

LGBT Legal Issues in Jesuit Higher Education

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Abstract

Issues facing the LGBT (lesbian, gay, bisexual, and transgender) community can prove to be a legal nightmare for college and university administrators to address, particularly at religiously affiliated institutions like Jesuit colleges. Administrators have to walk a fine line between nondiscrimination statutes and the religious beliefs and teachings of the school's affiliation. This paper explores the main legal issues pertaining to the LGBT community on campus, including students, employees (faculty and staff), and university policy. It offers a historical perspective on these issues, including a quick overview of Catholic Church doctrine and relevant United States case law, and summarizes implications for administrators at Jesuit colleges and universities. Finally, it makes recommendations to administrators ways in which Jesuit colleges and universities can address these issues, staying true to their mission while being mindful of all human experiences.

In 2004, Gonzaga University became the first Jesuit university to establish an LGBT (lesbian, gay, bisexual, and transgender) Resource Center, a much needed but highly controversial milestone in the history of providing LGBT services at Jesuit colleges and universities. Due to their relationship with the Roman Catholic Church, Jesuit universities are faced with the complex issue of balancing their need to provide student support with their need to maintain Catholic identity. This is especially true with regard to LGBT issues because of the Church's strong stance on homosexuality, particularly at Catholic universities, which train future priests.

This paper will examine several issues related to sexual orientation facing different facets of the university community (students, employees, and policy), summarizing legal and policy implications for Jesuit colleges and universities. Then these trends will be analyzed through several perspectives to extract implications for Jesuit higher education, ultimately resulting in recommendations for handling LGBT affairs on Jesuit campuses. The purpose is not to call on Jesuit higher education to challenge the Vatican on its stance on homosexuality, but rather to encourage institutions to remain faithful to their mission of intellectual curiosity and thirst for justice.

Unfortunately, the scope of this paper cannot meet the goal of addressing LGBT issues broadly. The acronym LGBT includes the letter T, referring to the community of people who identify as transgender. Issues impacting the transgender community, those relating to gender identity or expression, are not explicitly addressed here despite the need for a voice for the transgender community on Jesuit campuses. A whole separate paper could be written to address concerns specifically related to gender identity and expression. Some of the issues that affect lesbian, gay, and bisexual communities will impact the transgender community as well, but for the sake of analysis, this paper will focus on issues related to sexual orientation.

Issues Impacting Students

The most important segment of the university community to address is the students. There are two issues this paper will analyze with respect to students at Jesuit universities, the first being students' right to

assemble and form LGBT organizations on campus, and the second being protection of students' right to free speech on campus.

Case law shaping students' rights to form organizations on campus consists mostly of students' attempts to establish LGBT organizations. The main case which established standards for law regarding students' right to organize is *Healy v. James* (as cited in Kaplin & Lee, 1997, p. 398-399). This case set three standards to provide universities recourse for denying student organizations official recognition. These standards are: 1) students adhere to university conduct policies, 2) students do not create substantial disruption on campus, and 3) students are not engaged in illegal activities. These are the only three circumstances that universities could legally deny permission for students to form a particular organization.

Following this ruling several subsequent rulings have been issued with respect to students forming LGBT organizations at public colleges and universities. The first was a case at the University of New Hampshire where the university tried to prevent an already recognized LGBT organization from organizing a dance on campus at the behest of the state governor. The court ruled in *University of New Hampshire v. Bonner* (as cited in Kaplin & Lee, 1997, p. 398) that preventing the student organization from organizing its social events violated students' right to assembly as protected under the First Amendment of the Constitution. Two cases which followed were also ruled along the same lines, finding that the universities in question were violating students' First Amendment rights either by denying them funding or the right to organize: *Gay and Lesbian Student Association v. Gohn* and *Gay Lib v. University of Missouri* (as cited in Kaplin & Lee, 1997, p. 399-400). In the former, the organization was denied funding because the administration disagreed with the viewpoint of the organization, and in the latter the organization was denied recognition because the university alleged that students were involved in the promotion of illegal activities, namely sodomy. Courts ruled in both cases that students were denied the right to free speech; in the former because the university was engaged in censorship of students' viewpoints and in the latter because the students were advocating the overturning of a particular law and the university was blocking their right to do so.

These cases have much to offer in discussing legal precedent for students' rights to form LGBT organizations, but because they deal solely with public colleges and universities, they mostly do not apply to Jesuit colleges and universities. To be completely applicable to private universities, state action, a legal term which means an institution is acting as an agency of the state, must be determined as it relates to students forming an LGBT organization on campus. There is one case, however, which sets some precedent for private religiously-affiliated colleges and universities regarding how the law protects students' rights to organize LGBT organizations on campus. At Georgetown University, a Jesuit university, two student groups, one undergraduate and one law school group, sought official recognition and were subsequently denied. The students involved in the two groups sued Georgetown, and in an extremely complicated decision (upheld by the United States Supreme Court) the district court in Washington, D.C., issued six rulings in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University* (1987). The students argued that the denial of recognition denied them access to campus facilities, and the university argued that it was protected by the Free Exercise clause of the First Amendment, protecting its right to the free exercise of religion, to deny official recognition (Dutile, 1988).

The decision that was issued by the district court came down in several pieces. Mainly the court ruled that the university was not compelled to officially recognize the student organizations because of its right to free exercise of religion, but that the manner in which it denied the students access to campus facilities, on the basis of the students' sexual orientation, meant that it was in violation of the recently passed District of Columbia Human Rights Act:

By objecting to the student groups' assumed connection, "by definition," to a "full range of issues" associated with the "gay movement" [phrases taken from a letter of a University Dean], rather than to specific "purposes and activities" inconsistent with its Roman Catholic tradition, Georgetown engaged in the kind of stereotyping unrelated to individual merit that is forbidden by the Human Rights Act. (as cited in Dutile, 1988, p. 14-15)

The other issues that the district court decided were “Human Rights Act did not require university to grant official recognition,” “intangible endorsement [by the] university and actual provision of services were separate issues,” “university's acceptance of federal funds did not waive its free exercise [of religion] defense,” and “while enforcement of Act would impose burden upon university's free exercise of religion, District had compelling interest in eradicating discrimination on basis of sexual orientation, which outweighed burden placed on university” (*Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 1987). These other issues are of particular note, but they do not play as significant a role in students’ right to form LGBT organizations. Essentially, the court, in the Georgetown case, ruled that the university could deny the groups the right to official recognition on campus, but the university could not deny students the right to use campus facilities, and such usage does not imply that the university endorses the organization’s purposes and goals.

This decision, along with the increase in number of LGBT organizations at Jesuit universities seeking recognition, has shaped the conversation regarding these clubs on Jesuit campuses. In recent years, as different colleges have approved or denied recognition to LGBT organizations on their campuses, language aimed at balancing the need to protect a university’s Catholic identity with students’ need for community and a safe campus environment has been written into LGBT club constitutions. For instance, on Seattle University’s campus, the constitution for the recently formed (and now defunct*) Gay-Straight Alliance described its mission as acting “in accordance with the vision and values of Seattle University” (Gay-Straight Alliance, 2004) which would include the university’s commitment to its Jesuit Catholic tradition. One key issue that the court pointed out in the Georgetown case is that the Catholic Church does not oppose the legitimacy of homosexuality as a sexual orientation but rather sexual activity between two people of the same sex. This distinction also helped open the door for students on Jesuit campuses to form LGBT organizations.

The second issue facing students is how their right to free speech is protected on campus. This impacts students both in their right to express support or disapproval of homosexuality as well as being protected from hate speech on campus. Again, in this case the application of the First Amendment is complicated because state action has to be found in order for a private institution to be held liable for denying students’ right to free expression of ideas on campus. Fortunately for students, courts tend to hold in favor of the First Amendment over most other rights granted to individuals and institutions.

In general, protection of student expression stems from the First Amendment of the United States Constitution (Kaplin & Lee, 1997, p. 359). This applies in all cases to public institutions, but could also apply to private institutions both when state action is found and, like the D.C. Human Rights Act in *Gay Rights Coalition*, when students’ freedom of expression does not place special burden on the institution’s right to free exercise of religion. For instance, this would cover cases where students are expressing support for a law which would grant rights to people on the basis of sexual orientation as well as cases where students are expressing disapproval of homosexuality for philosophical or moral reasons. Private universities do have the right to decide whether students could publish such opinions in officially-sponsored campus publications, but courts could again rule in favor of the students based on historical precedent taken by the university with respect to censorship in official publications.

The place where freedom of expression becomes legally complicated is in instances of hate speech on campus. Universities have a compelling interest to maintain a safe and welcoming environment for all their students as they are highly interested in ensuring their academic success, but they also have a compelling interest in maintaining the right to freedom of expression on campus. Some universities try to protect students from hate speech by writing policies outlining the type of speech that is permissible on campus. However, courts have overturned these types of policies claiming the language was vague: the policies covered speech that was protected by the First Amendment. This was the outcome in two significant cases regarding hate speech on college campuses, *Doe v. University of Michigan* and *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System* (as cited in Kaplin & Lee, 1997, p. 386-387). Both were decided in lower

* A decision was made to merge the mission and activities of the Gay-Straight Alliance into the older and more established Triangle Club.

courts; no case at a college or university has gone before the United States Supreme Court. Precedent for hate speech ordinances at the federal level was set by the cases *R.A.V. v. City of St. Paul* and *Wisconsin v. Mitchell* which dealt with city ordinances or state laws which were vague and covered constitutionally-protected speech (as cited in Kaplin & Lee, 1997, p. 385).

Universities, however, are allowed to regulate the manner in which students exercise their right to free speech as well as the place and time that such speech is allowed to take place (Kaplin & Lee, 1997, p. 361-367). Oftentimes hate speech is accompanied by threatening behaviors or acts that are meant to intimidate particular groups of students, for example LGBT students (Kaplin & Lee, 1997, p. 390). One way that colleges and universities have been able to circumvent regulating the content of students' speech is to regulate where and when that speech can take place, as well as holding the actions of students engaged in hate speech to the university's conduct policy. As long as the university is not regulating the content of students' speech, it cannot be held liable for violating students' First Amendment rights.

Issues Impacting University Employees

LGBT individuals are also included among university employees and one issue in particular affects their experience in the work environment. Most Jesuit universities and colleges do not offer health (or other) benefits to the same-sex partners of employees. In fact, across the nation, LGBT employees at colleges and universities, public and private, are only beginning to see coverage for same-sex partners under their employer sponsored health plans. In some states this is compelled by new state laws recognizing marriages, civil unions, or domestic partnerships of same-sex couples. In other states this is due to successful lobbying by university employees to receive these benefits (an example in progress, Milburn, 2008).

In some states these benefits are being rolled back because of state laws and constitutional amendments banning state acknowledgement of same-sex relationships. According to the Human Rights Campaign (2007), only one state recognizes marriages between two people of the same sex, Massachusetts. There are several states which recognize civil unions between partners of the same sex and others which recognize same-sex domestic partnerships. States home to Jesuit colleges and universities which legally recognize relationships between same-sex partners include Massachusetts (Boston College and Holy Cross), Connecticut (Fairfield), New Jersey (St. Peter's), California (Santa Clara, San Francisco, and Loyola Marymount), Washington State (Gonzaga and Seattle University), and the District of Columbia (Georgetown). Many of these colleges have responded to the changes in their state's laws by developing policy that extends benefits coverage to employees' same-sex partners.

Many states have also passed laws and constitutional amendments defining marriage as between partners of opposite sexes and have attempted to prevent same-sex couples from forming any sort of contract partnership, such as a civil union or a domestic partnership. The intent is to prevent couples from suing the state over the constitutionality of being denied the right to state recognition for their relationships, and to prevent lawmakers from trying to pass similar legislation. One state in particular passed such a sweeping same-sex marriage ban that it legally includes benefits programs which cover state employees' same-sex partners. The constitutional amendment passed in Michigan (home to Detroit Mercy) in 2004 includes the words "or similar union for any purpose" ("Michigan Supreme Court," 2007), preventing public organizations from recognizing same-sex relationships in order to provide benefits coverage. This has been interpreted by the state Attorney General to include state-run colleges and universities, meaning that at the University of Michigan, where same-sex partners of university employees have enjoyed health benefits coverage for a number of years, these protections have been rolled back pending a ruling from the state's Supreme Court. This would not necessarily apply to a private university, but similar attempts have been made to prevent private employers from providing same-sex partner benefits by trying to hold benefits programs as illegal under same-sex marriage bans, with far less success than in cases like the one at the University of Michigan.

There are many reasons why Jesuit colleges and universities should provide same-sex partner benefits. One reason is the need to remain competitive with respect to recruiting and retaining talented employees (AAUP, 2005). The provision of same-sex partner benefits by Jesuit colleges and universities could afford an employee the ability to care for her or his family at the same level a married heterosexual employee enjoys.

The main argument against this provision at a Jesuit university is fidelity to its Catholic mission and identity. While the Catholic Church does not take a stance against the legitimacy of homosexuality as a sexual orientation (Catechism, 1994, 2357-2359), several recent documents from the Vatican have denounced legal recognition of same-sex relationships, including the provision of same-sex partner benefits (CDF, 2003). While Jesuit universities should not necessarily go to battle against the Roman Catholic Church on the issue of homosexuality, theology on the issue of sexual orientation still emerging and very complicated. Furthermore, such documents do not prevent discussion of these protections at Jesuit universities (or other Catholic universities as well). Jesuit colleges and universities should prioritize helping employees protect their families over their fidelity to Church teachings which are not considered infallible.

The other argument against the provision of benefits is the cost to the university, and research shows that the increase in cost is somewhere between 0.5% and 3% of the total cost of benefits on campus (Shepard, Yeskel, & Outcalt, 1995, p. 273). With that said, several Jesuit universities cover same-sex partners under their university benefits packages. Two examples of this are Seattle University and Santa Clara University. Santa Clara University began covering employees' same-sex partners in response to California passing a law recognizing same-sex couples' domestic partnerships (J. Rosenberger, personal communication, June 2006). Seattle University began covering "legally domiciled adults" (Seattle University b, n.d.) after other Jesuit colleges and universities began providing similar benefits. Looking at both universities' web sites, information regarding coverage of employees' same-sex partners is nearly nonexistent; both universities have tried an approach to provide benefits while protecting the university from a possible public controversy over this policy (R. Kelly, personal communication, May 1, 2007). Promoting these benefits might help the university attract more qualified and talented candidates for employment.

Issues Impacting Institutional Policy

LGBT issues affect Jesuit colleges and universities at the institutional level as well. There is no federal law protecting against discrimination on the basis of sexual orientation, although legislation to do so is currently pending ("Dems use gay pride month," 2007). Many states offer protection from discrimination on the basis of sexual orientation, particularly in employment, including states which are home to Jesuit colleges and universities. Some Jesuit universities also consider sexual orientation to be a protected class in the text of their nondiscrimination policies. Seattle University and Gonzaga University, both located in Washington State, include sexual orientation under their nondiscrimination policies (Gonzaga University, n.d.; Seattle University c, n.d.). Washington State in turn protects against discrimination in employment on the basis of sexual orientation (Equal Rights Washington, 2005), resulting from a bill passed by the state legislature in early 2006. A key factor in the *Gay Rights Coalition* decision was that Georgetown acted in violation of the District of Columbia's Human Rights Act. While Jesuit universities must comply with local statutes on discrimination, the courts will likely leave religiously-affiliated institutions to define and interpret their own nondiscrimination policies.

Implications

Keeping in mind the many different ways LGBT issues impact Jesuit colleges and universities, there are educational and ethical implications for how they address these issues on campus. These issues significantly impact the personal development of students at Jesuit colleges and universities. Using Hamrick, Evans, and Schuh's (2002) summary of student development theories, there are major implications for students' overall psychosocial development (p. 36-38), sexual orientation identity development (p. 48-50), and

opportunities for involvement on campus (p. 84-86). Researchers in the field of student affairs have identified the development of integrity and a sense of purpose to be of utmost importance to students' collegiate success, just as a positive and healthy sense of one's sexual orientation would. Researchers have also identified opportunities for students to be involved on campus, such as through student organizations, to positively impact students' academic success.

From an ethical perspective, there is a compelling interest on the part of Jesuit colleges and universities to balance their fidelity to their Jesuit Catholic mission with the needs of LGBT individuals who are part of their university communities to be successful and productive. That balancing act is different for each campus based on its unique culture, shaping the way these issues play out at each institution. The main factors that influence this culture include university administration, governance, students, and benefactors. Generally, policy-makers at these institutions consider these issues within the framework of protecting the university, both with respect to creating a safe and welcoming environment for all members of that community, and the institution's public image. There is also a dialogue happening on Jesuit campuses about what it means to be Jesuit. This has important legal implications regarding how the general public perceives the institution's exercise of religion, particularly how strict it adheres to religious doctrine in its policy and practice. This was the case for Georgetown in *Gay Rights Coalition*, and could easily be the case for any other school if sued for discrimination on the basis of sexual orientation.

Recommendations

LGBT issues hold many implications for administrators and policy-makers at Jesuit universities and colleges, legal or otherwise. Jesuit universities should try to do more than the law requires to protect the safety and well-being of LGBT individuals on campus, based on each university's commitment to ethics and justice. Jesuit universities are also committed to an atmosphere of free intellectual inquiry, moving beyond simple adherence to Catholic Church doctrine to engagement with that doctrine, calling for the protection of LGBT rights. For Jesuit universities to make provisions for LGBT individuals to be free from discrimination, harassment, and fear of being unable to protect one's family means Jesuit universities are allowing all members of their communities to thrive. It also means Jesuit universities can foster greater holistic development on the part of all community members, which is one of the main aspects of a Jesuit-inspired education.

Conclusion

Overall, it is important for Jesuit universities to address LGBT legal issues by validating those members of their institutions who identify as LGBT. It means Jesuit universities are engaged in what is referred to as the *magis*, meaning "more" (Seattle University d, n.d.). It is not enough for Jesuit colleges and universities to adhere to the law, nor is it enough for them to simply assent to Catholic Church doctrine. Jesuit colleges and universities are called on to do more by reaching out and affirming all people who come to their doors, and by doing so with a sense of mission and justice behind their work. Affirming the experiences of LGBT individuals at Jesuit colleges and universities is beneficial not only to the LGBT people they impact but also to the greater campus community by demonstrating an institutional commitment to hold a higher standard of care for the whole person. In doing so, these institutions maintain their fidelity to the Jesuit tradition of higher education which inspires their work.

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