Free Speech at Private Universities

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I. INTRODUCTION

The vast majority of universities in the United States promote themselves as institutions of free speech and thought, construing censorship as antipathetic to their search for knowledge. Their handbooks and policies declare that students and faculty have the right of free speech,[1] but surprisingly, most of those same colleges also have policies that explicitly restrict speech. University handbooks commonly contain policies that prohibit offensive and uncivil speech, require administrative approval of flyers and publications, or cordon public speech to a small area of the campus.[2] At public colleges, the First Amendment solves the conflict between a university's policies promising free speech and its speech-restrictive policies by rendering the speech-restrictive policies unconstitutional.[3] Private colleges, on the other hand, are not state actors, and thus, the First Amendment does not stop them from enacting speech-restrictive policies.[4]

Congress recently passed an aspirational resolution stating that "an institution of higher education should facilitate the free and open exchange of ideas," but this aspiration does not legally bind private universities—it merely expresses Congress's opinion on what the nation's universities ought to do.[5] In contrast, California's Leonard Law[6] requires that all private, nonsectarian universities follow the dictates of the First

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1. *See, e.g.*, Carnegie Mellon University's Policy on Freedom of Expression, http://www.cmu.edu/policies/documents/FreeSpeech (last visited Dec. 13, 2009).

2. *See, e.g.*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., SPOTLIGHT ON SPEECH CODES 2009, 20 (2009), *available at* http://www.thefire.org/Fire_speech_codes_report_2009.pdf.

3. *See, e.g., id.* at 11.

4. *See, e.g., id.*

5. Higher Education Opportunity Act, 20 U.S.C. § 1011a(a)(2)(C) (2006).

6. CAL. EDUC. CODE § 94367 (West 2008).

Buried policies proscribing hate speech,[16] for example, may not actually have the support of the majority of members in the institution.

This article will then examine the legal options for solving the wide-spread pQrRa]”v.[]W_eaIYp.[QsRa]”v.[QpRc.[Qetd[QlRa]”v.ZWebdZ]IYI”d.[QeRa]”v.[Qn

“The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation’s

il speech,[29] and requiring prior approval of flyers, student publications, and protests.[30]

Universities often seek to avoid the negative publicity that can arise from allowing controversial and offensive speech on their campuses, but at the same time, they realize removing free speech guarantees can also attract negative publicity.[31] This may be one reason why so many schools continue to maintain contradictory policies regarding free speech. The Foundation for Individual Rights in Education surveyed the publicly available policies[32] of all 110 private universities on the 2008 U.S. News' rankings of "50 Best Liberal Arts Colleges" and "100 Best National Universities."[33] Seventy of those universities—a full sixty-four percent—promoted their programs as institutions of free speech and thought, while also maintaining policies that clearly and substantially restricted speech.[34] The speech-restrictive policies most frequently prohibited offensive or uncivil speech, particularly when the speech related

to historically-disadvantaged groups, such as African-Americans or women.[35]

Columbia University, for example, had a policy

This ringing endorsement of free speech at Columbia—one among many—would surely leave prospective students, donors, and faculty with the belief that Columbia provides its community members with the right to speak freely. Not only are the statements unambiguous, the ideal Bollinger articulated forms the bedrock principle of a liberal arts or research college and so conforms to the reasonable expectations potential community members would have of an institution such as Columbia.

Despite Columbia's open endorsement, next to the same written policy that explicitly promised free speech, Columbia listed policies that restrict speech. For example, their harassment policy prohibited, among other things, "verbal or physical conduct of a sexual nature" that has the "purpose or effect" of "creating an intimidating, hostile, demeaning *or* offensive academic or living environment."[40] In a list of examples of what can constitute sexual harassment, Columbia included "love letters, obscene emails" and "sexist jokes or cartoons."[41]

Columbia guaranteed its students that they would confront "offensive and even odious" ideas in its open-community of learning, but at the same time, in its written policies, it prohibited students from creating "offensive academic . . . environment[s]" through their speech.[42] Indeed, Columbia has not hesitated to suppress student speech. In 2006, for example, Columbia suspended the Men's Hockey Club for posting "offensive" recruitment flyers that carried the slogan, "Don't be a pussy."[43]

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sniper rifle;[46] it lacked any element that could be construed as a threat or an obscenity.[47] Nevertheless, the college punished the students because it found the flyer threatening and demeaning.[48]

This occurred despite the fact that Colorado College's written policies guaranteed free speech for its students. Its policies explained that Colorado College is a place where "controversial points of view may be freely expressed," as "[f]reedom of thought and expression is essential to any institution of higher education."[49] Indeed, the policies further stated that "[n]o viewpoint or message may be deemed so hateful that it may not be expressed."[50]

Just like Columbia and sixty-nine other private colleges on the U.S. News' rankings,[51] Colorado College's policies were janus-faced, containing both guarantees of free speech and policies that restrict speech.[52] After guaranteeing free speech, Colorado College's policies prohibited speech that "produces ridicule, embarrassment, harassment, intimidation or other such result."[53]

Such contradictory policies leave students and faculty at private colleges vulnerable to unexpected punishments. They also chill some measure of speech while simultaneously enabling colleges to reap the benefits of portraying themselves as institutions of free speech.

III. CLASH OF LIBERAL IDEALS: FREE SPEECH AND THE RIGHT TO PRIVATE ASSOCIATION

The conflict between speech-protective and speech-restrictive policies occurs at public,[54] as well as private universities. As speech-restrictive

46. See THE MONTHLY BAG, *available at* http://www.thefire.org/pdfs/037438c8219a336c347bcc601d9c229a.pdf, which parodied the Feminist and Gender Studies Interns, THE MONTHLY RAG, *available at* http://www.thefire.org/pdfs/66b48367dce00830b700437a788de2ac.pdf.

47. THE MONTHLY BAG, *supra* note 46.

48. Carroll, *supra* note 44.

49. COLO. COLL., *Anti-Discrimination Policy*, *in* PATHFINDER 1 (2008).

50. *Id.*

51. FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *supra* note 2, at 4.

52. *See, e.g.*, *id.*; *see also* COLO. COLL., *Student Conduct Policies: Respect: Abusive Behavior*, *in* PATHFINDER 1, 1 (2008), *available at* http://www.thefire.org/pdfs/46bee51f5270ad4d669246aa82c0069c.pdf.

53. COLO. COLL., *supra* note 52, at 1.

54. FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *supra* note 2, at 4, fig.3 (stating 77% of public universities have policies restricting speech).

policies on public campuses violate the First Amendment, however, one side of the equation is void, and thus, the legal conflict disappears at public universities.[55] Some states have attempted to clear

The court found that Stanford's freedom of association claim failed for similar reasons.[69] Specifically, Stanford is a large institution that allows the public to walk its campus and submit applications for admissions.[70] Outside observers are unlikely to attribute students' private speech to the school, and the school possesses ample opportunity to disclaim such attribution.[71] The court declared that the key question was whether preventing Stanford from regulating its students' speech interferes with Stanford's purpose as an association or its ability to form and express its message.[72]

In response, the court made a judgment about Stanford as an institution and accepted the plaintiff students' argument that "the mission of [Stanford] is to provide its students with a comprehensive liberal arts education in which controversial ideas and presuppositions are subject to academic scrutiny, challenged by others in an effort to expand the critical reasoning skill of its students."[73] As such, Stanford could not plausibly argue that the state's forcing it to allow students to speak controversially on campus will interfere with Stanford's purpose as an association.[74]

In denying Stanford's academic freedom claim, the court assumed that the constitutional right to academic freedom is based on a particular understanding of the academic endeavor. In holding that academic freedom did not extend to Stanford's ability to restrict its students' speech outside the classroom, the court denied constitutional academic freedom protection for colleges that seek to provide a moral education.[75] The court's reasoning in reaching this conclusion was not entirely clear, but it seemed to rest both on the premise that the constitutional

Law is cognizant of this possibility, as it exempts colleges "that [are] controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of the organization."[77] However, the Leonard Law does not extend this exemption to secular ideological schools, and the California court's treatment of Stanford's claim to partially fit that mold was [illegible]

to accept members whose views they oppose.[86] Forcing the school to accept a professor who has views antithetical to its own could very well violate the school's right to expressive association by preventing it from regulating, forming, and expressing its own message.

The "complex clash of rights"[87] created by trying to impose the First Amendment obligations of

against a university as long as it does "not involve an inquiry into the nuances of educational processes and theories."[97]

With a few exceptions,[98] courts have not rejected the contractual model wholesale when a relationship between a private university and a student is involved. Instead, they have advocated a relaxed application of the contractual framework, as the judiciary should be "reluctant to interfere" with academic judgments[99] and should understand any contract in light of the "unique educational setting."[100]

Such courts advocate a vague hybrid approach that fails to specify particular legal rules governing the relationship. New York and New Jersey, for example, have referred to the relationship as containing elements of contract, resonating with the law of associations.[101] Additionally, in New York, courts require essential fairness to the student because of the one-sided nature of the relationship.[102]

In *Clayton v. Trustees of Princeton University*, one federal court's interpretation of New Jersey law[103] went further than the New Jersey state court's own interpretation and relied almost exclusively on the law of associations to adjudicate a student's claim against Princeton University.[104] Like other courts that rejected the wholesale contractual model, this decision arose out of a concern for "the unique role of a university and the need to maintain the institution's autonomy . . . ."[105]

The federal court stated that it would use a "balancing test to determine whether Princeton [was] bound by [its] established procedures."[106]

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97. Gebremedhin v. Univ. of Minn., No. C9-02-183, 2002 Minn. App. LEXIS 870, at *5 (Minn. Ct. App. July 23, 2002) (quoting Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 473 (Minn. Ct. App. 1999)).

98. *See, e.g.*, *Love*, 776 F. Supp. at 1075 (rejecting contract model, but noting even if a contract did exist, the plaintiff would lose his claim); Clayton v. Trs. of Princeton Univ., 608 F. Supp. 413, 438 (D.N.J. 1985) (applying law of private associations); Amaya v. Mott Cmty. Coll., No. 186755, 1997 Mich. App. LEXIS 3817 (Mich. Ct. App. Mar. 7, 1997) (rejecting contract model without offering substitute); Maas v. Cornell Univ., 94 N.Y.2d 87, 94 (N.Y. 1999) ("Maas has failed to plead a cognizable breach of contract action. The University nowhere reflected an intent that the provisions of its Code would become terms of a discrete, implied-in-fact agreement . . . .").

99. Raethz v. Aurora Univ., 805 N.E.2d 696, 699 (Ill. App. Ct. 2004).

100. Fellheimer v. Middlebury Coll., 869 F. Supp. 238, 245 (D.Vt. 1994).

101. *See, e.g.*, *Clayton*, 608 F. Supp. at 438 (applying law of private associations); Tedeschi v. Wagner Coll., 49 N.Y.2d 652, 660 (N.Y. 1980) (recognizing law of associations as a potential approach to the relationship).

102. *Tedeschi*, 49 N.Y.2d at 660.

103. *See Clayton*, 608 F. Supp. [illegible]

The judge described the balancing test as weighing the university's reasons for abandoning its own written rules against the student's interest in maintaining a record free of official condemnation.[107] As the court found that the university followed its own written procedures in relevant part, the court did not shed light on what type of reasons would justify a university deviating from its own policies.[108]

Implementation of the balancing test and other deviations from the contractual model demonstrate the courts' general reluctance to interfere with a university's ability to pursue its unique societal function. As one court stated, "[P]rivate colleges and universities must be accorded a generous measure of autonomy and self governance if they are to fulfill their paramount role as vehicles of education and enlightenment."[109]

The same reluctance to interfere with the uaye Yad[QaR]"v.ov_I]YbQiR]"v.Z

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one court explained in the context of a student challenging her failing a course simply because she objected to the instructor's substantive assessment of her performance:

> The educational contract between the student and the educational institution inherently and implicitly adopts the academic standards of the institution—including subjective or judgmental standards.
>
> That, indeed, is a critical element of the student's contractual bargain with the institution: he or she agrees to be judged academically according to the prevailing (or duly established) standards of academic performance. . . . Thus the court enforces the parties [sic] educational bargain by upholding the academic standards set by the academic professionals.[121]

This important point illuminates why courts do not need to refrain from enforcing university contracts to avoid infringing on universities' academic autonomy. Universities rarely provide a contractual basis for objecting to grades that were given based on academic criteria;[122] instead, the contract, if one exists, specifies that professors will assign grades on the basis of their academic judgment.[123] Often universities promise to refrain from making academic decisions based on certain explicit criteria—the race, sex, or religion of the student, for example.[124] Enforcement of such a provision, however, does not require courts to adjudicate academic standards. It simply requires courts to adjudicate, for example, whether a professor assigned a student's grade on the basis of the student's race.

Furthermore, courts' deviation from the contractual model ultimately results in greater interference with a university's institutional autonomy. For example, one federal court's interpretation of New Jersey's law of associations requires universities to establish "procedures for safeguard

ed procedures that are sufficiently fair and whether the university's reasons for deviating from those procedures are sufficient.[126] These judgments, based on unclear normative criteria, interfere with a university's autonomy more than a judgment of whether a university abided by its own policies. Courts that advocate these vague hybrid approaches present an even greater level of potential interference because they leave universities unable to gauge their legal obligations and vulnerable to judicial interference depending on a particular

as a matter of law, an inference of such intent on the part of the university."[131] The decision to accept disclaimers as legally valid may leave students and faculty without any legal relief from schools that do not abide by their stated policies.

A fair number of courts have responded more reasonably to inserted disclaimers by providing some form of legal relief when schools violate their promises. Courts afford this relief under three different legal theories. The first theory finds the disclaimers unconscionable and, therefore, void.[132] For example, one school stated that it could change the amount of tuition at any time, even after the student had registered and paid for the semester.[133] The court found this unconscionable, writing, "It is inconceivable that the University could retain carte blanche authority to raise the tuition at any time during the semester for any amount it deems appropriate."[134]

Other courts have found that the disclaimer eliminates the existence of an express contract but not the existence of an implied contract.[135] The problem with allowing disclaimers to void the existence of an implied contract, one court argued, is that "neither the school nor the student would have a remedy" when "non-performance caused damage."[136] The court concluded that even with a disclaimer, an implied contract exists, because despite the disclaimer, a relationship between the private college and the student remains fundamentally contractual in nature.[137] In the student-private college relationship, the college "agrees to provide educational opportunity and confer the appropriate degree in consideration for a student's agreement to successfully complete degree requirements, abide by university guidelines, and pay tuition."[138]

An implied contract, in this context, does not differ greatly from an express contract. To interpret the terms and conditions of the implied contract, courts still turn to a college's handbooks and policies for guid-

131. Eiland v. Wolf, 764 S.W.2d 827, 838 (Tex. App. 1989).
132. Gamble v. Univ. Sys. of N.H., 610 A.2d 357, 361 (N.H. 1992).
133. *Id.*
134. *Id.*
135. *See*, *e.g.*, Southwell v. Univ. of the Incarnate Word, 974 S.W.2d 351 (Tex. App. 1998).
136. *Id.* at 356.
137. *Id.*
138. *Id.*

ance.[139] Those explicit terms still form the basis for the reasonable expectations of students, faculty, and donors.[140]

Other courts have recognized that promissory estoppel can provide a viable legal claim against colleges that fail to abide by their policies.[141] Promissory estoppel remedies injustices that result from one party's reliance on another party's promises.[142] Rather than require an intent by the college to be legally bound, promissory estoppel only requires that the college "should reasonably have expected to induce the action or forbearance" of the student by making certain promises.[143] The clearer and more prominent the college's promises were, the less likely the college can escape liability by arguing that students did not reasonably rely on those promises in choosing to pay tuition and enroll.[144]

If a school disciplines, suspen

enables universities to better serve their traditional societal function. Most top-rated private liberal arts and research universities publicly broadcast their missions as accumulating and spreading knowledge but may then suppress speech in particular instances.[145] The possibility of official punishment for speaking out can chill speech and academic freedom, thereby undermining the university's purpose of seeking knowledge.[146] Adopting the contractual model forces universities to either disavow what they purport to be their fundamental mission or honor that mission even when it becomes temporarily inconvenient to do so. As the enactment of the First Amendment recognizes, institutions may endorse the principle of free speech in theory and yet find that, without any legal accountability, the temptation to suppress speech in any given instant may be too strong to resist.[147]

Not all top-rated private universities seek only knowledge. Some limit the search for knowledge by a moral or religious doctrine.[148] Still others aim to impart vocational or military knowledge.[149] Of the top-rated private liberal arts and research

academic freedom at Brigham Young does not extend to expression that "contradicts or opposes . . . fundamental Church doctrine or policy" or "violates the Honor Code because the expression is dishonest, illegal, unchaste, profane, or unduly disrespectful of others."[154]

Bard College, a nonsectarian college with a liberal ideology,[155] also binds the quest for knowledge with the dictates of its morality. Bard College states in its policies that its "students, faculty, staff and administration stand united in support of an inclusive environment in which freedom of expression is balanced with a respectful standard of dialogue."[156] Accordingly, all members of the community "must be committed to standards of behavior that emphasize caring, civility, and a respect for the personal dignity of others," and any demeaning, discomforting, vulgar, or embarrassing expression is prohibited.[157]

Though their moral ideologies differ, both Brigham Young and Bard College make publicly clear that attending their schools requires students to

those principles, the seminary could withhold his degree without violating the contract.[162]

The diversity of purpose among American private colleges is certainly a virtue worth protecting. Forcing every college to fit

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that “the mere dissemination of ideas—no matter how offensive to good taste—on a state university canmtnienyamt

free speech, parading this fundamental value to donors, current and prospective students, faculty, and alumni.[210] As Yale reaps the benefits of its representation, students must face the possibility that Yale will punish them for controversial speech. This inevitably diminishes the quality of discourse on campus, as even without further punishments, students may self-censor to entirely avoid the possibility of punishment.

Not long after the student was punished, Yale inaugurated a new President—a First Amendment expert—who used his inauguration speech to condemn violations of free speech, stating, “To stifle expression because it is obnoxious, erroneous, embarrassing, not instrumental to some political or ideological end is—quite apart from the grotesque ie

of damages to compensate for him his lost opportunities,[219] These remedies could be achieved through the application of contract law.

B. Quasi-Ideological and Technical Universities

Some universities have an official position on certain ideological questions but do not require students and faculty to endorse that ideo

free exercise claim, a court noted that Georgetown had a limited religious nature, writing, “Religious belief plays no role in admissions, graduation, class attendance, participation in sports or other student activities, or eligibility for financial aid, placement facilities, awards or honors programs.”[225] The court also noted Georgetown’s President’s comment that “education remains principally a secular business, and

attending a technical college, which is focused much less on ZbdIYI”d.i

perspective"[237] and that a student must "live his or her life accountable to God," act in a "Christ-like and professional manner," and "maintain an exemplary and involved lifestyle, including regular church attendance . . . ."[238] Accordingly, students' free speech and right of inquiry is limited by a belief in God and the dictates of the Bible.

For example, Adam Key, a student at Regent University, took a frame from a video of Regent's Chancellor Pat Robertson in which Robertson was "scratching his face with his middle finger. However, when the video clip was paused at [that] frame, it appeared that Robertson was 'flipping the bird' at his viewing audience."[239] Key then posted this image on the popular social networking site Facebook.[240] A Regent administrator "asked [Key] to remove the image from his Facebook account because it violated the Regent Standard of Personal Conduct's prohibition against profane or obscene behavior."[241] Key obliged but then posted the image on a Regent listserv.[242]

Regent initiated disciplinary charges against Key for posting the image on the listserv[243] and later found Key guilty of that charge.[244] In Key's subsequent lawsuit, he alleged, among other claims, that Regent had violated its contractual promises of free speech by punishing him for posting the image on the listserv.[245]

The court held that a contract did not exist due to a disclaimer in the school handbook stating the handbook was not a contract.[246] As a result, the court did not analyze the content of Key's claim.[247] However, if the court had analyzed the claim, it should have found that Key's claim was not tenable in light of Regent's specific limitations on free speech. Regent makes clear that the education it provides is a "biblical" one and that students' right to free expression does not extend to irreligious or offensive forms of expressioneIYI"d.[QoR]"v.[QfR]"vvZbIYI"d.[v.Y[bb[IYI"dWdcY_

enroll at Regent, they are on notice that their freedom ends where biblical mandates begin.[249]

In another case, a Catholic college's policies stated that students could be expelled for failing to live up to the "ideals of Christian education and conduct."[250] After two students participated in a civil—as opposed to religious—marriage ceremony and two other students served as witnesses to the ceremony, the school expelled all four students for failing to abide by Catholic doctrine,[251] which prohibits civil marriages.[252] The court upheld the expulsion against a contract claim, finding that the school was clearly a Catholic institution and that the school's policy explicitly requiring "Christian conduct" was widely understood to mean "Catholic conduct."[253] Furthermore, the students did "not claim that they understood it to mean anything else, nor do they claim that they did not understand what they were doing or the consequences of their act in the eyes of their Church."[254] In other words, the reasonable expectation of students attending a Catholic college that requires abidance by religious principles is that their behavior must accord with the dictates of the Church.

Like ideological universities, private military academies require students to forego a large degree of freedom of expression and conduct.[255] Norwich University is the only private university on the Army's list of senior military colleges.[256] Like its public counterparts, Norwich requires those in the cadet program to lead a highly structured life.[257] This regimented training, with the accompanying oaths and honor codes, requires

249. *See, e.g.*, Lexington Theological Seminary, Inc. v. Vance, 596 S.W.2d 11, 12–13 (Ky. Ct. App. 1979) (holding theological seminary could withhold degree because student failed to remain committed to Christian principles, as handbook clearly stated students must abide by Christian principles); Carr v. St. John's Univ., 231 N.Y.S.2d 410, 633–34 (N.Y. App. Div. 1962) (holding religious university's policies clearly stated that students must abide by Christian principles and school could therefore expel students for not abiding by those principles).

250. *Carr*, 231 N.Y.S.2d at 410.

251. *Id.*

252. *Id.* atsXr[IZI"f.[WY[aIYI"d[QucdIYI"d.[Q,R]"v.YWa[aYaw.dv.[QaR]YI"d.[Q,Z[j]"v.[hY].[hZnj]"v.[QyR]"v[Q1

students to forego the ability to speak freely and to accord great deference to their superiors.[258] Students are on notice of the regimented nature of the institution and its accompanying lack of freedom prior to enrollment.[259]

Given the explicit restrictions on behavior and expression military academies and ideological universities demand of their students, students’ reasonable expectations would be that they would have a more limited right to free speech at such an institution. Therefore, courts should interpret the institution’s policies in that light, prioritizing the school’s ideology or military purpose when reconciling conflicting policies.

VI. CONCLUSION

Most top-rated private universities issue contradictory written policies that both restrict and promise free speech. As private universities should have a right to associate according to the values they choose, forcing them to respect community members’ freedom of speech does not provide the optimal solution to this widespread problem. Applying a contractual framework, including the university’s written policies as part of the contract, in contr]]]respect the university’s ”\V[dWYYYb[IVZ\Z’ibcI”dWYYYb[IVZd]

speech to abide by the dictates of the university's ideology. In either case, however, courts should consider the parties' reasonable expectations in the contract law framework to reconcile conflicting policies and representations and to help afford relief to students, faculty, and donors who find that a university has breached its explicit promises of free speech.