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NACUA

NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

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.

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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

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.

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.

RESTORATIVE JUSTICE APPROACHES TO THE INFORMAL RESOLUTION OF STUDENT SEXUAL MISCONDUCT

MADISON ORCUTT, PATRICIA M. PETROWSKI, DAVID R. KARP, JORDAN DRAPER*

Abstract

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.

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We are grateful to Jacob Fallman and Julie Aust for their research assistance. We are also thankful for the research of Campus PRISM Project, which is dedicated to incorporating restorative justice principles into responses to sexual- and gender-based violence. This paper draws heavily on publications from the Campus PRISM Project, particularly DAVID R. KARP ET AL., A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2, 13 (2016), https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus_PRISM_Report_2016.pdf.

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Finally, we would like to thank the Restorative Justice Project at Impact Justice for their work on MOUs with District Attorney's Offices in the restorative justice realm—we modified their template MOU to the campus context in Exhibit B of this article. *See Generic RJD DA MOU,* RESTORATIVE JUSTICE PROJECT,

INTRODUCTION

Restorative justice (or RJ) is a philosophical approach to wrongdoing that embraces the reparation of harm, healing of trauma, reconciliation of interpersonal conflict, reduction of social inequality, and reintegration of people who have been marginalized and outcast. Restorative justice responses have been used to address minor crimes and policy violations,[1] other offenses that affect community climate but do not violate conduct codes,[2] as well as serious criminal offenses[3] and human rights violations.[4] There is a rich history of the use of restorative justice practices to resolve harms caused by many different kinds of misconduct in the juvenile[5] and criminal justice[6] systems as well as in schools and universities.[7]

In recent years, significant attention has been paid to the issue of student-on-student sexual misconduct. Such emphasis is the result of a complex cultural moment, including (but certainly not limited to) the attention of the Obama administration,[8] the

[1] *See, e.g.*, Sarah Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 413 (2003).

[2] *See, e.g.*, Anne Gregory et al., *The Promise of Restorative Practices to Transform Student-Teacher Relationships and Achieve Equity in School Discipline*, 26 J. EDUC. & PSYCHOL. CONSULTATION 325, 329 (2016) (outlining restorative practices aimed at prevention, building relationships, and developing community).

[3] *See, e.g.*, DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 150–54 (2019) (describing the use of a circle process in the aftermath of a shooting and matters of racial equity).

[4] *See, e.g.*, DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 260 (1999) ("I told them that the cycle of reprisal and counterreprisal that had characterized their national history had to be broken and that the only way to do this was to go beyond retributive justice to restorative justice ").

[5] *See, e.g.*, FLA. STAT. § 985.155 (2014) (empowering state attorneys to refer nonviolent, first-time juvenile offenders to Neighborhood Restorative Justice Centers).

[6] *See, e.g.*, Mary P. Koss, *The RESTORE Program of Restorative Justice and Sexual Assault: Vision, Process, and Outcomes*, 29 J. INTERPERSONAL VIOLENCE 1623, 1624–26 (2014) (discussing RJ programs for adult sex crimes broadly and outlining RESTORE, a community-based RJ conferencing program for prosecutor-referred adult sex crimes).

[7] *See, e.g.*, David R. Karp & Casey Sacks, *Student Conduct, Restorative Justice, and Student Development: Findings from the STARR Project: A Student Accountability and Restorative Research Project*, 17 CONTEMP. JUST. REV. 154, 155 (2014) (outlining a multi-campus study of several hundred cases of student misconduct in the United States).

[8] *See* Press Release, White House Office of the Press Sec'y, Memorandum—Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a (establishing a task force to protect students from sexual assault).

efforts of student activists,[9] students' demand letters,[10] *Time Magazine* covers,[11] documentaries,[12] and controversial op-eds.[13] Throughout this increased national attention, commentators and jurists have sustained continued criticism against the investigative procedures present on most college campuses—that is, whether the processes can proceed under an investigative-only model; whether a hearing is required; and if so, whether the parties must be afforded the opportunity to cross-examine one another and material witnesses. Most recently, a federal circuit split has emerged regarding the extent to which due process requires public universities to allow students accused of sexual misconduct ("respondents") to cross-examine their accusers ("complainants").[14] On the one hand, investigative-only campus sexual misconduct processes have been criticized for failing to meet the justice needs of many harmed parties.[15] On the other hand, such processes have been criticized for being

[9] *See, e.g.*, *About KYIX*, KNOW YOUR IX, http://knowyourix.org/about-ky9/ (last visited May 31, 2020) ("Founded in 2003, Know Your IX is a survivor- and youth-led project . . . that aims to empower students to end sexual and dating violence in their schools."); *Frequently Asked Questions*, END RAPE ON CAMPUS, https://endrapeoncampus.org/faq/ (last visited Oct. 19, 2019) ("EROC was founded by a group of students, survivors, and professors in the summer of 2013. The decision to form EROC resulted from the national need to formalize and centralize work around campus sexual assault.").

[10] *See, e.g.*, *A Call to End Sexual and Interpersonal Violence at Princeton*, PRINCETON IX NOW (Apr. 7, 2020, 10:01 AM), https://princetonixnow.com/reforms (citing a student demand at Princeton University including "[t]he establishment of an opt-in restorative justice track for survivors . . ."); *We Demand*, MASON FOR SURVIVORS (Apr. 7, 2020 10:09 AM), https://www.mason4survivors.com/copy-of-we-demand (citing a student demand at George Mason University including "[c]reat[ing] a committee of undergraduate students, graduate students and faculty to develop proposals for an opt-in restorative justice track for survivors . . ."); *Organizing for Survivors' Title IX Policy Change Demands*, SWARTHMORE VOICES (Apr. 7, 2020 10:14 AM), https://swarthmorevoices.com/content-1/2018/3/19/organizing-for-survivors-title-ix-policy-change-demands (citing a student demand at Swarthmore College noting that the institution "must formally take responsibility and admit to its wrongdoing in the name of restorative justice and accountability . . .").

[11] *Rape: The Crisis in Higher Education*, TIME MAGAZINE, May 26, 2014.

[12] *See, e.g.*, THE HUNTING GROUND (Chain Camera Pictures 2015) (a documentary on campus sexual assault describing the rise of student-led activism).

[13] *See, e.g.*, George F. Will, *George Will: Colleges Become the Victims of Progressivism*, WASH. POST (June 6, 2014), https://www.washingtonpost.com/opinions/george-will-college-become-the-victims-of-progressivism/2014/06/06/e90e73b4-eb50-11e3-9f5c-9075d5508f0a_story.html; Mel Robbins, *George Will: You Are So Wrong About Campus Sexual Assault*, CNN (July 2, 2014), https://www.cnn.com/2014/06/21/opinion/robbins-campus-sexual-assaults/index.html.

[14] *Compare* Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 69 (1st Cir. 2019) ("[W]e are simply not convinced that the person doing the confronting must be the accused student or that student's representative . . . [D]ue process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'") (citation omitted) *with* Doe v. Baum, 903 F.3d 575, 578 (6th Cir. 2018) ("[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.").

[15] *See, e.g.*, Judith Lewis Herman, *Justice from the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 597 (2005) ("[Survivors'] aims, however, were not primarily punitive. The main purpose of exposure was not to get even by inflicting pain. Rather, they sought vindication from the community as a rebuke to the offenders' display of contempt for their rights and dignity."); DAVID R. KARP ET AL., A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 2, 8 (2016), https://www.sandiego.edu/soles/documents/center-restorative-justice/Campus_PRISM_Report_2016.pdf ("[T]he goals of a campus adjudication process—utilizing fundamentally fair and unbiased approaches to determine what happened, whether what happened entailed a policy violation, and if so, what outcome should be assigned—can be incompatible with the needs of survivors.").

biased against respondents[16] and for stigmatizing and excluding individuals who engage in sexual violence.[17]

By contrast, a restorative justice approach to incidents of campus sexual misconduct offers a framework that 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, restorative justice aims to get an individual who caused harm to understand the harm that they caused and take responsibility for their actions.[18] The focus is often on the person accused of causing harm acknowledging what they have done and how they can repair it.[19] Although restorative justice approaches have been successful when resolving conflicts in many contexts, restorative approaches have rarely been used to resolve incidents of campus sexual misconduct.[20] This likely stems—at least in part—from the Department of Education's 2011 Guidance prohibiting mediation for sexual assault[21] and confusion regarding differences between mediation and restorative justice approaches.[22]

By tracing the essential elements of restorative approaches, as well as evolving guidance from the Department of Education, this article moves beyond the philosophical underpinnings of restorative justice to offer college campuses tools and procedures to consider when adopting restorative approaches to student-on-student sexual misconduct. Our focus is to assess how restorative approaches can serve as a structured, informal resolution process. In Part I, we provide an overview of restorative justice responses to resolving conflict, including a working definition of restorative justice and an overview of the different types of restorative approaches that campuses might consider. In Part II, we discuss the reasons why restorative justice approaches have been sparingly used for incidents of campus sexual misconduct to date, paying particular attention to evolving guidance from the Department of Education. In Part III, we outline the Department of Education's 2020 Final Rule and map the confidentiality concerns and legal considerations that may arise in restorative approaches. In Exhibit A, we offer a sample agreement to participate in informal resolution. In Exhibit B, we offer a memorandum of understanding (MOU) aimed at

[16] *See, e.g.*, Tyra Singleton, *Conflicting Definitions of Sexual Assault and Consent: The Ramifications of Title IX Male Gender Discrimination Claims Against College Campuses*, 28 HASTINGS WOMEN'S L.J. 155, 155 (2017) ("Male students accused of sexual assault argue the management of sexual assault charges against them by their respective schools was mishandled and biased because of their gender.").

[17] KARP ET AL., *supra* note 15, at 13 ("Individuals who engage in sexual violence are society's modern day pariahs. There are few, if any, communities in which people who engage in sexually inappropriate conduct are welcome, including colleges and universities..... Campuses that rely on expulsion as the default sanction for sexual and gender-based misconduct may recreate ..... stigmatizing and exclusionary practices that have been undertaken by the broader community, with similar issues and controversies.").

[18] *See, e.g.,* Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 246 (2014).

[19] *Id.*

[20] Katherine Mangan, *Why More Colleges Are Trying Restorative Justice in Sex Assault Cases*, CHRON. HIGHER EDUC. (Sept. 17, 2018), https://www.chronicle.com/article/Why-More-Colleges-Are-Trying/244542 ("The College of New Jersey is among a small but growing number of institutions that now offer alternatives to trial-like investigations..... ").

[21] *See* Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP'T EDUC. (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf ("Grievance procedures generally may include voluntary informal mechanisms (e.g., mediation) for resolving some types of sexual harassment complaints..... [I]n cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.")

[22] Koss et al., *supra* note 18, at 246–47.

protecting evidence obtained in a campus restorative process from later use in criminal proceedings. In Part IV, we map the processes currently used by three institutions employing restorative approaches as a response to campus sexual misconduct—at the College of New Jersey, Rutgers University—New Brunswick, and the University of Michigan. In Part V, we offer evidence of effectiveness at the intersection of restorative justice and sexual misconduct. In Part VI, we conclude.

I. An Overview of Restorative Justice Responses to Resolving Conflict

A. Restorative Justice Defined

Restorative justice is a structured, collaborative decision-making process that typically includes harmed parties, people who caused harm, and sometimes other members of the community. The goal is for the participants to share their experience of what happened; understand the harm caused; and reach consensus on how to repair the harm, prevent its reoccurrence, and/or ensure safe communities. The fundamental principles of restorative justice include the following:

- Focusing on the harms of wrongdoing more than the rules that have been broken;
- Showing equal concern and commitment to harmed parties and people who caused harm, involving both in the process of justice;
- Working toward the restoration of harmed parties, empowering them and responding to their needs as they see them;
- Supporting people who caused harm while encouraging them to understand, accept, and carry out their obligations;
- Recognizing that while obligations may be difficult for people who caused harm, they should not be intended as harms and they must be achievable;
- Providing opportunities for dialogue—direct (face-to-face) or indirect—between harmed parties and people who caused harm as appropriate;
- Involving and empowering the affected community through the justice process;
- Encouraging collaboration and, where appropriate, reintegration rather than coercion and isolation;
- Giving attention to the unintended consequences of our actions and programs; and
- Demonstrating respect to all parties, including harmed parties, people who caused harm, and impacted community members.[23]

B. Different Types of Restorative Justice Practices

There are a variety of restorative justice practices, and each requires some form of meeting—but not always face-to-face—between the person(s) who has been harmed and the person(s) who caused the harm. The most common types of restorative justice practices include restorative conferencing, indirect facilitation, restorative circles, and surrogate circle participation. The use of a

[23] KARP ET AL., *supra* note 15, at 23.

particular practice will depend upon the needs and desires of the person who has been harmed and the person who caused the harm, the areas of training and expertise developed by an institution, as well as the specific circumstances surrounding the harm. These practices need not occur in isolation, and indeed some cases may merit mixed-method approaches. Additionally, while the practices described below illustrate responses to student-on-student sexual harm, restorative justice practices may also exist in other contexts—such as in aiding in the reintegration of parties back into the campus community.[24]

1. Restorative Conference or Facilitated Dialogue

This model involves a structured and facilitated conversation between two or more individuals—most often the person who has been harmed and the person who caused the harm—with associated support people, although it may also involve other community members who often represent community harms and concerns.[25] After a discussion of the harm, the parties (rather than a third party) agree what steps the person who caused the harm can take to repair the harm and rebuild trust. These can include things such as apology, restitution, and community service to repair harm, and an agreement to attend educational workshops/counseling, conduct research to gain deeper insight into the harm caused, develop mentoring relationships, or engage in prosocial activities that rebuild trust and help reassure the harmed party and wider community that the student will be safe and responsible in the future. Agreements may also include a voluntary leave (perhaps until the harmed party graduates) or action steps taken by others or the institution to support the process or to address larger policy issues or systemic injustices. A recent case study of a campus restorative justice process responding to sexual assault provides an example of the agency of the participants, the active accountability of the student who caused harm, and the type of agreement that may emerge from a collaborative decision- making process that is focused on identifying and responding to sexual harm.[26] Trained facilitators guide the dialogue, often by a series of questions. The conference process typically includes (1) intake and education regarding informal resolution, (2) preconferencing preparation, (3) conference(s), and (4) monitoring/mentoring.[27]

2. Restorative Circles

This model is similar to a restorative conference but typically involves a larger number of people and more of a community approach to repairing the

[24] *See, e.g.*, DAVID R. KARP & KAAREN M. WILLIAMSEN, FIVE THINGS STUDENT AFFAIRS ADMINISTRATORS SHOULD KNOW ABOUT RESTORATIVE JUSTICE AND CAMPUS SEXUAL HARM 3, 7 (2020), https://www.naspa.org/report/five-things-student-affairs-administrators-should-know-about-restorative-justice-and-campus-sexual-harm1 (noting that reintegrative approaches to restorative justice might involve providing previously suspended respondents with support and accountability as they return to campus or assisting survivors as they rebuild connections with peers).

[25] KARP ET AL., *supra* note 15, at 24.

[26] *See* David R. Karp, *Restorative Justice and Responsive Regulation in Higher Education: The Complex Web of Campus Sexual Assault Policy in the United States and a Restorative Alternative*, *in* RESTORATIVE AND RESPONSIVE HUMAN SERVICES 143 (Gale Burford et al. eds., 2019); Stephanie Lepp, *A Survivor and Her Perpetrator Find Justice,* RECKONINGS PODCAST, (Dec. 3, 2018), http://www.reckonings.show/episodes/21.

[27] KARP ET AL., *supra* note 15, at 25.

harm. It involves structured dialogue of turn-taking between the person who was harmed, the person who caused the harm, and other impacted persons. Restorative circles are often used for a variety of purposes beyond a direct dialogue between the harmed person and the person who caused the harm regarding how to repair the harm. Often, circles are used for community- building or a discussion of difficult issues. For example, in the university context, if the harmed person and person who harmed lived on the same floor of a residence hall and other community members were involved or were bystanders, a circle could be used to repair the harm caused to the whole residence hall floor. Circles have also been used to address harm caused to a group and broader concerns about campus climate and culture; group harms have also been addressed through holding multiple, separate circles as well as employing mixed methods.[28]

3. Surrogate Participation

This model is a restorative circle or conference in which the harmed party does not want to participate in a restorative process but wants someone else—a surrogate—to help the person who harmed understand the impact of the harm.[29] For example, in the university context, a sorority member who alleges to have been sexually assaulted by a fraternity member may ask the sorority president to participate on her behalf in a restorative circle.

4. Indirect Facilitation

In this model, the facilitator takes an active role by having individual conversations with the person who has been harmed, the person who caused the harm, and any other impacted individuals. The facilitator relays information and questions between the parties. Indirect facilitation does not require direct face- to-face interaction between the parties or the parties and other participants, but rather a facilitator meets independently with each party and participant and "shuttles" between meetings with the parties and participants. The preparation process for a restorative conference or circle almost always involves indirect facilitation. If that facilitation meets the needs of the parties and leads to an agreement, then the process may conclude successfully without a face-to-face dialogue.

5. Other Restorative Approaches

While the focus of this article is on restorative responses to campus sexual misconduct, implementation of restorative practices in higher education extends

[28] *See* JENNIFER J. LLEWELLYN ET AL., REPORT FROM THE RESTORATIVE JUSTICE PROCESS AT THE DALHOUSIE UNIVERSITY FACULTY OF DENTISTRY 2, 29–30, 35 (2015), https://cdn.dal.ca/content/dam/dalhousie/pdf/cultureofrespect/RJ2015-Report.pdf (recalling various uses of circle processes after female students in Dalhousie University's Faculty of Dentistry became aware that some of their male colleagues had posted offensive material about them in a private Facebook group).

[29] Koss, *supra* note 6, at 1632-54 (discussing the experiences of surrogates in the RJ conferencing program RESTORE).

to prevention and reintegration.[30] These might include community-building circles to create authentic group dialogue about sexual consent, climate circles to explore harmful cultural conditions (such as toxic masculinity in fraternities or sexual objectification in the media), and reintegration circles to support a student returning from suspension while also reassuring the community that the student will be held responsible for new violations.

C. Preparation for a Restorative Process

Irrespective of the chosen approach, individual introductory meetings between a facilitator and each of the participants in a restorative justice approach is an essential part of the process to both prepare the parties for the process and to assess whether a restorative justice approach is appropriate. The preparation process allows the participants to learn about restorative justice and unpack the incident to develop a better understanding of what happened, how participants feel about it, and what participants want to do to make things better. Such meetings are also important so that the facilitators can ensure that participation is voluntary and that it is safe for the process to proceed if a process ends up involving a face-to-face meeting.

1. Consultation and Intake

After a report is made, the person who experienced the harm is presented with a set of options by the university regarding how they might proceed under applicable campus policies. This may include the harmed party requesting an investigative resolution, which likely will include an investigation and a hearing; for conduct that might be criminal in nature, choosing to make a report to law enforcement for criminal investigation; both; neither (e.g., no action or just a request for safety measures and/or supports); and/or requesting informal resolution. If the person who experienced the harm chooses to utilize informal resolution—and the university agrees—then the person who caused the harm is asked to participate. It is the parties' decision to participate in informal resolution. In alignment with Department of Education guidance and other law, the decision must be voluntary and made only after (1) the accused student has been put on notice of the allegations against them and (2) all parties are fully apprised of their various options.[31] As will be discussed in further detail below, the parties must also consent to participate in informal resolution voluntarily and in writing. Sample language outlining what parties' consent in this regard might look like is included as Exhibit A.

The person who experienced the harm might also initially decide to proceed with an investigative resolution and then subsequently decide—either before or after the investigation is complete, but before the university has reached an outcome determination—to utilize informal resolution. At that point, the person who caused the

[30] KARP, *supra* note 26.

[31] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,578 (May 19, 2020) (citing § 106.45(b)(9)).

harm will be asked to participate, and if both parties agree in writing, the informal resolution process will commence.

2. Preconference Preparation

Restorative responses to sexual misconduct require significant preparation, and preconference preparation is typically the most time-consuming phase of the process. The restorative facilitator(s) will have individual meetings with both the person who experienced the harm and the person who caused the harm. Depending upon the complexity of the case, preparation can be as short as one or two meetings but may require more. Advisers and support persons are also prepared during this stage. The purpose of the meetings is for the participants to become well-informed about the process and decide what process best meets their needs. These meetings also provide coordinators with the opportunity to gain an understanding of what each party needs and wants, decide how best to facilitate the conference based upon the parties' needs and wants, help to maintain appropriate expectations by each party, and evaluate the parties for readiness. Readiness is determined by (1) the respondent's acknowledgement of harm; (2) assurance that the parties are participating voluntarily; (3) assessing whether it is safe to proceed, and if the risk of revictimization is minimized; (4) addressing mental health concerns; and (5) establishing whether the parties are engaging in the process with a "restorative mindset," meaning that they are not using the process for ulterior motives. Ideally, there should not be any surprises among the participants or the facilitator once the conference begins.

Throughout preconference preparation, the facilitator works with the person who experienced the harm to help them prepare impact statements and to identify what they would like to see happen as an appropriate outcome of the process. Similarly, the facilitator works with the person who caused the harm to prepare statements and to discuss what they can do to address the harm caused. Facilitators closely assess whether the person who caused the harm is able to take responsibility for their misconduct. They may suspend the informal resolution process if they do not believe that the parties are ready or that a resolution agreement can be reached. In addition, throughout the preconference preparation, the participants are reminded that the conference is voluntary and that they may choose not to participate at any time. Preconference preparation includes the selection of the location, instructions about when and where the participants are to arrive to ensure that they do not cross paths before the conference starts, seating arrangements, and making sure that supportive resources are on call.

3. Conference or Facilitated Dialogue

A primary goal of a conference or facilitated dialogue is to create a structured space in which participants can be open and honest. The first part of the discussion is focused on what happened, a sharing of the impact by the person who experienced the harm, an explanation of what happened by the person who caused the harm, and a summary of harms by the facilitator. The second part of the conference explores how the harm can be remedied or repaired. Finally, an agreement is written and executed that specifies tasks, a timeline for completion, and consequences for one or more parties failing to meet their agreed-upon tasks. At the end of the conference process, the person who caused the harm will complete the agreed-upon actions to help demonstrate that they have learned from the process and/or to mitigate future harm.

4. Monitoring/Mentoring

After the conference, the facilitator or other student conduct administrators will meet regularly with the person who caused the harm to support them in their efforts to take responsibility and to ensure compliance with the agreement. They may also keep the person who experienced the harm updated about the progress and make sure that they have adequate support going forward.

II. The Reasons Restorative Justice Approaches Are Sparingly Used for Incidents of Campus Sexual Misconduct

Notwithstanding the success that restorative justice has had in resolving various types of harm within the juvenile and criminal justice system, as well as in schools and universities, the use of restorative justice to resolve sexual misconduct on college campuses has been exceedingly rare. Although the reasons behind its rare use are not known with certainty, it may stem at least in part from the fact that mediation, which the Department of Education prohibited for use in cases involving sexual assault until 2017, is often confused with restorative justice approaches.[32]

The rules governing sexual misconduct adjudication on college campuses have been evolving since the April 4, 2011 Dear Colleague Letter ("2011 DCL" or "2011 Guidance").[33] The procedures set forth in the 2011 DCL and subsequent guidance during the Obama administration laid out the steps that universities should take to address sexual misconduct. Such directives, while allowing for informal resolution processes in some limited circumstances, largely focused on formal adjudication procedures involving an investigation and a hearing. Indeed, the 2011 DCL echoed the Department of Education's view, dating back to the 2001 Revised Sexual Harassment Guidance ("2001 Guidance"),[34] that mediation was not appropriate even on a voluntary basis in cases of alleged sexual assault.[35] As a result, universities fearful of running afoul of the 2011 DCL either refused to allow *any* informal resolution, or did so under very limited circumstances, and almost certainly not in the cases involving sexual assault. Consequently, formal adjudication processes were often the only options available to students experiencing sexual misconduct. However, the goals of a formal adjudication process—utilizing fundamentally fair and unbiased approaches to determine what can be proven under a school's evidentiary standard, whether a policy violation occurred, and if so, what outcome should be assigned—can be inconsistent with the needs and wants of the students they were in large part designed to protect: those experiencing sexual misconduct.[36] As a result, many students who have experienced sexual misconduct choose not to report, and

[32] *See* U.S. Dep't of Educ. Office for Civil Rights, *Q&A on Campus Sexual Misconduct* 4 (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf; Koss et al., *supra* note 18, at 246–47.
[33] *See* Office for Civil Rights, *supra* note 21.
[34] *See* Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T EDUC. 21 (Jan. 19, 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf ("In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.").
[35] *See* Office for Civil Rights, *supra* note 21 ("[I]n cases involving allegations of sexual assault, mediation is not appropriate even on a voluntary basis.").
[36] *See* Herman, *supra* note 15.

many others who chose to report decline to participate in a campus adjudication process.[37]

In 2016, the American Bar Association's Criminal Justice Section commissioned the Task Force on College Due Process Rights and Victim Protections.[38] The Task Force ultimately "encourage[d] schools to consider non- mediation alternatives to traditional adjudication such as restorative justice processes . . . ."[39] The Department of Education's 2017 Dear Colleague Letter significantly departed from the Department of Education's 2001 and 2011 Guidance[40] by permitting informal resolution,[41] a shift that was later reflected in the Department of Education's 2018 Notice of Proposed Rulemaking on Title IX (NPRM).[42] Recognizing that it is "important to take into account the needs of the parties involved in each case, some of whom may prefer not to go through a formal complaint process[]," the NPRM permitted informal resolution, such as mediation, any time prior to reaching a determination regarding responsibility.[43] The proposed regulations emphasized that the decision to pursue informal resolution by the parties must be voluntary, and an institution must "obtain the parties' voluntary, written consent to the informal resolution process."[44] In addition, the NPRM specified that prior to utilizing informal resolution, an institution must provide written notice to both parties disclosing (1) the allegations; (2) the requirements of the informal resolution process, including any circumstances under which it precludes the parties from resuming a formal complaint from the same allegations; and (3) consequences resulting from participation in the informal resolution process such as what record will be maintained or could be shared.[45] In addition, as stated in the 2001 Guidance, the NPRM specified that the complainant must be notified of the right to end the informal process and begin the investigative resolution process.[46]

A. The Department of Education's Office for Civil Rights' Prohibition on Mediation in Sexual Assault Cases

As far back as the 2001 Guidance, the Department of Education has made clear that "grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so."[47]

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[37] *See, e.g.,* Kathryn J. Holland & Lilia M. Cortina, *It Happens to Girls All the Time": Examining Sexual Assault Survivors' Reasons for Not Using Campus Supports*, 59 AM. J. COMMUNITY PSYCHOL. 50, 62(2017)

[38] ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS: RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT 1 (2017), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf.

[39] *Id.* at 3.

[40] *See* Office for Civil Rights, *supra* note 34, at 21; Office for Civil Rights, *supra* note 21.

[41] Office for Civil Rights, *supra* note 32.

[42] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61,479 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. § 106).

[43] *Id.* at 61,479.

[44] *Id.*

[45] *Id.*

[46] *See id.* (noting that parties must receive written notice of "[t]he requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, if any . . ."); Office for Civil Rights, *supra* note 34, at 21.

[47] Office for Civil Rights, *supra* note 34, at 21.

However, the use of informal resolution in cases of sexual assault remained more limited:

> OCR [Office for Civil Rights] has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator, or, if appropriate, a teacher or administrator) . . . . In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.[48]

In addition, the 2001 Guidance stated that the complainant must be notified of the right to end the informal process at any time and begin the investigative resolution process.[49]

In the 2011 DCL, the Department of Education reiterated that "informal mechanisms" are appropriate for resolving some types of sexual harassment complaints but that "mediation is not appropriate[]" to resolve cases involving allegations of sexual assault.[50] The concern seemed to stem from fears that harmed parties "would be pressured to opt for mediation over a formal investigation[]" or that college campuses "would describe sexual violence as a mere 'dispute between students' and encourage survivors to 'work it out' with their rapists (not considering the further trauma such a meeting could cause)."[51] And in fact, an investigation by the Center for Public Integrity found that complainants were urged to "mediate" with the respondent using a process lacking rules and preparatory processes.[52]

B. How Restorative Justice Differs from Mediation

Informal resolution includes conflict resolution processes and techniques that act as a means for disagreeing parties to come to an agreement short of some type of judicial or quasi-judicial mechanism (whether it be a court of law or a hearing officer in a university proceeding). It is a collective term that refers to ways that parties can settle disputes with the help of a third party.

Both restorative justice and mediation are types of informal resolution processes. Mediation is similar to restorative justice in that it makes use of trained facilitators, prioritizes stakeholder empowerment, and emphasizes collaborative decision-making. Both mediators and restorative justice facilitators often receive a minimum of twenty to forty hours of training followed by a supervised apprenticeship. In addition, in both

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[48] *Id.*
[49] *Id.*
[50] *See* Office for Civil Rights, *supra* note 21.
[51] Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution*, TIME MAGAZINE (Oct. 2, 2017), https://time.com/4957837/campus-sexual-assault-mediation/.
[52] CENTER FOR PUBLIC INTEGRITY, SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE 19–20 (2010), https://cloudfront-files-1.publicintegrity.org/documents/pdfs/Sexual%20Assault%20on%20Campus.pdf.

mediation and restorative justice approaches, participants work together to decide on what they believe to be the best course of action to resolve the conflict.[53]

Mediation and a restorative justice approach differ, however, in the presumption of responsibility by the person who caused harm, the preparation process, and strategies to mitigate potential harm.[54] Mediation does not presume a harm-causing party and a harmed party, and there is no requirement for any party to take responsibility for harm; instead, mediation is a conflict management process that seeks a mutually agreeable solution to parties in dispute.[55] Mediation typically focuses on helping parties resolve arguments about facts or the law or both depending upon the negotiability of the issues. Often, mediation navigates disagreements about facts. By contrast, restorative justice focuses on the person who caused harm acknowledging their wrongdoing and their obligation to make things right. The focus is not on evidence or facts, but on identifying harms, needs, and obligations. As one harmed party stated, "mediation perpetuates the myth that sexual assault is simply a misunderstanding between two people, rather than what it really is: a violent abuse of power."[56] Someone has caused harm and someone has been harmed, and that fact is at the center of restorative justice approaches.

Because restorative processes begin with a recognition of harm, extra efforts are made to prepare the participants for dialogue. Mediation typically does not include individual meetings with the facilitator(s) prior to the dialogue, but restorative justice will often involve many. "To decide whether the case will go to a RJ dialogue, facilitators assess *risk of revictimization* and *ensure safety*, whether participants feel *pressure or coercion to participate* and if the participants' *goals are in alignment* with RJ."[57] This is one distinction that highlights how restorative approaches carefully attend to the risk of revictimization and potential power imbalances. In addition, restorative processes allow for multiple voices, including those of the institution, which may wish to ensure negotiated agreements minimize future risk to members of the campus community.[58]

* * *

Notwithstanding the fact that mediation is only one type of informal resolution and that restorative approaches substantively differ from mediation, informal resolution for some cases of sexual misconduct never gained traction within higher education. To the contrary, the Department of Education's restrictions on the use of mediation and its general enforcement posture following the 2011 DCL, combined with confusion about mediation and other types of informal resolution, meant that many college campuses avoided informal resolution altogether. As one researcher reported, "the college

[53] DAVID R. KARP, CAMPUS PRISM PROJECT BRIEF: DISTINGUISHING CAMPUS RESTORATIVE JUSTICE FROM MEDIATION 1,2 (2016), https://www.sandiego.edu/soles/documents/center-restorative-justice/RJ-vs-Mediation-Brief4.pdf.
[54] *Id.* at 2-3; *see* Koss et al., *supra* note 18, at 246–48 (differentiating mediation from RJ approaches).
[55] KARP, *supra* note 53.
[56] Watkins, *supra* note 51.
[57] KARP, *supra* note 53.
[58] *Id.*

administrators with whom I spoke reported that university counsel have prevented the use of [restorative justice] out of fear of running afoul of the DCL rule."[59] The same researcher found that "some universities prevent staff from facilitating *any* meeting that involves a potential complainant and a potential respondent outside of formal adjudication."[60] For the same reasons, many schools that have policies involving informal resolution(s) have precluded the use of such processes in cases involving sexual assault.

Adjudicating incidents of sexual misconduct on college campuses is complex and difficult. Universities are trying to improve procedures by dedicating greater resources to complicated investigation and adjudication processes. However, the goals of a campus adjudication process—utilizing fundamentally fair and unbiased approaches to determine (1) what can be proven under the school's evidentiary standard, (2) whether what happened entails a policy violation, and if so, (3) what outcome should be assigned—can be incompatible with the needs of harmed parties.[61] This is particularly true given that lengthy investigations sometimes require a harmed party to retell their story during multiple phases of a campus adjudication process, including on direct cross-examination.[62]

Research from the Department of Justice highlights that one reason college students do not report an incident is because they do not want the accused to get in trouble.[63] Campus climate sexual misconduct survey data from higher education institutions confirm this concern as a reason for underreporting.[64] To further complicate these cases, many harmed parties know the person who harmed them and have close social circles. Without informal resolution or restorative justice programs, universities are only offering an option that many harmed parties do not want; therefore, they select to either not report or not move forward with a process.[65]

Restorative justice approaches to informal resolution provide the parties an alternative to formal adjudication processes with the goal of identifying the incident that caused the harm and to whom, the needs of the person who was harmed, and how the person who caused the harm can repair it. Proponents see restorative justice approaches as a way to further the educational goals of universities,[66] more efficiently

[59] Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 201 (2016), https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1287&context=fac_articles.
[60] *Id.*
[61] *See* KARP ET AL., *supra* note 15, at 8.
[62] *See, e.g.,* Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 69 (1st Cir. 2019) ("[D]ue process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'") (citation omitted); Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018) ("[W]hen the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination.").
[63] U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE AGE FEMALES, 1995–2013 9 (2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.
[64] ASSOC. OF AM. UNIVS., REPORT ON THE AAU CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, 110, 112 (rev. Oct. 2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf.
[65] Telephone Interview with Chelsea Jacoby, Title IX Coordinator, The College of New Jersey (Sept. 16, 2019) (nearly two-thirds of the harmed parties at TCNJ indicated that they would not have participated in a Title IX process were it not for the availability of the restorative justice approach).
[66] Koss et al., *supra* note 18, at 249.

use staff time,[67] and provide avenues to discuss topics such as race and gender bias.[68] Critics worry that informal resolution does not offer a strong enough response to matters of sexual assault. Others express concern that students will feel pressured to bypass a formal resolution process and will regret it later if the accused is not appropriately held accountable. Moreover, asking a student to sit down with another student and work out an agreement is not only unrealistic, they argue, but possibly retraumatizing. However, a restorative justice approach to incidents of student sexual misconduct—including but not limited to sexual assault—provides the parties with an alternative to formal adjudication processes that may be more compatible with parties' needs and may encourage more students to come forward.

III. Legal Considerations for Restorative Justice Responses to Campus Sexual Misconduct

While restorative justice approaches to campus sexual misconduct can provide unique benefits, they also raise unique legal considerations. Frequent questions include whether informal resolution and restorative justice can be used for all forms of sexual misconduct, how to ensure that both parties voluntarily agree to a restorative approach, and the implications of potential or concurrent civil or criminal proceedings.

A. Circumstances Under Which Restorative Justice Responses Can and Should Be Available

As previously explained, there are legitimate concerns about the use of informal resolution—particularly mediation— to resolve instances of sexual assault among students. And even if a restorative justice approach is offered as an option in lieu of formal resolution, a harmed party could feel pressured by the administration or by the accused student to choose the restorative justice approach. Even if the student does not feel that way, the public may perceive the university's motivation to be that way. If handled poorly, the result could be inadequate consequences for the accused and an unsatisfactory outcome for the harmed party, both of which could expose the university to liability.

A threshold consideration in determining whether informal resolution is appropriate in a given case is whether the decision to participate is voluntary. Voluntariness is key not only for compliance with the Department of Education's guidance (as discussed in more detail below), but also to ensure the success of the restorative justice process, given that restorative justice-based informal resolution depends on the willingness of the parties to reach a given outcome. There are *very* few reported cases challenging or analyzing an institution's use of informal resolution in response to conduct covered by Title IX, with all available cases predating NPRM guidance. Nevertheless, available case law suggests that institutions that do not ensure

[67] *See, e.g.*, Jordan Draper et al., Conference Presentation at June 2019 NACUA Annual Conference (June 23–26, 2019) (conference slides on file with authors) (finding that while administrative hearings in Title IX cases took an average of 76.5 hours of staff time per case, alternative resolution only took an average of 24.5 hours of staff time per case).

[68] *See, e.g.*, Telephone Interview with Jackie Moran and Amy Miele, Director of Compliance/Title IX Coordinator and Assistant Director of Student Affairs Compliance/Title IX Investigator, Rutgers University (Oct. 21, 2019) (Rutgers University provides respondents with the opportunity to explore topics including identity and oppression.).

that informal resolution is engaged in voluntarily may be subject to liability (or at the least, costly litigation and potentially an OCR investigation).

For example, in *Takla v. Regents of the University of California*, a federal judge in the Central District of California denied the University's motion to dismiss a Title IX claim where the plaintiffs—PhD candidates alleging sexual harassment by their professor—asserted that the University acted with deliberate indifference in handling their Title IX complaint.[69] A central issue of the plaintiffs' complaint was the University's use of an "Early Resolution" process, a variation on informal resolution. In denying the motion, the court noted that the school "discouraged [the plaintiff] from filing a written request for a formal investigation by stating that [the respondent's] peers may well side with him and that Early Resolution would be faster and more efficient." [70]

Even if plaintiffs do not prevail against an institution in their lawsuit, a key complaint is that the University unilaterally made the decision to engage in informal resolution over the objection of the complainants, and/or failed to communicate with the complainants throughout an informal process. *Takla* also highlights a significant concern raised by harmed parties and advocates with respect to utilizing informal resolution—that institutions will use an informal process to *coerce* harmed parties into a less rigorous process that does not account for their needs. A restorative justice approach to informal resolution—at the very least—mitigates these concerns and—if implemented effectively—can provide a structured, rigorous process centered on the voices and needs of harmed parties.

On the other hand, the available cases suggest that if informal resolution is presented as a potential option and the complainant appears ready and able to make a decision regarding the propriety of informal resolution, a court will not second-guess such a decision under a deliberate indifference theory. In the 2019 case *Shank v. Carleton College*—a case currently under appeal—a Minnesota district judge granted the College's motion for summary judgment, holding that the College's use of a "mediated conversation" in a sexual assault case did not amount to deliberate indifference under Title IX.[71] The possibility of a "mediated conversation" did not originate with the plaintiff-complainant, instead originating with a dean who presented such a conversation as "an option for closure[]" in the aftermath of a formal hearing where it was determined that the respondent had violated the College's sexual misconduct policy.[72] The dean noted that the plaintiff "'seemed like she was in a good place to be able to . . . make that determination to have that conversation.'"[73] The court held that the use of mediated conversation did not amount to deliberate indifference because the plaintiff "wasn't required to participate in the meeting[]" and ultimately "chose to

[69] Case No. 2:15-cv-04418-CAS(SHx), 2015 WL 6755190, at *1, *1, *8 (N.D. Cal. Nov. 2, 2015) (unreported op.). Please note that the 2020 Final Rule does not permit the use of informal resolution to resolve allegations that an employee sexually harassed a student.
[70] *Id.* at *6.
[71] *See, e.g.*, Shank v. Carleton Coll., File No. 16-cv-01154 (ECT/HB), 2019 WL 3974091, *1, *6, *12 (D. Minn. Aug. 22, 2019) (slip op.), *appeal docketed*, Case 19-cv-03047 (8th Cir. Sept. 23, 2019) (granting the College's motion for summary judgment). Note also that in an earlier ruling on the College's motion to dismiss, the court, among other things, granted the motion to dismiss with respect to an intentional infliction of emotional distress claim, *except* insofar as that claim was based on allegations that the College coerced the plaintiff into a one-on-one meeting with her assailant. *Shank v. Carleton Coll.*, 232 F.Supp.3d 1100, 1117 (D. Minn. 2017).
[72] *Id.* at *6.
[73] *Id.*

participate[]" in the process.[74] When granting summary judgment in favor of the College, the court cautioned, "[i]t is possible to hypothesize a different case where, for example, a meeting is not voluntary or a school knows or should know that a victim's ability to make rational decisions is compromised, but neither [complainant] nor her experts argues that this is one of those cases."[75]

Additionally, the fact that the parties have provided written consent to voluntarily participate in informal resolution, while significant, does not mean that every case is appropriate for informal resolution. College campuses should consider all of the known facts and circumstances in deciding whether informal resolution is appropriate, including whether an agreement to pursue informal resolution is truly voluntary, whether the parties are participating in good faith, the nature of the alleged offense, whether there is an ongoing threat of harm or safety to the campus community, the power dynamics between the parties, and whether the respondent is a repeat offender. For example, in meeting with the parties to discuss or prepare for the informal resolution process, the campus should make every effort to determine that a decision by the parties to engage in informal resolution truly is voluntary and not subject to coercion. In doing so, campus employees may want to meet with each of the parties separately and ask why they want to pursue informal resolution, what they hope to achieve from it, why they view it as preferable to formal resolution, and whether anyone encouraged or coerced them to engage in informal resolution. Similarly, the Title IX Coordinator should consider the totality of the known circumstances, the nature of the offense, whether there is an ongoing safety threat to the community, the power dynamics between the parties, and whether there is a repeat offender or a pattern of behavior in deciding whether informal resolution is appropriate. Allegations of sexual assault alone may not disqualify the parties from participating in informal resolution, so long as the parties want to pursue informal resolution. However, repeat allegations of sexual assault by the same accused person involving a weapon or a power differential may preclude informal resolution. Ultimately, the Title IX Coordinator needs to balance the needs of the parties against the needs of the community.

B. Compliance Obligations and Other Considerations When Engaging in Informal Resolution

The Department of Education received over 124,000 public comments in response to the NPRM.[76] On May 6, 2020—and on the eve of publishing this article—the Department of Education released its Final Rule. The Department declined the opportunity to explicitly define the term "informal resolution" in its Final Rule, instead noting that the term was intended to "encompass a broad range of conflict resolution strategies including, but not limited to, arbitration, mediation, or restorative justice."[77] The Department further noted that informal resolution "may present a way to resolve sexual harassment allegations in a less adversarial manner than the

[74] *See id.* at *13.
[75] *Id.* at *14.
[76] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 31, at 30,055.
[77] *Id.* at 30,401. Moreover, the Department argued that defining the term may result in the unintended effect of limiting (1) parties' freedom to choose a resolution option that is best for them and (2) schools' flexibility to craft resolution process(es) that serve the unique educational needs of their community.

investigation and adjudication procedures that comprise the § 106.45 grievance process."[78]

The Department did, however, expose the contours of what informal resolution is not. In responding to comments from the public, the Department resisted efforts to characterize informal resolution as "forced" or "unregulated," instead noting that "[i]nformal resolution . . . enhances recipient and party autonomy and flexibility to address unique situations."[79] The Department further clarified that in adopting the term "informal resolution," it was not the Department's intent to suggest that "personnel who facilitate [informal resolution] need not have robust training and independence, or that [schools] should take allegations of sexual harassment less seriously when reaching a resolution through such processes."[80]

The Department also acknowledged the ways in which the 2020 Final Rule departs from prior guidance, and in particular the 2001 Guidance.[81] Given the conditions, restrictions, and parameters that the Final Rule places upon informal resolutions—including mediation—the Department believes that earlier concerns are ameliorated while still providing the benefits of informal resolution as a potential option.[82]

The Department does not conceptualize informal resolution as the default Title IX process—indeed, investigation and adjudication are the "default."[83] Yet a school *may* choose to offer parties an informal process subject to certain conditions.[84] Restorative justice models may emerge under the banner of Title IX in at least two ways: informal resolution may resolve a formal complaint without completing investigation and adjudication,[85] or alternatively, a restorative justice model may be utilized after a respondent is found responsible, such as through a disciplinary sanction.[86]

First, a school may not require parties to participate in informal resolution and may not offer informal resolution unless a formal complaint is filed.[87] In responding to public comment, the Department noted that increasing parties' sense of personal autonomy may be a benefit of informal resolution, yet where informal resolution is not desirable to either party for any reason, the party "is never required to participate in informal resolution."[88] Moreover, the Department rooted its decision to require formal complaints in parties' abilities to "understand what the grievance process entails[]" and

[78] *Id.* at 30,098 n. 463.
[79] *See id.* at 30,400.
[80] *Id.* at 30,401.
[81] *Id.* at 30,403 ("The 2001 Guidance approved of informal resolution for sexual harassment (as opposed to sexual assault) 'if the parties agree to do so,' cautioned that it is inappropriate for a school to simply instruct parties to work out the problem between themselves, stated that 'mediation will not be appropriate even on a voluntary basis' in cases of alleged sexual assault, and stated that the complainant must be notified of the right to end the informal process at any time and begin the formal complaint process.").
[82] *Id.*
[83] *Id.* at 30,400.
[84] *Id.* at 30,083. The choice to engage in informal resolution is further subject to the parameters of § 106.45(b)(9), as discussed below.
[85] *Id.* at 30,400.
[86] *Id.* at 30,406.
[87] *Id.* at 30,578 (citing § 106.45(b)(9)). "Formal complaint" is defined in § 106.30(a) as "a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment."
[88] *Id.* at 30,403.

to ensure that parties can "decide whether to voluntarily attempt informal resolution as an alternative."[89] Supportive measures may be offered without a filing a formal complaint,[90] but a formal complaint must precede informal resolution.[91]

Second, schools may not require waiving the right to an investigation and adjudication of formal complaints "as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right . . . ."[92] Among other things, the language prohibiting waiver arose from commenters' concerns that the NPRM failed to ensure that parties' consent to informal resolution was truly voluntary.[93]

Third, at any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution and resume the grievance process with respect to the formal complaint.[94] By contrast, the NPRM proposed to allow schools to prohibit parties from leaving the informal resolution process to return to a formal grievance process.[95] In explaining this shift and responding to commenters, the Department noted that it "expects informal resolution agreements to be treated as contracts; the parties remain free to negotiate the terms of the agreement and, once entered into, it may become binding according to its terms."[96]

Fourth, schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.[97] The Department noted that it was persuaded by commenters who expressed concern that it may be too difficult to ensure that informal resolution is truly voluntary on the part of students reporting sexual harassment by a school's employee due to power differentials and the potential for undue influence or pressure exerted by an employee over a student.[98]

Fifth, the Department extended the training and impartiality requirements of § 106.45(b)(1)(iii) to individuals who facilitate informal resolutions. The language of the Final Rule requires a number of school officials—including individuals who facilitate informal resolutions—to "be free from conflicts of interest and bias and trained to serve impartially without prejudging the facts at issue . . . ."[99] The Department extended training requirements to individuals who facilitate informal resolutions in response to concerns raised by some commenters regarding the training and independence of persons facilitating informal resolutions.[100]

The Final Rule allows schools to offer informal resolution options, but only with the voluntary, informed, written consent of all parties.[101] Before using informal resolution—including a restorative justice approach—a campus must provide all

[89] *Id.* at 30,098 n. 463.
[90] *Id.* at 30,046.
[91] *Id.* at 30,578 (citing § 106.45(b)(9)).
[92] *Id.*
[93] *Id.* at 30,402.
[94] *Id.* at 30,578 (citing § 106.45(b)(9)).
[95] *Id.* at 30,405.
[96] *Id.*
[97] *Id.* at 30,578 (citing § 106.45(b)(9)(iii)).
[98] *Id.* at 30,400.
[99] *Id.* at 30,575 (citing § 106.45(b)(1)(iii)).
[100] *Id.* at 30,401.
[101] *See id.* at 30,578 (citing § 106.45(b)(9)(i-ii)).

known parties with their options for formal and informal resolution of the complaint.[102] Under the 2020 Final Rule, a campus's written notice of allegations must include:

- the identity of the parties involved in the incident (if known);
- the specific section of the campus's policy that has allegedly been violated;
- the conduct constituting sexual harassment;
- the date and location of the alleged incident, if known;
- a statement that the respondent is presumed not responsible for the alleged conduct;
- a statement that a determination regarding responsibility is made at the conclusion of the grievance process;
- notice that parties are permitted an advisor of their choice, who may be an attorney, and may inspect and review evidence;
- information regarding any provision of the school's code of conduct that prohibits knowingly making false statements or knowingly submitting false information (if any such provision exists); and
- sufficient time for the respondent to prepare a response before any interview.[103]

In addition, a campus must provide the parties information about the requirements of the informal resolution process, including the circumstances under which informal resolution precludes the parties from resuming a formal complaint arising from the same allegations.[104] Moreover, it should be made clear that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.[105] Finally, the school must disclose any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.[106]

As a practical matter, the information a campus provides about informal resolution might also explain:

- what informal resolution is and the goal(s) of the process;
- that participation by all parties is voluntary and that the campus will not pressure or compel a party to participate in informal resolution;
- whether information shared during informal resolution can subsequently be used to pursue a formal resolution process under a student sexual misconduct policy or any other campus policy;
- how informal resolution differs from formal resolution;
- whether the process involves face-to-face interaction;
- whether informal resolution can result in a transcript notation or disciplinary record; and
- whether agreements reached and executed by the parties during informal resolution are binding and the consequences for failing to comply.

[102] *Id.* at 30,576 (citing § 106.45(b)(2)(i)(A)).
[103] *Id.* at 30,576 (citing § 106.45(b)(2)).
[104] *Id.* at 30,578 (citing § 106.45(b)(9)(i)).
[105] *Id.*
[106] *Id.*

A sample participation agreement covering many of these elements is attached as Exhibit A. In addition to providing notice about the allegations and information about informal and formal resolution processes, the campus must obtain parties' voluntary, written consent to the informal resolution process.[107] Rather than solely obtaining written consent, universities might consider obtaining a signed agreement from the parties to participate in informal resolution that clearly sets forth the campus's expectations and parties' agreement to key provisions. For example, if using a restorative justice approach, the campus should obtain the parties' agreement that successful completion of preparatory meetings as determined by the restorative justice coordinator is a prerequisite to participation in a restorative justice conference or other type of restorative justice approach. Similarly, a campus might want the parties' agreement that after executing an informal resolution agreement that is approved by the campus's Title IX Coordinator (or other appropriate official), the parties are bound by the agreement's terms, cannot return to a formal resolution process, and are subject to the consequences included in the informal resolution agreement for failing to comply with its terms.

An effective and legally sound restorative justice process meticulously adheres to the 2020 Final Rule—not only to ensure compliance but also to ensure that the parties fully understand their rights and options throughout the process.

C. The Implications of Potential or Concurrent Civil or Criminal Legal Proceedings

The fact that campus Title IX proceedings—whether utilizing a formal or informal approach—are separate from legal proceedings creates the possibility of concurrent or future civil or criminal legal proceedings.[108] Accordingly, individuals accused of sexual misconduct may have concerns about participating in restorative justice approaches—a goal of which is for the accused to accept responsibility for the harm they caused—when their statements could be used against them in subsequent civil or criminal legal proceedings.[109] Given the requirement that the respondent acknowledge the harm experienced by the complainant, the question of admissibility resulting from restorative approaches is particularly acute.[110] Similarly, survivors of sexual misconduct may want to know whether they can resolve a matter through restorative justice without fear of being pulled into a subsequent process operating outside of their control. While there is no answer that completely addresses these risks, universities can explore a number of potential options.

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[107] *Id.* (citing § 106.45(b)(9)(ii)).

[108] *See* Amy B. Cyphert, *The Devil is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses Under Title IX*, 96 DENV. L. REV. 51, 74 (2018); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 31, at 30,130 ("Whether or not statements made during a Title IX grievance process might be used in subsequent litigation, clarity, predictability, and fairness in the Title IX process require both parties, and the [school], to understand that allegations of sexual harassment have been made against the respondent before initiating a grievance process.").

[109] *See* Koss et al., *supra* note 18, at 253; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 31, at 30,130 (noting that while an allegation of sexual harassment is required under the Final Rule, there is no requirement that complainants provide a detailed statement of facts).

[110] Coker, *supra* note 59, at 202.

Comments regarding confidentiality in informal resolutions are of particular relevance to this article. In responding to commenters, the Department notes that the Final Rule imposes "robust disclosure requirements on [schools] to ensure that parties are fully aware of the consequences of choosing informal resolution, including the records that will be maintained or that could or could not be shared, and the possibility of confidentiality requirements as a condition of entering a final agreement."[111] As an illustration, the Department notes that a school "may determine that confidentiality restrictions promote mutually beneficial resolutions between parties and encourage complainants to report[]" or alternatively may determine that "the benefits of keeping informal resolution outcomes confidential are outweighed by the need for the educational community to have information about the number or type of sexual harassment incidents being resolved."[112]

A school's determination about the confidentiality of informal resolutions may be further influenced by the model(s) of informal resolution that a given school offers.[113] Regarding restorative justice specifically, the Department states the following:

> With respect to the implications of restorative justice and the recipient reaching a determination regarding responsibility, the Department acknowledges that generally a critical feature of restorative justice is that the respondent admits responsibility at the start of the process. However, this admission of responsibility does not necessarily mean the recipient has also reached that determination, and participation in restorative justice as a type of informal resolution must be a voluntary decision on the part of the respondent.[114]

Due to the possibility of potential or concurrent civil or criminal legal proceedings, campus counsel could examine the potential applicability of any state statutes that privilege communications during alternative dispute resolution such as mediation or restorative justice processes.[115] Similarly, there is an argument that documents and communications made in the context of an informal resolution may be covered by Federal Rule of Evidence 408 or its state analogs, which make "conduct or a statement made during compromise negotiations about the claim[]" "not admissible— on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction "[116] Yet the statutes

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[111] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 31, at 30,404.

[112] *Id.*

[113] *Id.* ("[F]or example, a mediation model may result in a mutually agreed upon resolution to the situation without the respondent admitting responsibility, while a restorative justice model may reach a mutual resolution that involves the respondent admitting responsibility.")

[114] *Id.* at 30,406.

[115] Coker, *supra* note 59, at 202–03 ("Evidence derived from a campus RJ process may be covered by state statutes that privilege communications in alternative dispute resolution processes, mediation, victim-offender mediation, community dispute resolution centers, and RJ. But in a number of states, these statutes define the process subject to privilege in a way that is not applicable to a campus RJ program, or they apply only to cases that are referred by a prosecutor or the court.") (citing statutes including, but not limited to, TEX. CIV. PRAC. & REM. CODE § 154.073 (2016); DEL. CODE tit. 11, § 9503 (2016); ALASKA STAT. § 47.12.450(e) (2016); ARK. CODE § 16-7-206(a) (2016); W. VA. CODE § 49-4-725(d) (2016)).

[116] FED. R. EVID. 408(a).

and federal rules may be limited in nature and may not cover Title IX complaints or campus informal resolution processes, such as restorative justice approaches.[117]

Another option may be a waiver of the parties' right to pursue a civil action against one another or an agreement that the parties will not share any of the information disclosed during the restorative justice process, provided that the restorative justice process is successfully completed. Such a waiver might be a viable protection against having to share information in a civil proceeding.[118] However, a waiver of civil suits cannot eliminate the possibility of a criminal trial because the decision to pursue criminal charges is often at the discretion of the prosecutor's office, not the harmed party. Moreover, an agreement not to share the information exchanged during a restorative justice approach would not prohibit the parties from complying with a lawful subpoena.

An alternative form of protection may be an MOU with the local prosecutor by which the prosecutor agrees not to use any evidence that is shared by the parties during the course of a restorative justice process in a subsequent criminal case.[119] MOUs of this sort[120] have been used to address sexual violence outside of the campus setting at the Restorative Justice Project at Impact Justice—which has used restorative approaches to address child-on-child sexual abuse[121]—and at RESTORE, a four-year demonstration project that used restorative approaches to address sexual assault cases involving adults.[122] A Sample MOU adjusted to the campus context is attached as Exhibit B.

Ideally, an MOU would protect all evidence obtained as part of the restorative justice process, but an alternative, more limited approach, would protect those statements made by the accused.[123] An agreement of this nature does not bind the harmed party to continue a restorative justice process and would not discourage the harmed party from filing a criminal complaint.[124] Nor would it preclude a harmed party from terminating an informal process to pursue a criminal complaint.[125] Moreover, the MOU would not prevent the prosecutor from pursuing criminal charges against the accused, provided there was sufficient evidence to support the charges that was not obtained through a restorative justice approach.[126] Prosecutors may not easily enter into such MOUs out of fear that such an agreement is an encroachment on their

[117] *See, e.g.*, DEL. CODE tit. 11, § 9504 (2019) ("An offender may not be admitted to [Victim-Offender Alternative Case Resolution] unless the Attorney General certifies that the offender is appropriate for the program"); NEB. REV. STAT. § 25-2914.01 (2019) ("No admission, confession, or incriminating information obtained from a juvenile in the course of any restorative justice program . . . shall be admitted into evidence against such juvenile, except as rebuttal or impeachment evidence, in any future adjudication hearing under the Nebraska Juvenile Code or in any criminal proceeding."); *see also* Coker, *supra* note 59, at 202–03.

[118] *See* Coker, *supra* note 59, at 202–03.

[119] *See id.* at 202.

[120] *See, e.g.*, *Memorandum of Understanding: Restorative Community Conferencing Service Agreement*, INT'L INST. FOR RESTORATIVE PRACS., https://iirp.edu/images/pdf/Cutro_John_2014-Generic-MOU.pdf (last visited May 17, 2020).

[121] sujatha baliga, *A Different Path for Confronting Sexual Assault*, VOX (Oct. 10, 2018), https://www.vox.com/first-person/2018/10/10/17953016/what-is-restorative-justice-definition-questions-circle.

[122] *See* Coker, *supra* note 59, at 204 n. 402.

[123] *Id.* at 203–04.

[124] *Id.*

[125] *Id.*

[126] *Id.*

ability to fully and effectively prosecute sexual violence.[127] However, prosecutors may be persuaded that precluding restorative approaches in campus communities would "decrease accountability in situations where the facts do not meet criminal standards (i.e., beyond a reasonable doubt) but would satisfy the lower preponderance of evidence standard utilized by most college campuses."[128] Additionally, there is very little risk to prosecutors in some campus cases such as in those cases involving noncriminal conduct.[129]

Universities could, therefore, try to limit the use of restorative justice approaches to violations of campus policy that are not criminal in nature. However, it is often difficult to discern whether campus prohibited conduct is also prohibited by law—especially without the use of formal investigative and adjudicative processes. Moreover, such an approach would preclude many harmed parties who want or need an alternative to the campus's formal adjudication process from taking advantage of restorative justice, when both sides would otherwise voluntarily consent to participate. Campuses implementing restorative justice approaches must therefore seriously consider how to balance the needs of the parties and ensure that the parties fully understand the implications of proceeding with informal resolution processes.

IV. Restorative Justice and Campus Sexual Violence in Practice

For whatever the reason, while the 2011 DCL Guidance was in place, most campuses were hesitant to use informal resolution, including RJ practices, for sexual and gender-based misconduct.[130] Today, however, a small number of college campuses have begun implementing restorative approaches to student sexual misconduct. The processes and experiences of three such institutions are outlined below. Please note that interviews with all three schools were completed prior to the release of the 2020 Final Rule.

A. The College of New Jersey[131]

The College of New Jersey (TCNJ), which has approximately 6,800 students, began implementing restorative justice approaches to campus sexual misconduct in October 2017. Since then, TCNJ has had twenty complainants interested in pursuing a RJ approach, which they term "Alternative Resolution." Of those twenty cases where a complainant decided to pursue Alternative Resolution, thirteen cases (sixty-five percent) fully completed the Alternative Resolution process. Three cases did not move forward with Alternative Resolution because they were denied by TCNJ—either the circumstances surrounding the respondent or the nature of the case itself precluded Alternative Resolution as an option. In two cases, the respondent refused to pursue Alternative Resolution. In two cases, the complainant changed their mind about pursing Alternative Resolution.

[127] Koss et al., *supra* note 18, at 246.
[128] *Id.* at 254.
[129] Coker, *supra* note 59, at 204.
[130] KARP ET AL., *supra* note 15, at 41.
[131] Telephone Interview with Chelsea Jacoby, Title IX Coordinator, The College of New Jersey (Sept. 16, 2019).

As a threshold matter, certain cases may be ineligible for Alternative Resolution at TCNJ. Cases involving a weapon are ineligible for Alternative Resolution. Cases where the complainant sustained obvious signs of physical injury may also be ineligible. TCNJ is also hesitant to employ Alternative Resolution in cases involving students and employees and in cases involving repeat offenders who have had claims substantiated against them in the past. Finally, cases involving minors are ineligible for Alternative Resolution. Given that these preconditions are satisfied, TCNJ remains willing to pursue Alternative Resolution in any case under the umbrella of Title IX, including in sexual assault cases.

Assuming that both the complainant and the respondent agree to Alternative Resolution, the process at TCNJ typically operates as follows:

- The Title IX Coordinator or Title IX Investigator (referenced throughout this section now as "Title IX Staff") receives an initial report and conducts outreach to the complainant.
- The Title IX Staff meets with the complainant and outlines all options potentially available to a complainant, including criminal charges, a traditional hearing process at the college, and Alternative Resolution. The Title IX Staff also asks the complainant what their ultimate outcomes and goals are in reporting and asks if the complainant needs any interim measures or accommodations as they weigh their options.
- If a complainant decides to pursue Alternative Resolution, the Title IX Staff and complainant meet again to draft an Alternative Resolution Contract that will guide the Alternative Resolution process. More information about TCNJ's Alternative Resolution Contracts will be discussed below. The drafted Alternative Resolution Contract is then sent to the complainant for the complainant's final approval.
- Once the Alternative Resolution Contract is finalized with the complainant, the Title IX Staff conducts outreach to the respondent and meets with the respondent.
- The Title IX Staff conducts a general intake meeting with the respondent (similar to the complainant) where information in shared about the alleged violation as well as resources and accommodations. Additionally, the Title IX representative presents the respondent with the complainant's version of the Alternative Resolution Contract. The respondent is made aware that if Alternative Resolution is pursued and completed fully, nothing will be on the respondent's record and no sanctions will be on the table. The respondent may opt to pursue Alternative Resolution and sign the complainant's Alternative Resolution Contract. The respondent may also opt to pursue Alternative Resolution but suggest modifications or additions to the Alternative Resolution Contract, which the Title IX Staff would then share with the complainant. The process of arriving at a mutually agreeable Alternative Resolution Contract will be discussed in greater detail below. The respondent may also opt to forego Alternative Resolution, and then the complainant is able to decide whether they would like to pursue a formal hearing, which is the default option at TCNJ if an agreement regarding Alternative Resolution is desired by one party but cannot be reached, or the complainant may choose to do nothing at that time.
- If satisfied with the terms of the Alternative Resolution Contract, the complainant, respondent, and Title IX representative sign the contract.

- It is then up to the respondent to complete all elements of the Alternative Resolution Contract in the time frame specified.
- Once the respondent has completed every aspect of their Alternative Resolution Contract, the Title IX Staff conducts a summative meeting with the respondent to learn about their engagement with the Alternative Resolution process.
- The Title IX Staff then reaches out to the complainant to let the complainant know that the process has been completed and to provide a summary of how the process went.
- As a final measure, both the complainant and the respondent are sent a follow-up evaluation survey to gain insights regarding their engagement with the process.

The lodestar of TCNJ's Alternative Resolution process is the Alternative Resolution Contract. TCNJ's Alternative Resolution Contract begins with the following:

> Alternative Resolution is a voluntary process within The College of New Jersey's Title IX Policy that allows a respondent in a Title IX investigation process to accept responsibility for their behavior and/or potential harm. By fully participating in this process the respondent will not be charged with a violation of College Policy.

Later on in the Alternative Resolution Contract, the parties are asked to initial a number of items, including that "[i]nformation documented during this process can be subpoenaed if a criminal investigation is initiated" and that "[p]articipation in this process does not constitute a responsible finding of a policy violation and therefore is not reflected on a student's disciplinary record."

While the Alternative Resolution process does not necessarily lead to an admission of behavior, the process does acknowledge the potential harm caused by the respondent. In addition to the contract specifying that Alternative Resolution does not constitute a finding of responsibility, TCNJ does not document specific details shared during the meetings with complainants or respondents. Finally, the process can only be used once and will not be considered if requested by a repeat respondent under the Title IX policy.

At times, the complainant and respondent may not agree about what an Alternative Resolution Contract's terms should entail. Although the Title IX Staff in such a situation may go back and forth between the complainant and respondent to see if a mutually agreeable contract can be reached, it is not the Title IX Staff's goal to have a protracted negotiation between the parties. In the event of a deadlock, TCNJ's formal hearing process involving an investigation remains the default option.

The Alternative Resolution Contract is quite flexible in its design out of the belief that there is not a one-size-fits-all response that meets the needs of all complainants and helps all respondents acknowledge the harm that they potentially caused. Consequently, there are a number of activities that could potentially be part of an Alternative Resolution Contract. For example, some respondents are required to attend an individualized alcohol education workshop. In one case, a complainant laughed in the aftermath of a sexual assault and was worried that the respondent read that laughter as enjoyment when the complainant was actually experiencing terror. That

complainant created an Alternative Resolution Contract where the respondent had to watch the Department of Justice's webinar on the Neurobiology of Sexual Assault.[132] Oftentimes, respondents attend three-part, individualized workshops on effective consent with a preventive education specialist where students are asked open-ended questions about consent that help students put their lives and actions in context. Another possible option in the contract includes a victim impact statement, either written by the complainant or presented by the complainant through a surrogate. All Alternative Resolution Contracts end with a summative meeting between the respondent and the Title IX Staff. Although TCNJ remains open to holding direct processes as part of an Alternative Resolution process, TCNJ has not held one as part of an Alternative Resolution process to date. One complainant did request this option, but it was declined by the respondent.

B. Rutgers University—New Brunswick Campus[133]

Rutgers University has over 50,000 undergraduate students and nearly 20,000 graduate students. Rutgers University's New Brunswick campus ("Rutgers") began implementing restorative justice approaches to campus sexual misconduct in the spring of 2019. Conflict resolution processes for Title IX at Rutgers broadly consist of two pathways, deemed the Investigation process and the Alternative Resolution process. Alternative Resolution contains two subtypes of resolution processes that work in tandem or independent of one another; as discussed in greater detail below, one subtype centers on educational programming while the other subtype is modeled after restorative justice practices. Rutgers has already had thirteen cases pursue Alternative Resolution. Nine of those cases have predominately centered on the educational programming pathway. Four of those cases have predominantly centered on the restorative justice pathway in cases spanning sexual assault with penetration, sexual assault without penetration, sexual harassment, and sexual exploitation.

As a preliminary matter, Rutgers does not categorically exclude certain types of cases from Alternative Resolution. But if a case raises matters such as community safety or repeat perpetration, the Title IX Coordinator may opt to take Alternative Resolution off of the table in a given case. Additionally, although restorative justice facilitators at Rutgers have been trained to address sexual misconduct, the school does not currently permit restorative justice approaches in cases of relationship violence pending further training in that area.

When any case comes in, the complainant first meets with a case coordinator and receives an explanation of the options and avenues available at Rutgers and beyond. It is during that initial meeting that the case coordinator begins to explore the complainant's goals and answers any questions that the complainant might have. For example, if a face-to-face meeting seems important to the complainant, the case coordinator might spend more time exploring a restorative justice conference. If the complainant seems interested in whether the university thinks that what happened to them is a policy violation, the case coordinator would likely begin to explore the investigation process in greater detail. A complainant who seems interested in the

[132] Rebecca Campbell, Webinar for the National Institute of Justice (Dec. 3, 2012), https://nij.ojp.gov/media/video/24056.

[133] Telephone Interview with Jackie Moran and Amy Miele, Director of Compliance/Title IX Coordinator and Assistant Director of Student Affairs Compliance/Title IX Investigator, Rutgers University (Oct. 21, 2019).

respondent receiving education might gravitate toward the educational programming available at Rutgers. In terms of the Alternative Resolution pathways at Rutgers, complainants who say that they want the respondent to be educated but who do not want to participate themselves tend to gravitate toward educational programming. Restorative justice conferences tend to appeal to complainants who want the respondent to experience growth and change but who also want to be directly involved in that process. Several students have started in one process and ended in another to better meet their needs. The restorative and educational pathways under the banner of Alternative Resolution are not mutually exclusive, and a given case may very well involve aspects of both.

1. Educational Programming

At Rutgers, the same office that provides victim advocacy also works with respondents on their education and prevention. There are a number of educational components offered at Rutgers that might be explored, including respondent-specific workshops on consent, workshops on building healthy relationships, and sessions on identity and oppression. Additionally, one option offered at Rutgers allows the complainant to write or record an impact statement detailing the effect that the incident had on them. The respondent then reads or watches the impact statement with staff at the University's Office for Violence Prevention and Victim Assistance and the respondent unpacks the impact statement with trained staff afterward. Additionally, Rutgers offers educational opportunities centered on digital violence and the healthy use of social media. There is also the opportunity for respondents to participate in a behavior integrity program that takes place in a group setting. The options available on the educational programming pathway are selected to be responsive to the issues that arose in a given incident, the needs of the complainant, and the skills from which the respondent might most benefit from building.

The educational programming pathway has its own agreement—the Alternative Process Agreement. Among other things, the Alternative Process Agreement (1) notifies the parties that information documented during this process can be subpoenaed if a criminal or civil investigation is initiated, (2) indicates that participation in the process does not constitute a responsible finding, (3) notes that if the respondent is found responsible for any violations in the future under an adjudicatory model, the Alternative Process Agreement can only be used in the sanctioning phase, and (4) gives notice that this process is voluntary and can be stopped at any time by either party or the University. The terms outlined in the agreement must be agreed to by both responding and reporting parties and approved by the University.

2. Restorative Justice Pathway

Under this pathway, Rutgers offers both face-to-face conferencing as well as indirect facilitation. To date, out of the four cases that have gone down the restorative justice pathway at Rutgers, everyone has opted for face-to-face conferences over indirect facilitations. The conferencing process at Rutgers involves preconference preparation and the conference itself as discussed in Part I of this article.

Up to the point of signing an agreement detailing the particular process that is being agreed to, either the complainant or the respondent can elect to pursue an investigation process instead. Once the agreement is signed, however, neither party

can choose to go through the investigation process. Staff members facilitating restorative processes do not retain case notes. Additionally, both parties are informed at the outset that information shared in the process might someday be subpoenaed.

The restorative justice pathway at Rutgers has its own unique agreement. Among other things, the Restorative Justice Agreement specifies that (1) any documentation resulting from the process can be subpoenaed if criminal or civil investigation is initiated, and (2) if the parties do not come to an agreement and sign the Restorative Justice Agreement, the case could go through the investigation process. The Restorative Justice Agreement further specifies that "participation in this process does not constitute a responsible finding of a policy violation. The Responding Party's admission to any accountability and/or responsibility of harm done is not considered an admission of guilt."

Respondents who fully comply with the Restorative Justice Agreement will not be charged with violating the sexual misconduct policy at Rutgers. Additionally, the complainant or respondent may be charged with Failure to Comply with University Officials for failure to meet the requirements laid out in an agreement.

C. The University of Michigan[134]

The University of Michigan (UM) has over 60,000 undergraduate and graduate students spread across three campuses. UM has been using restorative justice for a wide array of nonacademic, nonsexual misconduct since 2007. It began using restorative justice practices under its student sexual misconduct policy in 2013. At that time, it was known as "Informal Resolution" and was only permitted in cases of sexual harassment. Between 2013 and 2018 the name Informal Resolution changed to Alternative Resolution, and in 2018, the policy expanded Alternative Resolution to include some cases of sexual assault (nonpenetrative). In 2019, UM revised its student sexual misconduct policy once again and eliminated any restrictions on the types of cases that could go through restorative practices to address student sexual misconduct. The 2019 policy also expanded and clarified the restorative options available to address student sexual misconduct, now called "Adaptable Resolution."

Although UM's current policy does not restrict the types of cases eligible to go through Adaptable Resolution, each request to proceed through Adaptable Resolution must be approved by the Title IX Coordinator, who must confirm that the use of the process was without pressure or compulsion from others, and approve that the case is of the type that would be appropriate for it. While there are no bright line rules set forth under UM's policy to determine what types of cases are appropriate for Adaptable Resolution, the Title IX Coordinator considers the totality of the known circumstances, including the nature of the offense, whether a weapon was used, whether there is an ongoing threat to the community, the power dynamics between the parties, and whether the cases involves a repeat offender or a pattern of behavior. While the existence of any one of these issues does not necessarily preclude Adaptable Resolution, the Title IX Coordinator will weigh the request for Adaptable Resolution against these various factors to make a determination. The Adaptable Resolution

[134] Telephone Interview with Erik Wessel and Carrie Landrum, Director of the Office of Student Conduct Resolution and Assistant Director for Adaptable Resolution, Training, and Strategic Partnership, The University of Michigan (Sept. 19, 2019).

Coordinator also has full discretion to determine at what point in the process an adaptable resolution process is not appropriate and may refer the matter back to the Title IX Coordinator for further action. In instances of campus sexual misconduct, the Office of Student Conflict Resolution (OSCR) is responsible for facilitating Adaptable Resolution and the University's Office for Institutional Equity is responsible for conducting the investigation under an Investigative Resolution, and the University's Title IX Coordinator is responsible for broadly ensuring compliance with Title IX. During early stages of a report, the Title IX and OSCR offices work in concert to help the parties identify the method of resolution that best suits their needs.

UM's Adaptable Resolution process is outlined as follows:

- Once a report is made, it is routed to the Office for Institutional Equity (OIE). OIE assesses whether the allegations, if true, would constitute a policy violation.
- UM staff in both OIE and OSCR proceed in a partnered approach. The complainant meets with a case manager (from OSCR) and investigator (from OIE) during an intake process and initial meeting. Both the Adaptable and Investigative Resolution processes are described to the complainant. The case manager and investigator work in concert to elicit the complainant's needs and explore the complainant's primary interests. If an investigation and hearing emerge as the preferred path, then the investigator and OIE facilitate an investigation. If Adaptable Resolution emerges as the preferred path, then the Adaptable Resolution Coordinator, a specially trained staff member in OSCR, facilitates an Adaptable Resolution. The Adaptable Resolution Coordinator also has full discretion to determine at any point in the process that an Adaptable Resolution approach is not appropriate, and may refer the matter back to the Title IX Coordinator for further action.
- A complainant interested in Adaptable Resolution then meets with the Adaptable Resolution Coordinator for an intake meeting to discuss potential process options under Adaptable Resolution and desired outcomes. There are four restorative processes available to complainants under the banner of Adaptable Resolution: "Facilitated Dialogue,"[135] "Restorative Circle or Conference process," "Shuttle Negotiation" (indirect facilitation), and "Circle of Accountability".[136]An Adaptable Resolution process could include one or more of the above processes, tailored to the parties per their agreement.
- Once the complainant decides to move forward with Adaptable Resolution and chooses what type(s) of restorative process to use, the respondent is invited to participate in the process. The Adaptable Resolution Coordinator then meets with an interested respondent for an intake meeting. If the respondent is also

[135] UM's Title IX policy defines a facilitated dialogue as "a structured and facilitated conversation between two or more individuals, most often the Claimant, the Respondent, and/or other community members. The focus is often on providing a space for voices to be heard and perspectives to be shared. Depending on stated interests, the participants may sometimes work towards the development of a shared agreement, although working towards an agreement is not always the intended outcome."

[136] UM's Title IX policy defines a circle of accountability (COA) as "a facilitated interaction between the Respondent and University faculty and/or staff designed to provide accountability, structured support, and the development of a learning plan. The focus of a COA is to balance support and accountability for an individual who has acknowledged their obligation to repair harm and willingness to engage in an educational process. The COA model does not require participation from the Claimant, but as with other types of adaptable resolution, it must be voluntary for the Claimant and the Respondent."

agreeable to Adaptable Resolution, the parties execute a written Agreement to Participate in Adaptable Resolution, under which they separately acknowledge that participation in the process is voluntary; that either party may choose to end the process at any time and pursue investigative resolution; that the parties must successfully complete preparatory meetings prior to participating in Adaptable Resolution; that information obtained and utilized during Adaptable Resolution will not be used in any other university process or legal proceeding (though information could be subpoenaed by law enforcement); that Adaptable Resolution does not result in formal disciplinary action against the respondent; and that if the parties enter into a resolution agreement, they waive their right to return to an Investigative Resolution.

Once the parties have entered into an Agreement to Participate in Adaptable Resolution, the Adaptable Resolution Coordinator works separately with the parties to identify the impact that the harms had and what steps the respondent can take to repair the harms. Through these discussions, the Adaptable Resolution Coordinator works with the parties to identify the processes and/or elements of a desired outcome that will repair the reported harm. Once those terms are identified and agreed upon by the parties, the Adaptable Resolution Coordinator facilitates the relevant processes, which conclude with an Adaptable Resolution Agreement.

Complainants often request that the respondent engage in educational programming that addresses the underlying contributing factors to the respondent's behavior (e.g., education on consent, healthy relationships, sexual and gender-based harms, and alcohol or other drugs as contributing factors). The engagement in education that may prevent the respondent from causing future harm is restorative for many claimants who want to ensure that the respondent not cause similar harm in the future. Aside from education related to the harm, the most commonly requested agreement elements include an agreement or restriction on the academic, social, residential, or other physical spaces in which a respondent may be present where a complainant is also commonly present, as well as an agreement that the respondent will not communicate with the complainant. These assurances restore a sense of safety for the complainant that is important to be repaired. Resolution agreements may include additional elements to repair harm that are requested by the complainant, agreed to by the respondent, and approved by the Title IX Coordinator, which are intended to eliminate the prohibited conduct, prevent its recurrence, and/or remedy its effects in a manner that meets the needs of the complainant while maintaining the safety of the campus community.

Once the Title IX Coordinator approves an agreement and both parties sign, the parties are bound by its terms and cannot return to Investigative Resolution. Thus far, every case that proceeded to Adaptable Resolution at UM has resulted in an Adaptable Resolution Agreement. Up to the point of an agreement, either party may discontinue the Adaptable Resolution process and request Investigative Resolution. Should the process revert to Investigative Resolution, information obtained through the Adaptable Resolution process may not be utilized in the Investigative Resolution.

UM acknowledges that its educational records in this realm could be subpoenaed. In terms of Adaptable Resolution, UM does not create long, lengthy, or narrative case notes. Moreover, UM does not require an admission of responsibility as

a precondition to respondents' participation in Adaptable Resolution. Instead, Adaptable Resolution is generally designed to allow a respondent to acknowledge harm and accept responsibility for repairing harm (to the extent possible) experienced by the complainant and/or the university community. Therefore, signing an Adaptable Resolution Agreement does not necessarily amount to an admission of engagement in sexual misconduct. However, complainants may determine that an acknowledgment of responsibility is an important element of the process.

Out of the four approaches offered under the banner of Adaptable Resolution—facilitated dialogues, restorative circles or conference processes, indirect facilitations, and circles of accountability—indirect facilitations are the most commonly requested approach at UM. Many complainants have not requested an apology from a respondent, and there have even been cases where a respondent wants to apologize but the complainant was not interested. Since UM's newest policy went into effect in January 2019, about half of UM's student sexual misconduct cases have been addressed using Adaptable Resolution, with the other half of cases resulting in Investigative Resolution.

V. Evidence of Effectiveness of Restorative Justice Approaches

A. Effectiveness Generally

Research demonstrates that the use of restorative justice practices in criminal cases, compared to court processes, has better reduced recidivism, reduced the posttraumatic stress symptoms of the person who experienced the harm, and increased all parties' satisfaction with the process.[137] "The success of RJ in reducing, or at least not increasing, repeat offending is most consistent in tests on violent crime "[138] Broadly, a study of the effectiveness of college student misconduct cases comparing 165 restorative justice cases with 403 traditional conduct cases at 18 college campuses found similarly high levels of satisfaction among harmed parties and consistent improvement in student offender learning and development when compared with traditional approaches.[139]

Researchers have had few opportunities to see restorative justice applied to adult sexual assault. One exception was a project called RESTORE in Pima County, Arizona. Prosecutors screened cases—both misdemeanors and felonies—and allowed some harmed parties and those who caused sexual harm to opt in.[140] RESTORE took place between 2003 and 2007 and was studied by Mary Koss, a public health professor at the University of Arizona.[141] Out of the twenty-two cases in which both parties volunteered, twenty made it to the conferencing stage after extensive preparation.[142] Koss found that eighty percent of the people who caused harm completed the program,

[137] LAWRENCE W. SHERMAN & HEATHER STRANG, RESTORATIVE JUSTICE: THE EVIDENCE 1, 4 (2007), http://restorativejustice.org/10fulltext/restorative-justice-the-evidence.
[138] *Id.* at 68.
[139] Karp & Sacks, *supra* note 7, at 166.
[140] Coker, *supra* note 59, at 193 (citing Koss, *supra* note 6, at 1623).
[141] Koss, *supra* note 6, at 1623, 1633.
[142] *Id.* at 1631, 1647.

and only one reoffended during the follow-up year.[143] Harmed parties felt safe and highly satisfied, although not all felt that justice had been done.[144]

B. Anecdotal Evidence from Campuses[145]

TCNJ has been utilizing a restorative justice approach to incidents of sexual misconduct for over a year and has seen successful outcomes. Students in twenty cases indicated an interest in the alternative resolution process, with thirteen cases culminating in written agreements. Nearly two-thirds of the harmed parties indicated they would not have participated in a Title IX process were it not for the availability of the restorative justice approach.

At one TCNJ consent workshop, a respondent was able to realize that when he's in a relationship, he frequently has conversations regarding what his partner wants but that he does not have those same conversations in casual sexual situations. Through the individualized consent workshop, the respondent was able to recognize that when he does not know someone and how they react, the situation likely demands more conversation, not less.

Another respondent who went through a consent workshop demonstrated how the Alternative Resolution process has the potential for promoting growth and learning for both the respondent and a friend. After one session of a consent workshop, the respondent discussed the workshop with a friend in his off-campus apartment. Later that same week, the respondent's friend took a woman home from a party. The friend soon realized that the woman was very intoxicated and the earlier conversation about the consent workshop caused the friend to think twice about her ability to provide consent. Rather than attempting to sleep with the woman, the respondent's friend got the woman an Uber and sent her back home. In the morning, she texted him and expressed her gratitude.

One complainant at TCNJ wrote the following in reflecting on her engagement with Alternative Resolution at TCNJ:

Alternative Resolution has allowed me to <u>have</u> <u>a</u> <u>voice</u>. It gave me the opportunity to make a direct impact statement to my abuser where I could express all those thoughts I wish I had said to him sooner after he hit me. It was definitely not easy, but I <u>FINALLY</u> got the closure I needed. It allowed me to feel EMPOWERED.

Similarly, after an agreement has been fully satisfied, staff at Rutgers collect feedback from both complainants and respondents. To date, the feedback received on the restorative process has been entirely positive. One complainant stated that the process "provided me with a sense of relief that effort will be made to better the situation." Another complainant stated that the restorative process "allowed me to receive an insight on the situation & motive behind the actions made." One respondent stated that "the explorations of mine and [Complainant's] perspectives was done very well, I was

[143] *Id.* at 1647.
[144] *Id.* at 1644, 1647.
[145] Telephone Interview with Chelsea Jacoby, Title IX Coordinator, The College of New Jersey (Sept. 16, 2019); Telephone Interview with Jackie Moran and Amy Miele, Director of Compliance/Title IX Coordinator and Assistant Director of Student Affairs Compliance/Title IX Investigator, Rutgers University (Oct. 21, 2019).

shocked at times to hear things I had never even thought of." Another respondent noted that "the agreement process was very well done, it showed me a game plan that I could follow to alleviate the harm done to [Complainant] and to better myself."

VI. Conclusion: Comparative Analysis and Trade-Offs

Under the 2011 DCL Guidance, campuses may have been hesitant to employ RJ practices for sexual and gender-based misconduct—whether RJ was permissible under OCR guidelines remained less than clear.[146] Under the 2020 Final Rule, that uncertainty has been lifted.

Experiences implementing restorative justice at TCNJ, Rutgers, and UM reveal a series of decision points and trade-offs. All three schools interviewed for this article expressed a commitment to making restorative justice accessible to students in a wide variety of cases, including cases of alleged sexual assault involving penetration. In their agreements with students, all three institutions make it clear that information gathered in restorative processes may be subpoenaed at any time. Yet if addressing harm caused leads a respondent to divulge underlying behavior, the threat of a subpoena may conflict with respondents' abilities to fully explore their role in the incident at hand. As institutions move forward and as new institutions begin implementing restorative approaches to student sexual misconduct, it is worth exploring whether existing privileges in a given state provide any measure of protection to disclosures occurring within campus restorative processes.[147] Absent statutory safeguards, MOUs with local prosecutors—such as the MOU modeled in Exhibit B of this article—could prevent prosecutors from using information gained through the RJ process while nevertheless permitting discovery utilizing other means. Moving forward, it is also worth exploring the extent to which information gathered in a restorative proceeding could be used in civil proceedings[148] or in subsequent campus proceedings; confidentiality and the extent to which parties can discuss what came up during a restorative process with others; and what might be done structurally to isolate investigatory processes from restorative processes.[149]

The Final Rule[150] and a number of recent court cases[151] have arguably heightened the adversarial nature of traditional, formal adjudication models.[152]

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[146] *See* Office for Civil Rights, *supra* note 21; Koss et al., *supra* note 18, at 246–47.

[147] Coker, *supra* note 59, at 202 ("Evidence derived from a campus RJ process may be covered by state statutes that privilege communications in alternative dispute resolution processes, mediation, victim-offender mediation, community dispute resolution centers, and RJ. But in a number of states, these statutes define the process subject to privilege in a way that is not applicable to a campus RJ program, or they apply only to cases that are referred by a prosecutor or the court.").

[148] *See id.* at 204.

[149] Sites for ongoing investigation include (1) preventing the use of information gathered in a restorative process from use in a later, adversarial proceeding on campus should one become necessary and (2) navigating the disclosure obligations of employees required to report campus sexual misconduct under the banner of Title IX.

[150] *See, e.g.*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 31, at 30,402 ("A few commenters noted that the prospect of retraumatizing cross-examination under the NPRM's grievance procedures means many parties have no real choice at all.").

[151] *See, e.g.*, Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018) ("[W]hen the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination.").

[152] *See, e.g.*, Letter from Christina H. Paxton, President, Brown University, to Secretary Betsy DeVos, United States Secretary of Education, Department of Education (Jan. 29, 2019), https://www.brown.edu/news/2019-01-

The Final Rule requires schools to allow the parties to cross-examine each other at an in-person hearing through a lawyer or other adviser.[153] Some fear that the new rules governing hearings will heighten the adversarial nature of hearing processes and chill reporting.[154] As explained in Part IV of this article, the experiences of college campuses currently employing restorative justice in instances of student sexual misconduct have been quite the opposite— complainants have indicated that having options outside of adversarial models *motivated them to come forward*, with complainants at times opting to sit in the same room with respondents above other options.

At the same time, survivors of campus sexual misconduct have long reported such violence at low rates, even during the 2011 DCL era. In this sense, restorative approaches are not just about providing an alternative to adjudicatory models in the wake of the 2020 Final Rule—broadly, restorative justice "supports rather than stigmatizes, engages rather than isolates, empowers rather than silences, and teaches that meaningful accountability can rebuild a fractured campus community."[155] This moment presents an opportunity to consider approaches to sexual harm that are sensitive to the enduring concerns of both claimants and respondents.[156] While the use of restorative justice in this way on campuses across the United States is rather new, restorative justice approaches seem to offer harmed parties something that they want and—in keeping with the educational goals of college campuses—encourage respondents' growth and learning in the process.

29/titleix ("In addition, a shift to a more adversarial 'courtroom' environment may deter students from reporting sexual misconduct, undermining the ability of colleges and universities to create a safe and positive educational environment for all students.").

[153] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, *supra* note 31, at 30,577 (citing § 106.45(b)(6)(i)).

[154] *See, e.g.*, Letter from Bowdoin College, to Secretary Betsy DeVos, United States Secretary of Education, Department of Education (Jan. 14, 2019), https://www.bowdoin.edu/president/pdf/bowdoin-nprm-final-jan-14.pdf ("The College asks DOE to consider alternative approaches . . . to ensure a process that is fair and, as such, not intimidating and adversarial in ways that have the potential to significantly chill reporting.").

[155] David R. Karp & Olivia Frank, *Restorative Justice and Student Development in Higher Education: Expanding "Offender" Horizons Beyond Punishment and Rehabilitation to Community Engagement and Personal Growth*, *in* OFFENDERS NO MORE: AN INTERDISCIPLINARY RESTORATIVE JUSTICE DIALOGUE 160 (Theo Gavrielides ed., 2016).

[156] *See, e.g.*, Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, *in* RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 218, 221-26 (James Ptacek, ed., 2009) (organizing the conceptual phase of RJ program development from the perspectives of both survivor-victims and responsible persons).

Exhibit A

Agreement to Participate in Informal Resolution

Pursuant to Section __ of the University's [NAME OF TITLE IX OR SEXUAL MISCONDUCT POLICY] Policy, I, _____ (name), understand and agree to participate in informal resolution of the complaint filed on [DATE] by _____ (name(s) of complainant(s)) regarding the alleged conduct of _____ (name(s) of respondent(s)).

Informal resolution is a voluntary, remedies-based, alternative dispute resolution process under [INSERT UNIVERSITY POLICY] that allows the parties in a Title IX matter to agree to a resolution without formal disciplinary action against a respondent. Informal resolution is generally designed to facilitate a mutually agreeable outcome to alleged violations of [INSTITUTION] policy that centers on repairing the harm (to the extent possible) experienced by the complainant and/or the university community. Informal resolution is designed to eliminate the prohibited conduct, prevent its recurrence, and remedy its effects in a manner that meets the needs of the complainant while maintaining the safety of the campus community.

Informal resolution will only be used at the request and agreement of both the complainant and respondent and as deemed appropriate by the Title IX Coordinator, in their sole discretion. Before proceeding with an informal resolution, both parties must understand and agree to the necessary elements of the process.

By signing below, I acknowledge that I have read, understand, and agree to each of the following:

— Participation in this process is voluntary. Prior to signing a resolution agreement either the complainant or respondent can choose to end the process at any time and pursue investigative resolution; any other participant can also choose to end their participation at any time;

— Individuals who wish to participate in informal resolution must successfully complete preparatory meetings (as determined by [INSERT]) with an appropriate staff member prior to participating;

— Informal resolution does not result in formal disciplinary action against the respondent, and the respondent will not be found responsible for any policy violation;

— The Informal Resolution Coordinator has the sole discretion to determine at what point in the process an informal resolution process is not appropriate and must be referred back to the Title IX Coordinator for further action;

— I have not been asked to waive my right to an investigation and adjudication as a condition of enrollment or continuing enrollment, employment or continuing employment, or the enjoyment of any other right.

— I agree that to the extent permitted by law, I will not use information obtained and utilized during informal resolution in any other university process (including investigative resolution under the Policy if informal resolution does not result in an agreement) or legal proceeding. I understand that information

documented and/or shared during informal resolution could be subpoenaed by law enforcement if a criminal investigation is initiated;

— Information shared during informal resolution will not result in separate or subsequent disciplinary investigation or actions by the University, unless there is a significant threat of harm or safety to self or others;

— By signing a resolution agreement, the parties are affirming that the terms of the agreement (along with any other supportive or interim measures in place) appropriately address the conduct at issue and remedy its effects;

— After the parties sign a resolution agreement, and the Title IX Coordinator or designee approves it, the parties are bound by its terms and cannot return to investigative resolution;

— If the parties enter into a resolution agreement, the parties waive the right for an investigative resolution and the respondent agrees to comply with the terms of the resolution agreement. I understand that failure to comply with a resolution agreement, once signed and approved, may result in the agreed-upon consequences in the resolution agreement, which may include the university placing an appropriate hold on the student's account until the terms of the agreement are met;

— If the complainant and respondent do not reach a resolution agreement, the matter may be referred to the Title IX Coordinator for further action.

_____	_____
Printed Name	*Signature and Date*
_____	_____
Printed Name	*Signature and Date*
_____	_____
Title IX Staff Member Printed Name	*Signature and Date*

Exhibit B

Memorandum of Understanding:
Restorative Justice Informal Resolution Agreement

THIS MEMORANDUM OF UNDERSTANDING ("MOU") is by and between the following: **[name and title of the District Attorney with authority to make a binding agreement for the Division]** and the **[insert University name] ("the University")**.

I. Introduction and Definitions

The goal of this agreement is to ensure the confidentiality of information regarding alleged sexual misconduct shared by students during a University-run informal resolution process, known as Informal Resolution ("IR"). IR is a voluntary, remedies-based, structured interaction among affected parties that allows a student accused of misconduct ("the respondent") to acknowledge his/her harm and accept responsibility for repairing the harm experienced by the victim ("the complainant"), the University community, and/or the public at large. The Informal Resolution system models the restorative justice method of conflict resolution. As such, IR is only undertaken when the respondent is prepared to assume responsibility for repairing harm (to the extent possible).

During an IR, the respondent and the complainant typically share their experiences of what happened, understand the harm caused, and reach consensus regarding how to repair the harm, prevent its reoccurrence, and/or ensure safe communities. Other impacted individuals and supporters of the parties may also be present. When the plan is completed, the University does not pursue other formal resolution processes, such as an investigation and a hearing to determine responsibility.

IR is not an investigative process. There are no procedures for determining guilt, such as the presentation and weighing of evidence. Instead, by creating spaces where students can make amends directly to the people they have harmed, IR helps participants understand the harm. The process also creates a space to listen and respond to the needs of the complainant; to encourage accountability through personal reflection and collaborative planning; to reduce the risk of re-offense by building positive social ties to the community; and to create caring climates that support healthy communities by eliminating harmful behavior.

This MOU sets forth expectations upon **[the District Attorney's office and all organizations signing this document]** and the **[insert University name]**. This MOU will become effective upon the approval of the District Attorney ("DA") and the University.

Throughout this document, the term "IR" refers to the initial outreach and intake of all parties, preparatory communications, meetings, and conferences, any follow-up communications and meetings that extend through plan completion and case closure, and all written and electronic documents and communications related to this process.

II. District Attorney Agreements

A. Confidentiality

Generally. The DA agrees that all information learned in the IR process (including preconference meetings) is confidential and will not be accessible. Should the DA gain access to any information via any aspect of the IR process, the DA agrees that such information will be treated as confidential ("Confidential Information") and shall not be used against the respondent in any criminal proceeding or determination of probation violations. The DA agrees to not subpoena information or testimony from IR facilitators or other University staff or otherwise ask them to share Confidential Information learned in matters that involve individuals who participate in conference. The DA also agrees not to subpoena or otherwise interview/investigate other IR participants (in either preparatory meetings or in the conference itself) to testify about any Confidential Information that is learned through the IR program. Finally, the DA agrees that an individual's agreement to participate in IR, or the failure of a case to successfully resolve through IR, will not be introduced into any criminal proceedings for any purpose including for impeachment purposes, or in furtherance of an immigration proceeding.

Confidentiality and Immunity of Other Individuals/Participants. If the respondent brings other individuals to IR or to preparatory sessions or discusses other individuals in the IR or preparatory sessions ("Third Parties"), the DA agrees that this information, including, but not limited to, the identities of those Third Parties, will be treated as Confidential Information and will not be used against any Third Parties in a criminal proceeding or in furtherance of an immigration proceeding, regardless of whether the information pertains to the case at hand. The DA will take appropriate measures and exercise reasonable care to maintain the confidentiality of all Third Parties.

Confidentiality of Immigration Status. The DA agrees that all information learned in the conferencing process (including pre-conference meetings) regarding the immigration or documentation status of any of the participants (including but not limited to the respondent, the respondent's families and caregivers, and others participating in or discussed in the IR process) will be confidential and shall not be accessible to law enforcement. Should the DA gain access to such information, the DA agrees that all information learned in the process (including pre-conference meetings) regarding the immigration or documentation status of the respondent, the respondent's family and/or caregivers, and others participating in or discussed in the IR program will be treated as Confidential Information. The DA agrees not to share such Confidential Information with any federal law enforcement or immigration agencies or authorities to the extent permitted by law. The DA will not honor any federal or other requests for information regarding the immigration status of any participant to the extent permitted by law. The DA agrees not to subpoena as witnesses or ask questions of IR facilitators or other **[insert University name]** staff about immigration facts learned in matters that involve the respondent, the respondent's family and/or the respondent's support persons, the other IR participants, or people discussed during the IR process. The DA also agrees not to call other IR participants (in either preparatory meetings or in the conference itself) to

testify or to answer questions about any information regarding immigration status that is learned through the IR process.

B. Prosecution of Cases Referred to IR.

It is understood, however, that prosecution may proceed against respondents based on information gathered before, after, or otherwise outside the IR process.

If [**insert University name**] learns that the DA has initiated prosecution of a case referred to IR, [**insert University name**] will contact the DA to alert him/her to the ongoing IR. The DA agrees to engage in a good-faith discussion about the appropriateness of addressing the case solely through the IR process.

III. District Attorney and [insert University name] Agreements:

A. Term and Termination.

This MOU shall commence on the effective date and shall continue until **[insert termination date here]**, unless terminated earlier pursuant to this paragraph: Any party may terminate its obligations under this MOU prior to expiration upon 30-day notice of one to any other. Any signatory may terminate this MOU without affecting the remaining relationships governed under this MOU. Any IR process commenced under the terms of this agreement will be governed by the terms of this agreement, even if the MOU has been terminated. Commencement is determined by the complainant and respondent's written agreement to initiate IR proceedings.

B. Amendments. If for any reason, alterations or changes are made, all changes will be mutually agreed upon by all parties in a separate agreement as an addendum to this agreement.
Approvals:

_____ _____

[Managing District Attorney or District Attorney of entire participating jurisdiction's District Attorney's Office] Date

_____ _____

[University Authority] Date

THE PROBLEM OF GOOD INTENTIONS: CHALLENGES ARISING FROM STATE MANDATED UNIVERSITY-WIDE SEXUAL MISCONDUCT REPORTING

ANDREW LITTLE, CHRIS RILEY*[1]

Abstract

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

INTRODUCTION

Good intentions can make for bad policy. In this article we address developments in Texas law related to the mandatory reporting of sexual misconduct in university settings, framed by the background problems of underreporting and misreporting on college campuses. In addition, we address the relationship between the 2019 Texas statute and recent changes in Title IX procedures. The Texas Legislature, understandably motivated by high-profile incidents in the last few years where university employees failed to report or address obvious instances of sexual misconduct, crafted new legislation in 2019 that may create as many problems as it solves.[2] The Legislature's 2019 changes to the Texas Education Code may have especially problematic application at faith-

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[2] TEX. EDUC. CODE § 51.251 2020.

based universities, even though it may have been a faith-based university that generated the public outcry in the first place. While the problems of misreporting or underreporting of sexual misconduct are real, significant, and in need of redress, Texas Senate Bill 212 may be a blunt instrument that, in light of recent changes in federal Title IX law, seems to be the wrong legislative tool for the job.

In his seminal 1986 article "Violence and the Word," Robert Cover observed that "Law is the projection of an imagined future upon reality."[3] Those with the power to effectuate the moral accomplishment that is the law—whether judge, legislator, regulator, or litigant—implicitly imagine the world they want, then use the legitimated force of the state—inseparable from violence, Cover argues—to press down that idealized future upon the present. Sometimes the future matches well with present conditions, and law "works." Other times the lawmaker identifies the right problem, but the reach into the future for a solution misses the mark, as it cannot be easily projected onto the current reality.

The Texas Legislature correctly identified a weakness in existing legal schemes related to unreported or misreported sexual misconduct. But the imagined future has problematic application when pressed down upon the present day, which we highlight herein. Specifically, this article addresses new challenges for university employees in reporting sexual misconduct under Texas law. Texas appears to be unique among all states in that the burden of reporting sexual misconduct falls on virtually every employee of every higher education institution, despite the fact that recently released Title IX regulations relax such reporting requirements. In other words, the interplay between Title IX and state higher education laws is in flux, with different lawmaking bodies seeking different desired futures. The good intentions of this law may lead to bad policy when applied to many routine situations in universities. These unforeseen applications of the law to reality may be especially acute in faith-based institutions, which have unique organizational cultures that are both strengths and weaknesses. Significantly, although Title IX and some state legislatures may be moving away from mandatory reporting for all employees, the Texas statute could serve as a model for other states that seek to impose university-wide reporting, with severe penalties for noncompliance. Thus, while this article is limited mainly to the Texas statute in its context, we submit that this approach may be a realistic future for other jurisdictions.

We begin our article by providing an overview and contextualization of the Texas statute within the larger national landscape. Turning then to the text of the statute and an understanding of how it will be applied, we offer several critiques, both generally for all Texas universities and then specifically for faith-based institutions. We illustrate our critiques through the use of five hypothetical cases, which bring to light the problematic text and scope of the Texas law. Following these critiques and hypotheticals, we conclude with some suggested changes for improvement, which take into account present conditions and challenges, including the recently released Title IX regulations.

[3] Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1604 (1985–86).

I. SENATE BILL 212, IN CONTEXT

A. The Problems of University-Related Sexual Misconduct and Underreporting

Universities continue to struggle to eliminate the societal scourge of sexual misconduct[4] within their academic communities. While no organization or social institution is immune to these ills, universities may be particularly susceptible, given their residential structure with thousands of people living in close quarters and maintaining repeated interactions, pervasive late-adolescent culture with reduced supervision and less than fully formed social skills, the prevalence of alcohol and recreational drugs, and sometimes gross power disparities between community participants. Indeed, few settings in twenty-first century America can offer the same confluence of factors that fuel sexual misconduct as the contemporary university. Universities understand these challenges and utilize numerous tools to combat sexual misconduct, but research from the American Association of Universities indicates that the rate of nonconsensual sexual contact and misbehavior has actually increased since 2015, particularly when women are victims.[5] From this perspective, university efforts to combat the problems appear to be insufficient.

Layering an additional challenge on universities is the organizational phenomenon arising from the widespread failure to report or underreport incidents of assault and harassment. There are many instances in the last few years where initial acts of sexual misconduct went unreported or were improperly handled, which compounds the injury to the victim(s). Faith-based universities, which are addressed specifically in Part III of this article, are not immune to the problem of sexual misconduct and in some instances may offer high-profile negative examples of organizational cultures that suppress reporting and discipline. With this background, federal and state governments have created a host of statutory obligations with the goal of eliminating or reducing sexual misconduct in university settings as well as requiring greater reporting obligations for those who become aware of violations. Based on these requirements, all universities are required to have Title IX Coordinators as well as policies and procedures for reporting that are disseminated to their students and employees. Yet still, the problems of reporting persist.

It is within this milieu that Senate Bill 212 recently became the law in Texas on September 1, 2019, adding reporting requirements for university employees and mandating employee termination and prosecution for failure to report. We start from the position that any failure to report sexual misconduct is a significant problem worthy of attention and solution from university administrators, staff, faculty, students, and other stakeholders. Likewise, while we applaud legislative

[4] "Sexual misconduct" is not defined in the Texas statute but is a commonly used term of art that includes sexual assault, sexual harassment, stalking, and dating violence. See the following training materials from the Texas Higher Education Coordinating Board, *Sexual Misconduct Policy* (Dec. 2, 2019), http://reportcenter.thecb.state.tx.us/Training-materials/handouts/Sexual-Misconduct-Policy-Glossary/.

[5] David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct* (Sept. 15, 2015), AM. ASS'N OF U. vii–viii, https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.

or regulatory action that addresses the root problems in these cases, we criticize Senate Bill 212 as being inartfully drafted and difficult to apply in several common instances. In other words, the statute identifies an important problem, but as we explain, the solution creates additional new problems that are currently unresolved.

B. Legislative Attempts in Some States to Address Sexual Misconduct Investigations and Reporting

Texas lawmakers are not alone in their concerns related to sexual assault in the higher education context. Other state legislatures have been active in defining and delimiting how Title IX violations, sexual crimes, and sexual misconduct are handled on college campuses within their states. Notably, Georgia and Missouri have both attempted to create greater protections for universities and those accused of sexual misconduct. In 2017 in Georgia, state Representative Earl Ehrhart (R-Powder Springs) introduced a bill that would have required universities to refer all incidents that could be crimes to law enforcement officials. The university could pursue its own internal inquiry into the incident only if law enforcement opened an investigation, and discipline against the accused could occur only if the student was convicted or pled guilty.[6] The bill, Georgia HB 51, passed the State House 115–55, but then was referred to committee in the Senate, where it apparently died.[7]

Missouri lawmakers in 2019 likewise introduced legislation that would protect those accused of sexual misconduct in campus-based Title IX proceedings. Taking the state House and Senate bills together, the accused would have extensive due process rights, in addition to a statutory right of action against the university and the initial claimant, and the state's Attorney General could investigate universities for failure to accord sufficient rights to the accused.[8] The Missouri bills were placed on committee calendars, and nothing further appears to have happened legislatively in the last twelve months.[9] Part of the reason for the bills' failure to generate action in the Legislature may have stemmed from the fact that the *Kansas City Star* reported that the bills' original author, a lobbyist, allegedly wrote the proposed legislation to help his son, who had been expelled from a Missouri university based on Title IX allegations.[10] These efforts, while ultimately unavailing, stand in stark contrast to the Texas approach, described in detail below. Notably, while Georgia and Missouri attempted in their proposed legislation to ensure rights for the accused and limit a university's ability to launch

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[6] Shannon McCaffrey & Janel Davis, *Bill Would Restrict Colleges' Response to Sexual Assault Reports*, ATLANTA J. CONST., Jan. 16, 2017, https://www.ajc.com/news/bill-would-restrict-colleges-response-sexual-assault-reports/4hinoWnYROoCtMvQ1w9yWI/.

[7] Georgia H.B. 51, "Postsecondary institutions; reporting and investigation of certain crimes by officials and employees; provide manner," Georgia General Assembly, 2017–2018 Regular Session, http://www.legis.ga.gov/Legislation/en-US/display/20172018/HB/51.

[8] Edward McKinley, *Proposed Missouri Title IX Changes Would Give Accused More Power Than Any other State*, KANSAS CITY STAR, Jan. 30, 2019, https://www.kansascity.com/news/politics-government/article225240190.html.

[9] Missouri Senate, Senate Bill 259, https://www.senate.mo.gov/19info/BTS_Web/Bill.aspx?SessionType=R&BillID=1536359.

[10] Alisa Nelson, *Missouri Title IX Bill's Fate Appears to Be Fading*, MISSOURINET, Apr. 25, 2019, https://www.missourinet.com/2019/04/25/missouri-title-ix-bills-fate-appears-to-be-fading/.

its own investigation, no state has gone further than Texas in the other direction in mandating university-wide reporting.[11]

C. The Texas Approach, as Embodied by Senate Bill 212

During its 2019 biennial session, the Texas Legislature amended the Texas Education Code to increase reporting obligations on university employees when they become aware of sexual assault or harassment. Effective September 1, 2019, the new law states as follows:

> An employee of a postsecondary educational institution who, in the course and scope of employment, witnesses or receives information regarding the occurrence of an incident that the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking and is alleged to have been committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident shall promptly report the incident to the institution's Title IX coordinator or deputy Title IX coordinator.[12]

Employees who fail to report under the statute are subject to two sanctions. First, their failure is a class B misdemeanor (or class A misdemeanor if the employee concealed the underlying incident);[13] and second, the university "shall terminate the employment" of employees who fails to report.[14] To avoid criminal punishment and termination, employees must report "all information concerning the incident known to [them] that is relevant to the investigation, and if applicable, redress of the incident," regardless of when or where it occurred and how the employees learned the information.[15]

There are modified reporting requirements for certain employees, including (1) employees designated by the institution as confidential resources forstudents, (2) employees who receive the information under circumstances that render the employees' communications confidential or privileged "under other law," and (3) employees who receive information in the course or scope of their employment as health care, mental health, or medical providers. Still, in these incidents, the confidential or privileged employees are mandated to report that an incident occurred but may not include any information that would violate an expectation of privacy, absent consent to do so.[16] For example, if a student seeing a licensed professional counselor in the university's counseling center revealed he or she had been raped by a fellow student, the counselor would be required to disclose that information (but not the student's identity) to the Title IX Coordinator. Finally, the reporting requirement does not apply at all if the information was disclosed at a

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[11] Andrew Kreighbaum, *States Wade into Title IX Debate*, INSIDE HIGHER ED, June 19, 2019, https://www.insidehighered.com/news/2019/06/19/texas-legislation-contrasts-devos-take-campus-sexual-misconduct.

[12] Tex. Educ. Code § 51.252(a) 2020.

[13] Tex. Educ. Code § 51.255(b) 2020.

[14] *Id.* § 51.255(c).

[15] 19 Tex. Admin. Code § 3.5(a–b) 2020.

[16] *Id.* § 3.5(c).

public awareness event sponsored by the institution of an affiliated student organization.[17]

While there is some existing commentary on Texas Senate Bill 212, this article's limited inquiry arises from three contextual frames.[18] We first consider the Texas reporting requirements in light of federal reporting requirements as set out in Title IX of the Education Amendments of 1972 and its recently released regulations (Title IX) as well as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).[19] Next, we explore potential problems for all Texas universities posed by Senate Bill 212. For example, Senate Bill 212 imposes Draconian penalties for university employees who may not report misconduct because of good faith misunderstandings or lack of knowledge of context. Finally, we explore the unique challenges faced by faith-based institutions in engaging in best practices with these layered legal schemes. In particular, Senate Bill 212 fails to consider how issues related to privileged communications might play out in faith-based institutions, and ignores the sometimes-unique nature of organizational cultures at religious colleges and universities. We add to the literature by providing not only analysis of these issues, but also a few hypothetical illustrative case studies that will hopefully provoke further reflection and discussion before concluding with our own recommendations. This article is the first in-depth application of the law and commentary on the clergy privilege to Senate Bill 212 in the context of faith-based institutions.

D. Texas Senate Bill 212 in Larger Statutory and Regulatory Context

1. Title IX and Its New Regulations

Title IX of the Education Amendments of 1972 contains prohibitions on sex discrimination in higher education that are well known by most in the academic and higher education law communities. The general statement of the law is clear: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[20] In multiple cases, courts have explained that sexual harassment and sexual assault can result in discrimination under Title IX, for which educational institutions can be held civilly liable.[21] On May 6, 2020, the Department of Education (or Department) released new regulations adapting those standards to an administrative enforcement context. The new regulations articulate institutional responsibilities as follows:

> A [university] with actual knowledge of sexual harassment in an education program or activity of the [university] against a person in the United Stated, must respond promptly in a manner that is not

[17] *Id.* § 3.5(d).
[18] For an overview of some of the commentary related to Senate Bill 212, see Kreighbaum, *supra* note 10.
[19] 20 U.S.C. §§1681 - 1688 (1986).34 C.F.R. pt. 106(2020); 34 C.F.R. § 668.46 (2014).
[20] 20 U.S.C. § 1681(a).
[21] Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274 (1998); Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999).

> dilliberatly indeferent. A [university] is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of known circumstances.[22]

This actual knowledge standard replaced the former "know or reasonably should know" standard that existed prior to the new regulations. Under the old standard, a university had notice if a responsible employee "knew, or in the exercise of reasonable care should have known," about the harassment."[23]

Prior Title IX guidance defined a "responsible employee" as (1) an employee that has actual authority to take action to redress the harassment, (2) an employee who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or (3) an individual who a student could reasonably believe has this authority or responsibility.[24] Therefore, based on that prior guidance, many institutions adopted institutional policies that clearly defined and designated responsible employees. Some of these policies designate all employees at the institution as responsible employees, while others excluded certain portions (e.g., faculty) from their definition in an attempt to reduce liability and reporting obligations.

Now, under the new Title IX regulations, "Actual knowledge means notice of sexual harassment or allegations of sexual harassment to the Title IX Coordinator or any [university official] who has authority to institute corrective measures on behalf of the [university]."[25] As a justification for this limitation, the Department of Education points to the need for a uniform approach that is "aligned with the standards developed by the Supreme Court in cases assessing liability under Title IX for money damages in private litigation."[26] Instead of focusing on the behavior of individual "third parties" like university faculty, the new regulations tie liability under Title IX to the university's deliberate indifference arising from "an official decision by the [university] not to remedy the violation."[27] Specifically, the regulations' Preamble explains in this regard

> Because Title IX is a statute 'designed primarily to prevent recipients of Federal financial assistance from using the funds in a discriminatory manner,' it is a recipient's own misconduct—not the sexually harassing behavior of employees, students, or other third parties—that subjects the recipient to liability in a private lawsuit under Title IX, and the

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[22] 34 C.F.R. § 106.44(a) (2020).

[23] Office for Civil Rights, Revised Sexual Harassment Guidance, 66 Fed. Reg. 5512 (Jan. 19, 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [hereinafter 2001 Guidance].

[24] *Id.* at 13. Whether a student reasonably believed an individual has the requisite authority or responsibility depended on a variety of factors including the student's age and education, position held by the individual, and the school's formal and informal practices and procedures. *Id.* at 33û34, n.74.

[25] 34 C.F.R. § 106.30(a) [2020 (differentiating between elementary and secondary schools, where actual knowledge means notice of sexual harassment or allegations of sexual harassment to any employee).

[26] *Id.*

[27] Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 642 (1999). (stating that actual knowledge ensures that liability arises from "an official decision by the recipient not to remedy the violation") (citing Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 290 (1998) .

recipient cannot commit its own misconduct unless the recipient first knows of the sexual harassment that needs to be addressed.[28]

The rules go even further to reduce an institution's burden to respond by (1) narrowing the definition of what constitutes a violation by requiring that sexual harassment be "severe, pervasive, *and* objectively offensive," and (2) limiting application of Title IX to incidents occurring only in an education program or activity of the recipient university.[29] While the Department acknowledges that determining who is an official to whom notice of sexual harassment gives actual knowledge to the recipient will be fact specific, it is clear that the notice requirement does not apply generally to all university employees like it does in the K–12 or Texas contexts.[30]

It is also worth noting that the Texas Legislature and Department of Education have adopted different definitions of sexual harassment as its relates to traditional hostile environment claims, with Texas only requiring that the unwelcomed, sex-based conduct (1) be "sufficiently severe, persistent, *or* pervasive", in the educational context; or (2) "create an intimidating, hostile *or* offensive work environment."[31] As noted above, Title IX's new regulations define sexual harassment as conduct that is "severe, pervasive, *and* objectively offensive."[32] Moreover, unlike TItle IX, Texas law does not limit reports to those incidents occurring in the course and scope of university programs. This means, in effect, that university employees in Texas are required to report off-campus and nonuniversity-affiliated conduct, extending their obligations beyond those of K–12 employees under Title IX.

The Department of Education explains that drawing a distinction between K–12 and college employees is necessary, because "[e]lementary and secondary schools generally operate under the doctrine of in loco parentis, under which the school stands 'in the place of a parent,' and universities do not."[33] In this way, the new Title IX regulations "allow [universities] to decide which of their employees must, may, or must only with a student's consent, report sexual harassment to the recipient's Title IX Coordinator."[34] According to the Department, this change was necessary because prior guidance, which established vicarious liability for universities based on the constructive knowledge of employees, "unintentionally discouraged disclosures or reports of sexual harassment by leaving complainants with too few options for disclosing sexual harassment to an employee without automatically triggering a [university] response."[35] Instead, the Department acknowledges that university students "benefit from having options to disclose sexual harassment to college and university employees who may keep the disclosure confidential," and "retaining control over whether, and when, [they] want the [university] to respond to the sexual harassment."[36] In fact, the

[28] 34 C.F.R. § 106 (Supplementary Material at 47) 2020.
[29] 34 C.F.R. § 106.30(a) and 106.44(a) (emphasis added) 2020.
[30] 34 C.F.R. § 106.30(a).
[31] TEX. EDUC. CODE § 51.251(5) 2020 (emphasis added).
[32] 34 C.F.R. § 106.30(a) (emphasis added).
[33] 34 C.F.R. § 106 (Supplementary Material at 52–53).
[34] *Id.* at 54.
[35] *Id.* at 54.
[36] *Id.* at 55.

Department contends that "institutional betrayal may occur when aninstitution's mandatory reporting policies require a complainant's intended private conversation about sexual assault to result in a report to the Title IX Coordinator."[37]

To summarize, here are some key differences between the new 2020 regulations for Title IX and Texas's Senate Bill 212. First, Title IX focuses on the action or inaction of the university as a whole, while Senate Bill 212 focuses on the behavior of individual employees. Second, Title IX and Senate Bill 212 use different definitions of sexual harassment, with the notable change of the conjunctive "and" in Title IX to the disjunctive "or" in Senate Bill 212. And third, the Department of Education appears to rest some of its analysis on concerns related to institutional betrayal that could arise in some student confidential communications, whereas the Texas Legislature evinced no such unease with how a mandatory reporting requirement would affect confidential communications (other than in cases involving professional relationships and legal privileges, as described in Part III.B.).

2. The Clery Act and the University Reporting of Criminal Conduct

The Clery Act is a federal criminal reporting law that requires institutions to collect and publicly report statistics on crimes that occur on and around campus property.[38] The Clery Act only establishes limited reporting obligations based on specific roles in the institution. Specifically, the Clery Act imposes a duty on "Campus Security Authorities" to report fifteen different crimes (including sex-based offenses) to designated university officials, typically campus law enforcement.[39] A Campus Security Authority (or CSA) is defined by the Act's regulations as, "An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings."[40] According to the Department of Education's *Handbook for Campus Safety and Security Reporting* (or Clery Handbook), an "official" is "any person who has the authority and the duty to take action or respond to particular issues on behalf of the institution."[41] This can include faculty members so long as they are also officials with significant responsibility for student and campus activities beyond teaching. Examples provided in the Clery Handbook include faculty advising student organizations or members of a sexual response team. Moreover, the Clery Handbook specifically

[37] *Id.* at 62 and 313. (Citing Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 JOURNAL OF TRAUMATIC STRESS 1, 120 (2013) (describing "institutional betrayal" as when an important institution, or a segment of it, acts in a way that betrays its member's trust); Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. L. & FEMINISM 123, 140–41 (2017) (identifying one type of institutional betrayal as the harm that occurs when "the survivor thinks she is speaking to a confidential resource, but then finds out the advocate cannot keep their conversations private").

[38] 20 U.S.C. § 1092(f) 2009.

[39] 34 C.F.R. § 668.46 2014. This requirement also applies to campus security and law enforcement personnel.

[40] 34 C.F.R. § 668.46(a)(iv).

[41] John B King, *The Handbook for Campus Safety and Security Reporting The Handbook for Campus Safety and Security Reporting (2016)*, U.S. Dep't of Educ., https://www2.ed.gov/admins/lead/safety/handbook.pdf [hereinafter Clery Handbook].

excludes "a faculty member who does not have any responsibility for student and campus activity beyond the classroom."[42]

Even if staff or faculty members qualify as CSAs, the Clery Handbook makes it clear that they are only responsible to report alleged crimes that are reported to them in their capacities as CSAs:

> CSAs are not responsible for . . . reporting incidents that they overhear students talking about in a hallway conversation; that a classmate or student mentions during an in-class discussion; that a victim mentions during a speech, workshop, or any other form of group presentation; or that the CSA otherwise learns about in an indirect manner.[43]

This is particularly significant, given the ways indirect information flows around tight-knit communities like universities. Moreover, unlike the Texas reporting requirements in Senate Bill 212, the Clery Handbook acknowledges that CSA reporting responsibilities can "usually be met without disclosing personally identifying information," which allows victims to maintain confidentiality and ask the CSA to report only relevant details needed to meet reporting and timely warning requirements (as opposed to pursue criminal or administrative investigations).[44]

Similar to Senate Bill 212, the Clery Act includes a specific exclusion for the role of a professional counselor whose "professional responsibilities include providing mental health counseling to members of the institution's community and who is functioning within the scope."[45] However, where the Act differs from Senate Bill 212 is that it also provides an exclusion for "pastoral counselors," who are described as "a person who is associated with a religious order or denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor."[46] Note that unlike the definition of professional counselor, the definition of pastoral counselor does not mention the staff or faculty member's actual professional responsibilities, indicating that one might be considered a pastoral counselor even if that is not part of the person's job with the university. Still, the Clery Handbook states, "if your institution has an individual with dual roles, one as a professional or pastoral counselor and the other as an official who qualifies as a CSA, and the roles cannot be separated, that individual is considered a campus security authority and is obligated to report Clery Act crimes."[47]

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[42] *Id.* at 4–4.

[43] *Id.* at 4–5.

[44] *Id.* at 4–8. See also 34 C.F.R. § 668.46(c)(2)(i) ("Clery Act reporting does not require initiating an investigation or disclosing personally identifying information about the victim").

[45] *Id.*

[46] *Id.* (*Cf.* Professional counselor. A person *whose official responsibilities* include providing mental health counseling to members of the institution's community and who is functioning within the scope of the counselor's license or certification. 34 C.F.R. § 668.46(a)(iv).)

[47] Clery Handbook, *supra* note 40, at 4–8.

II. THE CHALLENGES OF APPLYING SENATE BILL 212 IN TEXAS UNIVERSITIES

The goal of the new Texas law is easy to understand and, in most cases, would not present complicating circumstances. There are obvious instances when a university employee—perhaps a faculty member or an assistant coach—finds out either from a student or from another source that sexual misconduct has taken place, and in those instances the employee must report what was learned to the institution's Title IX Coordinator. Yet a reporting obligation that seems simple in principle includes several facets that complicate the issue considerably. These complications arise from multiple assumed preconditions that Senate Bill 212 appears to take for granted. As with many laws, "the devil is in the details," so to speak, which leads to an assessment of the law as well intentioned but highly problematic.

A. Employment Status May Not Match University Reality

One complication in the statute is the potential for confusion about who is covered. By its text, Senate Bill 212 says that the person who receives information about an incident of sexual misconduct must be an "employee" of the institution. Does this precondition for the statute's application exclude independent contractors? A strictly textual reading is not unreasonable, given that"employee" and "independent contractor" are separate categories of the work relationship under both federal[48] and state[49] law, and the inclusion of one category could be read to exclude the other.[50] There is a heightened sense of awareness in legislatures around the country related to the employee/contractor distinction in the gig economy,[51] and it is possible—though by no means certain—that the Texas Legislature intended to only include employees within the scope of the statute.

One way to gauge the significance of the textual exclusion of independent contractors is to consider whether adjunct and contingent faculty are viewed as employees or contractors at a given higher education institution. Having a part-time academic appointment at a university or college can be accomplished either through an employment or independent contractor arrangement. If independent contractors are excluded, and if adjunct faculty are viewed as contractors, then a sizeable percentage of a given university's teaching staff may not have any reporting obligations. This exclusion is potentially significant, given that the American Association of University Professors estimates that approximately forty percent of all faculty in American higher education institutions are part time.[52] Part-time faculty rates are disproportionately high at masters-level, baccalaureate, and associate-degree institutions, with nearly seventy percent of faculty

[48] See e.g., *Publication 1779 (Rev. 3-2012)*, DEP'T OF TREASURY INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-pdf/p1779.pdf.

[49] *See generally* TEX. LABOR CODE § 201, Subchapters D and E (2018) (defining employment and listing numerous exceptions thereto).

[50] The classic Latin expression for this canon of construction is *expressio unius est exclusio alterius*. See Brooks v. Northglen Assoc., 141 S.W.3d 158, 168 (Tex. 2004).

[51] CAL. LABOR CODE § 2750.3 (2020)

[52] *Data Snapshot: Contingent Faculty in US Higher Ed*, AM. ASS'N OF U. PROFESSORS, Oct. 11, 2018, https://www.aaup.org/news/data-snapshot-contingent-faculty-us-higher-ed#.Xgpb95NKiLt).

appointments being part-time at community colleges.[53] At faith-based institutions, a situation described below in Part III, some of these contract workers may also be employed at churches such as instructors in religion courses. The problematic presumption that the person with the reporting obligation has employment status gives rise to the first simple hypothetical:

Hypothetical Example #1

A university hires an adjunct faculty member to teach a course in the business school. The adjunct is a local entrepreneur with a growing company, and one of the students in class has had an off-campus job at the company for two years. While at work one day, the student tells the adjunct faculty member about a sexual assault of which she is aware that occurred at an off-campus party. The student asks her boss at work (the adjunct faculty member) not to tell anyone, because her friend (the victim, who is also a student at the same university) is unsure she wants to press charges. The entrepreneur/adjunct professor strongly encourages the student employee to tell her friend to call the police but does not make a report to the university's Title IX office. Is the adjunct faculty member an "employee" under Senate Bill 212 such that a report to the Title IX office is required? The determination of whether a worker is an employee or independent contractor is highly fact specific, with labels and titles being viewed as evidence of one status or the other but not determinative. Therefore, even if a university calls its adjunct faculty contractors (or employees), it does not mean they in fact would be classified as such by the IRS, Department of Labor, or state workforce commission. Thus, how much of a fact-intensive inquiry is an adjunct faculty member supposed to make into their own status? And what level of legal sophistication is necessary for the adjunct faculty member to know that employee versus contractor status is a hotly contested topic in general? Finally, was the report made to the adjunct instructor in the course and scope of employment (addressed in Part III.C in the context of faith-based institutions)? Or was it made in the context of a part-time employee's discussion with her boss? What if the discussion between student and adjunct professor happened after class one day in a hallway in the business school and not onsite at the company where the student has a part-time job? Does the location of the report to the adjunct faculty member change its status?

Virtually all universities utilize an adjunct pool, and some may not have well-defined relationships with their adjuncts in terms of contract specificity. In addition, universities (and even departments within universities) vary considerably in terms of onboarding and training of adjuncts, and levels of support and supervision provided to adjuncts. Given the impossibility of describing the adjunct or contingent faculty relationship to a given university with precision, the limitation in Senate Bill 212 to "employees" could prove problematic in some contexts where the relationship is unclear or where adjunct faculty are explicitly independent contractors.

[53] *Id.*

B. The Reasonable Belief Requirement Expects Too Much from Employees

The reporting obligation under Texas Senate Bill 212 only arises if the university employee reasonably believes the incident at issue constitutes sexual harassment, as defined by Texas law, or sexual assault, dating violence, or stalking, as defined by the Clery Act.[54] This condition is potentially more problematic in application than the inquiry as to whether a given worker at a university is an employee, given the factual specificity of what constitutes such violations and the varying levels of legal sophistication of university employees, not to mention the competing definitions of sexual harassment under Texas law and the new Title IX regulations. While sexual assault, dating violence, and stalking derive their definitions from the federal Clery Act,[55] sexual harassment is defined in the Texas statute this way:

> "Sexual harassment" means unwelcome, sex-based verbal or physical conduct that: (A) in the employment context, unreasonably interferes with a person's work performance or creates an intimidating, hostile, or offensive work environment; or (b) in the education context, is sufficiently severe, persistent, or pervasive that the conduct interferes with a student's ability to participate in or benefit from educational programs or activities at a postsecondary educational institution.[56]
> This legislative text belies a larger problem, however, given that the statute's language appears to derive from verbiage in hundreds of sexual harassment cases under Title VII of the Civil Rights Act of 1964 over the past several decades, which are a manifestation of the fact-dependent nature of these sorts of inquiries.

An in-depth analysis of trends in sexual harassment law under Title VII is beyond the scope of this article, but a superficial summary of the employment law subfield highlights the challenges faced by university employees who are contemplating whether to report what they heard to their school's Title IX office. To begin, in 1993 the Supreme Court announced its definition of sexual harassment in the foundational case of *Harris v. Forklift Systems*. In that case, the Court held that "discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender."[57] About a decade later, the Court again stated that plaintiffs in sexual harassment cases "must show harassing behavior sufficiently severe or pervasive to alter the conditions of [their] employment."[58] Countless cases from around the country have repeated this language, yet courts still lament that "drawing the line between what is and is not objectively hostile is not always easy."[59] This is because two of the factors necessary to establish a sexual harassment case in the employment context are that 91) the plaintiff/victim subjectively believed the misconduct created an abusive work environment; and (2) a reasonable person would objectively agree with the plaintiff's subjective belief. Given the objective, reasonable person standard implied in this parallel law, a determination of

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[54] TEX. EDUC. CODE § 51.252(a) (2020)
[55] 20 U.S.C. § 1092(f) (2009).
[56] Tex. Educ. Code § 51.251(5) (2020)
[57] Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).
[58] Pennsylvania State Police v. Suder, 542 U.S. 129, 133 (2004) (internal quotations omitted).
[59] Turner v. The Saloon, Ltd., 595 F.3d 679, 685 (7th Cir. 2010) (internal quotations omitted).

whether conduct is so severe or pervasive as to interfere with either a person's employment or their educational attainment or participation under Texas Senate Bill 212 is highly dependent on facts and context. At a minimum, whether particular conduct in an organization rises to the level of sexual harassment is a mixed question of law and fact.[60] Title VII is not designed to be a civility code for the workplace,[61] and it is likely that Title IX and Texas Senate Bill 212 are likewise not designed to be civility codes for universities, so determining which behavior is merely uncivil, boorish, or offensive, and which behavior has an interfering effect with one's employment or education, often requires a jury determination.

In light of this dependence on context, how are typical university employees to know whether the information that is witnessed or learned by them in the course of their employment is actually sexual harassment? Consider the following questions in the next hypothetical.

Hypothetical Example #2

Is one rude or sexist comment between employees or students sufficient to trigger a reporting obligation under Texas Senate Bill 212? If the isolated comment was the basis of an employment case under Title VII, there would likely be no finding of actionable harassment. Yet if a university employee overhears one student making a rude or sexist comment to another student in a common area or on social media, does Senate Bill 212 mandate that it be reported to the Title IX office? In one section, the statute seems to contemplate "an incident" that puts the university on notice that sexual misconduct has occurred. "An incident" seems to indicate that a single isolated event can trigger a reporting obligation. But the definition of sexual harassment within the statutory text appears to work in the opposite direction, where a single incident would have to be unusually severe in order to fit the definition in the Texas law. Assuming for the sake of argument that single, isolated comments that are offensive but not severe do not give rise to sexual harassment discrimination under the Texas statute, in order for a reasonable belief of sexual harassment to exist, the employee would need to know about the context of any prior relationship between the two students.[62] For example, is this the first and only time such a comment was made? If so, then while offensive, it does not seem as though it would rise to the level of the harassment definition in Senate Bill 212. Or is the overheard comment yet one more instance in a long litany of abuse from an antagonistic and misogynistic classmate? It would be impossible to know without asking. If employees choose not to report based on their own lack of knowledge of the context, should they be terminated?

Some cases will be easy; others will be almost impossible. The conscientious employee who witnesses or is given information about an incident may be inclined to always report, because the legislative threats (termination and prosecution) are

[60] Shira Scheindlen & John Elofson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & PO'Y REV. 813, 815 (1998).

[61] Faragher v. City of Boca Raton, 524 U.S. 775, 787–88 (1998).

[62] Some courts have ruled that a single, isolated incident will suffice. *See*, *e.g.*, Feingold v. New York, 366 F.3d 138, 150 (2d Cir. 2004) ("[A] single act can create a hostile work environment if it in fact work[s] a transformation of the plaintiff's workplace." (internal quotation marks omitted)).

severe. It may be that overreporting was both foreseen by the Legislature and preferable to underreporting, but it is a phenomenon that is not without organizational problems, noted below in Part II.E.

C. Lack of Time Limits on Incidents That Trigger Reporting Obligations

It is worth noting that Texas Senate Bill 212 contains no time limit on reporting instances in the distant past (despite the fact that Title IX now permits a discretionary dismissal for complaints against respondents who are no longer enrolled or employed by the institution). The challenge of a lack of temporal limits is illustrated by the following hypothetical.

Hypothetical Example #3

> A long-term employee is discussing her department's work environment with a colleague across campus. She notes that it is much better now, but that her work conditions were almost unbearable back in the 1990s when a particular administrator repeatedly sexually harassed several of his direct reports, including the long-term employee. The harassing administrator left the university soon after the harassment (more than twenty-plus years ago), and no further adverse action has ensued. The long-term employee never mentioned the situation to anyone in the human resources (HR) department, because the administrator left on his own accord, and the situation improved dramatically. Does Texas Senate Bill 212 require the colleague who hears this story from the 1990s to report it to the university's Title IX Coordinator? If the person who hears the communication does not report the information because they view the matter as long-since resolved, should they still be terminated and prosecuted?

It seems absurd to require reporting of incidents from the distant past, which were either already remedied or which are now incapable of remediation due to lack of jurisdiction, statute of limitations, or significant change in university or employment conditions, yet that is what the Texas statute appears to require.

D. Lack of Due Process Protections for Employees

Another problematic point in the statute is that it contains no due process protections for employees accused of failing to report. Employees at public higher education institutions have some constitutional due process rights in their employment status, but faculty and staff at private institutions have no such protections.[63] While the statute and its regulations take pains to protect the procedural and confidentiality interests of victims, witnesses, and even alleged perpetrators,[64] there are no such protections for employees who fail to report (save a reference in the rules to the termination decision being made "in accordance with the institution's disciplinary procedure").[65] Thus, the private university employee is left in the most precarious position of all under Senate Bill 212, especially if the

[63] For public employee due process rights, *see generally Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sinderman*, 408 U.S. 593 (1972).
[64] 19 Tex. Admin. Code §§ 3.10 and 3.16 (2020).
[65] 19 Tex. Admin. Code § 3.8 (2020)

university's disciplinary process does not specifically address these issues and/or relies heavily on at-will termination. In a situation where the punishment seems far out of proportion to the offense (such as a situation described in Hypothetical #3), the lack of due process protections become even more egregious an omission. We address due process in our suggestions for statutory improvement in Part IV.

E. Changes to Organizational Culture in Higher Education Institutions

The new reporting requirements are already raising concerns stemming from the way they are expected to change organizational culture in Texas colleges and universities. For example, the American Association of University Professors raised the following concerns when discussing the potential for federally mandated reporting requirements for all faculty:

> Mandatory reporting policies have a strong and negative impact on college and university faculty members, given their teaching and advising relationships with students. After having a disturbing experience that may constitute sexual harassment, a student often goes to a trusted faculty member to discuss the experience and to seek advice . . . The faculty member's ability to be helpful to the student depends on the trusting nature of the relationship, where the faculty member is able to be a sounding board, to help the student think through various options, and to respect the student's choice about whether and how to respond to the situation . . . Such overly broad policies compel faculty members to violate confidentiality in their relationships with students.[66]

Moreover, while it is true that there will be an initial spike in reporting based on this new requirement, this seems to meet the underlying purpose of the statute. As Texas college students increasingly become aware that nothing that they share with faculty members will remain confidential, it is likely that reporting to faculty and staff will go down over time (especially in the most serious cases of sexual assault where students are afraid for others to find out about what happened). Additionally, the fact that faculty and staff are required by Texas law to report this information to the Title IX Coordinator will likely result in faculty being more focused on their reporting obligations (and avoiding punishment) than caring for the needs of those harmed. The punitive and ambiguous nature of these new requirements may even push some faculty and staff to distance themselves from students in situations where such a report feels imminent. In other words, in a time where students need the support of faculty and staff most, these new requirements are erecting barriers of fear and juridification that will have an adverse effect on victims.

Finally, the overreporting that will occur, for example, when faculty and staff incorrectly report incidents of sexual assault that occurred prior to students attending college, creates a burden on already taxed Title IX offices. Ideally, Title IX offices would be focusing primarily on prevention and those complaints of sexual misconduct coming directly from students that need and want help from

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[66] Risa L Lieberwitz & Anita Levy, *Comment in Department of Education Proposed Rule: Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance 34 CFR 106 (2019)*, (Jan. 28, 2019), AM. ASS'N OF U. PROFESSORS, https://www.aaup.org/sites/default/files/AAUP%20Comments-Title-IX-Regulations-28-January-2019-0.pdf.

the Title IX administrators. However, under this new requirement, overreporting by faculty and staff requires that the Title IX office chase down reports where students never wanted help beyond talking to someone they trust. In other words, the mandatory reporting requirement actually reduces the capacity of Title IX offices.

III. TEXAS SENATE BILL 212 MAY POSE UNFORESEEN PROBLEMS IN FAITH-BASED INSTITUTIONS

Texas has a thriving segment of faith-based or faith-affiliated, higher education institutions. The no-profit association ICUT—Independent Colleges and Universities of Texas—has forty regular and affiliate members, of which approximately thirty-three have either a present or historic connection to a faith tradition.[67] Current ties or identification with a denomination or tradition vary widely, but many of those thirty-three schools offer some level of religious educational context and support on their campuses and in their classes. Thus, it is worthwhile to consider how the statute plays out in those institutions that may have unique and distinguishing missions and cultures.

A. Senate Bill 212 May Not Remedy the Problems in Organizational Culture That Gave Rise to the Statute in the First Place

The organizational cultures of some faith-based (or faith-affiliated) higher education institutions reflect a different light on their engagement and compliance with Title IX. In fact, it may be that the distinct campus cultures at faith-based institutions are partially to blame for underreporting sexual misconduct. For instance, in a well-known negative example, Baylor University's implementation of Title IX best practices was hampered by, in the words of the university's board of regents, "existing barriers to reporting on Baylor's campus, including the impact of other campus policies regarding the prohibition of alcohol and extra-marital sexual intercourse."[68] Some religious universities that maintain strict behavioral controls through misconduct policies operate—perhaps like prescandal Baylor—with an attitude that sexual assault and harassment "'doesn't happen here,'" and students may fear reporting incidents because of concerns about victim blaming, or that victims or witnesses will be implicated in code of conduct violations.[69] While the Texas Legislature amended the Education Code in 2017 to protect students from disciplinary action when their report of sexual misconduct implicates them in a code of conduct violation, the stigma of being associated with prohibited conduct in faith-based universities (such as sex outside of marriage or alcohol or drug use) may be sufficient disincentive to report.[70] Senate Bill 212, however, does not resolve the underlying tension created by university cultures that deny that bad things can happen there; in fact, the law may exacerbate the problem.

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[67] Indep. C. and U. of Tex., *List of Institutions*, https://www.icut.org/our-schools/list-of-institutions/ [Au: June 24, 2020].

[68] Baylor U. Bd. of Regents, *Findings of Fact*, BAYLOR U. at 4, https://www.baylor.edu/thefacts/doc.php/266596.pdf **Jun 24, 2020.**

[69] *Id.* at 8.

[70] TEX. EDUC. CODE § 51.9366(b) (2020)

Part of the tension for faith-based colleges and universities arises from the nature of the relationship between students and employees. In centuries past, universities were viewed as guarantors of the safety and moral development of their students under the theory of *in loco parentis*.[71] Slowly, over the course of the twentieth century, the old doctrine of *in loco parentis* as a tort standard disappeared from American higher education law, to no one's great disappointment.[72] Some commentators note that the present understanding of how much student safety is guaranteed is more a matter of university culture and attitude, rather than a legal requirement.[73] Others suggest that the replacement schemes for universities' relationships with their students are more closely akin to contractual notions of consumer transactions.[74] Instead of the paternalism required by *in loco parentis*, Douglas Goodman and Susan Silbey now suggest that at present, the university and student have something like a business relationship, such as a consumer transaction or tenancy.[75]

This default understanding of a consumer or business transaction creates tensions within faith-based institutions,[76] which often use cultural language that describes a less transactional, more holistic and multidimensional conception of the relationship between student and institution, based typically on notions of Christian love and well-being. (The extent to which these slogans transcend rhetoric and manifest themselves in concrete structures and actions likely varies.) For instance, Baylor University's mission statement declares that the institution integrates "academic excellence and Christian commitment within a caring community."[77] Continuing, the university says that, "At Baylor, 'Love thy neighbor' are not just words...they are a way of life."[78] Likewise, St. Mary's University in San Antonio is part of the Marianist congregation and approach to education, which includes, among other things, the following commitments and characteristics: "Faculty, staff, and students work together to form a community of learning in service to the common good of all attending to both the formal and informal dimensions of education…. Community calls us to ... form mutual relationships of service and love with one another in the pursuit of our mission."[79] Other examples abound, which, when combined and abstracted, seem to reveal a

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[71] *See, e.g.*. Pratt v. Wheaton Coll., 40 Ill. 186 (1866) (upholding the right of a private college to expel a student for joining a secret society).

[72] *See e.g.* Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979) (refusing to hold Delaware State College liable for the injuries to a student who was injured by another student following a college-sponsored party where underage drinking had occurred).

[73] Vimal Patel, *The New 'In Loco Parentis': Why Colleges Are Keeping a Closer Eye on Their Students' Lives*, CHRON. HIGHER EDUC., Feb. 18, 2019, https://www.chronicle.com/interactives/Trend19- InLoco-Main.

[74] K.B. Melear, *From In Loco Parentis to Consumerism: A Legal Analysis of the Contractual Relationship Between Institution and Student*, 40 NASPA J. 124 (2003).

[75] Douglas J. Goodman & Susan S. Silbey, *Defending Liberal Education from the Law*, *in* LAW IN THE LIBERAL ARTS 23 (Austin Sarat ed., 2004).

[76] To be sure, viewing the university/student relationship as a business transaction may prove problematic in all sorts of contexts other than only at faith-based institutions. For a discussion of these issues in others contexts, *see* Andrew Little et al., *Intellectual Property Issues Arising from Business Ideas Generated by Undergraduate Students,* 23 S. L.J. 249, 258–59 (2013).

[77] Baylor University, "About Baylor, Vision and Values," https://www.baylor.edu/about/index.php?id=88784 **[June 24, 2020**

[78] *Id*.

[79] Ass'n of Marianist U. *Characteristics of Marianists Universities* (2019), https://cloud.3dissue.net/5656/5635/6316/21815/index.html.

sense at religious universities that the student is not merely a transactional consumer of academic credits or a tenant in institutional housing, but rather part of something metaphysical and more caring.

The language of caring extends beyond students to other employees in these kinds of institutions. At Abilene Christian University (the authors' own institution), the HR department has its own stated mission: "Live generously and graciously toward others, the way God lives toward you."[80] Yet the employment relationship in American organizations (both religious and nonreligious) is shot through with legality and pervasive regulation, and it is hard to live generously and graciously with other employees when the law provides a structure and rigidity that are premised on human estrangement and alienation from one another. In universities, near total juridification has occurred, of which Title IX and Senate Bill 212 are classic examples. As interpreted and applied by Goodman and Silbey, juridification is "first, the attempt to apply formal laws to situations that inherently depend on flexible, informal social interactions and, second, the tendency of these laws to be treated as reified social facts rather than moral accomplishments."[81] In some ways, like the university/student relationship, the university/employee relationship is highly regulated and legislated, resulting in rigidity and formality that some employees at faith-based institutions (and perhaps secular institutions as well) find stifling and problematic. The organizational ethos at such places is sometimes at odds with the juridified structure that overlays the employment relationship.

While we appreciate that universities generally care for their students, the metaphysical aspect of faith-based higher education creates additional expectations of all parties to the relationship. When the relationship between a faith-based university and its students and employees is characterized by care, service, and love, a vague pastoral atmosphere is created (intentionally or not), which differs in some respects from typical university relationships. One aspect of the implied pastoral role includes an emphasis on openness, confession, contrition, forgiveness, and redemption, all of which are explored below, and that raise questions in the current context about privileged communications between students and pastors or clergy.

In their discussion of organizational cultures at Christian universities, Obenchain, Johnson, and Dion found that most faith-based institutions have a "clan"-type culture. In such organizations, the rhetoric of family is used often, and organizational values include trust, loyalty, empowerment, and collegiality.[82] Rightly or wrongly, a legal requirement to report activities that could be sexual misconduct may put an employee at odds with institutional values of loyalty, trust, and collegiality. It signals that an employee is not part of the clan/family. To be clear, an employee who has knowledge of clear sexual misconduct has an ethical duty to report, even if it results in being ostracized in a tight-knit college community that emphasizes loyalty. But many cases are not obvious, as noted in

[80] Abilene Christian U., Human Resources Dep't, *Our Mission*, https://www.acu.edu/community/offices/hr-finance/hr/mission.html [June 24, 2020 (apparently based on *The Message's* rendering of Matthew 5:48).

[81] Goodman & Silbey, *supra* note 74, at 21.

[82] A.M. Obenchain et al., *Institutional Types, Organizational Cultures, and Innovation in Christian Colleges and Universities*, 3 CHRISTIAN HIGHER EDUC. 15, 32 (2004).

the hypotheticals throughout this article, and these harder cases create a bind for conscientious employees faced with uncertain facts. Employees seek to be loyal to the clan both because they agree with the institutional mission and because they want to keep their jobs, but learn about a situation that, depending on unknown factors, could be sexual misconduct. Yet the employees feel that their knowledge of all possible facts is incomplete, and they cannot presently make an informed judgment about whether reporting is required. Should an employee report all suspicions and let the Title IX office on campus handle the details? Or should the employee inquire further of the student or coworker who first raised the issue? At what point does an employee's duty to conduct a private investigation under Texas Senate Bill 212 become unreasonable?

It is important to note that some faith-based institutions have failed to create cultures that are amenable to reporting sexual misconduct, and as a result, the state stepped in to require reporting, backed by severe penalties. This is not limited to universities, obviously, given the numerous high-profile failings in denominational settings to root out sexual abuse and misconduct. Organizations built around metaphysical faith commitments, secrecy, hierarchy, and loyalty can be the most egregious perpetrators of institutional harm. Recognizing these tendencies, Texas understandably reacted strongly to limit institutional and employee prerogative. At the other end of the spectrum, and in a remarkable move that potentially reinforces the clannish commitments to secrecy and loyalty in religious organizations, some states are even allowing churches to create their own licensed police departments.[83] These statutory changes may allow religious groups to cover up crimes committed by their members through the use of authoritative state-backed law enforcement officials handling complaints discretely and privately, rather than in an open and publicly transparent process. A healthier approach would be for religious schools to reassess their cultures based upon the realization that an organizational ethos built on privacy instead of accountability, blame instead of listening, forgiveness instead of justice, and loyalty instead healing can do greater long-term harm to the parties, the university community, and society at large.[84]

B. Senate Bill 212 Raises Privilege Concerns in Faith-Based Institutions

The Texas statute requiring the report of sexual misconduct carves out a limited exception for privileged communications. As an exception to the general reporting rule requirement, Texas Education Code section 51.252(c) provides that a university employee "who receives information regarding such an incident

[83] ALA. CODE § 16-22-1(a) (rev. 2019); see also Richard Gonzalez, *New Alabama Law Permits Church to Hire Its Own Police Force*, NPR, June 20, 2019, https://www.npr.org/2019/06/20/734591147/new-alabama-law-permits-church-to-hire-its-own-police-force.

[84] One alternative approach in this regard is restorative justice practices (*See e.g.*, Harper, S., Maskaly et al., *Enhancing Title IX Due Process Standards in Campus Sexual Assault Adjudication: Considering the Roles of Distributive, Procedural, and Restorative Justice*, 16 J. SCH. VIOLENCE 302 (2017). While formal hearings, like those contemplated by the new Title IX regulations may be required (and preferred) in some cases, restorative justice approaches provide the parties with alternatives focused on acknowledging wrongdoing and addressing personal harms. As opposed to private internal processes or top-down punitive approaches controlled by the government or institutions, restorative justice approaches acknowledge "the need [for victims] to tell the story of their experiences, obtain answers to questions, experience validation, observe offender remorse, receive support that counteracts self-blame, and have input into the resolution of their violation." *Id.* at 312.

under circumstances that render the employee's communications confidential or privileged under other law shall, in making a report under this section, state only the type of incident reported and may not include any information that would violate a student's expectation of privacy." Yet knowing the boundaries of what counts as confidential or privileged information and relationships may not be easy to establish. As an example, consider the following hypothetical situation.

Hypothetical Example #4

> The university has a tenured professor of religion who is also a part-time pastor at a local church. A student has visited the church from time to time and enjoyed meeting the faculty member, and then the student signed up for one of the professor/pastor's elective religion classes his senior year in the hopes of learning more about the subject and perhaps even out of a desire for spiritual fulfillment. As the semester progresses, the student confesses to the professor/pastor to having been peripherally involved in an incident that occurred his freshman year, where consent may have been questionable in a sexual encounter. The other students involved, the primary alleged offender and the putative victim, have both graduated and are no longer part of the university community. Must the professor/pastor report the incident under Texas Senate Bill 212, including the identity of the confessing student, or just that an incident occurred but not reveal the students' identities, or should the university employee not report at all given that the activity arguably may not have constituted sexual assault?

This hypothetical raises questions about whether the communication was made to the employee in the employee's ministerial capacity, such that a privilege would apply. Texas law recognizes privileged communications in the following relationships: lawyer/client, spousal testimony, clergy/communicant, political vote, trade secret, informer's identity, physician/patient (civil), mental health professional/client (civil), and accountant/client.[85] While it is possible that multiple privilege categories within the foregoing list might apply at many universities, it is the discussion of the clergy/communicant relationship that is the subject of this section, since this relationship could be implicated in faith-based institutions.

Universities with faith affiliations may find that faculty and other employees view their roles through a ministerial lens. The possibility that professors or other staff could have ministerial roles is not merely abstract, given the following scenarios:

1. In one realistic arrangement at some faith-based schools, religion courses are taught by full-time faculty who may also hold part-time ministerial or pastoral positions at churches.

[85] TEX. R. EVID. 503 through 510. Note that the lawyer/client privilege is subject to a few limitations: (1) it does not apply to communications if the lawyer's services were sought to further a crime or fraud; (2) it does not apply in will contests when the deceased communicated with the lawyer; (3) it does not apply to cases involving claims against lawyers by clients or instances where the lawyer attested to a document; and (4) it does not apply to situations involving joint representation.

2. Another arrangement is for religion courses to be taught by adjunct faculty whose primary occupations are ministry in churches. This situation is compounded by the discussion, noted in Part II.A, related to adjunct faculty who may not hold employment status with universities, but rather are contract workers.
3. In addition, there are numerous faculty members (primarily at faith-based institutions but perhaps also at secular universities) who serve in their churches in a diaconal capacity, and whose university jobs have nothing to do with their religious work, but who view teaching and research as their vocational ministry.
4. Finally, many religious schools have faculty who fit into all three of the above categories.

In each of these examples, and perhaps in others not described, a statement to the faculty member as contemplated by the statute raises questions about the clergy privilege.

Texas Rule of Evidence 505(a)(1) defines a clergy member as "a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization or someone whom a communicant reasonably believes is a clergy member." Communicant, in turn, is defined to mean "a person who consults a clergy member in the clergy member's professional capacity as a spiritual advisor."[86] There is no requirement that the clergy member be a full-time, ordained minister or religious functionary. And the allowance for clergy status to be established only through the communicant's perceptions or reasonable beliefs likewise supports an expansive view of the clergy role. This being the case, certainly the first two examples noted in the preceding paragraph, and maybe even the third example, all create possibilities at universities where clergy/communicant relationships could be formed.

The clergy privilege has historical roots tracing back to the middle ages, but its status in post-Reformation England and then the early American republic was tenuous.[87] Seventeenth- and eighteenth-century courts tended to view the privilege as arising from Catholic confession—which was true insofar as it goes—and with the Reformation doing away with the sacrament and requirement of confession, the privilege lost its legal sanction. There were numerous instances on both sides of the Atlantic when courts refused to apply the privilege to communications between clergy and communicants, often in cases where the clergy member was Protestant, rather than Catholic.[88] It is only in the twentieth century that a large plurality of states adopted clergy privileges by statute or rule of evidence that apply to ministers and communicants of all faiths.[89]

Historically, the clergy privilege has been asserted by two different parties: the communicant, and the clergy member. In Texas, the privilege may be claimed by the communicant, or by the clergy member acting on the communicant's behalf.[90] Assertions by communicants are made for obvious reasons: they seek to

[86] TEX. R. EVID. 505(a)(2).
[87] Jacob Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 101–08 (1983).
[88] *Id*. at 104–06.
[89] *Id*.
[90] TEX. R. EVID. 505(c).

have the incriminating communication excluded from evidence, which would be more likely to result in punishment. Clergy are increasingly less likely to claim the privilege, using a host of justifications for why they can testify against communicants.[91] For instance, clergy members might refuse to use the privilege as a shield when they believe their conversations with the communicant were not carried out in their ministerial capacities or when they do not believe the communicant's confession or communication were sincerely made for the purpose of seeking spiritual guidance. Christine Bartholomew suggests in her empirical review of the literature that the clergy privilege is in decline, but it is largely based on ministers declining to claim protection, rather than courts forcing them to testify over objection. "Consciously or otherwise, and most notably in violent crime cases, clergy share confidences that are facially protected under broad state statutory language. Thus, the clergy's interpretation of the privilege is contributing to its decline."[92]

Clergy are more likely to claim the privilege when they determine that to testify against the communicant would unacceptably expose them to occupational and spiritual consequences. In other words, given that confession in a Catholic church is both required as a church sacrament and sealed by secrecy, it is no surprise that priests appear more likely to refuse to disclose the confidences of their penitents.[93] To do so could result in discipline and excommunication.[94] Indeed, numerous Catholic priests in history are martyrs to the seal of confession, preferring execution at the hands of the authorities rather than reveal the substance of confessions.[95]

Protestant churches appear less likely to discipline ministers for revealing parishioner communications, probably for the reason that both the role of clergy and the act of confession are less defined and regimented by denominational doctrine or church rule. In addition, for many independent Protestant churches, there is no ministerial discipline possible beyond the level of the individual church. Finally, there are instances where churches themselves affirmatively state that they recognize no privilege within their religious fellowship. An example of this last category is the 2008 Texas case of *Leach v. State*, where a member of a Church of Christ made statements both in an open congregational setting and later in private to church elders about a murder. Both the church elders and the defendant's own father testified that there is no expectation of privacy in confessions, based on the denomination's reluctance to claim a clergy privilege.[96]

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[91] Christine Bartholomew, *Exorcising the Clergy Privilege*, 103 Va. L. Rev. 1015 (2017).

[92] *Id*. at 1018 (internal citations omitted).

[93] Code of Canon Law 983 § 1 states, "The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason." Note that the terms "confessor" and "penitent" are roughly equivalent to "clergy" and "communicant," respectively. And continuing, Canon Law 984 § 1 states, "A confessor is prohibited completely from using knowledge acquired from confession to the detriment of the penitent even when any danger of revelation is excluded."

[94] See, e.g., Dan Harris, *Priest Kept Secret of Murder*, ABC NEWS, July 25, 2001, https://abcnews.go.com/WNT/story?id=130794&page=1.

[95] Catholic News Agency, *These Priests Were Martyred for Refusing to Violate the Seal of Confession*, Dec. 6, 2017, https://www.catholicnewsagency.com/news/these-priests-were-martyred-for-refusing-to-violate-the-seal-of-confession-44847.

[96] Leach v. State, 2008 Tex. App. Lexis 6684, *5 (Tex. App.—Houston [1st Dist.] Sept. 4, 2008).

In her recent analysis, Bartholomew suggests that because legislatures drew clergy privilege statutes in mostly absolute terms, ministers are pushed "to act as quasi-legislators, articulating boundaries that reflect canonical and judicial ends."[97] Thus, clergy actively and carefully circumscribe the boundaries of their professional relationships with communicants, likely testifying when necessary to preserve some greater good and prevent the imposition of injustice. Bartholomew's suggestion is that clergy themselves are uncomfortable with an absolute privilege.[98]

As Senate Bill 212 is applied to faith-affiliated institutions, a claim of privilege could arise in at least two ways. First, student communicants who are seeking spiritual advice from their minister/professors could confess facts in a clergy context, and the student communicants could claim the privilege and prevent reporting of the information because the students seek to avoid discipline or prosecution. Second, an institution could determine that faculty members did not report incidents of sexual misconduct originally discovered by them under clergy privilege circumstances, and the faculty members could claim the protections of the privilege to defend themselves in both their employment termination and criminal prosecution. This second situation seems more akin to the classic cases of Catholic priests refusing to break the seal of confession because of concerns arising from their greater loyalty to Canon Law and the church. If Bartholomew is correct, and clergy police the boundaries of the privilege based on the circumstances of every case, then this is yet another area where the outcome of a disciplinary proceeding will rest entirely on unique facts and circumstances. There will be no easy resolution of clergy privilege cases at faith-based institutions under Senate Bill 212.

C. The Course and Scope Requirement Is Not Clear

As noted above, the employees of the institution must have received the information related to the sexual misconduct in the course and scope of their employment.[99] The statute itself does not define this phrase, but regulations in the Texas Administrative Code indicate that course and scope of employment means "an employee performing duties in the furtherance of the institution's interests."[100] For most universities, this likely is a simple matter to determine, because the vast majority of employees in higher education institutions are advancing the school's interests almost by definition. But for faith-based schools, is an employee who also serves in some ministerial capacity at a religious organization acting "in furtherance of the institution's interests" when the person hears or otherwise discovers the sexual misconduct? Or is the employee engaging in a pastoral discussion with someone that does not further the institution's interests? Making this determination is yet another fact and context-specific inquiry, as discussed in Part II.A. and B.. However, the following example shows how complicated this issue could be for some employees.

Hypothetical Example #5

[97] Bartholomew, *supra* note 90, at 1048.
[98] *Id*. at 1051.
[99] TEX. EDUC. CODE § 51.252(a) (2020).
[100] 19 TEX. ADMIN. CODE § 3.3(b).

At a religious university, faculty and staff participate along with students in yearly Spring Break service trips to national and international locations. Faculty and staff use vacation time to attend the trips, but some academic departments cover the cost of the trips to encourage faculty to attend. During the course of an international trip, groups meet each night to pray and talk about their days. Following one of these gatherings, a student reveals to a university employee member that her roommate, another student at the university, who is not on the trip, told the student that she had been sexually assaulted last semester but made it clear she does not want anyone else to know. Does Texas Senate Bill 212 legally require the staff member to report the information to the university's Title IX office? Even if technically on vacation, is the employee performing duties in the furtherance of the institution's interests?[101]

One concern about employees acting in these off-duty, university-encouraged arrangements is that the employees' intent and subjective understanding when receiving the communication will likely be a factor. And presumably the employee will testify that the conversation with the person providing the information was not in furtherance of the institution's interests. This situation, like several other examples noted in this article, will create issues for the trier of fact to determine.

IV. CONCLUSION AND SUGGESTIONS

Texas Senate Bill 212 is the product of good intentions, but it will be problematic to apply to many ordinary university situations, as this article has sought to portray. To conclude our critique of the statute, we offer the following suggestions to administrators, in terms of creating clarity under the current statute as written, and to legislators, in terms of amending the statute in the next legislative session.

1. **Administrators Should Create Due Process Protections**—Employees at all universities—public and private—who are threatened with termination for failure to report should be afforded basic due process rights, including provisions for an evidentiary hearing and an organizational jury of their peers. Therefore, universities should modify existing university policies or create a new policy related to termination decisions for failing to report, especially for faculty and other contract employees (i.e., athletic coaches). Without such changes, the university may be forced to decide between violating its existing policies related to termination or being subject to legal violation and related fines from the state.

2. **Administrators Could Expand Confidential Employees**—Both the new Title IX regulations and existing Texas law allows universities to identify an unlimited number of confidential employees. While most universities typically only designate specific roles like medical care providers or full-time

[101] While new Title IX regulations clarify that Title IX does not apply extraterritorially, this question is not concerned with Title IX, but Texas requirements. Moreover, based on the provided scenario, there is no indication where or in what context the assault occurred. If it occurred on campus, then Title IX would still apply regardless if the initial report was made while abroad.

chaplains, universities could expand that approach by naming all faculty in certain institutional divisions (such as the seminary or school of theology) as confidential employees, which would still require faculty to report nonidentifiable information about the alleged sexual misconduct.

3. **University Leaders Should Reinforce Organizational Values that Support Reporting**—As noted earlier in this article, some of the problems the Texas Legislature sought to combat arise from the insular, private cultures at faith-based institutions that emphasize loyalty and commitment to metaphysical missions. While these may be valid attributes, surely the same universities could also emphasize values like organizational transparency and supporting victims of sexual misconduct, whether through informal resolution or formal grievance processes. If universities can help solve the problem—by focusing on accountability, listening, justice, and healing—then the legislation becomes less necessary.

4. **Legislators Should Revise Reporting Standards Similar to the Clery Act or the new Title IX**—While Texas is often willing to buck national trends, it should consider other legislative reporting regimes, which are informed not by a one-size-fits-all approach, but by content experts and the universities impacted by the law. For example, Texas could adopt the long-standing Clery Act approach, which only requires CSAs, not all employees, to pass along nonidentifiable information that they receive as a direct report from a student (as opposed to indirect information and rumors) or it could adopt an even lesser burden established by the new Title IX regulations, which require only Title IX administrators or those with power to enforce corrective measures to report. Such a change would allow the majority of teaching faculty to serve in a role of supporter and not reporter, while giving the universities discretion in terms of who it designates mandatory reporters.

5. **Legislators Should Adopt the Clery Act Approach to Institutional Fines and University Control of Employee Discipline**—A significant defect in the statute is the severe penalty for failures to report, given the highly contextual and fact-dependent nature of sexual misconduct in many instances. Requiring ordinary university employees to discern if what they learned or overheard fits the statute's definitions for various types of misconduct poses challenges in many instances, as noted in the hypothetical scenarios described above. In each of these instances, however, the failure to report leads to required termination and prosecution of the employee, and a significant fine for the university (up to $2 million). A better approach would be to maintain the university-level fine, and then allow the university to punish the employee through a for-cause termination (which would supersede an employment contract or tenured status) but not mandate termination.

6. **Legislators Should Consult Title IX Coordinators, Faculty and Students Impacted by these Requirements**—In the 2021 Texas Legislative Session, legislators should consider amending these mandatory reporting requirements after discussing their impact and challenges with key stakeholders. By talking to these groups, they will not only understand the challenges presented by these new mandatory reporting requirements but

better appreciate what type of requirements and approaches would be most effective in eliminating sexual misconduct.[102]

7. **Legislators Should Clarify Whether the Reporting Obligations Are Retroactive or Only Apply Prospectively to New Information**—As noted previously, the statute has no time limit on an employee's reporting obligation. The employee could have learned of some incident years or decades previously, which may not have been resolved at the time. Does the statute require past knowledge to be reported? Or does the statute only apply to new knowledge learned by employees after its effective date? Moreover, what are the expectations of employees to report incidents where the statute of limitations has long since run, or the people involved have left the university community, or the university has no way to address or remediate the situation for various reasons? This lack of clarity as to timeframes needs legislative attention. At a minimum, the Legislature should state whether the reporting obligation applies to past knowledge or only new knowledge.

Texas Senate Bill 212 is an important and well-intentioned attempt to solve several serious problems. In the process, however, the law creates new problems that need attention by legislators and university administrators. Some of these new quandaries are more acutely felt by faith-based universities, which, candidly, have not always manifested the kinds of healthy campus cultures they claim to have. Jointly, campus administrators and legislators can each work in their respective spheres to make a new way forward.

[102] While the Texas Higher Education Coordinating Board adopted administrative rules related to the current statute with input from some Title IX Coordinators and university legal counsel, that work focused on how to operationalize the current law, not how to improve it.

DEPARTMENT OF EDUCATION ENFORCEMENT OF A "BALANCE OF PERSPECTIVES" AS A CONDITION OF FEDERAL FUNDING

FREDERICK P. SCHAFFER*

Abstract

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.

Introduction

In April 2019, Rep. George Holding, a Republican from Raleigh, North Carolina, asked the U.S. Department of Education (DOE) to investigate the Consortium for Middle East Studies (CMES) run by Duke University and the University of North Carolina at Chapel Hill (UNC) because he had seen reports of anti-Israel bias and anti-Semitic rhetoric at a conference on the conflict in Gaza run by CMES and funded by federal dollars. DOE agreed to conduct an investigation of the use of federal funds by CMES.[1] By letter dated August 29, 2019 (the DOE letter), DOE reported on the conclusions of its review of the courses and programs offered by CMES and funded under Title VI of the Higher Education Act of 1965 (the Act).[2]

* Mr. Schaffer was the General Counsel and Senior Vice Chancellor for Legal Affairs of the City University of New York from 2000 to 2016.

[1] *See* Brian Murphy, *DeVos Opens Investigation into Duke–UNC Event with Alleged "Anti-Semitic Rhetoric,"* RALEIGH NEWS & OBSERVER (June 17, 2019), https://www.newsobserver.com/news/politics-government/article231643588.html. The conference was also the subject of a complaint by the Zionist Organization of America (ZOA) to DOE's Office of Civil Rights (OCR), which focused on the allegedly anti-Israel bias of the conference and on a clearly anti-Semitic song performed by a rap singer who performed at the conference. OCR conducted an investigation of the complaint, which resulted in resolution agreement with both UNC and Duke. *See* ZOA Press Release, ZOA's Anti-Semitism Complaint Against UNC Triggers Resolution Agreement with OCR Ensuring University's Protection of Jewish Students (Nov. 7, 2019), https://zoa.org/2019/11/10427656-zoas-anti-semitism-complaint-against-unc-triggers-resolution-agreement-with-ocr-ensuring-universitys-protection-of-jewish-students/; ZOA Press Release, Triggered by ZOA's Complaint, Duke U.—Like UNC—Enters into Agreement with U.S. Govt to Address Campus Anti-Semitism (Dec. 17, 2019), https://zoa.org/2019/12/10431913-431913/; Natalie Bey & Leah Boyd, *University Settles Discrimination Complaint on Gaza Conference*, DUKE CHRON. (Jan. 30, 2020), https://www.dukechronicle.com/article/2020/01/duke-university-discrimination-complaint-gaza-conference-israel-anti-semitism.

[2] The letter was subsequently published in the *Federal Register* at 84 Fed. Reg. 48919 (Sept. 17, 2019) It was widely reported in the press. *See,* e.g., Erica L. Green, *U.S. Orders Duke and U.N.C. to Recast Tone*

In that letter, signed by Assistant Secretary Robert King, DOE makes no reference to the conference on Gaza but states that CMES's other courses and programs failed to comply with certain requirements of the Act, including what DOE characterized as a lack of "balance of perspectives"—citing the absence of programs dealing with discrimination against non-Muslim communities or with positive aspects of Christianity, Judaism or other non-Islamic religions in the Middle East. The DOE letter threatens to cut off further federal funding under Title VI of the Act unless certain corrective actions are taken, including the development and implementation of "effective institutional controls ensuring all future Title VI-funded activities directly promote foreign language learning and advance the national security interests and economic stability of the United States, thereby meeting statutory requirements and meriting taxpayer funding."[3]

A number of organizations immediately issued statements that the DOE letter was a threat to academic freedom arising from both administrative micromanagement and political interference in academic programs.[4] Then, by letter dated September 20, 2019, Dr. Terry Magnuson, Vice Chancellor for Research at UNC, responded on behalf of CMES.[5] His letter refutes virtually all of the factual bases for DOE's contention that CMES was not in compliance with the Act, including evidence that the array of offerings was much broader and more diverse than DOE claimed and that they included activities covering the plight of religious minorities in the Middle East as well as portrayals of the positive aspects of Christianity and Judaism; the letter also points out that two programs that had been singled out for criticism in the DOE letter were not federally funded. The letter concludes by noting that CMES would reexamine its numerous existing procedures to ensure that its activities would continue to comply with the Act and would establish an advisory board to add additional transparency as to the relationship of each expenditure to the purposes and requirements of the Act.

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in Mideast Studies, N.Y. TIMES (Sept. 19, 2019), https://www.nytimes.com/2019/09/19/us/politics/anti-israel-bias-higher-education.html; Elizabeth Redden, *Education Department Probes Middle East Studies Program*, INSIDE HIGHER EDUC. (Sept. 17, 2019), https://www.insidehighered.com/quicktakes/2019/09/17/education-department-probes-middle-east-studies-program; Sara Brown, *Education Dept. Takes Aim at a Center on Middle East Studies. Scholars Say That Could Chill Academic Freedom*, CHRON. HIGHER EDUC. (Sept. 22, 2019), https://www.chronicle.com/article/Education-Dept-Takes-Aim-at-a/247202; Elizabeth Redden, *Middle East Studies Program Comes Under Federal Scrutiny*, INSIDE HIGHER EDUC. (Sept. 25, 2019), https://www.insidehighered.com/news/2019/09/25/federal-inquiry-middle-east-studies-program-raises-academic-freedom-concerns.

[3] 84 Fed. Reg. at 48921.

[4] *E.g.*, ACLU Letter to Secretary DeVos Regarding Funding for the Duke-UNC Consortium for Middle East Studies (Sept. 27, 2019), https://www.aclu.org/letter/aclu-letter-secretary-devos-regarding-funding-duke-unc-consortium-middle-east-studies; FIRE Statement on Department of Education letter to Duke–UNC Consortium for Middle East Studies (Sept. 20, 2019), https://www.thefire.org/fire-statement-on-department-of-education-letter-to-duke-unc-consortium-for-middle-east-studies; 18 Major Scholarly Societies Join MESA in Expressing Concern About the Department of Education's Interpretation of Title VI (Sept. 25, 2019), https://mesana.org/advocacy/letters-from-the-board/2019/09/25/18-major-scholarly-societies-join-mesa-in-expressing-concern-about-the-department-of-educations-interpretation-of-title-vi.

[5] Brian Murphy, *Duke-UNC Program Defends Instruction on Religious Minorities, Aspects of Christianity*, RALEIGH NEWS & OBSERVER (Sept. 23, 2019), https://www.newsobserver.com/news/politics-government/article235401502.html.

Soon thereafter, DOE advised CMES that it would continue to fund the activities of CMES after all.[6] On October 10, 2019, DOE publicly confirmed that and also released a letter to the Middle East Studies Association defending its review of CMES and reiterating its contention that the Act required funded programs to provide "balanced perspectives."[7] Although the dispute involving this one academic center has been resolved, the threat to academic freedom posed by the actions of DOE, and by the stated rationale for them, remains.[8] The DOE letter regarding CMES represents a heavy-handed and unprecedented intrusion by the federal government into the autonomy of colleges and university to establish curriculum and determine the contents of their courses and programs. For the reasons set forth below, DOE's review appears to have some statutory support, although not in the provision cited by DOE and not under the standard it employed; and its enforcement of a standard of "balance of perspectives" constitutes a significant threat to the right of free speech and academic freedom protected by the First Amendment.

I. The Absence of Support for the Requirement of a "Balance of Perspectives"

The explicit legislative purposes of Title VI of the Act are wide-ranging. Most relevant to the CMES matter, they include the purpose "to support centers, programs, and fellowships in institutions of higher education in the United States for producing increased numbers of trained personnel and research in foreign languages, area studies, and other international studies."[9] To achieve these purposes, the Act authorizes the Secretary of Education "to make grants to institutions of higher education or consortia of such institutions for the purpose of establishing, strengthening and operating—(i) comprehensive foreign language and area or international studies centers and programs; and (ii) a diverse network of undergraduate foreign language and area or international studies centers and programs."[10] The recipients of such grants are called "National Resource Centers."

The program operates on a four-year grant cycle administered by DOE's Office of International and Foreign Language Education (IFLE), which selects National Resource Centers based on a review of applications demonstrating compliance with statutory requirements concerning the purposes and subject matter priorities of the program as well as certain additional priorities implemented by IFLE. During the selection process in 2014 for the fiscal year 2014–17 cycle, DOE received

[6] Stephanie Pousoulides, *Duke–UNC Consortium received '19-20 funding from the Education Department Amid Controversy*, DUKE CHRON. (Sept. 30, 2019), https://www.dukechronicle.com/article/2019/09/duke-unc-consortium-middle-east-funding-education-department-controversy.
[7] Laura Meckler, *Education Department Reverses Stance and Says It Will Fund UNC–Duke Middle East Studies Program*, GREENSBORO NEWS & RECORD (Oct. 11, 2019), https://www.greensboro.com/news/education/education-department-reverses-stance-and-says-it-will-fund-unc/article_fa6363a1-ad5c-5068-b459-e5ecd9413e55.html.
[8] *See* FIRE statement on Department of Education letter to Duke-UNC Consortium on Middle East Studies (Sept. 20, 2019), https://www.thefire.org/fire-statement-on-department-of-education-letter-to-duke-unc-consortium-for-middle-east-studies/.
[9] 20 U.S.C. § 1121(b) (2018)
[10] *Id.*

165 applications. Of these, 100 applications (60.6%) received new National Resource Center grant awards totaling $22,743,107 per year for each of the four years.[11] In 2018, CMES received a four-year grant in the amount of $235,000.[12]

The DOE letter alleges that CMES violated the Act on several grounds, including its failure to enroll many students in language courses, its collaboration with other departments that are not aligned with the requirement to help students in science, technology, engineering, and mathematics achieve foreign language fluency; its relative lack of placement of students in government or business positions as opposed to academic positions; and the inclusion of many topics and titles with little relevance to the mandates of the Act, rather than focusing on core subjects that would prepare students to understand the geopolitical challenges to U.S. national security and economic needs.[13]

In one bullet point, the DOE letter contends that "CMES appears to lack balance as it offers very few, ifany, programs focused on the historic discrimination faced by, and current circumstances of, religious minorities in the Middle East, including Christians, Jews, Baha'is, Yadizis [sic], Kurds, Druze, and others."[14] Similarly, the letter states that in the "activities for elementary and secondary students and teachers, there is a considerable emphasis placed on the understanding [of] the positive aspects of Islam, while there is an absolute absence of any similar focus on the positive aspects of Christianity, Judaism, or any other religion or belief system in the Middle East."[15] The letter argues that this "lack of balance of perspectives is troubling and strongly suggests that the Duke-UNC CMES is not meeting [the] legal requirement that National Resource Centers 'provide *a full understanding* of the areas, regions, or countries' in which the modern foreign languages taught is commonly used" (emphasis added by DOE).[16]

DOE's argument that the contents of certain courses and programs (mostly concerning issues of race, gender, sexual orientation, art, and social change) advance ideological priorities unrelated to the mandate of the Act also relies on a citation to one of its legislative findings that

> The security, stability and economic vitality of the United States in a complex global era depend upon American experts in and citizens knowledgeable about world regions, foreign languages, and international affairs, as well as upon a strong research based in these areas.[17]

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[11] INT'L AND FOREIGN LANGUAGE EDUC. ANNUAL REPORT 2017 (Feb. 2019) at 10–14, https://www2.ed.gov/about/offices/list/ope/iegps/2017ifleannualreport.pdf.

[12] U.S. Department of Education, Office of Post-Secondary Education, International and Foreign Language Education —News, Announcement: IFLE Awards Over $71 Million in FY 2018 Grants to Strengthen International Studies, World Language Training and Global Experiences for Educators and Students, https://www2.ed.gov/about/offices/list/ope/iegps/2018news.html (last visited May 13, 2020 at 2:29 p.m.).

[13] 84 Fed. Reg. at 48920.

[14] *Id.*

[15] *Id.*

[16] Id., *quoting* 20 U.S.C. § 1122(a)(1)(B)(ii) (2018).

[17] *Id.*, *citing* 20 U.S.C. § 1121(a)(1).

DOE cites no regulation, adjudicatory decision, or long-standing practice of the agency to support its interpretation that the Act requires grant recipients to offer programs and courses that reflect a "balance of perspectives" or that focus solely on national security, geopolitics, and economics. Accordingly, DOE's interpretation of the Act would be entitled to no substantial judicial deference but only such respect as is due according to its persuasiveness.[18] As demonstrated below, DOE's interpretation of the Act is unpersuasive.

To begin with, the DOE letter relies on the first of four legislative findings and ignores the very next one in which Congress finds that

> Advances in communications technology and the growth of regional and global problems make knowledge of other countries and the ability to communicate in other languages more essential to the promotion of mutual understanding and cooperation among nations and their peoples.[19]

In light of that finding, it is clear that Congress intended to support courses and programs to increase knowledge of other countries and promote mutual understanding and cooperation among nations and their peoples—not solely courses and programs that further the national security, stability, and economic vitality of the United States, as the DOE letter contends. Similarly, courses and programs in political economy and social and cultural issues, including those dealing with race and gender, comply with the mandate of Title VI—not only courses and programs in geography, geopolitics, history, and language, as DOE asserts.

Nor does the Act support DOE's contention that the Act requires a "balance of perspectives." The fourth legislative finding of the Act, which the DOE letter also ignores, provides that "[s]ystematic efforts are necessary to enhance the capacity of institutions of higher education in the United States for—(A) producing graduates with international and foreign language expertise and knowledge; and (B) research regarding such expertise and knowledge."[20] Then, following the findings, the Act provides that the centers and programs to which grants are made shall be "national resources" for certain activities. Although DOE quotes and relies on a single phrase ("provide a full understanding") from that list, the full list of those activities reveals the flaw in DOE's position:

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[18] *See United States v. Mead Corp.*, 533 U.S. 218 (2001). Thus, DOE's interpretation is not entitled to *Chevron* deference but at most to *Skidmore* deference. *Compare Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984) *with Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *Skidmore* the Court held, "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id. a*t 140. Here, DOE can point to no evidence of thoroughness in its consideration or to any earlier pronouncements on the subject of "balance of perspectives" under the Act; on the contrary, the DOE letter contains the sole expression of its interpretation, and it was issued without any public notice or comment following a four-month review of the activities of CMES. Moreover, as demonstrated below, there is no validity to its reasoning.

[19] 20 U.S.C. § 1121(a)(2).

[20] *Id.*, § 1121(a)(4).

(i) teaching of any modern foreign language;

(ii) instruction in fields needed to provide full understanding of areas, regions, or countries in which such language is commonly used;

(iii) research and training in international studies, and the international and foreign language aspects of professional and other fields of study; and

(iv) instruction and research on issues in world affairs that concern one or more countries.[21]

In light of the overall purposes of the Act and the fourth finding as to the need for "systematic efforts," the phrase "instruction in fields needed to provide full understanding" in paragraph (ii) above clearly means that a National Resource Center should provide instruction in the broad array of fields necessary to fully understand an area, region, or country. There is nothing in that language to suggest it was intended to impose upon a National Resource Center the obligation to achieve "balance" among or within all of its courses and programs. Not surprisingly, in the fifty-four years since Congress passed the Act, it had never before been suggested that Title VI gave DOE authority to monitor the content of programs and courses to ensure what it regards as a proper "balance" of topics or viewpoints until the DOE letter in 2019.

In sum, DOE's interpretation of the Act as requiring a "balance of perspectives" is unreasonable. It should also be rejected because, as demonstrated below, DOE's interpretation of the Act raises significant constitutional issues that can be readily avoided by not conjuring up that requirement.[22]

DOE itself seems to grasp the weakness in its own argument. As noted above, the letter "strongly suggests" that the alleged lack of balance violates the Act; however, it does not explicitly say that CMES does so. Moreover, the letter ends with a series of directives to CMES by which it is to formulate a plan to demonstrate compliance with the Act. While quite detailed with respect to the other issues raised in the letter, not one of those directives refers to the issue of "balance." Thus, the paragraph of the letter dealing with "balance" appears to have been intended as a shot across the bow of the university community. The paragraph asserts the authority of DOE to evaluate whether the programs of grantees under Title VI are sufficiently balanced, but it embeds that assertion in the context of other criticisms of CMES's programs and requires no specific corrective action regarding the alleged imbalance. Then, DOE subsequently agreed to continue its funding without CMES having promised to make any changes in its programming.

II. An Alternative Statutory Standard: "Diverse Perspectives and a Wide Range of Views"

An interesting and surprising aspect of DOE's position in this matter is that there is, in fact, language in the Act that provides support for DOE's review of the funded activities of CMES but that DOE chose not to rely on. The Act specifically

[21] *Id.*, § 1122(a)(1)(B).

[22] *See, e.g., Zadvydas v. Davis*, 533 U.S.678, 689 (2001).

requires colleges and universities to include in their applications for grants "an explanation of how the activities funded by the grant will reflect diverse perspectives and a wide range of views and generate debate on world regions and international affairs."[23] The DOE letter omits any reference to that provision and cites only the Act's reference to "a full understanding of areas, regions or countries" as the source of the purported requirement of a "balance of perspectives." One can only speculate as to why DOE adopted this approach.[24] What is clear, however, is that the standard of review applied by DOE is different from the one set forth in the Act and has no support in any other provision of the Act. Nevertheless, the question remains whether that statutory provision is constitutional on its face or as (mis)applied by DOE through a standard of "balance."

III. The Constitutionality of the Act on Its Face: Vagueness

The statutory requirement that funded activities "will reflect diverse perspectives and a wide range of views, and generate debate on world regions and international affairs" clearly suffers from a degree of vagueness. DOE has issued no regulations or even informal guidance regarding what it means. Nor can one find a history of adjudicated cases or resolution agreements on this issue. As far as can be gleaned from the public record, this provision of the Act has not previously been applied to deny or terminate a grant. This leaves colleges and universities in the dark as to how to comply and makes them vulnerable to selective enforcement based on political or ideological preferences. This, in turn, may tend to create a chilling effect on what colleges and universities teach as they seek to avoid controversial issues. These are, of course, the types of harm that the First Amendment vagueness doctrine is intended to prevent.[25] However, the Act is a funding statute, not a criminal or regulatory law, and the constitutional analysis must take that difference into account.

The Supreme Court long ago rejected the broad principle that government funding is a privilege for which the benefit may be conditioned on the surrender

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[23] 20 U.S.C. §1122(e)(1) (2018).
This provision was added to the law by Section 602(3) of the Higher Education Act of 2008, 122 Stat. 3078, Pub. L. 110-315 (Aug. 15, 2008). Similar provisions were also added requiring applications for grants for other programs to include an explanation as to how the funded activities would reflect diverse perspectives. *See* 20 U.S.C. §§ 124(a)(7)(F), 1125(a), 1130-1(f)(3), 1130a(c) and 1131(c)(2). The Committee Report for the Act is silent on the reason for these provisions. According to one interested observer, it was done in response to the concern of some scholars and legislators that centers and programs on the Middle East had become ideologically uniform in their anti-American and anti-Israel bias. *See* The Louis D. Brandeis Center, *The Morass of Middle East Studies: title VI of the Higher Education Act and Federally Funded Area Studies* (Rev. Ed. November 2014) at 7-16, https://brandeis-center.com/wp-content/uploads/2017/10/antisemitism_whitepaper.pdf, last visited May 13, 2020 at 2:30 p.m.

[24] One possibility is that the above-quoted language, in referring to what must be included in the grant application, is intended only as a requirement during the selection process and cannot serve to justify a termination of funding in the midst of a four-year grant. It may also be that DOE concluded that the requirement that funded activities "will reflect diverse perspectives and a wide range of views and generate of debate on regions and international affairs" is too general and easy to satisfy and might point in a direction that favored the actual programs of CMES. Indeed, in responding to the DOE letter, Vice Chancellor Magnuson points out that the courses and programs of CMES represent diverse perspectives, citing that very section of the Act. *See supra* note5.

[25] *See, e.g.*, *Coates v. Cincinnati*, 402 U.S. 611 (1971).

of First Amendment rights.[26] However, for decades the Court has struggled with the issue of how and where to draw the line between an unconstitutional penalty on the exercise of free speech and a proper limitation of a government benefit to a particular, legitimate purpose.[27] Regarding a facial challenge to the constitutionality of the Act on the ground of vagueness, the most relevant case is *National Endowment for the Arts v. Finley*. In that case, the criteria for grants were "artistic excellence and artistic merit . . . taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[28] The Court upheld the constitutionality of the statute on its face because the National Endowment for the Arts interprets that provision as merely hortatory and because any "content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding," which necessarily involves the exercise of aesthetic judgment in which "absolute neutrality is simply 'inconceivable.'"[29]

The situation here is somewhat different from *National Endowment for the Arts*. The DOE letter makes clear that it does not regard the purported requirement of a "balance of perspectives" as merely hortatory. Moreover, this is not a case involving aesthetic judgment. Nevertheless, grant applications under the Act involve a competitive process, and the decision as to which projects to fund or terminate involves the application of an array of standards that involve some subjective judgment (even if to a lesser degree than with artistic grants). Thus, it would seem that a challenge to the Act on its face would likely fail unless supported by considerations of academic freedom (which will be considered below). However, while rejecting the facial challenge to the statutory criteria, the Court's opinion in *National Endowment for the Arts* noted that particular applications of them might violate the Free Speech Clause if the denial of a grant were shown to be based on invidious viewpoint discrimination.[30]

IV. The Constitutionality of the Act as Applied: Viewpoint Discrimination

That *dictum* in *National Endowment for the Arts* is consistent with the clearly established principle that laws that discriminate against a particular viewpoint violate the Free Speech Clause of the First Amendment even in the context of a funding case, unless the funding is intended to convey a government message.[31] For

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[26] *Speiser v. Randall*, 357 U.S. 513 (1958).

[27] In addition to *Speiser,* cited above, *see, e.g.*, *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001); *U.S. v. American Library Ass'n*, 539 U.S. 194 (2003); *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205 (2013).

[28] *National Endowment for the Arts*, 524 U.S. at 576.

[29] *Id.* at 585.

[30] *Id.* at 587.

[31] That principle is even more deeply rooted in the context of government regulation where funding is not involved. In the famous words of Justice Jackson, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

example, in *Rosenberger v. Rector & Visitors of University of Virginia,*[32] a public university rejected a request for funding out of its Student Activities Fund for the printing of a Christian student newspaper because of its policy excluding all publications with religious editorial content. The Court held that the university's action violated the First Amendment because it constituted viewpoint discrimination.[33]

The Court in *Rosenberger* recognized the principle that when the government creates a program not to encourage private speech, but rather to enlist private entities to convey a government message, it may enforce adherence to that message.[34] However, Title VI of the Higher Education Act does not involve the funding of a government message, but rather is intended to subsidize private speech (that is, university courses and programs) that furthers the broad public purpose of training personnel and increasing research in foreign languages, area studies, and other international studies.[35] Indeed, as noted above, the Act specifically requires colleges and universities to include in their applications "an explanation of how the activities funded by the grant will reflect diverse perspectives and a wide range of views and generate debate on world regions and international affairs."[36]

Nor is viewpoint discrimination necessarily justified on the ground that institutions of higher education remain free to offer whatever courses or programs they wish to outside of their Title VI project. In *Rust v. Sullivan,* the Supreme Court upheld the "gag rule" prohibiting projects receiving federal funding under Title X of the Public Health Services Act from counseling or referring women for abortion and from encouraging, promoting, or advocating abortion. Central to the Court's holding was the fact the challenged regulations "did not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities."[37] In the Court's view, the cases that have found funding conditions to be unconstitutional "involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program."[38] However, the Court went on to caution that its holding was not intended "to suggest that funding by the Government, even when coupled with the freedom of the fund-recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression."[39] As noted above, in *Rosenberger* and *National Endowment for the Arts*, which were both decided after *Rust*, the Court treated viewpoint

[32] 515 U.S. 819 (1995).
[33] *Id.* at 829–34.
[34] *Id.* at 833.
[35] *See supra* text accompanying notes 9-10.
[36] 20 U.S.C. § 1122(e)(1).
[37] 500 U.S. at 196.
[38] *Id.* at 197. Consistent with that view, in *Agency for International Development v. Alliance for Open Society International, Inc.*, the Supreme Court struck down a provision of the United States Leadership Against HIV/AIDS Act of 2003, which provided "that no funds could be made available to any organization that does not have a policy explicitly opposing prostitution and sex trafficking." The Court distinguished *Rust* on the ground that "[b]y demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects "protected conduct outside the scope of the federally funded program." 570 U.S. at 218.
[39] *Rust*, 500 U.S. at 199.

discrimination as an independent and sufficient ground for striking down a funding condition in situations like this one that do not involve government speech.[40]

In sum, if the DOE letter applies the Act in a way that discriminates on the basis of viewpoint, it would violate the First Amendment, notwithstanding the fact that the activities are funded by the government.[41] An argument can certainly be made that the DOE letter involves viewpoint discrimination. It criticizes the courses and programs of CMES for not focusing on historic discrimination of certain religious and ethnic groups in the Middle East and for ignoring the positive aspects of certain religions in the Middle East. In short, DOE objects that CMES portrays the Middle Eastern Islamic world in too favorable a light by ignoring or downplaying certain aspects of that world and threatens to withhold funding on that basis. However, DOE justified its actions in its letter to the Middle East Studies Association on the ground that it merely seeks to increase the diversity of views, not to prohibit any.[42] Unstated, but implicit in that argument, is the proposition that it would act similarly with respect to funded activities that presented a consistently anti-Islamic (or other one-sided) perspective. Although that argument may seem implausible in the current political situation, it is difficult to make a legally convincing case for viewpoint discrimination on the basis of a single event without discovery as to the actual motivations of DOE. For now, colleges and universities must live with a real if unproven concern that DOE review of their programs funded under the Act may be motivated and affected by its disapproval of the contents of those programs.

V. The Significance of the University Context: The Threat to Academic Freedom

The discussion has so far ignored any considerations relating to the fact that the activities funded by the Act take place within the context of institutions of higher education and their tradition of academic freedom. However, one of the core principles of academic freedom is the autonomy of colleges and universities to determine, on academic grounds and through their faculty, the content of their courses and programs. This principle derives from the earliest and most authoritative

[40] In *Rosenberger*, 515 U.S. at 833, the Court interpreted *Rust* as a case involving government speech in which viewpoint discrimination was therefore justified. *See also Legal Services Corp.*, 531 U.S. at 541, where the Court struck down as an impermissible viewpoint-based restriction a federal appropriations law barring the Legal Services Corporation from funding any organization representing indigent clients that seeks to amend or otherwise challenge existing welfare law. That decision, however, appeared to turn on the unique circumstances of that law, which involved a limitation on the arguments that attorneys could make, a resulting impairment of the judicial function, a lack of alternative channels for expression of the advocacy the statute sought to restrict, and an apparent congressional purpose to insulate the government's interpretation of the Constitution from judicial challenge.

[41] A different conclusion would be warranted with respect to funding limitations on subject matter. In the same way that government can reserve a limited public forum for the discussion of certain topics, *Rosenberger*, 515 U.S. at 829, it can presumably limit grants to specific subject matter areas. However, Title VI of the Act provides funding for a wide array of subject matters relating to foreign languages, area studies, and international affairs, and there is no statutory authority for the attempt by DOE to give preference to certain categories of programs over others when all fall within the broad purposes of the Act.

[42] *See supra* note 7.

statements on academic freedom[43] and has received recognition from the Supreme Court as part of its more general recognition of academic freedom as a special concern of the First Amendment. In the famous words of Justice Frankfurter, in *Sweezy v. New Hampshire*,

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[44]

The statutory provision requiring that funded activities "will reflect diverse perspectives and a wide range of views and generate debate on world regions and international affairs" threatens this principle of academic freedom in several distinct ways. First, that standard is vague and therefore may have a chilling effect on a university's willingness to teach controversial subjects.[45] Second, what constitutes such diversity is a subjective judgment that can easily slide from one based on academic criteria to one based on political or ideological criteria and thereby lead to selective enforcement. Third, as a legal requirement enforceable by DOE, the concept of "diverse perspectives" places final authority over academic content in the hands of government bureaucrats rather than college and university faculty.

These problems are exacerbated by DOE's decision not to enforce the statutory requirement as written, but instead to impose its own standard of a "balance of perspectives." The latter standard points toward a more detailed and specific inquiry into the contents and viewpoints of each and every course and program to determine if *all* perspectives and counter-perspectives have been covered (rather than just a diversity of perspectives). That is, in any case, how DOE applied the standard here in concluding that CMES had failed to meet it because its courses and programs allegedly did not cover the conditions of certain non-Muslim minorities in the Middle East or present the positive aspects of religions other than

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[43] *See* the 1915 Declaration of Principles on Academic Freedom and Academic Tenure and the 1940 Statement of Principles on Academic Freedom and Tenure, AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 3–7, 291–301(10th ed. 2006), https://www.aaup.org/AAUP/pubsres/policydocus/contents.

[44] 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). *Sweezy* is only one in a long line of cases in which the Court has recognized that academic freedom is entitled to a degree of protection by the First Amendment. *See, e.g.*, *Wieman v. Updegraff*, 344 U.S. 183, 196–98 (1952) (Frankfurter, J., concur- ring); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225–26 (1985) *Grutter v. Bollinger*, 539 U.S. 306, 328–29 (2003). *See generally* Lawrence White,*Fifty Years of Academic Freedom Jurisprudence*, 36 J.C. & U.L. 791, 827 (2010). The courts and commentators, however, have not always agreed about the nature of and reasons for the connection between academic freedom and the First Amendment. *See,* e.g., ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2012); Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 967 (2009); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment*," 99 YALE L.J. 251, 257 (1989).

[45] It might be argued that the Act has contained this provision from the outset without having caused such a chilling effect. However, as noted above, there is no record of DOE ever having applied that provision to the denial or termination of funding. Furthermore, as discussed below, DOE's application of the standard of "balance of perspectives," in place of the statutory provision, appears to involve a greater intrusion into academic freedom.

Islam. That alleged lack of "balance" presumably can be cured only by offering funded activities that include those subjects. Thus, the DOE letter does not merely seek to interfere with the freedom of universities to determine the contents of their own courses and programs; it seeks to impose a particular viewpoint on those courses as a condition of funding.

Putting to one side for a moment the funding aspect of this matter, it is clear that such a direct infringement on the academic judgment of a university and its faculty would violate the First Amendment. In *Regents of University of Michigan v. Ewing*,[46] the Supreme Court unanimously rejected a student's challenge to his dismissal from a joint undergraduate and medical program on the ground that it violated his right to due process. The decision to dismiss the student had been made after careful review by the faculty Promotion and Review Board and affirmed by the Executive Committee of the Medical School. Writing for the Court, Justice Stevens emphasized the Court's "reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom."[47] Furthermore, the opinion relied specifically on the role of the faculty:

> The record unmistakably demonstrates, however, that the faculty's decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career. When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. [Footnote omitted.] Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demon- strate that the person or committee responsible did not actually exercise professional judgment.[48]

Similarly, DOE's attempt to enforce a standard of "balance of perspectives" regarding the courses and programs of CMES would trench on the academic freedom of UNC and Duke and their faculty without any showing that their selection involved a departure from accepted academic norms or the absence of the exercise of professional judgment.

Turning now to the funding issue, none of the cases discussed above involved the issue of academic freedom. However, there is language in *Rust* suggesting a different analysis would be appropriate in such a case. As noted, the Court there cautioned that its holding was not intended "to suggest that funding by the Government, even when coupled with the freedom of the fund-recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression."[49] In discussing contexts in

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[46] 474 U.S. 214 (1985).

[47] *Id*. at 225.

[48] *Id*. at 225–26. *Cf. University of Pennsylvania v. EEOC*, 493 U.S. 182, 197–98 (1990), where the Supreme Court held that the Equal Employment Opportunity Commission did not violate academic freedom in requiring a university to turn over confidential peer-review materials pursuant to a subpoena issued in its investigation of a Title VII claim filed by a faculty member who had been denied tenure because the subpoena did not involve a "direct" infringement regarding the content of academic speech or the right to determine who may teach. Here, there is such a direct interference with the content of academic speech in determining what courses and programs to offer.

[49] Rust, 500 U.S. at 199.

which its holding would *not* apply, the Court mentioned public forums and universities.[50] With respect to the latter, the Court stated that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."[51] That language suggests a willingness to take a harder look at the vagueness issue raised by a statute involving grants to universities than the Court subsequently did in *National Endowment for the Arts* with regard to grants to artists.

Indeed, the above-quoted language in *Rust* cites to *Keyishian v. Board of Regents of the State University of N.Y.*[52] In that case the Supreme Court struck down a New York State statute and implementing regulations that prevented state employment of "subversive persons," including as faculty members at a state university, on the ground that they violated the First Amendment. The Court's reasoning with respect to the vagueness of the law rested in part on a well-established line of cases concerning the chilling effect of vague laws on the exercise of First Amendment rights in general.[53] However, before reaching that conclusion, the opinion boldly affirmed the connection of the First Amendment to academic freedom:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[54]

Thus, *Keyishian* supports the proposition that vague laws are a particular problem in the university context because of their chilling effect on the exercise of academic freedom. In citing to *Keyishian*, the Court in *Rust* recognized that proposition even where the law in question involves government funding.

Moreover, it is significant that the Court in *Rust* paired public forums and universities as two contexts that are exceptions to its holding that government funding, taken together with the freedom of fund recipients to speak outside the scope of the funded project, would justify government control of the content of expression. What public forums and universities have in common is that both are recognized zones in which it is especially important for their occupants to be free to exercise their First Amendment rights without governmental interference—and regardless of their ability to do so in other venues not owned by the government or in connection with other activities not funded by the government.

These considerations militate in favor of distinguishing *National Endowment for the Arts* from this matter and support a facial challenge to the constitutionality of the provision of the Act that makes grants subject to the condition that funded activities "will reflect diverse perspectives and a wide range of views and generate

[50] *Id.* at 199–200.
[51] *Id.* at 200.
[52] 385 U.S. 589 (1967).
[53] *Id.* at 604.
[54] *Id.* at 603.

debate on world regions and international affairs." Even if such a challenge might not be successful, however, the analysis set forth in *Rust* strongly supports the conclusion that the substitute standard of "balance of perspectives," as applied by DOE here, violates the First Amendment protection for academic freedom recognized by the Supreme Court.

Conclusion

The threat to academic freedom involved in DOE's enforcement of a standard of "balance of perspectives" to the funded activities of CMES is not new. DOE's position in this matter appears to be a direct descendant of the so-called Academic Bill of Rights that was proposed to, but never enacted by, Congress and several state legislatures in the early years of this century.[55] Like DOE's action in this matter, those bills sought, among other things, to require a balance of perspectives within the curriculum (as well as in the hiring of faculty). The issue there, as here, was not whether a diversity of perspectives is a desirable goal. Rather, it was whether the achievement of that goal should be left to the academic judgment of universities and their faculty or whether it should be defined, imposed, and enforced by administrators (or courts), with the attendant risk that academic judgment would be replaced by political criteria. Accordingly, the Academic Bill of Rights was successfully opposed on the ground that it would result in infringements on academic freedom.[56] That effort, however, at least sought to achieve its purpose through legislation in an open and deliberative process—a context in which principled arguments could be made in opposition.

Here, by contrast, an executive agency, relying on a standard not found in the statute, without engaging in rulemaking procedures, and in the absence of any prior consistent practice, used an investigative procedure, accompanied by a threatened loss of federal funding, to try to impose its views of what should be taught at two institutions of higher education. Under those circumstances, it is understandable that those universities would feel constrained to respond with a factual refutation rather than a legal challenge to the agency's statutory or constitutional authority—especially where, as here, such a factual refutation was available and convincing. However, in light of DOE's subsequent claim that it acted appropriately in this matter, it is important to make clear that its actions represent a troubling and ongoing threat to academic freedom.

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[55] *See* Cheryl A. Cameron et al., *Academic Bills of Rights: Conflict in the Classroom,* 31 J.C. & U.L. 243 (2005). Those bills were based on a proposal by David Horowitz that can be found at http://la.utexas.edu/users/hcleaver/330T/350kPEEHorowitzAcadBillTable.pdf (last visited May 13, 2020 at 3:33 p.m.).

[56] *See, e.g.*, Statement on the Academic Bill of Rights of Committee A of the American Association of University Professors (posted December 2003), http://www.aaup.org/AAUP/comm/rep/A/abor.htm.

VALUING TUITION WAIVERS FOR TAX PURPOSES

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Abstract

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.

Warning! The following is about a tax issue, but please keep reading. The issue is actually interesting—and important to American universities and their employees: what is the value, for tax purposes, of a taxable tuition waiver provided by a university to an employee or to an employee's spouse or dependent? I have written about this issue for tax publications,[1] but it deserves wider exposure in the academy. University administrations often get the answer wrong, to the detriment of both the institutions and the employees.

Under generally applicable principles of tax law, it is the *value* of a taxable benefit provided by employer to employee that should be included in the employee's income. Undergraduate tuition waivers are not taxed in most circumstances—and should never be taxable as long as a tuition reduction plan meets statutory requirements—so valuation of those waivers generally does not matter for tax purposes. Whatever their value, the undergraduate waivers are not taxable to the employees.[2] But many graduate and professional school tuition

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[1] Erik M. Jensen, *Graduate Education and the Taxation of Tuition Reductions*, 158 TAX NOTES 1187 (2018) [hereinafter Jensen I]; Erik M. Jensen, *If a Tuition Reduction Is Taxable, What's the Measure of Income?*, J. TAX'N INVESTMENTS, Summer 2018, at 63.

[2] The controlling provision is generally I.R.C. section 117(d), which excludes from gross income any "qualified tuition reduction," I.R.C. section 117(d)(1), defined as "the amount of any reduction in tuition provided to an employee of an organization described in section 170(b)(1)(A)(ii) [which refers to "an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on"] for the education (*below the graduate level*) at such organization (or another organization described in section 170(b)(1)(A)(ii)) of—
(A) such employee, or
(B) any person treated as an employee (or whose use is treated as an employee use) under the rules of section 132(h).

I.R.C. § 117(d)(2) (emphasis added). Section 132(h) extends the potential exclusion to undergraduate tuition waivers for, among others, spouses and children of a school's employees. *See* I.R.C. § 132(h)(2).

waivers provided by universities to their employees or employees' family members are taxable to the employees, and determining the value of those waivers is therefore critical.[3] (Whether the distinction between undergraduate and graduate tuition waivers makes sense as a matter of tax policy, it is the law.[4])

It is my understanding that most, if not all, universities take the position that the value of a taxable tuition waiver is determined by using the stated tuition figure (the sticker price). My school, Case Western Reserve University, does things that way. For example, if the annual sticker price for a graduate or professional program is $50,000 and the purported tuition waiver is $30,000, the university reports that the employee has income of $30,000 and withholds tax from the employee's paycheck accordingly.

In many situations, however, using sticker price to measure value for tax purposes leads to nonsensical results. At one time, sticker price may have been a good proxy for value, but that stopped being the case more than thirty years ago, when increases in university sticker prices began to significantly outpace

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(Given the statutory language, tax-free tuition waivers can also be available for elementary and secondary education.) For an otherwise eligible waiver to be tax free to a highly compensated employee, however, the tuition reduction plan must not discriminate in favor of such employees. I.R.C. § 117(d)(3). If the no-discrimination rule is violated—if, for example, the waiver plan is available only to the families of faculty members—an undergraduate tuition waiver would be taxable to any highly compensated employee.

[3] The exclusion of section 117(d)(1) generally would not apply to a graduate-level waiver. *See supra* note 2 (quoting language of section 117(d)(2), referring to "below the graduate level"). But section 117(d)(5) provides special treatment for tuition waivers provided to graduate teaching and research assistants—applying the statutory language quoted *supra* note 2 "as if it did not contain the phrase "(below the graduate level)."

Legislation proposed in the 115th Congress would have repealed section 117(d), including the special treatment for graduate teaching and research assistants receiving tuition waivers. *See* H.R. 1, 115th Cong., 1st Sess., § 1204(a)(3) (2017), https://waysandmeansforms.house.gov/uploadedfiles/bill_text.pdf. That legislation attracted enormous negative reaction from universities worried about the effects on graduate assistants and the institutions' ability to attract such assistants cheaply. The Tax Cuts and Jobs Act of 2017 (as it is generally but not officially known), Pub. L. No. 115-97, 131 Stat. 2054, did not include the repeal. I have questioned whether the repeal of section 117(d) would have been catastrophic for most teaching and research assistants, who ought to be treated as employees for tax purposes. Jensen I, *supra* note 1. Although the general rules applicable to graduate-level tuition waivers are in section 117(d), a particular graduate-level waiver may be excluded from an employee's gross income if, for that employee, the benefit is a "working condition fringe" (i.e., the tuition, if paid by the employee, would be deductible to him or her as an ordinary and necessary business expense), *see* I.R.C. § 132(a)(3), (d), or if it is part of an educational assistance plan. *See* I.R.C. § 127 (generally permitting educational benefits provided by employer to employee to be excluded from the employee's gross income up to $5250 per year, assuming the statutory requirements are satisfied—including a requirement that the plan not discriminate in favor of highly compensated employees). One or both of those provisions would help many, if not most, graduate assistants if section 117(d)(5) were to disappear.

[4] These rules date from the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 532, 98 Stat. 494, 887 (adding section 117(d)(1)–(3) to the Internal Revenue Code), and the Technical [*sic*] and Miscellaneous Revenue Act of 1987, Pub. L. No. 100-647, § 4001(b)(2), 102 Stat. 3342, 3643 (adding section 117(d)(5) to the Code). The justification for treating graduate-level waivers differently from other waivers was to put employees of colleges without graduate programs on an equal footing (or as close as possible to an equal footing) with employees of universities that have both undergraduate and graduate programs. Whether that goal is achieved—or is even desirable—is another matter.

inflation.[5] University officials talk a lot about "discount rates" these days—the percentage of sticker price not paid by the average student—as if their classrooms could be filled with qualified students who would pay full sticker price.[6] In some programs at some universities (dental and medical schools, for example), that may be true. But for most graduate and professional programs, few students—other perhaps than foreign students supported by their governments—pay the sticker price.[7] Indeed, many of the programs would disappear if they were dependent on full-paying customers. In law schools at many universities, for example, the average student pays less than fifty percent of the published tuition figure.[8]

Because sticker price bears no necessary relationship to what potential students would be willing to pay, it does not reflect value in any meaningful sense. The general understanding among tax professionals is that the fair market value

[5] It is not surprising that discount rates have risen to unprecedented levels when sticker prices have skyrocketed. The $5000 in Cornell Law School tuition that my parents paid on my behalf in 1978-79 is the equivalent of slightly less than $19,000 today, but the sticker price at Cornell is now almost $68,000.

[6] Significant "discounting" is pervasive in undergraduate institutions, particularly private ones. *See* Marjorie Valbrun, *Discount Rates Hit Record Highs*, INSIDE HIGHER EDUC. (May 10, 2019, https://www.insidehighered.com/news/2019/05/10/nacubo-report-shows-tuition-discounting-trend-continuing-unabated) (noting that, for the first time, discount rates for freshmen at private colleges exceeded fifty percent); Emma Petit, *A Fifth of Private Colleges Report First-Year Discount Rate of 60 Percent, Moody's Says*, CHRON. HIGHER EDUC. (Nov. 30, 2018), https://www.chronicle.com/article/A-Fifth-of-Private-Colleges/245092.

[7] One anonymous referee for *Journal of College & University Law* challenged my statement that discounts are the norm in graduate schools, pointing in particular to master's programs. It is true that discounting in master's programs has historically been less than in doctoral and professional programs. *See* Sandy Baum & Patricia Steel, *The Price of Graduate and Professional School: How Much Students Pay* 7 (Urban Institute, June 2017), https://www.urban.org/research/publication/price-graduate-and-professional-school-how-much-students-pay. It is also true that some universities have been able to create money-making master's programs, often in professional schools. But many of the would-be cash cows have turned out to be disappointments. *See* Lindsay McKenzie, *Has the Master's Degree Bubble Burst?*, INSIDE HIGHER EDUC. (Dec. 20, 2019), https://www.insidehighered.com/digital-learning/article/2019/12/20/probing-slowdown-masters-degree-growth?utm_source=Inside+Higher+Ed&utm_campaign=889b82e0a4-DNU_2019_COPY_03&utm_medium=email&utm_term=0_1fcbc04421-889b82e0a4-198609537&mc_cid=889b82e0a4&mc_eid=65b4834ff0. In any event, it is hardly the norm in traditional programs in the arts and sciences for students to pay full sticker price. (If it were the norm, why wouldn't schools raise their sticker prices?) And even if it is the case that students in a particular graduate program are generally paying full sticker price, that would mean only that sticker price would be a good measure of the value of a taxable tuition waiver *in that program*. It would not mean that sticker price is necessarily a good measure in other graduate programs at the same institution.

[8] *See* Paul Caron, *Median Private Law School Tuition Discount: 28% (Average Scholarship: $20,129)* TAXPROF BLOG (Feb. 28, 2018),, https://taxprof.typepad.com/taxprof_blog/2018/02/median-private-law-school-tuition-discount-28-average-scholarship-20129.html) (listing twenty schools with discount rates above forty percent, eight of which—one being my institution—exceeded fifty percent); *see also* Benjamin H. Barton, *The Law School Crash*, CHRON. HIGHER EDUC., Jan. 3, , https://www.chronicle.com/interactives/20200103-LawSchoolCrash?cid=wsinglestory_hp_1 2020 (noting that in 1999–2000, about fifty-eight percent of law students paid full sticker price, but in 2018–19 only twenty-nine percent did); Mike Spivey, *An In-Depth Analysis of the 2019 Law School Admissions & Entering Class Data* (Dec. 15, 2019), https://blog.spiveyconsulting.com/aba-2019-data/ (noting that 73.3% of law students in 2019 were receiving scholarship aid; at forty-eight schools at least 90% of the students receive scholarships; and at five schools *all* students receive scholarship aid). It has been estimated that "aggregate annual tuition revenue for all accredited American law schools fell over $1.5 billion from its inflation-adjusted peak in 2011–12." Bernard A. Burk et al., *Competitive Coping Strategies in the American Legal Academy: An Empirical Study*, 19 NEV. L.J. 583, 583 (2018).

of property is what a willing buyer and a willing seller of property, negotiating at arm's length, would agree on as the price. Similarly, the fair market value of services is the price that a willing provider and a willing consumer of services would negotiate. Such a definition is inevitably fuzzy in its application, unless the property being transferred is publicly traded,[9] but it obviously cannot mean sticker price if only a few are paying that price.[10]

If you are not already convinced that sticker price is a misleading measure of value, imagine that (for some reason) a university raised its sticker price in all programs by $50,000, but each student continued to pay exactly the same amount in tuition.[11] If that were to happen, would anyone seriously think that an employee receiving a taxable full-tuition waiver would have an annual increase of $50,000 in income? That would be absurd; the increase in sticker price would have changed nothing of substance. The net revenue figure, which is what institutions should care about, would be the same.[12] There would be no additional value from the preposterously overstated waiver.

Using sticker price as the measure of value makes taxable tuition waiver programs much less attractive than they should be. That is obviously harmful to employees, but it also harms the institutions, which lose good students and perhaps good employees as well. A taxable tuition waiver leaves the "beneficiary" in a worse position—because of the tax imposed on the amount of the purported "waiver" (the tax on $30,000 in my example above)—than a person with equivalent credentials but no family connections to the university who receives a tax-free scholarship in the same amount. In that situation, the employee "benefit" might even be considered to have *negative* value. All other things being equal, well-informed students eligible for such waivers should probably go elsewhere for

[9] I am aware of no publicly traded services.

[10] It is like the tag price when you can "Buy one suit and get two free." The tag may say $600 for one suit, but, regardless of what it says, you are in effect being offered three $200 suits for that price. If that is the case, the "discount rate" in the haberdashery context is zero.

[11] Many are puzzled why colleges and universities have sticker prices that substantially exceed what the average customer is going to pay and that, if folks take the numbers seriously, can deter good students from applying. What is the point of pretending to charge more than most potential students with acceptable credentials (or the parents of such students) will be willing to pay? (After all, an easy way to decrease the discount rate, if that really were a figure more important than net revenue, would be to reduce the sticker price, which a few schools have reluctantly done.) Several explanations have been advanced. To begin with, a high sticker price may bring in *some* additional revenue if a few students, including foreign students, actually pay that price. University finances might also be improved because it is presumably easier to convince a potential donor to create an endowment fund for student aid than to convince the donor to create a fund to pay for janitorial services (even though the annual income from both sorts of funds will be used for operating costs). In addition, apparently there is prestige value in having a high sticker price. (If a school says it charges as much as Harvard does, maybe—I guess—some folks think it must be as good as Harvard.) Besides, a student likes to be able to tell Mom and Dad (and potential employers) about receiving a big "scholarship." (One assumes, however, that parents are starting to figure out that most tuition reductions in the form of scholarships are a product of market forces and not their kids' inherited genius. Employers must also have become aware that many scholarships listed on job applicants' CVs do not mean much.)

[12] Even if the effect of doing so would be to increase the discount rate, it is generally better for an institution's bottom line to take an additional student who will pay $20,000 when the sticker price is $50,000, rather than to have the student go elsewhere. (That is true so long as the additional student will not create substantial additional costs.)

graduate school, where a tuition reduction can be characterized as a tax-free scholarship. [13] Well-informed potential employees also should go elsewhere if they are making their employment decisions on the assumption that graduate waivers will be wonderful for them and their families.

And not everyone is well informed, of course. Many disgruntled university employees around the country thought they were going to get terrific benefits from their universities' graduate tuition waiver programs—indeed, universities typically characterize the waivers as major benefits—until the employees saw how much additional tax was being withheld from their paychecks.[14]

In a world with differential pricing (that is, when the same service is provided to different customers at different prices, the norm at universities), there is no clearly right answer to the valuation question. I am inclined to think the average amount paid in tuition in a particular program would be a defensible figure to use as the value of a full-tuition waiver. If, despite a $50,000 sticker price, the average graduate student is paying $20,000 in tuition in the college of engineering, say, it makes more than a little sense to value a full waiver in that college at $20,000 (or a partial waiver up to $30,000 as zero). But I could be convinced that, in some cases, a different number would be better.[15] We can argue about what the "right" answer is in any particular situation, but some answers are clearly wrong. And mindlessly using sticker price—the $50,000 figure—to determine value is one of them.[16]

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[13] Tuition reductions provided to employees or family members of employees are generally not treated as tax-free scholarships under section 117(a) because, even though in form tuition waivers may look like scholarships, they are provided as compensation for the employees' services. *See* Treas. Reg. § 1.117-4(c) (excluding from the definition of "scholarship" a tuition benefit that is part of a quid pro quo arrangement). As a result, a university ought not to be able to circumvent the rules governing the taxability of graduate-level tuition waivers by recharacterizing tuition reductions to employees or their family members as "scholarships." Some universities do take the position that tuition reductions of that sort can be tax-free scholarships in at least some circumstances, and that might be right—but only if the awards are made with the schools' having no knowledge of the students' connection with university employees. In most cases, such an assumption seems unrealistic.

[14] I have spoken to such people. They are irritated at the result, of course, and also because their employers gave them no hint about the unhappy tax consequences. Those consequences might well have affected the decision about where to go to graduate or professional school.

[15] One critical question is who gets included in computing the average tuition actually paid—that is, the benchmark against which the value of any particular waiver might be measured. For example, should the comparison group include only American students, American students and foreign students not subsidized by their governments, some other subset of students, or all students without regard to subsidies from other sources?

[16] A referee commented, "The fact that universities are able to offer financial aid in the form of scholarships or institutional grants to supplement tuition payments—thereby creating a discount rate—does not mean that the value of the education being received is not reflected in the full sticker price. There are schools where aid is largely if not completely need-based. Why would donors to the university provide money for financial aid if they did not think the scholarships given to needy students reflected the value of the education those students received?" To begin with, not all tuition "aid" is funded, and unfunded aid is a financial-statement entry, nothing more. Moreover, the income from endowments for scholarships—funded scholarships—is used for the same purpose as tuition: to cover operating costs—paying for faculty, staff, heating, air conditioning, and so on. *See supra* note 11. Why do donors contribute for such purposes? To help the institution and to get a tax deduction, I suppose. Universities regularly claim, generally truthfully, that tuition does not cover all costs, but costs should have no bearing in determining the value of tuition waivers. For tax

I have been told by university officials that treating sticker price as value is the only way they can administer a waiver program. I disagree. Yes, they cannot be expected to make individualized determinations of value; that would be an administrative nightmare (and it is also not the way valuation is ordinarily done for tax purposes).[17] Yes, a $50,000 waiver is likely to have a different value than a $20,000 waiver in a particular program at a university,[18] but a $20,000 waiver in that program should have the same value, for tax purposes, to all students getting such a taxable tuition reduction.[19] In any event, any administrator knows the average discount rate for each constituent unit in his or her university. Using those data for valuation purposes would present no administrative problems whatsoever.

Besides, employers have to come up with valuation figures for all sorts of difficult-to-value taxable benefits—flying for personal reasons at no charge on the company plane or eating meals at no charge in the executive dining room, for example. A certain amount of arbitrariness may be necessary for such valuation "rules"—grand theorists might not be satisfied with the given answers in particular situations—but we have to do the best we can. And it is helpful when the Internal Revenue Service (IRS) provides guidance about acceptable valuation methodologies, either through regulations or subregulatory notices.[20]

I can see no reason why universities should not want to do better on the valuation issue. What is the downside of doing something that would make employees happier and make recruiting good students and employees easier?[21] Deans do get nervous when real dollars might be reallocated within a university

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purposes, value is what consumers are willing to pay, regardless of the costs incurred by the provider and regardless of how inherently valuable we might think education is.

[17] A system in which subjective value is controlling—so that taxpayers could always argue that property or services received are not worth much of anything *to them*—would clearly be unworkable.

[18] I use the word "likely" in that sentence because it could be that, in a particular situation, neither a $50,000 waiver nor a $20,000 one has any value at all.

[19] That is, administrators cannot possibly be expected to determine how much each waiver student would have been willing to pay in tuition had there been no waiver, and to value the waivers accordingly—student by student.

[20] *See, e.g.*, Treas. Reg. § 1.61-21(g) (setting out the "non-commercial flight valuation rule").

[21] Often the concern with valuing difficult-to-value, taxable fringe benefits is that some employers may try to undervalue the benefits, making employees happy but damaging the federal treasury. That is decidedly not the situation with taxable tuition waivers, however, and many universities seem to be totally unconcerned about the welfare of their employees. The federal treasury is the beneficiary of the overvaluation (except insofar as, because of the overvaluation, eligible employees decide to forgo the waivers offered by their home institutions).

A referee complained that I made no showing that "the need to pay taxes for the value of graduate courses (once they cost more than $5250 per year [*see supra* note 3]) is a deterrent to recruiting employees or having employees taking advantage of tuition remission programs." I have several responses to that claim. One is basic economics: you make something more expensive, and folks are, except in unusual circumstances, going to buy less of it. I know from personal experience that potential hires do sometimes ask about tuition waiver programs; such programs affect employment decisions. If the referee's point is that people generally do not take into account the taxability of waivers, I agree. But if that is so, it is because the employees or potential employees are clueless about tax consequences (and are not helped by the universities), and that is not a good thing. It is not unusual for employees to have buyer's remorse when a tuition "benefit" that seemed so wonderful results in an unexpectedly dramatic reduction in take-home pay. *See supra* note 14 and accompanying text.

system, but a change in valuation methods need not affect existing allocation schemes.[22] And I hope that no university is treating tuition waivers that result in little or no lost revenue as overhead costs for purposes of government grants. If that is not so—if Uncle Sam is "reimbursing" some universities for phony costs—that is a scandal in the making, not a reason to maintain an absurd valuation method.

Of course, the application of the rules should be as uniform as possible. No university wants to go it alone, in a publicly visible way, in challenging what has become a widespread practice. Any tax liability is ultimately the employees', but universities have withholding obligations, with penalties potentially applicable for underwithholding. University officials therefore want to be sure that the IRS will bless a more realistic valuation process. Popular perceptions to the contrary, the IRS can be reasonable, and it could be convinced by a concerted university effort on this issue. Or if the IRS has already been convinced by a few educational institutions that sticker price does not necessarily equal value, it should let everyone else know that—so the rest of the schools with graduate and professional programs can get on board.

[22] For example, if $30,000 attributable to a tuition waiver leads to real dollars' being shifted from the budget of one school in a university to another's or from the university's fringe benefits budget to that of the school in which the student beneficiary is enrolled, there is nothing in tax law that would prevent the university from continuing that policy—even if the real value of the waiver is little or nothing.

THE HAZING TRIANGLE: RECONCEIVING THE CRIME OF FRATERNITY HAZING

JUSTIN J. SWOFFORD*

Abstract

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.

* J.D. Candidate, The Pennsylvania State University, Penn State Law, 2021. This note is dedicated to the memory of Timothy Piazza and all other men and women who have lost their lives to hazing. They are martyrs in the ongoing quest to understand and eradicate this difficult problem. I also wish to thank Dr. Robert Farrell for his helpful comments on this note.

INTRODUCTION

Beta Theta Pi, a fraternity in existence since 1839, strives "[t]o develop men of principle for a principled life."[1] On February 2, 2017, that commitment to principle was compromised when fraternity brothers at The Pennsylvania State University ("Penn State")'s Alpha Upsilon chapter of Beta Theta Pi forced a Penn State pledge,[2] named Timothy Piazza, to consume eighteen drinks in eighty-two minutes, witnessed him fall down a flight of stairs, filmed his unconscious body for hours using cell phone cameras, and attempted to destroy evidence of their activities before ultimately summoning outside help.[3]

In 2018, the Pennsylvania General Assembly enacted the Timothy J. Piazza Antihazing Law (hereinafter Piazza Law or Law) in response to the incident at Beta Theta Pi.[4] While Pennsylvania's Piazza Law necessarily increases criminal penalties on hazing perpetrators,[5] this note argues that the Piazza Law places criminal penalties on one-off actors that are disproportionate with the comparatively light penalties it places on universities and fraternities.[6]

This note will specifically address fraternity hazing in the collegiate setting.[7] Part I of this note explores the interplay between fraternities, host institutions,[8] and hazing, and provides a review of the body of scholarship and law that has arisen in response to fraternity hazing.[9] Part II explores antihazing law's interplay with real-world actors through an extended case study of Pennsylvania antihazing law and Timothy Piazza's 2017 hazing-related death at Penn State.[10] Part III frames the issue of fraternity hazing through what it dubs the "Hazing Triangle" and explores how this "triangle" operates in the context of the Piazza Law.[11] Part IV suggests an "inversion" of the Hazing Triangle that places greater civil and criminal culpability upon fraternities and host institutions.[12] Finally, Part V provides a brief summation of this note's policy recommendations and briefly suggests a path forward for scholars and commentators tackling the issue of fraternity hazing.[13]

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1. *See About Beta Theta Pi*, BETA THETA PI, https://beta.org/about/about-beta-theta-pi/ (last visited Apr. 12, 2020).
2 . This note uses the term "pledge" to mean a person attempting to gain admission into a fraternity.
3. Mike Deak, *Parents Sue Penn State Frat Brothers over Tim Piazza's Hazing Death*, BRIDGEWATER COURIER NEWS (Feb. 5, 2019, 7:00 AM), https://bit.ly/2wlk2yW/.
4. *See* 18 PA. STAT. AND CONS. STAT. ANN. §§ 2801–11 (West 2020).
5. *See infra* Part III.C.1.
6. *See infra* Part III.
7. While this note's analysis and recommendations are largely applicable to sorority hazing as well, this note's specific focus is on fraternity hazing.
8. This note uses the term "host institution" to refer to a school, college, or university that houses, partners with, or officially recognizes a fraternity.
9. *See infra* Part I.
10. *See infra* Part II.
11. *See infra* Part III.
12. *See infra* Part IV.
13. *See infra* Part V.

I. BACKGROUND

This part provides a history and overview of fraternities and fraternity hazing,[14] reviews the legal and sociological scholarship on antihazing law,[15] and explores current contemporary antihazing statutes.[16]

A. The Historical Relationship Between Fraternities and Host Institutions

The role of Greek[17] life at American host institutions has progressed in various stages since seniors at Union College formed Kappa Alpha, the first social fraternity, in 1825.[18] While nineteenth-century fraternities provided independence from collegiate austerity,[19] early twentieth-century fraternities emphasized prestige and the exclusion of minorities from their ranks.[20] The current iteration of Greek life on American college campuses is marked by media portrayals glamorizing a party lifestyle.[21] Currently, thirteen percent of male students enrolled in host institutions full time are fraternity members[22] and the total value of fraternity houses nationwide totals at least three billion dollars.[23]

Because of their financial might, nationally recognized fraternities provide "tremendous financial savings" to host institutions in terms of providing student housing, which expands the total number of students host institutions may admit.[24] Fraternities also serve host institutions in several other important respects.[25] For example, fraternities provide host institutions with "distributed discipline" wherein administrators with busy agendas can maintain orderly student conduct through the use of Greek alumni and chapter presidents who (ostensibly) model appropriate behavior for students on an interpersonal level.[26] Also, donations from alumni involved in Greek life are higher than donations from non-Greek students.[27]

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14. *See infra* Part I.A.
15. *See infra* Part I.B.
16. *See infra* Part I.C.
17. Where the term "Greek" is used in this note, it is meant synonymously with "fraernity."
18. *See* ALEXANDRA ROBBINS, FRATERNITY: AN INSIDE LOOK AT A YEAR OF COLLEGE BOYS BECOMING MEN 37–43 (2019).
19. *See id.* at 37–38.
20. *See id.* at 39–42.
21. *See id.* at 42–43.
22. *See id.* at 43.
23. *See* Caitlin Flanagan, *The Dark Power of Fraternities*, ATLANTIC (Sept. 9, 2019, 2:00 PM), https://bit.ly/2SOfMzp.
24. *See id.*
25. *See* Vox, *Why Colleges Tolerate Fraternities*, YOUTUBE (Sept. 24, 2018), https://bit.ly/2OYcsAz.
26. *See id.*
27. *See id.* Greek alumni possess considerable financial influence over their host institutions. *See, e.g.*, NICHOLAS L. SYRETT, THE COMPANY HE KEEPS: A HISTORY OF WHITE COLLEGE FRATERNITIES 161 (2009) (noting that host institutions' financial dependence on fraternities had solidified by the close of the nineteenth century because of "purse string[]" control by fraternity alumni who largely dominated host institutions' trustee boards); Katherine Mangan, *Who Helps and Hurts in Fighting Unruly Frats*, CHRON. HIGHER EDUC. (Aug. 30, 2017), https://bit.ly/2AqSSZz ("An investment executive was so enraged by his chapter's suspension for hazing at Salisbury University that he withdrew a $2-million donation to the institution.").

While fraternities serve a need for student belonging, they can also "overwhelm their members with programming" and "romanticize the past."[28] Political lobbying by fraternities has led Congress to include freedom-of-association clauses in higher education bills to secure fraternities' place on campuses.[29] At least one commentator has suggested that this causes host institutions to operate from a weakened position vis-à-vis fraternities.[30] In the latter twentieth century, the large-scale rejection of *in loco parentis*[31] liability for colleges and the enactment of the National Minimum Drinking Age Act[32] triggered a social shift toward private partying that was an ideal situation for fraternities seeking to hide drinking activities from university and public scrutiny.[33] However, rising insurance costs resulting from numerous lawsuits in the 1980s caused many fraternities to self-insure under what is now dubbed the Fraternal Information and Programming Group (the Group).[34] Over thirty fraternities are members of the Group, and many fraternities who are not Group members self-insure under analogous schemes.[35] Self-insured fraternities shift financial responsibility onto their undergraduate members, whose families sometimes subsidize the venture through the families' own homeowner's insurance policies.[36]

B. *Fraternity Hazing and Antihazing Law*

While definitions vary, hazing can be characterized as "any action taken or any situation created intentionally that causes embarrassment, harassment or ridicule and risks emotional and/or physical harm to members of a group or team, whether new or not, regardless of the person's willingness to participate."[37] Over 250 hazing deaths have occurred at American schools since

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28. *See* ROBBINS, *supra* note 18, at 49 (noting that undergraduate chapter members "binge-drink and haze, all to make it like it *was* [and] real life imitates the cinematic portrayals, too. It's a cycle that feeds on itself") (emphasis added).
29. *See* Flanagan, *supra* note 23.
30. *See id.*
31. *See In Loco Parentis*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.").
32. *See* 23 U.S.C.A. § 158 (West 2020).
33. *See* Flanagan, *supra* note 23; *see also* Bradshaw v. Rawlings, 612 F.2d 135, 138 (3d Cir. 1979) ("[T]he modern American college is not an insurer of the safety of its students [T]he modern college student [is] an adult capable of protecting [his] own self-interests."). For a critique of the shift away from *in loco parentis* liability for fraternities, see Gregory E. Rutledge, *Hell Night Hath No Fury Like A Pledge Scorned and Injured: Hazing Litigation in U.S. Colleges and Universities*, 25 J.C. & U.L. 361, 378 (1998) (noting that despite universities "almost becom[ing] immune to liability for injuries to their students, even when the injury is on campus," fraternities have faced increased litigation since the law's shift from host-institutional liability).
34. *See* Flanagan, *supra* note 23 (noting that, according to the group's policy manual, either a third-party vendor or group members themselves must supply alcohol at fraternity parties to circumvent social host and dram shop theories of liability).
35. *See id.*
36. *See* JOHN HECHINGER, TRUE GENTLEMEN: THE BROKEN PLEDGE OF AMERICA'S FRATERNITIES 31–33 (2017).
37. *What Hazing Looks Like*, HAZINGPREVENTION.ORG, https://bit.ly/2SLL8Xn (last visited Apr. 12, 2020).

the 1800s,[38] and at least one person has died in connection with fraternity hazing each year for the past two decades.[39] Almost all hazing deaths since 1970 are attributable to fraternity or sorority incidents.[40] Seventy-three percent of fraternity and sorority members report that they have experienced hazing.[41] Although a nexus exists between Greek life and excessive drinking,[42] forced alcohol consumption is by no means the sole reason why which fraternity hazing can or does occur.[43]

Hazing continues at American fraternities each year "through a victim-to-perpetrator cycle" in which "students convince themselves that . . . the hazing was itself beneficial."[44] Although almost all fraternities now promulgate written antihazing policies,[45] belief in hazing's positive role nonetheless permeates fraternity culture.[46] Fraternities often place teenage members in charge of

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38. *See* Chris Quintana & Max Cohen, *Young Men Have Died in Fraternities Every Year for 2 Decades, But Frats Are Slow to Change*, USA TODAY (Sept. 5, 2019, 1:40 PM), https://bit.ly/37sYNbm.

39. *See id.* Hazing is hardly the sole liability facing fraternities, however. *See* Flanagan, *supra* note 23 (noting, inter alia, that twenty-three percent of liability claims against fraternities involved assault and battery, and fifteen percent of claims involved sexual assault).

40. *See* S. Brian Joyce & Jenny Nirh, *Fraternity and Sorority Hazing*, *in* CRITICAL PERSPECTIVES ON HAZING: A GUIDE TO DISRUPTING HAZING CULTURE 52, 55 (Cristóbal Salinas Jr. & Michelle L. Boettcher eds., 2018).

41. See id.

42. *See* Michael John James Kuzmich, Comment, *In Vino Mortuus: Fraternal Hazing and Alcohol-Related Deaths*, 31 MCGEORGE L. REV. 1087, 1093 (2000).

43. Although most fraternity hazing deaths from 1970 to 2017 involved alcohol, no alcohol-related hazing deaths occurred until 1940, largely because chapters did not use alcohol "as a litmus test of new member readiness" until this time. *See* Hank Nuwer, *Hazing in Fraternities and Sororities: A Primer*, *in* HAZING: DESTROYING YOUNG LIVES 24, 34 (Hank Nuwer ed., 2018). Further, hazing persists in Black Greek organizations, *see* Paul Ruffins, *The Persistent Madness of Greek Hazing*, BLACK ISSUES IN HIGHER EDUC., June 25, 1998, at 14, despite evidence that Black college students tend to drink less. *See* Walter M. Kimbrough, *The Hazing Problem at Black Fraternities*, ATLANTIC (Mar. 17, 2014), https://www.theatlantic.com/education/archive/2014/03/the-hazing-problem- at-black-fraternities/284452/. Additionally, one meta-analysis of drinking among fraternity members concluded that "alcohol interventions show limited efficacy in reducing consumption and problems among fraternity and sorority members." *See* Lori A.J. Scott-Sheldon et al., *Alcohol Interventions for Greek Letter Organizations: A Systematic Review and Meta-Analysis, 1987 to 2014*, 35 HEALTH PSYCHOL. 670, 670 (2016).

44. *See* Brandon W. Chamberlin, Comment, *"Am I My Brother's Keeper?": Reforming Criminal Hazing Laws Based on Assumption of Care*, 63 EMORY L.J. 925, 962 (2014) (explaining that hazing victims tend to become perpetrators themselves); s*ee also* ROBBINS, *supra* note 18, at 123 (attributing hazing to a need for group survival); Jamie Ball, *This Will Go Down on Your Permanent Record (But We'll Never Tell): How the Federal Educational Rights and Privacy Act May Help Colleges and Universities Keep Hazing a Secret*, 33 SW. U. L. REV. 477, 481 (2004) (noting that hazing "capitalizes on the dangerous intersection of vulnerability and daring that is characteristic of college-aged men and women."); Stephen Sweet, *Understanding Fraternity Hazing: Insights from Symbolic Interactionist Theory*, 40 J.C. STUDENT DEV. 355, 362 (concluding that hazers believe their "abuse of recruits is a desirable part of entry" into fraternities).

45. *See* David W. Bianchi & Michael E. Levine, *Hazing Horrors: Who's Accountable?*, TRIAL, June 2019, at 53, 55.

46. In an editorial for the *Philadelphia Tribune*, a lawyer and former fraternity member extolled the use of fraternity hazing provided that it does not involve "verbal and physical abuse." *See* Michael Coard, *Can Greek Hazing Be a Good Thing?*, PHILA. TRIB., Sept. 28, 2017, at 7A ("[I]f you ask me if I was ever hazed when I pledged, I would say no — even if I was."). Other former fraternity members echo this sentiment. *See* ROBBINS, *supra* note 18, at 119–20 (quoting, anonymously, a former national fraternity officer whose fraternity hazed a member that ultimately died: "Hazing

hazing, leading to "arbitrary and sometimes dangerous power and punishments."[47] Additionally, a credible body of evidence suggests that during fraternities' early history, host institutions not only tolerated hazing, but in fact *encouraged* fraternities to haze.[48] In 1915, the University of Illinois's dean of men declared that fraternity hazing was a form of "horse-play" that "determine[d] what a man possesses, whether he has a streak of 'yellow' or whether he has stamina."[49] Early twentieth-century child development specialists echoed educators' attitudes on hazing, declaring that fraternity hazing was "a natural, even beneficial, part of a boy's growing up."[50] Psychologist G. Stanley Hall wrote in a 1904 book on adolescence that Greek hazing freed young men from the "petticoat control" of women.[51]

Recent scholarship suggests that for policy makers to reduce student hazing deaths, they must first grapple with hazing's social and psychological catalysts.[52] The psychological underpinnings of hazing activity on the part of pledges and fraternity members include "normalcy bias,"[53] the "bandwagon effect,"[54] and the "normalization of deviance."[55] In addition, the "groupthink"

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works . . . hazing creates an unusually strong bond between people . . . and the toughness also creates the illusion of reaching a worthwhile goal.").

47. *See* ROBBINS, *supra* note 18, at 77.

48. *See* Hank Nuwer, *How Schools May Have Facilitated and Operationalized Hazing: An Interview with Peter F. Lake*, *in* HAZING: DESTROYING YOUNG LIVES, *supra* note 43, at 205, 205 (noting that host institutions provided spaces architecturally designed as secluded "hazing spaces," and that clear evidence shows that some institutions "operationalized" hazing); Cristóbal Salinas Jr. & Michelle L. Boettcher, *History and Definition of Hazing*, *in* CRITICAL PERSPECTIVES ON HAZING: A GUIDE TO DISRUPTING HAZING CULTURE, *supra* note 40, at 3, 7 (noting that hazing was once a graduation requirement in higher education because students "needed to be properly groomed."). A present-day example of this institutional recognition of hazing is Penn State Altoona, who, on its web site, notes that paddles "are often seen as a gift in the world of fraternities" and are often given as an "honor." *See Fraternity* and *Sorority Life Terminology*, PENN STATE ALTOONA, https://altoona.psu.edu/offices-divisions/student-affairs/student-civic-engagement/be-involved/fraternity-sorority-life/terminology (last visited May 30, 2020). In the same informational article, the school acknowledges that fraternity "initiation ceremon[ies]" are secret. *See id.*

49. See SYRETT, *supra* note 27, at 152.

50. *See* HECHINGER, *supra* note 36, at 52.

51. See *id.* at 53.

52. *See, e.g.*, Gregory S. Parks & Sarah J. Spangenburg, *Hazing in "White" Sororities: Explanations at the Organizational-Level*, 30 HASTINGS WOMEN'S L.J. 55, 117–18 (2019).

53. *See id.* at 97–98 (defining "normalcy bias" as "a mental state of denial that people enter when they are faced with a disaster [which] leads individuals to inaccurately reorder information to create a more optimistic outcome"); *see also* Bianchi & Levine, *supra* note 45, at 52 (noting that peer pressure in hazing cases causes pledges to do things that they would "never do outside of a pledging event.").

54. *See* Parks & Spangenburg, *supra* note 52, at 101 (defining the "bandwagon effect" as a situation where individuals tend to make decisions based on a larger group's social influence); *see also* Gregory S. Parks & Tiffany F. Southerland, *The Psychology and Law of Hazing Consent*, 97 MARQ. L. REV. 1, 53 (2013) (noting that "pledges may perceive that if they stick it out for another day . . . they will finally be members" and that this belief "may be particularly pronounced in groups, like pledge classes, where the individual's identity is submerged for the sake of the group's identity . . . ."); Jared S. Sunshine, *A Lazarus Taxon in South Carolina: A Natural History of National Fraternities' Respondeat Superior Liability for Hazing*, 5 CHARLOTTE L. REV. 79, 137 (2014) (noting that "the pledging process is like a contract of adhesion—you take it or leave it—and leaving it may be hard for pledges who have invested much of their time and themselves in their fraternity-to-be.").

theory of social psychology, which attempts to explain how the psychological need for group cohesion and consensus stifles individual dissent,[56] has been applied to the fraternity hazing context by hazing researcher Hank Nuwer.[57] Nuwer posits that "Groupthink" causes individual pledges to engage in acts they would normally dismiss as deplorable solely at the prospect of obtaining a fraternity's acceptance.[58] Another researcher, James C. Arnold, has applied research on cult psychology to fraternities and concluded that "chapters that haze use cult-like systematic manipulation . . . to effect psychological and social influence."[59] Researcher Stephen Sweet's social–psychological analysis of fraternity hazing concluded that hazers "manipulate pledges' definitions of self in a conscious manner" during the pledge process.[60] Echoing these commentators, courts deciding hazing cases have noted the inherent power inequities between fraternities and their members.[61]

In light of these social and psychological factors,[62] other scholars have expressed concern that statutory responses may be ineffective deterrents to fraternity hazing when aimed at the fraternity members themselves.[63] Scholarly concern over ineffective statutory response[64] is magnified by the concern that "hazing laws will drive even innocuous initiation activities further underground."[65] In one qualitative study analyzing college faculty attitudes

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55. *See* Parks & Spangenburg, *supra* note 52, at 113 (noting that "[c]ontinued deviance within an organization becomes normalized when there is persistence of the deviance within the organization's culture and policies").
56. *See* IRVING JANIS, GROUPTHINK 9 (1982).
57. Nuwer dubs his theoretical adaptation "Greekthink." *See* Nuwer, *supra* note 43, at 27–28.
58. *See id.* at 27.
59. *See id.* at 28; *see also* Justin M. Burns, Comment, *Covering Up an Infection with A Bandage: A Call to Action to Address Flaws in Ohio's Anti-Hazing Legislation*, 48 AKRON L. REV. 91, 117 (2015) ("[H]azing actions target a specific group of individuals whom the group demeans as 'not good enough' to be part of a group "); Hank Nuwer, *Greek Letters Don't Justify Cult-Like Hazing of Pledges*, CHRON. HIGHER EDUC., Nov. 26, 1999, at B7 ("Cut off from the day-to-day life of the college, fraternity and sorority recruits develop 'enforced dependency.'").
60. Sweet, *supra* note 44, at 359.
61. *See, e.g.*, Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity, 507 N.E.2d 1193, 1198 (Ill. App. Ct. 1987) (noting that "The social pressure that exists once a college or university student has pledged into a fraternal organization is so great that compliance with initiation requirements places him or her in a position of acting in a coerced manner"); Nisbet v. Butcher, 949 S.W.2d 111, 116 (Mo. Ct. App. 1997) (noting that "If great social pressure was applied [to the pledge] to comply with the membership 'qualifications' of the [[organization], [the plaintiff] may have been blinded to the danger").
62. *See supra* notes 52–61 and accompanying text.
63. *See, e.g.*, Gregory S. Parks et al., *Belief, Truth, and Positive Organizational Deviance*, 56 HOW. L.J. 399, 407 (2013) ("[W]here law may serve as a norm-orienting factor in the lives of individuals, it may play a less significant role in shaping organization members' behavior — given organizational beliefs, culture, and needs.").
64. *See, e.g.*, Skylar Reese Croy, *When the Law Makes the Lords of Discipline Actual Lords: Lessons on Writing Criminal Hazing Statutes*, 39 U. LA VERNE L. REV. 224, 253–54 (2018) (suggesting that "general criminal laws and hazing laws seem to have done little to deter hazing" because ambiguity in hazing statutes has increased prosecutorial discretion in pressing hazing charges).
65. *See* Chamberlin, *supra* note 44, at 958 (noting, as an example, that reports of hazing have increased in black Greek-letter organizations since a 1990 pledging ban); *see also* Bryce E. Johnson, *Please Tell Me You Caught That on Video! Social Media's Role in the Hazing Problem and Common Sense Solutions to Reduce the Prevalence of Hazing*, 39 U. LA VERNE L. REV. 62, 76 (2017) (noting that

about felony antihazing statutes, multiple study participants "felt very strongly that felony hazing laws were not effective at curtailing hazing activity at their institutions," while only two of six found the penalty effective.[66] One such faculty member elaborated:

> I don't think it's been effective. Students do hear . . . through the national news . . . about felony offenses involving hazing, but I don't think at my particular institution it's necessarily hit home. I don't think students necessarily understand the gravity of the hazing that they're engaged in, and the potential repercussions from the illegal activity they're engaged in.[67]

Student observations from a qualitative study at Alfred University uncovered similar skepticism toward the efficacy of antihazing policy.[68] Finally, although most hazing scholarship focuses on state-law solutions, a handful of commentators have suggested that Congress can or should enact federal antihazing legislation.[69]

C. *Criminal Antihazing Statutes*

Currently, forty-four states and the District of Columbia criminalize hazing in some form,[70] but six states have not codified hazing into their criminal statutes.[71] Only twelve states classify hazing as a felony.[72] Most existing antihazing statutes criminalize hazing as a misdemeanor resulting in a fine.[73]

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antihazing policies should target prevention, not punishment, because individual chapter regulation "drives hazing underground").

66. *See* Damon C. Richardson, University Officials' Perceptions About Felony Hazing Laws (2014) (unpublished Ph.D. dissertation, Barry University) (on file with author).

67. *See id.*

68. *See* Nicole Somers, *College and University Liability for the Dangerous Yet Time-Honored Tradition of Hazing in Fraternities and Student Athletics*, 33 J.C. & U.L. 653, 655 (2007). The "influential" study quoted a student who did not "see any possible or realistic method in which to limit, let alone eliminate," hazing. *See id.* at 673, 655. The efficacy of statutory solutions notwithstanding, fraternities themselves may be able to effect positive behavioral changes in students through behavioral modeling. *See* ROBBINS, *supra* note 18, at 292 (suggesting that traditional notions of masculinity play a role in hazing and that "better male-specific resources . . . could help fraternity brothers understand why they feel pressured and present more varied representations of gender roles"). Robbins also cites a 1996 study which found that student behavior shifted depending on whether students attended parties at "high-risk" or "low-risk" fraternities. *See id.* at 82. The 1996 study suggested that fraternities might "solve entrenched, long-term campus problems that top-down policy changes have failed to fix" by establishing new norms. *See id.*

69. *See* Devon M. Alvarez, *Death by Hazing: Should There Be a Federal Law Against Fraternity and Sorority Hazing?*, J. MULTIDISCIPLINARY RES., Summer 2015, at 43, 58–59; Darryll M. Halcomb Lewis, *The Criminalization of Fraternity, Non-Fraternity and Non-Collegiate Hazing*, 61 MISS. L.J. 111, 151–53 (1991); Joshua A. Sussberg, Note, *Shattered Dreams: Hazing in College Athletics*, 24 CARDOZO L. REV. 1421, 1490.

70. *See* Nuwer, *supra* note 43, at 24. For a "statutory appendix" of antihazing laws by state, see Chamberlin, *supra* note 44, at 974.

71. *See States with Anti-Hazing Laws*, STOPHAZING.ORG, http://www.stophazing.org/states-with-anti-hazing-laws/ (noting that Alaska, Hawaii, Montana, New Mexico, South Dakota, and Wyoming currently do not have hazing laws).

72. *See* Madeline Holcombe, *3 Fraternity Brothers Sentenced to Jail in Penn State Hazing Death*, CNN (Apr. 3, 2019, 4:22 AM), https://cnn.it/37u7ZMv.

73. *See* A. Chris Gajilan, *Greek Life More Popular than Ever, Despite Recent Controversy and Deaths*, CNN (Dec. 8, 2018, 12:16 AM), https://cnn.it/2wlkkG2.

Despite the increase in state statutes targeting fraternity hazing, reported hazing deaths have remained steady for the past forty years.[74]

Additionally, fraternities are rarely prosecuted in connection with student deaths.[75] Despite fraternity hazing's long history, the first criminal charge against a fraternity for a hazing-related death did not occur until 1998, when Phi Gamma Delta was indicted by a Boston grand jury for criminal manslaughter and misdemeanor hazing in connection with the death of an eighteen-year-old pledge at the fraternity's Massachusetts Institute of Technology chapter.[76] Notably, the District Attorney prosecuting Phi Gamma Delta did not pursue individual charges against chapter members, claiming that "the traditions and actions of the fraternity as a whole . . . were responsible . . . .
The individuals claimed to be acting more as a group in following the spirit and traditions of the fraternity house."[77] No defendant appeared in court on the chapter's behalf, the chapter disbanded, and local police retained a warrant in case the chapter ever attempted to reorganize.[78] Among the forty-four states that have sought to eradicate hazing is Pennsylvania, where hazing persists despite having been outlawed for decades.[79]

II. CASE STUDY: ANTIHAZING LEGISLATION IN PENNSYLVANIA

This part explores Pennsylvania's antihazing law before and after a major hazing incident within one of its public host institutions, Penn State.[80] In so doing, this part seeks to place the existing commentary on antihazing policy[81] into a framework useful for extended analysis.

A. 1987—2017: Pennsylvania's Initial Antihazing Statute and Incidents

Pennsylvania's first antihazing statute took effect in 1987.[82] Title 24, section 5351 of the Pennsylvania Consolidated Statutes classified hazing as a

74. *See* Chamberlin, *supra* note 44, at 955; *see also Hazing Deaths Database: Unofficial Hazing Clearinghouse & Watchdog Site*, HANKNUWER.COM, http://www.hanknuwer.com/hazingdeaths.html (last updated Apr. 18, 2020) (listing the college students who have died due to hazing, initiation, and pledging-related activities since 1838). Nuwer's database of hazing-related deaths has become an oft-cited source among hazing experts because the federal government does not track hazing incidents. *See* Katie Reilly, *College Students Keep Dying Because of Fraternity Hazing. Why Is It So Hard to Stop?*, TIME (Oct. 11, 2017), https://bit.ly/37w5mtE.

75. *See* R. Brian Crow & Colleen McGlone, *Hazing and the Law and Litigation: What You Need to Know, in* HAZING: DESTROYING YOUNG LIVES, *supra* note 43, at 299, 299 (noting that criminal prosecutions of hazing occur infrequently); *see also* Kuzmich, *supra* note 42, at 1123 (noting that the first hazing death-related criminal charge against a fraternity did not occur until the 1990s).

76. *See* Kuzmich, *supra* note 42, at 1123.

77. *See id.* at 1124. 78.

See id. at 1124–25.

79. *See infra* Part II.

80. *See infra* Part II.A, II.B, II.C, II.D.

81. *See supra* Part I.A and B.

82. *See* 24 PA. CONS. STAT. §§ 5351–54 (1986).

third-degree misdemeanor.[83] Section 5352 defined "hazing" as "[a]ny action or situation which recklessly or intentionally endangers the mental or physical health or safety of a student . . . for the purpose of initiation [into] . . . any organization."[84] Section 5354 required institutions to create and post written antihazing policies on a publicly accessible website.[85] It also required institutions to enforce policies through penalties that, though enumerated through examples, were left to the discretion of the institution.[86] A 2016 amendment to Pennsylvania's antihazing statute broadened the statute's reach from "student[s]" to "person[s]" and added secondary schools to its protective ambit.[87]

Only a handful of Pennsylvania judicial opinions found occasion to examine the original statute's text. In *Kenner v. Kappa Alpha Psi Fraternity, Inc.*,[88] the Pennsylvania Superior Court conducted a duty-of-care analysis through the use of a factor-balancing test[89] to conclude that a fraternity's members owed a duty to the fraternity's pledges to protect the pledges from harm.[90] Additionally, in *Commonwealth v. Pi Delta Psi, Inc.*,[91] the Pennsylvania Superior Court reversed a trial court decision that barred a criminally liable national fraternity from conducting business in Pennsylvania for ten years under Pennsylvania's then-current antihazing statute.[92] As rationale for its decision, the Superior Court cited a lack of legislative authorization for the fraternity's statewide ban,[93] as well as the fraternity's lack of amenability to statewide "excommunicat[ion]," because of its status as a corporation.[94]

In the years preceding Timothy Piazza's death at Beta Theta Pi,[95] hazing was far from unknown at Penn State.[96] In 2009, the Piazza scandal was foreshadowed when freshman Joseph Dado, whose blood alcohol level was

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83. *See id.* § 5351. In Pennsylvania, third-degree misdemeanors are punishable by a term of imprisonment not to exceed one year. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 106(b)(8) (West 2020).
84. *See* 24 PA. CONS. STAT. § 5352.
85. *See id.* § 5354(a)(3).
86. *See id.* § 5354(b)(2).
87. *See* 2016 Pa. Legis. Serv. 3016. (West).
88. 808 A.2d 178 (Pa. Super. Ct. 2002)
89. *See id.* at 182 (noting that factors indicating a duty of care include (1) the relationship between the parties, (2) the social utility of an actor's conduct, (3) the foreseeable nature of the incurred harm and nature of the risk imposed, (4) the consequences of imposing the duty upon the actor, and (5) the overall public interest in a proposed solution).
90. *See id.* at 183.
91. 211 A.3d 875 (Pa. Super. Ct. 2019), *appeal denied*, 221 A.3d 644 (Pa. 2019).
92. *See id.* at 892.
93. *See id.*
94. *See id*. (citing Case of Sutton's Hospital, 77 Eng. Rep. 960 (K.B. 1612)). The defendant, Pi Delta Psi, had a preestablished antihazing policy, developed "at least in part" in response to insurance needs. *See* Timothy M. Burke, *Guilty! A National Fraternity Criminally Convicted*, FRATERNAL L., Nov. 2017, at 1, 1–3, https://bit.ly/2wl05Ix.
95. *See* Deak, *supra* note 3.
96. *See* Camila Domonoske, *Grand Jury Report on Penn State Hazing Finds 'Indignities and Depravities'*, NPR (Dec. 15, 2017, 3:15 PM), https://n.pr/2SsTowx; *State College Should Be Cringing at Being Named "Pennsylvania's Drunkest City,"* LANCASTERONLINE (Dec. 4, 2017), https://bit.ly/39IX2s9.

double the Commonwealth's legal limit of 0.08%,[97] fell to his death down a campus stairwell during a fraternity party.[98] In 2013, a Penn State Phi Sigma Kappa pledge was held at gunpoint, forced to drink excessively, and given the choice between snorting cocaine or enduring videotaped sodomy.[99] In 2014 and 2015, two parents of Penn State students warned school officials about hazing events.[100] The parents claimed the school ignored the complaints.[101] In 2015, a Kappa Delta Rho pledge, who claimed that Penn State ignored his complaints of fraternal hazing, filed a civil suit against Penn State.[102] A judge subsequently dismissed the pledge's claims[103] despite the pledge's allegations of "cigarette burns to his chest, forced drinking of hard liquor until he vomited[,] and force[d] drinking from a bucket filled with a concoction of hot sauce, liquor, cat food, urine and other liquid."[104] Finally, in 2017, Timothy Piazza died during a pledging incident which garnered nationwide media attention.[105]

B. *2017: The Hazing Death of Timothy Piazza and Its Aftermath*

In 2017, nineteen-year-old Timothy J. Piazza was a sophomore at Penn State.[106] On February 2, 2017, Piazza attended a "Bid Acceptance Night" at Beta Theta Pi's Penn State chapter, Alpha Upsilon.[107] The fraternity had been a fixture at Penn State since 1888 and was the school's second-oldest fraternity.[108] However, in the seven years immediately preceding Piazza's death, 23 of Beta Theta Pi's 144 chapters nationwide were confirmed to have hazed pledges.[109] Upon Piazza's arrival at the fraternity house on February 2, fraternity members led Piazza and other pledges to the house's basement.[110] There, fraternity members required the pledges to consume a bottle of vodka amongst themselves.[111] After consuming the bottle together, pledge leaders directed

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97. *See State College Should Be Cringing at Being Named "Pennsylvania's Drunkest City," supra* note 96.
98. See id.
99. *See* Domonoske, *supra* note 96.
100. See Richard Pérez Pena & Sheryl Gay Stolberg, *Prosecutors Taking Tougher Stance in Fraternity Hazing Deaths*, N.Y. TIMES (May 8, 2017), https://nyti.ms/39AikIc.
101. See id.
102. *See* Geoff Rushton, *Judge Dismisses Hazing Claims Against Penn State in Fraternity Case*, STATECOLLEGE.COM (Dec. 13, 2016, 3:27 PM), https://bit.ly/2OYqIJD.
103. See id.
104. *See* Domonoske, *supra* note 96.
105. *See infra* Part II.B.
106. *See* Bret Pallotto, *It's Been 2 Years Since Tim Piazza's Death at Penn State. Here's What's Happened Since*, CTR. DAILY TIMES (Feb. 2, 2019, 3:50 PM), https://bit.ly/39Drwvm.
107. *See* Piazza v. Young, 403 F. Supp. 3d 421, 427 (M.D. Pa. 2019).
108. *See* Benjamin Wallace, *How a Fatal Frat Hazing Became Penn State's Latest Campus Crisis*, VANITY FAIR (Oct. 3, 2017), https://bit.ly/2uF9cDx.
109. *See* ROBBINS, *supra* note 18, at 126. Similarly, Beta Theta Pi's Penn State chapter had gained a troublesome reputation. *See* Caitlyn Flanagan, *Death at a Penn State Fraternity*, ATLANTIC (Nov. 2017), https://www.theatlantic.com/magazine/archive/2017/11/a-death-at-penn-state/540657/ (A simple trip through the archives of *The Daily Collegian* . . . revealed [that] the Alpha Upsilon chapter . . . was an outfit in which a warm day might bring the sight of a brother sitting, with his pants pulled down, on the edge of a balcony, while a pledge stood on the ground below, his hands raised as though to catch the other man's feces."). The national leaders of Beta Theta Pi temporarily shut down the Penn State chapter in 2009. *See id.*
110. *See Piazza*, 403 F. Supp. 3d at 427.
111. See id.

Piazza and other fraternity hopefuls to participate in "the Gauntlet."[112] During the Gauntlet, fraternity members required pledges to quickly finish alcoholic drinks laid out on a series of tables.[113]

In total, Piazza consumed eighteen alcoholic drinks in the span of eighty-two minutes, causing his blood alcohol concentration to rise to between 0.28 and 0.36%.[114] Witnesses described Piazza as "intoxicated" and "stuporous," and he was helped to a couch on the fraternity house's first floor by fraternity members.[115] At 11:20 p.m., Piazza got up from the couch, walked across the room, and fell down a flight of stairs leading to the fraternity house's basement.[116] The fall rendered Piazza unconscious.[117] While unconscious, Piazza vomited several times.[118] Brendan Young, the fraternity's chapter president, acknowledged the fraternity's potential liability via text messages to fellow members.[119] Other fraternity members attempted to forcibly rouse Piazza into consciousness, and several fraternity members discouraged those present from calling 911.[120] Ultimately, an unidentified fraternity member contacted emergency help more than eleven hours after Piazza's initial fall.[121] Fraternity members were later found to have made attempts to cover their actions by sending text messages to others about cleaning evidence, erasing surveillance camera footage, and eliminating text message evidence from Piazza's phone.[122] On February 4, 2017, Timothy Piazza died from complications of his injuries, which included a skull fracture and brain hemorrhaging.[123]

In the incident's wake, Penn State authorities disciplined thirteen individual members of the school's Beta Theta Pi chapter.[124] Five were expelled and six were suspended from the university.[125] Several Beta Theta Pi members withdrew from Penn State amid the prospect of university discipline.[126] Pennsylvania prosecutors criminally charged twenty-eight of Beta Theta Pi's Penn State chapter members, with seventeen of the members entering guilty pleas.[127] The chapter members who were eventually convicted received jail

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112. See id.
113. See id.
114. *See* Deak, *supra* note 3. Blood alcohol concentrations between 0.35 and 0.40 can cause loss of consciousness and coma. *See What Is BAC?*, STAN. U. OFF. ALCOHOL POL'Y & EDUC., https://stanford.io/2HsZNl2 (noting that (last visited Apr. 12, 2020).
115. *Piazza*, 403 F. Supp. 3d at 428.
116. See id.
117. See id.
118. *See id.* at 429.
119. *See* Deak, *supra* note 3 ("Young had previously sent a message to another member, 'Make sure the pledges clean the basement and get rid of any evidence of alcohol.'").
120. See id.
121. *See Piazza*, 403 F. Supp. 3d at 430.
122. See id.
123. *See id.* at 430–31.
124. See Susan Snyder, *PSU Releases Report on Hazing, First One Under New Tim Piazza Law*, INQUIRER (Jan. 15, 2019, 6:31 PM), https://bit.ly/3bCSWDw.
125. See id.
126. See id.
127. *See* Pallotto, *supra* note 106.

sentences of less than one year each.[128] Within two weeks of Piazza's death, Penn State revoked recognition of Beta Theta Pi for a minimum of five years.[129] The revocation was later converted into a permanent ban.[130] A grand jury presentment released in December 2017 recommended numerous policy changes, including harsher hazing penalties by host institutions, greater state funding for Greek life offices, and legal reforms.[131] The presentment found Penn State's hazing problem to be "rampant and pervasive" and criticized the university's failure to revoke fraternal recognition as a regulatory measure.[132]

In 2019, Timothy Piazza's parents filed a civil action in the Middle District of Pennsylvania against various Beta Theta Pi members.[133] The complaint alleged negligence, negligence per se, civil conspiracy, battery, and intentional infliction of emotional distress.[134] The defendants filed a motion to dismiss all causes of action alleged in the complaint.[135] In construing Pennsylvania's then-current antihazing law,[136] the Middle District of Pennsylvania denied the defendants' motion to dismiss on counts of negligence per se,[137] civil conspiracy,[138] and battery[139] but granted a motion to dismiss the claim for intentional infliction of emotional distress.[140] In a separate proceeding, other fraternity members attempted to challenge the constitutionality of Pennsylvania's then-current hazing law on vagueness grounds.[141] Both the trial court and the appellate court did not ultimately rule on the defendants' constitutional challenge.[142]

C. 2018: The Timothy J. Piazza Antihazing Law

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128. *See* Aaron Katersky & Morgan Winsor, *4 Penn State Fraternity Brothers Sentenced for Pledge's Hazing Death*, ABC NEWS (Apr. 3, 2019, 6:52 AM), https://abcn.ws/39BXrfJ.
129. *See* Wallace, *supra* note 108.
130. See Eric Italia, *Pennsylvania Fraternities Write Letter to State Legislators Supporting "Tim's Law,"* COED (Apr. 6, 2018, 4:07 PM), https://bit.ly/2UX2SSm.
131. *See* Steve Connelly, *Full Grand Jury Report in Penn State Greek Life Investigation*, ONWARD ST. (Dec. 15, 2017, 10:45 AM), https://bit.ly/39Feygy.
132. *See* Min Xian, *Grand Jury Says Hazing "Rampant and Pervasive" at Penn State*, WPSU (Dec. 15, 2017), https://bit.ly/2uEUAnG.
133. *See* Piazza v. Young, 403 F. Supp. 3d 421, 431 (M.D. Pa. 2019).
134. *See id.* at 431–42.
135. *See id.* at 431.
136. Pennsylvania's former antihazing law was codified at 24 PA. CONS. STAT. §§ 5351–54 (1986).
137. See *Piazza*, 403 F. Supp. 3d at 439 (noting that "if criminal statutes are to be used when determining the existence of a duty, this Court cannot ignore the anti-hazing statute in effect at the time of Defendants' conduct, which criminalized the 'forced consumption of any . . . liquor, drug[,] or other substance . . . which could adversely affect the physical health and safety of the individual'"). The Middle District's ruling on negligence per se in the context of hazing was something of an aberration. *See* Kuzmich, *supra* note 42, at 1126 (observing that while the presence of state hazing statutes has been helpful to courts' analyses, jurisdictions with hazing statutes have nonetheless been hesitant to apply principles of negligence per se in hazing cases).
138. *See Piazza*, 403 F. Supp. 3d at 441.
139. *See id.* at 442.
140. *See id.* at 443.
141. *See* Commonwealth v. Casey, 218 A.3d 429, 430 (Pa. Super. Ct. 2019).
142. See id. Although the plaintiffs claimed that the statute "create[d] an unconstitutional mandatory presumption in Pennsylvania's favor and that the statute [was] vague and overbroad," the Pennsylvania Superior Court rejected this claim on narrower procedural grounds. *Id.*

Several months after Timothy Piazza's death, Pennsylvania's then-senate majority leader, Jake Corman, sponsored a bill[143] designed to amend Pennsylvania's existing antihazing statute.[144] Timothy Piazza's parents and their attorney lent public support to the bill.[145] Penn State's Interfraternity Council, which governs the university's Greek life,[146] supported the bill with a letter to state legislators that advocated tougher legal penalties for hazing perpetrators.[147] The Pennsylvania State Senate passed the bill on April 18, 2018, by a vote of 49–0.[148] In October 2018, after unanimous passage in both chambers of the Pennsylvania legislature, Pennsylvania's then-governor signed the bill into law.[149]

Legislative history for the Piazza Law is scant.[150] In the news media, Senator Corman emphasized two legislative goals for the Piazza Law: preventing death or serious injury, and creating "a model for changing anti- hazing laws nationwide."[151] During a session of the Pennsylvania Senate's General Assembly, Senator Corman cited the bill's goal as providing "proper deterrence" for hazing.[152] In his brief remarks, Senator Corman expounded on the bill's proposed amendments to the state's existing antihazing law:

> [Timothy Piazza's parents] have channeled their pain and anguish . . . to make sure that other parents, such as myself or anyone else who is sending a child to college, will never have to go through what they have gone through We do have laws on the books [but] they are very difficult for the prosecutors around the State to prosecute because they are inflexible, meaning no matter what the type of incident that may have happened, whether it be fairly minor or something more significant, prosecutors are limited to a Misdemeanor 3, and so it may not be appropriate for the act that was committed. So, in this update, what we have done has now given prosecutors much more flexibility [153]

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143. *See* S.B. 1090, 202d Gen. Assemb., Sess. Of 2018 (Pa. 2018).
144. *See* Sarah Shearer, *Pennsylvania Senate Passes Antihazing Law*, PITT. NEWS (Apr. 20, 2018), https://bit.ly/37BaUDn.
145. *See* CBS This Morning, *Piazza Parents: Penn State Reforms "Good Start" But More Needs to Be Done*, YOUTUBE (Aug. 23, 2017), https://www.youtube.com/watch?v=pG3Amwf1390 (The Piazzas' attorney, Tom Kline, stated that "law is a great deterrent We're looking to change the law. We believe that stiffer penalties will mean deterrence, and that's a key.").
146. *See* Elissa Hill, *'Tim's Law' Anti-Hazing Bill Passes Through PA Senate*, ONWARD ST. (Apr. 18, 2018, 1:34 PM), https://bit.ly/2UX0sTQ.
147. *See id.*
148. *See id.*
149. *See Anti-Hazing Law Named for Penn St. Student Heads to Gov. Wolf's Desk*, CBS PITT. (Oct. 15, 2018, 5:57 PM), https://cbsloc.al/39DBoW1.
150. The cited document represents the only known debate of this bill. *See* Commonwealth of Pa. Legis. Journal, 202nd, at 328 (Pa. 2018) [hereinafter *Legislative History*].
151. *See* Sarah Rafacz, *Tim Piazza Anti-Hazing Law Unanimously Approved by Pa. Senate Committee*, CTR. DAILY TIMES (Mar. 27, 2018, 1:40 PM), https://bit.ly/2V5PImn.
152. *See Legislative History*, *supra* note 150, at 328. Senator Corman noted that "particularly this type of hazing, is something we need to take a stand on and need to discourage in Pennsylvania.") *See id.*
153. *See id.*

Senator Corman also emphasized the bill's penalties for schools and fraternities[154] and touted the virtue of the bill's safe harbor provisions.[155] Senator Corman concluded his remarks by assuaging potential worries that the bill presented "an attack on Greek life."[156] No other senators contributed remarks during debates.[157]

The Timothy J. Piazza Antihazing Law took effect on November 19, 2018,[158] and redefined "hazing" as follows:

> A person commits the offense of hazing if the person intentionally, knowingly or recklessly, for the purpose of initiating, admitting or affiliating a minor or student into or with an organization, or for the purpose of continuing or enhancing a minor or student's membership or status in an organization, causes, coerces or forces a minor or student to do any of the following:
>
> (1) Violate Federal or State criminal law.
> (2) Consume any food, liquid, alcoholic liquid, drug or other substance which subjects the minor or student to a risk of emotional or physical harm.
>
> (3) Endure brutality of a physical nature, including whipping, beating, branding, calisthenics or exposure to the elements.
>
> (4) Endure brutality of a mental nature, including activity adversely affecting the mental health or dignity of the individual, sleep deprivation, exclusion from social contact or conduct that could result in extreme embarrassment.
>
> (5) Endure brutality of a sexual nature.
>
> (6) Endure any other activity that creates a reasonable likelihood of bodily injury to the minor or student.[159]

Hazing remains a summary offense except when a person subjects victims to a risk of "emotional or physical harm,"[160] in which case hazing becomes a third-

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154. *See id.* ("[I]f a university, such as Penn State . . . [is] not taking an active role to discourage and prevent hazing . . . there could be liability."); ("[N]ational organizations of Greek life, are not, again, putting out the proper discouragement for this type of behavior "). For a discussion of the effectiveness of these penalties, see *infra* Part III.C.2 and C.3.

155. *See* Legislative History, *supra* note 150, at 328 ("I think one of the problems we have had is people do not want themselves to get into trouble, and so therefore they do not call to make sure the person in distress is taken care of.").

156. *See id.* (Greek life "is a very important part of the college life, and [it does] wondrous things and things that you can be very proud of, but certain things over time have to become things of the past.").

157. See id.

158. *See* 18 PA. STAT. AND CONS. STAT. ANN. §§ 2801–11 (West 2020).

159. *See id.* § 2802.

degree misdemeanor.[161] Hazing constitutes a third-degree misdemeanor "if it results in or creates a reasonable likelihood of bodily injury to the minor or student."[162] The statute now includes a heightened offense—"aggravated hazing"[163]—for offenders who cause serious bodily injury or death and either (1) act with reckless indifference[164] to health and safety; or (2) cause, coerce, or force consumption of an "alcoholic liquid."[165] Aggravated hazing constitutes a third-degree felony.[166]

Additionally, "organizations"[167] or "institutions"[168] that "intentionally, knowingly or recklessly promote[] or facilitate[]" a statutory violation are subject to fines of not more than $5000 for hazing offenses and fines of not more than $15,000 for aggravated hazing offenses.[169] Organizational hazing violations are subject to equitable relief[170] to be determined by a court of law.[171]

The Piazza Law prohibits defenses based on the putative consent of students or minors.[172] The statute also prohibits defenses based on the approval

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160. *See id.* In Pennsylvania, summary offenses are punishable by a term of imprisonment not to exceed ninety days. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 106(c)(2).
161. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2802(b)(2).
162. *See id.* Third-degree misdemeanors are punishable by a term of imprisonment not to exceed one year. *See* 18 PA. STAT. AND CONS. STAT. ANN §106(b)(8).
163. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2803(a).
164. See 18 PA. STAT. AND CONS. STAT. ANN. § 302(b)(3) (West 2020) (defining recklessness as "consciously disregard[ing] a substantial and unjustifiable risk that the material element exists or will result from [one's] conduct." Conscious disregard of the risk must "involv[e] a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation."). *See id.*
165. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2803(a)(2).
166. *See id.* § 2803(b). Third-degree felonies are punishable by a term of imprisonment not to exceed seven years. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 106(b)(4).
167. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2801 (West 2020) (defining an "organization" as "[a] fraternity, sorority, association, corporation . . . social or similar group, whose members are primarily minors, students or alumni of the organization, an institution or secondary school").
168. *See id.* (defining "institution" as "an institution located within this Commonwealth authorized to grant an associate or higher academic degree.").
169. *See* 18 PA. STAT. AND CONS. STAT. ANN. §§ 2804–05 (West 2020) (enumerating organizational and host-institutional hazing violations).
170. *See Equitable Remedy*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A remedy, [usually] a nonmonetary one such as an injunction or specific performance, obtained when available legal remedies, usu. monetary damages, cannot adequately redress the injury . . . Also termed equitable relief; equitable damages.").
171. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2804. *But see id.* § 2805 (leaving equitable relief for institutional hazing unaddressed).
172. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2806 (West 2020). Consent has been explicitly eliminated as a defense to hazing in at least twenty states. *See* Chamberlin, *supra* note 44, at 943. Commentators disagree as to whether the statutory abrogation of consent as a defense to criminal hazing culpability is sound policy. *Compare* Melissa Dixon, *Hazing in High Schools: Ending the Hidden Tradition*, 30 J.L. & EDUC. 357, 361 (2001) ("the idea that someone cannot consent to an illegal activity . . . is common to many areas of the law, including . . . criminal law"); *and* Sarah Hernandez, *Dying to Get in, Dying to Get High: Examining the Role of Proximate Cause in Criminal Hazing and Drug-Induced Homicide Cases*, 56 CRIM. L. BULL. 85, 86 (2020) (arguing that hazing consent defenses prevent proximate cause issues because they eliminate victims' voluntary acts as intervening causes), *with* Chamberlin, *supra* note 44, at 960 ("[many factors that seem to demonstrate the impossibility of consenting to hazing also mitigate the perpetrators' culpability . . . .").

or sanction of schools and host institutions.[173] Organizations in violation of the statute can be directed to forfeit property involved in a hazing incident under court order.[174] The Piazza law maintains the institutional policy requirements of the previous state statute[175] but now mandates yearly institutional reports detailing hazing incidents.[176] Additionally, the Piazza Law's "safe harbor" provision provides criminal immunity for individuals who seek medical attention for another.[177]

Former Centre County prosecutor Stacy Parks Miller, who handled the criminal charges in the Piazza incident, expressed concern about the statute's efficacy.[178] Tracy Maxwell, the founder of HazingPrevention.org, a watchdog website, echoed Miller's doubt.[179]

D. 2018—Present: *Responses from Pennsylvania Fraternities and Host Institutions*

In 2019, per the requirements of the Piazza Law,[180] Penn State released its first mandated Hazing Report of all hazing incidents from 2013 to 2018.[181] In total, Penn State disclosed thirty incidents and one pending investigation in the report.[182] After the Piazza Law's enactment, Penn State shifted responsibility for investigating and adjudicating fraternity misconduct from independent Greek life-governing councils to university staff.[183] Additional institutional reforms included (1) Penn State's hiring of 14 new staff members in Student Affairs who

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173. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2804 (1986).
174. *See id.* § 2807.
175. *Compare* 24 PA. CONS. STAT. § 5354(a)(3) (1986), *with* 18 PA. STAT. AND CONS. STAT. ANN. § 2809 (West 2020).
176. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2809 (West 2020) (mandating that such reports shall include names of report subjects, dates of incidents, and general descriptions of any violations).
177. See id. § 2810. The individual claiming immunity must establish (1) contact with a law enforcement officer based on reasonable belief that another was in need of medical attention, (2) reasonable belief that the individual was the first to contact security or law enforcement, (3) the providing of one's own name to security or law enforcement, and (4) that the individual remained with an individual needing assistance until relevant personnel arrived. *See id.*
178. *See* David Dekok, *Pennsylvania Law to Make Hazing Punishable as Felony*, REUTERS (Oct. 19, 2018, 6:05 AM), https://reut.rs/2wmIPCL (Miller commented, ""While I am very pleased to see a new felony for cases like Tim's, I am concerned there is now less leverage for prosecutions for the more commonplace hazing cases."); *see also* Reilly, *supra* note 74 (quoting Miller as stating that the legal changes are inadequate because "[i]t's the same system . . . still broken. It's not aggressive enough, and it won't save lives."). Similar skepticism shrouded the enactment of Texas's "tough" 1987 hazing law, which precipitated a slew of plea bargains, but few trials, in its first decade of existence. *See* Debbie Graves & Claire Osborn, *Barrientos Frustrated by Hazing Law's Lack of Use; UT Pledge Who Drowned at Fraternity Party Is Remembered*, AUSTIN AM.-STATESMAN, May 4, 1995, at B1.
179. *See* Dekok, *supra* note 178 ("'It doesn't matter how tough the law is if local prosecutors don't have the stomach to enforce it,' Maxwell said.").
180. *See* 18 PA. STAT AND CONS. STAT. ANN § 2809.
181. *See The Pennsylvania State University Hazing Report*, PENN ST. OFF. ETHICS & COMPLIANCE, https://universityethics.psu.edu/sites/universityethics/files/penn_state_hazing_report_january_2019.pdf (last visited Apr. 14, 2020).
182. *See id*.
183. *See Penn State* Greek-*Letter Orgs to Face Change as Aggressive New Measures Launch*, PENN ST. NEWS (Aug. 21, 2017), https://bit.ly/2uPIgRh.

were tasked with monitoring Greek life organizations, (2) a minimum grade point average of 2.5 required of all fraternity hopefuls, (3) a national "scorecard" system to inform parents and new members of fraternity conduct,[184] and (4) a "no tolerance" policy that revoked university recognition of fraternities who violate state law.[185]

The Timothy J. Piazza Center for Fraternity and Sorority Research and Reform (the Center) was established at Penn State in January 2019.[186] The Center's formation continues the work of the now-defunct Center for Fraternity and Sorority Research at Indiana University, which was created in 1979.[187] The Center studies hazing from a "data-driven perspective."[188] The Center's director, Steve Veldkamp, concluded on the basis of the Center's data studies that "[fraternal] organizations are mostly positive," but also that "there are significant problems in term[s] of hazing . . . when it is bad it is really bad."[189]

In the wake of its institutional hazing reforms, Penn State officials declined a request to discuss Greek life policy on camera, and a number of unidentified Penn State fraternity members declined to speak on camera pursuant to a directive from their fraternity's leaders at the national level.[190] Currently, fraternities at Penn State require students who "rush"[191] to do so via

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184. The national scorecard system spearheaded by Penn State collects aggregated national data on fraternities. *See Carnegie Mellon Will Not Participate in Piazza Center National Fraternity Scorecard*, PITT. POST-GAZETTE (Nov. 21, 2019, 11:59 AM), https://www.post-gazette.com/news/education/2019/11/21/Carnegie-Mellon-University-hazing-fraternities-alcohol-Piazza-Penn-State-colleges/stories/201911210143. While more than fifty universities agreed to submit data to the project, Pennsylvania's Carnegie Mellon University declined to share data on its fraternities, citing the adequacy of its own procedures and of its antihazing "working group." *See id.*

185. *See Penn State* Greek-*letter Orgs to Face Change as Aggressive New Measures Launch*, *supra* note 183; *see also Fraternity and Sorority Social Monitoring*, PENN ST. STUDENT AFF., https://bit.ly/3bGQMmj (last visited Apr. 12, 2020) (noting that the university (1) restricts Greek life organizations by allowing a limit of ten socials per semester, (2) prohibits day-long events, (3) limits allowable alcoholic consumption at socials to beer and wine, (4) limits indoor and outdoor events to the legal capacity of a Greek house, and (5) limits alcohol service at social events to legally designated RAMP servers).

186. See About the Piazza Center, PENN ST. STUDENT AFF., *https*://studentaffairs.psu.edu/piazzacenter/about (last visited Apr. 12, 2020). According to its website, the Center "seeks to build on and amplify professional practice that changes the hearts and minds of students, alumni, headquarters, and campuses by studying the efficacy of how practitioners advise chapters differently, change campus policies, and implement educational programs to create change." *See id.*

187. *See* Marielle Mondon, *Two Years After Hazing Death, Penn State Launches Multimillion-Dollar, Greek Life Research Center*, PHILLYVOICE (Jan. 22, 2019), https://bit.ly/2OXoNVY.

188. *See* Centre County Gazette and Vincent Corso, *Fraternity Fallout: Changing the Negative, Keeping the Positives*, STATECOLLEGE.COM (Feb. 18, 2020, 5:00 AM), https://www.statecollege.com/news/local-news/fraternity-fallout-changing-the-negative-keeping-the-positives,1482515/.

189. See id.

190. *See* VICE News, *Penn State Is Still Keeping Secrets on Frat Row*, YOUTUBE (Feb. 2, 2018), https://www.youtube.com/watch?v=pG3Amwf1390.

191. A "rush" is a "series of social events and gatherings that allow prospective and current fraternity or sorority members to get to know each other. Each institution has its own particular style for conducting rush. Rush lasts anywhere from a week to several weeks." *See*

an online application that instructs them to report hazing incidents directly to the school's interfraternity council rather than to police or Penn State authorities.[192]

III. THE HAZING TRIANGLE

The Piazza Law's amendments to existing state antihazing law enable prosecutors to seek stronger criminal penalties for individual hazing perpetrators.[193] However, the Law's penalties upon individual actors, as discussed in the following section, are flawed in spite of their necessity.[194] Further, the Piazza Law falls short of its intended goals[195] insofar as it penalizes the actions of fraternities[196] and host institutions[197] disproportionately with the actions of individual hazing perpetrators.[198] This part posits that the Piazza Law and other antihazing statutes' chief flaws are best understood through a theoretical lens that this note dubs "The Hazing Triangle."[199] The final sections of this part deal with each of these shortcomings in turn.[200]

A. An Unsolved Problem

Until now, scholarly recommendations for amending hazing statutes have tended to suggest modest alterations such as adding a clause that would include athletic hazing to a statute's protective ambit[201] or including mental harms[202] or intent[203] within a statutory definition of hazing. The Piazza Law largely responds to such scholarly proposals[204] but nonetheless, fraternity hazing continues in earnest.[205] Furthermore, other scholarly suggestions for hazing deterrence methods have hedged their bets too strongly on voluntary compliance.[206] For example, Chamberlin's proposed reform seeks to place

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Jackie Burrell, *Fraternity and Sorority Rush—What Are They?*, THOUGHTCO. (July 16, 2019), https://bit.ly/2SsUkRw.

192. See *Penn State Is Still Keeping Secrets on Frat Row*, *supra* note 190. *But see* Nuwer, *supra* note 43, at 24 (asserting that interfraternity councils should relinquish governance of campus Greek life to university control). Ultimately, this note argues that host institutions would be ill-equipped to administer such governance. *See infra* Parts III.C.3, IV.B.

193. *See* 18 PA. STAT. AND CONS. STAT. ANN. §§ 2802–03 (West 2020).

194. *See infra* Part IV.A.

195. *See supra* notes 151–52 and accompanying text.

196. *See infra* Part III.C.2.

197. *See infra* Part III.C.3.

198. *See infra* Part III.C.1.

199. *See infra* Part III.B.

200. *See infra* Part IV.C.

201. *See* Gregory L. Acquaviva, *Protecting Students from the Wrongs of Hazing Rites: A Proposal for Strengthening New Jersey's Anti-Hazing Act*, 26 QUINNIPIAC L. REV. 305, 327 (2008)

202. *See* Croy, *supra* note 64, at 258.

203. *See* Burns, *supra* note 59, at 117.

204. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2802 (West 2020).

205. *See, e.g.*, Chamberlin, *supra* note 44, at 927; Dara Aquila Govan, Note, "*Hazing Out*" *the Membership Intake Process in Sororities and Fraternities: Preserving the Integrity of the Pledge Process Versus Addressing Hazing Liability*, 53 RUTGERS L. REV. 679, 710–13 (2001) (proposing that fraternities should voluntarily renounce hazing rituals).

206. *See, e.g.*, Chamberlin, *supra* note 44, at 963–64 (advocating an omission theory of liability for hazing perpetrators).

criminal liability on immediate participants or supervisors of hazing activities once a person has been "rendered helpless."[207] However, because Chamberlin also criticizes existing antihazing laws for driving hazing further underground,[208] his proposal for an omission theory of hazing liability is vulnerable to criticism on the grounds that hazing perpetrators may overestimate their ability to haze safely under such a doctrine[209] and may therefore continue to carry out these rituals in the same clandestine manner that Chamberlin's proposal seeks to thwart.[210] Chamberlin's high confidence in the ability of hazing perpetrators to "become their brothers' keepers,"[211] as well as his reassurance that "[g]roups that haze generally care deeply about their members,"[212] does little to explain why fraternities, such as Beta Theta Pi, would wait eleven hours before summoning aid for a dying recruit.[213]

B. A Proposed Solution

Courts have grappled with the assignment of liability in fraternity hazing long before the Piazza Law's enactment.[214] Likewise, almost every state has enacted an antihazing statute[215] while, simultaneously, the hazing death curve has failed to flatten.[216] Legislatures should recognize and incorporate into their antihazing statutes the concept that fraternity hazing necessarily involves a "triangle" of three interrelated actors—individuals, fraternities, and host institutions—and that statutory duties and penalties assigned to each should reflect the realities of hazing psychology and criminal deterrence.[217] For criminal antihazing statutes to deter bad actors effectively, such statutes should "not be limited to a single class of persons."[218] However, the Piazza Law and other

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207. *See id.* at 963–64.

208. *See id.* at 973.

209. Many criminal offenders tend to overestimate their ability to avoid punishment. *See, e.g.*, Paul H. Robinson, *The Difficulties of Deterrence as a Distributive Principle*, *in* CRIMINAL LAW CONVERSATIONS 105, 107 (Paul H. Robinson et al. eds., 2009).

210. *See* Chamberlin, *supra* note 44, at 973.

211. *See id.* A brief aside on the irony of the Comment's title ("Am I My Brother's Keeper?") is worthwhile. The title's namesake verse is pulled from an Old Testament chapter that, in context, undermines Chamberlin's theory rather than bolsters it: "it came to pass, when they were in the field, that Cain rose up against Abel his brother and killed him." *Genesis* 4:8.

212. Chamberlin, *supra* note 44, at 970–71. For a stark contrast to Chamberlin's assertion, see Nuwer, *supra* note 43, at 29 (noting that "[n]othing incurs the collective wrath of a hazing group's members more than a pledge that refuses to cower and reports hazing . . . the group treats the unhappy quitter as a pariah with disdain [and] even threats"). It is also worthwhile to observe that most of the victims Chamberlin would seek to protect would not in fact be "members," but pledges seeking admission to the fraternity, thus undermining Chamberlin's premise.

213. *See* Piazza v. Young, 403 F. Supp. 3d 421, 430 (M.D. Pa. 2019).

214. *See* A. Catherine Kendrick, Comment, Ex Parte Barran*: In Search of Standard Legislation for Fraternity Hazing Liability*, 24 AM. J. TRIAL ADVOC. 407, 407 (2000).

215. *See supra* note 70 and accompanying text.

216. *See, e.g.*, Crow & McGlone, *supra* note 75, at 299 ("The dearth of hazing litigation seems at odds with the continued prevalence of hazing "); Chamberlin, *supra* note 44, at 927

217. For a discussion of the psychological underpinnings of fraternity hazing, see *supra* Part I.B.

218. Amie Pelletier, *Regulation of Rites: The Effect and Enforcement of Current Anti-Hazing Statutes*, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 377, 413 (2002); *see also* Nicholas Bittner, Comment, *A Hazy Shade of Winter: The Chilling Issues Surrounding Hazing in School Sports and the Litigation That*

antihazing statutes do, in fact, single out "persons" as the "tip" of the hazing triangle,[219] making individual deterrence an object of disproportionate statutory focus.[220]

C. *Application: Examining the Piazza Law Through the Lens of the Hazing Triangle*

The three sections below discuss each "point" of the hazing triangle within the context of the Piazza Law.[221]

1. *Individual Deterrence*

By punishing aggravated hazing as a felony[222] and defining hazing broadly,[223] the Timothy J. Piazza Antihazing Law responds to critics who have lamented a lack of felony penalties against individuals who cause bodily injury or death by hazing.[224] The Piazza Law's increased sentencing mandates will therefore punish individuals who carry out the physical acts that can lead to deadly outcomes like those seen in the Piazza case,[225] and appropriately so. However, empirical research suggests that criminalization of the individual within the hazing context will not, in fact, *deter* future hazing incidents.[226] Rather, the "certainty of apprehension, not the severity of the ensuing legal consequence," is necessary to effectively deter criminal behavior.[227] Further, the manipulation of substantive criminal law rules do not materially affect deterrence.[228] More specifically, research that has examined legal deterrents against the contravening social norms of college students in the context of music piracy and underage drinking suggests that legal prohibitions do not meaningfully change college student behaviors.[229]

Because of these realities, fraternity members and other students who fall within the Piazza Law's ambit are unlikely to take greater notice or caution than they would have under an earlier version of the statute, or indeed, under

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Follows, 23 JEFFREY S. MOORAD SPORTS L.J. 211, 254 (2016) ("[T]he individuals most at fault are not necessarily the ones holding the paddle or the bottle of alcohol.").

219. *See, e.g.*, CAL. PEN. CODE § 245.6(d) (West 2020); FLA. STAT. ANN § 1006.135(3)(a) (West 2020); 18 PA. STAT. AND CONS. STAT. ANN. §§ 2802–03 (West 2020).

220. *See infra* Part III.C.1.

221. *See infra* Part IV.C.1–C.3.

222. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2803(b).

223. *See id.* § 2802(a).

224. *See, e.g.*, Pelletier, *supra* note 218, at 413; Dekok, *supra* note 178.

225. *See supra* Part II.B.

226. *See generally* Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199 (2013) (compiling said research data); *see also* Robinson, *supra* note 209.

227. *See* Nagin, *supra* note 226, at 199.

228. *See* Robinson, *supra* note 209, at 105. For a similar argument, see KARL N. LLEWELLYN, THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL 118 (2018) (1930) (arguing that a society's basic order "grows . . . not from law, but . . . from the process of education") (italics omitted).

229. *See* Chamberlin, *supra* note 44, at 956; *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV 1175, 1179 (1989) (suggesting that "[r]udimentary justice requires that those subject to the law must have the means of knowing what it prescribes").

no statute at all.[230] Therefore, the Piazza Law's bolstered criminal penalties[231] may not take on special significance for individual fraternity members, particularly because "in a group [they] experience[] an identity shift so as to think in terms of group interests rather than personal interests."[232] Further, because hazing occurs covertly, the fact that offenders often overestimate their ability to avoid detection[233] presents unique challenges for hazing deterrence at the individual level. For these reasons, the Piazza Law's heightened criminal sanctions against individual hazing perpetrators, although necessary, cannot stand on their own as effective deterrents.

2. Fraternity Deterrence

Though "deterrence . . . should be the ultimate goal of hazing laws,"[234] the Piazza Law's "organizational hazing" provisions[235] will fail to deter fraternities, whose social norms have often condoned hazing,[236] from continuing to promote or allow hazing. First, by restricting a fraternity's liability solely to money damages[237] and the forfeiture of fraternity property,[238] the Piazza Law signals to fraternities that hazing's costs can be absorbed through an organization's financial stature. The Piazza Law's "organizational" fines (which are notably identical in dollar amount to the Piazza Law's "institutional" fines against host institutions)[239] are fines that national fraternities with large budgets will easily absorb—even if such fraternities are found guilty on many counts of organizational hazing.[240] The ability of fraternities to pay away hazing violations presents a troublesome prospect because hazing deterrence can only occur if an antihazing statute's target perceives the threatened cost of punishment as exceeding a perceived gain from crime.[241] Further, even assuming that the Piazza Law's fines are adequately calibrated to deter an

230. *See* Robinson, *supra* note 209, at 106 ("[S]tudies show a general ignorance of criminal law rules. People assume the law is as they think it should be [and] substitute their own intuition of justice . . . for the actual legal rules.").
231. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2803(b) (West 2020).
232. *See* Robinson, *supra* note 209, at 107; *see also* Parks et al., *supra* note 63, at 407. For a practical application of this principle, see *supra* note 77 and accompanying text.
233. *See* Robinson, *supra* note 209, at 107.
234. *See* Croy, *supra* note 64, at 258; *see also* Johnson, *supra* note 65, at 76.
235. See 18 PA. STAT. AND CONS. STAT. ANN. § 2804.
236. *See supra* note 46 and accompanying text.
237. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2804 (imposing a maximum fine of $15,000 in cases of "aggravated hazing"). For other examples of states that penalize fraternities through fines, *see* Table 1.
238. *See id.* § 2807.
239. *Compare id.* § 2804 (, *with id.* § 2805.
240. Though, of course, fraternities vary in size and financial means, many established fraternities could bear the financial brunt (negative press notwithstanding) of the Piazza Law's maximum allowable fine. *See, e.g.*, Tema Flanagan, *Greek Life Property Value: Fraternities and Sororities with the Largest and Most Valuable Properties*, HOUSE METHOD (Mar. 10, 2020), https://housemethod.com/home-warranty/greek-life-property-value/ (finding, based on a survey of 1300 fraternity-owned properties, that the average fraternity property value exceeded $1 million).
241. *See* Robinson, *supra* note 209, at 107; *see also* HECHINGER, *supra* note 36, at 251 ("Economists and public-health scholars agree that raising the cost of a behavior can reduce its prevalence.").

organization from "promot[ing] or facilitat[ing] hazing,"[242] statutory fines often do not deter offenses committed by corporations or other organizations, regardless of the fine's amount.[243]

The Piazza Law's nonmonetary organizational penalties are similarly lacking in deterrent power. Although the Law's forfeiture subsection allows for the forfeiture of a convicted fraternity's assets,[244] a close reading of the subsection's text reveals that the subsection merely *permits* a court to force forfeiture of fraternity assets.[245] The subsection leaves the ability to order such a forfeiture completely within the discretion of an individual judge.[246] The forfeiture penalty's deterrent power is further watered down by a number of exceptions,[247] one of which allows fraternities to sidestep the forfeiture penalty simply by successfully petitioning the court for a return of property.[248] These permissive attributes of the forfeiture subsection render the loss of a fraternity's real property a less-than-likely prospect, and by extension, a halfhearted hazing deterrent.

The lenient monetary and equitable penalties the Piazza Law imposes on fraternities ignore the powerful social role fraternities play in preserving hazing.[249] By extending jail sentences to the subjects of hazing indoctrination, but extending only fines and (possible) property losses to the indoctrinators themselves, the Piazza Law has introduced a wildly inequitable statutory scheme. Applying the Law's text to a hypothetical scenario, an eighteen-year- old fraternity member who recklessly, but upon orders from above, injures someone in a drinking ritual will face the lifetime of stigma that a felony conviction brings,[250] while the fraternity that created the cultural and situational antecedents necessary to propagate hazing[251] will face comparatively minuscule

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242. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2805.

243. *See, e.g.*, Zach Greenberg & Adam Goldstein, *Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public Interest*, 44 J. LEGIS. 22, 28–32 (2017) (noting that, despite misinterpretation by colleges, FERPA, a federal statute, has never been enforced, deeming it "a meaningless deterrent"); Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 525–26 (2011) (concluding, based on an empirical analysis, that criminal fines against corporate entities are rare). Additionally, calibrating fine amounts to the losses suffered by victims of violent crimes is difficult. *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1202 (1985).

244. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2807.

245. See id.

246. *See id.* ("Upon conviction . . . the court may . . . direct the defendant to forfeit property which was involved in the violation for which the defendant was convicted.").

247. See id.

248. *See id.* (referencing 42 PA. STAT. AND CONS. STAT. ANN. § 5806 (West 2020)).

249. *See* Chamberlin, *supra* note 44, at 962; *see also* Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 77 n.89 (2004) ("Hazing is a complex social problem that is shaped by power dynamics ").

250. *See, e.g.*, Crosby Hipes, *The Impact of a Felony Conviction on Stigmatization in a Workplace Scenario*, INT'L J. L., CRIME & JUST., Jan. 25, 2019, at 89, 96 ("For ex-offenders, the label of a criminal record, if it is disclosed, can lead to deeply negative stereotyping and discrimination. This is even when the details of the crime committed are unknown, and even when compared to another stigmatized category of person.").

251. *See* ROBBINS, *supra* note 18, at 49; Nuwer, *supra* note 43, at 29.

punishments (if, indeed, it is prosecuted at all). The Piazza Law's failure to penalize fraternities commensurately with their would-be members provides fraternities, many of whom exert strong psychological influence on members and pledges,[252] scarce disincentive to halt hazing practices that have served fraternity purposes for generations.[253] Ultimately, the Law's disproportionate penalties ensure that the cycle of hazing will continue as future generations join Greek ranks, students underestimate their chances of being caught, and fraternities regard state law as a mere stumbling block to carrying out the generations-old tradition of hazing.[254]

3. *Host-Institutional Deterrence*

Just as the Piazza Law ignores the powerful ability of fraternities to propagate or curb hazing in accordance with legal incentives, it also subjects host institutions to ineffectual mandates that do little to control hazing's causes. In fact, the Law's mandate that host institutions self-report hazing violations[255] presents multiple undesirable consequences.[256]

By allowing host institutions to comply with its mandates through the host institutions' own staff, procedures, and policy judgments,[257] the Piazza Law surrenders the proper administration of antihazing policy to institutions with a vested interest in reporting fewer and less serious hazing incidents so as not to jeopardize their own images[258] or invoke liabilities under state law.[259] Even if a state government could safely entrust colleges with administering the Piazza Law, early commentary on Penn State's narrow interpretation and application of the Law's reporting requirement[260] suggests that host institutions will interpret the Piazza Law contrary to legislative intent,[261] leading to undesirable results.[262] Further, the Piazza Law's directive ignores a powerful

252. *See supra* notes 52–61 and accompanying text.
253. *See* ROBBINS, *supra* note 18, at 117–20.
254. Organizations often perceive the prospect of civil damages as an "unguided missile" that "may or may not strike them" and, accordingly, such organizations fail to adopt more cautious behavior. *See* E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053, 1057 (1989).
255. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2809 (West 2020).
256. *See* Dixon, *supra* note 172, at 359 (noting that requiring host institutions to develop antihazing policies is a measure "without any real teeth").
257. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2808; *see also Fraternity and Sorority Social Monitoring*, *supra* note 185.
258. *See* Sweet, *supra* note 44, at 358 ("[C]olleges and universities add to the problem of estimating hazing by deliberately avoiding inquiry into hazing incidents for fear of damaging institutional reputations.") (citations omitted).
259. *See* 18 PA. STAT AND CONS. STAT. ANN. §2808.
260. *See* Christine Vendel, *Penn State Didn't Report Football Player's Hazing Allegations, But Should It Have Under State Law?*, PENNLIVE.COM (Jan. 16, 2020), https://bit.ly/2Ht22Vu.
261. *See id.*; *see also supra* notes 152–54 and accompanying text.
262. *See, e.g.*, Shashi Marlon Gayadeen, Ritualizing Social Problems: Claimsmakers in the Institutionalization of Anti-Hazing Legislation 25 (2011) (unpublished Ph.D. dissertation, University of Buffalo, State University of New York) (on file with author) (noting that where antihazing statutes contain ambiguities, organizations interpreting the statutes will either (1) define their own acceptable standards or (2) change their current practices to accommodate their perceived legal duties).

elephant in the room: fraternities with powerful alumni and reliable donors who exert social pressures on host institutions to preserve broad privileges for Greek institutions.[263]

More specifically, the Piazza Law's requirement that host institutions report "all violations of the institution's antihazing policy . . . that are reported to the institution"[264] has been unevenly interpreted by Pennsylvania host institutions.[265] Despite the reporting requirement's plain text, at least three Pennsylvania colleges have opted to include only "substantiated" hazing violations in their mandated Piazza Law reports.[266] Among the three colleges is Timothy Piazza's alma mater Penn State, whose spokesperson proffered that reporting unsubstantiated claims under the Piazza Law "does not acknowledge that initial reports of alleged hazing do not always match the definition of hazing (and thus should not be listed as such,) nor does it provide an accurate picture of actual misconduct that may be taking place." However, officials from the Piazza Law's original sponsor's office confirmed, on request for comment, that the Law's text "did contain language that supports reporting of all incidents."[267] Further, the long-standing rule that Pennsylvania courts should construe remedial clauses and statutes liberally to best effect their purposes[268] cuts against Penn State's narrow approach to the Piazza Law.[269]

If, in fact, educating students is a host institution's most effective method of preventing student victimization,[270] then hazing laws that mandate host-institutional reporting should do so in unambiguous language. Host institutions

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263. *See* Eric Kelderman, *Why Colleges Don't Do More to Rein in Frats*, CHRON. HIGHER EDUC. (Mar. 27, 2015), https://www.chronicle.com/article/Why-Colleges-Don-t-Do-More/228841 ("Cracking down on fraternities faces big hurdles, such as upsetting powerful alumni and donors who were members of those groups. But some colleges and national associations have taken it upon themselves to limit their responsibilities chiefly because of the cost and potential legal liability."); *Why Colleges Tolerate Fraternities*, *supra* note 25.

264. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2809(a). Arguably, a reporting requirement is unnecessary as hazing awareness has greatly increased due to the ubiquity of social media evidence. *See generally* Johnson, *supra* note 65.

265. *See* Vendel, *supra* note 260.

266. *See id.* Penn State spokesperson Lisa Powers has declared that the University "'has decided that publishing the name of organizations accused of hazing, but then found not guilty of this violation, definitely has the potential to unfairly paint those organizations (as well as all of their members) with a broad brush of misconduct, for which there were no supportable findings.'").

267. *See id.*

268. *See, e.g.*, *In re* A.B., 987 A.2d 769, 775 (Pa. 2009); Verona v. Schenley Farms Co., 312 A. 317, 320 (Pa. 1933).

269. An argument that the reporting requirement ought to be construed narrowly because of its penal nature, *see* 1 PA. STAT. AND CONS. STAT. ANN. § 1928(b)(1) (West 2020), similarly falls short because the Piazza law enumerates no penalties for a host institution's failure to report, *see* 18 PA. STAT. AND CONS. STAT. ANN. § 2808 (West 2020), in spite of the Pennsylvania judiciary's mandate that penal statutes must specify fines and punishments. *See* Commonwealth v. Stone and Co., 788 A.2d 1079, 1082 (Pa. Commw. Ct. 2011) (citing Commonwealth v. Henderson, 663 A.2d 728, 733 (Pa. Super. Ct. 1995)).

270. *See* Kelly W. Bhirdo, Note, *The Liability and Responsibility of Institutions of Higher Education for the On-Campus Victimization of Students*, 16 J.C. & U.L. 119, 135 (1989); *see also* Douglas Fierberg & Chloe Neely, *A Need for Transparency: Parents, Students Must Make Informed Decisions About Greek-Life Risks*, *in* HAZING: DESTROYING YOUNG LIVES, *supra* note 43, at 42, 48.

approach the law "collectively and institutionally,"[271] and they often bury legal disputes by settling when they predict that disputes with "bad facts" will, if litigated to final judgment, create precedents unfavorable to host institutions.[272] Therefore, the apparent willingness of host institutions to parse the Piazza Law's language narrowly[273] despite its remedial purposes[274] suggests that host institutions will engage in selective compliance in order to serve their public relations and financial goals.[275]

Even assuming the prudence of legislatures placing universities at the helm of hazing disclosure and policing, the role of host institutions in curtailing hazing may still prove problematic. The director of Penn State's recently installed Piazza Center for Fraternity and Sorority Research and Reform, Steve Veldkamp, cited Penn State's "seed money" and the mentorship of older students in creating "stable organizations" as essential to hazing prevention.[276] However, while Veldkamp's "mentorship" approach may reduce hazing at fraternities where safe behaviors are modeled by all members,[277] mentorship alone is unlikely to eradicate fraternal hazing when such behavior has become "the spirit and tradition" of a fraternity."[278] Further, Veldkamp's mentorship approach does not respond adequately to the psychological "victim-to- perpetrator cycle"[279] seen in fraternity hazers. This cycle tends to suggest that older fraternity members will be unable or unwilling to denounce hazing within a mentorship role.[280] Indeed, the acquiescence of Beta Theta Pi's chapter president during the Piazza incident[281] demonstrates that fraternity "mentors" may themselves be incentivized to condone or propagate hazing. One fraternity "adviser" acknowledges the shortcomings of fraternal mentorship firsthand:

> When, as a fraternity adviser, I talk to my guys, and I tell them, "Look, you've got to stay within the boundaries of the school's rules and the state law, or you could be expelled, or you could go to prison," they're going to look at me like I'm lying to them because *I am* They know that on paper, supposedly you could be expelled and supposedly you could be prosecuted, but the odds are really, really against that ever happening.[282]

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271. *See* ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 89 (1999).
272. *See id.* at 90. Because of this tendency, the authors note that "[u]niversity law has the risk of being what university lawyers *say* it is." *Id.* at 90–91 (emphasis added).
273. *See* Vendel, *supra* note 260.
274. *See supra* notes 152–54 and accompanying text.
275. *See* Alvarez, *supra* note 69, at 55–56 ("Universities have a self-serving interest in making sure their reputation and federal funding remain intact..... Reporting hazing incidents does not serve [their] efforts to maintain.....standing among prospective applicants.").
276. *See* Centre County Gazette & Vincent Corso, *supra* note 188.
277. *See* ROBBINS, *supra* note 18, at 292
278. *See* Kuzmich, *supra* note 42, at 1124.
279. *See* Chamberlin, *supra* note 44, at 962.
280. See id.
281. *See* Deak, *supra* note 3.
282. *See* Naomi Andu, *To End Hazing, Students Must Be Individually Punished or Prosecuted, Advocates Tell Texas Lawmakers*, TEX. TRIB. (Feb. 11, 2020, 5:00 PM), https://www.texastribune.org/2020/02/11/end-hazing-punish-students-not-just-organization-

Because the ability of host institutions to self-police and self-report can be easily abused,[283] states should appoint one independent commissioner tasked with monitoring and reporting on fraternal organizations and hazing violations.[284] By doing so, the Piazza Law can avoid the biases inherent in self-policing for which it presently allows.

IV. INVERTING THE TRIANGLE: AMENDING CRIMINAL ANTIHAZING STATUTES TO ACHIEVE OPTIMAL HAZING DETERRENCE

This note has identified the Piazza Law's statutory weaknesses vis-à-vis the three main actors who play a pivotal role in either the propagation or eradication of fraternity hazing: individual students,[285] fraternities,[286] and host institutions.[287] As a corollary to the shortcomings of the Piazza Law's conception of what this note has dubbed the "Hazing Triangle,"[288] this part suggests that state legislatures who enact antihazing laws should "invert" the Hazing Triangle by enacting stronger criminal penalties for fraternities and their host institutions.[289] In "inverting the triangle," the focus of criminal deterrence will shift to fraternities and host institutions, whom this note has suggested require greater statutory oversight and penalization,[290] and whose clout and influence can stem the fraternity hazing tide more powerfully than the criminalization of individual actors.[291]

A. Imposing Criminal Penalties upon Fraternities Found Guilty of "Organizational Hazing"

To invert the triangle, the Piazza Law and other statutes must sanction fraternities more meaningfully. In this regard, Professor Robinson's blueprint for meaningful criminal deterrence provides a useful starting point:

> [R]ule manipulation can, under the right circumstances . . . have an effect on conduct . . . where there [is]: good communication of the legal rule manipulation, meaningful punishment rates, a perceived substantial punishment threat against only a moderate benefit from crime, [and] an improved ability to reliably gauge how to calibrate

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texas-advocates-say/ (quoting Jay Maguire, founder of "Parents and Alumni for Student Safety") (emphasis added).

283. *See supra* notes 266–69 and accompanying text.

284. *See* Andu, *supra* note 282 ("[U]niversities need to focus on ensuring investigations are conducted by impartial third parties"). Consider, too, that four major fraternity hazing incidents occurred at Penn State before the death of Timothy Piazza finally triggered a major response. *See supra* notes 96–104 and accompanying text.

285. *See supra* Part III.C.1.

286. *See supra* Part III.C.2.

287. *See supra* Part III.C.3.

288. *See supra* Part III.B.

289. *See infra* Part IV.A and B.

290. *See supra* Part III.B.

291. *See supra* Part III.C.2 and 3.

> punishment amount. . . . Unfortunately, the existence of these conditions is the exception rather than the rule.[292]

Despite the importance of meaningful penalties against fraternities, only seventeen states specifically enumerate financial or equitable criminal sanctions against fraternities for hazing crimes.[293] Table 1 provides an overview of these "organizational hazing" offenses.

Table 1: Antihazing Statutes That Directly Penalize Fraternities[294]

State	Nature of Penalty	Acts or Omissions Required for Fraternity Hazing Offense
Alabama	Automatic loss of host-institutional recognition where hazing occurred; mandatory loss of public funding[295]	Fraternity must "knowingly permit[]" hazing to be conducted by a person subject to its "direction or control"[296]
Arizona	Automatic loss of host-institutional recognition where hazing occurred[297]	Fraternity must "knowingly permit[], authorize[], or condone[]" hazing[298]
Connecticut	Automatic loss, for at least one year, of host-institutional recognition at any school statewide; automatic fine[299]	Fraternity must "engage in hazing"[300]
Delaware	Possible loss of host-institutional recognition where hazing occurred[301]	Fraternity must "authorize[] hazing in blatant disregard" of statute[302]
Florida	At public host institutions, possible loss of host-institutional recognition where hazing occurred[303]	Fraternity must "authorize[] hazing in blatant disregard" of statute[304]
Louisiana	Possible loss of host-institutional recognition where hazing occurred (minimum of four years if hazing results	Fraternity representative or officer must know of hazing incident and fail to report it to

292. *See* Robinson, *supra* note 209, at 112.
293. *See* Table 1.
294. The table's use of the term "possible" indicates that the statute *permits* a court to enforce the penalty in question. The term "automatic" indicates that the statute demands the penalty in question.
295. *See* ALA. CODE § 16-1-23(e) (2020).
296. *See id.*
297. *See* ARIZ. REV. STAT. ANN. § 15-2301(A)(10) (2020).
298. *See id.*
299. *See* CONN. GEN. STAT. ANN. § 53-23a(c) (West 2020)
300. *See id.* § 53-23a(b). The statute does not differentiate the acts required of an organizational hazer from those required of an individual hazer. *See id.*
301. *See* DEL. CODE ANN. tit. 14, § 9304(b)(3) (West 2020).
302. *See id.*
303. *See* FLA. STAT. ANN. § 1006.63(8)(b) (West 2020).
304. *See id.*

	in serious bodily injury); possible fine; possible forfeiture of public funding[305]	law enforcement[306]
Maine	Automatic loss of host-institutional recognition where hazing occurred[307]	Fraternity must "authorize[]" hazing[308]
Nebraska	Automatic fine[309]	None required[310]
New Hampshire	Misdemeanor[311]	Fraternity must either "knowingly permit[] or condone" hazing, "negligently fail[] to take reasonable measures" to prevent hazing, or fail to report hazing to law enforcement[312]
Oklahoma	Misdemeanor; possible fine; possible loss of host-institutional recognition, for a minimum of one year, where hazing occurred[313]	Fraternity must "engage or participate in hazing"[314]
Oregon	Possible fine[315]	Fraternity is guilty if fraternity, or one of its members, "intentionally" hazes[316]
Texas	Possible fine[317]	Fraternity commits hazing if it "condones or encourages" hazing or if any combination of its members hazes[318]
Pennsylvania	Possible fines and equitable relief to be determined by a court[319]	Fraternity must "intentionally, knowingly, or recklessly promote[] or facilitate[]" hazing[320]
Utah	Misdemeanor[321]	Unspecified[322]
Vermont	Automatic loss of host-institutional recognition where hazing occurred[323]	Fraternity must "knowingly permit[], authorize[], or condone[]" hazing[324]

305. *See* LA. STAT. ANN. § 14:40.8(B)(1)(a)(i)—(iii) (2020).
306. *See id.* § 14:40.8(B)(1)(a).
307. *See* ME. REV. STAT. tit. 20-A, § 10004(3)(C) (2020).
308. *See id.*
309. *See* NEB. REV. STAT. ANN. § 28-311.06(3) (West 2020).
310. *See id.* ("If the offense of hazing is committed for the purpose of initiation into . . . an organization . . . operating under the sanction of a [host institution] and such offense is committed by members . . . such organization shall be punished by a fine of not more than ten thousand dollars.").
311. *See* N.H. REV. STAT. ANN. § 631:7(II)(b) (2020).
312. *See id.* § 631:7(II)(b)(1)-(3).
313. *See* OKLA. STAT. ANN. tit. 21, § 1190(D) (West 2020).
314. *See id.* § 1190(A) (West 2020).
315. *See* OR. REV. STAT. ANN. § 163.197(2)(a) (West 2020).
316. *See id.* § 163.197(1) (West 2020).
317. *See* TEX. EDUC. CODE ANN. § 37.153(b) (West 2020).
318. *See id.* § 37.153(a).
319. *See* 18 PA. STAT AND CONS. STAT. ANN. § 2804 (West 2020).
320. *See id.* § 2804(a).
321. *See* UTAH CODE ANN. § 76-5-105.5(3) (West 2020).
322. *See generally id.* § 76-5-105.5.

Washington	Automatic loss of host-institutional recognition at any public school within the state[325]	Fraternity must knowingly permit hazing[326]
West Virginia	Possible loss of host-institutional recognition where hazing occurred[327]	Fraternity must "authorize[] hazing in blatant disregard" of statute[328]

Many of the "organizational hazing" penalties enacted by the seventeen states above, such as severance of a host-institutional relationship, suggest a legislative willingness to hold fraternities to account for their role in hazing. An organizational conception of fraternity hazing culpability recognizes, inter alia, the long-standing concept of accessories after the fact in criminal law.[329] Nonetheless, this note suggests that each of the seventeen legislative schemes, in isolation, will punish fraternities but not ultimately prevent them from continuing to propagate hazing crimes.

As such, the Piazza Law and other antihazing statutes should strengthen fraternity deterrence in two ways. First, criminal fines against fraternities should not be statutorily capped. Instead, the monetary value of criminal fines for organizational hazing violations should be left to the determination of a factfinder in criminal cases. This will ensure that fine amounts are not insufficient deterrents to well-funded fraternities,[330] and alternatively, that smaller fraternities are not sanctioned disproportionately with larger fraternities.

Second, and perhaps more controversial, all criminal antihazing statutes should follow the lead of the seventeen states that currently hold fraternities criminally liable for hazing,[331] and criminal hazing statutes generally should explicitly declare the organizational crime of hazing as a strict liability offense.[332] The legislative enactment of strict liability criminal statutes offers at least two important advantages.[333] First, strict liability eliminates the

323. *See* VT. STAT. ANN. tit. 16, § 178(b) (West 2020).
324. *See id.*
325. *See* WASH. REV. CODE ANN. § 28B.10.902(2) (West 2020).
326. *See id.*
327. *See* W. VA. CODE ANN. § 18-16-4(b)(2) (West 2020).
328. *See* W. VA. CODE § 18-16-4(b)(2) (1995).
329. Accessories after the fact can be held criminally liable for assisting another person in avoiding arrest or prosecution for committing an already completed offense. *See, e.g.*, People v. Zierlion, 157 N.E.2d 72, 73 (Ill. 1959). Additionally, fraternities could not, under this theory, escape criminal liability even if they enacted formal policies against chapter hazing. *See* Henry J. Amoroso, *Organizational Ethos and Corporate Criminal Liability*, 17 CAMPBELL L. REV. 47, 51 (1995) ("[Criminal] acts may be imputed to the corporation, even if they are forbidden and against corporate policy or express instructions.") (citing United States v. Gold, 743 F.2d 800 (11th Cir.), *cert. denied*, 469 U.S. 1217 (1984)).
330. *See supra* notes 239–43 and accompanying text.
331. *See* Table 1.
332. *See Strict-Liability Crime*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An offense for which the action alone is enough to warrant a conviction, with no need to prove a mental state; specif., a crime that does not require a mens rea element, such as traffic offenses and illegal sales of intoxicating liquor.").
333. Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 422 (2007).

administrative burdens of verifying defendants' mental states.[334] In the case of hazing, such a lessening of the mens rea required for fraternity culpability will disallow fraternities from disavowing the actions of their constituent members as being unrelated to fraternity oversight. Second, and more important for purposes of fraternity hazing, strict liability crimes improve deterrence[335] by ensuring that actors who cannot exercise a basic level of care do not engage in certain behaviors.[336] When employed by legislatures, strict criminal liability "shift[s] the burden of acting within the law onto . . . persons who stand in a responsible relation to the harm."[337] Within the organizational context, strict liability crimes produce stronger incentives for organizational leaders to supervise organizational activities because, under a statutory scheme where their ignorance of wrongdoing is irrelevant to fault, organizational leaders become compelled to exercise oversight of such activities.[338] Because hazing is a dangerous activity that fraternities are in good stead to thwart as collective entities, strict organizational liability for organizational hazing has the potential to reduce fraternity hazing incidents. Further, other dangerous activities affecting impressionable victims, such as the sale of intoxicating liquor to minors, have also been the subject of strict liability crimes.[339]

Critics of this strict liability approach may argue that a more forgiving mens rea standard, such as criminal negligence, better suits organizational hazing.[340] However, legislatures shaping criminal statutes must ensure that juries, who "may be ill-suited to decide what is reasonable in complex high risk activities,"[341] such as hazing, do not reinvent reasonableness standards on an ad hoc basis.[342] Further, in states, such as Ohio, where *individual* hazing has been treated as a strict liability offense, prosecutors have not "run amuck" in their enforcement of the statute.[343] Nonetheless, in an attempt to best balance the policy ramifications of strict liability crimes against crimes requiring a showing of mental state, this note suggests a common ground—that organizational hazing offenses targeting fraternities should reflect a tiered mens rea approach based on the severity of hazing.[344] Such an evening of group and individual culpability for fraternity hazing will not only acknowledge the powerful role that fraternities as organizations play in perpetuating hazing,[345] but will also

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334. *See id.*
335. *See id.*
336. *See id.* at 424.
337. George Jugovic, Jr., *Legislating in the Public Interest: Strict Liability for Criminal Activity Under the Pennsylvania Solid Waste Management Act*, 22 ENVTL. L. 1375, 1392–93 (1992).
338. *See* Hamdani, *supra* note 333, at 447.
339. Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 419 (1993) (noting that strict liability "shifts the risks of dangerous activity to those best able to prevent a mishap").
340. Courts, additionally, are reluctant to infer strict liability where doing so "would criminalize a broad range of apparently innocent behavior." *See* State v. Anderson, 5 P.3d 1247, 1251 (Wash. 2000) (en banc).
341. Levenson, *supra* note 339, at 421.
342. *See id.*
343. Croy, *supra* note 64, at 260.
344. *See infra* Part IV.C.1.
345. *See* Chamberlin, *supra* note 44, at 962.

cause fraternity leaders to recognize the probability of punishment for hazing[346] and to adjust their actions accordingly.[347] Extending the scope of organizational criminal liability to fraternity hazing is particularly apropos because such liability "prompts organizations to more rigorously police their agents,"[348] and in the context of hazing, local chapters essentially act as agents of national governing bodies.[349]

B. Ensuring the Compliance of Host Institutions Through Specific and Enforceable Statutory Requirements

In conjunction with the "inverted" triangle's bolstered criminal penalties for fraternities,[350] host institutions must likewise hold up their 'side' of the triangle alongside the fraternities with whom they associate. In this regard, antihazing statutes must achieve multiple ends simultaneously. First, to avoid institutional biases,[351] statutory disclosure requirements like the Piazza Law's[352] must clearly delineate the administrative role of the host institution bound to comply with the statute.[353] Appropriate penalties against the institution for failure to comply with reporting requirements must also be statutorily codified in an unambiguous manner. Further, antihazing statutes must require public host institutions (and private host institutions who accept state funding) to sever institutional recognition and funding from fraternities who are found criminally liable for any hazing offense.[354] This statutory requirement will force

346. *See* LLEWELLYN, *supra* note 228, at 16 ("[I]n the case of legislation on crimes . . . commands are public. They can be learned of by the interested parties. And to a large degree the interested parties foresee what the officials will now do, and reshape their own affairs in consequence.").

347. Importantly, this note does not suggest that applying organizational culpability involves eschewing individual culpability. Both parties must be held accountable because if individual members are absolved of blame completely, the antihazing statute would "enforce the idea that members can hide within the organization." *See* Joyce & Nirh, *supra* note 40, at 59.

348. *See* Daniel L. Cheyette, *Policing the Corporate Citizen: Arguments for Prosecuting Organizations*, 25 ALASKA L. REV. 175, 185 (2008).

349. *See, e.g.*, Whitney L. Robinson, *Hazed and Confused: Overcoming Roadblocks to Liability by Clarifying a Duty of Care Through a Special Relationship Between a National Greek Life Organization and Local Chapter Members*, 49 U. MEM. L. REV. 485, 514 (2019).

350. *See supra* Part IV.A.

351. *See supra* notes 266–69 and accompanying text; *see also* Nuwer, *supra* note 59 (noting that "administrators . . . view pledges as willing participants rather than susceptible victims of cult-like groups; as a result, they punish hazers too lightly").

352. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 2804(a) (West 2020).

353. *See* Fierberg & Neely, *supra* note 270, at 45–48 (arguing that host institutions owe a duty to students to inform them fully and accurately of Greek life risks, and that "opaque descriptions" of misconduct are insufficient protections for students).

354. This approach would not be unprecedented. *See, e.g.*, FLA. STAT. ANN. § 1006.63(8)(b) (West 2020) ("In the case of an organization at a Florida College System institution . . . that authorizes hazing in blatant disregard of such rules, penalties may also include rescission of permission for that organization to operate on campus property or to otherwise operate under the sanction of the institution."); W. VA. CODE ANN § 18-16-4(b)(2) (West 2020) (echoing Florida's "rescission of permission" language nearly verbatim). This approach is also necessary considering the Pennsylvania Superior Court's reluctance to "excommunicate" a fraternity from the Commonwealth without express statutory authorization. *See* Commonwealth v. Pi Delta Psi, Inc., 211 A.3d 875, 892 (Pa. Super. Ct. 2019), *appeal denied*, 221 A.3d 644 (Pa. 2019). Finally, this approach was recommended by the grand jury presentment in the aftermath of the Beta Theta Pi hazing scandal. *See* Xian, *supra* note 132.

host institutions to approach troublesome fraternities with a "tough love" attitude and compel host institutions to approach their reporting and disclosure requirements with greater concern.

C. *Lifting the Haze: Model Statutory Text for a Post-Piazza Collegiate World*

To address the lack of legal deterrence that state antihazing statutes have placed on fraternities and host institutions, this section provides a model "Organizational Hazing" statutory section that intends to achieve two functions: (1) to acknowledge the available literature's insights on how incentives drive or deter fraternity hazing and (2) to bridge the penological gaps that exist among state statutes that criminalize organizational hazing.[355]

The author's aim in providing this model statutory text is, specifically, to inform the legislative drafting of an organizational hazing offense that ensures organizational and host-institutional deterrence. As such, this model text does not include otherwise necessary features of antihazing statutes, such as definitions of hazing and bodily injury, or a consent clause. Additionally, although this note argues that legislatures should impose penalties where host institutions have been found not to comply with specific reporting requirements, legislatures will necessarily differ as to how host-institutional reporting requirements are to be delegated and enforced. Some legislatures, for instance, may appoint an individual commissioner to investigate whether host institutions comply with the statute, or may even create a civil enforcement mechanism against host institutions for any citizens who become aggrieved by reporting requirement oversights. Therefore, despite this note's argument that these requirements should be enforceable (if enacted), this model text does not include such a section.

1. LEGISLATIVE PURPOSE.

The legislature recognizes that the act of hazing, as defined by the legislature, can cause serious bodily injury, psychological harm, and death. The legislature also recognizes that organizations, as defined in this section, often exercise undue coercion and psychological influence upon individual actors who commit hazing. In enacting this section, as well its strict liability penalties against organizational hazing, it is the intent of the legislature to create strict criminal liability for organizations who commit the crime of hazing because of the severe nature and consequences of the activity.

2. DEFINITIONS.

The term "organization" shall include student organizations, associations, fraternities, sororities, corporations, and student living groups. The term "host institution" shall include any private or public school, college, or university that recognizes or affiliates with a fraternity.

355. *See* Table 1.

3. ORGANIZATIONAL HAZING.

a. Any organization that negligently permits hazing to be conducted by its members, or by others subject to its direction or control, commits a misdemeanor and such organization

> (1) shall forfeit all official recognition, approval, rights, and privileges of being an organization organized or operating at an institution of higher education, for a period to be determined by a court but not less than two years; and
> (2) may be subject to any such fines or forfeiture of any property involved in the offense as the court deems equitable based on the circumstances of the hazing violation(s).

b. Where any person or group of persons who are members of an organization, or who are subject to the organization's direction and control, commit hazing that results in bodily injury or death, such organization

> (1) shall forfeit permanently all official recognition, approval, rights, and privileges of being an organization organized or operating at any host institution in this state; and
> (2) may be subject to any such fines or forfeiture of any property involved in the offense as the court deems equitable based on the circumstances of the hazing violation(s).

V. CONCLUSION

The Piazza Law, although laudable in its ambitions, falls short of its legislative objectives by placing insufficient penalties upon fraternities and host institutions—two actors that can curb the spread of hazing more effectively than the individual hazing perpetrators that the Piazza Law and other statutes primarily target.[356] This note argues that this problem should be solved in two ways.[357] First, the Piazza Law and other antihazing statutes should impose greater penalties upon fraternities.[358] Second, antihazing statutes should specifically enumerate responsibilities and corresponding liabilities for host institutions and should appoint an independent commissioner to oversee antihazing statutes' directives.[359]

As an intended "model for changing anti-hazing laws nationwide,"[360] the Piazza Law's text has already become a near-verbatim boilerplate for a pending antihazing bill in New Jersey.[361] Doubtless other states will follow Pennsylvania's and New Jersey's lead in strengthening their antihazing statutes

356. *See supra* Part III.
357. *See* supra Part IV.
358. *See supra* Part IV.A.
359. *See supra* Part IV.B.
360. *See supra* note 151 and accompanying text.
361. *See* N.J.S.B. 2093, 219th Leg., Reg. Sess. (N.J. 2020), https://legiscan.com/NJ/text/S2093/2020.

as further fraternity hazing incidents saturate the news media. Because of the Piazza Law's emerging role as a model statute,[362] state legislatures must consider carefully how this new trend in antihazing legislation may not produce the deterrent results hoped for. Ultimately, it is the aim of this note that its "inverted triangle" approach to antihazing policy will mark the start of an extended scholarly and public dialogue on how best to achieve fraternity hazing deterrence.

362 *See supra* notes 151, 361 and accompanying text. This note's analytical framework and conclusions are applicable to all current and future antihazing statutes. Further, the interplay discussed herein between state legislatures, host institutions, fraternities, and individuals are of general applicability, despite this note's use of Pennsylvania law and events as its primary objects of analysis.

Review of Anne M. Hornak's

ETHICAL AND LEGAL ISSUES IN STUDENT AFFAIRS AND HIGHER EDUCATION

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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.[1] 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.

This book is immensely helpful for higher education administrators, and particularly newer student affairs staff, learning to make ethical decisions when faced with complex dilemmas. Likewise, more seasoned administrators may benefit from using this book as a resource for building a culture of ethics at their institution. However, the text falls short on describing all of the complicated legal issues at play. Although there is a dedicated chapter on the current legal issues affecting student affairs, the book would benefit from including a legal perspective throughout the text. Nevertheless, I recommend that legal counsel read this book to understand the mind-set of higher education administrators when faced with an ethical or legal quandary.

The foreword by Naijan Zhang and the first chapter by Anne M. Hornak, successfully set the stage; readers can expect qualified student affairs professionals (including heavy hitters, such as José A. Cabrales and Tricia Bertram Gallant, among others) to discuss multiple aspects of ethical decision-making. The book aptly begins with Jonathan J. O'Brien detailing a variety of ethical foundations, frameworks, and theories, along with briefly touching on their benefits and limitations. Peppered throughout the chapter are examples and vignettes, specifically including American College Personnel Association's (ACPA) 2017 "Respect Happens Here"

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[1] An online search of the *Chronicle of Higher Education* (www.chronicle.com), conducted February 17, 2020, for articles containing the term "law and higher education" reveals 600 published pieces in the past three years; 250 of those are related to student affairs.

campaign[2] launched by a coalition of student affairs professionals to promote campus civility. While it's certainly not all-inclusive, this chapter packs a lot of theoretical frameworks into a limited number of pages, allowing readers to get a sense of the foundation of ethical decision-making.

Building on the previous chapter, chapter 3 highlights three decision-making frameworks from the counseling profession,[3] organization management,[4] and accounting.[5] The author walks you through making a difficult decision using each framework. Throughout the chapter, Anne M. Hornak emphasizes the importance of viewing a problem from multiple perspectives, and urges student affairs practitioners to consider the moral and ethical consequences—in addition to the legal consequences—of a decision. Although the author clearly implies that the law must be followed, the chapter would benefit from an explanation on how legal and ethical obligations could be at odds, and how you reconcile those differences. The chapter does, however, include several nuanced examples of realistic and complicated ethical decisions that are helpful, even without explicit legal implications. Interestingly, the chapter concludes with a case study that is geared toward students and not the primary audience of higher education administrators.

In chapter 4, authors V. Barbara Bush and Daniel Chen view ethics from a wider lens. They begin to explain the importance of ethical culture, in addition to individualized ethics, which is more commonly discussed. The authors describe a need for creating conversations around ethical decision-making, offering ethic workshops for students, and promoting a culture of integrity. The authors go on to describe how administrators either support or hinder an ethical campus culture, yet they fail to mention how an administrator's morals and values can impact what they deem as ethical.

In the next chapter, Regina Garza Mitchell, Ramona Meraz Lewis, and Brian Deitz, fill in the gaps that chapter 4 is missing. Chapter 5 opens by discussing the importance of professional and personal ethics in decision-making, and how personal values and morals affect outcomes. The authors also spotlight the Council for the Advancement of Standards in Higher Education (CAS), an organization that reviews the ethical principles of many higher education organizations. Legal counsel may be interested in learning more about CAS and its guidelines that many colleges adopt. Perhaps the most valuable aspect of this chapter is the inclusion of an

[2] American College Personnel Association (ACPA), *Join the Respect Movement!*, ACPA—COLLEGE STUDENT EDUCATORS INT'L (2017), https://www.myacpa.org/article/join-respect-movement.
[3] Vilia M. Tarvydas, *Ethics and Ethical Decision-Making*, *in* THE PROFESSIONAL PRACTICE OF REHABILITATION COUNSELING 339 (D.R. Maki & V.M. Tarvydas ed., 2011).
[4] Thomas M. Jones, *Ethical Decision Making by Individuals in Organizations: An Issue-Contingent Model*, 16 ACADEMY OF MANAGEMENT REVIEW 366 (1991).
[5] MARY ELLEN GUY, ETHICAL DECISION MAKING IN EVERYDAY WORK SITUATIONS (1990).

ethical scenario in which the authors describe each step of their decision-making process. The chapter concludes with another intriguing case, this time aimed at the audience running through their own decision-making process.

As the title promises, chapter 6 describes the legal implications student affairs practitioners should consider in their decision-making. The amount of information needed to discuss the current legal issues affecting student affairs could fill, and has filled, many volumes of books. Strikingly, in only one short chapter, Natalie Jackson and Janelle Schaller manage to provide a solid overview of student civil rights, free speech, due process, campus safety obligations, and privacy laws impacting student educational records. They even briefly mention the resources available to students who feel their rights have been violated by an institution. There are certainly more laws, policies, and information that could have been included in this chapter if space allowed;[6] however, this is a strong foundation.

After a brief hiatus, the book then refocuses on what constitutes an ethical campus culture. Clearly showing her expertise on this topic in chapter 7, Tricia Bertram Gallant explores several facets of academic integrity. The author also utilizes Dalton and Crosby's (2011) conceptual paradigms[7] to discuss the role student affairs professionals should play in creating and upholding an institutional culture of academic integrity. Bertram Gallant examines several ethical and legal considerations, such as due process concerns, and at times repeats information from earlier chapters. This chapter ends with case studies and role play scenarios for orientation leaders and resident assistants. While incredibly thought provoking, the case studies include unanswered legal questions that readers may wish the author commented on (e.g., when and to whom you can disclose a student's disciplinary record).

Chapter 8, written by Patricia L. Farrell-Cole and José A. Cabrales, discusses what an ethical campus culture at a Hispanic-Serving Institution (HSI) looks like. Colleges and universities become HSIs when they enroll twenty-five percent or more Latinx students, no matter how they intend to serve the Latinx population. The authors expand upon García's (2018) emphasis on the difference between Latinx-*serving* institutions and Latinx-*enrolling* institutions[8] by focusing on whether or not a campus culture is equitable, educational, and welcoming for the students it intends to serve. Farrell-Cole and Cabrales then discuss how institutions can strengthen their support, education, and success of/for Latinx students. Throughout the

[6] For student affairs professionals looking for a more robust legal reference book, I recommend: WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION, 5TH EDITION: STUDENT VERSION (2014).

[7] Jon C. Dalton & Pamela C. Crosby, *A Profession in Search of a Mission: Is There an Enduring*

Purpose for Student Affairs in U.S. Higher Education?, 12 J. C. AND CHARACTER 1 (2011).
[8] Gina Ann García, *Decolonizing Hispanic-Serving Institutions: A Framework for Organizing*, 17 J. HISPANIC HIGHER EDUC. 132 (2018).

chapter, readers are reminded that while the future of the nation's economy depends on educating Latinx folks (the largest racial minority in the United States), funding for higher education and specifically HSIs remains inadequate, an ethical complication in and of itself.

After much discussion about ethical decision-making from a multitude of perspectives, readers are now put to the test. A great tool for training and/or professional development, chapter 9, written by Tamara Hullender and Margaret Partlo, includes important ethical dilemmas that need untangling. While some of these case studies include legal considerations, they all live in the "grey area" and have no explicitly right or wrong answers. Appropriate for this book, the case studies include implications for new, mid-, and senior-level student affairs professionals.

The book concludes with a note from the editor, which properly summarizes the volume and again highlights various ethical principles and standards for professional practice, as created by several student affairs associations. Hornak also reiterates a tip, which is threaded throughout the book; student affairs professionals should consult legal counsel with a legal question and consult an ethicist when faced with an ethical dilemma. I suggest that legal counsel and ethicists read this book to get a sense of the information higher education administrators are receiving regarding ethical and legal decision-making.