

MARQUETTE UNIVERSITY
LAW SCHOOL
ECKSTEIN HALL

The Recorded Classroom

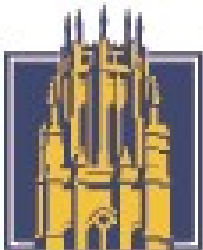
Bruce E. Boyden

Marquette University Law School

AALS Annual Meeting 2023

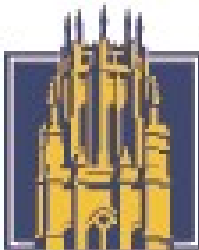
Topics

- **Copyright Ownership**
- **Use of Copyrighted Materials**
- **Privacy Rights of Students & Faculty**
- **Academic Freedom**

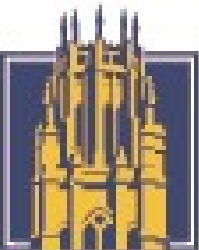


Concerns

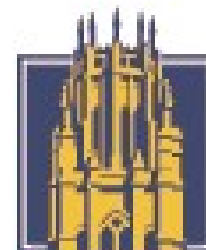
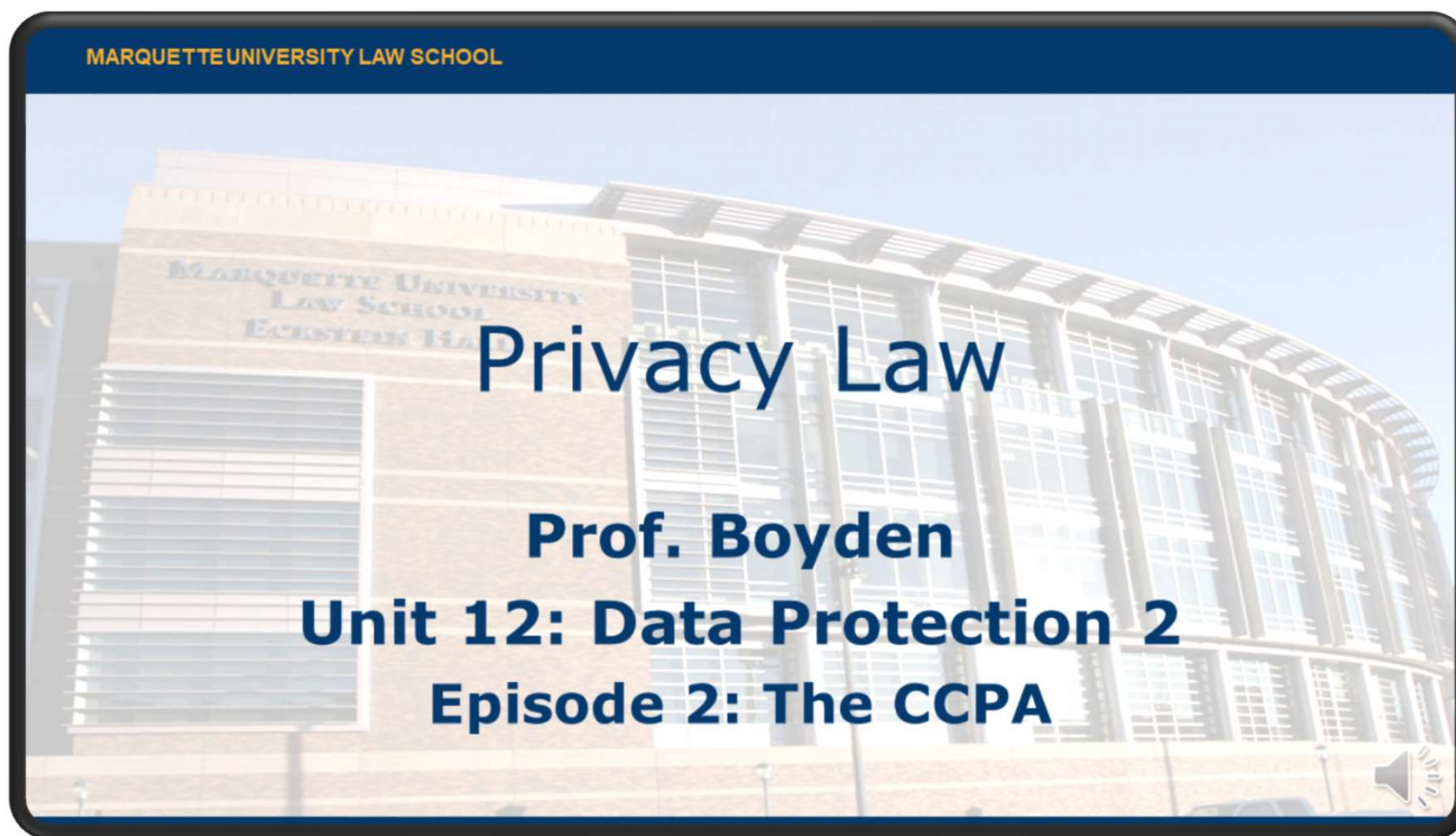
- **Does selling recorded lectures violate faculty rights of publicity?**
- **Are recorded class videos subject to FERPA?**
- **How should the risk of viral excerpts be minimized?**
- **How should university administrations use recordings?**



PRIVACY

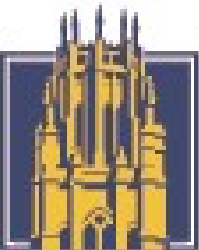


Commercialization

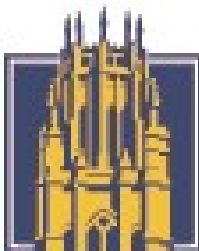
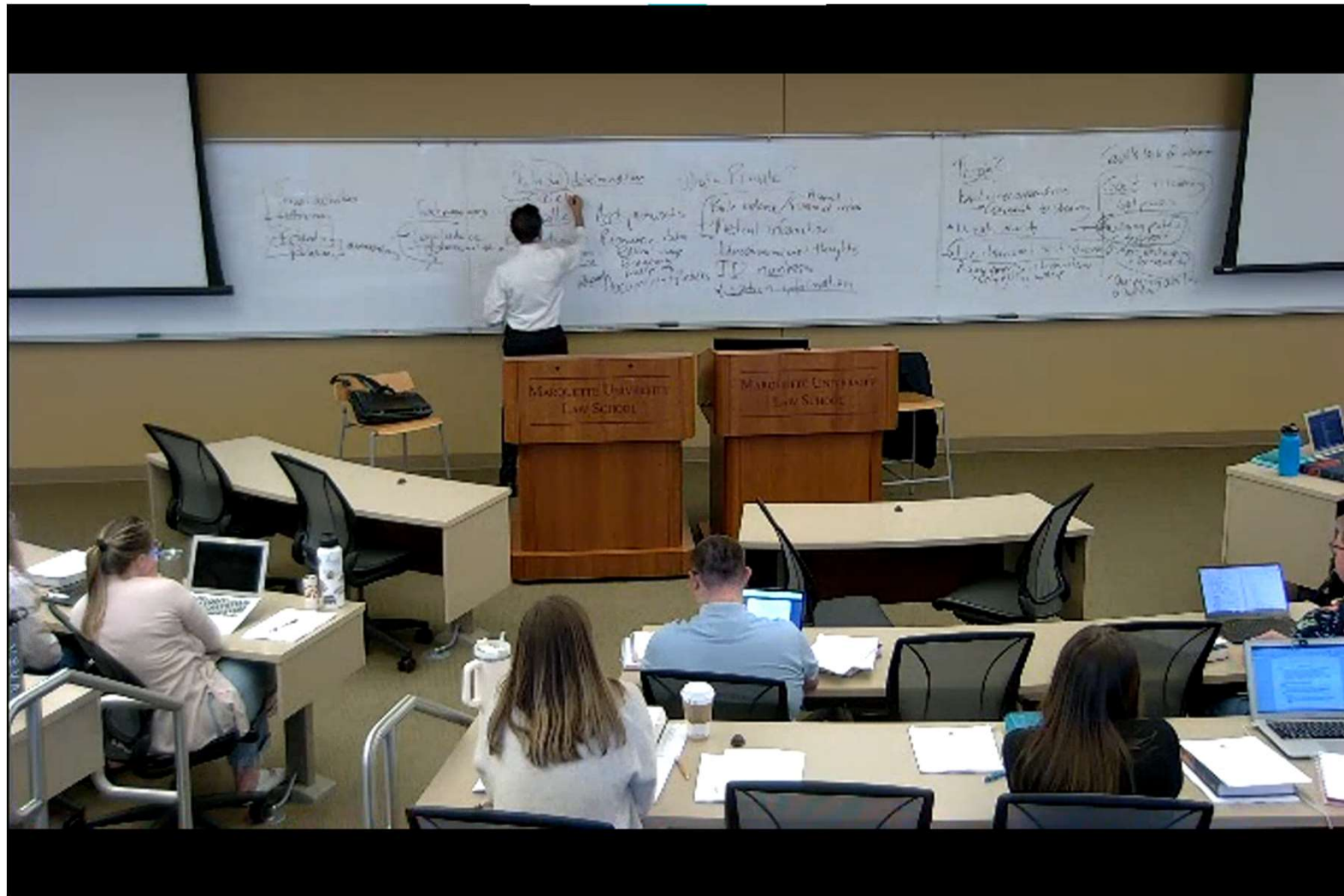


Commercialization (2)

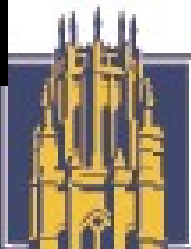
- **Right of publicity**
 - Appropriation of P's name or likeness for D's use or benefit
- **Likely preempted by Copyright Act**
 - E.g. *Melendez v. Sirius XM Radio, Inc.*, 50 F.4th 294 (2d Cir. 2022)



Recorded In-Person Class

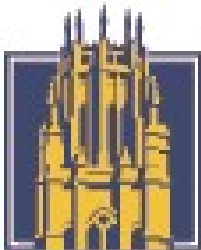


Virtual Class

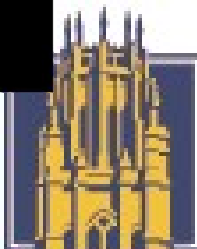
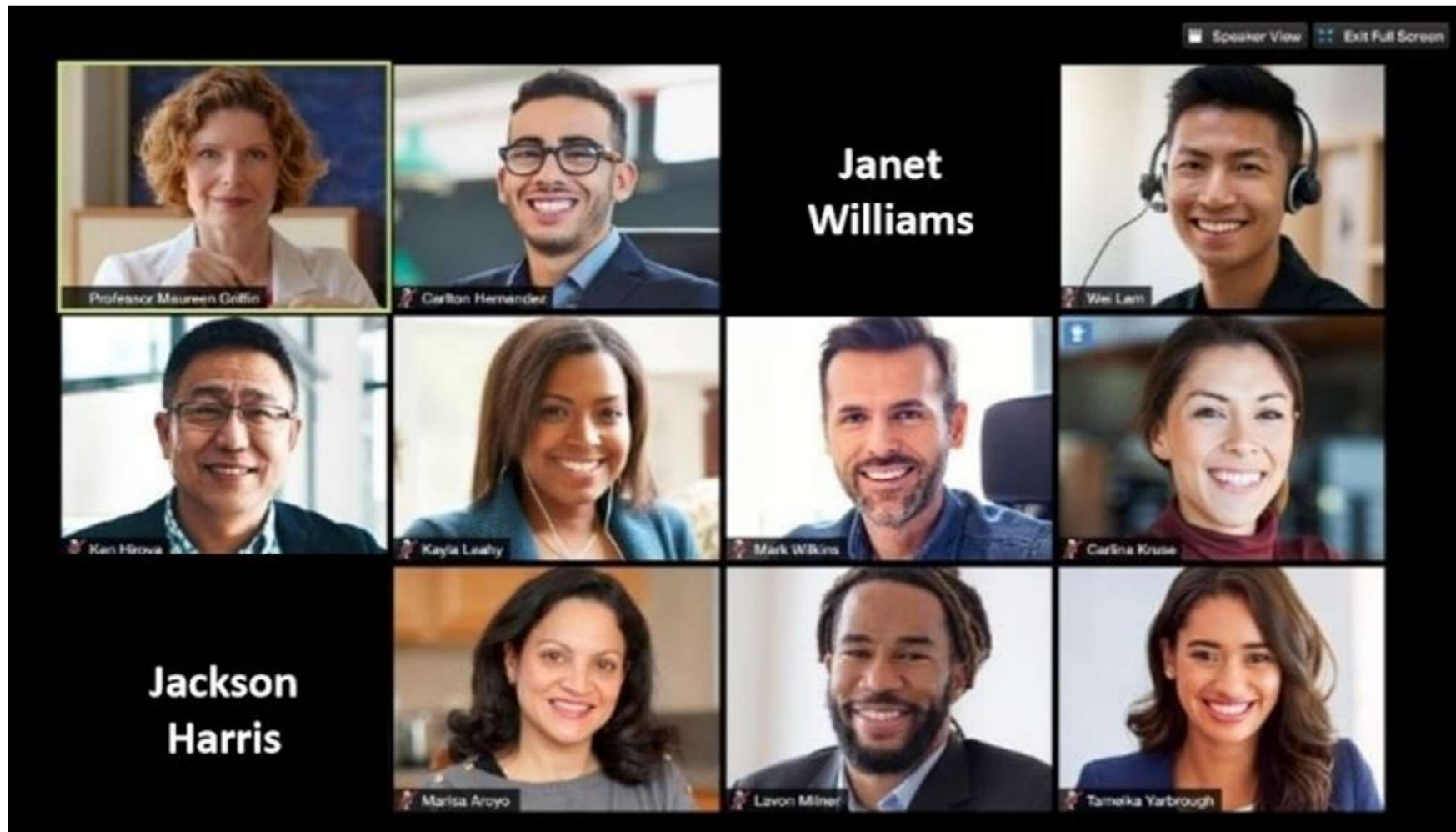


Student Privacy in Videos

- **FERPA Regs, 34 C.F.R. § 99.30**
 - Require signed written consent before disclosure of PII from students' "education records"
- **"Education record"**
 - (1) Directly related to a student; and
 - (2) Maintained by an educational institution or by a party acting for the institution
 - Dept. of Educ. [FAQ on Photos and Videos Under FERPA](#): distinction between "direct" and "incidental"

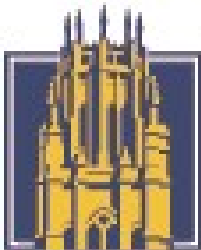


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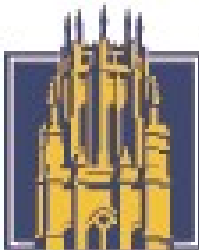
Class Sharing of Recordings

- “[A]ssuming the video recording does not disclose PII from student education records during a virtual classroom lesson ... ,
- “...FERPA would not prohibit the teacher from making a recording of the lesson available to students enrolled in the class.”
 - Dept. of Educ., FERPA and Virtual Learning During COVID-19 (Kala Shah Surprenant, Acting Director, Student Privacy Policy Office, March 30, 2020)



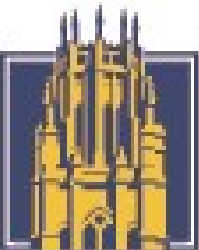
Student Data Collection & Use

- **Internal disclosures require “legitimate educational interest”**
- **Vendors**
 - Use of education records must be “under the direct control” of the university
 - Must be prohibited from disclosing PII from education records without consent unless pursuant to specified FERPA exceptions



Student Data Collection & Use (2)

- **Electronic Communications Privacy Act**
 - Prevents disclosure of content of communications
- **CCPA**
 - Purpose limitation: Use of personal information limited to purposes for which information was collected or processed



Viral Videos



'Serious intellectual & mental problems': Another USC prof caught on video slamming Bush, berating conservatives



TSU professor caught yelling at student in viral video no longer employed



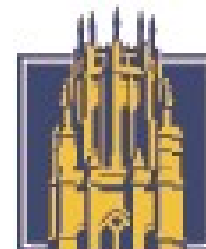
Viral video shows Black N.C. college student being led out of class in handcuffs after a dispute with her professor

The
WASHINGTON FREE BEACON

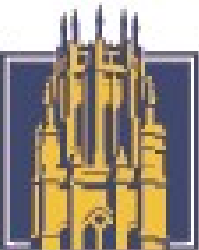
CAMPUS

**'Scary for the Legal Profession':
Georgetown Upends Traditional Law
School Lessons in New Woke
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Top law school says new approach will serve as model for
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ACADEMIC FREEDOM

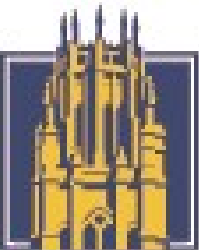


AAUP 1915 Declaration

GENERAL REPORT OF THE COMMITTEE ON ACADEMIC FREEDOM AND ACADEMIC TENURE

PRESENTED AT THE ANNUAL MEETING
OF THE ASSOCIATION

December 31, 1915



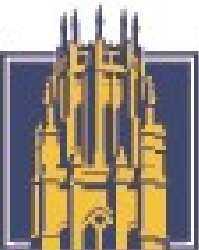
External Monitoring

- **AAUP 1915 Declaration**

- “Discussions in the classroom ought not to be supposed to be utterances for the public at large....
- “It has, unfortunately, sometimes happened in this country that sensational newspapers have quoted and garbled such remarks.”

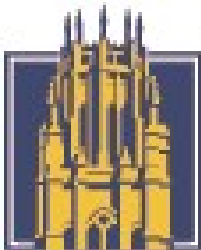
- **1985 Joint Statement on AIA**

- External monitoring “will have a chilling effect on the academic freedom of both students and faculty members.”



GW Law Recording Policy (9/9/22)

- **Law School & faculty have exclusive right to record classes**
- **Sole purpose to allow student review of class discussion**
 - “Any other use ... is strictly prohibited without the prior, express permission of the relevant faculty member.”
- **Students Impliedly Consent**



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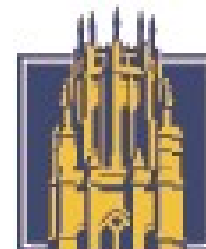
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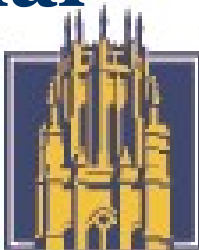
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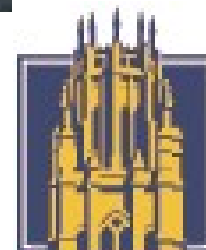


Recording Policy

- **Law School & faculty have exclusive right to record classes**
- **Sole purpose to allow student review of class discussion**
 - “Any other use ... is strictly prohibited without the prior, express permission of the relevant faculty member.”
- **Students Impliedly Consent**
- **Add: Student videos to document internal complaint permitted**

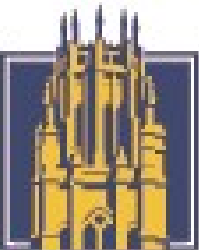


Use for Monitoring



Internal Monitoring

- **AAUP Committee A, 1983**
 - “[A]n academic community will not subject its members to the debilitating inhibitions and anxieties of covert surveillance.”



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