

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

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## *Abstract*

*Legislatures and regulators struggle to create effective legal mechanisms to address the misreporting and underreporting of sexual misconduct on college campuses. The problems are clear: how does the law balance the desire to fully support victims of sexual misconduct by providing access to supportive measures and complaint resolution options, while also honoring the desire of some victims not to have private information shared with others? While some employees have failed to report known instances of sexual misconduct based on inappropriate grounds, others do so based on a desire to respect the victim's wishes. How should these problems, which may stem from organizational cultures, be solved through legislation or regulation? Federal laws--Title IX and the Clery Act--impose reporting duties on only some employees, based on their particular role, but beginning in 2019, the Texas Legislature went a step further and mandated university-wide sexual misconduct reporting for all employees. The penalties for failure to report are severe: termination and prosecution. While well-intentioned, this new Texas law nevertheless creates many problems that undermine its effectiveness. We address Texas Senate Bill 212 in its larger national context, offer several general critiques, highlight the special problems associated with the application of the law at faith-based universities, and make suggestions for university administrators and future legislative action in an attempt to refine the scope of the law to better address the underreporting problem.*

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

## INTRODUCTION

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

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<sup>2</sup> TEX. EDUC. CODE § 51.251 2020.

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

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

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

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

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<sup>3</sup> Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1604 (1985–86).

## I. SENATE BILL 212, IN CONTEXT

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

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

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

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

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

<sup>5</sup> David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct* (Sept. 15, 2015), AM. ASS’N OF U. vii-viii, [https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf).

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

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

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

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

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

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

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

<sup>9</sup> Missouri Senate, Senate Bill 259, [https://www.senate.mo.gov/19info/BTS\\_Web/Bill.aspx?SessionType=R&BillID=1536359](https://www.senate.mo.gov/19info/BTS_Web/Bill.aspx?SessionType=R&BillID=1536359).

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

its own investigation, no state has gone further than Texas in the other direction in mandating university-wide reporting.<sup>11</sup>

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

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

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

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

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

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

<sup>12</sup> Tex. Educ. Code § 51.252(a) 2020.

<sup>13</sup> Tex. Educ. Code § 51.255(b) 2020.

<sup>14</sup> *Id.* § 51.255(c).

<sup>15</sup> 19 Tex. Admin. Code § 3.5(a-b) 2020.

<sup>16</sup> *Id.* § 3.5(c).

public awareness event sponsored by the institution of an affiliated student organization.<sup>17</sup>

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

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

##### *1. Title IX and Its New Regulations*

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

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

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<sup>17</sup> *Id.* § 3.5(d).

<sup>18</sup> For an overview of some of the commentary related to Senate Bill 212, see Kreighbaum, *supra* note 10.

<sup>19</sup> 20 U.S.C. §§1681 - 1688 (1986).34 C.F.R. pt. 106(2020); 34 C.F.R. § 668.46 (2014).

<sup>20</sup> 20 U.S.C. § 1681(a).

<sup>21</sup> *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999).

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

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

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

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

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

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<sup>22</sup> 34 C.F.R. § 106.44(a) (2020).

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

<sup>24</sup> *Id.* at 13. Whether a student reasonably believed an individual has the requisite authority or responsibility depended on a variety of factors including the student’s age and education, position held by the individual, and the school’s formal and informal practices and procedures. *Id.* at 33ú34, n.74.

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

<sup>26</sup> *Id.*

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

recipient cannot commit its own misconduct unless the recipient first knows of the sexual harassment that needs to be addressed.<sup>28</sup>

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

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

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

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<sup>28</sup> 34 C.F.R. § 106 (Supplementary Material at 47) 2020.

<sup>29</sup> 34 C.F.R. § 106.30(a) and 106.44(a) (emphasis added) 2020.

<sup>30</sup> 34 C.F.R. § 106.30(a).

<sup>31</sup> TEX. EDUC. CODE § 51.251(5) 2020 (emphasis added).

<sup>32</sup> 34 C.F.R. § 106.30(a) (emphasis added).

<sup>33</sup> 34 C.F.R. § 106 (Supplementary Material at 52-53).

<sup>34</sup> *Id.* at 54.

<sup>35</sup> *Id.* at 54.

<sup>36</sup> *Id.* at 55.

Department contends that “institutional betrayal may occur when an institution’s mandatory reporting policies require a complainant’s intended private conversation about sexual assault to result in a report to the Title IX Coordinator.”<sup>37</sup>

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

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

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

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

<sup>38</sup> 20 U.S.C. § 1092(f) 2009.

<sup>39</sup> 34 C.F.R. § 668.46 2014. This requirement also applies to campus security and law enforcement personnel.

<sup>40</sup> 34 C.F.R. § 668.46(a)(iv).

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

excludes “a faculty member who does not have any responsibility for student and campus activity beyond the classroom.”<sup>42</sup>

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

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

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

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

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<sup>42</sup> *Id.* at 4-4.

<sup>43</sup> *Id.* at 4-5.

<sup>44</sup> *Id.* at 4-8. See also 34 C.F.R. § 668.46(c)(2)(i) (“Clery Act reporting does not require initiating an investigation or disclosing personally identifying information about the victim”).

<sup>45</sup> *Id.*

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

<sup>47</sup> Clery Handbook, *supra* note 40, at 4-8.

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

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

### A. *Employment Status May Not Match University Reality*

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

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

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

<sup>49</sup> See generally TEX. LABOR CODE § 201, Subchapters D and E (2018) (defining employment and listing numerous exceptions thereto).

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

<sup>51</sup> CAL. LABOR CODE § 2750.3 (2020)

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

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

### Hypothetical Example #1

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

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

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<sup>53</sup> *Id.*

## B. *The Reasonable Belief Requirement Expects Too Much from Employees*

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

“Sexual harassment” means unwelcome, sex-based verbal or physical conduct that: (A) in the employment context, unreasonably interferes with a person’s work performance or creates an intimidating, hostile, or offensive work environment; or (b) in the education context, is sufficiently severe, persistent, or pervasive that the conduct interferes with a student’s ability to participate in or benefit from educational programs or activities at a postsecondary educational institution.<sup>56</sup>

This legislative text belies a larger problem, however, given that the statute’s language appears to derive from verbiage in hundreds of sexual harassment cases under Title VII of the Civil Rights Act of 1964 over the past several decades, which are a manifestation of the fact-dependent nature of these sorts of inquiries.

An in-depth analysis of trends in sexual harassment law under Title VII is beyond the scope of this article, but a superficial summary of the employment law subfield highlights the challenges faced by university employees who are contemplating whether to report what they heard to their school’s Title IX office. To begin, in 1993 the Supreme Court announced its definition of sexual harassment in the foundational case of *Harris v. Forklift Systems*. In that case, the Court held that “discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their . . . gender.”<sup>57</sup> About a decade later, the Court again stated that plaintiffs in sexual harassment cases “must show harassing behavior sufficiently severe or pervasive to alter the conditions of [their] employment.”<sup>58</sup> Countless cases from around the country have repeated this language, yet courts still lament that “drawing the line between what is and is not objectively hostile is not always easy.”<sup>59</sup> This is because two of the factors necessary to establish a sexual harassment case in the employment context are that (1) the plaintiff/victim subjectively believed the misconduct created an abusive work environment; and (2) a reasonable person would objectively agree with the plaintiff’s subjective belief. Given the objective, reasonable person standard implied in this parallel law, a determination of

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<sup>54</sup> TEX. EDUC. CODE § 51.252(a) (2020)

<sup>55</sup> 20 U.S.C. § 1092(f) (2009).

<sup>56</sup> Tex. Educ. Code § 51.251(5) (2020)

<sup>57</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

<sup>58</sup> *Pennsylvania State Police v. Suder*, 542 U.S. 129, 133 (2004) (internal quotations omitted).

<sup>59</sup> *Turner v. The Saloon, Ltd.*, 595 F.3d 679, 685 (7th Cir. 2010) (internal quotations omitted).

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

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

### Hypothetical Example #2

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

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

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<sup>60</sup> Shira Scheindlen & John Elofson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL'Y REV. 813, 815 (1998).

<sup>61</sup> Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998).

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

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

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

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

#### **Hypothetical Example #3**

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

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

### *D. Lack of Due Process Protections for Employees*

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

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<sup>63</sup> For public employee due process rights, see generally *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sinderman*, 408 U.S. 593 (1972).

<sup>64</sup> 19 Tex. Admin. Code §§ 3.10 and 3.16 (2020).

<sup>65</sup> 19 Tex. Admin. Code § 3.8 (2020)

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

#### *E. Changes to Organizational Culture in Higher Education Institutions*

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

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

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

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

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

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

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

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

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

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

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

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

<sup>69</sup> *Id.* at 8.

<sup>70</sup> TEX. EDUC. CODE § 51.9366(b) (2020)

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

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

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

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

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

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

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

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

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

<sup>78</sup> *Id.*

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

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

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

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

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

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

<sup>81</sup> Goodman & Silbey, *supra* note 74, at 21.

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

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

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

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

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

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

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

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

#### Hypothetical Example #4

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

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

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

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

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

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

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

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

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

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

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<sup>86</sup> TEX. R. EVID. 505(a)(2).

<sup>87</sup> Jacob Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95, 101-08 (1983).

<sup>88</sup> *Id.* at 104-06.

<sup>89</sup> *Id.*

<sup>90</sup> TEX. R. EVID. 505(c).

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

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

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

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<sup>91</sup> Christine Bartholomew, *Exorcising the Clergy Privilege*, 103 Va. L. Rev. 1015 (2017).

<sup>92</sup> *Id.* at 1018 (internal citations omitted).

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

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

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

<sup>96</sup> *Leach v. State*, 2008 Tex. App. Lexis 6684, \*5 (Tex. App. – Houston [1st Dist.] Sept. 4, 2008).

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

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

### *C. The Course and Scope Requirement Is Not Clear*

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

### **Hypothetical Example #5**

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<sup>97</sup> Bartholomew, *supra* note 90, at 1048.

<sup>98</sup> *Id.* at 1051.

<sup>99</sup> TEX. EDUC. CODE § 51.252(a) (2020).

<sup>100</sup> 19 TEX. ADMIN. CODE § 3.3(b).

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

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

#### IV. CONCLUSION AND SUGGESTIONS

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

- 1. Administrators Should Create Due Process Protections**—Employees at all universities—public and private—who are threatened with termination for failure to report should be afforded basic due process rights, including provisions for an evidentiary hearing and an organizational jury of their peers. Therefore, universities should modify existing university policies or create a new policy related to termination decisions for failing to report, especially for faculty and other contract employees (i.e., athletic coaches). Without such changes, the university may be forced to decide between violating its existing policies related to termination or being subject to legal violation and related fines from the state.
- 2. Administrators Could Expand Confidential Employees**—Both the new Title IX regulations and existing Texas law allows universities to identify an unlimited number of confidential employees. While most universities typically only designate specific roles like medical care providers or full-time

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

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

3. **University Leaders Should Reinforce Organizational Values that Support Reporting**—As noted earlier in this article, some of the problems the Texas Legislature sought to combat arise from the insular, private cultures at faith-based institutions that emphasize loyalty and commitment to metaphysical missions. While these may be valid attributes, surely the same universities could also emphasize values like organizational transparency and supporting victims of sexual misconduct, whether through informal resolution or formal grievance processes. If universities can help solve the problem—by focusing on accountability, listening, justice, and healing—then the legislation becomes less necessary.
4. **Legislators Should Revise Reporting Standards Similar to the Clery Act or the new Title IX**—While Texas is often willing to buck national trends, it should consider other legislative reporting regimes, which are informed not by a one-size-fits-all approach, but by content experts and the universities impacted by the law. For example, Texas could adopt the long-standing Clery Act approach, which only requires CSAs, not all employees, to pass along nonidentifiable information that they receive as a direct report from a student (as opposed to indirect information and rumors) or it could adopt an even lesser burden established by the new Title IX regulations, which require only Title IX administrators or those with power to enforce corrective measures to report. Such a change would allow the majority of teaching faculty to serve in a role of supporter and not reporter, while giving the universities discretion in terms of who it designates mandatory reporters.
5. **Legislators Should Adopt the Clery Act Approach to Institutional Fines and University Control of Employee Discipline**—A significant defect in the statute is the severe penalty for failures to report, given the highly contextual and fact-dependent nature of sexual misconduct in many instances. Requiring ordinary university employees to discern if what they learned or overheard fits the statute’s definitions for various types of misconduct poses challenges in many instances, as noted in the hypothetical scenarios described above. In each of these instances, however, the failure to report leads to required termination and prosecution of the employee, and a significant fine for the university (up to \$2 million). A better approach would be to maintain the university-level fine, and then allow the university to punish the employee through a for-cause termination (which would supersede an employment contract or tenured status) but not mandate termination.
6. **Legislators Should Consult Title IX Coordinators, Faculty and Students Impacted by these Requirements**—In the 2021 Texas Legislative Session, legislators should consider amending these mandatory reporting requirements after discussing their impact and challenges with key stakeholders. By talking to these groups, they will not only understand the challenges presented by these new mandatory reporting requirements but

better appreciate what type of requirements and approaches would be most effective in eliminating sexual misconduct.<sup>102</sup>

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

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

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