

## NOTE

### The Virtual Bathroom Stall: Solving the Headache of Geo-Based Anonymous Message Applications on University Campuses

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#### ABSTRACT

*Since its launch in late 2013, Yik Yak, a location-based application that permits users to post on local, virtual message boards targeted at university campuses, has become a massive headache for universities who are responsible, under Department of Education guidelines, for maintaining a safe environment for their students. These message boards have become a breeding ground for personal attacks, sexual harassment, bigotry, and threats of mass violence, which have caused huge disruptions to educational environments. Yik Yak, however, is not responsible for the messages being posted; it is responsible only for creating and placing virtual bulletin boards on college campuses, which the institutions have no ability to regulate. Through guidance letters issued over the last five years, the Department of Education has warned universities that they may be responsible for adequately responding to incidents and environments of harassment that occur on their campuses, regardless of the medium through which the harassment occurs. Because Yik Yak's Global Positioning System ("GPS") located virtual message boards are no different than if someone walked onto the school grounds and placed a message board on the physical campus without the school's permission, this Note proposes universities use the traditional property law action of trespass to exclude the Yik Yak application from campuses.*

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\* J.D., 2017, The George Washington University Law School. I would like to thank the editors and members of *The George Washington Law Review* Vol. 85 for their assistance during the editorial process and my parents for their support throughout my education.

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INTRODUCTION

College and university administrators nationwide are no strangers to harassing and disparaging speech targeting their students. Colgate University, a small liberal arts school located in central Upstate New York, with a student population of about 2900,<sup>1</sup> is no exception. In 2001, more than seventy students led a seven-hour occupation of the school’s admissions office to protest a number of racially insensitive events that occurred on campus.<sup>2</sup> At the heart of the protest was “an e-mail message from a political science professor to a student saying

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<sup>1</sup> *Colgate at a Glance*, COLGATE U., <http://www.colgate.edu/about/colgate-at-a-glance> [https://perma.cc/L6PD-W5ZL] (last visited Apr. 3, 2017).

<sup>2</sup> Karen W. Arenson, *Racial Tensions Lead to Student Protest at Colgate*, N.Y. TIMES (Nov. 28, 2001), <http://www.nytimes.com/2001/11/28/nyregion/racial-tensions-lead-to-student-protest-at-colgate.html>.

that many minority students took soft courses where they could discuss their feelings and might get ‘undeservedly high grades.’”<sup>3</sup>

Thirteen years later, in the fall of 2014, over 300 students marched back into Colgate’s admissions office to stage a “sit-in” to protest the poor treatment of, and incidents of “microaggression”<sup>4</sup> against, minority students on campus.<sup>5</sup> The sit-in, which lasted for five days,<sup>6</sup> culminated in student protest leaders and members of the university administration releasing a twenty-one-point action plan calling for the immediate reform of various school policies and procedures.<sup>7</sup> The recent student protest at Colgate, a school with an almost seventy percent white student population,<sup>8</sup> garnered national attention from alumni,<sup>9</sup> students at universities all over the country,<sup>10</sup> and multiple media and news outlets.<sup>11</sup> Pictures and videos of the sit-in, as well as personal anecdotes from various student protestors, flooded social media.<sup>12</sup>

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

<sup>4</sup> Microaggression is “[a] comment or action that is subtly and often unintentionally hostile or demeaning to a member of a minority or marginalized group.” *Words We’re Watching: Microaggression*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/words-at-play/microaggression-words-were-watching> (last visited Apr. 3, 2017).

<sup>5</sup> Jake New, ‘*Can You Hear Us Now?*,’ INSIDE HIGHER ED (Sept. 24, 2014), <https://www.insidehighered.com/news/2014/09/24/anonymous-racist-posts-social-media-network-prompt-colgate-students-stage-sit-now>.

<sup>6</sup> Contributing Writer, *Peaceful Demonstration Concludes with Release of 21-Point Road Map*, COLGATE U.: NEWS (Sept. 26, 2014), <http://news.colgate.edu/2014/09/peaceful-demonstration-concludes-with-release-of-21-point-road-map.html/>.

<sup>7</sup> *Colgate for All*, COLGATE U. (June 29, 2015), <http://colgate.edu/campus-life/diversity-and-inclusion/colgate-for-all> [<https://perma.cc/WLE8-MMQ4>].

<sup>8</sup> See *University Demographics, 2016-2017*, COLGATE U., <http://www.colgate.edu/offices-and-services/equity-and-diversity/university-demographics> [<https://perma.cc/G65L-G4Q4>] (last visited Apr. 3, 2017).

<sup>9</sup> E.g., The Alumni of Color Organization, *We Have Support from the Alumni of Color Organization*, ASS’N OF CRITICAL COLLEGIANS (Sept. 24, 2014), <http://colgateacc.tumblr.com/post/98350720375/we-have-support-from-the-alumni-of-color> [<https://perma.cc/F957-VBJG>].

<sup>10</sup> See generally ASS’N OF CRITICAL COLLEGIANS, <http://colgateacc.tumblr.com/> [<https://perma.cc/UR5E-J9QW>] (last visited Apr. 3, 2017).

<sup>11</sup> See Jaleesa Jones, *Colgate University Students Ask #CanYouHearUsNow*, USA TODAY: COLLEGE (Sept. 24, 2014, 5:40 PM), <http://college.usatoday.com/2014/09/24/colgate-university-students-ask-canyouhearusnow/>; Jonathan Mahler, *Who Spewed That Abuse? Anonymous Yik Yak App Isn’t Telling*, N.Y. TIMES (Mar. 8, 2015), [http://www.nytimes.com/2015/03/09/technology/popular-yik-yak-app-confers-anonymity-and-delivers-abuse.html?\\_r=0](http://www.nytimes.com/2015/03/09/technology/popular-yik-yak-app-confers-anonymity-and-delivers-abuse.html?_r=0); Avery Stone & Tyler Kingkade, *Racist Posts on Yik Yak Prompt Student Protest at Colgate University*, HUFFINGTON POST: C. (Sept. 24, 2014, 6:19 PM), [http://www.huffingtonpost.com/2014/09/24/colgate-university-protest-racist-yik-yak\\_n\\_5875106.html](http://www.huffingtonpost.com/2014/09/24/colgate-university-protest-racist-yik-yak_n_5875106.html).

<sup>12</sup> See generally ASS’n of Critical Collegians Channel, YOUTUBE, <https://www.youtube.com/channel/UCJ-lmLfaHpJ7JpwOM--6fdA> (last visited Apr. 3, 2017); Colgate Ass’n of Critical Collegians (@colgate\_acc), INSTAGRAM, [https://instagram.com/colgate\\_acc/](https://instagram.com/colgate_acc/) (last visited

Unlike the lone racially insensitive email that sparked student outrage on Colgate's campus thirteen years prior, the 2014 sit-in was the result of something currently invading hundreds of American university campuses: the Yik Yak anonymous message application.<sup>13</sup> Yik Yak is a location-based application that permits users to post on local, virtual message boards based on the user's Global Positioning System ("GPS") location,<sup>14</sup> specifically targeting university campuses and students.<sup>15</sup>

Messages such as "do black people have more freedom of speech because they are allowed to say the n-word?,"<sup>16</sup> "[w]e'll [sic] then maybe leave, if you don't want to deal with realities of living in a white world, don't try to,"<sup>17</sup> and "[i]f you're pissed about racism here, you're an idiot. You should've known going in that a school like this was gonna be all white. . . Just like any upstanding aspect of society,"<sup>18</sup> are only a few examples of the messages posted to the Colgate campus Yik Yak message board that prompted the student protest. But Yik Yak, unlike the professor who sent the email which sparked the 2001 student protest,<sup>19</sup> is not responsible for the *content* of the messages being posted.<sup>20</sup> It is responsible only for creating and placing the virtual bulletin boards (which the institutions have no ability to regulate or control)<sup>21</sup> on college campuses.<sup>22</sup>

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Apr. 3, 2017); Colgate Ass'n of Critical Collegians (@colgateacc), TWITTER, <https://twitter.com/colgateacc> (last visited Apr. 3, 2017).

<sup>13</sup> See Stone & Kingkade, *supra* note 11; *Explainer: What Is Yik Yak?*, WEBWISE, <http://www.webwise.ie/parents/explainer-what-is-yik-yak/> (last visited Apr. 3, 2017).

<sup>14</sup> *Explainer: What Is Yik Yak?*, *supra* note 13.

<sup>15</sup> Jordan Crook, *Yik Yak Gets a Much-Needed Makeover*, TECHCRUNCH (July 22, 2014), <http://web.archive.org/web/20140821093353/http://techcrunch.com/2014/07/22/yik-yak-gets-a-much-needed-makeover/>.

<sup>16</sup> Colgate Ass'n of Critical Collegians (@colgateacc), TWITTER (Sept. 22, 2014, 12:27 PM), <https://twitter.com/colgateacc/status/514133951531978752>.

<sup>17</sup> Colgate Ass'n of Critical Collegians (@colgateacc), TWITTER (Sept. 22, 2014, 9:24 AM), <https://twitter.com/colgateacc/status/514087787830972416>.

<sup>18</sup> Colgate Ass'n of Critical Collegians (@colgateacc), TWITTER (Sept. 22, 2014, 9:26 AM), <https://twitter.com/colgateacc/status/514088391609438209>.

<sup>19</sup> Arenson, *supra* note 2.

<sup>20</sup> *Yik Yak Terms of Service*, YIK YAK (Aug. 16, 2016), <https://www.yikyak.com/terms> ("You are responsible for any information . . . opinions, messages, comments, photos, videos, graphics, sounds and other content or material that you submit, upload, post or otherwise make available on, through or in connection with the Services . . .").

<sup>21</sup> See Caitlin Dewey, *What Is Yik Yak, the App That Fielded Racist Threats at University of Missouri?*, WASH. POST (Nov. 11, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/11/11/what-is-yik-yak-the-app-that-fielded-racist-threats-at-university-of-missouri/>; Mahler, *supra* note 11.

<sup>22</sup> See James Goodman, *N.Y. College Seeks Identities of Yik Yak Users*, USA TODAY

The Department of Education has warned universities, through guidance letters issued over the last five years, that they are responsible for adequately responding to incidents and environments of harassment that occur on their campuses.<sup>23</sup> The Department of Education, however, has not yet issued an explicit mandate regarding university obligations to respond to harassment occurring on anonymous social messaging applications—leaving universities potentially responsible for the harassment happening on their campus through Yik Yak.<sup>24</sup> Finding a resolution to this uncertainty has grown even more pressing for universities, as the first administrative complaint has been filed with the Department of Education accusing a university of failing to respond to threats posted on Yik Yak.<sup>25</sup>

This Note proposes that the traditional property law principle of trespass can be used by universities to exclude the Yik Yak application from campuses as Yik Yak's GPS-located virtual message boards may be analogized to someone walking onto school grounds and placing a message board on the physical campus.<sup>26</sup> Bringing an action against Yik Yak for trespass also avoids First Amendment concerns because the exclusion of the message board, rather than the messages themselves, is a content- and viewpoint-neutral solution grounded in the university's right to implement time, place, and manner restrictions on campus speech.<sup>27</sup>

Part I of this Note explains what the Yik Yak application is, how it works, and the issues that have arisen on college campuses across the country as a result of the application. Part II describes the safeguards implemented by the inventors of the application, the shortcomings of those safeguards, and the response the application has taken to combat misuse of the application at high schools. Part III addresses the uncertain standard the Department of Education has promulgated regarding universities' responsibilities to respond to virtual harass-

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(Mar. 9, 2015, 7:40 PM), <http://www.usatoday.com/story/tech/2015/03/09/university-rochester-yik-yak-user-identities/24672825/>.

23 See RUSSLYNN ALI, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: HARASSMENT AND BULLYING 2–4 (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>; CATHERINE E. LHAMON, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE i–ii (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

24 See *infra* Part III.

25 See First Amended Administrative Complaint at 3, Feminists United on Campus v. Univ. of Mary Washington, DEP'T OF EDUC. (July 20, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2015/10/UMWAmendedComplaint.pdf>.

26 See *infra* Section IV.A.

27 See *infra* Section IV.A.

ment and details recent legal action taken against a university for its failure to respond to Yik Yak harassment on its campus. Finally, Part IV proposes universities bring actions for common law trespass against Yik Yak in order to prevent further harassment from occurring on their campuses and to satisfy their Title VI and Title IX responsibilities. Part IV also addresses previously-proposed solutions, noting in particular their shortcomings in addressing the on-campus Yik Yak problem.

## I. YIK YAK: THE VIRTUAL BATHROOM STALL WALL

Amid all the new smartphone applications developed and marketed each day, Yik Yak has emerged as one of the more ubiquitous.<sup>28</sup> Due to Yik Yak's unique features,<sup>29</sup> the application has quickly latched on with teens and college-age students and has become a hot-bed for campus gossip.<sup>30</sup> But when that gossip turns into harassment, Yik Yak becomes more than just a thorn in the side of college and university administrators.

### A. *What Is Yik Yak?*

Launched in 2013, Yik Yak is a social media network that users can access through an application on their phone.<sup>31</sup> Users post text-only messages, up to 200 characters,<sup>32</sup> onto the application completely anonymously without even "a photo or avatar to distinguish themselves."<sup>33</sup> Users may also comment on posts, effectively turning posts into conversations.<sup>34</sup>

What sets Yik Yak apart from other anonymous messaging applications or gossip websites is that the application is location based—or, rather, "geo-based."<sup>35</sup> The application acts as a "hyperlocal any-

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<sup>28</sup> See *infra* Section I.B.

<sup>29</sup> See *infra* Sections I.A, II.B.

<sup>30</sup> See *infra* Section I.B.

<sup>31</sup> John Patrick Pullen, *You Asked: What Is Yik Yak?*, TIME (Feb. 4, 2015), <http://time.com/3694578/you-asked-what-is-yik-yak/>.

<sup>32</sup> Alyson Shontell, *Yik Yak, A 7-Month-Old School Gossip App That's Spreading Like Crazy, Has Raised \$10 Million*, BUS. INSIDER INDIA (June 30, 2014, 4:30 PM), <http://web.archive.org/web/20140821222539/http://www.businessinsider.in/Yik-Yak-A-7-Month-Old-School-Gossip-App-That's-Spreading-Like-Crazy-Has-Raised-10-Million/articleshow/37522970.cms>.

<sup>33</sup> Pullen, *supra* note 31.

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

<sup>35</sup> See Eric Stoller, *Don't Ban Yik Yak*, INSIDE HIGHER ED (Jan. 22, 2015), <https://www.insidehighered.com/blogs/student-affairs-and-technology/dont-ban-yik-yak>. Yik Yak's geo-location feature fosters smaller communities for sharing anonymous information. The mechanics behind geolocation are important to understanding universities' struggles with the application.

mous Twitter,” which “combines GPS and instant messaging technologies to allow users to share and discover what people are talking about” nearby.<sup>36</sup> The application’s radius is limited to between one and a half and ten miles, making it particularly popular in isolated communities like college campuses.<sup>37</sup> In fact, Yik Yak’s developers specifically target the application towards colleges and their students.<sup>38</sup> The company began by “targeting college campuses in the South East” and quickly expanded “to over 100 universities across the country.”<sup>39</sup> Its purpose was to “serve as a local bulletin board for schools.”<sup>40</sup>

Just like a physical billboard, only students and individuals in a particular geographic radius may utilize a particular Yik Yak board.<sup>41</sup> Although users are able to read what is posted in different locations, they are only able to write messages and report abusive messages that appear on boards within their determined location.<sup>42</sup> In this way, Yik Yak acts as a virtual billboard, or rather a “digital ‘bathroom stall

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Location based, or “geolocation” based, applications serve two main functions: “They report your location to other users, and they associate real-world locations (such as restaurants and events) to your location.” Daniel Ionescu, *Geolocation 101: How It Works, the Apps, and Your Privacy*, PC WORLD (Mar. 29, 2010, 7:45 PM), <http://www.pcworld.com/article/192803/geolo.html>. “Geolocation works by sending a mobile device user’s GPS coordinates to a third party, which utilizes that information for its own business purposes. In the context of social media, specific applications utilize the user’s location to send targeted advertisements for close establishments, to connect users with other local users, to identify the user’s location on existing platforms . . . and to connect users with a local online group or circle that is only available to those in similar proximity.” DENIELLE M. BURL ET AL., NAT’L ASS’N OF COLL. & UNIV. ATT’YS, *SOCIAL MEDIA, ANONYMOUS SPEECH AND WHEN SOCIAL MEDIA BECOMES THE CRISIS* 10 (2015), [http://www.nacua.org/securedocuments/programs/June2015/8E\\_15\\_6\\_63.pdf](http://www.nacua.org/securedocuments/programs/June2015/8E_15_6_63.pdf) [[https://web.archive.org/web/20151211025243/http://www.nacua.org/securedocuments/programs/June2015/8E\\_15\\_6\\_63.pdf](https://web.archive.org/web/20151211025243/http://www.nacua.org/securedocuments/programs/June2015/8E_15_6_63.pdf)].

<sup>36</sup> *Explainer: What Is Yik Yak?*, *supra* note 13 (quoting Sarah Perez, *Yik Yak’s Founders on the Value of Anonymous Apps*, TECHCRUNCH (May 5, 2015), <https://techcrunch.com/2015/05/05/yik-yaks-founders-on-the-value-of-anonymous-apps/> [<https://perma.cc/E6CY-5C9A>]).

<sup>37</sup> See Stoller, *supra* note 35.

<sup>38</sup> See *About, YIK YAK*, <https://www.yikyak.com/about> [<https://perma.cc/QX35-JRL9>] (“What started on one campus has now grown to over 2,000 campuses across the US . . .”) (last visited Mar. 1, 2017).

<sup>39</sup> Crook, *supra* note 15.

<sup>40</sup> Lance Lijewski, *Down Voting Yik Yak*, DAILY EVERGREEN (Apr. 8, 2015), [http://www.dailyeverygreen.com/news/article\\_191b7b46-dd8c-11e4-b1bd-e3015ea7f35a.html](http://www.dailyeverygreen.com/news/article_191b7b46-dd8c-11e4-b1bd-e3015ea7f35a.html).

<sup>41</sup> See *FAQs: Top Questions: Why Can’t I Vote/Post/Comment in My Peek Locations?*, YIK YAK, <https://www.yikyak.com/support/faqs/sections/201022049/205383675> [<https://perma.cc/7593-U4WW>] (“Yik Yak is a social media app that acts as a bulletin board for the specific GPS location that your device picks up. You can only post/vote/comment in the location that your device picks up.”) (last visited Apr. 3, 2017).

<sup>42</sup> *Explainer: What Is Yik Yak?*, *supra* note 13.

wall,'”<sup>43</sup> where “[o]ne person wr[ites] it, some people are talking about it, but everyone s[ees] it.”<sup>44</sup> Unlike graffiti on a bathroom stall wall, however, abuse spewed on Yik Yak reaches every corner of campus.

### B. Misuse of Yik Yak on Campus

College students’ recent obsession with Yik Yak, and corresponding problems of harassment, bigotry, and threats of violence associated with it, are not exclusive to Colgate University. Universities across the country have reported issues stemming from Yik Yak posts since its launch in late 2013.<sup>45</sup> As of November 2015, Yik Yak was used on over 1600 different college campuses across the country, with approximately 3.6 million users (mostly college students) per month.<sup>46</sup> Around that time, the Washington Post calculated that Yik Yak was spawning high profile incidents at a rate of one every two weeks.<sup>47</sup> The harassment spawned through the application and occurring on college campuses has taken on many different forms and affected numerous aspects of campus life.

#### 1. Harassment of Individuals

Users’ ability to personally name and attack individuals via the application has caused particular uproar on college campuses. For example, in the spring of 2014, Middlebury College student Jordan Seman scrolled through the Yik Yak message board at her school and came across a post that said, “If I could bang a hippo for no finals, I would hunt down Jordan Seman.”<sup>48</sup> Jordan, who had battled body image issues for most of her life and who had gone through therapy to cope with those issues, hid in her room for much of the next two days after reading the post.<sup>49</sup>

In response to an overwhelming number of hateful and insensitive posts, such as “[f]ave game to play while driving around Emory:

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<sup>43</sup> Elyse Betters, *What Is Yik Yak? It's like a Bathroom Stall Wall and Teens Are Cray Cray for It*, POCKET-LINT (Apr. 23, 2015), <http://www.pocket-lint.com/news/133253-what-is-yik-yak-it-s-like-a-bathroom-stall-wall-and-teens-are-cray-cray-for-it>.

<sup>44</sup> Pullen, *supra* note 31.

<sup>45</sup> Mahler, *supra* note 11.

<sup>46</sup> Libby Nelson, *Colleges' Yik Yak Problem, Explained*, VOX (Nov. 13, 2015, 10:40 AM), <http://www.vox.com/2015/11/13/9728368/yik-yak-colleges-missouri>.

<sup>47</sup> Dewey, *supra* note 21.

<sup>48</sup> Jordan Seman, Opinion, *A Letter on Yik Yak Harassment*, MIDDLEBURY CAMPUS (Oct. 8, 2014), <http://middleburycampus.com/article/a-letter-on-yik-yak-harassment/>.

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



not hit an Asian with a truck” and “[g]uys stop with all this hate. Let’s just be thankful we arn’t [sic] black” on the Emory University Yik Yak board, Maxwell Zoberman, a sophomore student government representative, decided to take action.<sup>50</sup> After reviewing Emory’s open expression policy, Zoberman believed the posts violated the university’s discriminatory harassment policies, even though the messages were posted anonymously on Yik Yak—an obstacle he believed should not stop Emory from enforcing its own anti-harassment policies.<sup>51</sup> However, shortly after Zoberman publicly proposed disabling Yik Yak from Emory’s Wi-Fi network, Yik Yak abuse began focusing on him, with, for example, some posts calling him a “fascist.”<sup>52</sup>

Abusive messages are not just targeted towards students. In the fall of 2014, an Eastern Michigan University teaching assistant approached Professor Margaret Crouch about a Yik Yak conversation that had occurred on the application during her 230-person class.<sup>53</sup> The application revealed dozens of demeaning and sexually explicit posts about the female professor, all of which had been posted during class.<sup>54</sup> In response, Professor Crouch urged school officials to take action, sending screenshots of the worst messages.<sup>55</sup> Writing to her union representative, she stated, “‘I have been defamed, my reputation besmirched. I have been sexually harassed and verbally abused[ ]’ . . . ‘I am about ready to hire a lawyer.’”<sup>56</sup> Although these harassing “Yaks”<sup>57</sup> are troublesome and may disrupt daily life for the individual personally attacked, such individual harassment is not the most significant campus disruption. Rather, the use of Yik Yak to harass minority student groups has generated some of the most headline-grabbing incidents.

## 2. *Harassment of Minority Student Groups*

Beyond personal attacks and sexual harassment, Yik Yak has become a breeding ground for posts disparaging and attacking minority

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<sup>50</sup> Mahler, *supra* note 11.

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

<sup>52</sup> Alexandra Villarreal, *The Real Problem with Yik Yak, the Controversial Campus App We’re All Talking About*, HELLOGIGGLES (Mar. 16, 2015, 6:06 AM), <http://hellogiggles.com/yik-yak/>.

<sup>53</sup> Mahler, *supra* note 11.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

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

<sup>57</sup> Posts on Yik Yak message boards are referred to as “Yaks.” See *FAQs: Top Questions: Reporting a Post*, YIK YAK, <https://www.yikyak.com/support/faqs/sections/201022049/205384825> [https://perma.cc/8KA3-5DGL] (last visited Apr. 3, 2017).

groups on campuses across the country. In January 2015, disparaging messages about minority students posted on Yik Yak led to a large student protest at Clemson University.<sup>58</sup> As part of their protest, a group of about eighty students read a list of demands to the administration brought on, in part, by racist posts on the university Yik Yak board.<sup>59</sup> In addition to asking the school to ban Yik Yak from campus, the students asked President Jim Clements to apologize, on behalf of the University, for the hateful speech made on the application and asked the administration to commit to prosecuting predatory behavior and defamatory speech committed by individuals at Clemson University on Yik Yak.<sup>60</sup>

Even more recently, amid the student protests that became a spotlight for American news outlets in November 2015 at the University of Missouri, posts on the university Yik Yak board attempted to incite attacks against black students.<sup>61</sup> Posts such as, “I’m going to stand my ground tomorrow and shoot every black person I see,” escalated the situation on campus from peaceful student protests to students of color refusing to attend class out of fear for their own lives.<sup>62</sup> These student protests are just a few examples of the responses to harassing and disparaging Yik Yak posts towards minority students that have disrupted campus life for students. But Yik Yak has created no bigger disruption to campus life than the panic it generates when it is used to threaten mass violence on campus.

### 3. *Threats of Mass Violence*

Yik Yak has also become a breeding ground for users to threaten and broadcast incidents of mass violence on campuses, shutting down classes, buildings, and entire schools. At the University of North Carolina, a student who lived on campus was criminally charged after posting to Yik Yak, “[t]o all my friends, don’t be in the Pit tomorrow at noon. Things will be getting a big [sic] explosive.”<sup>63</sup> Police arrested a freshman at Michigan State University after he posted, “I’m gonna

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<sup>58</sup> Nathaniel Cary, *Clemson Considers Banning Anonymous App Yik Yak*, GREENVILLE ONLINE (Jan. 8, 2015, 7:40 PM), <http://www.greenvilleonline.com/story/news/education/2015/01/08/clemson-considers-yik-yak-anonymous-app-ban/21463007/>.

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

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

<sup>61</sup> See Dewey, *supra* note 21.

<sup>62</sup> See *id.*

<sup>63</sup> UNC Chapel Hill Police Make Arrest in Social Media Threat, ABC 11 (Nov. 20, 2014), <http://abc11.com/education/police-make-arrest-in-social-media-threat-at-unc/403787/>.

(gun emoji) the school at 12:15 p.m. today.”<sup>64</sup> A football player at the University of Albany posted a message threatening to blow up the school.<sup>65</sup> The University of Georgia evacuated its Zell B. Miller Learning Center after an individual posted, “[i]f you want to live, don’t be at the MLC at 12:15.”<sup>66</sup> Authorities arrested a University of Southern Mississippi student for posting, “[t]he red will flow tomorrow in JGH [a general classroom building]. I recommend missing class.”<sup>67</sup> The number of threats of violence at schools has become so overwhelming that Yik Yak now addresses the issue in its “Help Desk” page under the question “[c]an I post a threat with no repercussions?”<sup>68</sup> The response: “No! Don’t be dumb. DON’T POST A THREAT. We take threats to safety very seriously and cooperate with local authorities if there’s a post that poses a threat to people.”<sup>69</sup> While Yik Yak’s team talks about taking a hard stance against users posting threats, the measures they have implemented to prevent those threats remain superficial.

## II. YIK YAK’S ATTEMPTS AT SAFEGUARDS

The Yik Yak developers have implemented some safeguards in order to prevent many of the harms inherent in anonymous social messaging. However, in light of the thousands of complaints Yik Yak has received and with new incidents arising around the country,<sup>70</sup> Yik Yak’s attempt at implementing safeguards is nothing more than an artificial gesture.

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<sup>64</sup> AJ Dellinger, *All the Threats, Petitions, and Bans Against Yik Yak*, DAILY DOT (Mar. 8, 2017, 8:47 AM), <http://www.dailydot.com/technology/yik-yak-bans/>.

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

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

<sup>67</sup> *Id.* The number of violent threats against schools across the country are not limited to the examples above. Numerous other instances have occurred on the Yik Yak application, including: a student who was “arrested after writing a Yak that indicated a ‘purge’ of the University of Southern Mississippi campus would take place”; “[t]he University of Nebraska at Kearney evacuated its library after a bomb threat Yak appeared”; police arrested a 20-year-old Widener University student after referencing Columbine in a Yik Yak post; “[a]t Penn State University, a 20-year-old . . . was arrested after . . . authoring a Yak . . . threaten[ing] to shoot up the University’s HUB-Robeson Center”; and a “University of South California freshman . . . posted ‘[c]ome 3:30 this campus is going to become a very dangerous place’ on Yik Yak.” *Id.*

<sup>68</sup> *Yik Yak Help Desk: Top Questions: Can I Post a Threat with No Repercussions?*, YIK YAK (July 14, 2016, 2:15 PM), <https://yikyak.zendesk.com/hc/en-us/articles/205209195-Can-I-post-a-threat-with-no-repercussions-> [<https://perma.cc/29XN-9NKP>].

<sup>69</sup> *Id.*

<sup>70</sup> See *supra* Section I.B.

### A. Age Limitation and Cooperation with Police

Before a user can use the application, he or she must agree to Yik Yak's terms of service, which state that all users must be eighteen years old or older.<sup>71</sup> The developers have also created filters on the application to attempt to prevent users from posting full names of individuals.<sup>72</sup> Users can also "upvote" or "downvote" any messages within their radius, and any message that receives five "downvotes" is removed from the boards.<sup>73</sup> Lastly, Yik Yak also gives users the option of reporting posts by "flagging" them on the application.<sup>74</sup> But once the message is "flagged," users must still wait for Yik Yak's team to review the message before it makes a final decision to remove the post.<sup>75</sup> Beyond the self-policing "downvote" and reporting system, Yik Yak seems to have few other control mechanisms in place.

Part of this is due to the fact that Yik Yak is constrained by the federal Stored Communications Act, 18 U.S.C. §§ 2701–2712,<sup>76</sup> which "restricts Yik Yak's disclosure of user account information without the lawful consent of the account holder or unless authorized by a properly issued warrant, court order, or subpoena."<sup>77</sup> This presents a major problem for colleges and universities trying to control and limit campus threats made on the Yik Yak boards because Yik Yak will not respond to requests for user information from universities.<sup>78</sup> Instead, Yik Yak states that it "can only respond to requests for user account information that are received directly from a law enforcement agency

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<sup>71</sup> *Yik Yak Terms of Service*, *supra* note 20 ("By using, you represent, acknowledge and agree that you are at least 18 years of age. If you are not at least 18 years old, you may not use the Services at any time or in any manner or submit any information to the App, the Site or any part of the Services.").

<sup>72</sup> See Mahler, *supra* note 11 ("Certain keywords, like 'Jewish,' or 'bomb,' prompt this message: 'Pump the brakes, this yak may contain threatening language. Now it's probably nothing and you're probably an awesome person but just know that Yik Yak and law enforcement take threats seriously. So you tell us, is this yak cool to post?'" ).

<sup>73</sup> Briallyn Smith, *The Unspoken Yik-Yak Etiquette Code*, MAKEUSEOF (Mar. 18, 2015), <http://www.makeuseof.com/tag/unspoken-yik-yak-etiquette-code/> [<https://perma.cc/LX48-SL2U>].

<sup>74</sup> *FAQs: Top Questions: I'm Being Bullied/Targeted*, YIK YAK, <https://www.yikyak.com/support/faqs/sections/201022049/205758949> [<https://perma.cc/MTF3-Y6ES>] (last visited Apr. 3, 2017).

<sup>75</sup> See *id.*

<sup>76</sup> For a detailed explanation of the Stored Communications Act, see generally Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide To Amending It*, 72 GEO. WASH. L. REV. 1208 (2004).

<sup>77</sup> *FAQs: Top Questions: Can You Give Me the User Information from a Specific Post?*, YIK YAK, <https://www.yikyak.com/support/faqs/sections/201022049/204565949> [<https://perma.cc/Y457-ZAMK>] (last visited Apr. 3, 2017).

<sup>78</sup> See *id.*

pursuant to appropriate legal process.”<sup>79</sup> Users are told on Yik Yak’s website, “[i]f you are aware of an emergency situation, you should immediately contact your local law enforcement officials,”<sup>80</sup> which can be a slow and tedious process for universities attempting to control and maintain a safe environment for their students.

Thus, universities are helpless to find the source of disparaging—but nonthreatening—Yaks when these racially and sexually harassing posts do not implicate law enforcement involvement. They remain hugely disruptive to college campuses and communities, however.<sup>81</sup> Instead, in response to harassing posts, universities are left with little recourse other than reporting the post for Yik Yak’s team to review and waiting for action to be taken.<sup>82</sup> Because Yik Yak will never reveal the source without a “warrant, court order, or subpoena,”<sup>83</sup> universities must simply hope similar messages will not also be posted.

The on-campus Yik Yak problem is not unique to colleges and universities. Many of these same problems are occurring with younger students at middle and high schools around the country.<sup>84</sup> But in response to those situations, Yik Yak’s team has taken a very different approach.

### B. *Geo-Fencing at High Schools*

While Yik Yak’s founders have failed to accept responsibility for harassment on college campuses, and have refused to remove access to the application from those campuses, the company has taken steps to address the issues its virtual billboard has caused among younger populations.<sup>85</sup> When the application was initially launched, although meant for users seventeen and older, younger users were still able to access the application.<sup>86</sup> High schools and middle schools in regions across the country immediately began experiencing many of the same

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

<sup>80</sup> *Yik Yak Guidelines for Law Enforcement*, YIK YAK (Aug. 16, 2016), <https://www.yikyak.com/guidelines> [<https://perma.cc/B6H2-L7DW>].

<sup>81</sup> See Goodman, *supra* note 22 (explaining a recent situation on the University of Rochester’s campus as a result of both messages posted to Yik Yak and the company’s response to the school).

<sup>82</sup> See *FAQs: Top Questions: Reporting a Post*, *supra* note 57.

<sup>83</sup> See *FAQs: Top Questions: Can You Give Me the User Information from a Specific Post?*, *supra* note 77.

<sup>84</sup> Nick Valencia, *Yik Yak Chat App Stirring Up Trouble in High Schools*, CNN (Mar. 10, 2014, 5:30 PM), <http://www.cnn.com/2014/03/07/tech/yik-yak-app-high-school-problems/>.

<sup>85</sup> See *id.*

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

problems that have riddled college campuses.<sup>87</sup> One school district went so far as to block the application from its network, but as the principal noted, “students have found ways around that too.”<sup>88</sup>

In response to many of the incidents involving young users at middle schools and high schools, Brooks Buffington, one of Yik Yak’s founders, admitted that the use of the application by younger students was creating a problem.<sup>89</sup> To combat the problem, the company has attempted to disable the application in those locations through the use of physically defined barriers called “geo-fences.”<sup>90</sup> To implement this policy, Yik Yak hired a third-party data provider, Maponics, a company that defines geographic boundaries, primarily to gather information on school attendance zones, to create the geo-fences around middle schools and high schools in the United States.<sup>91</sup> Geo-fences are virtual geographic perimeters built around locations based on their GPS coordinates,<sup>92</sup> which effectively block students from using the application when they are at or near a specific predetermined location.<sup>93</sup> If a student attempts to access the application while in a geo-fenced area, a message appears stating, “[i]t looks like you are using this at a high school or middle school which is not allowed. Sending and reading messages is disabled.”<sup>94</sup> At the time of their partnership, Maponics had the GPS data for roughly eighty-five percent of U.S. high schools and middle schools, a total of 100,599 public schools and 28,111 private schools.<sup>95</sup>

The implementation of geo-fences on college campuses to prohibit Yik Yak is a solution that could immediately solve the problem. Specifically, using geo-fences could eliminate what is merely a symbolic banning<sup>96</sup> of the application when universities block the app on

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<sup>87</sup> See *id.*

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

<sup>89</sup> See *id.*

<sup>90</sup> *Id.*; see Diana Graber, *Yik Yak App Makers Do the Right Thing*, HUFFINGTON POST: BLOG (Mar. 26, 2014, 6:10 PM) [http://www.huffingtonpost.com/diana-graber/yik-yak-app-makers-do-the\\_b\\_5029679.html](http://www.huffingtonpost.com/diana-graber/yik-yak-app-makers-do-the_b_5029679.html).

<sup>91</sup> Graber, *supra* note 90; see *About Us*, MAPONICS, <http://www.maponics.com/about-us/overview> [<https://web.archive.org/web/20161029005830/http://www.maponics.com/about-us/overview>] (last visited Mar. 1, 2017).

<sup>92</sup> See Graber, *supra* note 90.

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

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

<sup>95</sup> Sarah Perez, *Amid Bullying & Threats of Violence, Anonymous Social App Yik Yak Shuts Off Access to U.S. Middle & High School Students*, TECHCRUNCH (Mar. 13, 2014), <http://techcrunch.com/2014/03/13/amid-vicious-bullying-threats-of-violence-anonymous-social-app-yik-yak-shuts-off-access-to-u-s-middle-high-school-students/>.

<sup>96</sup> A university prohibiting students from accessing the application through the university-

their campus internet<sup>97</sup> because geo-fences block the app from working in a specific location, regardless of whether users attempt to access the application through the internet or cellular data use.<sup>98</sup> Unfortunately, although Yik Yak has recognized that the problems occurring at high schools are the same problems occurring at universities across the country, they have adopted a strict policy of refusing geo-fence requests for college campuses.<sup>99</sup> This decision, coupled with other ineffective safeguards Yik Yak has implemented,<sup>100</sup> has left universities to fend for themselves with few tools in the face of growing responsibility.

### III. UNIVERSITIES' LEGAL RESPONSIBILITY TO PROTECT STUDENTS FROM HARASSMENT

Thus far, this Note has highlighted many instances of bullying, harassment, and threats of mass violence that have arisen on college campuses through the Yik Yak virtual billboards. These instances are not just temporary inconveniences to campus life—rather, the issues that have arisen through Yik Yak yield new questions about the responsibility universities owe to their students who are subjected to harassment on mediums over which the university has no control or oversight.

The United States Supreme Court, in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*,<sup>101</sup> determined that educational institutions have a duty to “protect its students from harassment that under Title IX, Title VI, or the [Americans with Disabilities Act], is ‘so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or bene-

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supplied campus wireless internet would not prohibit students from accessing the application through their privately supplied cellular data service. Therefore, the gesture of blocking the application from the university wireless internet would only be symbolic because it would not prevent students from accessing the application. See Nathan Rubbelke, *Campuses ‘Symbolically’ Ban Yik Yak as Battle Over App Rages*, C. FIX (Oct. 21, 2015), <http://www.thecollegefix.com/post/24735/>.

<sup>97</sup> See Dewey, *supra* note 21.

<sup>98</sup> See Valencia, *supra* note 84.

<sup>99</sup> *Support: Geofence Request*, YIK YAK, <https://www.yikyak.com/support/requests/geofence> [<https://perma.cc/WC5Q-WWTQ>] (last visited Apr. 3, 2017) (“We only geofence middle and high schools (primary and secondary) and will not geofence an entire town or college campus.”); see Dewey, *supra* note 21 (“The student government at the tiny College of Idaho asked Yik Yak to place a geofence around campus, the same method they use to block the app at high schools. (Yik Yak declined.)”).

<sup>100</sup> See *supra* Part II.

<sup>101</sup> 526 U.S. 629 (1999).

fits provided by the school.’”<sup>102</sup> In assessing the quality of an institutional response to harassment, the Court has held an institution and its officials may be held liable if their response is “clearly unreasonable in light of the known circumstances.”<sup>103</sup> In order to demonstrate such “deliberate indifference,”<sup>104</sup> a plaintiff must show that a university had “substantial control” over both the “environment in which the harassment occurs” and over the harasser.<sup>105</sup>

Under this standard, responsibility for failing to protect students from the threats and harassment posted to Yik Yak is not easily imputed to universities or their officials. First, the “environment” over which the university must have substantial control is unspecified.<sup>106</sup> While Yik Yak and not the university has control over the application and message board,<sup>107</sup> as opposed to a university-sponsored online forum,<sup>108</sup> the Yik Yak message boards are geo-based to specific areas,<sup>109</sup> over which the universities do have control—their campuses. Second, due to messages’ “anonymous” nature, fulfilling the second prong (that the university has control over the bully himself) is a difficult hurdle to overcome—not only because the messages are anonymous, but also because Yik Yak has taken a firm stance to not reveal the users responsible for harassing messages.<sup>110</sup> Therefore, it seems unlikely that students would succeed in bringing a direct suit against a

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<sup>102</sup> BURL ET AL., *supra* note 35, at 7 (quoting *Davis ex rel. LaShonda D.*, 526 U.S. at 650).

<sup>103</sup> *Davis ex rel. LaShonda D.*, 526 U.S. at 648; see BURL ET AL., *supra* note 35, at 7.

<sup>104</sup> BURL ET AL., *supra* note 35, at 7.

<sup>105</sup> *Id.* (quoting *Davis ex rel. LaShonda D.*, 526 U.S. at 644–45); see also *Davis ex rel. LaShonda D.*, 526 U.S. at 644–45 (“[Title IX’s] plain language confines the scope of prohibited conduct based on the recipient’s degree of control over the harasser and the environment in which the harassment occurs. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference ‘subject[s]’ its students to harassment. That is, the deliberate indifference must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.” (alterations in original) (quoting 20 U.S.C. § 1681(a) (2012), *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966), and *Subject*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2275 (1961))).

<sup>106</sup> See generally *Davis ex rel. LaShonda D.*, 526 U.S. at 629–54 (stating that Title IX’s language requires that “the harassment must take place in a context subject to the school district’s control,” but not clarifying if that context is limited to the location, whether virtual or physical, of the harassment’s origin, or if it extends to areas impacted by such harassment).

<sup>107</sup> See *Yik Yak Terms of Service*, *supra* note 20 (“We may, in our sole discretion, refuse to offer the Services to any person or entity. We may, without notice and in our sole discretion, terminate your right to use the Services, or any portion thereof, and block or prevent your future access to and use of the Services or any portion thereof.”).

<sup>108</sup> See BURL ET AL., *supra* note 35, at 3.

<sup>109</sup> See *supra* Part I.

<sup>110</sup> See *FAQs: Top Questions: Can You Give Me the User Information from a Specific Post?*, *supra* note 77.



university over its failure to prevent harassment on the Yik Yak application.

While universities may not be liable in a direct suit for failure to prevent environments of harassment on campus created by Yik Yak, the Department of Education presents a second, more promising avenue for victims to hold universities accountable through administrative actions—an option students affected by Yik Yak at the University of Mary Washington recently utilized.<sup>111</sup>

#### A. *The Department of Education's Uncertain Standard of University Responsibility*

Universities and colleges are also subject to a second, lesser standard for administrative enforcement of Title II, Title VI, and Title IX, by the Department of Education.<sup>112</sup> According to the U.S. Department of Education's Office for Civil Rights, this standard does not require actual knowledge or deliberate indifference like the standard the *Davis* Court articulated.<sup>113</sup> Rather, the Department of Education has stated:

A school violates a student's rights under Title IX regarding student-on-student sexual violence when the following conditions are met: (1) the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit

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<sup>111</sup> See *infra* Section III.B.

<sup>112</sup> See ALI, *supra* note 23, at 1 ("The statutes that [the Office for Civil Rights] enforces include Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination on the basis of race, color, or national origin; Title IX of the Education Amendments of 1972 (Title IX), which prohibits discrimination on the basis of sex; Section 504 of the Rehabilitation Act of 1973 (Section 504); and Title II of the Americans with Disabilities Act of 1990 (Title II). Section 504 and Title II prohibit discrimination on the basis of disability." (footnotes omitted)); see also *Racial Incidents and Harassment Against Students at Educational Institutions*; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (Mar. 10, 1994) ("To establish a violation of title VI under the hostile environment theory, [the Office for Civil Rights] must find that: (1) A racially hostile environment existed; (2) the recipient had actual or constructive notice of the racially hostile environment; and (3) the recipient failed to respond adequately to redress the racially hostile environment."); *id.* ("Under this analysis, an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment."); CATHERINE E. LHAMON, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: RESPONDING TO BULLYING OF STUDENTS WITH DISABILITIES 4 (Oct. 21, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf> ("[The Office for Civil Rights] would find a disability-based harassment violation under Section 504 and Title II when: (1) a student is bullied based on a disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) school officials know or should know about the bullying; and (4) the school does not respond appropriately.").

<sup>113</sup> See BURL ET AL., *supra* note 35, at 7; LHAMON, *supra* note 23, at 1.

from the school's educational program, i.e. creates a hostile environment; and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects.<sup>114</sup>

This is not to imply that an educational institution has an obligation to respond to every offensive message.<sup>115</sup> However, the Department of Education made clear in a 2010 statement on harassment and bullying that an institution is obligated to respond to student harassment that 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."<sup>116</sup> This 2010 statement suggests that schools may be responsible for and "have a duty to respond to online harassment over which it has no control or oversight, provided it knew or reasonably should have known about it, even where the harassment/bullying is anonymous."<sup>117</sup>

The Department of Education further suggests the broad scope of an institution's responsibility through hypothetical examples of hostile scholastic environments, such as: "Some students anonymously inserted offensive notes into African-American students' lockers and notebooks, used racial slurs, and threatened African-American students . . . . Some African-American students told school officials that they did not feel safe at school. The school investigated and responded to individual instances of misconduct by assigning detention . . . ."<sup>118</sup>

In its critique of the hypothetical, the Department of Education states that school officials violated their Title VI obligations when they failed to realize and adequately address the clear pattern of harassment as creating a racially hostile environment.<sup>119</sup> Specifically, the Department critique states:

The nature of the harassment, the number of incidents, and the students' safety concerns demonstrate that there was a racially hostile environment that interfered with the stu-

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114 LHAMON, *supra* note 23, at 1; see ALI, *supra* note 23, at 1 ("School districts may violate these civil rights statutes and the Department's implementing regulations when peer harassment based on race, color, national origin, sex, or disability is sufficiently serious that it creates a hostile environment and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees.").

115 See ALI, *supra* note 23, at 2.

116 *Id.*

117 BURL ET AL., *supra* note 35, at 7-8.

118 See ALI, *supra* note 23, at 4.

119 *Id.*

dents' ability to participate in the school's education programs and activities. . . . [T]he school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate.<sup>120</sup>

Thus, if failure to adequately respond to harassment that is not directed at a particular individual and leads to a racially hostile environment can trigger institutional responsibility,<sup>121</sup> concern arises about the responsibility universities owe their students who are subjected to harassment through mediums over which the university has no control or oversight. Unlike the hypothetical given by the Department of Education where the harassment occurred exclusively on school-owned facilities,<sup>122</sup> universities have no control over what messages can be posted onto Yik Yak's message boards,<sup>123</sup> yet the harassment at issue is still occurring on their campuses. It therefore begs the question: if a university may be held liable for the hostile environment created by Yik Yak's intrusion onto its campus, should the school be given greater control over these message boards?

*B. Current Legal Action Against Universities for Failure to Respond to Yik Yak Harassment*

Concerns surrounding the creation of hostile environments on college campuses due to geo-based Yik Yak message boards, and the potential liability universities face in failing to mount adequate responses, no longer reside solely in the abstract. Although Yik Yak is still relatively new on many college campuses, the first legal actions against universities have already begun.

In early 2015, a group of students and professors at the University of Mary Washington, collectively called, "Feminists United on Campus," as well as the "Feminist Majority Foundation," a women's rights advocacy group, filed an administrative complaint with the Office for Civil Rights of the Department of Education against the University of Mary Washington.<sup>124</sup> In their complaint, Plaintiffs accuse the school of

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<sup>120</sup> *Id.*

<sup>121</sup> *See id.*

<sup>122</sup> *Id.*

<sup>123</sup> *See* Dewey, *supra* note 21; Mahler, *supra* note 11.

<sup>124</sup> *See* Eugene Volokh, *Feminist Majority Foundation (Publisher of Ms. Magazine) and Others Call for Restricting Campus Speech*, VOLOKH CONSPIRACY (Oct. 27, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/27/feminist-majority-foundation-publisher-of-ms-magazine-and-others-call-for-restricting-campus-speech/>; *see also* First Amended Administrative Complaint, *supra* note 25, at 1–2).

“failing to act on threats against its members . . . on the popular and controversial messaging app Yik Yak.”<sup>125</sup> Specifically, the complaint details numerous threats of rape and violence made on Yik Yak against members.<sup>126</sup> One member’s movements around campus were posted on the application and other posts urged individuals to create issues at a Feminists United meeting, resulting in police being called to provide safety.<sup>127</sup>

What is most interesting about the complaint, however, is that it alleges that the University failed to adequately respond to more than just criminal threats, but harassing ones such as, “‘this feminist needs to calm the hell down,’ and ‘these feminists need to chill their tits,’” as well as more derogatory posts.<sup>128</sup> Feminists United leaders approached school officials numerous times about the problems occurring on Yik Yak, but the school responded by telling students that the university had “‘no recourse for cyberbullying’ and urged them to report incidents to the social-media site.”<sup>129</sup> After the school failed to take any action to control the harassment fostered by Yik Yak on campus, the student group initiated an action against the school.<sup>130</sup>

In response to the complaint, officials with the Department of Education launched an investigation into how the university officials handled the threats against students made on Yik Yak.<sup>131</sup> Specifically, the Office for Civil Rights announced it was “probing whether the university administration subjected students to a hostile environment by failing to properly respond to sexual harassment on social media.”<sup>132</sup> While the investigation is still ongoing, a spokesman for the Department of Education reported to the *Washington Post* that “the agency has made it clear that schools must respond to harassment of students based on sex, even if it happens online.”<sup>133</sup> This current inves-

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125 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](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).

126 See Volokh, *supra* note 124.

127 First Amended Administrative Complaint, *supra* note 25, at 15.

128 *Id.* at 7–8.

129 Jouvenal & Shapiro, *supra* note 125.

130 See First Amended Administrative Complaint, *supra* note 25, at 3–5.

131 Letter from Michael Hing, Supervisory Att’y, Dep’t of Educ., Office for Civil Rights, to Lisa J. Banks, Att’y, Katz, Marshall & Banks 2 (Oct. 13, 2015), <http://static.politico.com/8e/a9/7776b73d49b3ba439972d0708b92/office-for-civil-rights-complaint-notification-letter.pdf>.

132 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/>.

133 *Id.*

tigation, coupled with the possibility of responsibility the Department of Education implied in their 2010 Dear Colleague Letter,<sup>134</sup> underscores the necessity for universities to quickly find a solution to the Yik Yak problem.

Further adding to the pressure universities face about whether and how to respond to harassment occurring online through mediums over which they have no control is a recent letter to the Department of Education from seventy-one women's and civil rights groups, including the Feminist Majority Foundation and the American Association of University Women, asking for the Department of Education "to pressure colleges to (1) punish students for their speech and (2) block student access to certain Web sites . . . such as Yik Yak."<sup>135</sup> The letter, titled "Request for Guidance Reminding Schools of Obligation Under Title IX and Title VI to Address Sex- and Race-Based Harassment Occurring on Yik Yak and Other Anonymous Social Media Applications," warns that the Department of Education's most recent 2010 Guidance Letter to universities about their obligations to respond to harassment does not address newer areas of social media technology through which harassment occurs, leaving educational institutions without clear guidelines and students vulnerable to institutions who feel they have no responsibility for online harassment.<sup>136</sup> In addition to the disruptions on campus, concerns of retaining faculty, and keeping alumni donations forthcoming, the Department of Education's unclear standard surrounding Title II, Title VI, and Title IX responsibilities drives the need for universities to quickly develop a solution to the Yik Yak problem.

#### IV. PROPERTY LAW: A PHYSICAL SOLUTION FOR A VIRTUAL PROBLEM

Due to pressure from students and the Department of Education on universities to adequately respond to virtual harassment and to take steps to prevent future harassment,<sup>137</sup> institutions must develop

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<sup>134</sup> See ALI, *supra* note 23.

<sup>135</sup> See Eugene Volokh, *National Coalition in Favor of Campus Censorship*, VOLOKH CONSPIRACY (Oct. 26, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/10/26/national-coalition-in-favor-of-campus-censorship/>.

<sup>136</sup> See Letter from Feminist Majority Found. et al. to Arne Duncan, U.S. Sec'y of Educ., U.S. Dep't of Educ., and Catherine Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. 10–12 (Oct. 20, 2015), [http://chronicle.com/items/biz/worddoc/OCR%20Letter%20re%20Anonymous%20Social%20Media\\_Oct%202015.docx](http://chronicle.com/items/biz/worddoc/OCR%20Letter%20re%20Anonymous%20Social%20Media_Oct%202015.docx) (when URL is entered, letter is downloaded in Microsoft Word format, not displayed on a web page).

<sup>137</sup> See *supra* Part III.

action plans to combat the issues Yik Yak has incubated on their campuses. However, the uncertainty created by the Department of Education's failure to issue a clear standard regarding universities' responsibilities to respond to harassment through third party anonymous social message applications, such as Yik Yak, has placed educational institutions in the precarious position of determining how to aptly respond to a medium over which they have no control.<sup>138</sup>

Although Yik Yak's message boards and the words posted to them are virtual, by being located on the physical campus's GPS coordinates<sup>139</sup> the nature of the message board itself remains physical. Therefore, addressing the problem of Yik Yak and localized anonymous social message applications with a traditional property law solution is not only appropriate, but promises a simple and effective remedy for universities. Traditional property law principles provide multiple tools through which universities might find ample solutions to the current Yik Yak campus invasion, such as actions for trespass or nuisance, but it is the common law tort of trespass that proposes the most promising remedy. Unlike proposals offered by other sources to address general problems with social media on campus,<sup>140</sup> common law trespass provides the most complete answer for universities looking to expel Yik Yak from campus.

#### A. *Excluding Yik Yak Through a Trespass Action*

Universities should focus on excluding Yik Yak message boards under a theory of trespass law. Under the Restatement (Second) of Torts, an action for trespass may be brought, regardless of whether or not harm was caused, if one intentionally "enters land in the possession of the other, or causes a thing . . . to do so."<sup>141</sup> Further, one need not physically touch the land to trespass as "a trespass may be committed on, beneath, or above the surface of the earth."<sup>142</sup> While public universities are considered public land, the Supreme Court has long held that access to public university campuses on a First Amendment

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<sup>138</sup> See *supra* Part III.

<sup>139</sup> See *supra* Section I.A.

<sup>140</sup> See generally Matthew Fenn, Note, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?*, 81 FORDHAM L. REV. 2729 (2013) (proposing refined state legislation to combat bullying at middle schools and high schools).

<sup>141</sup> RESTATEMENT (SECOND) OF TORTS § 158 (AM. LAW INST. 1965). In the subsequent Reporter's Note, "enters land" is described as "not only coming upon land, but also remaining on it, and, in addition, to include the presence upon the land of a third person or thing which the actor has caused to be or to remain there." *Id.* § 158 cmt. b.

<sup>142</sup> *Id.* § 159(1).

basis is not without limits.<sup>143</sup> Therefore, a public institution “may control access to and use of its property through policies and procedures that comport with the First Amendment requirements.”<sup>144</sup>

The first step in assessing a potential right of access on publicly owned land, especially a right of access implicating a First Amendment right on a public university, is to run a forum analysis.<sup>145</sup> “A forum analysis focuses on whether the speech occurred in a (1) traditional public forum, (2) designated public forum, or (3) . . . nonpublic forum, in order to then determine the level of scrutiny that is applied to governmental regulation of speech within the forum.”<sup>146</sup>

A traditional “public forum is a space that has . . . been held out as a place for use by the general public for speech and speech-related activities[ ] . . . [e.g.] public parks, town squares, and city sidewalks.”<sup>147</sup> A public entity cannot limit speech based on content unless there is a compelling interest.<sup>148</sup> However, a public entity may enforce content-neutral time, place, and manner restrictions in a public forum.<sup>149</sup>

A designated or limited public forum is created when a state designates a forum for use limited to a certain population—such as

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<sup>143</sup> See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”).

<sup>144</sup> See *BURL ET AL.*, *supra* note 35, at 3.

<sup>145</sup> See *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008) (“The first step in assessing a First Amendment claim relating to private speech on government property is to ‘identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.’” (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 965 (9th Cir. 2002), *abrogated by* *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008))); Eric D. Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments*, 38 J. C. & U. L. 451, 456 (2012).

<sup>146</sup> See Bentley, *supra* note 145, at 456 (footnote omitted).

<sup>147</sup> *BURL ET AL.*, *supra* note 35, at 4; see *Perry Educ. Ass’n*, 460 U.S. at 45 (stating a public forum is a place “devoted to assembly and debate”); Lyrrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1982 (2011) (“The definition of the traditional public forum is drawn from dicta in the 1939 case of *Hague v. Committee for Industrial Organization*: ‘Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’” (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939))).

<sup>148</sup> See *Perry Educ. Ass’n*, 460 U.S. at 45.

<sup>149</sup> See *id.* (“The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”).

students of a public college or university—or for a certain purpose.<sup>150</sup> The government actor may protect, in a reasonable and viewpoint-neutral way, those limitations.<sup>151</sup> Examples of a limited public forum include “space set aside for registered student organizations to use for organization business[ ] [or a] campus bulletin board set aside for campus community members to post anything of interest to the campus community.”<sup>152</sup>

A nonpublic forum is a space controlled by a public entity, but which is not traditionally made open to members of the public, such as spaces for the public institution to carry out its business, and are not designed or designated for members of the public to use, e.g., classrooms, offices, and laboratories.<sup>153</sup> “In a non-public forum, a public institution can use reasonable means to . . . regulate speech . . . .”<sup>154</sup> The Court has previously used the nonpublic forum to “demarcate a class of government property in which the [F]irst [A]mendment claims of the public are radically devalued and immune from independent judicial scrutiny.”<sup>155</sup>

Here, the targeting of Yik Yak message boards onto university land that is designated as both a limited public forum—the university school yard and outdoor areas—and a nonpublic forum—the university classrooms and lecture halls—is a trespass denying the university its ability to control access to its grounds and interferes with students’ ability to obtain an education.<sup>156</sup> In each forum, the university may regulate the use of those spaces through narrowly tailored, content-

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<sup>150</sup> *Id.* at 46 n.7; see Lidsky, *supra* note 147, at 1984.

<sup>151</sup> See Christian Legal Soc’y Chapter of the Univ. of Cal., *Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 (2010).

<sup>152</sup> *BURL ET AL.*, *supra* note 35, at 5; see *Gilles v. Garland*, 281 F. App’x 501, 511 (6th Cir. 2008) (noting that “open areas on campus generally accessible to students are not traditional public forums” but are limited public forums).

<sup>153</sup> See *Perry Educ. Ass’n*, 460 U.S. at 46; *BURL ET AL.*, *supra* note 35, at 4; Lidsky, *supra* note 147, at 1989–90.

<sup>154</sup> *BURL ET AL.*, *supra* note 35, at 4; Lidsky, *supra* note 147, at 1989 (“In a nonpublic forum the State has rights similar to those of a private property owner to ‘preserve the property under its control for the use to which it is lawfully dedicated.’” (quoting *United States v. Grace*, 461 U.S. 171, 178 (1983))).

<sup>155</sup> Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. REV.* 1713, 1766 (1987).

<sup>156</sup> See *Widmar v. Vincent*, 454 U.S. 263, 276–77 (1981) (“[W]e affirm the continuing validity of cases, e.g., *Healy v. James*, 408 U.S. [169], 188–189 [(1972)], that recognize a university’s right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.”); see, e.g., *OSU Student All. v. Ray*, 699 F.3d 1053, 1061 (9th Cir. 2012) (“[I]f the government wishes to regulate the placement of newsbins in a public forum, it must do so according to established, content-neutral standards.”).



neutral policies which “leave open alternative ample channels of communication.”<sup>157</sup> But even with the ability to regulate speech in these forums through content-neutral policies, like time, place, and manner restrictions, universities that choose to bring trespass actions against Yik Yak will not implicate First Amendment concerns.<sup>158</sup>

While harassing and threatening Yik Yak messages cause university alarm, a university would not attempt to proscribe message content, which would violate message posters’ First Amendment rights. Rather, a university would try to remove only the medium through which the messages are posted: the Yik Yak message board itself.<sup>159</sup> This action would leave open ample alternative channels of communication for students, such as physical campus billboards or speaking aloud on campus. Students would be permitted to express the same content that currently appears on the Yik Yak message boards, but would have to do so without the veil of anonymity provided by Yik Yak, thus enabling universities to more efficiently protect students from harassment. In this way, banning Yik Yak on college campuses by bringing actions for trespass against the application is both viewpoint and content neutral and is simply an exercise of a university’s right to implement time, place, and manner restrictions on speech.<sup>160</sup> Imagined another way, there is almost no difference between the university bringing an action against a third party to remove a physical billboard placed on its campus and Yik Yak to remove its virtual message board targeted to the GPS coordinates of the school’s campus.<sup>161</sup> Though the use of physical property law to combat a virtual problem

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157 *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Perry Educ. Ass’n*, 460 U.S. at 45).

158 *See Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 669–70 (1973) (per curiam).

159 *See, e.g.,* Campus Use of Univ. Facilities Comm., *Campus Use of University Facilities*, U. COLO. BOULDER (last visited June 10, 2017), <http://www.colorado.edu/policies/campus-use-university-facilities> [<https://perma.cc/4T4G-W4P5>] (“Lawn Signs may be placed only by the following: [1] A University Department for the purpose of promoting a University Department program. [2] A student group registered with SOFO [“Student Organization Financial Office”]. [3] The University of Colorado Student Government (“CUSG”) or candidate for CUSG office in connection with a CUSG election.”); *id.* (defining “lawn sign” as “a temporary sign placed in or on the ground in any Outdoor Space”).

160 *See Papish*, 410 U.S. at 670 (universities have an “authority to enforce reasonable regulations as to the time, place, and manner of speech and its dissemination”). Further, commentators have observed that “the Court’s review of time, place, and manner restrictions normally is not particularly vigorous.” DANIEL A. FARBER, *THE FIRST AMENDMENT* 177 (3d ed. 2010).

161 *See Perry Educ. Ass’n*, 460 U.S. at 46 (“[T]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129–30 (1981))); *see also OSU Student All.*, 699 F.3d at 1061.

may seem unusual, it is not unprecedented. Various states use trespass as a tool to prevent the unauthorized access of virtual computer information.<sup>162</sup>

Using a trespass theory to expel Yik Yak's boards from campuses is the most complete approach to prevent Yik Yak from spawning hostile campus environments. Attempting to simply block the application on a university's Wi-Fi network is only a "symbolic ban" and will not stop users from accessing the application on campus.<sup>163</sup> As other universities have discovered, students are still able to access the application on campus through their cellular data plans, allowing Yik Yak to continue enabling student harassment on campus.<sup>164</sup>

By suing Yik Yak under a trespass theory, universities will protect themselves against the uncertain standard hinted at by the Department of Education.<sup>165</sup> Rather than implementing reactive policies to soothe a hostile environment on college campuses, asserting a property right and excluding Yik Yak from placing message boards located on college campuses is a proactive approach that removes the source of the problem before it materializes. Excluding Yik Yak from college campuses, while requiring costs for the initial litigation, is a one-step solution that will remain effective in the future, rather than resorting to remedial measures every time a new threatening post is made or employing a team of "social media watchdogs" to review all posts occurring on campus.<sup>166</sup>

While excluding Yik Yak from college campuses will not eradicate all harassment and threats on campus, it will lessen the burden on universities to prevent harassment through mediums over which the school has no control. Students will still be able to access the application when not on campus, but limiting its easy access on campus should lessen students' desire to use the application—rendering it just a fad, rather than a permanent installation. Schools may also have to pay a social price if they choose to bring actions against Yik Yak for

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<sup>162</sup> See, e.g., N.Y. PENAL LAW § 156.10 (McKinney 2006) ("A person is guilty of computer trespass when he or she knowingly uses, causes to be used, or accesses a computer, computer service, or computer network without authorization and: [1] he or she does so with an intent to commit or attempt to commit or further the commission of any felony; or [2] he or she thereby knowingly gains access to computer material.").

<sup>163</sup> Dewey, *supra* note 21.

<sup>164</sup> See *id.*

<sup>165</sup> See *supra* Part III.

<sup>166</sup> See Jack Dickey, *Don't Say "Colt 45" or "Pearl Necklace": How to Avoid Being Busted by the Facebook Cops of College Sports*, DEADSPIN (May 24, 2012, 2:30 PM), <http://deadspin.com/5912230/dont-say-colt-45-or-pearl-necklace-how-to-avoid-being-busted-by-the-facebook-cops-of-college-sports>.

trespass, as prospective students may not wish to attend schools where social media applications are limited. This, however, is a worthwhile risk, as the alternative has already begun to create campus environments where students no longer feel safe and welcome<sup>167</sup>—arguably a larger deterrent to application numbers than the inability for students to use certain technologies.

*B. A Second Physical Property Law Approach: Public Nuisance*

It is also natural to examine the Yik Yak problem through the common law tort of nuisance. As a possible remedy, institutions may choose to bring a suit against Yik Yak for the nuisance and disruption it has created on the physical campus<sup>168</sup> in order to receive an injunction against Yik Yak. While nuisance laws, based on property rights, are subject to individual state statutes and therefore may vary between states,<sup>169</sup> this Note relies on the Restatement (Second) of Torts as its guiding principle. However, due to the uncertainty of how a court might view the severity of the on-campus disruptions Yik Yak causes, using nuisance laws as a means to expel Yik Yak from campus is not the preferred option.

Under the Restatement (Second) of Torts, a public nuisance is defined as “an unreasonable interference with a right common to the general public.”<sup>170</sup> The California Supreme Court has clarified that “[t]he public nuisance doctrine is aimed at the protection and redress of *community* interests and, at least in theory, embodies a kind of collective ideal of civil life.”<sup>171</sup> In determining what constitutes a public nuisance, the Restatement suggests three factors for courts to consider:

- (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
- (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
- (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor

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<sup>167</sup> See *supra* Section I.B.

<sup>168</sup> See *supra* Section I.B.

<sup>169</sup> See, e.g., N.Y. PENAL LAW § 240.45 (McKinney 1989); see also Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 365 n.38 (1990).

<sup>170</sup> RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. LAW INST. 1979).

<sup>171</sup> *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 603 (Cal. 1997).

knows or has reason to know, has a significant effect upon the public right.<sup>172</sup>

Here, there is overwhelming evidence that Yik Yak boards have interfered with the public peace and public comfort on college campuses, satisfying factor (a). As a result of the messages posted on the Yik Yak boards, daily life on many campuses has been disrupted, with students leading protests and sit-ins,<sup>173</sup> campuses temporarily shutting down due to threats of mass violence,<sup>174</sup> and even the filing of administrative complaints against universities for the failure to address the resulting hostile environments.<sup>175</sup> While factor (b) is most likely unsatisfied due to Yik Yak's and other anonymous localized message applications' status as very recent developments, factor (c) is clearly met. The installation of the virtual message board on a university's GPS coordinates<sup>176</sup> means that while one insulting message may disappear over time,<sup>177</sup> the board remains, allowing new harassing or threatening messages to be posted continuously. Further, Yik Yak is no longer an innocent bystander. It is well aware of the problems created by its application—most evidenced by the need to create geo-fences around almost every high school and middle school in the country to bar the harmful effects of the message boards.<sup>178</sup>

However, a university taking action against Yik Yak under a public nuisance theory would still face a variety of hurdles which may limit the claim's effectiveness. First, while this Note argues that the message board itself creates a nuisance, a court might see the messages themselves, but not the message board, as the source of the nuisance. Since the messages are being posted by users and not Yik Yak itself,<sup>179</sup> some courts might find that Yik Yak is not liable for any nuisance. Second, while a university may bring a suit for public nuisance in order to enjoin Yik Yak from operating on its campus, various courts might find that the nuisance, while interfering with a public right to peace, does not interfere enough to justify a complete injunction.<sup>180</sup> As the Restatement notes,

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<sup>172</sup> RESTATEMENT (SECOND) OF TORTS § 821B(2) (AM. LAW INST. 1979).

<sup>173</sup> See *supra* Section I.B.

<sup>174</sup> See *supra* Section I.B.

<sup>175</sup> See *supra* Section III.B.

<sup>176</sup> See *supra* Section I.A.

<sup>177</sup> See *supra* Section II.A.

<sup>178</sup> Valencia, *supra* note 84; see *supra* Section II.B.

<sup>179</sup> See *supra* Section I.A.

<sup>180</sup> See RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

In determining whether to award damages, the court's task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done. Although a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it. In an action for injunction the question is whether the activity itself is so unreasonable that it must be stopped. It may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying.<sup>181</sup>

The risk of being awarded only partial damages, and not a full injunction, limits the utility of suing under a theory of public nuisance for universities because any remedy short of a full injunction will not remove Yik Yak from campuses.<sup>182</sup> Unable to remove Yik Yak from campuses entirely, universities will still be susceptible to the hostile environments created by the boards and will have to continue implementing piecemeal solutions, such as monitoring programs,<sup>183</sup> to stay compliant with future Department of Education mandates. Therefore, an action for trespass based on the message boards' placement on campus presents a much more effective and wholesale approach to solving the Yik Yak problem.

### C. *Other Proposed Solutions*

Other solutions to the Yik Yak problem have been proposed by those working in the field or attempted at universities across the country. The National Association of College and University Attorneys has suggested that institutions take a clear stance against harassment, educate their campus about civility standards, tolerance, and diversity, and create a "campus threat assessment team" to review the indicators of a hostile campus environment.<sup>184</sup> This approach, however, is not all that different than the policies currently in place at universities across the country that have failed to prevent the hostile environments at issue. While universities should continue to implement these strategies, they cannot be a university's only, or even primary, response to Yik Yak.

The National Association of College and University Attorneys has also proposed that universities could implement a monitoring pro-

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<sup>181</sup> *Id.* § 821B cmt. i.

<sup>182</sup> *See id.*

<sup>183</sup> *See infra* Section IV.C.

<sup>184</sup> BURL ET AL., *supra* note 35, at 9–10.

gram of all student social media usage.<sup>185</sup> While the idea of a university monitoring its students' social media use may seem draconian, monitoring the social media of student athletes by universities has become quite widespread.<sup>186</sup> In fact, in a March 2012 National College Athletic Association ("NCAA") infractions report involving the University of North Carolina and its student athletes, the NCAA determined that member institutions may have a duty to monitor social media sites "when [the university] has or should have a reasonable suspicion of rules violations."<sup>187</sup> In conducting monitoring of social media, some schools have allowed the use of social media only with the permission of a team coach; others have prohibited social media use during certain periods of the day.<sup>188</sup> In an even more drastic approach, some universities have required athletes to permit team staff "to access their social media accounts, either by 'friending' them, providing usernames and passwords, and/or using third-party monitoring technology through companies such as UDiligence and Varsity Monitor," which can cost between \$7000 and \$10,000 a year.<sup>189</sup>

Though setting up an institutional monitoring program in theory may be effective, the cost of such a program could be overwhelming. Financially, the costs to hire a "social media police force" may require a significant portion of a school's yearly budget and would require twenty-four-hour surveillance to be effective. While the costs of third party applications like UDiligence and Varsity Monitor might help reduce the costs to schools who choose not to hire their own social media surveillance personnel, the applications, which "work through apps that the [students] install on each of their social media accounts and that give the company access to the content on their accounts"

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<sup>185</sup> *Id.* at 12–13.

<sup>186</sup> *Id.* at 13 n.33 ("The students made public records requests to 83 universities with NCAA Division 1 athletics programs for documents about regulation of student-athlete social media accounts. They found 'at least 59 individual university athletic departments restrict student-athletes' use of social media.'" (quoting Rex Santus, *Social Media Monitoring Widespread Among College Athletic Departments, Public Records Survey Shows*, STUDENT PRESS L. CTR. (Mar. 16, 2014, 8:00 PM), <http://www.splc.org/article/2014/03/social-media-monitoring-wide-spread-among-college-athletic-departments-public-records-survey-shows>))).

<sup>187</sup> NCAA, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL PUBLIC INFRACTIONS REPORT 12 (Mar. 12, 2012), [www.ncaa.com/sites/default/files/files/NC%20Public%20Infractions%20Report%20031212.pdf](http://www.ncaa.com/sites/default/files/files/NC%20Public%20Infractions%20Report%20031212.pdf).

<sup>188</sup> For example, the coach of the women's soccer team at Western Kentucky University precludes social media use between midnight and 5 a.m., theorizing this is when "the kids are out . . . drinking or doing stuff they're not supposed to be doing." Santus, *supra* note 186.

<sup>189</sup> BURL ET AL., *supra* note 35, at 14 (citing Dickey, *supra* note 166; Adam Justice, *Kentucky Colleges Make Social Media Monitoring Mandatory*, SOC. MEDIA SUN, <http://socialmedia.sun.com/kentucky-colleges-social-media-monitoring> (last visited Apr. 3, 2017)).

would have damning social costs.<sup>190</sup> The implementation of such a program might create competition between schools since many students may choose to attend schools that would not require students to turn over usernames and passwords to social media accounts, instead of schools that do. Schools implementing social media surveillance programs may also be faced with huge legal obstacles as well. In addressing privacy concerns, twelve states so far have adopted legislation limiting “post-secondary schools’ ability to gain access to their students’ social media postings.”<sup>191</sup> This monitoring approach also leaves universities in an uncertain position about whether they have been able to catch every single harassing message, or if some have slipped through the cracks. Therefore, expelling the application itself from campus, in one fell swoop, is a more certain solution.

Removing Yik Yak through an action for trespass avoids the recurring monitoring costs and social stigmas of invading each student’s social media account. Further, removing the medium through which the messages are posted avoids possible First Amendment privacy concerns that are inherent in monitoring and censoring individual students’ social media accounts.<sup>192</sup>

## CONCLUSION

Yik Yak has rapidly spread to college campuses across the country, bringing with it unprecedented racial and sexual harassment and threats of mass violence.<sup>193</sup> The application, which serves as a virtual bulletin board targeted at physical college campuses,<sup>194</sup> has become front-page news over the extreme disruptions and hostile environments it has fostered on campus.<sup>195</sup> Faced with protesting students and uncertain guidelines from the Department of Education over their responsibility to protect students from online harassment,<sup>196</sup> universities must find a solution to the Yik Yak problem. Actions for trespass against the Yik Yak application can provide universities with a wholesale solution that does not implicate First Amendment concerns over

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 15.

<sup>192</sup> See Frank D. LoMonte, *Fouling the First Amendment: Why Colleges Can’t, and Shouldn’t, Control Student Athletes’ Speech on Social Media*, 9 J. BUS. & TECH. L. 1, 42 (2014); see also BURL ET AL., *supra* note 35, at 16.

<sup>193</sup> See *supra* Section I.B.

<sup>194</sup> See *supra* Section I.A.

<sup>195</sup> See *supra* Section I.B.

<sup>196</sup> See *supra* Part III.

censoring users' speech,<sup>197</sup> saving time and money that would otherwise be required to implement piecemeal fixes.<sup>198</sup>

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<sup>197</sup> See *supra* Section IV.A.

<sup>198</sup> See *supra* Section IV.C.