

WHEN EVERYONE IS BLAMED, ARE ALL RESPONSIBLE? DEFINING THE LEGAL RELATIONSHIP BETWEEN NORTH AMERICAN INTERFRATERNITY CONFERENCE FRATERNITIES/NATIONAL PANHELLENIC CONFERENCE SORORITIES AND UNIVERSITIES IN HARASSMENT CASES

COLLEEN E. LOFTON

A complex legal relationship exists between North American Interfraternity Conference fraternities/National Panhellenic Conference sororities and higher education institutions. This legal relationship has been defined for issues such as association rights and hazing, yet little research exists about this relationship in harassment cases. My review of scholarship and case law revealed that control and level of claim specificity are needed to define the relationship in instances of harassment. By understanding this legal relationship, both North American Interfraternity Conference fraternities/National Panhellenic Conference sororities and universities can continue to address harassment in higher education.

Keywords: legal relationship, harassment, fraternity, sorority, university

Fraternity/sorority organizations and universities have a complex relationship (e.g., Harvey, 1990), and issues such as freedom of association (e.g., Bauer, 2013) and hazing (e.g., Parks & Grindell, 2021) have been the basis for many legal cases that test the relationship's stability. The relationship is comprised of the various stakeholders that impact the status of a local chapter, including the university, the local governing council, and the national organization (as relevant for most but not all local chapters). Yet, examining this relationship through the issue of harassment at universities has not received nearly as much attention.

Like other alleged policy violations, when an incident of harassment involving a fraternity within the North American Interfraternity Conference (NAIC) or a sorority within the National Panhellenic Conference (NPC) occurs, there may be multiple discipline proceedings. In general, the host university may have the chapter go through discipline proceedings (e.g., Hauser, 1997; Thomason, 2014), but so may the national NAIC fraternity or NPC sorority (e.g., Hauser, 1997), and there could be criminal issues as well (e.g., Fernandes, 2016). Lawsuits have been brought against individual members, the chapter, and the national NAIC fraternity/NPC sorority organizations (Marshlain, 2006). With all the actors and organizations involved, it can be difficult for higher education practitioners to understand how and by whom an NAIC fraternity/NPC sorority is held accountable for wrongdoing.

One reason why it might be difficult to know who must be held accountable when harassment cases happen is because the relationship between NAIC fraternity/NPC sorority organizations and universities is inconsistent. On some university campuses, fraternities are willing to have a cordial and collaborative relationship with their host university (Rumsey, 1985), while others have “a love-hate relationship” (Harvey, 1990, p. 11). Harvey (1990) goes on to explain that fraternities “resent campus administrators’ periodic attempts to control their affairs. ... [and] universities sometimes question whether fraternities help or hinder them in the performance of their academic mission” (p. 11). In short, there is no single way to describe the relationship between NAIC fraternities/NPC sororities and universities because it varies based on the university.

This relationship varies from campus to campus because of how each entity is governed (i.e., Interfraternity Council and College Panhellenic Associations; NIC, n.d.; NPC, n.d.). Universities are either public or private institutions, which influences how they are governed and which laws apply to them (Hutchens & Fernandez, 2019). Generally, private institutions are self-governing, and public institutions are governed by the state (Hutchens & Fernandez, 2019). Additionally, public institutions are typically regulated by the state and federal governments, whereas private institutions have limited government oversight (Hutchens & Fernandez, 2019). A national NAIC fraternity/NPC sorority headquarters is a separate organization—with their own polices—from the university. The chapter is located on a university campus and is both associated with and autonomous from the national headquarters, yet is regulated by the policies of the university, national headquarters, and their own chapter. Therefore, the interactions at the intersection of university, national headquarters, and chapter look different depending on the university campus.

Due to the complexity of this relationship, it is unsurprising that the legal relationship can also be complex (e.g., Rumsey, 1985). Scholars have worked to untangle the legal relationship between fraternity/sorority organizations and the university, primarily through the areas of association rights (e.g., Bauer, 2013) and hazing (e.g., Parks & Grindell, 2021). One area seemingly lacking inquiry is framing the legal relationship in terms of harassment. Even though harassment may occur during hazing, it also occurs at other times (Merriam-Webster, n.d.b; Swoford, 2020). Therefore, the purpose of this paper is to help define the legal relationship between North American Interfraternity Conference fraternities and National Panhellenic Conference sororities—inclusive of their national organization, chapters, and house corporations—and four-year public and private universities in the context of harassment cases. I use the term *university* to describe four-year public and private colleges and universities.

Legal Relationship Between NAIC Fraternities/NPC Sororities and the University

Prior to examining the legal relationship between NAIC fraternities/NPC sororities and universities in harassment cases, it is necessary to understand how this relationship has been defined in other circumstances. As noted earlier, the focus of the fraternity/sorority-university relationship is often situated around issues of freedom of association (e.g., Bauer, 2013) and hazing (e.g., Parks & Grindell, 2021). Therefore, this section highlights key points from those issues.

Association

To date, the legal relationship between NAIC fraternity/NPC sorority organizations and universities has primarily been examined through two general bodies of law: association rights and hazing. Fraternities and sororities have exerted their associated rights in two forms: expressive and intimate. Expressive association rights, a form of speech, stem from the First Amendment of the U.S. Constitution (Harvey, 1990; Rumsey, 1985). Intimate association, the “right to associate with others in personal relationships . . . [stems from] the amorphous ‘zone of privacy’ implied by several different constitutional amendments” (Harvey, 1990, p. 23). Both expressive and intimate rights could be violated when there is too much university regulation on fraternities and sororities (Harvey, 1990; Hauser, 1997). Universities regulate fraternity and sorority behavior through aspects of university activities such as funding, housing, and recruitment (Hauser, 1997). For example, “a notable minority of colleges began to promulgate policies that severely restricted or banned fraternities. Often, these interdictions were pronounced for the express purpose of monopolizing student housing under the college’s control” at the end of the twentieth century (Sunshine, 2017, p. 66). At public universities, legal scholars argue, attempting to regulate the student association of fraternities and sororities would likely prove legally difficult, therefore affording these organizations association rights (Harvey, 1990; Hauser, 1997; Rumsey, 1985).

Hazing

Another way to understand the legal relationship between NAIC fraternity/NPC sorority organizations and universities is through hazing. Instances of hazing continually make headlines for their often tragic consequences and for the solutions universities and state governments attempt to make (Harris, 2017; Hatch, 2022). The simplest way to think about the major entities involved in hazing is using Swofford’s (2020) *hazing triangle*. The *hazing triangle* identifies individual people, fraternities/sororities, and universities as “the three main actors who play a pivotal role in either the propagation or eradication of fraternity hazing” (Swofford, 2020, p. 321). As a result, fraternities/sororities and institutions should be the focus of hazing deterrence efforts (Swofford, 2020). Additional consideration should be given to the national fraternity/sorority and its affiliated chapters because they are often technically different entities by law (Parks & Grindell, 2021). This structure is

necessary to understanding the legal relationship between NAIC fraternities/NPC sororities and universities because the arrangement often results in little to no legal liability for the national organization when the chapter or chapter members break the law (Parks & Grindell, 2021).

Negligence is used most often to try to hold universities, fraternities/sororities, and individuals accountable for a hazing-related injury (Parks & Grindell, 2021). A duty of care can be more easily established between a member and chapter as compared to the national organization because of the chapter's more direct interaction with members (Parks & Grindell, 2021). Even though the chapter is more likely to be liable for the actions of members in hazing-related injuries compared to the national organization, both entities often get named in lawsuits, and, at times, the national organizations can be held liable as well (Parks & Grindell, 2021).

There are a variety of approaches a plaintiff could use to allege a university is liable in hazing-related injuries (Mumford, 2001; Parks & Grindell, 2021). There are four common ways plaintiffs attempt to establish a duty of care upon universities: "(1) landowner liability, (2) custodial liability, (3) assumption of a duty, and (4) vicarious liability" (Parks & Grindell, 2021, p. 686; Parks et al., 2015, p. 123-124). The location where the hazing-related injury occurred is critical. Generally, the owners of a fraternity's/sorority's house will either be the national organization or the chapter's house corporation (Parks & Grindell, 2021). Furthermore, "if hazing occurs on campus or at a fraternity house situated on, or even near, university property, the university may be named as a defendant in a hazing-related personal injury case" (MacLachlan, 2000, p. 548). The university and fraternities/sororities are interconnected through the ownership of the facility and land, creating a close legal relationship.

An "institution's creation of specific policies against certain activities, specifically where such policies lead to injury of a student" can lead to the argument that the university should be held liable for the injury under custodial liability (Parks & Grindell, 2021, p. 689). However, universities are typically not held liable under this standard due to the challenge of showing a connection between the injured student and policy enforcement (Parks & Grindell, 2021; Parks et al., 2015). For some universities that tried to regulate and prevent hazing within fraternity/sorority organizations, these actions led to being found liable under assumption of a duty (Parks & Grindell, 2021; Parks et al., 2015). Scholars have noted custodial liability and assumption of a duty are very close in definition; however, the major difference stems from the preventative actions of a university (Parks & Grindell, 2021; Parks et al., 2015). These types of preventative actions by the university can lead to being held liable for the exact behaviors they are trying to prevent (Parks & Grindell, 2021; Parks et al., 2015; Sandok, 1998). Finally, vicarious liability means a student "was acting within the university's scope of employment" at the time they were hazing another student and is the most rarely used theory of liability (Parks & Grindell, 2021, p. 691; Parks et al., 2015). In

short, scholars argue universities have two options: "They can either relinquish all control over student organizations or they can strictly control student organizations with detailed policies and prohibitions" (Sandok, 1998, pp. 339-340). This strict control would also require strict monitoring of how the policies are implemented and perhaps create too much administrative burden for institutions to handle (Sandok, 1998).

Harassment in Higher Education

Because of how laws are written and can be interpreted, the courts are presented with the challenge of determining whether liability should be placed on the university or NAIC fraternity/NPC sorority organizations in instances of harassment. For example, the courts will typically find that while verbal sexual harassment alone does not automatically meet the standards of the Patsy Mink Equal Opportunity in Education Act, commonly referred to Title IX, physical attacks do (Fromer et al., 2016). In instances of assault, some scholars argue the university should not always be found liable (Hoye & Hahn, 1998). Additionally, the definition of hazing can include harassment (Merriam-Webster, n.d.b; Swofford, 2020). In situations where universities could not stop the assault, scholars argue that the university should not be held liable for a student assaulting another student (Hoye & Hahn, 1998). The complexity surrounding who is liable in cases of harassment is why defining the legal relationship between NAIC fraternities/NPC sororities and the university is critical.

Before reviewing cases to define the legal relationship in harassment cases, harassment must be defined. As previously noted, harassment and hazing are intertwined because hazing can take the shape of harassment (Merriam-Webster, n.d.b; Swofford, 2020). One legal dictionary describes harassment in very broad terms, namely "words or behavior that threatens, intimidates, or demeans a person. Harassment is unwanted, uninvited, and unwelcome and causes nuisance, alarm, or substantial emotional distress without any legitimate purpose" (Wex, n.d., paragraph 1). The dictionary cited is Wex, "a free legal dictionary and encyclopedia sponsored and hosted by the Legal Information Institute at the Cornell Law School. Wex entries are collaboratively created and edited by legal experts" (Legal Information Institute, n.d., What is Wex? section). Wex is useful for someone seeking a general understanding of legal terms. The Merriam-Webster dictionary, which was cited earlier in this paragraph, "has been America's leading provider of language information" for over 150 years, which also makes it an important source to review (Merriam-Webster, n.d.a, paragraph 1). Of course, one cannot simply rely on dictionary definitions to understand hazing and harassment. This is because both hazing and harassment have specific legal definitions depending on how the relevant federal, state, and local law is written and interpreted. Although harassment can occur within hazing activities (Merriam-Webster, n.d.b), it can happen outside this context and therefore requires its own analysis.

There are two prominent federal rules that regulate how harassment is addressed at universities. Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 apply to any institution, group, or activity that accepts federal financial assistance (Office of Civil Rights, n.d.b; U.S. Department of Education, n.d.b), which includes many public and private universities (Hutchens and Fernandez, 2019). In general, these laws require universities to take proactive steps to prevent harassment from happening at their institution and take appropriate action when harassment occurs. Therefore, while state and local laws may have varying criminal and other definitions of harassment, for purposes of this paper, I will utilize the definitions of harassment within Title VI and Title IX as these definitions apply to all public university-NAIC fraternity/NPC sorority relationships.

A Summary of the Title VI of the Civil Rights Act of 1964

According to Title VI of the Civil Rights Act of 1964, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (1964). For example, racial harassment would violate Title VI (U.S. Department of Education, n.d.a). Areas within higher education such as athletics, housing, student conduct, and student services would likely be held to the standards of Title VI (Office of Civil Rights, n.d.a). Title VI applies not only to educational settings but also to employment settings (Office of Civil Rights, n.d.a; U.S. Department of Education, n.d.a).

The Office of Civil Rights' guidance provides further clarification about the definition of harassment under Title VI. This guidance explains harassment that falls under Title VI "is unwelcome conduct based on a student's actual or perceived race or national origin. ...[which] can take many forms, including slurs, taunts, stereotypes, or name-calling, as well as racially-motivated physical threats, attacks, or other hateful conduct" (Office of Civil Rights, n.d.b, section Racial Harassment). The guidance further clarifies harassment that targets one's ethnicity and religion (e.g., attire) would fall under Title VI (Office of Civil Rights, n.d.b).

A Summary of Title IX of the Education Amendments of 1972

Title IX of the Education Amendments of 1972 concerns harassment that is based on sex. The law states, "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" (Patsy Mink Equal Opportunity in Education Act, 1972). In short, Title IX "is designed to eliminate (with certain exceptions) discrimination on the basis of sex" in education settings (Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 2020, para. 1). Under Title IX, sexual harassment is an umbrella term used to describe an array of behavior done based on a person's sex, which includes sexual assault and stalking (U.S. Department

of Education, n.d.b). The portion of this definition most relevant for this paper states sexual harassment is “unwelcome conduct, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity” (U.S. Department of Education, n.d.b, p. 4).

To further understand Title IX, two contextual elements are relevant to highlight. What is interesting to note is that the law and regulations do not explicitly state a protection against sexual harassment (Goodman, 2022). Instead, regulatory and policy guidance and case law have shaped the parameters of Title IX as it applies to sexual harassment. Additionally, the 2020 “rule insinuates...punishing verbal sexual harassment taking place on college campuses may violate the First Amendment and infringes on the free exchange of ideas that should take place at universities” (Goodman, 2022, p. 1289). This concept will become particularly relevant when defining the legal relationship between NAIC fraternities/NPC sororities and universities in the context of harassment.

Analyzing Harassment Cases Involving NAIC Fraternities/NPC Sororities

After a review of case law and literature, several cases exemplify how NAIC fraternities/NPC sororities and universities interact in harassment cases. Although I noted earlier that harassment can be defined under both Title VI and Title IX, I noticed in my research that Title IX cases were more prevalent, therefore becoming the focus this analysis. *Mc-Neil v. Yale Univ.* (2020), *Niesen v. Iowa State Univ.* (2017), and *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.* (1993) are the three cases I used to define the relationship between NAIC fraternity/ NPC sorority organizations and universities in instances of harassment. Before discussing these three cases, I highlight key points from two seminal Title IX harassment cases: *Davis v. Monroe County Bd. Of Educ.* (1999) and *Franklin v. Gwinnett Cnty. Pub. Sch.* (1992).

Key Points From Davis v. Monroe County Bd. Of Educ. (1991)

The *Davis* (1999) case is an important Title IX harassment case because it focuses on student-to-student harassment, rather than employee-to-student harassment cases (Fromer et al., 2016). How the decision was written lends itself to applying to higher education as well, even though a higher education institution is not involved (Petouvis, 2001). The *Davis* standard has three elements that apply in higher education (Fromer et al., 2016). First, the university had “actual knowledge” that harassment was occurring (Fromer et al., 2016, p. 460; Goodman, 2022, p. 1282; Petouvis, 2001, p. 413). Second, the university’s response to the harassment was “deliberately indifferent” (Fromer et al., 2016, p. 461; Goodman, 2022, p. 1282; Petouvis, 2001, p. 413). Third, the behavior was considered harassment “so severe, pervasive, and objectively offensive that it deprives the victims of access to the educational opportunities or benefits provided by the school” (Fromer et al., 2016, p. 460). This definition of harassment is called “actionable

harassment” and is necessary for requiring a university to act on the report(s) of harassment (Goodman, 2022, p. 1282). This case continues to influence courts’ rulings on Title IX harassment, as exemplified in *McNeil v. Yale Univ.* (2020). Finally, the *Davis* standard sets the tone for how universities must interact with NAIC fraternities/NPC sororities in responding to harassment.

Key Points From Franklin v. Gwinnett Cnty. Pub. Sch. (1992)

The *Franklin* (1992) case is foundational because it gave a person the right to be awarded monetary damages for a university not properly responding to a Title IX incident (Goodman, 2022). “Title IX was eventually applied to sexual harassment in *Franklin*” and is another reason why this Supreme Court case is foundational to the topic of harassment (Goodman, 2022, p. 1279). This case also matters as it relates to the concept of hostile environment. One interpretation of *Franklin* is that a hostile environment theory was used in the outcome of the case (Goodman, 2022). Years later, “the Fourth Circuit has more explicitly stated that hostile environment theories underlie most Title IX sexual harassment claims, modifying the *Davis* inquiry,” and seems to provide further evidence of hostile environment’s role in Title IX (Goodman, 2022, p. 1297). This concept becomes extremely relevant in the following three cases because each addresses hostile environment claims but in different manners. Each case showcases how universities and NAIC fraternities/NPC sororities are connected in harassment cases.

McNeil v. Yale Univ. (2020)

In 2020, three students and an equity-focused student group, Engender, at Yale University brought forth twelve claims because of the actions of social fraternities at Yale University (*McNeil v. Yale Univ.*, 2020). For the purposes of this paper, the two Title IX claims are the focus: *Title IX—the Hostile Educational Environment Claim* and *Title IX—the Gender Discrimination in Terms and Conditions of Education Claim*. However, the Title IX hostile environment claim is the primary focus because the Title IX gender discrimination claim focused on fraternity membership practices and the court made a similar conclusion as the hostile environment claim.

In the Title IX hostile environment claim, the U.S. District for the District of Connecticut court determined whether the university was *deliberately indifferent* about the hostile environment claim. This required the plaintiff to show that the harassment happened in a space the university had control over, that the university had *actual knowledge* of the harassment, that the university did not respond to that knowledge, and that the plaintiff was denied educational benefits due to the harassment being so severe and pervasive (*McNeil v. Yale Univ.*, 2020). This hostile environment claim had two scenarios presented within it: one dealing with a group of students and one dealing with a single person. The three students alleged having experienced or witnessed sexual assault—specifically there were multiple allegations of groping—at various fraternity parties. One of the three women claimed she was initially

denied entrance into one of the fraternity parties because she is Black. They also pointed out that fraternities do not accept women and non-binary people as members. As a result of this behavior, the plaintiffs claimed a hostile environment was created by fraternities (*McNeil v. Yale Univ.*, 2020).

The court in *McNeil v. Yale Univ.* (2020) disagreed with this claim made against the fraternities. One of the major reasons given was due to the lack of university control over the fraternities. The court also explained Title IX does not apply to fraternity membership practices, which is also discussed in the Title IX gender discrimination claim. Furthermore, the university lacked control over the environment in which the harassment occurred because the fraternity parties were not sponsored by Yale University, happened off-campus, and were not educational in nature (*McNeil v. Yale Univ.*, 2020). Title IX's lack of application to membership practices and Yale University's lack of control over fraternities were also given as reasons why the court dismissed the Title IX gender discrimination claim, which focused on discrimination rather than a hostile environment. The court's decision shows an example of how fraternities act outside the university's control. Therefore, *control* is an important element of the relationship definition and, in this case, confirms the separation between NAIC fraternity/NPC sorority organizations and universities.

Where the relationship between NAIC fraternities/NPC sororities and universities converges is at the application of legal tests and claim specificity. In terms of the hostile environment Title IX claim, the court found Engender and two of the three students did not report to the university specific sexual assault allegations. The lack of *actual knowledge* on the part of the university is another reason why the university was not held liable in this claim (*McNeil v. Yale Univ.*, 2020). This *actual knowledge* requirement highlights the application of legal tests in the relationship. Recall, the university is only required to act when they have *actual knowledge* of harassment, as established by the *Davis* standard (Fromer et al., 2016; Goodman, 2022; Petouvis, 2001). As a result, this legal test connects NAIC fraternities/NPC sororities and universities by indicating the point in which universities are required to intervene.

The other major element of the hostile environment Title IX claim in *McNeil v. Yale Univ.* (2020) focused on one student's allegations of sexual assault and relates to why claim specificity is the third important element. Similar to the allegations made by the two other students, this student "alleges both having experienced a sexual assault and having witnessed others being sexually assaulted at a single event" (*McNeil v. Yale Univ.*, 2020, section III. A.). The student also allegedly told a designated university official about what happened; however, that person did not take further action after receiving the allegation. While the court's decision seemed entwined in the idea of level of claim specificity, what made this claim different is the fact that the student reported the sexual assault to the proper university official and that person did not act. (*McNeil v. Yale Univ.*, 2020). This claim—limited to the student

and the allegations at this single, specific party—was deemed as having the potential to be a Title IX claim (*McNeil v. Yale Univ.*, 2020). *McNeil v. Yale* (2020) shows the relevance of the *Davis* standard in requiring the university to address harassment involving NAIC fraternities/NPC sororities, while showing the importance of claim specificity. In sum, this case highlights a separate relationship between NAIC fraternity/NPC sorority organizations and universities exist unless required by law.

Niesen v. Iowa State Univ. (2017)

In 2017 Taylor Niesen, a member of a social sorority, sued Iowa State University because she was sexually assaulted by someone in a social fraternity (*Niesen v. Iowa State Univ.*, 2017). The case addressed the sexual assault and university response, both Title IX claims. Part of Niesen's sexual assault Title IX claim involved describing the type of climate social fraternities produced on campus. For the university response-Title IX claim, Niesen claimed there was a hostile environment.

In the *Niesen v. Iowa State Univ.* (2017) case, the plaintiff made claims about the behavior before and after she was sexually assaulted. As it relates to *pre-alleged assault liability*, a U.S. District Court determined the university did not have control because there was, very little information about the student perpetrator of the assault. It does not identify the fraternity where the assault occurred, whether it was located on or off campus, or the context in which the assault occurred beyond the fact it occurred at the fraternity (*Niesen v. Iowa State Univ.*, 2017, section II. B.)

The court's rationale seems to imply needing more specificity in the facts of the case than what was presented. Ultimately, the court dismissed this sexual assault-Title IX claim because the claim would not yield relief (*Niesen v. Iowa State Univ.*, 2017). Here, the elements of control and claim specificity merge into a single relevant question for the court. From reading the case, it would seem the court might rule differently if the claim made was more specific and the university had control over the space. In *Niesen v. Iowa State Univ.* (2017), the ruling signals the university and NAIC fraternities/NPC sororities have a relationship if the proper variables are in place, e.g., in instances where the university has control over the location where the harassment occurs.

Under the *post-alleged assault liability*, the plaintiff also made a hostile environment claim due to the retaliation she alleges occurred from other students in fraternities and sororities (*Niesen v. Iowa State Univ.*, 2017, section II. C.). The court ruled the "Complaint is factually sufficient to plead the control element of her post-alleged assault retaliation claim" (*Niesen v. Iowa State Univ.*, 2017, section II. C.). The court also affirmed the university's argument that they cannot control opinions or expression of students (in reference to the retaliation claims), and then briefly described the right of association compared to the right of speech, both under the First Amendment. The court concludes, "it is enough that the Complaint does not on its face allege retaliatory conduct which in all aspects would clearly be protected speech or as-

sociation" (*Niesen v. Iowa State Univ.*, 2017, section II. C.). In sum, the court determined whether the university has the ability to control the fraternities and sororities and whether the university's inaction in regulating fraternities and sororities was appropriate. This case highlights how control and claim specificity in a harassment case connects NAIC fraternities/NPC sororities with universities.

***Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.* (1993)**

In 1991, a chapter of Sigma Chi at George Mason University held an "ugly woman contest," which ended up being considered by many to be sexist and racist (*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 1993, section I). While the event involved Sigma Chi Fraternity and sorority teams, the fraternity men dressed as female caricatures to participate in an element of the contest. The tipping point for the sexism and racism seemed to be when one of the fraternity men incorporated exaggerated body parts into his portrayal, changed his vernacular, and painted himself black to portray a caricature of a Black woman (*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 1993). Additionally, the case also highlighted how some believed the actions created a hostile environment; however, this did not rise to the level of a legal claim. The university suspended the chapter temporarily and put them on probation for their actions (*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 1993). Although this case is from the early 1990s, the case is often cited in literature pertaining to student speech and hate speech (Herbert, 2017; Juhan, 2012; Papandrea, 2017). I also purposefully included this case last to show the ambiguity involved in harassment. Higher education practitioners might think of this behavior as creating a hostile environment, similar to what was revealed in the facts of the *Iota* case. However, the *Iota* case only addresses the issue of speech.

Both *McNeil v. Yale* (2020) and *Niesen v. Iowa State Univ.* (2017) showed examples of universities not controlling fraternities because they were not required by law. The university and the fraternity had a more separate relationship when it came to addressing harassment. In the *Iota* case, the opposite occurred: the Fourth Circuit court found the university violated the fraternity's First Amendment right to free speech because their attempt to regulate the fraternity was inappropriate (*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 1993). The court concluded that "the University should have accomplished its goals in some fashion other than silencing speech on the basis of its viewpoint" (*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 1993, section IV). One major reason for the ruling was due to the application of the *Johnson* test; the *Johnson* test determines "the intent to convey a message" and whether the audience understood the message as entertainment or a joke (*Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 1993, section III. B.). The court ruled the *Johnson* test was met; the contest was likely understood as a form of entertainment, therefore protecting the fraternity's expression.

The *Iota Xi Chapter of Sigma Chi Fraternity* (1993) ruling exhibits how the university's approach to controlling the fraternities was the issue. Regarding the facts of the case, one scholar noted, "students...convinced an administrator that the speech created a hostile educational environment and conflicted with the university's mission; administrators subsequently imposed sanctions" (Juhan, 2012, p. 1589). Another scholar argued that universities punish student speech that does not align with institutional values, seeming to indicate this case is neither unique nor irrelevant today (Papandrea, 2017). The *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.* (1993) case can teach practitioners that the relationship between the university and NAIC fraternity/NPC sorority organizations may not be the issue as much as the approach to the relationship.

The *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.* (1993) case was later distinguished by *Abbot v. Pastides* (2017), a U.S. District Court ruling in the Fourth Circuit. While this case does not address harassment involving NAIC fraternities/NPC sororities, it is relevant for considering how universities can regulate harassment in the form of speech. It is also relevant for understanding how courts have evolved on the *Iota Xi* decision since 1993. In *Abbot v. Pastides* (2017), a "Free Speech Event" was held at the University of South Carolina to raise concerns about restrictive speech rights (section I). Many in the internal and external campus community raised concerns about the event due to the visuals used, one of which was a swastika. Even though the university determined the Equal Opportunity complaints filed did not warrant an investigation, the pre-investigation meeting was one reason cited by Abbot that his rights were violated by the university (*Abbot v. Pastides*, 2017). He also claimed the university's policies regarding discrimination and harassment and the university's creed were unconstitutional. The court found the University of South Carolina narrowly tailored the First Amendment rights for all students (*Abbot v. Pastides*, 2017). Additionally, the court ruled the university had a "compelling interest in protecting students' rights to be free from discrimination based on race, gender, religion, or other attributes" (*Abbot v. Pastides*, 2017, section III. A. 2). Including these two speech cases should further support the idea that universities can have a close relationship with NAIC fraternity/NPC sorority organizations through control; however, they must be careful about their approach.

Summary

These cases can teach higher education practitioners that universities and NAIC fraternity/NPC sorority organizations have a relationship. Based on reviewing *McNeil v. Yale Univ.* (2020), *Niesen v. Iowa State Univ.* (2017), and *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.* (1993), I noticed two relationship-defining themes arose:

1. Who has control over the setting in which the harassment occurred? (Control)
2. Is the harassment claim specific? (Claim Specificity)

Control and level of claim specificity are likely necessary to understand who might be held accountable in instances of harassment, therefore defining the relationship between the university and NAIC fraternities/NPC sororities. Identifying who controls the space where the harassment occurred (e.g., university, fraternity/sororities, or another entity) aligns with the conclusion made about the fraternity/sorority and university relationship in hazing cases (e.g., Parks & Grindell, 2021; Parks et al., 2015; MacLachlan, 2000). Additionally, the courts did not accept the broad harassment allegations made in the *McNeil v. Yale Univ.* (2020) and *Niesen v. Iowa State Univ.* (2017) cases, something that did not get discussed in literature about hazing or association rights. These three harassment cases highlight the interconnected relationship NAIC fraternities/NPC sororities have with their host institutions in harassment cases.

The fact that the legal relationship between NAIC fraternities/NPC sororities and universities in harassment cases is messy and nuanced should not be a reason these entities stay stagnant. Historically, universities have not been at the forefront of creating and implementing policies that address harassment, particularly sexual harassment (Cudd, 1994). Therefore, universities and NAIC fraternities/NPC sororities need to better address harassment on their campuses. The implications for defining the relationship between NAIC fraternities/NPC sororities and universities in harassment cases are best thought of through the Swofford's (2020) *hazing triangle*.

Recall, the *hazing triangle* is made up of the university, the fraternity/sorority, and the individual(s) (Swofford, 2020). This concept serves as an example of how multiple actors are involved in contributing to an issue and why they need to be part of the solution (Swofford, 2020). Furthermore, anti-hazing laws must account for these three components of the triangle by creating unique requirements and consequences for each group on the triangle (Swofford, 2020). At the same time, Swofford (2020) argues for "inverting the triangle" where fraternities/sororities and universities are deterred from being involved in hazing through anti-hazing laws (p. 321). This concept arose from a critique of anti-hazing laws, particularly the Piazza Law. The Piazza Law was fueled by the 2017 death of Timothy J. Piazza, which resulted from a hazing incident involving Beta Theta Pi Fraternity at The Pennsylvania State University (Swofford, 2020).

Applying Swofford's (2020) *hazing triangle* to harassment at universities means anti-harassment laws should focus on both universities and fraternities/sororities. Continuing to follow this model, the approach of "inverting the triangle" in harassment cases would yield more severe punishments for both universities and fraternity/sorority organizations (Swofford, 2020, p. 321). Additionally, the *hazing triangle* argues, an added layer of accountability for hazing must be placed on the university, such as a state-appointed commissioner (Swofford, 2020). This could be an applicable layer of accountability for universities as it relates to harassment.

Recall, Title VI and IX apply to any university that receives federal assistance, and First Amendment protections only apply to public universities (Office of Civil Rights, n.d.b; Petouvis, 2001; U.S. Department of Education, n.d.b). Given the focus of this article has been on federal laws, applying Swofford's (2020) *hazing triangle* to this implication requires a university check and balance system within the federal government. Public universities should try to minimize sexual harassment through their university policies, while paying attention to narrowly tailoring the speech policies (Herbert, 2017; Petouvis, 2001). However, in using Swofford's (2020) logic of the *hazing triangle*, there must be greater government oversight of harassment at universities. At the same time, because I found Title IX cases to be more prevalent in my research, there is an opportunity for future research to explore the role of Title VI cases, especially as it relates to the *hazing triangle*.

Conclusion

Harassment continues to be prevalent on and off university campuses. A 2016 study of students at one university found that out of the different types of assault, college students reported verbal assaults and harassment (sexual harassment) most often (DeKeseredy et al., 2019). Addressing this problem takes time and requires focus on the university environment because the environment shapes what behavior is allowed and not allowed within the university community (Shultz, 2018). Based on this thinking, chapters, chapter members (NAIC fraternities/NPC sororities), and university administrators (the university) are part of the university community, and, therefore, must be part of the solution for addressing harassment. This rationale takes Swofford's (2020) *hazing triangle* and applies it to harassment: both groups are part of the problem, and both must be involved in a solution. The relationship between NAIC fraternity/NPC sorority organizations and universities is interconnected through control and level of claim specificity in instances of harassment. Applying Swofford's (2020) *hazing triangle* to harassment shows NAIC fraternities/NPC sororities and universities must work together, even if they have a complex relationship.

References

- Abbott v. Pastides, 263 F. Supp. 3d 565 (D.S.C., Columbia Division, 2017)., *aff'd*, 900 F.3d 160 (4th Cir. 2018). <https://advance-lexis-com.proxyiub.uits.iu.edu/api/document?collection=cases&id=urn:contentItem:5P0K-6H61-F04F-81RF-00000-00&context=1516831>.
- Bauer, M. D. (2013). Freedom of association for college fraternities after Christian Legal Society and Citizens United. *Journal of College and University Law*, 39(2), 247–302.
- Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964). [https://uscode.house.gov/view.xhtml?req=\(title:42%20section:2000d%20edition:prelim\)%20OR%20\(granuleid:USC-prelim-title42-section2000d\)&f=treesort&num=0&edition=prelim](https://uscode.house.gov/view.xhtml?req=(title:42%20section:2000d%20edition:prelim)%20OR%20(granuleid:USC-prelim-title42-section2000d)&f=treesort&num=0&edition=prelim)
- Cudd, A. E. (1994). When sexual harassment is protected speech: Hostile environment sexual harassment policy in the university. *Kansas Journal of Law & Public Policy*, 4(1), 69–82.
- DeKeseredy, W., Nolan, J. J., & Hall-Sanchez, A. (2019). Hate crimes and bias incidents in the ivory tower: Results from a large-scale campus survey. *American Behavioral Scientist*, 00(0), 1–12. <https://doi.org/10.1177/0002764219831733>
- Fernandes, R. (2016, March 4). Baylor fraternity president is charged with sexual assault. *The Chronicle of Higher Education*. <https://www-chronicle-com.proxyiub.uits.iu.edu/blogs/ticker/baylor-fraternity-president-is-charged-with-sexual-assault>
- Fromer, G., Mosi, B., & Nelson, A. (2016). Sexual harassment in education. *Georgetown Journal of Gender and the Law*, 17(1), 451–472.
- Goodman, J. R. (2022). Deliberately indifferent: Institutional liability for further harassment in student-on-student Title IX cases. *Vanderbilt Law Review*, 75(4), 1273–1305.
- Harris, A. (2017, October 5). Southern methodist u. Suspends fraternity for alleged hazing. *The Chronicle of Higher Education*. <https://www-chronicle-com.proxyiub.uits.iu.edu/blogs/ticker/southern-methodist-u-suspends-fraternity-for-hazing>
- Harvey, J. C. (1990). Fraternities and the constitution: University-imposed relationship statements may violate student associational rights. *Journal of College and University Law*, 17(1), 11–42.
- Hatch, B. (2022, June 22). The death of a student in a fraternity house sparked an anti-hazing bill in Virginia. It failed. *The Chronicle of Higher Education*. <https://www-chronicle-com.proxyiub.uits.iu.edu/article/the-death-of-a-student-in-a-fraternity-house-sparked-an-anti-hazing-bill-in-virginia-it-failed>
- Hauser, G. F. (1997). Intimate associations under the law: The rights of social fraternities to exist and to be free from undue interference by host institutions. *Journal of College and University Law*, 24(1), 59–96.

- Herbert, A. (2017). Can we still talk things out: A case study of campus hate speech regulations at the University of Texas. *Connecticut Public Interest Law Journal*, 17(1), 117-140.
- Hoye, W. P., & Hahn, W. A. (1998). Beyond the camel's nose: Institutional liability for peer sexual harassment on campus. *South Carolina Law Review*, 50(1), 55-92.
- Hutchens, N. H., & Fernandez, F. J. (2019). Higher education governance. In S. C. Bon, D. H. K. Nguyen, & J. A. Rippner (Eds.), *Contemporary issues in higher education law* (4th edition, pp. 13-34). Education Law Association.
- Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993). <https://advance-lexis-com.proxyiub.uits.iu.edu/api/document?collection=cases&id=urn:contentItem:3S4X-GG40-003B-P2VV-00000-00&context=1516831>.
- Juhan, S. C. (2012). Free speech, hate speech, and the hostile speech environment. *Virginia Law Review*, 98(7), 1577-1619.
- Legal Information Institute. (n.d.). *Wex*. LII / Legal Information Institute. Retrieved July 18, 2023, from <https://www.law.cornell.edu/wex>
- MacLachlan, J. (2000). Dangerous traditions: Hazing rituals on campus and university liability. *Journal of College and University Law*, 26(3), 511-548.
- Merriam-Webster. (n.d.a). *About us*. Merriam-Webster. Retrieved July 18, 2023, from <https://www.merriam-webster.com/about-us>
- Merriam-Webster. (n.d.b). Hazing. In *Merriam-Webster.com dictionary*. Retrieved December 17, 2022 from <https://www.merriam-webster.com/dictionary/hazing>
- McNeil v. Yale Univ., 436 F. Supp. 3d 489 (D. Conn. 2020), *vacated*, McNeil v. Yale Chapter of Aha Delta Phi Int'l, 21-639-cv, 2021 U.S. App. LEXIS 33750 (2nd Cir. 2021). <https://casetext.com/case/mcneil-v-yale-univ>
- Mumford, K. (2001). Who is responsible for fraternity related injuries on American college campuses. *Journal of Contemporary Health Law and Policy*, 17(2), 737-770.
- NIC. (n.d.). *About interfraternity council (IFC)*. North American Interfraternity Conference. Retrieved November 11, 2023, from <https://nic-fraternity.org/about-interfraternity-council-ifc/>
- Niesen v. Iowa State Univ., 4:17-cv-201-RAW, 2017 U.S. Dist. LEXIS 221061 (S.D. Iowa, Central Division, 2017). <https://casetext.com/case/niesen-v-iowa-state-univ>
- Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. §106 (2020). <https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-106>
- NPC. (n.d.). *Our members*. National Panhellenic Conference. Retrieved

- November 11, 2023, from <https://npcwomen.org/about/our-members/>
- Office of Civil Rights. (n.d.a). *Education and Title VI*. Retrieved December 19, 2022 from <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html>
- Office of Civil Rights. (n.d.b). *Race, color, or national origin discrimination: Frequently asked questions*. Retrieved April 5, 2023 from <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html#racehar1>
- Papandrea, M.-R. (2017). The free speech rights of university students. *Minnesota Law Review*, 101(5), 1801–1862.
- Patsy Mink Equal Opportunity in Education Act, 20 U.S.C. § 1681. (1972). <http://uscode.house.gov/view.xhtml?req=20+USC+1681%3A+Sex&f=treesort&fq=true&num=10&hl=true&edition=prelim&granuleId=USC-prelim-title20-section1681>
- Parks, G. S., & Grindell, E. (2021). The litigation landscape of fraternity and sorority hazing: Criminal and civil liability. *Nebraska Law Review*, 99(3), 649–696.
- Parks, G. S., Jones, S. E., Ray, R., Hughey, M. W., & Cox, J. M. (2015). White boys drink, black girls yell...: A racialized and gendered analysis of violent hazing and the law. *The Journal of Gender, Race & Justice*, 18(1), 93–158.
- Petouvis, G. M. (2001). Student-on-student sexual harassment in higher education: The effect of Davis v. Monroe County Board of Education. *Virginia Journal of Social Policy & the Law*, 8(2), 397–438.
- Rumsey, R. S. (1985). Legal aspects of the relationship between fraternities and public institutions of higher education: Freedom of association and ability to prohibit campus presence or student membership. *Journal of College and University Law*, 11(4), 465–480.
- Sandok, C. D. (1998). Public educational institutions and their unconstitutional regulation of first amendment rights of fraternal organizations: An analysis of the Maryland Plan. *Syracuse Law Review*, 48(1), 323–354.
- Shultz, V. (2018). Reconceptualizing sexual harassment, again. *Yale Law Journal Forum*, 128, 22–66.
- Sunshine, J. S. (2017). Antitrust precedent & anti-fraternity sentiment: Revisiting Hamilton College. *Campbell Law Review*, 39(1), 59–134.
- Swofford, J. J. (2020). The hazing triangle: Reconceiving the crime of fraternity hazing. *Journal of College and University Law*, 45(2), 295–329.
- Thomason, A. (2014, November 26). San Diego State fraternities suspend activities over sexual harassment. *The Chronicle of Higher Education*. <https://www-chronicle-com.proxyiub.uits.iu.edu/blogs/>

ticker/san-diego-state-fraternities-suspend-activities-over-sex-assault-concerns

U.S. Department of Education. (n.d.a, February 16). *Race and national origin discrimination: Overview of the law*. Retrieved December 6, 2022 from <https://www2.ed.gov/policy/rights/guid/ocr/raceoverview.html>

U.S. Department of Education. (n.d.b). *Questions and answers on the title ix regulations on sexual harassment (july 2021) (updated june 28, 2022)*. Retrieved December 6, 2022 from <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>

Wex. (n.d.). Harassment. In *Wex legal dictionary and encyclopedia*. Cornell Law School. Retrieved December 6, 2022 from <https://www.law.cornell.edu/wex/harassment>

Author Biography:

Colleen E. Lofton is a higher education practitioner with nearly ten years of experience. She is a doctoral candidate in the higher education program at Indiana University Bloomington, where she also earned a graduate certificate in education law. Colleen serves as chapter housing specialist at Kappa Delta Sorority.

ORCID iD: <https://orcid.org/0000-0002-7038-2425>