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Susan DuMont*

Campus Safety v. Freedom of Speech: An Evaluation of University Responses to Problematic Speech on Anonymous Social Media

Introduction

SOCIAL MEDIA IMPACTS HOW COLLEGE STUDENTS INTERACT, and universities are struggling with the challenges presented by problematic speech on these sites. Platforms that encourage unidentified posting, such as Yik Yak and former gossip site JuicyCampus.com, significantly increase the potential for real harm through problematic speech, including hate speech, threats of violence, sexual harassment, and other forms of damaging, anonymous speech.¹

University administrators are forced to evaluate options for responding to problematic speech on anonymous social media sites.² Given the current culture of treating the internet as the “Wild West,” it is understandable why universities may choose to ignore the sites and why response has been limited.³ On the other end of

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1. DANIELLE CITRON, HATE CRIMES IN CYBERSPACE 57–61 (2014) (exploring why individuals will say and do things anonymously online that they would not otherwise do in person or online if they were identified).

2. This comment relies heavily on federal law. It is therefore primarily focused on universities that receive federal funding. However, all institutions of higher education, including private colleges, are facing these challenges and can benefit from this analysis.

3. CITRON, *supra* note 1, at 79. See also *Request for Guidance Reminding Schools of Obligations Under Title IX and Title VI to Address Sex- and Race-Based Harassment Occurring on Yik Yak and Other Anonymous Social Media Applications*, (Oct. 20, 2015) <http://feminist.org/blog/wp-content/uploads/2015/10/OCR-Letter-re-Anonymous-Social-Media-Oct-2015.pdf> (calling for governmental guidance on university duty to respond to harassing speech online).

the spectrum, some students and campus administrators believe that banning these sites is the answer.⁴ However, both of these approaches are sorely misguided.

Universities have a duty to exercise reasonable care to minimize the risk of physical injury to students⁵ and to provide a learning environment free from harassment.⁶ However, public universities are also bound by the Constitution and student speech rights.⁷ How universities should balance these campus safety obligations and their commitment to free speech on anonymous social media sites is a complex but crucial question that must be answered. Universities should rely on case law and governmental guidance related to campus safety and in-person speech to develop a multifaceted approach to these sites in order to ensure a safe learning environment while also protecting student rights.⁸ Such an approach should include prevention efforts, reporting structures, and investigations into speech or conduct that violates campus policies or diminishes campus safety, regardless of the medium on which it takes place.⁹

I. The Evolution of Collegiate Internet Speech

Although other social networking sites and online chat tools existed previously, Facebook was invented specifically for college students, and it directly impacted how college students interact and use the internet.¹⁰ When “The facebook,” as it was originally known, launched in February of 2004, the site allowed students to make a

4. Anna Webb, *Yik Yak: Online Bullying of Free Speech? College of Idaho Tries to Ban Controversial App*, IDAHO STATESMAN (May 14, 2015), <http://www.idahostatesman.com/news/local/education/article40858806.html> (discussing the College of Idaho’s motivation to ban Yik-Yak, President Marv Henberg stated “If someone puts a racist epithet on a Latino’s door, or a black person’s door, there’s at least a potential evidence thread that can be investigated. Not with Yik Yak.”). See also Nathan Rubbelke, *Campuses ‘Symbolically’ Ban Yik Yak as Battle Over App Rages*, THE COLLEGE FIX (Oct. 21, 2015), <http://www.thecollegefix.com/post/24735/>.

5. Robert D. Bickel & Peter F. Lake, *Reconceptualizing the University’s Duty to Provide a Safe Learning Environment: A Criticism of the Doctrine of In Loco Parentis and the Restatement (Second) of Torts*, 20 J.C. & U.L. 261, 261 (1994) (“For more than ten years, the federal and state courts have been asked to recognize a duty of the college or university to exercise reasonable care to minimize the risk of physical injury to students occasioned by third parties, or by other students.”). See also *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336 (Mass. 1983) (“Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.”).

6. *Infra* notes 79–88 and accompanying text.

7. *Healy v. James*, 408 U.S. 169, 180–81 (1972); *Tinker v. Des Moines Ind. School Dist.*, 393 U.S. 503, 506 (1969).

8. *Infra* Part IV.

9. *Infra* Part IV.

10. See generally, Steve Jones, Camile Johnson-Yale, Sarah Millermaier, & Francisco Seone Pérez, *Everyday Life, Online: U.S. College Students’ Use of the Internet*, 14 FIRST MONDAY 10 (Oct. 5, 2009) <http://firstmonday.org/article/view/2649/2301>.

profile and network with other students at their host institution.¹¹ By 2007, Facebook had become the world's largest social-networking site with over 30 million users who could all connect with each other.¹² Facebook's Second Quarter 2015 Operational Highlights stated that Facebook experienced an average of 968 million daily users in June of 2015.¹³

In the following decade, platforms like Twitter, Snapchat, LinkedIn, Instagram, and other sites which allow users to connect in more nuanced ways, rounded out the social media market for college students. Snapchat, a real time photo-sharing app, has recently emerged as a heavily relied on app for collegiate communication.¹⁴ LinkedIn identifies itself as the world's largest professional network on the internet with forty million student and college graduate users.¹⁵ Instagram is a photo-based platform with over 300 million users described as "a simple way to capture and share the world's moments."¹⁶ To use these platforms, a person first creates a username and profile and then connects with other users to build an online network or community within the platform.¹⁷

Unlike Facebook and Instagram, other platforms, like former gossip site JuicyCampus.com, are based on anonymity.¹⁸ Users either create usernames that do not directly identify themselves, or in the case of Yik Yak, post without any identifier at all.¹⁹ Instead of creating an online network like Facebook and LinkedIn, Yik Yak focuses on the ability to share information without identifying the poster.²⁰ Yik Yak describes itself as a "local bulletin board," where users can "connect to and

11. Sarah Phillips, *A Brief History of Facebook*, THE GUARDIAN (July 25, 2007), <http://www.theguardian.com/technology/2007/jul/25/media.newmedia>.

12. *Id.*

13. *Facebook Reports Second Quarter 2015 Results* (July 29, 2015), <http://investor.fb.com/releasedetail.cfm?ReleaseID=924562>.

14. Karine Joly, *Should Your University SnapChat?*, UNIV. BUS. (Mar. 2015), <https://www.universitybusiness.com/article/should-your-university-snapchat> ("A survey of 1,650 self-identified 'influential' college students found that 77 percent used SnapChat daily.").

15. LINKEDIN, <https://press.linkedin.com/about-linkedin> (last visited Feb. 14, 2016).

16. KNOW MY APP, <http://www.knowmyapp.org/Details.aspx?id=2180> (last visited Feb. 11, 2016).

17. Alanna Kirschner, *Instagram 101: Understanding the Basics*, TECHLICIOUS (Jul. 31 2015), <http://www.techlicious.com/tip/instagram-101-understanding-the-basics/> ("Your username is how people recognize you on Instagram.").

18. Tyler Kingkade, *Former College Gossip Site Founder Creates Anti-Anonymous Social Media App Called Reveal*, HUFFINGTON POST (June 16, 2015), http://www.huffingtonpost.com/2015/06/16/reveal-social-media-app_n_7587708.html ("Ivester created JuicyCampus, an anonymous forum college students used to spread gossip about each other, in 2007 as a recent Duke University graduate.").

19. Carolinen Moss, *Here's What You Need to Know About Yik Yak – The Anonymous Gossip App Wreaking Havoc on High Schools Everywhere*, BUS. INSIDER (May 5, 2014), <http://www.businessinsider.com/what-is-yik-yak-2014-5> ("Yik Yak is an app that allows anyone to post anything without attaching themselves to a username (you don't even need a password to log in).").

20. Sarah Perez, *Yik Yak's Founders On The Value of Anonymous Apps*, TECH CRUNCH (May 5, 2015), <http://techcrunch.com/2015/05/05/yik-yaks-founders-on-the-value-of-anonymous-apps/>.

share with others without having to know them.”²¹ Yik Yak’s founder, Brooks Buffington, believes that the app levels the playing field because “[t]he quiet kid is judged the same as the most popular kid.”²²

Despite statements that indicate positive intentions, Yik Yak and similar platforms have created additional spaces for anonymous hate speech, sexual harassment, violent threats, and suicidal statements by students. For example, in the spring of 2015 at Syracuse University, posts on Yik Yak complained about a step show, a historically black performance art, and called the participants “monkeys,” a racial slur.²³ In November of 2015, University of Missouri students responded to a protest by black students against racism on campus by making overtly racist statements on Yik Yak.²⁴ Anonymous sites like Yik Yak have also been platforms for sexual harassment of students and faculty.²⁵ At Eastern Michigan University, students posted dozens of demeaning, crude, and sexually explicit statements on Yik Yak about their female professor during a course, which caused the faculty member to state she had been “defamed . . . sexually harassed and verbally abused.”²⁶ Campuses have also experienced threats of mass violence on Yik Yak and similar sites. At Kenyon College in Ohio, a poster proposed a gang rape at the campus’s women’s center,²⁷ and students involved in a feminist student organization at the University of Mary Washington experienced more than 700 posts threatening rape and violence against them before a leader of the group was actually murdered.²⁸ In the spring of 2015, a Johns Hopkins Student posted on an

21. *Yik Yak*, CRUNCHBASE.COM, <https://www.crunchbase.com/organization/yik-yak#/entity> (last visited Jan. 10, 2016).

22. Perez, *supra* note 20.

23. Meghan Mistry, *Racist Yik Yak Posts Considered “Hate Speech” by Syracuse*, USA TODAY (May 6, 2015), <http://college.usatoday.com/2015/05/06/racist-yik-yak-posts-considered-hate-speech-by-syracuse/>.

24. Rose Schmidt, *Mizzou African-American Football Players Join Protest for Removal of President*, USA TODAY COLLEGE (Nov. 8, 2015), <http://college.usatoday.com/2015/11/08/missouri-football-players-boycott/>. Students were originally protesting a number of race related issues at the University of Missouri including swastika that had been drawn in feces in a residence hall. A graduate student began a hunger strike, calling for the university president to resign based on his lack of response and action to the racism on campus. Students responded to the hunger strike and protests by posting the following statements on Yik Yak and a similar platform: “Why don’t black people like blow jobs? They don’t like any jobs,” “How do you starve a black guy? You hide his food stamps under his work boots,” and “Nig fest at Speakers Circle, I fucking hate Mizzou. Time to transfer.” Mike Martin, *The Dumb Racist Files: Persistent N-word Snark Proves Case, Wins Skeptics for Black Mizzou Student Protestors*, THE COLUMBIA HEARTBEAT (Nov. 11, 2015), <http://www.columbiaheartbeat.com/index.php/mizzou/1118-110715>.

25. Jonathan Mahler, *Who Spewed that Abuse? Yik Yak Isn’t Telling*, N.Y. TIMES, Mar. 9, 2015, at A1.

26. *Id.*

27. *Id.*

28. Justin Jouvenal & T. Rees Shapiro, *Feminists at Mary Washington Say They Were Threatened on Yik Yak*, WASH. POST (May 6, 2015), https://www.washingtonpost.com/local/crime/feminists-at-mary-washington-say-they-were-threatened-on-yik-yak/2015/05/06/3d8d287a-f34a-11e4-b2f3-af5479e6bbdd_story.html (it has not yet been determined if her murder is related to the online threats).

anonymous chat website, Greekrank.com, about her suicidal intentions following sorority recruitment.²⁹ These examples illustrate the types of anonymous social media postings college communities are experiencing, and the need for universities to develop appropriate, legally sound response strategies.

II. Legal Standards for Safety and Speech at Universities

Several legal standards and doctrines govern the relationship between universities and their students. Here, the most relevant include the preservation of free expression fundamentals under the First Amendment,³⁰ an assumed duty of care to provide a safe and secure campus,³¹ a federally imposed duty to warn students of safety threats under the Clery Act,³² and a federally imposed duty to provide a learning environment free from both sexual harassment under Title IX³³ and from racially motivated discrimination under Title VI.³⁴

A. Free Expression Fundamentals

Although schools may enforce content-based restrictions when speech materially disrupts classwork or involves substantial invasion of the rights of others, students retain their First Amendment rights when entering college campuses.³⁵ Universities likely have even less ability to monitor or restrict student speech that is determined to have taken place in an off-campus environment.³⁶

Citizens' First Amendment rights continue to exist when they step onto public university campuses. In *Sweezy v. New Hampshire*,³⁷ the Supreme Court decided whether the Attorney General of New Hampshire could prosecute an academic lecturer for refusing to answer questions regarding a political party. The Court ruled in favor of the faculty member and stated "[t]he essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."³⁸ The freedom of expression was further affirmed in *Papish v. Board of Curators of*

29. See *infra* notes 149–55 and accompanying text.

30. See *infra* Part II.A.

31. See *infra* Part II.B.1.

32. See *infra* notes 73–78 and accompanying text.

33. See *infra* notes 85–88 and accompanying text.

34. See *infra* notes 79–84 and accompanying text.

35. 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, 8–9 (2014).

36. *Id.* at 9–11.

37. 354 U.S. 234 (1957).

38. *Id.* at 250, 255.

University of Missouri,³⁹ where the Court held that the expulsion of a student for the publication of an offensive newspaper headline violated the student's rights, and that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"⁴⁰ The open expression of ideas is considered fundamental to the college environment and is protected under the First Amendment.

Even offensive speech, including racist speech, is protected at universities following the holding in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*.⁴¹ George Mason disciplined the Sigma Chi Chapter on campus following a racially insensitive "ugly woman" contest that the Chapter sponsored on campus.⁴² The Fraternity sued, and the Federal District Court for the Eastern District of Virginia found for the Fraternity, stating "[t]he First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas or matters some may deem trivial, vulgar or profane."⁴³ The Fourth Circuit affirmed, and the case illustrates the judicial leaning in favor of protecting student First Amendment rights against universities' efforts to regulate offensive or unpopular language through disciplinary action or speech codes.⁴⁴

On the other hand, at an educational institution, speech is no longer protected under the First Amendment and becomes actionable in order to preserve equal access to education when it is considered harassment that creates a hostile environment. Speech rises to the level of actionable harassment when it is sufficiently severe or pervasive to create a hostile environment which "interfere[s] with or limit[s] a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school."⁴⁵ The Office of Civil Rights maintains that Title VI's regulations "are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution . . . [instead they] are intended to protect students from invidious discrimination, not to regulate the content of speech."⁴⁶ Speech is a common element of harassment, but harassment must "include something beyond the mere expression of views, words, symbols or

39. 410 U.S. 667 (1973).

40. *Id.* at 670–71.

41. 993 F.2d 386, 387 (4th Cir. 1993).

42. *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 773 F.Supp. 792, 793 (E.D. Va. 1991), *aff'd* 993 F.2d 386 (4th Cir. 1993).

43. *Id.* at 795.

44. *See also*, *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 360–61, 372–73 (M.D. Pa. 2003) (where the court held for a student challenging a University speech code, granting injunctive relief and denying the university's motion for summary judgment).

45. RUSSLYNN ALI, OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER 2 (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

46. GERALD A. REYNOLDS, OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., FIRST AMENDMENT: DEAR COLLEAGUE LETTER (July 28, 2003).

thoughts that some person finds offensive. . . . [It] must also be sufficiently serious to deny or limit a student's ability to participate in or benefit from an educational program."⁴⁷ If speech rises to this level, it is no longer considered expressive activity deserving of protection under the First Amendment.

B. Campus Safety

The standards for safety and the parameters of a university's duty to students have been developed through both case law and legislation.⁴⁸ The current understanding of campus safety expands a university's duty beyond the requirement of maintaining a physically safe campus, and further requires campuses to provide a safe learning environment that is free from harassment that creates a hostile environment.⁴⁹

1. University Duty to Student Safety Developed Through Case Law

Although universities have neither a custodial relationship with students nor an affirmative duty to students, courts have identified occasions where universities do have a duty to students related to campus safety.⁵⁰

Prior to the late 1970's, an era referred to as *en loco parentis*, universities were understood to have a stand-in parental role that constituted a legal special relationship with students, and therefore owed students an affirmative duty of care.⁵¹ However, the standard changed in *Bradshaw v. Rawlings*,⁵² as the court recognized the changing role of universities and a new understanding of college student maturity and independence. Universities were no longer understood to have an affirmative duty of care to their students.⁵³ This standard was broadened in *Rabel v. Illinois*, which confirmed that universities do not have a custodial

47. *Id.* (providing the reasonable person standard for the evaluation of the conduct).

48. *See infra* Parts II.B.1–2.

49. *Supra* notes 45–47, 79–88 and accompanying text. *See also*, Gina Maisto Smith & Leslie Marie Gomez, *Effective Implementation of the Institutional Response to Sexual Misconduct Under Title IX and Related Guidance*, HIGHER EDUC. COMPLIANCE ALLIANCE 3 (June 19–22, 2003), file:///C:/Users/Susan/Google%20Drive/JBTL/Comment/Raw%20Sources/Effective%20Implementation%20of%20the%20Inst.%20Res.%20To%20Sexual%20Misconduct%20Under%20Title%20IX%20and%20Related%20Guidance.pdf (“Colleges and universities are tasked with providing a safe and secure educational environment. In the arena of sexual harassment and misconduct, schools are responsible for the prevention, investigation, evaluation and adjudication of allegations . . .”).

50. *Infra* notes 56–64 and accompanying text.

51. *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979).

52. *Id.* at 137–43.

53. *Id.* at 138.

relationship with students and do not assume a duty to assure their safety.⁵⁴ This was further affirmed by *University of Denver v. Whitlock*, where the court declined to impose a duty to control the recreational choices of its students.⁵⁵

However, universities do have a duty to provide campus safety based on the doctrine of special relationship and the assumed duty of care. In *Mullins v. Pine Manor College*, a student brought suit after she was abducted from her dorm room and raped on campus.⁵⁶ The Massachusetts Supreme Judicial Court recognized a duty arising from existing social values, customs, and the student-college relationship.⁵⁷ The court determined that colleges have a duty to provide campus security, and also that a “duty voluntarily assumed must be performed with due care.”⁵⁸ At the time of the assault, Pine Manor College employed a very small number of security officers but failed to have any supervisory standards for the guards.⁵⁹ The court concluded that the college had undertaken a duty to provide security, that students and their parents relied on the security, and that the evidence supported a jury finding that failure to provide adequate security was a breach of the duty of care owed to Mullins and constituted negligence.⁶⁰

Universities may also assume a duty towards students based on warnings and knowledge of potential danger. In *Furek v. Delaware*, a University of Delaware (UD) student brought suit against the university following a serious injury caused by fraternity hazing.⁶¹ The Delaware Supreme Court found that UD’s policy on hazing and repeated, targeted warnings to students about the hazards of hazing “constituted an assumed duty” to protect students from injuries suffered as result of hazing.⁶² However, not all courts agree, and the recent holding by the Indiana Supreme Court in *Yost v. Wabash College* affirmed this ambiguity,⁶³ holding that no

54. 514 N.E.2d 552, 560–61 (Ill. App. Ct. 1987) (“Upon consideration, we do not believe that the university, by its handbook, regulations, or policies voluntarily assumed or placed itself in a custodial relationship with its students, for purposes of imposing a duty to protect its students . . . It would be unrealistic to impose upon a university the additional role of custodian over its adult students and to charge it with the responsibility for assuring their safety and the safety of others.”).

55. 744 P.2d 54, 55 (Colo. 1987).

56. 449 N.E.2d 331, 334 (Mass. 1983).

57. *Id.* at 335. (“[T]he college community itself has recognized its obligation to protect resident students from the criminal acts of third parties. This recognition indicates that the imposition of a duty of care is firmly embedded in a community consensus. This consensus stems from the nature of the situation. The concentration of young people . . . creates favorable opportunities for criminal behavior. The threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to ensure the safety of its students.”).

58. *Id.* at 336.

59. *Id.* at 334.

60. *Id.* at 336–38.

61. 594 A.2d 506, 509 (Del. 1991).

62. *Id.* at 520.

63. 3 N.E. 3d 509, 513 (Ind. 2014).

special relationship was created by the policies prohibiting hazing and the university's hazing prevention efforts because "universities should be encouraged, not disincentivized" to have policies and programs regarding campus safety and hazing prevention.⁶⁴

The state of the law regarding a university's duty to respond to suicide threats and proactively prevent suicide is currently unclear but is believed to be expanding.⁶⁵ Historically, the duty to prevent suicide has been very narrow and limited to the special relationship between patients and health care providers or those entrusted with the care of another.⁶⁶ Elizabeth Shin's suicide at the Massachusetts Institute of Technology (MIT) in 2000 and the subsequent lawsuit brought by her parents against MIT, challenged this historical standard and expanded the possible reach of the special relationship between a university and its students.⁶⁷ Shin's parents brought a negligence suit against MIT for the failure to prevent Shin's suicide.⁶⁸ In response to the suit, an MIT administrator stated "[i]f we don't [win], it has implications for every university in this country."⁶⁹ The Massachusetts Superior Court denied MIT's motion for summary judgment on Shin's parents' claim of negligence against MIT administrators for the failure to prevent their daughter's suicide.⁷⁰ This decision "does suggest that the legal landscape has changed' and that universities and non-clinician administrators are entering an era where potential liability is more expansive."⁷¹ Shin's case was subsequently settled out of court.⁷²

2. Federally Imposed Duties Related to Student Safety

The federal government has also imposed campus safety standards on all institutions that accept federal funding through the Clery Act, Title VI, and Title IX.

64. *Id.* at 518.

65. See generally Heather E. Moore, *University Liability When Students Commit Suicide: Expanding the Scope of the Special Relationship*, 40 IND. L. REV. 423 (2007) (noting the increased prevalence of suicide on college campuses and analyzing the legal implications of the litigation following Shin's suicide at MIT).

66. *Id.* at 428.

67. *Id.* at 423–24.

68. *Id.* at 424.

69. *Id.*

70. *Shin v. Mass. Inst. of Tech.*, No. 02-0403, 2005 Mass. Super. LEXIS 333, 333 (June 27, 2005).

71. Moore, *supra* note 65, at 424 (quoting DAMON SIMS, LEGAL ISSUES IN STUDENT AFFAIRS (Indiana Student Affairs Assoc., Indiana University-Bloomington, Oct. 19, 2005)).

72. Rob Capriccioso, *Settlement in MIT Suicide Suit*, INSIDE HIGHER ED (Apr. 4, 2006), <https://www.insidehighered.com/news/2006/04/04/shin> ("Everyone was watching. But administrators who hoped to gain clarity from one family's suit against employees of the Massachusetts Institute of Technology in regard to how to balance concerns over liability issues with concerns for students' mental health were left to wait for another day—and, almost certainly, another lawsuit.").

CAMPUS SAFETY V. FREEDOM OF SPEECH

The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act⁷³ (Clery Act), named in memory of Jeanne Clery,⁷⁴ provides students the right to knowledge regarding campus crime and threats to safety.⁷⁵ The Act requires that universities disclose campus safety policies and crime rates to students and staff, and also mandates that the school provide warnings to students when there is a threat to campus safety.⁷⁶ The Act includes detailed requirements for which crimes must be reported.⁷⁷ Despite a growing awareness of the significant harms experienced by online harassment, online threats and harassment are not included in these reporting requirements.⁷⁸

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance including universities.⁷⁹ Verbal conduct that constitutes harassment is considered a form of discrimination.⁸⁰ Although offensive speech, including hate speech, is protected under the First Amendment, speech rises to the level of actionable harassment when it becomes discriminatory.⁸¹ Speech rises to this level and creates a hostile environment when it is “sufficiently severe, pervasive, or persistent so 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.”⁸² If harassment based on race, color, or national origin creates a hostile environment, the institution must respond promptly and adequately in order to avoid violating Title VI.⁸³ A student who experiences discrimination on the basis of race, color or national origin at an institution that receives federal funds may file a complaint with the U.S. Department of Education’s Office of Civil Rights under Title VI.⁸⁴

The federal government further impacted collegiate safety through Title IX. Title IX prohibits sex-based discrimination in educational institutions that receive

73. 20 U.S.C. § 1092(f)(15).

74. CLERY CENTER FOR SAFETY ON CAMPUS, <http://clerycenter.org/our-history>, (last visited May 5, 2015). After Clery was raped and murdered by a fellow student during her first year at Lehigh University in April of 1986, her parents were alarmed to learn about other acts of campus violence prior to her enrolling as a student. *Id.*

75. *Id.*

76. *Id.*

77. 20 U.S.C. § 1092(f).

78. 20 U.S.C. § 1092(f).

79. 28 C.F.R. § 42 (1964).

80. REYNOLDS, *supra* note 46.

81. *Id.*

82. ALI *supra* note 45, at 2.

83. *Id.* at 1.

84. OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., EDUCATION AND TITLE VI, <http://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html>.

federal funding.⁸⁵ This includes more than 7,000 postsecondary institutions, including the activities and programs supported by the school.⁸⁶ The language of Title IX is brief but it has wide-reaching effects. Although Title IX has historically been thought of as a sports equity law, it also addresses admittance policies and practices, as well as the prevention and remediation of sexual harassment.⁸⁷ Guidance from the Office of Civil Rights has been provided regularly since the passage of Title IX in order to deliver significantly more detail on the obligations and duties of educational institutions under Title IX related to sexual harassment and sexual violence.⁸⁸ These federal guidance documents and related case law can inform effective and legally sound university responses, regardless of whether the problems occur in a campus residence hall or on a social media platform.

III. Current Primary Response Strategies: Ineffective Approaches of Ignoring and Banning Sites and Platforms

Although a growing number of schools are responding to individual and specific instances of problematic speech on anonymous social media platforms, many campuses are ignoring these platforms.⁸⁹ While university administrators primarily respond by looking away, students and administrators on a small number of campuses are taking steps to ban the app from their campuses.⁹⁰ By choosing not to respond to problematic speech on anonymous social media sites, universities are missing an opportunity to prevent possible harm that may be caused by this speech,

85. 20 U.S.C. §106.1 (1975).

86. OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., TITLE IX AND SEX DISCRIMINATION (Apr. 2015), http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

87. *Id.* ("Some key issue areas in which recipients have Title IX obligations are: recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education; and employment.").

88. The Office of Civil Rights issued a guidance document regarding Title IX on Apr. 29, 2014 (clarifying the legal duties outlined in the Apr. 4, 2011 Dear Colleague Letter and suggesting proactive efforts schools may take to prevent sexual violence). CATHERINE E. LHAMON, OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 1 –2 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. The Dear Colleague Letter issued on April 4, 2011 explains that the requirements related to sexual harassment under Title IX also apply to sexual violence, and defines sexual violence. RUSLYNN ALI, OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER 1 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>. Several other guidance documents have also been issued in recent years, including Dear Colleague Letters issued on June 25, 2013 and April 20, 2010. *Reading Room (eFOIA Index)*, OFFICE OF CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX>.

89. *Request for Guidance Reminding Schools of Obligations Under Title IX and Title VI to Address Sex- and Race-Based Harassment Occurring on Yik Yak and Other Anonymous Social Media Applications*, (Oct. 20, 2015) <http://feminist.org/blog/wp-content/uploads/2015/10/OCR-Letter-re-Anonymous-Social-Media-Oct-2015.pdf>.

90. *See supra* note 4 and accompanying text.

failing to remedy harm caused by the speech, and potentially failing to fulfill both assumed and federally assigned duties of care to their students.

A. Attempting to “Ban” - An Impossible and Unconstitutional Effort

A small but growing number of universities have attempted to institute campus “bans” on Yik Yak,⁹¹ and both high school⁹² and college students have attempted to ban the app on campuses.⁹³ St. Louis University, along with a small number of other campuses, have also “symbolically” banned Yik Yak from campus.⁹⁴ The app has been banned on the college network because it was “found to violate the university’s appropriate use policy” following concerns about sexual and racial harassment, but students can still access the app on their smart phones through their wireless providers.⁹⁵ The College of Idaho, a small private college, banned the app by building a geofence, a “virtual boundary around a real-world geographical area,”⁹⁶ to prohibit the app on campus. However, even with a ban in place on campus, students are still free to access the app from nearby off-campus properties.⁹⁷ Although Yik Yak has an “[a]sk nicely and we’ll build it for you” policy for building a geofence to disable the technology around primary and secondary schools, the company will not build one around a college campus.⁹⁸ Further, while bans and geofencing may work for younger students, the geography of college students’ lives is far more complex and does not begin or end at campus boundary lines, but is instead deeply tied to the internet.⁹⁹ Speech that happens off campus, including on the internet, affects the campus environment and vice versa and must be treated as such. Finally, banning one of the many platforms that present these issues does not

91. See *supra* note 4 and accompanying text.

92. Elizabeth Long, *Petitioning Yik Yak Tyler Droll and Brooks Buffington Shut Down the app “Yik Yak”*, CHANGE.ORG (Oct. 27, 2015) <https://www.change.org/p/tyler-droll-and-brooks-buffington-shut-down-the-app-yik-yak> (where a high school student petitioned Yik Yak’s founders to make changes to the app to prevent bullying or remove it from the market).

93. Ryan Chapin Mach, *Why Your College Campus Should Ban Yik Yak*, HUFFINGTON POST (Oct. 3, 2014), http://www.huffingtonpost.com/ryan-chapin-mach/why-your-college-campus-should-ban-yik-yak_b_5924352.html.

94. Nathan Rubbelke, *Campuses ‘Symbolically’ Ban Yik Yak as Battle Over App Rages*, THE COLLEGE FIX (Oct. 21, 2015) <http://www.thecollegefix.com/post/24735/>.

95. *Id.*

96. TECHOPEDIA, <https://www.techopedia.com/definition/14937/geofencing> (last visited Feb. 18, 2016).

97. Josh Logue, *Who Should Prevent Social Media Harassment?*, INSIDE HIGHER ED (Oct. 22, 2015) <https://www.insidehighered.com/news/2015/10/22/colleges-face-new-pressure-monitor-social-media-site-yik-yak>.

98. *Geofence Request*, YIKYAK, <https://www.yikyak.com/support>.

99. CITRON, *supra* note 1, at 102 (“When we connect to the Internet via our cell phones, computers, or tablets, we do not enter a separate space. Networked interactions are embedded in real life.”).

solve the underlying problem, and it presents concerns about censorship and limiting students' First Amendment speech rights.

Even if banning the app was a feasible response, banning Yik Yak and similar social media platforms is unlikely to pass the First Amendment scrutiny test because such a ban would likely constitute restricting content-based speech off-campus.¹⁰⁰ Off-campus speech is typically protected by the First Amendment, and content-based constraints are viewed with deep constitutional skepticism.¹⁰¹ Although some problematic speech occurs on social media platforms like Yik Yak, other speech takes place alongside it that cannot be restricted because "[o]nly the narrowest subset of speech is categorically unprotected by the First Amendment, including 'true threats' to commit violence, the incitement of imminent unlawful activity, or 'patently offensive' sexual material that is so lacking in any redeeming value as to be legally obscene."¹⁰² Although universities have not yet faced constitutional challenges to policies that limit social media use by students, these policies are considered ripe to fail if challenged.¹⁰³

Finally, even if a complete ban on a specific app was feasible and constitutionally sound, it would be impossible to truly address the problem of anonymous problematic speech on social media via site specific bans. Given the diverse forms of social media and the constantly changing landscape of social media, this approach amounts to an internet-based game of whack-a-mole. Between 4chan/b, greekrank.com, campusabc.com, anonymous Twitter handles, and the constantly growing list of anonymous based social media sites and apps, Yik Yak is just the app of the moment among the many platforms that allows and encourages this type of speech.

B. Choosing to Look Away: Failing in Federal and Moral Duty to Campus Safety

Most universities are currently ignoring the content on anonymous social media sites, including when posts are brought to their attention, because staff and administrators view monitoring or responding to these sites as outside of the bounds of their campus roles.¹⁰⁴ This option will certainly not infringe on freedom

100. LoMonte, *supra* note 35, at 32.

101. *Id.* at 4 (citing *R. A. V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)).

102. *Id.* at 5.

103. *Id.* at 32 ("If analyzed under the existing framework applicable to student First Amendment rights, the bulk of colleges' first-generation responses to unwelcome speech on social media will flunk constitutional scrutiny.").

104. In response to the idea of the Department of Education providing guidance on responding on how to monitor and respond to Yik Yak, one campus staff member stated, "I 'monitor' YikYak all the time when I'm bored and need to kill a few minutes. . . . Now back to my actual job. . .[sic]" Teena M. Johnson, *NASPA Fraternity and Sorority Knowledge Community*. FACEBOOK, (Oct 22, 2015, 11:24AM), <https://www.facebook.com/groups/naspafrskc/>.

of speech rights as it does not attempt to limit or respond to any content. Additionally, not responding to this speech is closely aligned with the ideal of higher education as a safe haven for free expression in order to support a “central mission . . . to nurture and preserve a learning environment that is characterized by competing ideas, openly discussed and debated.”¹⁰⁵ However, by ignoring these sites, universities may fail to fulfill their duty to students regarding campus safety and will likely fail to fulfill their duties under Title IX and Title VI, as well as fail to respond to self-harm statements.

By ignoring Yik Yak and related sites, universities may fail to satisfy their duties related to physical campus safety. A number of campuses have experienced threats of mass violence on anonymous sites.¹⁰⁶ Under the Clery Act, credible threats to campus safety require universities to notify students of the danger.¹⁰⁷ Failure to respond to threats posted on Yik Yak may violate the Clery Act if the threats are deemed credible and the school fails to fulfill its duty to warn. Campuses have also experienced specific threats of targeted violence against students. For example, Grace Rebecca Mann, a student and campus leader of Feminists United at the University of Mary Washington, was killed in April of 2015.¹⁰⁸ She and other members of her student organization had been the subject of violent threats on Yik Yak, including a number that threatened to rape or kill members of the group.¹⁰⁹ University President Richard Hurley received harsh criticism based on the University’s failure to prevent Mann’s death, despite repeated reports by Mann and other members of the group that they felt unsafe.¹¹⁰ This failure to prevent Mann’s death in the face of ongoing threats may constitute a breach of the assumed duty of care.¹¹¹

Further, by ignoring sexual harassment on these sites, universities may fail to fulfill federally imposed duties under Title IX. Mann’s murder at Mary Washington further illustrates the room for allegations of fault that universities face under Title

105. Arthur L. Coleman, Jonathon R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom From Discrimination On University Campuses*, 23 J.C. & U.L. 91, 99 (1996).

106. Cyrus Farvivar, *Want Attention and Jail Time? Post a Violent Threat on Yik Yak*, ARS TECHNICA (Oct 14, 2015), <http://arstechnica.com/tech-policy/2015/10/want-attention-and-jail-time-post-a-violent-threat-on-yik-yak/>. See also Tami Abdollah, *Yik Yak Isn’t So Anonymous, Turns Data Over to Police*, HUFFINGTON POST (Nov. 12, 2015), http://www.huffingtonpost.com/entry/yik-yak-isnt-so-anonymous-turns-data-over-to-police_us_5644a2d7e4b060377347d492.

107. See *supra* note 76 and accompanying text.

108. Justin Jouvenal, *Mary Washington President Defends His Handling of Yik Yak Threats*, WASH. POST (June 9, 2015), https://www.washingtonpost.com/local/crime/president-of-mary-washington-defends-handling-of-yik-yak-threats/2015/06/09/d8b08f68-0ec0-11e5-aded-e82f8395c032_story.html (Mann’s housemate has been charged with her murder).

109. *Id.*

110. *Id.*

111. See *supra* notes 56–60 and accompanying text.

IX, should they choose to ignore sexual harassment on Yik Yak. Mann and other members of her student organization believe they were targeted specifically based on their gender, and their feminist activism related to sexual assault prevention and campus groups.¹¹² Following Mann's death, Feminists United filed a federal complaint with the U.S. Department of Education alleging that the women were subjected to "sex-based cyber assaults" and that Mary Washington failed to adequately respond to the threats made against the students.¹¹³

Similarly, by ignoring hate speech on these sites, universities may fail to fulfill their duties under Title VI. A single offensive statement alone, such as the one made at Syracuse using the term "monkeys" to refer to participants in the university step show,¹¹⁴ is unlikely to trigger any duties under Title VI. On the other hand, statements that are sufficiently pervasive or severe so as to interfere with a student's ability to access and benefit campus programs rise to the level of actionable discrimination under Title VI and universities must respond. The numerous racially motivated posts on Yik Yak that occurred at the University of Missouri during campus protests regarding race and inclusion illustrate the type of speech that could rise to this level.¹¹⁵

Although suicide does not on its face affect campus safety in the way that mass violence or harassment can, it is a serious campus health and safety concern. At a minimum, universities miss an opportunity to proactively respond to mental health crises, and at the extreme end, may create liability in failing to adequately respond to suicide threats. Approximately 1,100 college students die annually from suicide, making it the second leading cause of death among college students,¹¹⁶ and therefore an important issue for university administrators. By choosing to ignore statements made on Yik Yak and similar sites, universities are missing the opportunity to engage with students on mental health and self-harm where students are having these conversations.¹¹⁷ On the other end of the spectrum, if a student discloses an

112. Jouvenal & Shapiro, *supra* note 28.

113. Feminist Press Release, Press Release: Feminist Groups File Title IX Complaint Against University of Mary Washington (May 7, 2015), <https://feminist.org/blog/index.php/2015/05/07/press-release-feminist-groups-file-title-ix-complaint-against-university-of-mary-washington/> ("The complaint charges university administrators with 'systemic failure to protect students from a sexually hostile school environment, from sex-based cyber assaults, and from threats of physical and sexual violence and from the University's failure to take immediate effective action to eliminate the sexually hostile environment, prevent its recurrence, and address its effects.'").

114. *Supra* note 23 and accompanying text.

115. *Supra* note 24 and accompanying text.

116. Allyson Sherwin, *Suicide if the Second Leading Cause of Death Among College Students*, THE MANEATER (Oct. 8, 2015), <http://www.themaneater.com/stories/2015/10/8/suicide-second-leading-cause-death-among-college-s/>.

117. Darcie Moran, *U-M Community Bands Together After Suicidal Note on Yik Yak*, MICH. LIVE (April 26, 2015), http://www.mlive.com/news/ann-arbor/index.ssf/2015/04/u-m_community_bands_together_a.html (After a suicidal statement was posted on Yik Yak, students responded to the poster in an attempt to prevent the

intent to commit suicide on these platforms in such a way that a university had knowledge or should have had knowledge about the intention, the institution may find themselves liable under the increasing scope of the special relationship as it is believed to have been expanded following Elizabeth Shin's suicide.¹¹⁸

Finally, by ignoring the problematic speech on these sites, universities are failing to recognize the significant impact that the internet has on students and their learning environment. In her book *Hate Crimes in Cyberspace*, Danielle Keats Citron, a Professor of Law at the University of Maryland Francis King Carey School of Law and legal expert in online harassment, identifies the significant impact the internet has on day-to-day life offline.¹¹⁹ University administrators may believe the mistaken cultural perception that online harassment will have less impact than in-person harassment, and that there should be less regulation of the internet than in-person interactions.¹²⁰ However, online harassment is just as significant, can travel more widely at a more rapid rate, and can follow a student into the future more easily than in-person harassment.¹²¹ Today's higher education community is intimately connected to social media and educational internet sites such as Blackboard,¹²² OrgSync,¹²³ and other platforms.¹²⁴ If universities respond to harassing speech by encouraging victims to reduce their use of the internet, it may inadvertently impact students' ability to fully engage in the educational environment.¹²⁵

suicide, and also planned an in person gathering to show support, which was also attended by the Dean of Students.).

118. *Supra* notes 65–71 and accompanying text.

119. CITRON, *supra* note 1, at 20.

120. *Id.* at 20 (“The notion that more aggression should be tolerated in cyberspace than in real space presumes that virtual spaces are cordoned off from physical ones.”). *See generally, id.* ch. 3 (discussing the social perceptions of the internet).

121. *Id.* at 66–72 (discussing the challenge victims face when attempting to remove content from the internet because of how quickly and how far information, including false and harassing statements, can spread through cyber-space).

122. *Who We Are*, BLACKBOARD.COM, <http://www.blackboard.com/about-us/who-we-are.aspx> (last visited Feb. 18, 2016) (“Of the Top 50 Times Higher Education Reputation Ranking in 2014, 80% of the world’s top academic institutions work with [blackboard].”).

123. *Build an Online Community for Your Campus*, ORGSYNC.COM, http://www.orgsync.com/what_is_orgsync (last visited Feb. 18, 2016) (“OrgSync creates an online community for campus that helps departments, programs, and all member-based organizations streamline processes and drive engagement.”). Over 450 college campuses utilize OrgSync to support student engagement and learning. *Meet the Extended OrgSync Family*, ORGSYNC.COM, http://www.orgsync.com/our_customers (last visited Feb. 18, 2016).

124. *See supra* notes 14–16 and accompanying text.

125. CITRON, *supra* note 1, at 37–43 (discussing the common responses to cyber harassment that victims should “turn off” their computers, and the cost for victims who choose to disengage with the internet).

IV. Universities Should Recognize the Harm Caused by Problematic Speech on Anonymous Social Media, Engage in Prevention Efforts, Policy Development, Response Strategies and Investigations, and Undertake Efforts to Remedy the Effect of the Speech on the Learning Environment

In order to respond effectively, universities must first reverse the assumption that it is impractical, or even impossible, to respond to anonymous internet-based speech. Rather, for any problematic speech, universities should assess if a response would be warranted if the speech were written on a white board on the door of a student's dorm room.¹²⁶ If so, then an understanding of the internet as an extension of campus culture and student life requires that response is warranted on the internet as well. Relying on federal guidance related to Title IX, Title XI, and the Clery Act, this section recommends that in order to best respond to problematic speech on anonymous social media sites, universities should develop consolidated response efforts, a reporting mechanism, a plan to investigate and respond to problematic speech, efforts to remedy the harm caused by such speech, a communication plan for threats to campus safety, and prevention efforts to reduce occurrences of problematic speech on anonymous social media sites.

A. Recognize the Harm Caused by Problematic Speech on Anonymous Social Media

Higher education professionals have articulated the fear that by responding to the issues on these platforms, or by regularly “monitoring” and responding to these sites, universities expose themselves to additional assumed duties and further liability.¹²⁷ This fear drives the motivation to ignore these sites. However, this rationale is the reason for “should have known” language in standards of care. Higher education professionals are fully aware that problematic, harmful speech is occurring on these sites, but are choosing to not look or respond for fear of “knowing.” This is akin to avoiding instating hazing prohibitions, despite knowledge that hazing is likely happening in student groups, in order to avoid liability when students are harmed by hazing. Although plaintiffs have attempted to create liability by arguing that prohibitions and prevention efforts create a duty, the

126. Threats and hate speech being written on dorm room white boards is a not uncommon campus conduct issue. This example is regularly used as an example of the challenges presented by anonymous problematic speech. See *supra* note 4 (where speech on Yik Yak is compared to slurs written on a student's door).

127. E-mail from campus based student affairs professional, to Susan DuMont, Student, Univ. of Md. Sch. of Law (Feb. 2, 2016, 11:32 EST) (on file with author, used on the condition of anonymity). (“I [t]hink that monitoring any form of social media can be a liability. Some professionals on my campus are hesitant to engage with students via social media because they fear liability associated with potential post. The depth and breadth of social media outlets is significant and if an institution opted to monitor posts on sites, it could become a full time job. If an institution chooses to address one incident of inappropriate speech or concerning behavior via social media, it sets a precedent for all future concerning posts to be addressed.”).

Indiana Supreme Court addressed this in *Yost v. Wabash College*.¹²⁸ The court stated that colleges should be encouraged to provide education and policies, and to impose liability on these facts would disincentivize such work.¹²⁹

Although response to anonymous internet-based speech may feel more complicated than responding to in-person student conduct, university administrators should stop burying their heads in the sand. They should instead employ a multifaceted approach in order to adequately respond to the legal and social challenges presented by problematic speech on these platforms. By looking to federal guidance issued regarding Title IX and the Clery Act, as well as to case law, universities can develop a legally and socially sound prevention and response strategy to address the most frequent situations that arise on these sites.

The Title IX framework for educating, preventing, and responding to sexual harassment provides a strong starting point for universities to look at when considering what elements are necessary in a holistic response.¹³⁰ Under Title IX, schools have a responsibility to address sexual harassment, including “a responsibility to respond promptly and effectively. If a school knows or reasonably should know about [harassment] that creates a hostile environment, the school must take immediate action to eliminate the [harassment], prevent its recurrence, and address its effects.”¹³¹ Although specifically written for responding to sex discrimination including sexual harassment, these elements provide a strong framework for responding to any conduct that creates a hostile environment or prohibits equal access to educational programs. The guidance documents further delineate procedures that must be met by all schools, including that every institution must have and distribute a policy against sex-based discrimination, have

128. 3 N.E.3d 509, 516–17 (Ind. 2014).

129. *Id.* at 518 (“Wabash’s policies and investigations with respect to hazing do not rise to the level of a specific undertaking that demonstrate a special relationship between Yost and Wabash so as to justify the imposition upon Wabash of a gratuitously assumed duty to protect Yost from hazing. To the contrary, colleges and universities should be encouraged, not disincentivized, to undertake robust programs to discourage hazing and substance abuse. To judicially impose liability under a theory of gratuitously assumed duty is unwise policy and should be cautiously invoked only in extreme circumstances involving a negligently performed assumed undertaking—circumstances not here present.”).

130. The Office of Civil Rights and the Department of Education have provided significant guidance that provides both broad and specific interpretations on the reach and understanding of Title IX and university duty to prevent and remedy harassment. The expansive scope of guidance, and the recent growing attention being paid to university duty under Title IX, making Title IX an excellent starting point for an analysis. *See supra* note 87.

131. KNOW YOUR RIGHTS: TITLE IX PROHIBITS SEXUAL HARASSMENT AND SEXUAL VIOLENCE WHERE YOU GO TO SCHOOL, OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC. 1 (Apr. 2, 2011), <http://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html>.

a Title IX Coordinator, have procedures for filing complaints, and make the procedures known to the student body.¹³²

B. Develop and Distribute Comprehensive Policies

Universities should start with clear and widely distributed policies, just as they have for other types of prohibited campus behaviors. Although speech codes have widely been struck down as unconstitutional, universities do have standards and codes of student conduct which typically include policies against sexual harassment and threats of violence against others.¹³³ These policies should be updated to clarify that any speech that violates these policies in person will also violate the policy if posted online. These policies are widely distributed to students and are typically posted online for all students and community members to access, along with other campus conduct documents, including the notice of nondiscrimination which is required to be distributed under Title IX.¹³⁴

C. Consolidate Response Efforts

Next, as is the case for other types of campus conduct issues, a campus administrator should be named as the point person for efforts related to problematic anonymous speech.¹³⁵ University appointment of a designated administrator allows one person to coordinate the institution's response and to "monitor outcomes, identify and address any patterns, and assess effects on the

132. RUSSLYNN ALL, OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER 6 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

133. E.g., *Harvard College Handbook for Students*, HARVARD UNIV., 1 (2015), <http://handbook.fas.harvard.edu/book/harassment> ("Recognizing that harassment, including on the basis of race, sex, sexual orientation, and gender identity, constitutes unacceptable behavior, the University, the Faculty of Arts and Sciences, and the Faculty Council have issued a number of documents setting forth the position of the College on these matters, as well as the procedures that are available to students who believe that they have been the object of such harassment."); *University of Maryland Sexual Misconduct Policy and Procedures*, UNIV. OF MD, 2 (Oct. 1, 2015), http://www.umd.edu/ocrsm/files/OCT2015_VI-1_60A_University_of_Maryland_Sexual_Misconduct_Policy_FINAL%20.pdf ("Sexual misconduct is a broad term used to describe a range of behavior, including sexual harassment . . . Sexual misconduct will not be tolerated. It corrupts the integrity of the educational process and work environment, and violates the core mission and values of the University."); *Threats and Acts of Violence Policy*, GEORGE WASH. UNIV., 1 (Sept. 30, 2014), <http://my.gwu.edu/files/policies/Threats%26ViolenceFINAL.pdf> ("The university prohibits all threats and acts of violence on its campuses and other property and in connection with its programs and activities. Any university student or member of the faculty or staff who violates this policy will be subject to disciplinary action up to and including expulsion or termination.").

134. ALL, *supra* note 132, at 6.

135. Title IX requires that "[e]ach recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part." 34 C.F.R. § 106.8(a).

campus climate, so the College can address issues that affect the wider school community.”¹³⁶ The lead conduct officer, Title IX coordinator, or a staff member who coordinates response to behavioral concerns are all examples of individuals who could serve in this role. Each campus should select the staff member who is best suited based on campus positioning, skill, and the university’s needs as identified by the types of problematic speech most commonly seen at the institution.

D. Develop a Reporting Mechanism

Next, universities should develop a reporting mechanism to capture complaints regarding problematic speech.¹³⁷ Concrete knowledge regarding the details of the problem and the harm students experience from anonymous internet-based speech is essential for creating prevention and response efforts.¹³⁸ By developing a reporting mechanism and distributing information about the method to all students, universities will be better situated to gather information from students on the frequency, type, and severity of problematic speech they experience on the internet. Systematically collecting this information will allow campuses to develop effective prevention programming.¹³⁹

A reporting mechanism may also address the concern regarding how universities could be expected to monitor the constantly growing sphere of the internet. Just as they do in physical spaces, universities should position themselves to respond to reports rather than assuming the position of a ‘watchdog.’ Students are constantly engaging with these media platforms and are in the best position to report posts that are outside of the bounds of decency.¹⁴⁰ Building a reporting structure is a necessary first step in capturing this information from students. Next, as Eckerd

136. *Sample Language for Title IX Coordinator’s Role in Sexual Misconduct Policy*, NOTALONE.GOV, 2 <https://www.notalone.gov/assets/role-of-title-ix-coordinator.pdf> (last visited Feb. 21, 2016).

137. Title IX requires schools to have clear grievance procedures for sex discrimination and sexual harassment which includes adopting and publishing a grievance procedure which includes a process for a complaint, investigation, and disciplinary process. 34 C.F.R. § 106.8(b).

138. *A Public Health Approach to Violence Prevention*, CENTER FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/violenceprevention/overview/publichealthapproach.html> (last visited Jan. 10, 2016) (“The first step in [prevention] is to understand the ‘who’, ‘what’, ‘when’, ‘where’ and ‘how’ associated with [the problem].”).

139. *Id.* (“Findings from the research literature and data from needs assessments, community surveys, stakeholder interviews, and focus groups are useful for designing prevention programs. Using these data and findings is known as an evidence-based approach to program planning.”).

140. David Geer, *Recognizing and Responding to Threats of Violence Made via Social Media*, UNIV. BUS. (Nov. 2012), <http://www.universitybusiness.com/article/posting-threat> (“The best way to discover threats on social media is to count on those who see posts first, such as students who follow each other’s accounts. ‘It really comes down to making individuals, especially students, comfortable with reporting threats and behaviors they see there,’ says Adam Colby, director of emergency management and campus safety at Eckerd College.”).

College in Florida has done, institutions should encourage students to report concerning speech, while also promoting healthy postings that support the values and mission of the university.¹⁴¹ By creating a way to capture information about problematic posts from students, institutions can position themselves to better understand the issue, solve the resource problems associated with “monitoring,” and begin to respond to incidents and harm in a systematic and reasonable way.

E. Investigate and Respond Accordingly to Problematic Speech

After these procedures are in place, universities should further rely on the recommendations made in the Title IX guidance documents for the best practices related to elimination and prevention efforts, as well as for remedies to address harm caused to the environment by the speech. To be clear, this is not a call for censorship, just as the call for response to in-person harassment is not a call for First Amendment violation.¹⁴²

In order to eliminate problematic speech, campuses should make a good faith effort to investigate concerning speech and speech which violates campus policies. Although investigating anonymous internet speech is a challenging feat, school administrators should make a good faith effort to investigate and ascertain information about the commenter and any potential targets. Any identifying information about the commenter or victim provided in the post is as obvious a starting point for an investigation as it would be for an in person statement.¹⁴³ If no identifying information is provided, university staff may consider stating that the post is concerning and asking for anyone with information about the post to come forward. Although this may not be fruitful, it will communicate a significant message. First, it shows a level of care and concern to potential victims. Second, it reiterates a community standard and communicates that university policies extend to all areas of campus life and student conduct. Finally, it simply shows a presence of campus staff, which may serve to encourage respectful and positive behavior. These messages and efforts to change campus culture may help address the climate, if not the specific incident.

Investigations into anonymous online hate speech should include outside partners where appropriate, particularly in the case of threats of violence to the campus community. Of all the challenges of anonymous social media, universities have responded most aggressively and successfully to broad threats of campus violence. Yik Yak has cooperated with police to provide IP addresses for posters of multiple mass shooting threats which has resulted in arrests and charges against

141. *Id.*

142. *See generally* CITRON, *supra* note 1, ch. 8 (discussing free speech and the regulation of the internet).

143. *Supra* notes 155–57 and accompanying text.

several university students.¹⁴⁴ However, despite universities' duties to both individual students and the community at large,¹⁴⁵ this level of investigation or cooperation is rarely provided unless the threat is against the community at-large rather than against a specific student. Debra Katz, the attorney representing the students in the Feminist United complaint filed against the University of Mary Washington recently stated, "[t]he only time that the police get involved is when [posts] say things like we are going to go shoot up the campus and then they can find with record speed who is doing the posting, and they should."¹⁴⁶ Katz expressed her belief that threats against individual students deserve the same level of attention and response as broad threats to campus safety, saying "they should also find with record speed [identifying information on students] who posts things like '[I'm gonna rape that student.]'"¹⁴⁷ Knowing that these sites are capable of producing the data required to identify the posters, in order to protect campus safety universities should utilize these resources whenever particularized, credible threats are reported from these sites, regardless of whether the threat is made against an individual or the community at-large.

Universities should also investigate and attempt to respond to anonymous threats of self-harm. The legal standard for university liability in student suicide where the school had knowledge is uncertain.¹⁴⁸ There was significant interest in Shin's case against MIT. Campus administrators across the country hoped to see the case proceed to trial in order to either reaffirm, or articulate a new standard, for university duty to prevent student suicide.¹⁴⁹ However, the case was settled after MIT's motion for summary judgment was denied.¹⁵⁰ Legal scholars, writing after the settlement, indicated a belief that schools may be found liable for student suicide as a result of foreseeability.¹⁵¹ When self-harm statements are made by students on anonymous social media sites, universities should again respond by making a good faith effort to investigate and respond just as they would for an in-person threat. Like other forms of anonymous speech, the lack of identifying information may make this challenging. However, like threatening statements, university staff and students may respond by posting campus resources, hotline information, and

144. Abdollah, *supra* note 106.

145. See *supra* notes 56–64 and accompanying text.

146. Fenit Nirappil, *Federal Investigation Into the Way A University Handled Social-Media Threats*, WASH. POST., (Oct. 21, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/10/21/federal-investigation-into-the-way-a-university-handled-social-media-threats/>.

147. *Id.*

148. See *supra* notes 66–72 and accompanying text.

149. See Capriccioso, *supra* note 72 and accompanying text.

150. *Id.*

151. Rachel S. Sparks Bradley, *On-Campus Suicide Sites and Means-Restricted Suicide Barriers: Protecting Students and Their Universities*, 21 CORNELL J.L. & PUB. POL'Y 697, 706 (2011).

support, as well as attempt to request additional information from the poster that would allow additional outreach.

A reaction to an online suicide threat at Johns Hopkins University (JHU) offers an excellent example of a proactive response strategy to an anonymous, online, suicide threat. A JHU student posted anonymously on GreekRank.com indicating that she intended to commit suicide during her participation in sorority recruitment.¹⁵² Other students responded to the original poster and the information made its way to the JHU Safety and Security.¹⁵³ Tiffany Sanchez, Assistant Dean for Student Engagement, was the emergency staff member on call that evening and coordinated the response. Reflecting back on the experience, Sanchez stated that she immediately believed that the post was a legitimate threat, and that although it took place on an anonymous site “[i]t never occurred to me that this might have been a joke. . . . [The student] genuinely seemed to be in distress, felt isolated, etc. . . . I did feel very strongly that we needed to do as much as we could to find her.”¹⁵⁴ Although the initial post was very generic, the student shared small pieces of identifying information in subsequent exchanges with other students who responded via the website.¹⁵⁵ Staff followed up and narrowed the possibilities to a small number of students who matched the identifiers, reached out to those students, and utilized campus resources to locate the student.¹⁵⁶ Sanchez stated that she was not concerned about exposure to additional liability in deciding to respond, although there was some nervousness regarding the choice to contact the parents of the student that they believed to be the original poster.¹⁵⁷ Sanchez believes that a similar response would be implemented again if a comparable situation arose on any anonymous platforms, including on Yik Yak, although she would attempt to better protect the students who were responding to aid in the investigation.¹⁵⁸ This situation shows that although it is time consuming and complicated, it is possible to

152. E-mail from Tiffany Sanchez, Asst. Dean of Student Engagement, Johns Hopkins University, to Susan DuMont, Student, Univ. of Md. Sch. of Law (Dec 7, 2015 at 3:08pm EST) (on file with author).

153. *Id.*

154. *Id.*

155. *Id.* (“She posted repeatedly providing hints as to who she was: freshman, on [sic] of only two freshmen women who took a very specific class in her major (which she listed), lived in a single in a specific residence hall, etc.”).

156. *Id.* (“Once we had that information, I was able to work with the office of the Registrar and the One-Card office to determine class schedule, when she had last used her JHU ID card to swipe into the dining hall and her building, etc.”).

157. Sanchez, *supra* note 152 (“There were no concerns about [exposing JHU to liability by responding] as I was investigating who the student was. The only time that I truly began to question our response was when I was asked by our Vice Provost for Student Affairs to reach out to the parents of a student who we thought was likely the poster. The VP let me know that he ‘would rather be sued for a FERPA violation than for not doing what needed to be done to find and connect with this person.’”).

158. *Id.*

respond to anonymous, online suicide threats in order to protect the health and safety of a student.

Additionally, universities must ensure that all students are provided due process through the campus disciplinary system through any investigation.¹⁵⁹ In the event that an investigation is fruitful, universities should hold students accountable for online threats or harassment in the same way they would for in-person speech. This includes providing due process and following campus judiciary procedures.

F. Remedy The Hostile Environment

Finally, just as universities are required to remedy the hostile environment caused by in-person harassment,¹⁶⁰ universities should address the harm that has been caused by injurious anonymous social media posts that may create a hostile environment. Remedial efforts may be different based on the type of speech and the harm it caused.

The response strategy may differ depending on if the harm was caused to an individual student or to the environment. Again, universities should first consider what actions would be taken if the statement had been made in a physical space and what the intended outcomes of those actions are. If an individual student has been targeted, providing adequate support should be the first priority. Where statements are made against groups or populations rather than against individual students, universities should take action to remedy the hostile climate¹⁶¹—be it related to race, gender, religion, sexual orientation, or other climate need. In situations where investigations are not fruitful, action may still be taken to attempt to remedy the harm, change campus climate, and prevent future occurrences. The Office of Civil Rights offers the following guidance on effective response other than punishment where racially motivated speech creates a hostile environment:

*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.*¹⁶²

159. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 151 (5th Cir. 1961) (requiring that public universities provide due process to students before imposing conduct sanctions).

160. See generally, ALI, *supra* note 45.

161. See generally, ALI, *supra* note 45 (assessing various remedy efforts to eliminate hostile environments).

162. ALI, *supra* note 45, at 4.

These efforts make progress towards remedying the environmental harm and supporting the student learning environment, even where an individual student who caused the harm cannot be held accountable.

G. Communicate Campus Safety Concerns

Universities should look to the standards provided in the Clery Act to create a communication plan for speech that affects the safety of the campus community. The Clery Act requires universities to publish an annual report of campus crime statistics,¹⁶³ and requires a timely communication of threats to campus safety.¹⁶⁴ Campus leaders determine what constitutes a threat to campus, and any warning that is issued must be substantively accurate, and specific enough to be helpful.¹⁶⁵ Universities often develop a team of campus professionals, frequently including the police, which systematically receives reports of problematic or concerning behavior and performs a threat assessment.¹⁶⁶ Universities should apply the same policies and procedures to online anonymous speech in order to evaluate when these statements present a campus safety concern, and to communicate information regarding the threat to the community accordingly.

H. Prevent Future Occurrences

Campuses should also attempt to prevent harmful speech in the same ways they attempt to deter other harmful behaviors through prevention campaigns and by creating norms of respect and inclusion, and seeking aid from administrators for students of concern. Universities are encouraged to undertake efforts to influence student behavior across a broad range of activities, including efforts that encourage healthy habits in order to support healthy and safe campus environments.¹⁶⁷ These topics may include sleep, alcohol and other drug use, sexual-health, and stress management.¹⁶⁸ Media campaigns that focus on changing student perception of an

163. 20 U.S.C. § 1092(f)(1).

164. 20 U.S.C. § 1092(f)(1)(J)(i) (requiring that universities “immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus”).

165. *A President’s Guide to the Clery Act*, AMERICAN COUNCIL ON EDUCATION 8 (2012), <http://www.acenet.edu/news-room/Documents/A-Presidents-Guide-to-the-Clery-Act.pdf>.

166. BEHAVIORAL INTERVENTION TEAMS, <https://nabita.org/behavioral-intervention-teams/#campus>, (last visited Feb. 23, 2016). See also, University of Oklahoma, *Behavioral Intervention Team*, <http://www.ou.edu/normanbit/who.html> (last visited Feb. 23, 2016).

167. E.g., HEALTHY CAMPUS 2020, <https://www.acha.org/HealthyCampus/About/HealthyCampus/About.aspx?hkey=2c0c96b6-c330-47e1-87fe-747ec8397e85> (last visited Feb. 24, 2016).

168. E.g., HARVARD UNIV, HEALTH SERVICES, <http://hpe.huhs.harvard.edu/services> (last visited Feb. 24, 2016).

issue can change student behavior and campus culture on the topic.¹⁶⁹ These campaign and culture building efforts should specifically address how internet speech affects and harms students. By encouraging responsible internet usage and creating norms of respect, campuses can minimize the amount and severity of harmful speech and thus reduce the challenge of attempting to investigate and respond to this speech.

Conclusion

For university administrators, problematic, anonymous, internet-based speech may appear to be an unsolvable problem that pits free speech against campus safety and includes complex investigatory challenges.¹⁷⁰ However, rather than choose to ignore or ban platforms such as Yik Yak, university administrators should develop a strategy for how to respond to anonymous, internet-based problematic speech that affects the campus.¹⁷¹ Universities should recognize the harm these types of speech can cause and should rely on case law and governmental guidance on related topics to develop a multifaceted approach to this problem, including prevention efforts, reporting structures, and investigations into conduct that violates campus policies, regardless of the medium on which it takes place.¹⁷² By doing so, universities can better provide a safe learning environment, while also protecting student rights.

169. Michael Haines & Sherilynn F. Spear, *Changing Perception of the Norm: A Strategy to Decrease Binge Drinking Among College Students*, 45 J. OF AM. COL. HEALTH 3, 134, 134 (1996) (“A traditional intervention proved unsuccessful, but a media campaign designed to change student perceptions of the amount of binge drinking showed an 18.5% drop in the number of students who perceived binge drinking as the norm (from 69.7% to 51.2%) and a corresponding reduction in self-reported binge drinking of 8.8% (from 43.0% to 34.2%). The apparent effectiveness of this prevention effort suggested that changing college students’ perceptions of drinking norms may lower the proportion of students who engage in binge drinking.”).

170. *Supra* Part II.

171. *Supra* Part IV.

172. *Supra* Part IV.