Anonymous Harassment – Issues and Responses**

There are various circumstances in which a complaint of harassment may arise – including where particular students or student groups are singled out on social media for special attention and, usually in such circumstances, opprobrium or threats. What rises to the level of harassment? When does an institution have a duty to take action? What action can an institution take when it has no control over the speaker or the website hosting such speech?

The topic of electronic harassment and cyberbullying have been very thoroughly, and recently, addressed in other NACUA programs. We refer you to three prior outlines for additional discussion of this topic:

(a) Monica C. Barrett and Margaret L. Wu, *When Bullies Move Online: Dealing With Cyberbullying and Electronic Harassment on Campus*, NACUA Conference Outline (March 12, 2015), available at [www.nacua.org/securedocuments/programs/March2015/04A\\_15-03-4.pdf](http://www.nacua.org/securedocuments/programs/March2015/04A_15-03-4.pdf).

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<sup>4</sup> *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 1539, (2003).

<sup>5</sup> *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 393, 112 S. Ct. 2538, 2549 (1992).

<sup>6</sup> *Id.* at 383.

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

<sup>8</sup> See, e.g. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514, 89 S. Ct. 733, 740 (1969), in which the Supreme Court held that “it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. . . .”

(b) Monica C. Barrett, Phyllis Karasov, & Patrick O'Rourke, *Cyber-Bullying on the Quad* (2012), available at [http://www.nacua.org/lrs/NACUA\\_Resources\\_Page/SocialNetworking.asp](http://www.nacua.org/lrs/NACUA_Resources_Page/SocialNetworking.asp).

(c) Tracy Mitrano and Joseph Storch, *Campus Cyber-Wars: Bullying, Defamation, Harassment* (2011), available at [http://www.nacua.org/lrs/NACUA\\_Resources\\_Page/SocialNetworking.asp](http://www.nacua.org/lrs/NACUA_Resources_Page/SocialNetworking.asp).<sup>9</sup>

In general, harassment in the school setting has two slightly different standards. According to the U.S. Supreme Court, an institution must protect its students from harassment that under Title IX, Title VI, or the ADA is “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”<sup>10</sup> An institutional response that demonstrates deliberate indifference or is “clearly unreasonable in light of the known circumstances” may subject the institution and/or its officials to liability to the student.<sup>11</sup> Deliberate indifference requires that the college or university have “substantial control” over the “environment in which the harassment occurs” and of the bully him or herself.<sup>12</sup>

OCR points out that the standard for administrative enforcement of Title IX and for injunctive relief does not require actual knowledge or deliberate indifference.<sup>13</sup> OCR articulates the standard as follows: “A school violates a student’s rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s educational program, i.e. creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.”<sup>14</sup>

While institutions do not have a duty to respond to every objectionable or offensive statement, they are obligated to respond to student harassment that is “sufficiently severe, pervasive, or persistent as to interfere with or limit a student’s ability to participate in or benefit from the services, activities or opportunities offered by a school”<sup>15</sup> As articulated in *Davis*, a higher education institution has a responsibility to respond to harassment that takes place in any medium over which the school has “substantial control,” such as a University-sponsored online discussion forum. The 2010 OCR Dear Colleague Letter on Harassment and Bullying (the “Bullying DCL”) suggests an institution may also have a duty to respond to online harassment over which it has no

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<sup>9</sup> See also Danielle Keats Citron, *Hate Crimes in Cyberspace* (2014).

<sup>10</sup> *Davis v. Monroe*, 526 US 629, 642 (1999).

<sup>11</sup> *Id.* at 642.

<sup>12</sup> *Id.* at 644-45.

<sup>13</sup> See A-2 from *Questions and Answers on Title IX and Sexual Violence*, page 1, Office of Civil Rights, U.S. Department of Education (April 2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

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

<sup>15</sup> Office of Civil Rights Dear Colleague Letter: *Harassment and Bullying* (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>.

control or oversight, provided it knew or reasonably should have known about it, even where the harassment/bullying is anonymous.<sup>16</sup>

For example, OCR offers the following hypothetical of the Bullying DCL:

*Some students anonymously inserted offensive notes into African-American students' lockers and notebooks, used racial slurs, and threatened African-American students who tried to sit near them in the cafeteria. Some African-American students told school officials that they did not feel safe at school. The school investigated and responded to individual instances of misconduct by assigning detention to the few student perpetrators it could identify. However, racial tensions in the school continued to escalate to the point that several fights broke out between the school's racial groups.<sup>17</sup>*

OCR criticizes the hypothetical school's response in "fail[ing] to acknowledge the pattern of harassment as indicative of a racially hostile environment" and notes that "[t]he nature of the harassment [including overt racial slurs and notes targeted at students based on their race], the number of incidents, and the students' safety concerns demonstrate that there was a racially hostile environment that interfered with the students' ability to participate in the school's education programs and activities."<sup>18</sup> OCR also notes that "[m]isconduct need not be directed at a particular student to constitute discriminatory harassment and foster a racially hostile environment."<sup>19</sup> For remedial steps, OCR suggested:

Had the school recognized that a racially hostile environment had been created, it would have realized that it needed to do more than just discipline the few individuals whom it could identify as having been involved.... [T]he school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate. A more effective response would have included, in addition to punishing the perpetrators, such steps as reaffirming the school's policy against discrimination (including racial harassment), publicizing the means to report allegations of racial harassment, training faculty on constructive responses to racial conflict, hosting class discussions about racial harassment and sensitivity to students of other races, and conducting outreach to involve parents and students in an effort to identify problems and improve the school climate. Finally, had school officials responded appropriately and aggressively to the racial harassment when they first became aware

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*



of it, the school might have prevented the escalation of violence that occurred.<sup>20</sup>

Another example in the Bullying DCL addresses a situation with several reported incidents of anti-Semitic conduct at a junior high school. OCR faults the school in the example for not recognizing their “responsibilities” under Title VI, though the school punishes those students it can identify, cleans graffiti, and looks into every incident about which it is aware. Here, the OCR concludes:

Because the school failed to recognize that the incidents created a hostile environment, it addressed each only in isolation, and therefore failed to take prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence. In addition to disciplining the perpetrators, remedial steps could have included counseling the perpetrators about the hurtful effect of their conduct, publicly labeling the incidents as anti-Semitic, reaffirming the school’s policy against discrimination, and publicizing the means by which students may report harassment.<sup>21</sup>

OCR also advises that the school should have trained students to recognize and address anti-Semitic incidents and that the school could have created an age-appropriate program to educate students about anti-Semitism, including outreach to involve parents and community groups.

### **C. Incident Response in Light of Guidance**

Given this guidance, the campus dealing with a situation of anonymous harassment might need a vigorous institutional response – despite lack of control and despite whatever reasonable beliefs it may hold that there are no (or few) students it can identify for student disciplinary purposes.

Some ideas:

- (i) Convene campus threat assessment team to review the circumstances. If your institution does not have a campus threat assessment team, consider convening a representative group to review the situation. Recognize the very real possibility of a campus climate problem – one that OCR might label a hostile environment.
- (ii) Address safety concerns promptly and reasonably. Even if there appears to be no objectively reasonable basis to conclude there is an imminent threat of harm, consider steps that can be taken to improve the campus safety environment – with

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<sup>20</sup> *Id.* at 4 -5. In this discussion, OCR refers the reader to OCR’s 1994 Investigative Guidance for investigating racial incidents and harassment against students at educational institutions, available at <http://www2.ed.gov/about/offices/list/ocr/docs/race394.html>.

<sup>21</sup> *Id.* at 6.

some particular steps focused on the students/groups that are the subject of targeted posts/comments.

(iii) Explain to complaining students their rights. Deal with any complaints that are submitted in a prompt fashion – recognize that the usual timetable may not be fast enough. Also, respect their feelings of concern, suspicion, and/or fear.

(iv) Take an institutional stance clearly and definitively against harassment and retaliation. Establish, reinforce and/or publicize institutional policies.

(v) Educate – depending on the particular crisis, this may take the form of programming on: diversity, religious tolerance, community civility standards, harassment prevention, etc.

#### **IV. The Fundamental Challenge of Anonymous Cyber-Harassment**

##### **A. The Role of Geolocation**

Geolocation works by sending a mobile device user's GPS coordinates to a third party, which utilizes that information for its own business purposes. In the context of social media, specific applications utilize the user's location to send targeted advertisements for close establishments, to connect users with other local users, to identify the user's location on existing platforms (for example, when you "check in" an establishment on Facebook), and to connect users with a local online group or circle that is only available to those in similar proximity.

One such application that has garnered the attention of many in higher education is Yik Yak. Yik Yak is a social media application that enables users in a specific geographical proximity to make anonymous comments and/or anonymously respond to other comments. Although its founders state they envisioned it as a "tool for observational campus comedy," Yik Yak is one more app in a long line of apps seen by third parties as creating a safe haven for hate speech.<sup>22</sup>

##### **B. Anonymous Speech – Can You Identify the Speaker?**

Generally, institutions endeavor, and, at times, have an obligation, to respond to online speech that creates a hostile campus environment. However, the anonymity of the speech and the nature of the platform on which the speech occurs makes it difficult to respond.

First, these sites likely promote offensive speech given the fact that individuals who might not otherwise comment feel emboldened to take part in speech that cannot be

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<sup>22</sup> Rebecca Koenig, *What you Need to Know about Yik Yak, an App Causing Trouble on Campuses*, Chronicle of Higher Education (Sept. 26, 2014), available at <http://chronicle.com/article/What-You-Need-to-Know-About/149005/>.

individually attributable. Second, these companies' desire to create a platform that celebrates anonymity renders them reluctant participants in creating effective deterrent policies. Finally, service providers are certainly not interested in divulging their users' identities – because, if they did, they would soon have no users. YikYak has been the subject of a number of articles this year related to its often-ugly anonymous online content. While YikYak and others cooperate with police in the event of specific, actionable threats of violence, they do not otherwise provide information about the identities of their users.<sup>23</sup>

Further, providers of the websites on which hateful or threatening (or vaguely threatening) comments may be made have no liability for the speech of their users. Such providers are protected by Communications Decency Act Section 230, “Protection for Private Blocking and Screening of Offensive Material.”<sup>24</sup>

That said, there may be reasons for asking anyway. At a minimum, it shows the alleged victims that the institution is taking their concerns seriously, which may go a long way towards easing any dissatisfaction with the institution's response. While the request will more than likely be denied, it is possible that a website will provide all or some of the requested information or take some other action. There have been reports of Facebook taking down certain posts reported to have violated its Terms of Use. Those terms prohibit hate speech and threats; prohibit creating an account with false personal information; and include a requirement that users sign up with a first and last name.<sup>25</sup> YikYak says that it will block users who engage in negative or harmful behavior on the app.<sup>26</sup> Of course, we have no idea how YikYak defines “negative or harmful behavior” in terms of its platform and users.

In the event of civil litigation or the criminal investigation of a threat, it may be possible to subpoena user information held by websites. Many social media sites are tracking various (and varying) bits of information on their users, mostly for their own financial purposes. But this option may be of little utility when dealing with cyber-bullying that does not rise to the level of criminal misconduct (or, as to civil litigation, a tort). Further, some sites (like 4chan – [www.4chan.com](http://www.4chan.com)) have standing protocols that lead to fast elimination of posts and post data, and sites like Wickr ([www.wickr.com](http://www.wickr.com)) say they do not keep user data at all.

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<sup>23</sup> See Jonathan Mahler, *Who Spewed That Abuse? Anonymous Yik Yak App Isn't Telling*, New York Times (March 8, 2015) available at [http://www.nytimes.com/2015/03/09/technology/popular-yik-yak-app-confers-anonymity-and-delivers-abuse.html?\\_r=0](http://www.nytimes.com/2015/03/09/technology/popular-yik-yak-app-confers-anonymity-and-delivers-abuse.html?_r=0). Unrelated for our purposes, YikYak has made it impossible to use their application at most of the middle and high schools in the country, using geo-fences. Other location-based services have taken similar or related steps.

<sup>24</sup> “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. §230(c)(1).

<sup>25</sup> See *Terms of Service*, Facebook, available at: <https://www.facebook.com/legal/terms>.

<sup>26</sup> See Annette Lawless, *Anonymous Cell Phone Apps May Fuel Cyber Bullying*, Kake.com (Apr 20, 2015) available at: <http://www.kake.com/home/headlines/I-Team-Investigation-anonymous-cell-phone-apps-may-fuel-cyber-bullying-292139201.html>.

You could try to figure out who are the users by tracking other activity or asking the Internet at large to help in the search. There are certainly some limited circumstances in which this can be successful. Various individuals have learned the hard way that one's anonymous posts can occasionally be tracked or cracked. Earlier this year, Curt Schilling called out Twitter users (by real name) for highly offensive comments about his teenage daughter – one lost his job, another was expelled from school.<sup>27</sup> Gawker outed a particular Reddit user in 2012 – Violentacrez – who lost his job at a financial services company.<sup>28</sup> Of course, reports like these are not all that common, so no institution could rely on this as a solution.

Tracking internet activity by pattern or regularly-used anonymous identity (username, for example) is tricky at best. It is even harder with the various apps (such as Whisper and Burnbook) that do not require users to create an account or username – anyone can post at any time using any tag line (or none at all – in which case the site might assign a recycled one to the post). Whisper says it cannot associate an IP address with any particular post.<sup>29</sup> But posts on such sites can be forwarded or copied, so users who are not careful with details within the message(s) may find their identities less protected than expected. Another example of that problem is with apps that capture what people think will be ephemeral messages – Snapkeep and Snapbox are among several available apps for saving Snapchat photos and videos without the other person knowing. Snapchat competitor Wickr encrypts all messages, but still users can take screenshots. All of these examples indicate that tracking an anonymous user across internet activity can be very challenging and often – but not necessarily always – impossible.

Specific technical solutions for the anonymous online harasser/bully are few and far between, and that can be discouraging when facing real students in the real world who want you to make their problems stop. Perhaps it helps to know that schools, victims, and parents are struggling with this all over the country and beyond: If you run a Google search for “Cyber-bullying” or “online harassment,” be prepared to sort through many, many results. It is for this reason that taking steps of a largely symbolic nature – e.g., requesting websites to reveal data on anonymous users or take down harassing posts – can sometimes be helpful, especially when realistic expectations are established early on and maintained. These steps show that you care and that you know where the problem lies.

## **V. Institutional Monitoring of Student Social Media Activity**

There are various reasons why a college or university may want to keep an eye on what its students are saying in social media outlets. As noted above, students may be

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<sup>27</sup> See Anne Reeves, *Curt Schilling Goes Grizzly On Internet Trolls and Hits a Home Run*, PennLive.com (March 6, 2015), available at: [http://www.pennlive.com/living/index.ssf/2015/03/baseball\\_star\\_goes\\_grizzly\\_on.html](http://www.pennlive.com/living/index.ssf/2015/03/baseball_star_goes_grizzly_on.html).

<sup>28</sup> See Adrian Chen, *Reddit's Biggest Troll Fired From his Real-World Job; Reddit Continues to Censor Gawker Articles*, Gawker (October 15, 2012), available at: <http://gawker.com/5951987/reddits-biggest-troll-fired-from-his-real-world-job-reddit-continues-to-censor-gawker-articles>.

<sup>29</sup> See *Law Enforcement Response Guide*, Whisper, available at: <https://whisper.sh/legal>.

harassing or bullying classmates, or engaging in other illegal activity, online. And in general, because everything seems to get discussed on social media these days, posts can give school administrators a feel for what issues are concerning their students and knowledge of upcoming events.

Student athletes may give rise to special concerns, both because they may garner more publicity for themselves and the institution and because they may be subject to particular NCAA rules.<sup>30</sup> A recent survey of approximately 1000 student-athletes found that 43% spend more than an hour on social media daily, with high percentages of them posting daily to four main platforms: Facebook, Twitter, Instagram, and Snapchat.<sup>31</sup> 37% admitted they had “posted something on social media that they regret,” 48% believed Yik Yak is anonymous, and 45% stated they had no social media training.<sup>32</sup>

It is perhaps not surprising, then, that a recent survey of university athletic departments by University of Maryland journalism students found monitoring of student-athlete social media accounts to be “widespread,” with resulting sanctions for problematic posts ranging from written reprimands to loss of scholarships or suspension or dismissal from the team.<sup>33</sup> Monitoring of student athletes received even more attention after a March 2012 NCAA infractions report involving the University of North Carolina found that a member institution may have a duty to monitor social networking sites “when it has or should have reasonable suspicion of rules violations.”<sup>34</sup> The Committee on Infractions “decline[d] to impose a blanket duty ... to monitor social networking sites,” but found that “such sites should be part of the monitoring effort if the institution becomes aware of an issue that might be resolved in some part by reviewing information on a site”; that is, “if the institution receives information regarding potential rules violations, and if it is reasonable to believe that a review of otherwise publically available social networking information may yield clues to the violations, this committee will conclude that the duty to monitor extended to the social networking site.”<sup>35</sup>

Nonetheless, there are practical and legal considerations before embarking on any monitoring program.

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<sup>30</sup> For examples of publicized negative postings by student athletes, see Bentley, *supra* page 4; Mary Margaret “Meg” Penrose, *Free Speech Versus Free Education: First Amendment Considerations in Limiting Student Athletes’ Use of Social Media*, 1 Mississippi Sports L. Rev. 71, 73, 76 (2012).

<sup>31</sup> *Social Media Use of Student Athletes: 2015 Survey Results*, FH Media (Mar. 9, 2015), available at <http://www.fieldhousemedia.net/social-media-use-of-student-athletes-2015-infographic/>.

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

<sup>33</sup> Rex Santus, “*Social media monitoring widespread among college athletic departments, public records survey shows*” Spic.org (Mar. 16, 2014), available at <http://www.spic.org/article/2014/03/social-media-monitoring-widespread-among-college-athletic-departments-public-records-survey-shows>. The students made public records requests to 83 universities with NCAA Division 1 athletics programs for documents about regulation of student-athlete social media accounts. They found “at least 59 individual university athletic departments restrict student-athletes’ use of social media.” *Id.* The article also provides links to some of the relevant policies.

<sup>34</sup> NCAA, University of North Carolina, *Chapel Hill Public Infractions Report* (Mar. 12, 2012), at 12, available at [www.ncaa.com/sites/default/files/files/NC%20Public%20Infractions%20Report%20031212.pdf](http://www.ncaa.com/sites/default/files/files/NC%20Public%20Infractions%20Report%20031212.pdf).

<sup>35</sup> *Id.* at 11-12.

## A. Ways to Monitor Student Social Media

Colleges and universities currently use a wide variety of practices to regulate student social media, especially for student athletes. Some schools issue policies forbidding student-athletes from posting content “which contain offensive or foul language that could embarrass or ruin the reputation of yourself, your family, your team, the athletic department or [the school].”<sup>36</sup> Some require athletes to remove posts as determined by school administrators to be “unacceptable.”<sup>37</sup> Some schools have team-specific rules, often imposing more stringent restrictions on “in-the-spotlight teams,” like men’s football and basketball, than on other sports.<sup>38</sup> At least one team allowed Twitter accounts only with a signed agreement with the coach,<sup>39</sup> and another team prohibited social network use between midnight and 5 a.m. (on the theory that is the time period when “the kids are out, . . . drinking or doing stuff they’re not supposed to be doing”).<sup>40</sup> Other teams have precluded all use of Twitter, at least during the season.<sup>41</sup>

With regard to monitoring, schools have required athletes to allow team staff or other administrators to access their social media accounts, either by “friending” them, providing usernames and passwords, and/or using third-party monitoring technology through companies such as UDiligence and Varsity Monitor.<sup>42</sup> Schools such as University of Louisville, University of Kentucky, LSU, Ole Miss, Texas Tech, Utah State, Texas A&M, Texas, Baylor, University of Florida, New Mexico, Missouri, Oklahoma, North Carolina, and Nebraska have all reportedly used such technology, which can cost in the range of \$7,000 to \$10,000 a year.<sup>43</sup> Both UDiligence and Varsity Monitor work through apps that the athletes install on each of their social media accounts and that give the company access to the content on their accounts.<sup>44</sup> The companies then use software algorithms to search for certain terms specified by the school. The lists can cover hundreds of terms, typically related to sex, drugs, alcohol, or potential NCAA

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<sup>36</sup> Santus, *supra* note 33 (quoting Missouri State policy); see also *id.* (quoting Kent State policy allowing imposition of sanctions for “online content that isn’t in a manner befitting highly visible members of the university community”).

<sup>37</sup> *Id.* (quoting Florida State policy and also referring to Texas Tech policy).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting University of Georgia men’s basketball team agreement).

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

<sup>41</sup> See Paul Steinbach, *Schools Attempt to Control Athletes’ Social Media Use*, Athletic Business (Oct. 2012), available at <http://www.athleticbusiness.com/web-social/schools-attempting-to-control-athletes-use-of-social-media.html>; Pete Thamel, *Tracking Twitter, Raising Red Flags*, New York Times (Mar. 30, 2012), available at [http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html?\\_r=1&hp=&pagewanted=all](http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html?_r=1&hp=&pagewanted=all); J. Wes Gay, Note, *Hands Off Twitter: Are NCAA Student-Athlete Social Media Bans Unconstitutional?* 39 Florida State Univ. L. Rev. 781, 796 (2012).

<sup>42</sup> See [www.udiligence.com](http://www.udiligence.com) and [www.varsitymonitor.com](http://www.varsitymonitor.com); Thamel, *supra* note 41.

<sup>43</sup> Thamel, *supra* note 41; Adam Justice, *Kentucky Colleges Make Social Media Monitoring Mandatory*, Social Media Sun, available at <http://socialmediasun.com/kentucky-colleges-social-media-monitoring>; Jack Dickey, *Don't Say "Colt 45" Or "Pearl Necklace": How To Avoid Being Busted By The Facebook Cops Of College Sports*, Deadspin (May 24, 2012), available at <http://deadspin.com/5912230/dont-say-colt-45-or-pearl-necklace-how-to-avoid-being-busted-by-the-facebook-cops-of-college-sports>.

<sup>44</sup> Varsity Monitor claims it can monitor “all images” posted as well as text. See [varsitymonitor.com/benefits.php](http://varsitymonitor.com/benefits.php).

violations involving recruiting and benefits.<sup>45</sup> The companies email any matches to both the school and the athlete. Depending on the ranking of the term found, the alert can be sent immediately or compiled into daily emails.<sup>46</sup> The companies tout efficient 24-hour monitoring that would be impossible for schools to replicate manually.

## **B. State Law Restrictions on the Monitoring Student Social Media Accounts**

The desire and technology to monitor social media notwithstanding, an increasing number of states have imposed limitations on post-secondary schools' ability to gain access to their students' social media postings in order to address privacy concerns. Starting with Delaware in 2012, a dozen states have enacted such laws to date:

1. Arkansas: A.C.A. §6-60-104
2. California: Cal. Ed. Code § 99121
3. Delaware: 14 Del. C. § 8103
4. Illinois: § 105 ILCS 75/10
5. Louisiana: La. R.S. § 51:1954
6. Michigan: MCLS § 37.274
7. New Jersey: N.J. Stat. § 18A:3-30
8. New Mexico: N.M. Stat. Ann. § 21-1-46
9. Oregon: ORS § 326.551
10. Rhode Island: R.I. Gen. Laws § 16-103-2
11. Utah: Utah Code Ann. §§ 53B-25-201 and -202
12. Wisconsin: Wis. Stat. § 995.55

The provisions vary, but they generally forbid colleges and universities from requiring students or prospective students to provide passwords or otherwise allow access to private social media accounts. These restrictions generally do not apply to accounts offered by the school, and some of the laws explicitly make exceptions for investigations of potential rule or policy violations.<sup>47</sup> No law prohibits schools from monitoring publicly available social media information.<sup>48</sup>

Also, as of this writing in April 2015, similar legislation (SB 210) was passed by the Maryland legislature and is pending approval by the governor.<sup>49</sup> In addition to forbidding compelled access to a "personal electronic account," the bill also protects

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<sup>45</sup> For a list of UDiligence search terms acquired from a public university through a public records request, see Jack Dickey, *"Ass Ranger" To "Zoomies": The Complete List Of Things College Athletes Can't Say On Social Media*, Deadspin (May 24, 2012), available at <http://deadspin.com/5912832/ass-ranger-to-zoomies-heres-the-complete-list-of-what-college-athletes-shouldnt-say-on-twitter>.

<sup>46</sup> Steinbach, *supra* note 41.

<sup>47</sup> See, e.g., Cal. Ed. Code § 99121; §105 ILCS 75/10; ORS § 326.551(2).

<sup>48</sup> UDiligence and Varsity Monitor both advertise monitoring options that comply with state law restrictions by searching public information only.

<sup>49</sup> Mariana Viera, *Maryland Governor to Consider Student Social Privacy Bill*, Huffington Post (Apr. 10, 2015), available at [http://www.huffingtonpost.com/student-press-law-center/maryland-governor-to-consider-student-social-media-privacy-bill\\_b\\_7042374.html](http://www.huffingtonpost.com/student-press-law-center/maryland-governor-to-consider-student-social-media-privacy-bill_b_7042374.html).

institutions by explicitly providing that its language may not be construed to “create a duty requiring an educational institution to search or monitor the activity of a personal electronic account” or “make an educational institution liable for failing to request or require” access to or allow observation of such an account.<sup>50</sup> Other bills are also pending in New Hampshire, Massachusetts, and Hawaii.<sup>51</sup> Counsel should check the latest applicable authorities in their specific jurisdiction.

### C. Constitutional Concerns in Monitoring Student Social Media

Critics of institutional monitoring of student social media have argued that such surveillance may impinge both First Amendment free speech rights and Fourth Amendment privacy rights.<sup>52</sup> In a non-athletic context, at least one case has found a school’s broad search of a student’s private Facebook postings could violate the Fourth Amendment, finding a reasonable expectation of privacy in password-protected posts that were not made available to the general public and questioning school officials’ interest in private communications with another student made off-campus that did not violate any law or school policies.<sup>53</sup> However, limitations tied to regulating athletic participation may be more readily accepted, because courts have generally held that there is no right to engage in interscholastic activities, and athletics therefore are a privilege.<sup>54</sup> The argument is that students who choose to participate in extracurricular activities (and in some situations also accept scholarships and other benefits) can be subjected to “different, and often higher, standards than the general student population.”<sup>55</sup> At least one case has explicitly recognized the particular need for team unity and compared team restrictions to workplace restrictions that have been upheld.<sup>56</sup> If total bans on social

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<sup>50</sup> SB 210, available at <http://mgaleg.maryland.gov/2015RS/bills/sb/sb0210t.pdf>. Wisconsin’s law contains a similar provision. Wis. Stat. §995.55(5).

<sup>51</sup> See National Association of State Legislatures, *Access to Social Media Usernames and Passwords*, <http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx>; Associated Press, *NH may limit access to students’ social media accounts (Mar. 23, 2015)*, available at <http://hosted2.ap.org/NHCON/c26bcf5af6bd4fda84f3e73888f72aef/Article%2015-03-24-NH-XGR--Senate-Colleges-Passwords/id-e226dc32ed5645fcb966453ae4a5a8fe>.

<sup>52</sup> See Frank D. Lomonte, *Fouling the First Amendment: Why Colleges Can’t, and Shouldn’t, Control Student Athletes’ Speech on Social Media*, 9 J. Bus. & Tech. L. 1 (2014).

<sup>53</sup> See *R.S. v. Minnewaska Area Sch. Dist. No. 2149*, 894 F.Supp.2d 1128, 1142-43 (D. Minn. 2012) (denying motion to dismiss). The school district ended up settling the case for \$70,000. See Curt Brown, *ACLU wins settlement for sixth-grader’s Facebook posting*, Star Tribune (Mar. 25, 2014), available at <http://www.startribune.com/local/252263751.html>.

<sup>54</sup> See, e.g., *Davenport v. Randolph County Bd. of Educ.*, 730 F.2d 1395, 1397 (11th Cir.1984); *Walsh v. Louisiana High Sch. Athletic Ass’n*, 616 F.2d 152, 159 (5th Cir.1980); *Angstadt v. Midd-West Sch. Dist.*, 286 F.Supp.2d 436, 441-43 (M.D.Penn.2003); *Farver v. Bd. of Educ. of Carroll County*, 40 F.Supp.2d 323, 324-25 (D.Md.1999); *Peterson v. Indep. Sch. Dist. No. 811*, 999 F.Supp. 665, 674 (D.Minn.1998); *James v. Tallassee High Sch.*, 907 F.Supp. 364, 366-67 (M.D.Ala.1995), *aff’d*, 104 F.3d 372 (11th Cir.1996); *Brands v. Sheldon Cmty. Sch.*, 671 F.Supp. 627, 631 (N.D. Iowa 1987); *Haverkamp v. Unified Sch. Dist. No. 380*, 689 F.Supp. 1055, 1058 (D.Kan.1986); see also *Ryan v. California Interscholastic Federation-San Diego Section*, 94 Cal.App.4th 1048, 114 Cal.Rptr.2d 798 (2001) (finding no protectable liberty interest either).

<sup>55</sup> Penrose, *supra* note 30, at 78.

<sup>56</sup> See, e.g., *Lowery v. Euverard*, 497 F.3d 584, 596-98 (6th Cir. 2007).



media use could be justified,<sup>57</sup> less draconian measures such as monitoring would necessarily be permissible as well. Some critics of total bans on social media use by athletes agree that more limited bans (such as only for the season) would likely pass constitutional muster.<sup>58</sup> As noted above, however, content-based restrictions on student speech must still be evaluated carefully. A court may very well find that the school's concerns notwithstanding, the restrictions on student-athlete speech are unreasonably broad. Furthermore, schools should guard against equal protection challenges by making sure they are treating similarly situated students consistently.<sup>59</sup>

#### **D. Potential Duty to Act**

Another potential pitfall of undertaking affirmative monitoring is the possibility of incurring liability if a post indicating problematic behavior is overlooked or mishandled and another student suffers harm from that behavior.<sup>60</sup> In general, there are only “certain limited circumstances” in which a college may be liable to a student for the conduct of another student,<sup>61</sup> including creating the danger under which the student was harmed.<sup>62</sup> Nonetheless, in two cases arising from the Columbine High School shootings, the plaintiffs alleged that, among other things, concerned citizens had alerted county sheriffs, and/or school administrators had otherwise become aware, of disturbing posts one of the shooters had made on his website before the incident – including death threats, plans to kill people with pipe bombs, and descriptions of bombs detonated or built by the shooters – but failed to take sufficient action to prevent the attack that eventually happened at the school.<sup>63</sup> The plaintiffs brought state common law claims as well as substantive due process claims under section 1983 of the Civil Rights Act.<sup>64</sup> The court dismissed the claims, finding the web site posts to be too “vague and rambling” to forecast the attack.<sup>65</sup> However, more specific postings potentially could have given rise to an argument that the institution should have taken more protective steps. The risks are heightened where the monitors have not been thoroughly trained to recognize applicable warning signs.

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<sup>57</sup> Penrose, *supra* note 30.

<sup>58</sup> See Gay, *supra* note 41; Bentley, *supra* note 41.

<sup>59</sup> See Kayleigh R. Mayer, Note, *Colleges and Universities All Atwitter: Constitutional Implications of Regulating and Monitoring Student-Athletes' Twitter Usage*, 23 Marquette Sports L. Rev. 455, 466-68 (2013).

<sup>60</sup> See Jill Garfinkle Weitz & James A. Keller, *Student Social Media Usage: Obligations and Liabilities #AARGH*, (June 2014 NACUA Annual Conference), available at [http://www.nacua.org/lrs/NACUA\\_Resources\\_Page/SocialNetworking.asp](http://www.nacua.org/lrs/NACUA_Resources_Page/SocialNetworking.asp).

<sup>61</sup> *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189,198 (1989).

<sup>62</sup> See e.g. *Maxwell v. School Dist. Of City of Philadelphia*, 53 F.Supp.2d 787, 792 (E.D. Pa. 1999) (stating that a state actor might be liable for student on student harassment if the harm was foreseeable and fairly direct, the state actor acted in “willful disregard for the safety of the plaintiff,” there was an existing relationship between the state (or its actors) and the plaintiff, and “the state actors used their authority to create an opportunity that otherwise would not have existed for the third party’s crime to occur”).

<sup>63</sup> *Castaldo v. Stone*, 192 F.Supp.2d 1124, 1134 (D. Colo. 2001); *Ireland v. Jefferson County Sheriff's Dep't*, 193 F.Supp.2d 1201, 1210 (D. Colo. 2002).

<sup>64</sup> *Castaldo*, 192 F.Supp.2d at 1136; *Ireland*, 193 F.Supp.2d at 1215.

<sup>65</sup> *Castaldo*, 192 F.Supp.2d at 1141, 1145-46.

## E. Stored Communication Act Issues

Another issue to consider in monitoring student social media is the application of the Stored Communications Act (SCA), which prohibits accessing “without authorization a facility through which an electronic communication is provided.”<sup>66</sup> Cases have held that social media accounts are included in the electronic communications covered by the statute.<sup>67</sup> The SCA is not an issue where a student has consented to the access (such as by providing a password or installing monitoring software). There are also exceptions for communications “readily accessible to the general public”<sup>68</sup> and “conduct authorized by the person or entity providing” the service.<sup>69</sup> Accessing a student’s private password-protected social media accounts without the student’s permission, however, may give rise to liability.<sup>70</sup>

## F. A More Proactive Approach – Teaching and Encouraging Positive Social Media Use

Even if legally acceptable, there are also policy questions to consider in whether to monitor student social media accounts. Does the school have sufficient resources to devote to effective monitoring? Does it want to expend its resources in this fashion?

More fundamentally, several colleges and universities have recognized that their students need to be educated on the ramifications of social media use, both while they are in school and for their professional and personal reputations post-graduation.<sup>71</sup> Colgate University’s media relations manager, for example, provided athletes with in-person training to set a goal of how to market themselves and get noticed by recruiters or potential employers in a positive way.<sup>72</sup> Other schools also encourage their administrators to become familiar with the technologies that students are using and train their students on the university’s expectations and examples and the value of positive social media use.<sup>73</sup> Students can “brand” themselves by highlighting their individual strengths and writing with a specific purpose. Positive reinforcement is also key. For

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<sup>66</sup> 18 U.S.C. § 2701(a); see also Weitz & Keller, *supra* note 60, at 18-20.

<sup>67</sup> See *Ehling v. Monmouth-Ocean Hospital Serv. Corp.*, 961 F.Supp.2d 659, 666-69 (D.N.J. 2013); *Rodriguez v. Widener Univ.*, 2013 WL 3009736 (E.D. Pa. June 17, 2013).

<sup>68</sup> 18 U.S.C. § 2511(g); *Rodriguez*, 2013 WL 3009736 at \*8.

<sup>69</sup> 18 U.S.C. § 2701(c); see *Reichert v. Elizabethtown College*, 2011 WL 3438318 (E.D. Pa. Aug. 5, 2011) (no SCA claim for search of college-provided e-mail account).

<sup>70</sup> See *Rodriguez*, 2013 WL 3009736, at \*9 (denying motion to dismiss SCA claim for accessing Facebook images).

<sup>71</sup> See Weitz & Keller, *supra* note 60, at 20-21.

<sup>72</sup> Allie Grasgreen, *Tweet Smart, Tweet Often*, Inside Higher Ed. (Aug. 20, 2013), available at <https://www.insidehighered.com/news/2013/08/20/instead-telling-athletes-not-tweet-colgate-shows-how-social-media-can-work-them>.

<sup>73</sup> Brooke Hundley & Russell Varner (Elon University), *Re-Defining the Game, A New Rulebook for Social Media Use by Collegiate Athletes & Universities* (2014), available at <http://www.slideshare.net/elonimedia/social-mediaforathletes>.

example, the University of Washington and other schools highlight athletes' positive social media use in their own Twitter accounts.<sup>74</sup>

## **VI. Roadmap to Addressing a Student Social Media Crisis**

Following this discussion of social media, particularly as it relates to anonymous harassment/bullying, the authors wanted to provide a roadmap for responding to social media that present a crisis on campus. During such events, there is a desire to respond as quickly as possible with little time for reflection. By moving too quickly, decision-makers risk a number of negative consequences, including the failure to contemplate long-term risks. With this in mind, we provide the following action plan with the hope it might help university counsel effectively navigate any issues that arise in the context of student social media.

### **1. Step One: It's Probably Not A Crisis**

It may be helpful to first recognize that this social media issue is probably not a crisis. Yes, this will probably take some time to resolve. In fact, it is unlikely that it will satisfactorily "resolve" as much as simply and finally go away. Until that time, your institution may face intense scrutiny. The situation will require additional effort on top of your already packed schedule. This will be time-consuming and stressful, but it is probably not a crisis. It will not likely have a lasting impact.

To wit: if asked to recall other universities' or colleges' social media "crises" – how many can you remember? There were, after all, dozens that took place just last year. Social media issues are just one more issue in higher education that requires thoughtful resolution. Work through it and it will (eventually) go away.

### **2. Step Two: Identify The Potential Legal Issues**

A. Are there any free speech considerations that will impact the institution's ability to restrict or respond to speech?

(1) Are you a public institution that is subject to First Amendment law?

a. Is it protected speech? (Consider, e.g. true threats, harassment, defamation, etc. which are not protected by First Amendment.)

b. If protected speech, conduct a forum analysis to identify the steps the institution may take to respond.<sup>75</sup>

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<sup>74</sup> *Id.*; Grasgreen, *supra* note 72.

<sup>75</sup> See pages 2 - 5, *supra*, for discussion of public forum analysis.

- (2) If private, are there any institutional policies or statements that provide or appear to provide such rights? (For example, student handbooks may constitute a binding contract in some, although not most, jurisdictions.<sup>76</sup>)
  - (3) Are there any relevant state laws? (For example, California’s Leonard Law extends the speech rights provided under the First Amendment to private institutions.<sup>77</sup>)
- B. Does the speech constitute defamation of a university employee? Is this a university issue or a private issue between the speaker and the employee?
  - C. Does the speech arise in the context of a potential civil rights issue?<sup>78</sup>
  - D. Are there any contract issues that impact or instruct the institution’s response? (This might include labor agreements, student athlete agreements, etc.?)
  - E. If this arises in the employment setting, does the speech deal with “protected” and “concerted” activity under the National Labor Relations Act? If this arises in the hiring setting, are there any state laws prohibiting employers from accessing the candidate’s social media?
  - F. Does the speech implicate any NCAA rules?
- 3. Step Three: Identify Whether You Have Any Existing Policies That Cover (Permit, Restrict, Prohibit, Advise On) The Issue, Which May Form The Basis Of A Contract And/Or Due Process Complaint Or Raise Public Relations Issues.**
- A. Does the speech identify a violation of university policies, including the student code, housing contract, professional standards, etc.? Do these policies apply to online conduct?
  - B. Are there any social media policies, including policies that apply to specific populations, like student athletes or student employees?

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<sup>76</sup> *Jallali v. Nova Se. Univ., Inc.*, 992 So. 2d 338, 342 (Fla. Dist. Ct. App. 2008) *citing* *Sharick v. Se. Univ. of the Health Sciences, Inc.*, 780 So. 2d 136, 138 (Fla. 3d DCA 2000) (finding “student-university relationship is contractual in nature and that the terms of the contract may be derived from a student handbook, catalog, or other statement of university policy.”).

<sup>77</sup> That law states, in relevant part,

No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.

Cal. Educ. Code § 94367.

<sup>78</sup> See pages 7 – 9, *supra*, for discussion of institutions’ obligations to respond to harassment and bullying.

- C. Are there any free speech policies, including adoption of AAUP's Free Speech?
- D. Does this fall under your nondiscrimination / harassment policies?
- E. Are there any student employee contracts at issue?

**4. Step Four: Identify The Potential Policy Issues**

- A. Campus Climate: What is the campus climate? Does your institution have a history in this area? Does your institution have credibility? (The more credibility the institution has in this area, the stronger a position it may be able to take defending itself.)
- B. Who is on record? Has a university employee already commented on the case so as to frame the issue? How will you work with those comments?

*Related:* Do you have an employee who you suspect may be working behind the scenes to undermine the institution's work in this area (for their own political or professional gain?) Is it possible to assign a task to them, such that their success is directly tied to the positive outcome of this issue?

- C. Relevant Subject Matter Inquiry: How available, strong, and clear are the university's resources in this area? If someone has a question, can they find the answer quickly on your website? (The easier it is to navigate your website, the more quickly you will be able to dispel rumors or inaccuracies.)
- D. Student response: What is the likely response from students? Do you have an active student population that will respond in such a way as to draw more attention?
- E. Donor/alumni relations: How will this issue impact donor and alumni relations and should that be taken into consideration? How will you mitigate external pressure that may undermine your ability to act in the best interest of the institution?<sup>79</sup>
- F. Media relations: How is this likely to play in the media? Is this a national or local issue? What could push this to the next level?

**5. Step Five: Get The Stakeholders Together, Evaluate Decisions And Possible Outcomes, And Chart A Course.**

**Examples of potential action include:**

- A. Ignore the speech.

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<sup>79</sup> For guidance on this subject, see Roderick K. Danne, 's "The Role of University Counsel", 12 J.C. & U.L. 399, 399 (1985).

- B. Issue a high-level institutional response denouncing the speech, but take no specific action.
- C. If the speech is offensive / inappropriate / hateful and you can identify the speaker, respond to the conduct within the parameters established by the First Amendment, state laws or university policies, as applicable. If the issue deals with discrimination/harassment, refer to appropriate procedure/office (e.g., Title IX Coordinator, EO Director, Conduct, etc.).
- D. If an individual's health or safety is threatened or at stake:
  - (1) Notify your Behavioral Threat Assessment Team.
  - (2) Contact law enforcement on behalf of the student or community.
  - (3) Encourage the student to take action on behalf of himself/herself.
- E. Censorship: When Utica College found offensive comments on a site, that campus blocked that site from their wireless network.<sup>80</sup>
- F. Engage in nonregulatory responses:
  - (1) After a series of hateful messages were posted on an anonymous social media site, Colgate University's faculty flooded that site with positive messages.<sup>81</sup>
  - (2) When Connecticut College found highly offensive language written on bathroom walls, they cancelled classes for a day of discussion.<sup>82</sup>
  - (3) When University of Rochester saw harassing messages on a social media site, they made a demand of social media site to turn over the names, email addresses and other information that would help college identify students engaging in speech.<sup>83</sup>
  - (4) Ask resident assistants to host community meetings among their residential students to discuss the issue.

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<sup>80</sup> Hari Magge, "Colleges consider banning Yik Yak", The Daily Pennsylvanian (Mar. 15, 2015), available at <http://www.thedp.com/article/2015/03/colleges-consider-banning-yik-yak>.

<sup>81</sup> After several anonymous speakers posted racist messages on Yik Yak within Colgate's vicinity, professors decided to work together to flood the site with positive messages on the last date of class. See Kaitlin Mulhere, "The Yik Yak Take Back", Insidehighered.com. (Dec. 14, 2014), available at: [https://www.insidehighered.com/news/2014/12/15/professors-turn-yik-yak-happy-space?utm\\_source=slate&utm\\_medium=referral&utm\\_term=partner](https://www.insidehighered.com/news/2014/12/15/professors-turn-yik-yak-happy-space?utm_source=slate&utm_medium=referral&utm_term=partner).

<sup>82</sup> Ellen Wulforst, "Connecticut College cancels classes after racist graffiti found", Reuters (Mar. 30, 2015), available at <http://www.reuters.com/article/2015/03/30/us-usa-connecticut-college-idUSKBN0MQ22920150330>.

<sup>83</sup> That demand letter is available at <http://www.rochester.edu/news/pdfs/yikyak.pdf>.

- (5) Host a campus speech day in which you invite impacted individuals to discuss their experience.

**6. Step 6: Revisit the Situation and Modify as Necessary**

*“If you’re going through hell, keep going.” – Winston Churchill*

- A. Several days in, you may want to revisit the issue. Is the media around the event settling down? Alternatively, has the student’s posting sparked a larger campaign?
  - (1) If the latter, the previous approach may no longer be appropriate. It may be time to consult a larger list that include such steps as formally evaluating the institution’s processes and convening a campus taskforce to examine the issue, wherein students are invited to speak and provide feedback.
  - (2) Once the situation has settled down, the university can change its attention from public-relations management to critical self-scrutiny to determine whether/how the campus culture may have contributed to the issue. As a recent Chronicle article highlighted, an inadequate response may leave victims at risk of further harm in the future.<sup>84</sup>
- B. Meanwhile, you will continue to review any communications regarding potential lawsuits or investigations and respond accordingly, through the execution of litigation hold notices and other litigation preparedness.

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<sup>84</sup> Peter Schmidt, “Colleges Respond to Racist Incidents as if Their Chief Worry is Bad Providence, Studies Find”, Chronicle of Higher Education (April 21, 2015), available at <http://chronicle.com/article/Colleges-Respond-to-Racist/229517/>.

## **HYPOTHETICAL WITH PRACTICAL ANALYSIS**

Female student brings disciplinary proceeding against Male Student for alleged sexual assault. University finds Male Student “Not Responsible”. The Female Student’s appeal is denied. Consistent with Title IX, school informs both parties about the outcome via a letter and email. Female Student posts outcome letter on her Instagram site with the words, “I was raped, but my college said I wasn’t.” This is picked up by the local and national media, who start calling the Female Student, your President and your Title IX Coordinator.

**Step One:     Remind yourself and other colleagues that this is not a crisis.**

**Step Two:     Review Potential Legal Issues**

- A.     Title IX issue.
- B.     There are corresponding state sexual assault procedural requirements.
- C.     FERPA limits the amount of information we may provide in response.
- D.     This is a public institution that is subject to FOIA.
- E.     No threat of litigation or referral to federal agency . . . yet.

**Step Three:   Review Relevant Institutional Policies, Procedures, Etc.**

- A.     This institution does not maintain a social media policy or guidelines.
- B.     There are three disciplinary policies that speak to the Title IX issue, including (1) a student code of conduct that prohibits sexual assault, (2) a student disciplinary process that defines the process by which we adjudicate such claims; and (3) nonretaliation policy.
- C.     There is a university media policy that requires employees to direct all inquiries from the media to the university communications department, who will work with the President and General Counsel to coordinate a response.

**Step Four:   Identify Public Relationships Issues**

- A.     Campus Climate: Since rolling out its revised Sexual Assault Policy and related trainings, the institution has seen an increase in the number of reported sexual assaults. The institution has responded to each of these through a thorough investigation and, if warranted, cases have gone through the student conduct office. Those investigating and administering sexual harassment/assault cases have received training in this area.



- B. To your knowledge, no employees have spoken on record about the issue, although there is thought that a staff member may be counseling the student.
- C. Relevant Subject Matter Inquiry: We do not yet know whether our online resources are sufficient in this area and will review.
- D. Donor relations: unknown. Student is not affiliated with any other institutional organizations (e.g. sorority).
- E. Student response: We have an active student population. We expect that students will take up this student's cause.
- F. University Communications department: We expect to have extensive local coverage. Note: university is limited in its ability to defend itself or present information related to the case.
  - (1) Do we ask the student for permission to speak about the issue? Is it more important that the institution provide information that may undermine the complainant or is it more important to demonstrate respect for alleged victims of sexual violence?
- G. Other potential policy issues:
  - (1) Although the issue has been identified, the university does not yet have a social media communications strategy. Use of social media is limited – this may reduce the availability or efficacy of institution messaging.
  - (2) Is there anything that suggests the institution should review the university processes or protocols underlying the issue?

**Step Five: Meet with stakeholders, evaluate decisions and outcome, chart a course.**

Following discussion, university officials agree on the following:

- A. The institution will identify one individual to serve as the institution's spokesperson on this subject. All calls will be referred to this person. In this case, it might be helpful to have that individual be, or be as structurally close as possible, to the resident expert. (Consider whether the spokesperson should embody particular physical characteristics helpful to the specific case.)
- B. The spokesperson will (1) speak to the institution's obligations under FERPA; (2) decline to provide to the public any information about the complainant; (3) will provide information regarding institutional process; and (4) share with the media the positive steps the institution has taken in this area.

- C. We will not ask student for permission to disclose information about her case. We do not want to be seen as harassing or further victimizing student.
- D. Without any direct evidence, we will not follow up with the employee suspected of encouraging student.
- E. The institution will critically review its own electronic communications on this subject. It will revisit its own social media/website related to these issues to make sure that people with questions regarding the institutions' process can find the answers quickly.
- F. The institution will assign someone to follow the media on the subject so that it can anticipate and/or be prepared to respond to dips or spikes in the media.
- G. The institution identifies that it recently went through its annual review of its policies and procedures related to Title IX and VAWA. It will include this information in its communications with media.
- H. Although there is no threat of litigation, the university will monitor to determine whether that changes, prompting a need for litigation hold notices.

#### **Step Six: Revisit and Adjust**

- A. After five days, articles continue to run in local newspapers. The university reviewed its communications in this area and, after updating its electronic communications on this subject, the requests for information have decreased.
- B. The student has formed a student organization against sexual assault. The president of the university agrees to meet with the student organization to review their requests. Upon review, the university confirms that it is already doing the requested items.
- C. The university has received several FOIA requests for information related to the student's case. The university denies the requests, citing FERPA, but offers general information about its procedures and resources.

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2015

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# Social Media, Anonymous Speech & When Social Media Becomes the Crisis

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# SOCIAL MEDIA EXPLAINED



TWITTER

I AM EATING A #DONUT



FACEBOOK

I LIKE DONUTS



FOURSQUARE

THIS IS WHERE I EAT DONUTS



INSTAGRAM

HERE'S A VINTAGE PHOTO OF MY DONUT

You Tube

YOUTUBE

WATCH ME EATING A DONUT



LINKEDIN

MY SKILLS INCLUDE DONUT EATING



PINTEREST

HERE'S A DONUT RECIPE

last.fm

LAST.FM

NOW LISTENING TO "DONUTS"



GOOGLE+

I AM A GOOGLE EMPLOYEE  
WHO EATS DONUTS



PLEASE RESHARE! [JEFFHESTER.NET](http://JEFFHESTER.NET)

# A Discussion Presentation

# Hypothetical – Part 1

- A conservative student organization (“CSA”) at Tolerance University (TU) invites a political commentator who is known for his provocative statements about the Muslim American community. Many Muslim leaders have characterized his commentary as vitriolic and offensive.

## Hypothetical – Part 1 (cont.)

- In response, the Muslim Student Association (“MSA”) organizes a series of events to promote interfaith tolerance and recognition of Muslim culture and announces them on its Facebook page, Instagram page, and Twitter feed.
- Almost immediately, anonymous comments show up on TU’s Facebook page, YikYak, and other social media, denouncing the MSA’s programming and also the efforts of other groups joining with the MSA.

# Hypothetical – Part 1 (cont.)

- There are posts: (1) accusing the MSA of provoking religious hatred and working to divide “real” Americans from their heritage; (2) telling Muslim students to leave the University; (3) stating that Muslim Americans in general are not doing “their part” to de-radicalize young Muslim American youth; and (4) depicting the MSA group leaders in cartoons being tortured and calling on readers to take “action.” Additionally, anonymous posters provide home addresses for certain Muslim students.



## Hypothetical – Part 1 (cont.)

- The MSA and its supporters launch communication counter-attacks on the same social media websites, increasing social media coverage of the issue.
- Several Muslim students complain to University administrators that they are being subjected to a hostile environment. Two Muslim students report being verbally harassed in an off-campus store by unknown individuals.

# DISCUSSION

## Hypothetical – Part 2

- In response to requests from TU officials to take down offensive posts or close the accounts making the posts, one website operator gives partial IP addresses for some of the most offensive postings. Unfortunately, the partial IP address traces only as far back as one segment of the campus network, which corresponds to a high-rise dorm at TU that has 450 residents, including students and advisers.

## Hypothetical – Part 2 (cont.)

- One TU administrator wants to investigate all 450 residents by monitoring internet use on that segment of the network. Campus officials hope to link other social media activity to the threatening anonymous posts through whatever location/user data that might be able to be gleaned.
- The dorm residents include 45 student-athletes. Also in the dorm are several prominent student leaders whom MSA blames for the most offensive anonymous posts.

## Hypothetical – Part 2 (cont.)

- For the student athletes and student leaders, the University considers requiring them to install monitoring applications on their social media accounts as a condition of continuing to play on school teams or serve as officers in student organizations supported by the University.
- They also wish to search each student's campus email accounts (TU provides email accounts to its students but does not typically access or monitor those accounts).

# DISCUSSION

## Hypothetical – Part 3

- Despite various expressions of protest against the event, and some threats made against the speaker and any persons attending the talk, the event takes place.
- Campus administration leaders, including the President, come out in favor of holding the event as an example of the fundamental U.S. principle of free speech.

## Hypothetical – Part 3 (cont.)

- During his presentation, the pundit makes light of the uproar stemming from his appearance and criticizes the Muslim students for trying to change a “free America” into an Islamic state. A student at the presentation uploads this clip to Twitter, which goes viral before the pundit’s presentation is over.



## Hypothetical – Part 3 (cont.)

- At this point, the social media frenzy has created a real-world crisis – some students are protesting the administration’s lack of response in support of the Muslim student group; some students are complaining that this controversy is overblown; media outlets are calling, including asking for details of any related student conduct actions; Tolerance University is a trending topic on several social media platforms; and state legislators are discussing proposing a bill to criminalize “campus cyber-harassment,” despite existing state laws on the books criminalizing cyberstalking.

# DISCUSSION and Q&A