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Butler University v. John Doe: A New Challenge to Academic Freedom and Shared Governance

By William Watts

What are the circumstances that would lead a university to act against its own self-interest, and negate its most basic values, including its commitment to academic freedom? This is perhaps the most urgent question posed by the libel lawsuit *Butler University v. John Doe*.

The trend for universities to rely more and more heavily on legal processes to regulate their affairs and conduct their business has been widely observed and well documented. In her book *The Trials of Academe: The New Era of Campus Litigation* (2009), Amy Gajda writes that “the growing recourse to the courts by academics, and the increasing willingness of judges to accept the invitation and resolve campus disputes, pose a substantial threat to [the] heart of academic self-governance.”¹ Even in the context of this trend, however, the Butler case stands out, and raises the question of how far universities are willing to go in legalizing their campuses.

The lawsuit against John Doe, filed in Marion County Superior Court in Indianapolis in January 2009, accuses the anonymous blogger of the site *TrueBU* of publishing “libelous and

defamatory statements . . . which have harmed the honesty, integrity, and professional reputation of Butler University and two of its high-level administrators,” the provost and the dean of its College of Fine Arts.² When the lawsuit was made public, many months later, it became clear the John Doe named in the suit was a Butler University student, then in his junior year.

The legal action taken by the university was deeply problematic in two fundamental ways. First, it is the basic mission of a university to help students, not to sue them. Butler prides itself on being student-centered and on helping students to realize their highest aspirations. It is hard to see how a libel lawsuit against a student furthers that mission.

Secondly, free speech is the lifeblood of a university. A university should be the sort of place described in John Milton’s “Areopagitica,” where Falsehood and Truth confront one another openly and without restraint: “so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”³

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The notion of the university as a place where Truth and Falsehood are allowed to confront one another openly and without restraint is embodied in the US Supreme Court decision of 1957, *Sweezy v. New Hampshire*, which extends legal protection to academic freedom. Writing for the majority, Chief Justice Earl Warren stated that “the essentiality of freedom in the community

of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”⁴

Given the “essentiality of freedom” to an academic community, a university’s suing a student for libel constitutes a curious act of self-abnegation, rather like the United Way taking a position against charitable giving, or the National Cattlemen’s Beef Association urging that all Americans embrace a vegan diet.

In some ways, *Butler University v. John Doe* might be seen as a local matter—a blunder that reflects the personalities and conflicts of a particular place at a particular point in time. In other ways, however, the Butler story reflects tensions, dynamics, and dangers that will be familiar to faculty members at universities across the country. In particular, the Butler lawsuit shows what can happen when legalistic reasoning replaces academic deliberation, and when the faculty is marginalized in the decision-making processes of a university. For this reason, I believe that it is important for both Butler and for the wider academic community to examine this case and consider both what went wrong and what might be done to avoid similar violations of academic freedom and student rights in the future. To that end, I will begin my discussion with a narrative of events leading up to and following from *Butler University v. John Doe*. I will follow this with a commentary on those events, informed by my opinions. In the last two sections of this essay, I will offer a discussion of the implications of the lawsuit for Butler and other academic communities, followed by a discussion of remedies that might avert the recurrence of an event like a university’s suing a student for libel.

Part 1: A Narrative of Events

The blogger named in the suit wrote under the pseudonym “Soodo Nym” and maintained *TrueBU* on a Google site from mid-October 2008 to early January 2009. The blog claimed, on its masthead, to tell “the true, anonymous stories of Butler University.”⁵ Early blog entries dealt with the arrival of the new provost, Jamie Comstock, and with the influence of fraternities and sororities on campus. Later ones dealt with a conflict between the chair of the School of Music

and dean of the university's Jordan College of Fine Arts. This conflict began when the music chair offered her letter of resignation to the dean in response to criticism she deemed unfair; when negotiations to keep her in her position failed, her letter was accepted and she was dismissed from her position.

The blog offered harsh criticism of the dean and the provost for their handling of the conflict and expressed sympathy for the music chair. The blog also published some apparently private documents, including an exchange between the president and a faculty member. This was a time of some tension on campus; the music chair had many supporters and the dean had many detractors. Consequently, the blog was read by many on campus who were eager for news and understanding of the events that were unfolding. The blog received about two thousand hits in less than three months, suggesting a robust local audience, but little reach beyond the Butler campus.

On Christmas Day, toward the end of the blog's existence, Soodo Nym sent a sarcastic e-mail message to the provost and dean, telling them, "I haven't forgotten the abuses of power and the poor leadership you showed last semester."⁶ The blog was shut down soon after the first of the year, after the university lawyer threatened, through an e-mail message, to take both civil and criminal action against Soodo Nym.

The lawsuit was filed on January 8, 2009, about a week after the blog was shut down. The lawsuit includes the Christmas e-mail message among its exhibits and calls it "threatening/harassing." The lawsuit also quotes about a dozen passages from the blog that it deems defamatory and libelous. The quotations in the lawsuit include some early postings, in which blogger suggests that the provost doesn't really care about students and does not work with them unless "she can see how the relationship will directly benefit her."⁷

Most of the passages quoted in the lawsuit, however, concern the conflict between the music chair and the dean of fine arts. For example, the lawsuit includes the blogger's statement that the dean of the fine arts college is "power hungry and afraid of his own shadow,"⁸ and that he has driven talented administrators away from the college. In the last passage quoted in the

lawsuit, the blogger asks, “Is this what is becoming of the Butler Way? . . . Administrators who are so full of themselves and, paradoxically, lack the confidence to be honest and truthful while making decisions?”

So far as I know, the only people on campus who knew of the existence of the lawsuit from the time it was filed in January until it became public in September 2009 were the president and the provost. During this time, however, there were controversies on campus that seemed, in retrospect, to be either directly or indirectly related to the *TrueBU*.

To begin with, the *Butler Collegian* reported, at the end of February, on an incident in which a student’s private e-mail was read by university officials.⁹ The story suggested that this student was in conversation with students who maintained the *TrueBU* blog but was not himself responsible for it. The student identified in the story was the son of the dean of the College of Liberal Arts and Sciences and the stepson of the former music school chair, whose dismissal had been discussed in the *TrueBU* blog.

I was alarmed by the prospect of university officials reading private e-mail, and I spoke to the student about the incident. From this conversation, I learned that the private e-mail of the student’s father, the dean of my college, had also been read, and I spoke to him as well. I then wrote an opinion piece criticizing the practice of reading private e-mail messages, which was subsequently published in a blog maintained by the opinion editor of the campus newspaper.¹⁰

The controversy over the reading of private e-mail allowed some on campus to discern the identity of Soodo Nym, the blogger responsible for *TrueBU*. In my early conversations with the student, he claimed that he was not responsible for the blog but knew the students who were. In subsequent conversations, the student admitted that he had a hand in running the blog. Eventually I came to believe—and subsequent events confirmed—that the student was solely responsible for the blog, although he included in it contributions from at least one other student.

This meant that the student maintaining the blog was writing about events that directly affected his family. As he reported on the conflict between the music chair and the dean of fine

arts, culminating in the dismissal of the chair, he was writing about his own stepmother and her travails. Moreover, his harsh criticism of the dean and his sympathy for the chair could be seen as the expression of family allegiances. As I will discuss later in this essay, the revelation that familial allegiances were at play influenced the way that some on campus came to see both the original blog and the lawsuit filed against it.

The familial complication to the controversy was compounded when, in early May 2009, the dean of the College of Liberal Arts and Sciences was dismissed in a very public way by the provost. The dismissal occurred during a meeting of the faculty of the college, at which the provost was to report on the faculty's review of the dean at the end of his third year of service. She reported on a positive faculty review of the dean but then said she had decided that it was time for new leadership in the college. Some weeks later, the dean was out of his office (but remained on the faculty), and an interim dean was appointed.

As President Bobby Fong later reported, in a memorandum to the faculty, the university obtained definitive proof of the identity of Soodo Nym, the blogger, on June 9, 2009.¹¹ As part of the lawsuit, the university had subpoenaed Google, which provided the blogging service that hosted *TrueBU* and the e-mail service used by Soodo Nym. The Google response to the subpoena showed that Soodo Nym was the Butler student whose stepmother had been chair of music and whose father had been dean of liberal arts.

I first became aware of the lawsuit at the end of September, when the student told me that he was being sued by the university. He first read to me, over the phone, and then showed me an e-mail message that had been sent by the university lawyer to his lawyer, stating that the university "will proceed to substitute [the student blogger's name] for John Doe in the pending lawsuit. I anticipate that these actions will occur by the end of the week. Please let me know whether you will accept service for [the student blogger]."

Once I knew of the existence of the lawsuit, I went to the Marion County Courthouse in downtown Indianapolis to obtain a copy of it. I then took a number of steps to try to stop the lawsuit. I wrote to the president and vice president of student affairs asking them to "take

immediate steps to close this case and to clarify the standing of the student in question.”¹² I wrote separately to the provost, suggesting that suing a student was inappropriate and would bring no good result to the university. I did not convince university officials to drop the lawsuit, but they arranged for me to speak with two lawyers responsible for the case. In an hour-long telephone conversation, the lawyers told me that Butler’s lawsuit met the legal standards for defamation and libel, and I argued back that it was immoral and inconsistent with university’s mission to sue a student for libel.

When my private efforts to stop the lawsuit failed, I took the matter to the Faculty Senate. I conveyed an electronic copy of the lawsuit to my fellow senators and raised a set of concerns about the action. I suggested that the lawsuit was inconsistent with the mission of the university, especially with regard to its commitment to the free exchange of ideas, and I questioned whether it was appropriate to expend university funds on such an action. Because the senate’s e-mail list goes to all faculty members, my message of October 10 effectively made the lawsuit public within the university.

At the senate meeting of October 13, the president answered my questions and defended the lawsuit. He claimed that the lawsuit was justified and that the expenditure of funds was “necessary and appropriate.”¹³ He further suggested that the lawsuit was consistent with the university’s commitment to the free exchange of ideas; “Academic freedom,” he asserted, “does not provide protection for defamation and harassment.” The president also suggested that the lawsuit was necessary to protect the safety of the provost. In response to the request to close the lawsuit, the president said that “the University is keeping all of its options open.”¹⁴

The following day, the *Butler Collegian* ran three separate pieces on the lawsuit: a news article about the senate meeting; an opinion piece I wrote, asking that the lawsuit be closed; and an interview with the student in which he admitted, for the first time in public, that he was Soodo Nym.¹⁵ In the interview, the student defended both the blog and his decision to write anonymously, and he asserted that there was nothing in his writing that was in any threatening or harassing. He criticized the university’s case against him as a “SLAPP (Strategic Lawsuit

Against Public Participation) lawsuit.” Because the student had identified himself, it was now possible for the first time to name him in public discussions of the lawsuit.

In the meantime, the lawsuit was beginning to attract attention beyond the university. The night before the senate meeting, a local television station reported that Butler University was suing a blogger.¹⁶ A few days later, on October 16, the online journal *Inside Higher Ed* published an article about the lawsuit under the headline “University Sues Student Blogger.”¹⁷ As part of its article, *Inside Higher Ed* published the original blog and the lawsuit in its entirety. The next day, the *Indianapolis Star* ran an article that stated, on the authority of Adam Kissel of the Foundation for Individual Rights in Education, that “this is the first case of a university suing a student over online speech.”¹⁸

Soon after the *Inside Higher Ed* piece appeared, the story was picked up by a wide array of websites interested in free speech issues and by student newspapers. By the end of 2009, more than twenty student newspapers around the country had covered the lawsuit, either as a news article or as the topic of an editorial. Many of the editorials suggested that the Butler case set a dangerous precedent for student publications. The *Daily Iowan* wrote that “a blatantly censorial lawsuit filed against a Butler University junior is a threat to students’ freedom of speech everywhere.”¹⁹ The *Johns Hopkins News-Letter* opined that “Butler University’s course of action against [the student blogger] is misguided, unnecessary and poses a very terrifying problem for students and journalists everywhere: Will universities nationwide attempt to dictate free speech and muddy the growth of free thinking, following Butler University’s course of action?”²⁰

The Indiana University *Daily Student* observed that the free speech issues in the lawsuit were so obvious that they did not even need discussion; instead, this editorial quoted from Butler’s mission statement and argued that the university had violated its own mission in pursuing the lawsuit: “Students should be supported by their university in all forms of ‘inquiry’ and ‘interactive dialogue’ —even the kind that is critical of the university administration.”²¹

In response to such criticism, the president issued a second memorandum to the faculty defending the lawsuit on October 19. In it, he said that “Butler has a duty to safeguard robust

academic speech. However, the university also has a duty to protect all of its members from defamation, harassment, threats, and intimidation. This, too, is part of creating a campus climate where robust speech can flourish.”²² He also asserted in this memorandum that “the University did not, has not, and will not sue” the student blogger. The lawsuit, however, remained open.

At the next Senate meeting, on October 27, President Fong announced that the university would close the suit and seek to punish the student for his statements through disciplinary processes internal to the university. Even then, however, President Fong continued to defend the suit. In his memorandum announcing that the suit would be closed, he stated, once again, “Butler has a duty to safeguard robust academic speech. However, the University also has a commitment and duty to protect the safety of all its members and ensure the opportunity to teach and to learn freely.”²³

The disciplinary process continued for almost two months after the lawsuit was dropped. At one point, the student filed a restraining order against the university to stop the process. The university, in turn, demanded that the student post a one-hundred-thousand-dollar bond pending the outcome of the hearing to dispose of the restraining order. Eventually, however, the university and the student came to an agreement to resolve the matter. The university insisted that the agreement be treated as confidential, so the terms of the agreement have not been made public. This agreement was completed sometime in December 2009.

Thus, the resolution of this matter took nearly an entire year, from the time the university filed the lawsuit in January to the time when the disciplinary process concluded near the end of 2009. The student graduated a year early, in May 2010, and entered law school at the University of Illinois in the fall of that same year.

Part 2: An Interpretation of the Events

In this section, I will take up two interconnected questions: (1) Why did the university pursue a lawsuit that seems contrary to its own best interests? and (2) Why were the faculty unable to

respond collectively to the lawsuit and affirm the value of free speech on campus? In attempting to answer these questions, I will need to go beyond the facts I have related in the previous section and draw on my own interpretation of events. In order to differentiate between facts and my own views, I will frequently resort to phrases such as “in my opinion” or “I believe,” in contradiction to the best advice offered by experts on English prose style.

In a series of memoranda and public statements, the president offered three main reasons for the university’s pursuit of the lawsuit. First, as the lawsuit itself asserts, the material in the blog and in the e-mail message was defamatory and libelous and therefore subject to legal action. Second, the lawsuit was necessary to protect the physical safety of the provost. And third, the university never planned to bring the lawsuit to trial but instead filed the suit in order to establish the identity of the anonymous blogger.

One might argue that these three explanations are mutually contradictory. More important, however, I would argue that none of them stands up to critical scrutiny.

The entire blog is now available on the *Inside Higher Ed* website, and I believe one would be hard-pressed to identify passages that are in fact defamatory or libelous. Many of the passages quoted in the lawsuit represent opinions and are therefore excluded from the definition of libel. On the occasions where the student does present facts, I believe that he either does offer or could offer evidence in support of his claims. In perhaps the most perilous statement on the blog, he asserts that the dean of fine arts lied at a public meeting. I have also heard faculty members claim that the dean lied at that meeting, so I have to believe that, if the matter came to trial, the student would be able to support the claims he made. If it could be shown that the student blogger was wrong in asserting that the dean lied, I do not believe that it could be shown that his statement was malicious, as required by libel law.

As for the claim that the lawsuit was filed to protect the physical safety of the provost, I would point out, again, that the entire blog and the e-mail message written by Soodo Nym are public, and I would suggest that there is not a word of threat contained in this record. There is criticism, and sometimes harsh criticism, but at no point does the blogger suggest that he is

going to harm any of the administrators he criticizes, nor does he invite his readers to threaten or harm them. To construe the blog and the e-mail as threatening is, in my view, to construe all criticism as threatening.

In addition, if there were some kind of threat in the blog and e-mail message, it does not seem to me that a libel lawsuit is the proper response to such a threat. A police report and a criminal complaint would seem to me to be the more appropriate response to a threat. Moreover, the student was threatened with the lawsuit in September 2009, almost nine months after the blog was shut down and Soodo Nym's e-mail message had been sent, and long after any conceivable threat was in circulation. In my opinion, there is simply no credible evidence that the lawsuit was filed to protect the physical safety of anyone on campus.

Finally, the claim that the university did not really plan to sue the student, but wanted to discover the identity of the blogger, seems to me far-fetched, given the president's other statements that the lawsuit was necessary. I believe that the university knew all along whom it was suing, but if it is true that it university needed proof of his identity, it received that, according to the president, on June 9, when Google responded to the subpoena and revealed the identity of Soodo Nym. This rationale does not, however, explain why the university then threatened, on September 27, to substitute the student's name for John Doe in the lawsuit.

And, indeed, many outside commentators did not accept the university's claim that it had not actually sued a student. The *Inside Higher Ed* headline declared, bluntly, "University Sues Student Blogger." The three student newspapers I quote above—from Indiana University, the University of Iowa, and Johns Hopkins University—all suggest that the Butler had sued one of its own students. Given the lawyer's threat on September 27 to substitute the student's name for John Doe, I think there is very good reason to apply Ockham's razor to the university's legalist explanation, and say that it sued one of its own students.

I don't think that there ever will be an adequate explanation for the university's pursuit of the libel lawsuit, because I do not believe that the motives of the president and provost can be explained in a way that is coherent and consistent with the interests of the university. My own

opinion is that they were acting out of an intense anger that blinded them to the consequences of their actions. In the first instance, their anger was directed toward the blog itself, which they found embarrassing both to themselves and to the institution, and they took decisive steps to close the blog down.

Later, however, I believe that their anger was directed toward the student's father, whose dismissal from his position as dean of liberal arts was not a tidy affair. In May, the provost gave a report to the college's Board of Visitors in which she criticized the former dean's performance of his job. These comments got back to the former dean, who stated, through a lawyer, that the provost's characterization of his performance was defamatory and demanded an apology. It was only when negotiations for an apology broke down that the university lawyer threatened to name the student in the lawsuit. In this way, I believe, the university used the threat of a lawsuit as leverage against the father. In doing so, I further believe that the university failed to honor the autonomy and rights of one of its own students.

In making their unwise decisions first to file the lawsuit and then to defend it, the president and provost were supported by a very aggressive lawyer from a local law firm which held the contract to represent the university. Even though he was not a university employee, he played a powerful and unusual role within the university. In the original *Inside Higher Ed* story, this lawyer served as the spokesman for the university, and explained its commitment to academic freedom. At one of the two faculty senate meetings, the lawyer appeared with the president to defend the lawsuit. It is my belief that the lawyer emboldened the president and provost to pursue the lawsuit, and, in doing so, deflected their attention from the mission and needs of the university. Moreover, I believe that the presence of the lawyer deterred members of the community from speaking up about the lawsuit, and his presence also enabled to the president and the provost to dismiss any criticism they did receive. In this way, the lawyer, the president and the provost formed a closed circle of communication, isolated from the values and concerns of the wider university community

When a university is off track and is beginning to behave in ways that are self-destructive, one would hope that there would be internal checks that correct this course of action. And when the issues involve academic freedom, it seems to me that the faculty should take a leading role in correcting the course of the university. Unfortunately, however, this part of the story is rather discouraging.

At the two Faculty Senate meetings devoted to the issue, more faculty members spoke in support of the lawsuit than against it, and both the chair and the vice chair of the senate expressed sympathy for the action. A brave junior faculty member, who was up for tenure at the time, organized a lively and well-attended forum on free speech, and a number of faculty members and students gave passionate speeches in defense of free speech, but the event did not really resonate across campus. The notion that Butler had violated its own mission statement by suing a student, so forcefully stated in the Indiana University's *Daily Student* editorial, never really took hold on campus.

There are several reasons for this. For one thing, many faculty members were inclined to accept the administration's explanation of the lawsuit at face value. In some cases, faculty members were willing to defend the lawsuit without having read it, and without having read the blog and e-mail message that inspired it. Some repeated the claim that the blog was libelous, or that the lawsuit was necessary to protect the safety of those on campus, or that the university had not really sued the students without being able to point to evidence that supported these claims.

Campaigning by both sides of the conflict also contributed to the divisiveness of the faculty. The father of the blogger used his extensive contacts among academics to encourage colleagues to comment on the case and to sign a petition on behalf of his son. The student sent out news releases about the case to campus newspapers and to organizations that support free speech. He also set up a new blog, "I Am John Doe" (<http://akadoe.blogspot.com/>), recounting his experiences in dealing with the lawsuit and subsequent disciplinary process within the university. This new blog received far more attention than the original *TrueBU*. Some of the

editorials and news stories in student papers were inspired by these news releases and blog postings. Given their strong belief that both the lawsuit and university's efforts to punish the son were unjust, it is understandable that the father and son sought to turn this into a cause célèbre, but their actions allowed some to dismiss the matter as an exercise in partisanship.

University administrators, for their part, suggested that some egregious action had occurred that they could not talk about. On more than one occasion, the provost said, "If you knew what I knew, you would understand why I have to do this." At one point, when I told the provost that I thought it immoral to sue a student, she suggested that I was being "played" by the student's father.²⁴ But even after extensive public scrutiny of this matter, no egregious action by either the father or son ever emerged.

A central question for many trying to understand this case had to do with whether the father, who was dean of the liberal arts college at the time, had provided the son with materials that he used in his blog. In an apparent effort to discover whether this was true, campus officials read the private e-mail of both the father and the son. They apparently found no such evidence. If they had found such evidence, I believe they would have made it known. Moreover, if such evidence emerged, it would have provided reason to punish the father, not to sue the son for libel.

Because private e-mail was being read by university officials, and because the stakes seemed so high, a climate of fear took hold in some parts of campus. (It is still the case that many Butler faculty members avoid campus e-mail because they believe it is being monitored by administrators.) A group of faculty members in the music school claimed that they had information that would exonerate the blogger by showing that he had received private letters and other material from them and not from his father. These faculty members claimed that they were unwilling to identify themselves for fear that they would be subjected to retribution by administrators. In one of the stranger moments in this extended conflict, they gave confidential testimony to a minister on campus who then wrote a letter on their behalf.²⁵

This climate of divisiveness, fear, and indecision ultimately meant that the faculty took no collective action in response to the lawsuit and made no statement in support of academic freedom and student rights in the wake of *Butler University v. John Doe*. In my view, this controversy lasted longer than it had to and was more damaging than it needed to be because the faculty did not act. I will say more about this in the final section of this essay.

Part 3: The Implications of the Lawsuit

I began this essay by asserting that Butler's libel lawsuit could be seen within the context of the increasingly legalistic climate of academia but that it tested the outer limits of this trend. In this section, I wish to elaborate on that point, and I also want to explore why this lawsuit matters to Butler and other universities.

In her account of the growing legalization of academic life, Amy Gajda tells stories of students suing universities for academic accommodation and violations of their First Amendment rights, students suing professors over grades, professors and universities suing one another over intellectual property rights, and professors suing other professors for negative reviews. One could imagine *Butler University v. John Doe* residing comfortably among these stories in a future edition of Gajda's book.

In other ways, though, Butler's lawsuit seems singular and goes beyond anything described by Gajda. Two things, in particular, seem to stand out in this case. First, this may well be the first time a university has filed a lawsuit for libel or defamation against one of its own students. Second, I will argue, it is extraordinary that the university itself filed a libel lawsuit on behalf of administrator; in all other cases that I am aware of where students have been sued for libel or defamation, the injured individuals, rather than the university itself, has filed the suit and borne the cost of litigation. One way to see the peculiarities of the Butler case is to compare it to similar cases concerning libel and defamation at universities in recent years.

I cannot find a single instance of a university suing one of its own students for libel or defamation. The closest case I can find is *Full Sail Inc. v. Spevack*, brought before the US District

Court of the Middle District of Florida in 2003. This case concerned the website, fullsailsucks.com, which reproduced the trademark for Full Sail University, of Winter Park, Florida, next to the words “three piles of shit awarded to Full Sail for being a really shitty school.”²⁶ The website also offered a reward of “\$100 to anyone who takes a self picture of themselves in front of Full Sail with a sign that reads fullsailsucks.com!”²⁷ Students and alumni posted both positive and negative comments about the university on the website.

Before it filed the lawsuit, Full Sail tried to shut down fullsailsucks.com through a complaint of trademark infringement filed with the World Intellectual Property Organization (WIPO). Full Sail also argued that Ryan Spevack was using the domain name in bad faith. In its decision, WIPO denied the complaint, concluding that the “website appears to be a legitimate protest site, used to inform current and potential students about Complainant’s school.”²⁸ Full Sail also lost its lawsuit against Spevack when the Florida court determined that it did not have jurisdiction over a website that was initiated or operated by residents of Arizona.

Full Sail University differs from Butler University in several important ways. It is a for-profit trade school, offering degree programs in such areas as computer animation, film, and game development. It is accredited not by the regional accrediting body, the Southern Association of Colleges and Schools, but by the Accrediting Commission of Career Schools and Colleges (ACCSC). Not surprisingly, the lawsuit, like the trademark case, is argued on commercial grounds; Full Sail claims that the website fullsailsucks.com caused “(1) tortious interference of advantageous business relationships under state law, and (2) dilution by tarnishment of registered trademarks in violation of . . . the Lanham Act.”²⁹

Because it is a for-profit entity, and because its lawsuit concerns damage to its business prospects, Full Sail University’s libel lawsuit does not provide a very good precedent for Butler University’s libel case. Butler is a nonprofit university, accredited by the North Central Association of Colleges and Schools, and it has a system of tenure and faculty governance designed to protect academic freedom.

When a student has been sued for libel or defamation at a traditional nonprofit university, the suit has invariably been brought by an individual rather than by the university itself. Thus, for example, in *Yeagle v. Collegiate Times*, which was decided by the Supreme Court of Virginia in 1998, an assistant to the vice president of student affairs at Virginia Polytechnic Institute and State University argued that she had been defamed by the campus newspaper in an article that referred to her as the “Director of Butt-Licking.”³⁰ The newspaper admitted that the designation was a mistake; it was inserted as a placeholder until Sharon Yeagle’s actual title was found, but it was never removed from the article. Nevertheless, Yeagle sued for \$500,000 in compensatory damages, and \$350,000 in punitive damages. She lost at each stage of the judicial process, and the Virginia Supreme Court affirmed the lower courts’ dismissal of the case on the grounds that “Director of Butt-Licking” amounted not to defamation but to “rhetorical hyperbole.”³¹³²

Similarly, in *Lewis v. The University Chronicle*, a libel lawsuit was filed not by a university but by a university administrator who considered himself injured. In 2002, when Richard Lewis was interim dean of St. Cloud State University, the student newspaper published an article that attributed anti-Semitic statements and actions to him. The newspaper subsequently withdrew and apologized for some of its assertions. In 2008, the Minnesota Court of Appeals affirmed the lower court’s dismissal of the case on the grounds that Lewis was a “limited-purpose public figure” and that he had not succeeded in showing malice on the part of the newspaper.³³ More recently, Timothy Rosen, a Queens College law professor has sued a student for libel and slander, alleging that the student had spread rumors that he was “having sex with a 17-year-old Queens College student.”³⁴ This case is still pending, but, again, the suit has been brought by an individual, and not by the university.

If we compare these cases to *Butler University v. John Doe*, several things stand out. First of all, the assertions of Soodo Nym, the Butler blogger, are relatively tame by comparison. He does not give Butler the “three piles of shit award,” nor does he call anyone the “Director of Butt-Licking,” nor does he mistakenly attribute anti-Semitic remarks to any administrator. He does assert that the dean of fine arts is “power hungry and afraid of his own shadow,” but surely this

is a milder form of “rhetorical hyperbole” than “Director of Butt-Licking.” One can disagree with Soodo Nym’s opinions, but they are, on the whole, reasoned and supported. Moreover, it is quite clear, from the attention the blog received while it was operating, from what faculty members in the music school have stated about providing documents to the blogger, and from what others will state privately, that Soodo Nym’s blog postings gave voice to attitudes, perceptions, and opinions shared by a sizeable group of people on campus.

What is even more striking, however, is the fact that Butler has invested its institutional prestige and resources in a spurious lawsuit. If the provost and the dean of fine arts had decided to initiate their own libel suit, at their own expense and on their own authority, as faculty members and administrators have done at other institutions, then the action would have had a kind of legitimacy and seriousness of purpose lacking in *Butler University v. John Doe*. I certainly don’t think these administrators would have won their case, but at least the university itself would not have been implicated in this effort to punish speech on campus.

Even in strictly pragmatic terms, many aspects of Butler’s case seem strangely miscalculated and contrary to the interests of the university. Take, for example, the notion that the anonymous blogger “harmed the honesty, integrity, and professional reputation of Butler University.” This assertion is made in the lawsuit, and it was repeated by the president and provost after the blogger was identified. The notion that a twenty-year-old junior, who ran a blog that received about two thousand hits in three months, could single-handedly harm the reputation of a 150-year-old university in a way that would cause lasting damage is far-fetched, to say the least. And if the university really was trying to protect its reputation, the lawsuit itself did more harm to that reputation than anything the blogger wrote.

In its defense of individual administrators, the lawsuit is equally misguided. The provost was understandably hurt by the assertion that she did not care about students. One would think, however, that the best way to refute this assertion would be to work with students, and show through actions that the criticism was unfounded. Suing would seem to do more to affirm the criticism than to discredit it.

What is perhaps most disturbing about the Butler case, however, is that it may suggest new ways in which nonprofit universities may begin to act in ways comparable to corporations and for-profit counterparts. Butler did not file a complaint or lawsuit over trademark infringement, as Full Sail University did, but one can detect a similar sort of logic in its claim that the university itself had been libeled by the student. In one of the passages cited in the lawsuit, the student criticized administrators for their purported misdeed, and then asked, "Is this what is becoming of the Butler Way? . . . Administrators who are so full of themselves and, paradoxically, lack the confidence to be honest and truthful while making decisions?" As if to emphasize the point, the lawsuit goes on to quote another passage in which the blogger asserts, "That seems to be the Butler way: A blatant lack of integrity."

To comprehend the full import of these passages in the lawsuit, one needs to understand that Butler, like many universities, has gone through a process of marketing itself that includes developing a brand. Butler's brand is "The Butler Way." This marketing tag seeks to capitalize on the success of the Butler men's basketball team, which has played well for much of the past decade, and which came within two points of winning the NCAA championship game last year against Duke. "The Butler Way" has been used by the athletics program to define an approach to competition that "demands commitment, denies selfishness, accepts reality yet seeks improvement everyday while putting the team above self."³⁵ Over the past two years, "The Butler Way" has been attached to all aspects of the university, including its academic programs.³⁶

In associating "The Butler Way" with bad administrative practices, the student might be seen as tarnishing the university's brand. In this way, the lawsuit suggests that there might not be such a big difference between nonprofit university, like Butler, and a for-profit university, like Full Sail. Fortunately, Full Sail did not win its libel case, and the trademark court ruled *fullsailsucks.com* to be a legitimate protest site. But Butler and Full Sail may well have pointed the way forward for other universities wishing to establish, protect, and promote their brands. Such lawsuits do not need to win in a court of law; by forcing the targets of the lawsuit to

expend money on their own defense, universities can drive up the cost of criticism and discourage their detractors from speaking up.

Butler's action in filing a lawsuit in the defense of "two of its high-level administrators" also sets a disturbing precedent. This could, I think, be seen as a further step in the movement away from a collegial and largely egalitarian form of governance and toward a corporate model, in which top executives enjoy privileges and rights unavailable to the rest of the community. The student threatened with a lawsuit was, after all, a member of the Butler community, too, but he had no access to the legal resources of the university.

Most important, the Butler lawsuit calls into question the very manner in which members of an academic community speak about their universities. I hold the view that dissent plays an essential role in an academic community, and we criticize our universities with the ultimate aim of making them better. In my experience, this impulse to criticize animates a good many faculty meetings. If the Butler lawsuit points the way forward, however, we may need to check our wallets and determine what level of legal defense we can afford before we speak up.

Part 4: Remedies

Clearly, it is too late to kill all of the lawyers, as Dick suggests in *Henry VI*. Academics are close cousins, both literally and figuratively, to lawyers, and the lawyers are on campus to stay. But surely there is some kind of balance to be found between taking prudent legal steps to protect the interests of the university, on the one hand, and preserving essential academic virtues, such as academic freedom and a commitment to students, on the other.

One of the few good things to come out of this unhappy series of incidents is that the university will no longer employ the aggressive lawyer and the law firm he represents for its business. The chair of the Board of Trustees, whose response to this incident has otherwise been Delphic, has said that in the future the university will employ a lawyer who is versed in the law as it applies to higher education.

Perhaps this will help, but we should remind ourselves that, in most instances, lawyers do the bidding of those who employ them. Moreover, as Gajda points out, “as far as litigation and the courts are concerned, academia is beginning to resemble other walks of life.”³⁷ Hiring a lawyer who specializes in academic matters might only quicken the impulse to litigate and accelerate this trend toward legalization.

For this reason, universities need to take steps to resist this impulse to enter into litigation and other legal tactics that are fundamentally at odds with their own mission and values. On the most practical level, it seems to me, the Butler case points to the need to implement protocols for reviewing legal actions before they are initiated. Before legal papers are filed in any courthouse, and before any party is threatened with a university-initiated lawsuit, it seems to me that those who control the legal resources need to ask themselves, explicitly, whether the contemplated action is consistent with the values and academic mission of the university. And those conducting this review should realize that not everything that is legally permissible is ethical or conducive to the good of the university.

This review should be especially rigorous when a university is contemplating legal action against a member of its own community. And administrators should also ask themselves whether the institution would be well served if the legal action were reported on the front page of the *Chronicle of Higher Education*.

Even more important, however, the faculty needs to be more confident and more decisive in exercising its professional judgment. Our faculty, perhaps more than most, is inclined to go along with administrative initiatives, and to trust administrators when they say that a course of action is for the good of the university. In many cases, this is perhaps a sound impulse and makes for a degree of institutional harmony.

But in cases like this one, where an action is so clearly at odds with academic freedom and the mission of a university, the faculty needs to find a way to speak clearly and collectively. In his recent book, *No University Is an Island*, Cary Nelson emphasizes the role of shared governance in preserving academic freedom on campus. He writes that “academic freedom is

an empty concept, or at least an effectively diminished one, if the faculty does not control its enforcement through shared governance."³⁸ Nelson also emphasizes the importance of collective faculty action in maintaining academic freedom and shared governance: "Sufficient faculty solidarity is a nearly irresistible force and can be used to guarantee proper forms of shared governance."³⁹

For this reason, it is perhaps not surprising that *Butler University v. John Doe* has occurred during a period of much diminished shared governance at the university. Butler is primarily a teaching university and has therefore not experienced the kinds of dramatic stories of corporatization that come with the infusion of research funds into a university.⁴⁰ There have been no departments taken over by corporate interests, no new divisions formed to avoid faculty oversight of the curriculum, and no controversial tenure decisions that can be tied directly to the commercialization of the university.

Rather, the erosion of shared governance at Butler has been more subtle and more insidious. Over the past fifteen years, the faculty has been removed from more and more of the decision-making processes of the university. Butler once had a cabinet, with representatives drawn from the faculty, the administration, and the student body, which had decision-making authority over many aspects of campus life, including the annual budget. Soon after he became president ten years ago, Bobby Fong reduced the cabinet to an informational body and then eliminated it altogether. The faculty has even lost much of its authority over the curriculum under the current administration; when the university's core curriculum was to be revised a few years ago, a task force was convened by the provost in order to bypass the established structures of faculty governance. The Faculty Assembly, which had once been a vital and active part of campus life, became increasingly irrelevant, and faculty members themselves lost interest in it. When the Faculty Assembly could no longer attract enough faculty members to its meetings for a quorum, it was replaced by a Faculty Senate, with elected representatives, in the fall of 2008.

It remains to be seen whether this new senate can restore any of the coherence and authority the faculty once possessed. Early signs have not been positive. After the senate unanimously

passed a policy calling for the periodic review of administrators, the provost took the policy to the Board of Trustees to have it set aside. On another occasion, the Faculty Senate voted for a provision that would allow search committees to elect their own chairs, rather than to have their chairs appointed by the provost. After the vote succeeded, the president declared the vote “non-dispositive” and overrode it.

In an environment where nearly all faculty contributions to shared governance are treated as “non-dispositive,” it is all too easy for administrators to make decisions that undermine the teaching mission of the university. One of the most painful moments in the public response to Butler’s lawsuit came in the cartoon that accompanied the Indiana University *Daily Student* editorial. The cartoon shows a professor speaking to a class of Butler students, who are gagged and handcuffed. The professor is holding a key to the handcuffs, and is saying, “C’mon students, this is a learning environment, feel free to discuss anything you like. . . .” If they had a say in the matter, this is not the kind of learning environment my colleagues would create.

I may be naive to say this, but I do not believe that faculty members who are actively engaged in the day-to-day project of teaching university students would have initiated the lawsuit *Butler University v. John Doe*. Unfortunately, as we saw at Butler, some teachers were willing to defend the lawsuit after it was filed, but I believe that if they had been told beforehand of the plan to sue a student, they would respond with incredulity. Most of my colleagues wish for students who are more confident, more assertive, and more willing to think critically about all things, including what is going on in the classroom and the university. They understand instinctively the point made in the *Daily Student* editorial: The lawsuit sends the wrong message to students, suggesting that they are not really free to speak their minds.

The challenge for my community, and for others as well, is to maintain and strengthen the teaching ethos of the university. Obviously, the faculty is not going to be consulted about every legal action taken by the university. But if administrators knew that they would be held accountable to the faculty, and if they worked in and helped to create an environment in which the academic mission of the university were foremost in their actions, then it seems to me we

could avoid embarrassing incidents like *Butler University v. John Doe*. And I also believe that the university would benefit in numerous other ways from the restoration of real shared governance.

The restoration of real shared governance would confer on the faculty a greater sense of confidence, dignity, and purpose as it fulfills its role in the university. In particular, it is the duty of faculty members to preserve academic freedom on campus, and they need to take an expansive view of this obligation. In this case, they needed to say—and they needed to have the courage, support, and collective wisdom to say—“This action is wrong. It is contrary to who we are, and who we want to be. Stop it.” And when the faculty speaks in this way, the president, provost, and other leaders of the university need to listen.

That simple act—listening—might prove to be the most difficult thing of all to achieve.

William Watts is completing his twentieth year as a member of the English Department at Butler University in Indianapolis. He served for seven years as head of the department, and for four years as the vice chair of faculty assembly, and has generally been active in faculty governance. He is by training a medievalist, and writes on Chaucer and other poets of the fourteenth century.

Notes

¹ Amy Gajda, *The Trials of Academe: The New Era of Campus Litigation* (Cambridge, MA: Harvard University Press, 2009), 12.

² *Butler University v. John Doe aka Soodo Nym aka truebu@gmail.com*, no.49D020901PL0011164, 2009 Marion County Superior Court, 1. An electronic copy of the lawsuit can be found through a link embedded in “University Sues Student Blogger,” *Inside Higher Ed*, October 16, 2009, available online at <http://www.insidehighered.com/news/2009/10/16/butler#>, accessed October 31, 2010.

³ John Milton, "Areopagitica," in *The Complete Poetry and Prose*, ed. William Kerrigan, John Rumrich, and Stephen Fallon (New York: Random House, 2007), 963.

⁴ *Sweezy v. New Hampshire*, 354 U.S. 234, 1957 United States Supreme Court, LEXIS 6, *12. Robert O'Neil provides a very fine account of the importance of *Sweezy* in establishing a legal protection for academic freedom in "The Constitution and the Courts," chapter 3 of his book *Academic Freedom in the Wired World* (Cambridge, MA: Harvard University Press, 2008), 43–77.

⁵ An archive of the entire *TrueBU* blog can be found through a link embedded in the "University Sues Student Blogger," *Inside Higher Ed*, October 16, 2009, available online at <http://www.insidehighered.com/news/2009/10/16/butler#>, accessed October 31, 2010.

⁶ The entire text of Soodo Nym's December 25, 2008, e-mail message can be found at <http://thebutlerunderground.blogspot.com/2009/03/professor-bill-watts-email-monitoring.html>, accessed October 31, 2010.

⁷ *Butler University v. John Doe*, 3.

⁸ *Ibid.*, 4.

⁹ Bob Herman, "Student E-mail Tracking Case Spurs Questions," *Butler Collegian*, February 25, 2009, 1.

¹⁰ "Jess Zimmerman's Email and the Closing of *TrueBU*," available online at <http://thebutlerunderground.blogspot.com/2009/03/professor-bill-watts-email-monitoring.html>, accessed October 31, 2010.

¹¹ The president made this announcement to the Faculty Senate on October 19, 2009. He then sent his full statement to the entire faculty of Butler University in his memorandum of October 19, 2009.

¹² E-mail message from the author to Bobby Fong and Levester Johnson, October 7, 2009.

¹³ President Fong sent the text of his address to the entire faculty in his memorandum of October 13, 2009.

¹⁴ President Fong's memorandum to the entire faculty, Butler University, October 13, 2009.

¹⁵ Jennifer Pignolet, "Fong Addresses Faculty Senate," *Butler Collegian*, October 14, 2009, 1; Jennifer Pignolet, "Student Confirms, 'I Am Soodo Nym,'" *Butler Collegian*, October 14, 2009, 1; Bill Watts,

"Butler's Lawsuit Is Unnecessary, Frivolous," *Butler Collegian*, October 14, 2009, 6.

¹⁶ A print version of the television spot can be seen at <http://www.theindychannel.com/news/21279941/detail.html>, accessed October 31, 2010.

¹⁷ David Moltz, "University Sues Student Blogger," *Inside Higher Ed*, October 16, 2009, at <http://www.insidehighered.com/news/2009/10/16/butler#>, accessed October 31, 2010.

¹⁸ Dan McFeely, "Clash of Schools, Blogs Raises Free-Speech Issues," *Indianapolis Star*, October 16, 2009. Available online at <http://www.indy.com/posts/clash-of-schools-blogs-raises-free-speech-issues>, accessed October 31, 2010.

¹⁹ *Daily Iowan* Editorial Board, "Administrators' Stifling of Student Free Speech Rights Troubling," *Daily Iowan*, November 13, 2009, available at <http://www.dailyiowan.com/2009/11/13/Opinions/14342.html>, accessed August 30, 2010.

²⁰ Payal Patnaik, "'What's in a Pseudonym?'" *Johns Hopkins News-Letter*, November 12, 2009, available online at http://www.jhunewsletter.com/home/index.cfm?event=displayArticlePrinterFriendly&uStory_id=6b331ead-dc16-4153-b6ae-c1c3e74c5a09, accessed August 30, 2010.

- ²¹ IDS Editorial Board, "Bulldog Bullies," *Indiana Daily Student*, November 1, 2009, available at <http://www.idsnews.com/news/story.aspx?id=71533>, accessed August 30, 2010.
- ²² President Bobby Fong, memorandum to the faculty, Butler University, October 19, 2009.
- ²³ President Bobby Fong, memorandum to the faculty, Butler University, October 27, 2009.
- ²⁴ Jamie Comstock, e-mail message to the author, October 3, 2009.
- ²⁵ This letter can be seen at <http://akadoe.blogspot.com/2009/10/faculty-confirm-true-bu-culture-of-fear.html>, accessed August 30, 2010.
- ²⁶ *Full Sail, Inc. v. Spevack*, No. 6:03-cv-887-Orl-31JGG, 2003 US District Court, Middle District Court of Florida, LEXIS 20631, *15.
- ²⁷ *Full Sail, Inc. v. Spevack*, LEXIS 20631, at *13.
- ²⁸ WIPO Arbitration and Mediation Center, Administrative Panel Decision, Case No. D2003-0502, available online at <http://euro.ecom.cmu.edu/program/law/08-732/DomainNames/FullSailSucks.pdf>, accessed August 30, 2010.
- ²⁹ *Full Sail, Inc. v. Spevack*, LEXIS 20631, at *3.
- ³⁰ *Sharon D. Yeagle v. Collegiate Times*, 255 Va. 293, Virginia Supreme Court 1998, LEXIS 32, *294.
- ³¹ *Sharon D. Yeagle v. Collegiate Times*, LEXIS 32, at *239.
- ³² Gajda dismisses this lawsuit as "frivolous" in *The Trial of Academe*, 174–75. Nevertheless, the Thomas Jefferson Center for the Protection of Free Expression, the Reporters Committee for Freedom of the Press, and the Student Press Law Center took the case seriously enough to file an amicus brief with the court. Robert O'Neil, the former president of the University of Virginia and one of the founders of the Jefferson Center, was one of the two lawyers to sign the amicus brief, which can be seen at <http://www.tjcenter.org/wp-content/uploads/2007/03/YeaglevCollegiateTimes.pdf>, accessed August 30, 2010. The brief argues that important free speech issues are at stake in *Yeagle v. Collegiate Times*.
- ³³ *Richard D. Lewis v. The University Chronicle*, A06-2281, 2008 Court of Appeals of Minnesota, LEXIS 210, *2.
- ³⁴ Thomas Zambito, "Queens College Law Professor Gives Student a Real-Life Lesson—By Suing Him for Libel," *New York Daily News*, March 20, 2010, available online at http://www.nydailynews.com/news/2010/03/20/2010-03-20_law_prof_libel_suit_vs_student.html, accessed August 30, 2010.
- ³⁵ This definition of the "The Butler Way" can be seen on "The Official Home of Butler Athletics," at www.butlersports.com, accessed October 18, 2010.
- ³⁶ The liberal use of "The Butler Way" for all aspects of the university, including its academic programs, can be seen on Butler's home page, www.butler.edu.
- ³⁷ Gajda, *Trials of Academe*, 4.
- ³⁸ Cary Nelson, *No University Is an Island: Saving Academic Freedom* (New York: New York University Press, 2010), 32.
- ³⁹ Nelson, *No University Is an Island*, 41.
- ⁴⁰ For a comprehensive overview of the effects of corporatization, primarily at research universities, see Jennifer Washburn, *University Inc.: The Corporate Corruption of Higher Education* (New York: Basic Books, 2005).