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Beta Theta Pi prosecutions and Tim's Law: dilemmas in balancing individual liberty with public safety.

By Katherine Watt

This series continues *Bailiwick News* coverage of the Centre County repercussions from the February 2017 death of Penn State student Timothy Piazza, starting with a review of the initiation of criminal prosecutions in May 2017.

May 2017

On May 5, 2017, then-District Attorney Stacy Parks Miller announced the findings of the Centre County Investigating Grand Jury, and filed more than 1,200 criminal charges against 18 Penn State students and the Alpha Upsilon chapter of the national Beta Theta Pi corporation.

The charges stemmed from the February 4 death of Penn State student Timothy Piazza allegedly caused by severe alcohol poisoning and falls that took place at the Beta Theta Pi fraternity house on the night of Feb. 2-3.

Charges included aggravated assault; involuntary manslaughter; simple assault; reckless endangerment of another person (REAP); hazing; furnishing alcohol to minors; consumption of alcohol by a minor; disorderly conduct; and tampering with evidence.

During her May 5 press conference, Parks Miller gave a general overview of the night that led to Piazza's death, stating that it was "bid acceptance night," during which 14 pledges – 12 of whom were under age 21 at the time – ran through a series of "forced drinking" stations, requiring the pledges to rapidly drink beer, wine and vodka, after which they participated in a joint social event attended by about 150 people, including Beta Theta Pi members and members of a sorority called Trilogy.

Parks Miller said the investigation – based primarily on interviews with witnesses, extensive review of surveillance video footage, and text messages extracted from Penn State student phones – had uncovered evidence that the fraternity had run the obstacle course at least three semesters (Spring 2016, Fall 2016, and Spring 2017), despite presenting itself to the Penn State Interfraternity Council and the housing corporation that owned the house at 220 North Burrowes St. as "dry."

The grand jury presentment cited forensic pathologist Harry Kamerow's testimony regarding Piazza's blood alcohol content (BAC), estimating it was between 0.28 and 0.36 at about 11:00 p.m. on February 2, just before Piazza fell down a steep flight of steps into the basement of the fraternity at about 11:22 p.m.

According to the presentment, fraternity members carried Piazza back upstairs, and video evidence showed them taking a variety of more or less incompetent steps to care for him in his intoxicated state, until about 3 a.m. when he was left alone, sleeping on a couch.

Around 10 a.m. the next morning, fraternity members found Piazza unconscious in the basement, carried him upstairs again, and called an ambulance just before 11 a.m. By the time Piazza reached Mount Nittany Medical Center, he had sustained severe brain and spleen injuries, from which he later died at Hershey Medical Center.

Parks Miller said the grand jury further instructed her office to prepare a report with recommendations to the Pennsylvania legislature and Penn State administrators on possible ways to change the fraternity, alcohol-abuse and underage drinking culture in State College that fostered the terrible sequence of events that led to Piazza's death.

Bailiwick News covered the initiation of the prosecution in the May 8, 2017 edition, presenting the information above; describing the history of secret investigating grand juries from William the Conqueror's reign through Pennsylvania's grand jury laws and procedures; and recapping Parks Miller's personal experience as the target of an investigating grand jury, after her alleged forgery and other crimes were referred to a statewide IGJ in 2015.

On May 13, 2017, *Bailiwick News* published critical analysis, reviewing bystander syndrome and duty to rescue laws; the strange role of in-house "residential advisor" Tim Bream; and the inherent public risks of secret grand jury procedures.

The analysis noted Parks Miller's disparate legal treatment of the fraternity members – charged with hundreds of violations – as contrasted with the lack of charges filed against other individuals who facilitated or turned a blind eye to binge drinking culture within the Greek community at Penn State, including Bream, leaders of the Interfraternity Council, Vice President for Student Affairs Damon Sims, and President Eric Barron.

The May 13 analysis concluded with a comparison of Parks Miller's double standards for secrecy and destruction of texting evidence depending on the target of the investigation. During the multiple investigations of her own alleged forgery and *ex parte* communications, prosecutorial and grand jury secrecy were depicted as necessary to preserve the reputational rights of targets, and destruction of texts and cell phones – despite orders to preserve – was framed as inadvertent and in any case irrelevant.

But as Parks Miller initiated prosecution of the fraternity members, secret club rituals were framed as sinister, and destruction of texts and video surveillance was framed as criminal tampering with evidence.

Summer 2017 - Preliminary Hearings, Round 1

By June 12, as the first round of preliminary hearings began, two of the originally-charged individual defendants had been dropped from the case: Ed Gilmartin and Ryan Foster, leaving 16.

Of those 16 defendants, eight were charged with the three most serious crimes of Aggravated Assault, Involuntary Manslaughter, and Simple Assault, plus mid-grade offenses of reckless endangerment of another person and hazing, and lesser offenses of tampering with evidence, furnishing alcohol to minors and unlawful acts relative to liquor and consumption of alcohol by a minor.

Those eight men included Brendan Young, Daniel Casey, Johah Neuman, Nicholas Kubera, Michael Bonatucci, Gary DiBileo, Luke Visser and Joseph Sala.

The other eight defendants were charged with medium and lesser offenses only, including Michael Schiavone, Craig Heimer, Lars Kenyon, Parker Yochim, Ryan McCann, Lucas Rockwell, Braxton Becker and Joseph Ems.

During preliminary hearings, the judge's task is to assess evidence as presented by prosecutors against the elements required under Pennsylvania law for each crime, to decide whether sufficient probable cause exists to charge each individual defendant with each count.

The judge's role is to then dismiss any counts for which the evidence is insufficient and "bind over" for trial all counts for which the evidence could reasonably convince a jury to convict.

From a public policy perspective, preliminary hearings are designed to conserve court resources, prosecutorial resources and defense resources, so that the whole criminal justice system isn't brought to bear on charges that lack foundation.

Criminal laws charged

Under Pennsylvania law 18 Pa.C.S. §2702(a)(1), "a person is guilty of aggravated assault if he...attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." In most cases, aggravated assault is a first-degree felony, punishable by up to 20 years imprisonment and up to \$25,000 fines.

Under 18 Pa.C.S. §2504, a person is guilty of involuntary manslaughter when "as a direct result of the doing of an unlawful or lawful act in a reckless or grossly negligent manner, he causes the death of another person." In most cases, involuntary manslaughter is a misdemeanor of the first degree, punishable by up to five years imprisonment and up to \$10,000 fines.

Under 18 Pa.C.S. §2701(a)(1), "a person is guilty of [simple] assault if he...attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another." In most cases, it's a second-degree misdemeanor, punishable by up to two years of imprisonment and up to \$5,000 fines.

Under 18 Pa.C.S. §2705, a person is guilty of recklessly endangering another person if he or she recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." It's a second-degree misdemeanor, punishable by up to two years of imprisonment and up to \$5,000 fines.

Under Pennsylvania law, 23 P.S. 5353 – which is an education law, not a part of the crimes code – a person is guilty of hazing if he or she "causes or participates in hazing," defined as:

"Any action or situation which recklessly or intentionally endangers the mental or physical health or safety of a student or which willfully destroys or removes public or private property for the purpose of initiation or admission into or affiliation with, or as a condition for continued membership in, any organization operating under the sanction of or recognized as an organization by an institution of higher education. The term shall include, but not be limited to, any brutality of a physical nature, such as whipping, beating, branding, forced calisthenics, exposure to the elements, forced consumption of any food, liquor, drug or other substance, or any other forced physical activity which could adversely affect the physical health and safety of the individual, and shall include any activity which would subject the individual to extreme mental stress, such as sleep deprivation, forced exclusion from social contact, forced conduct which could result in extreme embarrassment, or any other forced activity which could adversely affect the mental health or dignity of the individual, or any willful destruction or removal of public or private property. For purposes of this definition, any activity as described in this definition upon which the initiation or admission into or affiliation with or continued membership in an organization is directly or indirectly conditioned shall be presumed to be "forced" activity, the willingness of an individual to participate in such activity notwithstanding." (Emphasis added).

The anti-hazing law appears to delegate most enforcement to higher education institutions, by mandating "written anti-hazing policies" and endorsing penalties for individuals including fines, withholding of diplomas or transcripts, probation, suspension or dismissal.

To the extent hazing falls under criminal court jurisdiction, it's a third-degree misdemeanor, punishable by up to one year of imprisonment and up to \$1,000 fines.

Furnishing of alcohol to minors (18 Pa.C.S. 6301.1) and Consumption of Alcohol by a Minor (18 Pa.C.S. 6308) are self-explanatory. The former is a third-degree misdemeanor, punishable by fines between \$1,000 and \$2,500 and imprisonment up to 1 year. The latter is a summary offense, punishable by fines between \$500 and \$1,000 and up to 90 days imprisonment.

Prosecution's theory

Parks Miller's theory of the case was that furnishing alcohol to Piazza, who was 19 years old and therefore under the legal drinking age of 21, even if Piazza appeared to consume the alcohol voluntarily, met the statutory definition of hazing as inherently forced to the extent that organizational membership is conditioned on participation.

She argued although the fraternity men didn't intend for Piazza to get severely injured and die, they did intend for Piazza and all the other pledges to get extremely drunk very fast, and they carried out that intention by organizing and operating the obstacle course followed by the social.

She argued that Piazza's intoxication was the key factor in his lack of physical coordination; that the intoxication caused him to fall down the stairs; and that falling down the stairs critically injured him, such that the defendants' intent to intoxicate Piazza and other pledges was tantamount to the intent to severely injure or kill him.

Parks Miller further argued that, even though Pennsylvania criminal codes do not require bystanders to provide help during emergencies – there is no statutory “duty to rescue” – the fraternity incident met the standards for civil liability through case law requiring those who create a dangerous condition to render aid to a victim of their actions who becomes unable to help himself.

She argued the fraternity defendants breached that duty by failing to call 911 immediately after the 11:22 p.m. fall.

During the Summer 2017 preliminary hearing – which spanned seven days and was heard by Magistrate Judge Allan Sinclair – Parks Miller elicited direct testimony from State College Police Detective David Scicchitano and made legal arguments to support her theory of the case.

The attorneys for the defendants elicited cross-examination testimony and made legal arguments to rebut Parks Miller's theory of the case.

Close reads of the summer 2017 preliminary hearing transcripts – including direct testimony, cross-examination, burden of proof, and legal arguments before Judge Sinclair – will be covered in future installments of this series.

On Sept. 1, Judge Sinclair dismissed more than 500 of the original charges against the 16 individual defendants and the fraternity corporation, including felony aggravated assault and misdemeanor involuntary manslaughter charges.

Although Sinclair didn't explain his rulings on the record, given the purpose of preliminary hearings, he apparently concluded the Commonwealth had not met its burden of proof to establish probable cause that each defendant committed all of the acts required to meet the legal standards for each alleged crime.

Parks Miller immediately took to the steps of the courthouse to announce her disagreement with Judge Sinclair's decisions, and her intent to refile the charges.

In the following months, her office refiled some of the original charges, filed new charges against the original defendants and newly-added defendants, and filed a

motion for Centre County Court of Common Pleas Judge Pamela Ruest to order a new judge to hear the next round of preliminary hearings.

In November, DA-elect Bernie Cantorna recused himself and turned the Beta Theta Pi case over to the Pa. Office of Attorney General Josh Shapiro for prosecution.

In December, Parks Miller published the recommendations of the Investigating Grand Jury regarding reform of the Greek system at Penn State, and left office.

As Cantorna took office in January 2018, the OAG took up the case, and Judge Ruest denied Parks Miller's motion for a new magistrate judge.

To date (July 9, 2018) there have been two additional rounds of preliminary hearings (Round 2 in March before Judge Sinclair, and Round 3 in May before Magistrate Judge Steven Lachman) on charges filed against additional defendants, and on charges refiled against the original defendants.

Round 2 and Round 3 again resulted in the most serious charges being dismissed, and lesser charges being bound over for trial.

A fourth preliminary hearing is now scheduled on charges refiled again, later this month.

CRITICAL ANALYSIS

This Summer 2018 *Bailiwick News* reporting and critical analysis series is sourced from court transcripts, legal filings, press releases, news reports and legal research, and primarily explores two issues.

The first issue is the double standard implicit in the prosecutions of Beta Theta Pi members – college-age men – for their participation in events that contributed to the death of another college-age man: Piazza, who was 19 at the time of his death.

Prosecutors have presented Piazza to the courts and the public as a minor legally incompetent to give informed consent for his otherwise-voluntary participation in the dangerous alcohol-steeped bid-acceptance night activities at the Beta Theta Pi fraternity house on February 2, 2017, frequently citing a provision in the current Pennsylvania anti-hazing law (adopted in 1986 and amended in 2016) that hazing activities as described in the statute “shall be presumed to be ‘forced’ activity, the willingness of an individual to participate in such activity notwithstanding,” to the extent that fraternity membership is conditioned on participation.

Prosecutors have largely ignored the role played by Penn State staff and administrators.

The fraternity defendants – in contrast – have been presented to the courts and the public, by prosecutors, as competent adults who freely and knowingly participated in endangering Piazza by providing him with access to large volumes of alcohol. They are being prosecuted in adult criminal courts.

The second issue is the constitutionality of laws prohibiting hazing in the name of personal security, specifically Pennsylvania laws and proposed revisions

thereto, as those laws relate to American citizens' rights to freedom of assembly, freedom of association as a form of free expression, and the individual free will that's foundational to all of our guaranteed civil liberties.

Prior to the civil rights and student movements of the 1950s and 1960s, university administrators enjoyed broad discretionary latitude to discipline students engaging in conduct prohibited by student conduct codes governing physical and moral behavior, up to and including immediate expulsion without explanation or opportunities to appeal.

The basic, shared understanding of students, parents and administrators was that the university could and would act "*in loco parentis*," in the place of parents, and would hold students to behavioral standards as parents held their children accountable at home.

However, the civil rights and student movements of the era upended that tradition. Students disciplined for engaging in political speech argued that their constitutional rights – including their rights to free speech and due process – did not disappear when they crossed onto university grounds, particularly public universities created by state legislatures to promote state interests.

Dixon v. Alabama State Board of Education, decided by a divided three-judge panel in the Fifth Circuit Court of Appeals in 1961, was a key case that recognized the due process rights of college students: that they could not be summarily expelled for exercising fundamental constitutional rights.

In that case, six African-American students were expelled from Alabama State College after participating in lunch counter desegregation actions at the Montgomery County Courthouse.

Two of the three Fifth Circuit panel judges found that the students had a "private interest...in the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing," and noted "it requires no argument to demonstrate that education is vital and, indeed, basic to civilized society."

After a review of the differences between the rights of students enrolled in private universities and public universities, the panel concluded that students at public universities are entitled to due process before being deprived of their private interest in their education for alleged misconduct, including at least "the rudiments of an adversary proceeding."

Public universities no longer had the right to unilaterally discipline students, and the doctrine of *in loco parentis* eroded.

One natural result was a decline in the ability of universities to maintain behavioral standards among their student populations by imposing immediate penalties, which in turn led to a decline in those behavioral standards.

Pennsylvania's first anti-hazing law was adopted in 1986, presumably in response to an increasing societal concern with injuries, illnesses and death directly or indirectly caused by victims' participation in dangerous initiation rituals at higher education institutions.

The 1986 law was updated in 2016 to add secondary schools (grades 7-12) to the institutions covered by the law.

In March 2018 – in response to Piazza's death and the grand jury's recommendations – State Senator Jake Corman introduced the Timothy J. Piazza Antihazing Bill, a bill to repeal and replace the 1986 law. SB 1090 passed the Senate 49-0 on April 18.

The bill was most recently amended by the Pa. House of Representatives Judiciary Committee (General Assembly Printers No. 1825, June 5, 2018), and appears to have been tabled the following day.

Future installments of this series will cover the details of the bill.

But on first read, the text of the amended anti-hazing legislation demonstrates one of the difficult dilemmas confronting legislators and university administrators.

Setting aside the provisions specific to protecting children under 18 – since most college students are 18 or older – the bill's authors appear to be trying to promote rapid reporting of dangerous hazing activities by participants and provide immunity for a maximum of two individuals per incident (the first person to report the emergency and the victim of the hazing, but only under certain narrow circumstances), *without* providing a blanket immunity tool for *all* underage alcohol-drinkers and *all* those who furnish alcohol to individuals under age 21.

This dilemma leads back to the constitutional problem. Free exercise of constitutional rights by an adult citizen requires personal acceptance of the responsibilities and risks associated with those choices by the individual who makes them.

As a society, therefore, the prosecution of the Beta Theta Pi defendants, internal policy reforms at Penn State, and the introduction of Tim's Law present us with questions that have no easy answers.

Should we statutorily strip adult citizens (age 18 and over) of their rights to exercise their freedom of expression, assembly and association through voluntary participation in sometimes dangerous fraternal organizations, to potentially save lives, by overhauling laws criminalizing hazing?

Or should we leave current, weak anti-hazing laws in place or fully repeal them, to protect the principles of individual rights and responsibilities, and accept – as a society – the costs in lives lost when adults choose to engage in high-risk behaviors?

It's the conflict between liberty and security that American society has struggled to reconcile since our very earliest days.

Working Chronology – Subject to Revision

- Feb. 2, 2017 – Beta Theta Pi bid acceptance night.
- Feb. 4, 2017 – Piazza's death at Hershey Medical Center
- Feb. 22, 2017 – Office of Disciplinary Counsel Petition for Discipline filed against Parks Miller (document made public on or about Aug. 18, 2017)

- March 30, 2017 – Penn State Vice President for Student Affairs Damon Sims announced new university policies regarding Greek organizations, intended to curb underage drinking, binge drinking, illegal drug use and sales, and sexual assault at fraternity and sorority events.
- May 5, 2017 – DA Parks Miller held a press conference regarding charges filed against first group of 18 individual defendants and Alpha Upsilon Chapter of Beta Theta Pi corporation
- May 16, 2017 – Primary election. Parks Miller was defeated by challenger Bernie Cantorna in the Centre County District Attorney race by wide margins of both Democratic and Republican voters.
- June 2, 2017 – Penn State announced Board of Trustees support for additional Greek life reforms.
- June 12, 2017 – Day 1 of Preliminary Hearing Round 1 for 16 of 18 original individual defendants and fraternity corporation, before Magistrate Judge Allan Sinclair: Parks Miller’s direct examination of Commonwealth’s only witness, State College Detective David Scicchitano.
- July 10, 2017 – Day 2 of Preliminary Hearing Round 1. Continued direct examination of Scicchitano, followed by cross-examination by Michael Leahey for Alpha Upsilon corporation and Frank Fina for Brendan Young.
- July 11, 2017 – Day 3 of Preliminary Hearing Round 1. Cross-examination by Steve Trialonas for Daniel Casey; cross by Daniel McGee for Jonah Neuman; cross by Andrew Shubin for Nicholas Kubera; cross by Rocco Cipparone for Michael Bonatucci; cross by Michael Engle for Gary DiBileo.
- Aug. 9, 2017 – Newly-discovered (previously deleted) basement surveillance video sent to Federal Bureau of Investigations for recovery.
- Aug. 10, 2017 - Day 4 of Preliminary Hearing Round 1. Cross by Theodore Simon for Luke Visser; cross by Leonard Ambrose for Joseph Sala; Marc Neff for Michael Schiavone; Evan Kelly for Craig Heimer; Julian Allatt for Lars Kenyon; Ron McLaughlin for Parker Yochim.
- Aug. 11, 2017 – Day 5 of Preliminary Hearing Round 1. Cross by Jason Dunkle for Lucas Rockwell and Ryan McCann; Karen Muir for Braxton Becker; William Brennan for Joseph Ems Jr. Direct examination of first defense witness, investigator Jeff Johnson, by Ambrose, regarding Johnson’s efforts to serve resident advisor Tim Bream with a subpoena to testify.
- Aug. 18, 2017 – Office of Disciplinary Counsel published Feb. 22, 2017 Petition for Discipline against Parks Miller.
- Aug. 21, 2017 – Penn State transfer of supervisory control of Greek organizations from Interfraternity Council to university put into effect.
- Aug. 30, 2017 – Day 6 of Preliminary Hearing Round 1. Direct examination of Bream by Ambrose, Leahey and Trialonas followed by closing arguments.
- Aug. 31, 2017 – Day 7 of Preliminary Hearing Round 1. Closing arguments continued.
- Sept. 1, 2017 – Judge Sinclair ruled, dismissing the most serious charges and binding over for trial most of the hazing, furnishing and underage drinking charges. Parks Miller held a press conference announcing her intent to refile the charges.
- Oct. 27, 2017 – Parks Miller refiled charges against 11 of the 16 Round 1 defendants and filed a motion for a new judge to hear the refiled charges.
- Nov. 13, 2017 – Parks Miller filed new charges against five of the Round 1 defendants and an additional 12 new defendants.
- Nov. 21, 2017 – DA-elect Cantorna announced his intention to refer the Beta Theta Pi prosecution to the Office of Attorney General due to a conflict of interest.
- Nov. 22, 2017 - Parks Miller issued a press release condemning Cantorna’s decision.
- Dec. 7, 2017 – Hearing before Common Pleas Judge Pamela Ruest regarding Parks Miller’s motion for appointment of a new magistrate judge to hear the refiled charges, argued by ADA Michael Osterberg. Parks Miller issued a press release (from Las Vegas) excoriating Judge Ruest during the hearing.
- Dec. 15, 2017 – Parks Miller released the Centre County Investigating Grand Jury’s Report and Recommendation on the Greek Culture at Penn State University, along with Penn State’s rebuttal report.
- Jan. 2018 – Parks Miller left office, Cantorna took office, Office of Attorney General accepted Beta Theta Pi prosecution and Judge Ruest denied Parks Miller’s motion for a new judge to hear the refiled and new charges during Round 2.
- March 23, 2018 – Pa. Senator Jake Corman introduced the Timothy J. Piazza Anti-hazing Law (SB 1090) in the Pa. Senate.
- March 23, 2018 – Day 1 of Preliminary Hearing Round 2: Judge Allan Sinclair heard evidence and arguments for Commonwealth’s refiled and new charges against 11 of the Round 1 defendants, this time presented by OAG attorneys.
- March 26, 2018 – Day 2 of Preliminary Hearings Round 2.
- March 27, 2018 – Day 3 of Preliminary Hearings Round 2.
- March 28, 2018 – Judge Sinclair ruled on Round 2, dismissing some refiled and new charges, binding others over for trial.
- April 18, 2018 – Pa. Senate passed SB 1090, Tim’s Law, sending it to the Pa. House of Representatives.
- April 23, 2018 – Disciplinary Board panel held hearing in Harrisburg regarding the ODC Petition

for Discipline against Parks Miller filed Feb. 22, 2017.

- May 2, 2018 – Day 1 of Preliminary Hearing Round 3 before Magistrate Judge Steve Lachman, regarding 12 defendants, some of whom were first charged in May 2017, and some of whom were first charged November 2017 after Parks Miller’s office had obtained previously-unavailable surveillance video from the basement of the fraternity house.
- May 7, 2018 – Judge Lachman ruled on Round 3, dismissing some refiled and new charges, binding others over for trial.
- June 5, 2018 – Revised SB 1090 – as amended by House – published by General Assembly, PN1825.

Reporting and critical analysis to be continued throughout Summer 2018. #slownews #microjournalism

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