
Essay

Preventing Sexual Harassment and Misconduct in Higher Education: How Lawyers Should Assist Universities in Fortifying Ethical Infrastructure

Susan Saab Fortney[†]

On May 16, 2018, Michigan State University announced that it had reached a \$500 million agreement to settle claims asserted by survivors of the largest sexual assault case in sports history.¹ More than 300 women sued, asserting that the university had ignored or dismissed complaints that Larry Nassar, the former doctor and Michigan State employee, had abused female gymnasts and other athletes for decades.²

Shortly after the announcement of the settlement, the U.S. Senate Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security convened a hearing entitled, “Preventing Abuse in Olympic and Amateur Athletics: Ensuring a Safe and Secure Environment for Our Athletes.”³ The hearing shed light on how universities commonly handle allegations related to sexual misconduct.⁴ In her hearing testimony, Lou Anna

[†] Professor, Texas A&M University School of Law. Copyright © 2018 Susan Saab Fortney.

1. David Eggert & Ed White, *Michigan State Reaches \$500M Settlement for 332 Victims of Larry Nassar*, CHI. TRIB. May 16, 2018, <http://www.chicagotribune.com/sports/college/ct-spt-michigan-state-larry-nassar-settlement-20180516-story.html>.

2. *For Nassar Sex Abuse Victim, MSU Settlement is a “Victory” but the Fight is far from Over*, CBS NEWS, May 17, 2018, <https://www.cbsnews.com/news/larry-nassar-abuse-victim-reacts-to-500-million-msu-settlement/>.

3. *Preventing Abuse in Olympic Amateur Athletics: Ensuring a Safe and Secure Environment for Our Athletes: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, Ins., and Data Sec. Comm. on Commerce, Sci., and Transp.*, 115th Cong. (2018) (statement of Lou Anna Simon, Former President, Michigan State University), https://www.commerce.senate.gov/public/_cache/files/5291125c-7fdf-40eb-bc2b-c60f3684e475/3564271DD86C3B6A84DB0B56BFA86739.1-simon-testimony-06.01.2018.pdf.

4. *Id.*

K. Simon, the former Michigan State president, apologized to all survivors, stating that she was horrified that Nassar's crimes happened during her tenure.⁵ She explained, "Had I known . . . I would have taken immediate action to prevent him from preying on additional victims, including terminating his employment and reporting him to the police."⁶ Dr. Simon noted that an independent review of the Michigan State's Title IX policies revealed that the university's "policies and procedures [were] among the most comprehensive and robust" the reviewing team of lawyers had seen.⁷

Assuming that this reviewing team's assessment was correct, one might ask how sexual misconduct on a university or college campus could go undetected and unaddressed for years. One answer may be found in a Consensus Study Report issued by the National Academies of Sciences, Engineering and Medicine in 2018. The report, called *Sexual Harassment of Women: Climate, Culture and Consequences in Academic Sciences, Engineering, and Medicine* (the National Academies Report), examines the influence of sexual harassment on the advancement of women in scientific, technical and medical work.⁸ In discussing organizational efforts to address sexual harassment, the report points to the inadequacy of legal mechanisms.⁹ According to the report, judicial interpretation of applicable statutes has "incentivized institutions to create policies and training on sexual harassment that focus on symbolic compliance with current law and avoiding liability, and not on preventing sexual harassment."¹⁰ Despite the fact that organizations have developed their anti-harassment policies and reporting mechanisms required by law, the report cautions that sexual harassment remains pervasive in many work settings.¹¹ Because "the legal system alone is not an adequate mechanism for reducing or eliminating sexual harassment," the report recommends that legal obligations for addressing harassment under federal law be treated "as a floor, not

5. *Id.*

6. *Id.* at 1.

7. *Id.* at 3.

8. NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, MEDICINE, CONSENSUS STUDY REPORT ON SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 1–12 (2018), https://www.ncbi.nlm.nih.gov/books/NBK507206/pdf/Bookshelf_NBK507206.pdf [hereinafter NATIONAL ACADEMIES REPORT].

9. *Id.*

10. *Id.* at 2.

11. *Id.* at 93.

a ceiling . . .”¹² Rather than simply focusing on legal compliance, the report urges institutions and concerned individuals “to move beyond basic legal compliance to promote sustainable, holistic, evidence-based policies and practices to address sexual harassment and promote a culture of civility and respect.”¹³

According to the National Academies Report, “the most potent predictor of sexual harassment is organizational climate—the degree to which those in the organization perceive that sexual harassment is or is not tolerated.”¹⁴ Changing the organizational climate will reduce the likelihood that harassment occurs, because perpetrators will know that there are serious consequences for harassing others. Further, persons harassed should be more comfortable pursuing complaints when they understand that the organization does not tolerate sexual harassment.

In order to change the culture and climate in higher education and to improve policies and procedures, university administrators should use the analytical framework of ethical infrastructure to evaluate the organization’s formal and informal systems, as well as the climate that supports those systems. Using such a framework, universities and colleges can proactively and systematically deal with sexual harassment and misconduct. Rather than focusing on reactive measures designed to meet the minimum legal requirements, the ethical infrastructure framework empowers institutions to assess and improve formal and informal systems, while addressing culture and climate concerns related to sexual harassment and misconduct.

To provide background information on the serious problem of sexual harassment and misconduct in higher education, Part I introduces sexual harassment and misconduct as an ethics issue. Part II discusses how the “ethical infrastructure” framework can be used for evaluating and improving formal and informal policies and procedures, as well as the climate related to sexual harassment and misconduct. Part III proposes that higher education institutions use a self-assessment tool covering all of the aspects of ethical infrastructure to effectively address sexual harassment and misconduct. Part IV discusses the American Law Institute’s role in developing principles of the law related to sexual misconduct in universities and colleges. The conclusion calls for legal scholars and practitioners to partner with other experts to develop a comprehensive self-assessment tool

12. *Id.*

13. NATIONAL ACADEMIES REPORT, *supra* note 8, at 93.

14. *Id.* at Preface x.

for examining and improving the ethical infrastructure related to sexual harassment and misconduct.

I. RECOGNIZING SEXUAL HARASSMENT AND MISCONDUCT AS AN ETHICS ISSUE

As concisely captured by the title of the book, *Sexual Harassment Is an Ethical Issue in Academic Life*, sexual harassment fundamentally involves ethical behavior at the individual and corporate level.¹⁵ At a minimum, an ethical organization must provide a safe and respectful environment so that individuals do not feel exposed to harm, or even threats of harm. Simply stated, “sexual harassment is an ethical issue primarily because it harms others.”¹⁶ Because sexual harassment creates such harmful consequences, legislation has been adopted to make it legally wrong.¹⁷

To address the ethical problem of sexual harassment and misconduct, organizations, including universities, have adopted policies, codes of conduct, and complaint procedures.¹⁸ Such policies and codes attempt to define what is “right” or “wrong” or what is “good” or “bad.”¹⁹ Such determinations are ethical questions because they are “either implicitly or explicitly involved when a decision has to be made by an individual or society about what is the appropriate thing to do.”²⁰

Despite the efforts of universities and colleges, sexual harassment and other types of sexual misconduct pose a very serious problem on university and college campuses. Studies on the prevalence of sexual harassment and misconduct in higher education raise concerns as to whether universities have failed to provide safe and respectful learning and work environments. According to a 2015 Association of American Universities study on twenty-seven campuses, 47.7 percent of the student-respondents reported that they had been the victims of sexual harassment

15. LESLIE P. FRANCIS, *SEXUAL HARASSMENT AS AN ETHICAL ISSUE IN ACADEMIC LIFE* 3–18 (2001).

16. Joann Keyton & Steven C. Rhodes, *Sexual Harassment: A Matter of Individual Ethics, Legal Definitions, or Organizational Policy?*, 16 J. BUS. ETHICS 129, 132 (1997).

17. *Id.*

18. See Margo Kaplan, *Restorative Justice and Campus Misconduct*, 89 TEMP. L. REV. 701, 720 (2017) (noting that university codes of conduct commonly prohibit noncriminal behavior, including noncriminal sexual behavior).

19. Keyton & Rhodes *supra* note 16, at 131–32.

20. *Id.* at 132.

since enrolling at the college.²¹

The policies and procedures of universities and colleges to address the serious problem of sexual harassment and misconduct, while commendable, fall short when they are largely reactive.²² In higher education, it is critical that additional steps be taken to address more proactively legal and ethical concerns related to institutional cultures and climates that fail to prevent and deal with the harmful effects of sexual harassment and misconduct.

The Equal Opportunity Employment Commission Select Task Force on the Study of Harassment in the Workplace Report (EEOC Task Force Report) identified five core organizational practices to help prevent and address workplace sexual harassment.²³ These practices cover: (1) committed and engaged leadership; (2) consistent and demonstrated accountability; (3) strong and comprehensive harassment policies; (4) trusted and accessible complaint procedures; and (5) regular, interactive training tailored to the audience and the organization.²⁴

Although the EEOC Task Force Report identified engaged leadership and accountability, most higher education institutions have focused on the implementation of policies and procedures.²⁵ As suggested by the National Academies Report, such policies and procedures will not be effective in preventing harassment without a climate that supports both formal and informal policies and procedures.²⁶ Rather than relying on formal policies and procedures, institutions should use a more

21. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 29 (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.

22. Katharine Silbaugh, *Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Sexual Assault*, 95 B.U. L. REV. 1049, 1049–52 (2015).

23. See Equal Employment Opportunity Commission, *Promising Practices for Preventing Sexual Harassment*, https://www.eeoc.gov/eeoc/publications/promising-practices.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= (citing Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016)) [hereinafter *EEOC Promising Practices*].

24. *Id.*

25. For an overview of the legal and policy mechanism in the academy, see NATIONAL ACADEMIES REPORT, *supra* note 8, at 93–119.

26. “Judicial interpretation of Title IX and Title VII has incentivized organizations to create policies, procedures, and training on sexual harassment that focus on symbolic compliance with current law and avoiding liability, and not on preventing sexual harassment.” *Id.* at 118.

comprehensive approach to examining formal and informal systems, as well as the climate in which those systems operate. Such an assessment of ethical infrastructure will enable an institution's administrators to discharge their responsibilities as ethical leaders committed to preventing and addressing sexual harassment and misconduct.

II. APPLYING THE FRAMEWORK OF ETHICAL INFRASTRUCTURE TO SEXUAL HARASSMENT AND MISCONDUCT

In the 1990s, legal scholars and experts used the term “ethical infrastructure” to refer to an organization’s policies and procedures designed to promote ethical conduct by individuals.²⁷ Experts in the field of organizations further developed the concept of “ethical infrastructure.” Most notably, Professors Ann E. Tenbrunsel, Kristin Smith-Crowe, and Elizabeth E. Umphress published a seminal work fleshing out a theoretical model of an organization’s ethical infrastructure.²⁸ According to the authors, “ethical infrastructure” consists of, “formal and informal systems—each including communication, surveillance, and sanctioning components—as well as the climates that support these systems.”²⁹ They asserted that formal systems are embedded within informal counterparts in the organization and that the informal systems are embedded in organizational climates.³⁰ Formal and informal systems differ in that “Formal systems are the tangible objects and events pertaining to ethics that are purposefully designed and implemented, whereas informal systems are the unofficial policies, practices, and procedures that are relevant to ethics.”³¹

The first type of formal system is one that communicates expectations and standards for ethical conduct.³² These include of-

27. *E.g.*, Ted Schneyer, *Professional Discipline for Law Firms*, 77 CORNELL L. REV. 1, 10 (1991).

28. Anne E. Tenbrunsel et al., *Building Houses on Rocks: The Role of the Ethical Infrastructure in Organizations*, 16 SOC. JUST. RES. 285 (2003) (defining the organizational elements that contribute to an organization’s ethical effectiveness).

29. *Id.* at 287.

30. *Id.* at 301–03.

31. Kristin Smith-Crowe et al., *The Ethics “Fix”: When Formal Systems Make a Difference*, 131 J. BUS. ETHICS 791, 792 (2014).

32. Tenbrunsel, *supra* note 28, at 289.

official communications such as training programs, written performance standards, and codes of conduct.³³ Although the communications vary, they commonly describe expectations for ethical conduct related to topics such as whistleblowing, workplace safety, and harassment.³⁴

As it relates to preventing sexual harassment and misconduct on campuses, communication plays the most important role in clarifying what standards of conduct are acceptable and aspirational. Such formal communication systems would include codes that expressly condemn sexual harassment and misconduct. In considering the impact of such codes, the effectiveness of the codes will depend on their implementation, as well the extent to which the messaging of ethical conduct is communicated through informal systems, as well as the organizational climate in which the formal and informal systems are embedded.³⁵

Training programs also are part of the formal communication system used to provide specific guidance and tools for dealing with ethical dilemmas.³⁶ In addressing concerns related to sexual harassment and misconduct, it is now common for employers and organizations to mandate completion of training programs.³⁷ Experts assert that effective training and other communication systems help inculcate ethical values and promote ethical conduct.³⁸

Within universities, training related to sexual harassment and misconduct often involves some form of interactive, on-line tutorials to be completed by faculty members, researchers, and graduate assistants. These modules typically require participants to work through educational material and then ask participants to complete a series of questions by selecting the appropriate response from multiple options.³⁹ Although such online

33. *Id.*

34. *Id.*

35. “Informal communication systems are defined as those unofficial message that convey the ethical norms within the organization.” *Id.* at 291.

36. *See id.* at 290 (explaining that “[m]essages about ethics conveyed in mission statements, written performance standards, and training programs help focus employee attention on ethical dilemmas and help provide the tools and the guidance for employees to act in an ethical matter.”)

37. *See EEOC Promising Practices*, *supra* note 23 (identifying regular and interactive training as one of the five core principles that have generally proven effective in preventing and addressing harassment).

38. Tenbrunsel, *supra* note 28, at 288–89.

39. Leslie E. Sekerka, *Organizational Ethics Education and Training: A Review of Best Practices and their Application*, 13 INT’L J. OF TRAINING & DEV.

delivery of content is efficient, relying only on such modules may leave gaps in the ethical infrastructure because, “knowing the rules and applying them in an online session is not the same as learning how to recognize, work through, openly discuss and resolve an ethical dilemma (when there may not be one right solution to an issue).”⁴⁰ Adopting best practices related to ethics education and training would improve the manner in which legal and ethical norms related to sexual harassment and misconduct are communicated throughout university and college settings.

Once ethical norms are communicated, formal systems must be implemented to monitor and support ethical conduct and address unethical conduct.⁴¹ Such monitoring systems should recognize ethical conduct on one hand and discourage and discipline unethical conduct on the other hand.⁴² In universities and colleges, the formal monitoring systems often are set forth in policies and procedures that describe how students and faculty members should report misconduct, including sexual harassment and misconduct.⁴³ Formal monitoring can also be advanced through periodic climate surveys that provide relevant information related to experiences associated with sexual misconduct, harassment and other discriminatory conduct.

Sanctioning, as the final aspect of the ethical infrastructure, involves both formal distribution of rewards for ethical conduct and punishments for wrongdoing.⁴⁴ In university settings, supervisors may recognize ethical and inclusive conduct when completing performance evaluations. Inappropriate and unethical conduct should also be considered in performance evaluations.

77, 90 (2009) (noting that quiz takers are directed to choose an appropriate response by applying corporate rules to correctly address a series of issues).

40. *Id.* at 90–91.

41. In their seminal piece on ethical infrastructure, Professors Ann E. Tenbrunsel, Kristin Smith-Crowe and Elizabeth E. Umphress use the term “formal surveillance systems” to refer to “officially condoned policies, procedures, and routines aimed at monitoring and detecting ethical and unethical behavior.” Tenbrunsel *supra* note 28, at 288.

42. See Linda Klebe Trevino et al., *The Ethical Context in Organizations: Influences on Employee Attitudes and Behaviors*, 8 BUS. ETHICS Q. 447, 452 (1998) (suggesting that ethical conduct should be higher in organizations where “leaders and norms encourage and support ethical conduct, and where ethical conduct is rewarded and unethical conduct is punished”).

43. See Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 72 (2017) (urging universities and colleges to revise their reporting policies).

44. David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y. J. L. & BUS. 317, 348 (2016).

When there is an actual finding of wrongdoing, discipline may be imposed at this stage of the formal sanctioning system. In addition to formal discipline, informal sanctions may include ostracism, negative social interactions, and group pressure.⁴⁵

III. EDUCATION TOWARD COMPLIANCE: ADDRESSING SEXUAL HARASSMENT AND MISCONDUCT THROUGH A SYSTEMATIC EXAMINATION OF ETHICAL INFRASTRUCTURE

The ethical infrastructure framework has been applied to various public and private enterprises, including private business, public administration, and the auditing profession.⁴⁶ Most notably, a number of researchers and regulators have used the ethical infrastructure framework in studying the legal profession and recommending initiatives to prevent unethical conduct and promote ethical conduct.⁴⁷ As discussed below, empirical research related to law firms reveals that the number of complaints involving misconduct can be reduced and ethical infrastructure can be improved through the use of a self-assessment tool to examine ethical infrastructure.

In 2001 legislators in Australia took a pioneering step by codifying an “ethical infrastructure” requirement in a statute allowing lawyers to incorporate their law firms with no restrictions on non-lawyer ownership.⁴⁸ The statute required that incorporated law practices adopt appropriate management systems (AMS) to promote the provision of legal services in accordance with lawyers’ professional obligations.⁴⁹ Because the statute did not provide guidance on the meaning of AMS, the Commissioner of Legal Services in New South Wales, Australia and interested

45. *Id.*

46. *E.g.* Roger D. Martin, *Through the Ethics Looking Glass: Another View of the Work of Auditors and Ethics*, 70 J. BUS. ETHICS 5 (2007).

47. *E.g.*, Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691 (2002) (proposing a research agenda for the study of ethical infrastructure in large law firms).

48. Susan Saab Fortney, *The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms*, 4 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 112, 117 (2014) [hereinafter *Ethics Audits*].

49. Susan Saab Fortney & Tahlia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L. J. 152, 153 (2012) [hereinafter *Law Firm Management Systems*].

stakeholders developed ten objectives for ethical law practice.⁵⁰ In addition, the Commissioner collaborated with others in developing a self-evaluation document that firms would complete to evaluate and report on their compliance with each of the ten objectives.⁵¹ The process was called “education toward compliance” because the expectation was that lawyers would learn from the self-assessment process and improve their ethical infrastructure.⁵²

In studying the Australian program, researchers and regulators learned that the self-assessment process prepares firm leaders to first examine and then improve the ethical infrastructure.⁵³ In one empirical study, the rate of complaints against law firms went down by two-thirds after the firms completed an initial self-assessment of ethical practices.⁵⁴ A related finding was that the rate of complaints for the firms that completed the self-assessment was one-third the number of complaints registered against firms that did not complete the self-assessment process.⁵⁵

In 2012, a mixed-method study on the Australian scheme examined the impact of the new regulatory regime and the reasons for the reduction in the number of complaints against lawyers who completed the self-assessment process.⁵⁶ The study results revealed that the self-assessment process successfully provided firm leaders the incentives, tools, and authority to take steps to improve the ethical delivery of legal services.⁵⁷ The results from these empirical studies point to the value of institutions using a self-assessment process to evaluate and improve their compliance with legal requirements and other aspects of ethical infrastructure.

50. *Id.*

51. *Id.*

52. Susan Saab Fortney, *Promoting Public Protection Through an “Attorney Integrity” System: Lessons from the Australian Experience with Proactive Regulation of Lawyers*, 23 PROF. LAW. 16, 18 (2015) [hereinafter *Attorney Integrity System*].

53. *E.g.*, Christine Parker et al., *Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J. L. & SOC’Y 466 (2010) (providing a preliminary empirical evaluation of the impact of management-based regulation).

54. *Id.* at 485.

55. *Id.* at 493.

56. Susan Saab Fortney, *Preventing Legal Malpractice and Disciplinary Complaints: Ethics Audits as a Risk-Management Tool*, BUS. L. TODAY 1 (2015) [hereinafter *Ethics Audits for Risk Management*].

57. *Id.*

Using a similar approach to that used in Australia, universities should devote the necessary time and resources to critically examine and assess all aspects of ethical infrastructure related to sexual harassment and misconduct. Self-assessment has been recognized “as a comprehensive, systematic, and regular review of an organization’s activities, and results are referenced against a specific model.”⁵⁸ Rather than relying on outside consultants, self-assessments internalize the evaluation process by enabling managers and supervisors “to answer essential questions such as ‘How are we doing?’ ‘What are our strengths?’ and ‘What areas require improvement?’”⁵⁹ In short, self-assessments can serve as an information system for identifying and improving organizational processes.⁶⁰

Numerous studies have been conducted on the use and validity of self-assessment tools in different types of organizations.⁶¹ The work on the effectiveness of self-assessments has contributed to their widespread use in private and public sectors.⁶² Increasingly, self-assessment processes are being used in higher education settings.⁶³

The extensive research and literature on self-assessments generally and self-evaluations in higher education will provide support for institutions devoting time and resources to conducting self-assessments related handling of sexual harassment and misconduct concerns. A comprehensive self-assessment will facilitate universities evaluating how their current ethical infrastructure measures up to best practices related to preventing and dealing with sexual harassment and assaults.

IV. THE ROLE OF THE AMERICAN LAW INSTITUTE IN

58. A.M. Ahmed et al., *Self-Assessment Methodology: The Route to Business Excellence*, 10 QUALITY MGMT. J. 43, 43–44 (2003) (examining different tools used in self-assessment, including matrix charts and questionnaires).

59. Matthew W. Ford & James R. Evans, *Models for Organizational Self-Assessment*, BUS. HORIZONS 25 (2002).

60. *Id.* at 25–26.

61. *E.g.*, Isabelle Bourgeois, *Application of an Organizational Evaluation Capacity Self-Assessment Instrument to Different Organizations: Similarities and Lessons Learned*, 50 EVALUATION & PROGRAM PLAN. 47 (2015) (providing a multiple case study across three different organizations: non-profit, provincial government, and federal government).

62. Juan Jose Tari, *Self-Assessment Processes: The Importance of Follow-Up for Success*, 18(1) QUALITY ASSURANCE IN EDUCATION 19 (2010).

63. Juan Jose Tari, *Self-Assessment Exercises: A Comparison Between a Private Sector Organisation and Higher Education Institutions*, 114 INT’L J. OF PRODUCTION ECONOMICS, 105, 109 (2008).

PROVIDING GUIDANCE TO COLLEGES AND
UNIVERSITIES WITH RESPECT TO SEXUAL
HARASSMENT AND MISCONDUCT

In addition to resources that discuss best practices, an ongoing American Law Institute (ALI) project called “Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities,” (the ALI Sexual Misconduct Project) will provide guidance to enable higher education institutions to examine their procedures for responding to, investigating, and resolving allegations of sexual misconduct by students.⁶⁴ The Introductory Note to the draft of the Principles presented at the May 14, 2018 Annual Meeting of the ALI describes the rationale for the project’s focus on procedural issues related to sexual misconduct by students.⁶⁵ The draft explains that addressing sexual misconduct by faculty and other employees would complicate the recommendations and the analysis would extend the time to complete the project.⁶⁶ Although those involved in college and university governance and administration may have expressed a sense of urgency with respect to obtaining guidance related to sexual misconduct by students, the issues of sexual misconduct by faculty and staff also are a matter of grave concern to all involved.⁶⁷ Understanding this, the ALI should tackle the issue of sexual misconduct by faculty and staff after completing the Principles of Law related to Student Sexual Misconduct.

CONCLUSION

In the Press Release announcing the ALI Sexual Misconduct Project, Professor Vicki Jackson, the Reporter for project, referred to the special challenges that institutions of higher education face in dealing with sexual harassment and misconduct.⁶⁸ As stated: “These challenges include maintaining an academic community with equal educational opportunities for all students while implementing procedures that are both effective and fair for those who have suffered from such misconduct and for

64. Vicki C. Jackson et al, *Student Sexual Misconduct: Introductory Note*, THE ALI ADVISOR (May 14, 2018), <http://www.thealiadviser.org/campus-sexual-misconduct/student-sexual-misconduct-introductory-note/>.

65. *Id.*

66. *Id.*

67. *Id.*

68. Jackson et. al, *supra* note 64.

those accused of such misconduct.”⁶⁹ The ALI should be commended for its initiative in launching the ALI Sexual Misconduct Project to provide guidance to universities and colleges. The principles of law that the ALI is articulating with respect to student sexual misconduct and other principles that may later address sexual harassment and misconduct by faculty and staff will provide an excellent starting point for an institution conducting a self-assessment of procedures related to sexual misconduct on campuses.

As suggested by the National Academies Report discussed in the Introduction, focusing only on policies and procedures should only be the floor, not the ceiling for higher education institutions to effectively address sexual harassment and misconduct.⁷⁰ Compliance with legal requirements alone is inadequate because policies and procedures are just one aspect of ethical infrastructure. As discussed above, formal and informal policies are embedded in the climate of the organization.⁷¹ Without serious examination of both formal and informal systems, as well as the climate in the organization, sexual harassment and misconduct will continue to plague members of university communities.

To empower colleges and universities to evaluate and improve their ethical infrastructure, members of the ALI consultative group, as well as other legal scholars and practitioners, should collaborate with other experts in developing guidelines and practices that can be examined in a comprehensive self-assessment tool. Such a tool would empower institutions to more effectively prevent sexual harassment and misconduct, because the instrument would cover both the requirements of the law and formal systems, as well as the informal systems and climate in which the formal and informal systems are embedded. All who understand the costs and trauma to victims of sexual harassment and other sexual misconduct, as well as the costs and damage to the institution and those associated with it, should embrace such an approach to proactively prevent problems, rather than reactively dealing with them after the misconduct has occurred.

Through such a systematic examination, university leaders and administrators communicate that there is an ethical imperative to move beyond legal compliance and to foster a climate

69. *Id.*

70. See NATIONAL ACADEMIES REPORT, *supra* note 8, at 93.

71. Tenbrunsel, *supra* note 28, at 293–94.

and culture that does not tolerate sexual harassment and misconduct. By doing so, they recognize that an ethical organization can only be built on the foundation of safety and respect for all those who come through its doors.