
THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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RUTGERS
Law School

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NATIONAL ASSOCIATION
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The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 4,900 attorneys who represent more than 1,800 campuses and 850 institutions.

The Association's purpose is to enhance legal assistance to colleges and universities by educating attorneys and administrators as to the nature of campus legal issues. It has an equally important role to play in the continuing legal education of university counsel. In addition, NACUA produces legal resources, offers continuing legal education programming, maintains a listserv (NACUANET) and a variety of member-only web-based resources pages, and operates a clearinghouse through which attorneys on campuses are able to share resources, knowledge, and work products on current legal concerns and interests.

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RUTGERS

Law School

Rutgers, The State University of New Jersey, celebrated its 250th anniversary in 2016, and legal education at Rutgers traces its history over 100 years of that span. However, the current Rutgers Law School was established in 2015, when the American Bar Association approved the merger of the Rutgers School of Law–Camden and the Rutgers School of Law–Newark into a single school. It is one of the largest public law schools in the country, with more than 1,000 J.D. students and 110 members of the teaching faculty. Its distinctive structure and size offer the advantages of scholarly and teaching depth in various fields such as criminal law, intellectual property, health law, business law, and public interest law, while each of its two locations offers students an intimate learning environment. The distance between the two locations in Camden and Newark is bridged by the “holodeck,” a new immersive digital classroom, which facilitates collaboration across campuses through its capacity to host classes, meetings, and events in both locations at once.

Rutgers Law students have easy access to three of the nation’s ten largest legal markets: New York City, Philadelphia, and New Jersey. The school’s graduates are leaders in the private sector as well as the public-service community. Rutgers Law School’s award-winning pro bono programs and historically prominent clinical programs both provide outstanding preparation for the practice of law while advancing the school’s strong tradition of diversity and social impact.

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The *Journal of College and University Law* is the only law review entirely devoted to the concerns of higher education in the United States. Contributors include active college and university counsel, attorneys who represent those institutions, and education law specialists in the academic community. The *Journal* has been published annually since 1973. In addition to scholarly articles on current topics, the *Journal of College and University Law* regularly publishes case comments, scholarly commentary, book reviews, recent developments, and other features.

On July 1, 2016, the Rutgers Law School assumed publication of the *Journal*, which had been published at Notre Dame Law School from 1986 to 2016, and at the West Virginia University College of Law from 1980-1986.

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ARTICLES

Restorative Justice Approaches to The Informal Resolution of Student Sexual Misconduct

William C. Kidder

This article reviews controversies about campus Title IX adjudication and the recent implementation of restorative justice (or RJ) responses to campus sexual harm. The RJ approach focuses on who has been harmed, what their needs are, and how the person who harmed them can meet those needs. Instead of engaging in adjudication, RJ aims to get an individual who caused harm to understand the impact of and take responsibility for their actions. Part I defines the RJ approach, describes various practices, and details the preparation necessary for a structured informal resolution process. Part II explains why RJ approaches have been limited to date for Title IX cases and outlines evolving guidance in this realm. Part III reviews legal considerations, including compliance requirements from the Department of Education's 2020 Final Rule and the implications of the approach for concurrent or subsequent civil or criminal proceedings. Part IV offers three case studies of implementation. Part V summarizes evidence of effectiveness and Part VI concludes. By tracing these essential elements, this article moves beyond the philosophical underpinnings of RJ to offer tools and procedures to consider when adopting RJ for student-on-student sexual misconduct.

The Problem of Good Intentions: Challenges Arising From State Mandated University-Wide Sexual Reporting

Andrew Little, Chris Riley

Legislatures and regulators struggle to create effective legal mechanisms to address the misreporting and underreporting of sexual misconduct on college campuses. The problems are clear: how does the law balance the desire to fully support victims of sexual misconduct by providing access to supportive measures and complaint resolution options, while also honoring the desire of some victims not to have private information shared with others? While some employees have failed to report known instances of sexual misconduct based on inappropriate grounds, others do so based on a desire to respect the victim's wishes. How should these problems, which may stem from organizational cultures, be solved through legislation or regulation? Federal laws--Title IX and the Clery Act--impose reporting duties

on only some employees, based on their particular role, but beginning in 2019, the Texas Legislature went a step further and mandated university-wide sexual misconduct reporting for all employees. The penalties for failure to report are severe: termination and prosecution. While well-intentioned, this new Texas law nevertheless creates many problems that undermine its effectiveness. We address Texas Senate Bill 212 in its larger national context, offer several general critiques, highlight the special problems associated with the application of the law at faith-based universities, and make suggestions for university administrators and future legislative action in an attempt to refine the scope of the law to better address the underreporting problem.

Key Words: mandated reporting, sexual misconduct, employee, state, Texas, Title IX, Senate Bill 212

Department of Education Enforcement of a “Balance of Perspectives” as a Condition of Federal Funding

Frederick P. Schaffer

In August 2019, the U.S. Department of Education threatened to terminate federal funding for programs of the Consortium for Middle East Studies, operated jointly by Duke University and the University of North Carolina, because they allegedly failed to comply with requirements of Title VI of the Higher Education Act of 1965, in part because of a lack of “balance of perspectives.” Although the dispute was subsequently resolved, DOE’s actions, and its rationale for them, pose a continuing threat to principles of academic freedom that the Supreme Court has long recognized as part of the Free Speech Clause of the First Amendment.

Valuing Tuition Waivers for Tax Purposes

Erik M. Jensen

Some tuition waivers provided by universities to employees or family members of employees are taxable benefits; that is often the case for waivers in graduate and professional programs. This article argues that the method used by many universities to value the benefit for tax purposes—treating the tuition sticker price as if it measured value—is an incorrect reading of tax law. Because sticker price generally exceeds fair market value, the result is more taxable income to employees who “benefit” from waivers than should be the case—to the obvious detriment of the employees but also to the detriment of the universities, which may lose good students and employees to other institutions.

STUDENT NOTE

The Hazing Triangle: Reconceiving the Crime of Fraternity Hazing

Justin J. Swofford

For decades, legislators have struggled to deter fraternity hazing. In 2017, the hazing death of a Penn State sophomore garnered national attention and prompted legislators to amend Pennsylvania’s existing antihazing law. In

response, the Timothy J. Piazza Antihazing Law made hazing punishable as a felony offense and instituted reporting guidelines for educational institutions across Pennsylvania.

However, despite the Piazza Law's enhanced criminal penalties against individual hazers, college administrators have pushed back against its institutional reporting requirements. Even more troubling, the Piazza Law's penalties fail to acknowledge the immense power colleges and fraternities possess in propagating and concealing hazing. Consistent findings from legal, sociological, and psychological scholarship suggest that for legislation to best deter future hazing injuries and deaths, greater criminal and civil penalties must be placed upon schools and fraternities.

Drawing on an extended case study and scholarship from numerous disciplines, this note posits that host institutions, fraternities, and individual hazers form a "triangle" of hazing culpability that has been neglected or misconstrued by legislatures, leading to laws that fail to deter fraternity hazing. To rectify this issue, this note provides a blueprint for states to restructure their antihazing statutes to impose more meaningful penalties upon fraternities and their host institutions while maintaining criminal sanctions against individual hazers.

BOOK REVIEW

Ethical and Legal Issues in Student Affairs and Higher Education

Amy N. Miele

As higher education becomes more litigious, especially as it relates to student affairs, faculty and staff are inundated with information on potential ethical and legal issues pertaining to their job responsibilities. The amount of information can be overwhelming and confusing. Although most schools have a legal counsel's office, and sometimes an ethicist, to make sense of this information, these resources may not have the capacity to proactively train administrators on all relevant laws as well as ethical decision-making. Faculty and staff need a concise yet detailed resource to refer to and, for the most part, *Ethical and Legal Issues in Student Affairs and Higher Education* fits the bill.