



# FRATERNAL LAW™

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## Finding the Right Balance

One of the most difficult issues currently on our campuses which impacts fraternities and sororities, as well as all students, is the issue of sexual assault, or sexual misconduct.

The issue is receiving intense attention while some challenge the numbers cited in the White House Report "Not Alone," that one in five women will experience sexual assault during their collegiate experience. Whatever the numbers, the attention is justified. The issues involved are numerous.

Colleges, legislators and students struggle with what constitutes consensual sex. Colleges and universities stretch to comply with the directives from the United States Department of Education Office of Civil Rights and how to ensure both care for the victim and the basic fairness to which an accused perpetrator is entitled. Other issues include: how to proceed when a victim does not want a criminal report filed, but only wants to not have to sit in the same classroom with the alleged perpetrator; when is it appropriate for a university to proceed with a disciplinary process while a criminal investigation or prosecution is underway; what is the appropriate standard of proof; what role may an attorney play in defending the accused in a campus hearing; how to afford the right of confrontation without re-victimizing the victim; and who should be on the campus hearing panel -- seventy-six (76) student body presidents joined in a letter to the Secretary of Education objecting to removing students from disciplinary panels.

These are all difficult and serious questions.

This issue of *Fraternal Law* presents a special selection of articles as a part of this critical national discussion.

• Timothy M. Burke

## A View From the Ground

Prior to becoming Xavier University's Title IX Coordinator, I represented victims of sexual violence as they participated in university complaint resolution processes, worked with their universities to address their safety, housing, and academic needs, and pursued Office for Civil Rights (OCR) complaints when university responses were out of compliance with Title IX, and in many cases, with the schools' own policies. Over six years, I saw firsthand the impact that being involved in a campus sexual violence complaint had on not only my client, but also on the accused student- and not just the parties, but their friends, teammates, roommates, and families. Importantly, I witnessed the detrimental impact it has on all involved when universities do not have effective systems in place to address sexual violence-impact that goes far beyond those involved in a particular case to directly influence the broader campus community's perceptions of a school's priorities and agenda around sexual violence. Out of this experience I resolved that my next professional step would be to address this issue from within a university- and not just any university, but one I understood to be committed to creating the very best systems to address sex discrimination- not to "check the box" of legal compliance, but because the university understood that having those systems in place was part of its mission and delivered on its promise to students.

With this background laid, I share the premise in which I ground my work as Xavier University's Title IX Coor-

## The Rights of Accused Students

The national controversy about the responsibilities of colleges and universities to sexual assaults on campuses continues to grow. After years of criticism for being too lax on campus sexual assault, on April 11, 2011, the U.S. Education Department's Office of Civil Rights sent a "Dear Colleague" to colleges and universities.<sup>1</sup> The Dear Colleague Letter indicated that, in order to comply with Title IX, colleges and Universities must have transparent, prompt procedures to investigate and resolve complaints of sexual misconduct. Most notably, the Dear Colleague Letter required schools to adopt a relatively low standard of proof- "more likely than not" -in cases involving sexual misconduct, including assault.<sup>2</sup>

Concerns for the rights of the accused are also growing. In the January 2015 issue of this Newsletter, Micah Karmass wrote about how the allegations of a terrible sexual assault at the University of Virginia, and the subsequent retraction of the story, "demonstrates the dangers of punishments before providing for the right to fairly defend against the allegations." The Federal Government, through the Department of Education, has been using Title IX to pressure colleges and universities to aggressively pursue investigations of sexual



## The Ground (cont'd)

dinator. With the appropriate methodology in place, a university can facilitate a complaint resolution process to determine whether a student has violated their conduct policies prohibiting sexual misconduct in a fair, impartial, equitable way that protects the rights of both the complainant and the respondent.

There are three primary components of the methodology that allows this premise to be true. First, the work must be grounded in the understanding, from the highest level of administration to the Title IX Coordinator, that 1) what a school has to stand on is the integrity of its process and 2) that integrity is established and maintained through the consistent, impartial, equitable implementation of written policies that address and protect the rights of all parties involved. If a Title IX Coordinator does the work exclusively through the lens of doing so in a way that protects the school from liability related to one "side" of the case, this increases the likelihood that the school's process will not be unbiased and impartial.

Second, those who touch the complaint resolution process in any way must receive comprehensive, ongoing training, and that training must address the issue of sexual violence equitably to ensure that bias or partisan thinking does not impact the fairness of the process. For example, training must address the dynamics of sexual violence as it relates to the experience of the reporting student, but it also must address how being accused of sexual violence impacts a student and how that might affect his or her demeanor and behavior.

Third, the university administration and those involved with the complaint resolution process must understand that higher education is a place in which sex discrimination happens and a setting in which it should be addressed- not because we have to under Title IX, but because the university's mission surely supports the premise that students should not have to experience discrimination on the basis of sex while seeking an education.

Some voices in the national conversation on how campuses handle sexual misconduct are asking, why are universities and colleges in the business of handling sexual assault complaints anyway? Why aren't we requiring schools to report these complaints to police and leaving the response solely to the criminal justice system?

Higher education is not in the business of prosecuting sexual assault cases. We're in the business of determining whether a student has violated our community expectations related to sexual misconduct as defined in our internal conduct policies. *The same way we do for a wide range of other misconduct* that is also criminal in nature and may result in expulsion (e.g. physical assault, illegal drug use, drug distribution, dating violence, stalking)- a practice that has raised no eyebrows or caused a shred of outrage. We would be remiss if we didn't consider the question, why now? Why on just sexual assault? If we aren't acknowledging that sexual assault is viewed and treated differently in our culture than any other crime, and particularly in our criminal justice system, with its unique focus on the alleged victim's behavior, character, and credibility, we aren't starting this conversation from an honest or realistic place.

As much as we would like it to be otherwise, the criminal justice system is not currently one in which most victims of rape feel comfortable turning to and for those who do, the system is often perceived as offering very little in the way of accountability. Out of 100 rapes, 32 are reported to police.<sup>1</sup> Of

## The Rights (cont'd)

assaults on campuses. The assistant secretary of education who heads the Education Department's Office for Civil Rights, told college officials attending a conference that schools need to make "radical" change.<sup>3</sup> She later told a separate conference, "I will go to enforcement, and I am prepared to withhold federal funds."<sup>4</sup>

Against this background, most schools have adopted or modified sexual harassment or sexual misconduct policies. These policies call for new procedures for investigating and resolving allegations of sexual assault. Instead of implementing policies aimed at finding the truth after full and fair investigations and hearings, many schools have adopted policies that more closely resemble witch hunts aimed at making examples of accused students to show the Department of Education that school is "tough" on allegations of sexual assault.

As attorneys, we have been approached by dozens of students from schools across the nation facing disciplinary proceedings. Most of these matters have been resolved quietly; some have led to litigation. What they all have in common is that the students believe that the procedures did not afford them fundamental fairness.

Let's be clear: sexual assault on college campuses is a real problem that requires a real solution. The authors of this article are former prosecutors who have sent many men to prison for sex offenses. As former prosecutors, we are committed to providing adequate due process protections to those accused of sexual assault because, in part, these protections enhance the credibility of the proceedings and ultimately serve to provide justice for victims of sexual assault. As prosecutors, we were committed to using fair procedures and adhering to long-standing rules and protections of the rights of the accused; we believe that these are necessary to assure the dignity of all participants in the process, both the accused and the victim.

A student who faces disciplinary sanctions is entitled to a full and fair hearing before being disciplined. This should not be controversial. The April 4, 2011 Dear Colleague Letter specifically states that schools are obligated to protect the due process rights of students accused of sexual assault. For example, on page 12 of the Dear Colleague Letter, the Department of Education states, "Public and state-supported schools must provide due process to the alleged perpetrator." And, on page 22, the Department notes "The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding." The Department of Education has also recognized that due process rights include the ability to present evidence.

What does a full and fair process look like? The hearings do not need to resemble criminal trials, and not all rights guaranteed by the Constitution in a criminal trial need to be present. Yet, a full and fair process that allows students a meaningful opportunity to be heard prior to the imposition of sanctions should include a number of traditional and time-tested protections that lead to reliable outcomes.

- A full and fair investigation. The initial investigation by a school should be conducted by an unbiased person with significant investigatory experience. Many investigators lack law enforcement experience and are, thus, ill equipped to resolve sensitive issues with conflicting versions of events. No matter how well done, training on Title IX investigations are not a substitute for law

## The Ground (cont'd)

those 32, seven lead to arrest.<sup>2</sup> Three are referred to prosecutors.<sup>3</sup> Two lead to felony convictions<sup>4</sup> and two will spend a single day in prison.<sup>5</sup> Why do 68% of those who experience rape not report to the police?<sup>6</sup> I would suggest that between “getting the memo” on these conviction statistics and being well aware that they are part of a culture that asks first “What poor decision or bad judgment did the alleged victim engage in to put her or himself in to become a victim of a rape?” rather than focusing on the accused person in the way law enforcement would in say, a robbery allegation, has something to do with it.

There are truly phenomenal, well-trained, experienced police, prosecutors, and judges working on sexual violence across this country who should be lauded for their work. But to suggest that all those conducting investigations and making decisions in the criminal justice system (including juries) are comprehensively trained on the issue of sexual violence and free of any bias is both false and imprudent. The fact is most colleges and universities require a level of training for those making findings in sexual misconduct cases that no jury in the criminal justice system *will ever receive*. Any college or university with its eye on the ball is providing in-depth training for decision-makers on questioning skills, weighing different types of evidence, elemental policy analysis, standards of proof, applying facts to policy, assessing consent and capacity, and the psychology/sociology of the accused individual and the alleged victim. Many are required to participate in a mock hearing. Shouldn't we all be asking why, in this national conversation on how higher education addresses sexual violence, so few have turned the same spotlight currently on higher education on the criminal justice system's response to sexual violence? Where are the task forces, roundtables, best practice policies, guidance documents, and proposed legislation related to that system's response?

A hypothetical to illuminate the reality of this issue. Imagine your neighbor's daughter is starting college. You have known her for her whole life- she is a great student, involved in extracurricular and volunteer activities, straight as an arrow behavior-wise. She grew up with your own kids and you consider her a family friend. She heads to the college of her dreams- the one for she worked her whole life to get in. A few weeks into college she tells her parents there's a guy she's getting to know and likes. Three weeks later she tells them that she went to a party with that guy, had two cups of alcoholic punch, and started kissing the guy. He began pushing her to do more- she tried to say no, but he kept going and raped her. Her parents go with her to report to the police. They investigate and pass the case to the Prosecutor's Office. The Prosecutor's Office tells your neighbors they are not taking the case forward because it is a “he said, she said” in which both parties were drinking alcohol and there was consensual sexual activity before the allegation. There will be no criminal case. Your neighbors' daughter has two classes with the accused student and they live in the same dorm. Your neighbors tell you their daughter can't sleep and is having trouble concentrating in class. She's afraid to be in her dorm room and the few friends she made in the first couple of weeks are gradually drifted away as word has gotten out that she accused that student of rape. What would you expect and/or like the school to do?

To ensure a fair, thorough process, I must and do respond to allegations of sexual misconduct by engaging with the reporting party in a trauma-informed, compassionate way. I do

## The Rights (cont'd)

enforcement experience.<sup>5</sup>

- The assistance of counsel. Very few college students have the ability to sort through evidence and present a coherent case. In many schools, alleged victims are provided with “advocates” who are experienced in the disciplinary process while the accused, who likely cannot afford an attorney, is left to face the process alone. Attorneys do not need to play an active role in the presentation of evidence, but the role of attorneys in the truth seeking process can be valuable.
- Written rules and procedures. Most school disciplinary hearing panels lack rules and procedures for basic aspects of the process, such as rules on the admissibility of evidence. Rules should be aimed at assuring that the panels receive only reliable and not unduly prejudicial evidence. Hearsay is acceptable, but only if there are sufficient indicia of reliability and a student has the ability to cross-examine the speaker. Panel members also need to be instructed on basic concepts such as the “presumption of innocence” and the “burden of proof.”<sup>6</sup>
- An unbiased and well trained panel. A legal background should be a requirement for the chair of any panel. We have seen too many panels led by instructors with no legal background; the result is inconsistency and unfairness. In addition, in many instances, panel members are self-selected because they have an agenda. Schools need to take steps to assure that panel members are dedicated to implementing the rules of the school without preconceived conceptions of doing “what is right.”
- The ability to effectively cross-examine witnesses. While a school does not need to provide unlimited cross-examination, the opportunity to confront and cross-examine witnesses is essential when the information supplied by those witnesses is the reason for the imposition of discipline. School disciplinary proceedings can include more extensive cross-examination if the case had resolved itself into a problem of credibility as in many “he-said, she-said” cases, while still excluding irrelevant or harassing questions, such as about a student's sexual history.

Schools need to look at these hearings as educational opportunities. A full and fair process prior to the imposition of punishments is at the core of liberal democracy and the values of educational institutions. The history departments of schools should be able to provide ample examples of societies that sacrificed individual freedoms in order to more effectively punish perceived offenders. Certainly the law schools at our leading institutions should be able to stand firmly behind the proposition that fundamental fairness and the ability to punish offenders are not incompatible.

## The Ground (cont'd)

that while making no assumptions that the accused individual is responsible for the allegation and while asking targeted, pressing, detailed questions as part of my investigation. I also must and do engage with respondents in sexual misconduct allegations in a trauma-informed, compassionate way. I do that while making no assumptions that individual is responsible for the allegation and while asking targeted, pressing, detailed questions during my investigation.

Some voices in this conversation seem to suggest that it is impossible for any non-law enforcement, university-employed individual to respond to sexual misconduct on campus in a fair, impartial way that protects the rights of all students. I beg to differ and would argue that there are individuals on campuses across the country working extremely hard every day to do just that.

Is responding to sexual misconduct with the methodology described above complex, effortful work? Yes. Does it require vigilance regarding maintaining impartiality? Yes. The fact that the work is challenging and requires a high level of competence does not mean we shouldn't be doing it.

Higher education is under remarkable scrutiny on these issues right now- from my perspective, that's a good thing. The higher the scrutiny, the higher our standards, and we should always be striving for the highest standards for *all* students.

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- 1 United States Justice Department, *National Crime Victimization Survey*: 2008-2012.
- 2 FBI, *Uniform Crime Reports, Arrest Data*: 2006-2010.
- 3 FBI, *Uniform Crime Reports, Offenses Cleared Data*: 2006-2010.
- 4 Department of Justice, *Felony Defendants in Large Urban Counties*: 2009.
- 5 Id.
- 6 Justice Department, *National Crime Victimization Survey*: 2008-2012

## The Rights (cont'd)

- Michael K. Allen
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- 1 Available at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.
- 2 This standard of proof is also called "preponderance of the evidence." In one case, a school administrator described this as "50% and a feather." Note that the concept of standard of proof is different from the concept of burden of proof. The burden of proof refers to which side must make a case, and is tied to the concept that a student is "innocent until proven guilty."
- 3 Sander, *Colleges Are Reminded of Federal Eye on Handling of Sexual-Assault Cases*, Chronicle of Higher Education, February 11, 2014.
- 4 NPR, *How Campus Sexual Assaults Came To Command New Attention*, August 12, 2014.
- 5 The Department of Education, in the Dear Colleague letter, page 10, states, "Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation." In our view this creates a dangerous problem for students facing simultaneous criminal and school investigations. Students have a right to remain silent in a criminal investigation, yet may be compelled to provide a statement to a school investigator in order to avoid discipline. The better approach, which respects the Constitutional right of students to remain silent, is to allow the criminal investigation to be completed prior to conducting a school investigation.
- 6 Schools, of course, need to follow their own rules, not matter how insufficient. In a number of instances, we are aware that hearing panels are either unaware of the existing rules or do not follow the rules.

## The Bipartisan Campus Accountability and Safety Act

On February 26, 2015, a bipartisan group of 12 United States Senators introduced the Campus Safety and Accountability Act to address the issue of campus sexual assault. The sponsors are Kelly Ayotte (R-NH), Roy Blount (D-MO), Richard Blumenthal (D-CT), Shelly Moore Capito (R-WV), Kristen Gillibrand (D-NY), Chuck Grassley (R-IA), Dean Heller (R-NV), Claire McCaskill (D-MO), Gary Peters (D-MI), Marco Rubio (R-FL), Mark Warner (D-VA) and Sheldon Whitehouse (D-RI). The following summary of the bill is reprinted from the web site of Senator Kristen Gillibrand.

*Currently, an American woman who attends college is more likely to be a victim of sexual assault than a woman who does not attend college. At the same time, institutions of higher education across the country do not have an incentive to acknowledge the problem publicly or address it proactively. The current oversight of the federal laws has the perverse effect of encouraging schools to take proactive steps to protect their students and rid their campuses of sexual predators. Specifically, this new legislation provides the following:*

- I. Establishes New Campus Resources and Support Services for Student Survivors



- Under this legislation, colleges and universities will be required to designate Confidential Advisors who will serve as a confidential resource for victims of crimes committed against a student. The role of Confidential Advisors will be to coordinate support services and accommodations for survivors, to provide information about options for reporting, and to provide guidance or assistance, at the direction of the survivor, in reporting the crime to campus authorities and/or local law enforcement.
- To encourage individuals to come forward with reports about sexual violence, schools will no longer be allowed to sanction a student who reveals a violation in good faith, such as underage drinking, in the process of reporting a sexual violence claim.

## II. Ensure Minimum Training Standards for On-Campus Personnel

- Currently, a chronic lack of training of on-campus personnel hampers sexual assault investigations and the disciplinary process which often has resulted in negative outcomes for survivors. This legislation ensures that everyone from the Confidential Advisors, to those responsible for investigating and participating in disciplinary proceedings, will receive specialized training so that they have a firm understanding of the nature of these crimes and their effect on survivors.

## III. Creates New Historic Transparency Requirements

- For the first time, students at every university in America will be surveyed about their experience with sexual violence to get an accurate picture of this problem. This new annual survey will be standardized and anonymous, with the results published online so that

parents and high school students can make an informed choice when comparing universities. The Department of Education will also be required to publish the names of all schools with pending investigations, final resolutions, and voluntary resolution agreements related to Title IX.

## IV. Increases Campus Accountability and Coordination with Law Enforcement

- All schools will now be required to use one uniform process for campus disciplinary proceedings and may no longer allow athletic departments or other subgroups to handle complaints of sexual violence for members of that subgroup alone.
- This legislation will require colleges and universities to enter into memoranda of understanding with all applicable local law enforcement agencies to clearly delineate responsibilities and share information so that when a crime occurs, both campus authorities and local authorities can focus on solving the crime rather than debating jurisdiction.

## V. Establishes Enforceable Title IX Penalties and Stiffer Penalties for Clery Act Violations

- Schools that don't comply with the certain requirements under the bill may face a penalty of up to 1% of the institution's operating budget. Previously, the only allowable penalty was the loss of all financial aid which is not practical and has never been done. The bill increases penalties for Clery Act violations to up to \$150,000 per violation from the current penalty of \$35,000.

1 [www.gillibrand.senate.gov/campus-sexual-assault](http://www.gillibrand.senate.gov/campus-sexual-assault).

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# Recent Developments: The Impact of Student Conduct Policies on Greek Letter Organizations and Members

Almost every university publishes a code of conduct which it expects students to follow as a condition of enrollment. While these codes vary, common elements include expectations for student behavior, including conduct which may result in various degrees of discipline.

Some schools consider the student code to be guidelines.<sup>1</sup> **Courts differ about the legal effect of codes. Some cases hold that when a student enrolls, and pays tuition and fees, the resulting relationship may reasonably be construed as contractual in nature, the terms of which are found in the catalog, handbook, and/or other guidelines supplied to the students.**<sup>2</sup> Other cases hold that a student handbook does not constitute a contract between a university and a student requiring strict compliance with every provision.<sup>3</sup>

Most codes contain a process covering how and when a student may be disciplined. Generally, where the code requires notice, a hearing, and provides the student with an opportunity to present evidence, the disciplinary proceeding is considered "quasi-judicial".<sup>4</sup> Thus, the rules and enforcement of student codes often present important legal issues, and may impact related civil or criminal cases.

### 1. Use of Student Codes to Control Off Campus Conduct.

Some codes purport to extend their reach to cover off campus student conduct, such as membership in unrecognized fraternities. While individual students could still face consequences, if the university doesn't recognize a group, it loses a lot of its ability to regulate and discipline the organization.<sup>5</sup> Ignoring or disavowing unrecognized groups has not insulated

universities from liability claims.<sup>6</sup> Thus, a growing number of schools now seek to eliminate unrecognized Greek organizations by bringing disciplinary proceedings against members, even where no specific incidents or misbehavior are alleged to have occurred; i.e., membership itself is the violation.

Many university websites now include statements regarding unrecognized organizations. The University of Connecticut website warns that "... *Any operation of these groups is considered underground activity, is against university policy, and is not sanctioned by the Office of Fraternity and Sorority Life. Therefore, students should carefully consider their potential student conduct record before associating with an unrecognized group.*"

Amherst College, a private school, recently reaffirmed a 1984 resolution that "... *student participation in off-campus fraternities and sororities, and fraternity-like and sorority-like organizations, is prohibited. Violations will be subject to discipline, including suspension or expulsion from the College.*" The Trustees concluded "...*The College has no authority with respect to underground fraternities. It knows little about their membership or their activities... Amherst students can and do—and should—freely participate in many off-campus pursuits, and in most cases these pursuits are transparent and have no bearing on the College, nor does the College need or wish to venture an opinion. In this instance, however, the activity reaches directly into College life...*"

Public universities have been recognized as instrumentalities of the state, thereby granting constitutional protection to students.<sup>8</sup> In certain circumstances, the constitutional interests of the student must yield to a school's need to maintain order and to discipline when necessary to assure a safe school environment conducive to learning.<sup>9</sup> Likewise, private universities may not expel students in an arbitrary manner.<sup>10</sup>

A student does not surrender his civil rights upon enrollment. Certain uses of student codes have been struck down for violating students' free speech rights. In *Tinker v. Des Moines Independent Community School District*,<sup>11</sup> the Supreme Court held that the district could not restrict symbolic speech that did not cause "undue interruptions" of school activities. The Court held that "schools may not be enclaves of totalitarianism". School officials do not possess absolute authority over their students, who retain ... fundamental rights which the State must respect..."

Courts have since limited the applicability of *Tinker* but have not departed from the core holding extending free speech rights to students. In the years following *Tinker*, the courts have upheld disciplinary action taken against students' speech, rather than expanding students' speech rights.<sup>12</sup>

Actual occurrences, such as hazing, sexual misconduct, alcohol, or drug use may be "undue interruptions" of school activities, which justify limiting students' constitutional rights. Some schools threaten "never" to recognize a chapter which has operated off campus. Consequently, national organizations must decide with increasing frequency, whether to support a good off-campus group, unfairly denied university recognition, while students are pressured to disaffiliate and threatened with discipline based on membership alone.

## 2. Good Samaritan Policies.

Some victims of campus sexual assault turn to the criminal justice system; while others look to their schools for help or recourse. Most student codes include sexual misconduct policies.

While policies vary widely, all have common elements of protecting the safety and welfare of students,<sup>13</sup> and ensuring university compliance with federal reporting laws.<sup>14</sup> Most codes list local law enforcement agencies, university departments, and community support organizations where reports of sexual misconduct can be made.<sup>15</sup> To encourage reporting of incidents without fear of legal penalties, many codes include "Good Samaritan" policies, which give amnesty to victims or witnesses, including student organizations, for alcohol and minor drug violations.

Good Samaritan policies require universities to strike a difficult balance between encouraging students to report sexual violence, in exchange for ignoring otherwise actionable misconduct. Policies vary as to who may receive amnesty. Some codes offer amnesty only to "victims,"<sup>16</sup> others include "third party witnesses,"<sup>17</sup> "students"<sup>18</sup> and "student organizations."<sup>19</sup> Some policies *require* student organizations to seek immediate medical assistance for their members or guests when any potential health risk is observed.<sup>20</sup> Some university codes *require* that witnesses report a sexual assault. Failure to do so is itself a violation.<sup>21</sup> Amnesty is sometimes limited to persons making reports during emergency medical situations.<sup>22</sup> Some universities may require the reporter to complete educational programming or other treatment as a condition of amnesty.<sup>23</sup>

Likewise, some state laws require that witnesses to a sexual assault call the police. Failure to do so may be a criminal offense. Thus, while a university may have a Good Samaritan policy, reporting to the school alone may not satisfy the reporter's legal obligations, nor provide protection from criminal prosecution.<sup>24</sup>

There are times when the local police and a school may be simultaneously pursuing a case. Under federal law, when a school knows or reasonably should know that one of its students has been sexually assaulted, it is obligated to act. A criminal investigation does not relieve a school of its independent obligation to conduct its own investigation, nor may a school wait for a criminal case to conclude to proceed.<sup>25</sup>

Absent parallel state Good Samaritan laws, criminal investigations and other police action may still occur at the discretion of the law enforcement agency responding to the incident.<sup>26</sup> Even where a university Good Samaritan policy exists, the reporter is only protected from discipline under the student code. Reporters may be faced with difficult, immediate decisions requiring admissions to obtain protections provided by a university Good Samaritan policy, but which might be used against them in a criminal prosecution.

Statements by victims may be privileged or confidential in some circumstances, such as when made to medical providers, counselors, religious or legal advisors. Typically, statements made by third parties are not privileged, although many codes provide for anonymous reporting.<sup>27</sup> Nevertheless, all reporters should anticipate that they will be interviewed by law enforcement. If criminal charges or a civil lawsuit are brought, reporters may be contacted by investigators, deposed, and subpoenaed to testify in Court.

Victims and third party reporters may face attacks on their character, credibility and motive.<sup>28</sup> The most common defense in sexual misconduct cases is "consent." Definitions of "consent" are often the product of campus studies and forums, and vary widely in student codes and criminal laws.<sup>29</sup> It is a violation under some codes to engage in sexual activity with an impaired person, who is deemed conclusively incapable of giv-



ing consent.<sup>30</sup>

In summary, Good Samaritan policies offer reporters some, but not complete relief from alcohol or drug related offenses. Where circumstances permit, reporters should still seek legal advice before admitting to illegal alcohol or drug use. Student organizations and members would be well advised to familiarize themselves with their rights and responsibilities under their university code, and local law.

• Stephen Bernstein

Stephen Bernstein is the General Counsel to the Alpha Epsilon Pi International Fraternity. He is also a past National President of Alpha Epsilon Pi.

- 1 The *University of Rhode Island Student Handbook 2012-2014* provides: "These standards are written to give students general notice of expected and prohibited conduct. The regulations should be read broadly and are not designed to define misconduct in exhaustive terms."
- 2 *Prince v. Kent State Univ.*, 10th Dist. No. 11AP-493, 2012-Ohio-1016, *Tate v. Owens State Community College*, 10th Dist. No. 10AP-1201, 2011-Ohio-3452, *Lewis v. Cleveland State Univ.*, 10th Dist. No. 10AP-606, 2011-Ohio-1192.
- 3 *Rollins v. Cardinal Stritch Univ.*, 626 N.W.2d 464 (Minn.Ct.App. 2001), *Ryan v. Hofstra University*, 67 Misc.2d 651, 324 N.Y.S.2d 964 (1971).
- 4 *Savoy v. University of Akron*, 15 N.E.3d 430, 2014-Ohio-3043 (Ohio App. 10 Dist. 2014).
- 5 *Illegal Fraternities May Have More Power Than Colleges*, The Huffington Post, By Nina Friend, Posted:06/17/2014 6:12 pm EDT.
- 6 The family of a University of Albany student who died after drinking an excessive amount of alcohol at an off campus fraternity party has served the state attorney general's office a Notice of Intent to file a lawsuit against the university. The fraternity was using the name of Zeta Beta Tau Fraternity without authority of the national organization See <http://www.albanystudentpress.net/big-brothers-at-underground-zbt/>; <http://www.topix.com/wire/colleges/suny-albany>.
- 7 See Amherst College, *Board Statement and Resolution on Fraternities*, May 6, 2014. In the intervening years, since passing the 1984 resolution, several "underground fraternities" have existed at Amherst. They have had "non-status" as official student organizations, but Amherst "...never expressed itself with a single mind about them, creating a condition of ambiguity."
- 8 *Miller v. Long Island Univ.*, 380 N.Y.S.2d 917 (N.Y. App. Div. 1976); *Smith v. Univ. of Tenn.*, 300 F. Supp. 777 (E.D. Tenn. See also 89 Nebraska L. Rev.634. "Enforcement of Law Schools' Non-Academic Honor Codes: A Necessary Step Towards Professionalism?"
- 9 *Vernonia School District 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985); *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).
- 10 *Rollins v. Cardinal Stritch Univ.*, *Ryan v. Hofstra University*, supra.
- 11 393 U.S. 503 (1969).
- 12 See *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York*, 502 F.3d 136 (2nd Cir.2007), *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*, 229 F.3d 435, 439 (3rd Cir. 2000).
- 13 See, for example, "University of Michigan Student Sexual Misconduct Policy."
- 14 See Title IX , 20 U.S.C. §§ 1681-1688, Clery Act , **20 USC § 1092 (f)**, Campus Sexual Violence Elimination (SaVE) Act.
- 15 See, for example, Syracuse University Policies, "Sexual Activity, Non Consensual; LeMoyne College, "Sexual Misconduct."
- 16 See, for example, Oregon State University, "Student Conduct and Community Standards, Victim Support and Reporting"; see also, Safer Students Active for Ending Rape, "What Makes A Better Sexual Assault Policy?"
- 17 See, for example, Amherst College, "Sexual Misconduct Policy"; University of Evansville, "Policy Prohibiting Sexual Misconduct".
- 18 See, for examples, SUNY "Uniform Sexual Assault Policy"; Michigan State University "Relationship Violence & Sexual Misconduct Policy."
- 19 See, for example, University at Albany, State University of New York, "Good Samaritan 911 Policy", University of Arizona, Residence Life, "Good Samaritan Campaign."
- 20 See, for example, The Kutztown University, " Good Samaritan Policy for Alcohol & Other Drug Incidents."
- 21 See University of Colorado, "Sexual Harassment Policy and Procedures."
- 22 See, for example, Loyola University Chicago, " Good Samaritan Policy."
- 23 See, for example, "Good Samaritan Provision, **University of Northern Iowa Student Conduct Code.**"
- 24 For example, The University of Rhode Island Handbook provides: "Medical Amnesty. Actions taken to preserve life and/or safety of students in emergency situations shall not expose students to conduct charges regarding alcohol or drug consumption if that student's role in the situation is to call for help or emergency services. However, Rhode Island General Laws, 11-37-3.1 provides, "Any person, other than the victim, who knows or has reason to know that a first degree sexual assault or attempted first degree sexual assault is taking place in his or her presence shall immediately notify the state police or the police department of the city or town in which the assault or attempted assault is taking place of the crime."
- 25 See " NOT ALONE-The First Report of the White House Task Force to Protect Students From Sexual Assault ", April 2014.
- 26 See Loyola Marymount University, "Good Samaritan and Self-Reporting."
- 27 See, for example, " **SEXUAL MISCONDUCT POLICIES AND PROCEDURES DOCUMENT FOR FACULTY, STAFF, AND STUDENTS**", University of Wyoming, pp. 5-7.
- 28 False reporting is also often included as a violation of the code. See, for example, Swarthmore College, "Student Handbook", Michigan State University "Relationship Violence & Sexual Misconduct Policy"; Case Western Reserve University, "Sexual Assault Policy."
- 29 Compare, for examples, "Yale Sexual Misconduct Policies and Related Definitions"; The Ohio State University, Sexual Violence : "OSU's Sexual Misconduct Policy", Antioch College, "Sexual Offense Prevention Policy", see also "The Diamondback, University of Maryland Independent Student Newspaper, "Consent Officially Defined in Sexual Misconduct Policy", Posted: Monday, September 16, 2013, Updated, Wed Sep 18, 2013.
- 30 See Georgetown University, "Sexual Misconduct and Sexual Assault."



## National Fraternity not Responsible for Football Injury

The Phi Delta Theta Chapter at the University of Alabama pitted its pledges in a football game against the pledges of Beta Theta Pi on September 23, 2011. Tempers apparently flared and according to the lawsuit he filed, Brett Bodin was physically attacked without provocation, rendered unconscious and his jaw was broken. His lawsuit named national Phi Delta Theta, the local House Corporation, and the Chapter.

In December, the trial court granted summary judgment<sup>1</sup> to the national fraternity and the house corporation. While there is no written opinion from the court explaining its decision, the argument made by the fraternity counsel in support of the motion argued that neither the national nor the house corporation had a duty to prevent injuries to players in football game. There was no relationship between the plaintiff and Phi Delta Theta creating a duty entitling the plaintiff to care. Under Alabama law, the alleged criminal conduct of the pledge who

is claimed to have assaulted the plaintiff was not the fault of the fraternity or house corporation since it was neither foreseeable and there was no specialized knowledge by the fraternity of criminal activity, nor was there any reason to believe that it was probable. As a practical matter, as counsel pointed out, the fraternity had no knowledge of the football game, nor the injury until months after it had happened.

Bottom line, it is unlikely that any court would conclude that football games between collegiate students should or could be banned or expect a national fraternity to ban them or be responsible for injuries sustained in games the National had no knowledge of.

• Timothy M. Burke

<sup>1</sup> *Bowden Brett v. Phi Delta Theta Foundation, et al.*, Circuit Court of Tuscaloosa County, Alabama Case No. CV-2012-900729.00, 12/10/14.

## DKE Sues Wesleyan

Wesleyan University in Middletown, Connecticut, announced in the fall of 2014 that within three years, its residential fraternities must become fully co-educational. Delta Kappa Epsilon (DKE) presented plans to the University to include women in their house, but according to the University, those plans were insufficient since they “did not include a timeline or detail for its proposed approach to partner with a sorority to achieve co-education.”<sup>1</sup>

Wesleyan requires students to live on campus all four years and has a wide variety of housing options on campus. Nonetheless, the day before housing selection for the 15-16 academic year was to begin, the university announced its housing agreement with DKE had been terminated because of dissatisfaction with DKE’s plans.

DKE responded filing a lawsuit<sup>2</sup> on February 19<sup>th</sup> on behalf of its House Corporation, the Gamma Phi Chapter of DKE at Wesleyan, and two of its members. The suit is against the University, the University President and the Vice President for Student Affairs. The suit has 12 counts, including violations of Connecticut’s Unfair Trade Practices Act,<sup>3</sup> Breach of Contract, and Tortious Interference with Business Expectancies.

Wesleyan posts on its website a wide variety of housing options known as Program Housing in some 30 separate houses. Of those, four are listed as fraternities by the University, two of which -- the Eclectic House and Alpha Delta Phi -- appear to be local organizations which are already co-ed. The Program Housing includes housing which may be single sex, including the Womanist House and Women of Color House. Housing options in

the University’s residence halls include, evidently at the students’ choice, both co-ed floors and single sex floors.

The initial hearing in this case is scheduled to take place on March 9, 2015, and seeks an injunction which would allow current members of DKE to continue to apply for residence in the DKE house and include the house in the University’s Program Housing. The suit also seeks compensatory and punitive damages, as well as attorney’s fees.

Curiously, the complaint does not state a cause of action for discrimination on the basis of sex (limiting men’s living options), nor claim a violation of Title IX.

Wesleyan is a private university and the history of litigation by fraternities against private universities has not been good, but the unique facts in this case and Wesleyan’s Housing Program may make this a stronger case.

• Timothy M. Burke

<sup>1</sup> February 25, 2015, *Update on Greek Life at Wesleyan* by Hill Holder from the Wesleyan University website.

<sup>2</sup> *Kent Literary Club of Wesleyan University at Middletown, et al. v. Wesleyan University, et al.*, Superior Court of Middlesex at Middletown, filed February 19, 2015.

<sup>3</sup> Conn. Gen. Stat. Sec. 42-110b, et seq., Breach of Contract, Breach of Covenant of Good Faith and Fair Dealing, Promissory Estoppel and Negligent Misrepresentation.

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