THE GROWING ROLE OF CAMPUS SECURITY

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I. Introduction

The first university police department is believed to have been established at Yale University in the late 1800’s in response to riots involving Yale students and the citizens of New Haven. The goals of that first department were to keep people off campus who did not belong there and to protect the students, their property, and the property of the University.1 While the goals of that first department are likely shared by all college and university police departments today, the complexity and nature of the work has changed dramatically.

For over fifteen years, there has been an increasing concern by the public and legislators about crime on college campuses. This concern was reflected by the passage of the Federal Crime Awareness and Campus Security Act of 1990,2 and in the creation of organizations such as Security on Campus, Inc. Along with this concern is an increase in

1 http://www.yale.edu/police/overview.html#History
2 20 U.S.C. section 1092(f); subsequently amended and now known as the Clery Act
the number of state courts that have recognized a duty on the part of universities to maintain a safe campus, even in the face of third party criminal acts. Further, there have also been a number of cases that have imposed a duty on employers to use reasonable care in selecting employees who work with vulnerable populations, such as college students.

The effect of September 11th on the public’s concern about security in general has also had an effect on college campuses. Traditionally, college campuses have been forums for the expression of conflicting ideas, and this expression has often been confrontational. Our institutions are also becoming more diverse, and this diversity can also be a source of conflict.

There is an inevitable conflict between the traditional openness of a college campus, the increased willingness of students to express their dissatisfaction about a number of different issues through protests and demonstrations, and the demand for increased campus security by students and parents. Colleges and their campus law enforcement officials must be sensitive to both the legal requirement to maintain a safe campus and the need to allow students the freedom to explore new ideas. This paper will analyze the legal issues faced by colleges as they balance security, individual responsibility, and freedom of expression.

II. Premises Liability

It is the duty of the owner or operator of premises to exercise reasonable care for the safety of its invitees. Generally, courts consider students on a campus to be invitees of
the college or university. The reasonable care that is owed is to protect the student from unreasonable harm about which the university knew or should have known and to minimize the predictable risks to the student. With the increased availability of sophisticated surveillance techniques, one could argue that an institution may have a greater duty to discover the criminal before he or she can do harm on campus. However, as the case below illustrates, the college or university cannot lose sight of the simple precautions that it can and should take to provide additional security for the campus.

In Shivers v. University of Cincinnati, a student was raped in a residence hall bathroom that did not have locks on the shower doors. She sued for negligence. The court held that students reasonably relied on the University to keep them safe, and the University breached that obligation when it failed to take the inexpensive step to add a latch to the door to the shower where an individual was most vulnerable. The court noted that for there to be duty to protect against third party wrongdoers, there must be a special relationship between the parties, and the criminal act must be foreseeable. The court held that the plaintiff met both burdens. This case was remanded for trial on damages, and the plaintiff was awarded damages in the amount of $100,000. However, the University appealed and the Ohio Court of Appeals overturned the verdict and ruled that the University did not owe a duty to protect the plaintiff from the rape in question because it was not foreseeable. The Court said that foreseeability of a criminal act had to be

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determined by the “totality of the circumstances.” The Court stated that “[t]he totality of the circumstances test considers prior similar incidents, the propensity for criminal activity to occur on or near the location of the business, and the character of the business…Because criminal acts are largely unpredictable, the totality of the circumstances must be ‘somewhat overwhelming’ in order to create a duty”. 4

Although the University won this case, it had to endure several appeals and a trial in order to prevail. Perhaps this could have been avoided had the University housing officials consulted with the campus law enforcement officials in order to get advice regarding reasonable security measures to reduce the risk of crime in the residence hall.

In another Ohio case involving Cleveland State University, a commuter student entered a large lecture room where her final exam was to be given two hours before the exam. She was beaten and raped about an hour later. She sued saying there was a duty to provide adequate security in classrooms. The Ohio Court of Claims held that the rape in a classroom on a weekday morning when an exam was scheduled was not foreseeable. In quoting its Court of Appeals in another case, the court said: “. . . foresight, not hindsight is the standard of diligence . . . it is nearly always easy after an [incident] has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence.” Even though there had been another rape on campus less than two years earlier, it was at another location far away from the classroom building and sufficiently distant in time to prevent the current rape from being foreseeable. The court also

summarized the testimony of the University’s Chief of Police who stated that there were usually three to five officers on duty during the time when the rape occurred. 5

It is obviously difficult to prevent such third party attacks on a campus to which the general public has easy access, and the courts do seem to appreciate this dilemma and are hesitant to impose liability. However, it also seems likely that if there are several similar incidents closely related in time and location, then the institution’s duty is greater and liability is more likely. Under such circumstances the police and general administration must work together and use extraordinary measures to limit future criminal acts.

In Johnson v. Alcorn State University, 6 the mother of a student who was shot and killed on the Alcorn State University campus sued the University for wrongful death and negligence. The shooting came after four non-students visited the campus to attend a “non-Greek” step show that was taking place. The non-students did not log-in at the University’s Welcome Center pursuant to the campus police department procedures, and they had a confrontation with several female students that resulted in a fight. One of the female students who tried to break-up the fight was struck with a beer bottle and told her boyfriend about the fight. The boyfriend and his friend, the deceased, both of whom were students, returned to the scene of the fight. The non-student was recognized by one of the female students and in response he immediately drew a pistol shooting the boyfriend in the chest and fatally shooting his friend in the head. The court found that the campus

police department acted with reckless disregard of the safety of the students because the police department did not follow written regulations governing the Welcome Center.

However, the court declined to find liability because the plaintiffs could not establish the necessary causal connection between the failure by the police to follow its regulations and the shooting of the deceased student. The plaintiffs also failed to show that the shooting was foreseeable, and the shooting represented a criminal act that served as a superseding cause that relieved the University of liability. On appeal, the court affirmed the lower court decision and explained that the non-student’s decision to draw a pistol and shoot two students was the proximate cause of the death and injuries.\textsuperscript{7} This case illustrates how important it is for police departments to establish procedures that they can and will actually follow, because it would not have been unreasonable for the court to actually find a causal connection between the failure to require the non-student to sign in and the use of a gun by that individual to kill the student.

Because students living in residence halls are particularly vulnerable to third party criminal attacks, courts seem to be more likely to impose liability on a university if a student is injured by a criminal in a residence hall. For example, while not actually imposing liability, the U.S. Court of Appeals for the Second Circuit determined that Utica College did owe a duty to its students living in residence halls to take reasonable measures to prevent criminal acts by third parties when there had been several previous incidents of violent crime on campus and where a security firm had suggested better

\textsuperscript{7} Id.
monitoring of a residence hall entrance. In this case, a female student had been assaulted in her room during the middle of the day. The college as a matter of policy kept all residence hall exterior doors locked 24 hours per day, except for a breezeway entrance that was to be monitored during business hours by work-study students. On the day in question there was some doubt as to whether the breezeway entrance was actually monitored. Although the court recognized that the college might have breached its duty to provide reasonable security by failing to monitor properly the unlocked entrance, the court determined that the plaintiff could not present sufficient evidence to prove a causal link between this security failure and the attack on the plaintiff, since the assailant was never identified and could have been a fellow student who had legitimate access to the building.\(^8\)

In an interesting case decided by the District of Columbia Court of Appeals, Gallaudet University was able to persuade the Court that it did not have a duty to prevent the murder of a student in a residence hall by a fellow student. In September of 2000 another student was murdered in his room by Joseph Mesa. However, the police arrested another individual for that crime and that student was suspended from the University. In February of 2001, Benjamin Varner was stabbed to death in his dorm room by Mesa, who later was apprehended when trying to use one of the deceased’s checks. Mesa was convicted of both murders.

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\(^8\) Williams V. Utica College of Syracuse University, __F. 3d__. 2006 WL 1755295(2d Cir. 2006), June 28, 2006.
Varner’s parents filed suit against the University claiming that it was negligent in allowing Mesa to remain in school after he had committed several thefts totaling thousands of dollars, including a theft from a roommate, and that it was also negligent in its security procedures after the first murder. While the appeals court found against the plaintiffs on both of these claims, the court’s language raises some interesting questions. Mesa had been suspended instead of being expelled for his previous thefts. The plaintiffs argued that he should have been expelled, and the failure to expel was the proximate cause of their son’s death. Alternatively, they claimed that Mesa should not have been allowed to live in a dormitory when he was allowed to return to school. On this issue the Court stated: “[t]he point is not frivolous; arguably, thieves should not be permitted to live in dormitories, even when a year or more has elapsed since the thefts. One might reasonably ask whether the other residents of the dormitory were not entitled to a warning that a former thief was in their midst.” However, because there was no expert testimony to establish that there was some national standard of care to bar such students from living on campus, the court refused to impose a duty on the University to do so and upheld the dismissal of this claim.

The plaintiffs also claimed that the University was negligent in the security procedures that were followed after the first murder. They claimed that the University should have re-programmed all students’ key cards so that they could only enter their own building, and since the murderer and victim lived in different dorms, this failure was alleged to be a proximate cause of the death. The plaintiffs claimed that there was a national standard

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10 Id.
of care to require such re-programming based on recommended practices of the International Association of Campus Law Enforcement Administrators (IACLEA). However, the court noted that the IACLEA standards were “aspirational”, and “[a]spirational practices do not establish the standard of care which the plaintiff must prove in support of an allegation of negligence.” It was also noted that the murderer had been allowed access to the victim’s dorm on the night in question in order to allegedly retrieve his things that were still in that dormitory from when he had lived there earlier.

This case raises some interesting points which university administrators should consider. First, it seems that this court might have allowed the IACLEA standards to be used to establish a standard of care and a resulting duty, if the plaintiffs’ experts had been able to testify that this was a practice followed by many other institutions. Thus, it is important that the campus law enforcement officials meet with general university administrators, especially those in charge of campus housing, in order to determine whether institutional practices are in keeping with IACLEA recommendations. Second, housing officials should carefully consider the types of disciplinary or criminal records that should disqualify a person from living in student housing. With the growing interest in background checks for students, it would not be surprising to see some institutions requiring background checks for all students living in campus housing. Of course, since juvenile records are not readily available and the accuracy of background checks has been called into question, such checks may be an expensive venture which does not really improve the security of the resident student.

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11 Id., at 682
It does seem clear that colleges and universities should focus their security efforts on effective police patrols and adequate physical security in order to prevent liability. This past spring, a jury in Illinois determined that Knox College failed in these efforts and returned a $1.05 million dollar verdict against the college for negligence. A 19 year old female student was beaten to death in a glass enclosed stairwell by a fellow student. According to the family’s lawyer, the glass enclosure was designed to provide “natural surveillance” but 9 of 20 light bulbs were burned out and 6 others were turned off.\(^\text{13}\) Further, the nearest emergency phone to the incident was not working when the victim was discovered, still alive, by another student, and the security guard in the building was guarding the computers in the computer room in the building and instead of patrolling the premises.\(^\text{14}\) The comments of the plaintiffs’ lawyer are instructive: “When kids get killed on campus, it’s usually because something went wrong, there was some breakdown in the system. If even one school hears about this and decides to add some money to the security budget, to make sure everything is done correctly, then it’s been worth it to the family”.\(^\text{15}\)

### III. Campus Expression and Campus Safety

The law of the First Amendment is largely restraining government (including public colleges and universities) from actions whose effects limit expressive activity. Decisions summarized here demonstrate the pervasive influence of First Amendment law on

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\(^\text{14}\) (Comments from the father of the deceased)  
[http://www.overlawyered.com/2006/05/deep_pockets_files_racibozynski.html](http://www.overlawyered.com/2006/05/deep_pockets_files_racibozynski.html)  
institutional policies that foster expression in a learning environment. Those policies seek, however, also to balance interests favoring expression with others that look to create a safe environment conducive to teaching and learning.

Two similar but distinct public policy threads are clearly evident in the law that has shaped campus speech policies, and it is worthwhile to consider those policy threads in any review of modern First Amendment law. The first is best expressed in a dissenting opinion by Justice Holmes in Abrams v. United States, where the United States Supreme Court upheld five criminal convictions under the Federal Espionage Act. Although Justice Holmes wrote in dissent, his views have come to be a pillar of First Amendment jurisprudence. Holmes opined that as people realize "time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."  

Years later, in Whitney v. California, (where the U.S. Supreme Court refused to invalidate California's Criminal Syndicalism Act), Justice Brandeis voiced a somewhat different rationale in support of free expression. Brandeis (who had joined Justice Holmes in his Abrams dissent) suggested that "[t]hose who won our independence" felt that free expression was a search for "political truth," but felt also that "without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; and that this should be a fundamental principle of the American government." It is easy to see the congruence, then, between the mission of the modern college or university and the First Amendment's purpose (as

16  250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173 (1919)

17  250 U.S. at 630.

18  274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927)

19  274 U.S. at 375
identified by Holmes and Brandeis) to facilitate the search for the truth, political or otherwise.

A. Student expression--forum analysis

Forum doctrine, or forum analysis, is a test American courts apply in determining the extent to which a governmental entity may regulate speech of a public nature on premises that entity controls. It aspires to gauge whether the state may impose regulations whose alleged effect--intended or otherwise--is to limit public expression. The forum doctrine is fundamental to analysis of First Amendment issues that arise in a public college or university setting; yet its application in American courts often seems discordant. Students, faculty, advocacy groups, and private citizens rely upon the doctrine in defense of their professed right to be heard on campus. The doctrine's intent has traditionally been to balance the interests of the government in controlling the use of public settings (such as parks, street corners, schools, colleges and universities) with those supporting the right of free expression. It protects not only speeches on the street corner, but also such forms of expression as art displays, college yearbooks, and even student activity fees.

The case of *Perry Education Association v. Perry Local Educators’ Association*, 20 involved a school district’s collective bargaining agreement with its teachers that afforded the teachers union the authority to use the intra-district mail system and teacher mailboxes to distribute union literature. When the school board denied a rival union similar access to the mail system, that union challenged the decision in federal court, arguing that access was required under the First Amendment.

On behalf of the court, Justice White noted that, for locations “which by long tradition or by government fiat have been devoted to assembly and debate,” there exists a spectrum of rights that authorize the state to “limit expressive activity.” At one end of the spectrum

20 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)
are rights that authorize the state to “limit expressive activity.” At the other end of the spectrum is the public forum: settings which traditionally have been held in trust for the use of the public and, “time out of mind,” used for assembly and public discussion. In the public forum, the state may not prohibit expression. Any sort of restrictions based on content of expression must be narrowly drawn to serve a compelling state interest. The state may enforce regulations based on the time, place, and manner of expression, but those must be content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

The second category Justice White articulated is public property that the state has chosen to be open for public use “as a place for expressive activity.” Even though the state is not required to create this forum for expressive activity, this limited public forum is governed by the same standards as those governing the traditional public forum: “Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”

Different standards apply to the third type of forum Justice White recognized. This category—generally known now as a non-public forum—is public property “which is not by tradition or designation a forum for communication.” For such a setting, the state may impose time, place and manner restrictions and “reserve the forum for its intended purposes.” It may not, however, regulate speech “in an effort to suppress expression merely because public officials oppose the speaker’s view.” 21 Under this analysis, then, any governmental regulation based on content of expression in either a public forum or a limited public forum must be narrowly tailored to serve a significant government interest, and must afford alternative means of communication. “A regulation is ‘narrowly tailored’ when it does not ‘burden substantially more speech than is necessary to further the government’s interests.’ . . . At a minimum, a regulation cannot be narrowly tailored unless the cost to speech is ‘carefully calculated’ and the fit between the burden and the

21 103 S.Ct. at 954-955.
state interest is ‘reasonable.’” *Hays County Guardian v. Supple.* Moreover, in none of the fora may the government regulate speech based on viewpoint.

Forum analysis entails three forum classifications: public forum, limited public forum, and nonpublic forum. In discussing the concept of a limited public forum, however, courts have also variously used the terms “designated public forum,” “created public forum,” and “designated open public forum.” “Limited public forum,” however, is the term most commonly used.

Whether a forum may be said to exist will be determined "by the objective characteristics of the property", *Brister v. Faulkner.* In the traditional college or university setting, it might be safe to presume that a forum analysis is generally appropriate for cases involving expression of a public nature on the campus of a public institution. When campus communication is open for communication by the general public to the general public, a limited public forum likely has been created.

One of the more recent forum cases arising out of a public university context, *Bowman v. White,* highlights the tendency of the various appellate courts to refine forum doctrine in a way that is significant for postsecondary institutions. In *Bowman*, a street preacher challenged a facilities use policy of the University of Arkansas. The policy required that off-campus speakers obtain a permit to use outdoor space, submit to a five-day cap per semester to use the premises for expression, give the University three days advance notice prior to use, and refrain from using campus facilities during final examination periods. The Eight Circuit found all but the five-day cap provisions to be narrowly tailored to meet a legitimate state interest. The *Bowman* court agrees with others the

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22 969 F.2d 111, 118 (5th Cir., 1992).


24 214 F.3d 675, 681 (5th Cir. 2000).

25 444 F.3d 967 (8th Cir. 2006)
degree to which government may control expressive activity in both public and non-
public fora. It highlights, however, what it deems "substantial confusion" over the
remaining forum category in forum analysis. For starters, the Eight Circuit labels that
category a "designated public forum," which is a "nonpublic forum the government
intentionally opens to expressive activity for a limited purpose such as use by certain
groups or use for discussion of certain subjects." It further holds, however, that within the
category of "designated public forum" are two subsets: a "limited designated public
forum" (where the government opens a non-public forum but limits expressive activity to
certain kinds of speakers or to discussion of certain subjects) and an "unlimited
designated public forum" (a forum designated for expressive conduct by the government
but not limited to a particular type of speech or speaker).26

In a setting where these two subsets are recognized, the key distinction is the
degree to which government (namely, the public college or university) may regulate
expression. According to Bowman, in a limited designated public forum, "'[r]estrictions
on speech not within the type of expression allowed in a limited public forum must only
be reasonable and viewpoint neutral.'" In an unlimited designated public forum, however,
"the government may enforce a content-neutral time, place, and manner restriction only if
the restriction is necessary to serve a government interest and is narrowly drawn to
achieve that interest."27 Given the duty of a University to maintain a safe campus, it is
important for administrators to consult with campus law enforcement officials in trying to
establish these time, place, and manner restrictions, while taking into account things such
as police manpower and traffic and crowd control issues.

In Ward vs. Rock Against Racism,28 the U.S. Supreme Court provided important guidance
as to what constitutes content-based regulation, as well as the extent to which the
government may control speech in a public forum. The case was a challenge by a rock
music promoter against guidelines the City of New York had issued to control the volume
of rock concerts presented at the Naumberg Acoustic Bandshell in Central Park. The key

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26 444 F.3d at 975.
27 Id. at 976.
28 491 U.S. 781, 109 S.Ct. 2746 (1989),
question in assessing whether a regulation is content-neutral "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . The government's purpose is the controlling consideration," the majority announced; the regulation of expression can still be content-neutral even if the regulation "has an incidental effect on some speakers or messages but not others."29 Perhaps more importantly, the Ward Court held that reasonable time, place and manner restrictions are permissible as long as they are do not make reference to the content of the speech, are narrowly tailored to serve a legitimate state interest, and provide for sufficient alternative means of communicating the information. The Court rejected the holding of several lower courts that any governmental regulation of speech in a public forum be the least restrictive or least intrusive means of controlling expression.30 It seems likely that safety considerations of a campus would be a legitimate state interest.

B. Protecting expression and safety concerns

The inclination of postsecondary institutions to enact policies prohibiting hate speech stems from various concerns based on preserving an appropriate academic setting, but ensuring that the environment is also a safe one clearly is a factor. The seminal case over unlawful regulations based on viewpoint of expression is *R.A.V. v. City of St. Paul, Minnesota*31. *R.A.V.* was a challenge to an ordinance that made it unlawful to place on public or private property expression such as a symbol or graffiti "including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . ." After a juvenile was charged under the ordinance with burning a cross on the lawn of a home owned by an African-American family, the juvenile claimed that the ordinance violated the First and Fourteenth Amendments. The Minnesota Supreme Court upheld the ordinance as a permissible regulation of speech based on

29 491 U.S. at 791.

30 491 U.S. at 798.

content as a prohibition against "fighting words" under Chaplinsky v. New Hampshire.\textsuperscript{32} The U.S. Supreme Court disagreed, however, and struck down the ordinance in that it outlawed otherwise permissible speech solely on the basis of the subjects the speech addresses.

On behalf of the majority, Justice Scalia noted that even though content-based regulations are presumptively invalid, there does not exist an absolute prohibition against content discrimination. When the government may regulate speech--even "fighting words"--based on content, it may not do so "based on hostility--or favoritism--towards the underlying message expressed." \textsuperscript{33} The St. Paul ordinance outlawed expression that was based on race, color, creed, religion, or gender. Persons who wished to use "fighting words' in connection with other ideas--to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality--are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."\textsuperscript{34} Undoubtedly the countervailing interests of campus security and free expression will arise when efforts to maintain order pose a threat to expression. In \textit{Bowman}, for example, campus police at the University of Arkansas were forced to erect barricades to maintain crowd control in response to the street preacher's presentations.

In \textit{Orin v. Barclay},\textsuperscript{35} an anti-abortion protester demanded the right to erect a display on the campus of Olympic Community College. The display included posters that graphically depicted aborted fetuses. A college official advised the protester that he could conduct the demonstration as long as he did not cause a disturbance, interfere with campus activities, or engage in religious worship or instruction. The demonstration ultimately became hostile, and college safety officers and local police ordered the protester to leave. When he refused, he was cited for criminal trespass. The Ninth Circuit

\textsuperscript{32} 315 US 568, 62 S.Ct. 766 (1942).
\textsuperscript{33} 505 US at 386.
\textsuperscript{34} Id, at 391.

\textsuperscript{35} 272 F.3d 1207 (9th Cir. 2001)
found the first two conditions imposed by the College official to be narrowly tailored to achieve the College's educational purpose. It found the third condition--to refrain from engaging in religious worship or instruction--to be "problematic." Citing *Widmar*, the court held that once the College had allowed the protester on campus to conduct a demonstration, it "could not, consistent with the First Amendment's free speech and free exercise clauses, limit his demonstration to secular content."36

Last October, in *Long Beach Community College District v. Superior Court of Los Angeles County*,37 the college had established a separate area within its free-expression zone on the campus Quad for advocacy by off-campus speakers. The college's regulations provided, *inter alia*, that an off-campus speaker was required to submit an application to the dean of student affairs before distributing printed materials in this separate area. An anti-abortion speaker demanded to appear on campus without first filing such an application, but the space was already occupied by another off-campus speaker who had duly submitted an application with the college administration. The anti-abortion advocate was ultimately refused access to the premises by campus police, who feared that the "situation was potentially volatile." The California court of appeals found the Quad area in general to be a designated public forum, and rejected the claim that the college's application requirement was unreasonable. It noted that "the application requirements allow school officials to keep track of who is on campus for a legitimate purpose, to coordinate requests of different groups to use the campus, to provide any equipment the groups might need, to provide for safety concerns, to assure the free flow of pedestrian traffic and to provide school officials with contact information if there is a problem."

### 3. Alcohol consumption

36 272 F.3d at 1216.

37 2006 WL 3072413 (Cal.App.2 Dist.),
It might be tempting to view an institution's efforts to curb alcohol consumption by students as unduly paternalistic. Nonetheless, the legitimate interest that campus security officials might have in enforcing against public intoxication on campus or at college-sponsored events is self-evident. *Pitt News v. Pappert*,\(^{38}\) represents an instance of where the state's efforts to act in support of that interest (with the effect of controlling expressive activity) were struck down. *Pitt News* addressed a Pennsylvania statute prohibiting "any advertisement of alcoholic beverages" in (among other things) "any booklet, program book, yearbook, magazine, newspaper . . . or other similar publication published by, for, or in behalf of any educational institution." Shortly after the statute took effect, the newspaper (a certified student organization at the University of Pittsburgh) pleaded with its alcohol-serving advertisers that they continue to advertise in the paper, but merely refrain from mentioning alcohol in their ads. Gradually, however, those businesses stopped advertising in the *Pitt News* altogether, and the newspaper came to lose thousands of dollars in ad revenue.

The Third Circuit concluded that the Pennsylvania statute, as it applied to the *Pitt News*, violated the First Amendment. Writing on behalf of the panel, Judge (later Justice) Alito acknowledged both that the advertising at issue was not deceptive and the substantial nature of the state interest: the prevention of underage drinking. Judge Alito wrote, however, that the statute "founder[ed]" on the third and fourth prongs of *Central Hudson*. First, the statute did not achieve the state interest because even if Pitt students did not see ads for alcoholic beverages in the pages of the *Pitt News*, they would "still be exposed to a torrent of beer ads on television and the radio, and . . . see alcoholic beverage ads in other publications, including the other free weekly Pittsburgh papers that are displayed on campus together with *The Pitt News*."\(^{39}\)

Finally, in determining that the statutory ban on alcoholic beverage advertisements was more extensive than necessary to achieve the state interest, Judge Alito offered a sweeping indictment of postsecondary institutions in general. He suggested that

\(^{38}\) 379 F.3d 96 (3rd Cir. 2004),

\(^{39}\) 379 F.3d at 107.
Pennsylvania could "combat underage and abusive drinking by college students" by enforcing "alcoholic beverage control laws on college campuses"; but "studies have shown that enforcement of these laws on college campuses is often half-hearted . . . ."

Although Judge Alito cited only one study (a survey of college administrators and security chiefs) to support his claim, he presumed that the University of Pittsburgh was as guilty as other postsecondary institutions of lax enforcement of liquor control laws.

The Pitt News ruling is consistent with the protections that courts currently recognize that the First Amendment affords commercial expression; its underlying policy tenets, however, are at odds with what college officials--and safety personnel in particular--seek to effect at their institutions. "This decision," notes Peter Lake, "will have a chilling effect on regulations that would be used to limit certain forms of alcohol advertising and commercial speech in college publications. . . . It will be more difficult to promote a safe and reasonable campus environment when that environment features publications which generally promote alcohol use and in some cases excessive alcohol use." 40

Conclusion

It seems clear that greater demands are being placed on campus law enforcement. Not only is there an increased public demand for better security on campus, the courts are increasingly more likely to hold colleges and universities legally responsible for the criminal acts of third parties. This obligation is further complicated by the limitations that courts are imposing on public institutions’ ability to regulate the presence of outsiders on campus if their presence is for the use of a portion of campus that may be a public forum.


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Clearly, colleges and universities must approach campus safety in a holistic fashion, balancing their legal obligations to provide a safe campus environment with the need to allow protected speech activities.