

BAILIWICK NEWS

Reporting and critical analysis of Centre County public affairs

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Critical analysis: Piazza's death, the Centre County court credibility crisis, Beta Theta Pi fraternity, corporate Penn State profiteering, and possibilities for change.

By Katherine Watt

Part 6B: Continuation of Part 6A (Sections 1-4) published May 8, 2017, in a series reporting on legal and political principles as prioritized by incumbent DA Stacy Parks Miller and challenger Bernie Cantorna. Both are running as Democrats; the primary election is May 16, 2017.

Section 5 - CRITICAL ANALYSIS

The involuntary manslaughter; aggravated assault; simple assault; reckless endangerment; hazing; furnishing alcohol to minors; consumption of alcohol by a minor; disorderly conduct; and tampering with evidence charges filed against 18 Penn State students in the February 4, 2017 death of Timothy Piazza are related to allegations of criminal forgery, tampering with public records and destruction of evidence by incumbent DA Stacy Parks Miller in a number of interesting ways.

Further, the charges highlight many other long-festering regional issues, most notably, the corrupt and unaccountable community influence of the Penn State Office of Finance and Business led by Senior Vice President David Gray and tasked with managing a \$4 billion annual budget and a perverse incentive structure: maximizing economic profits for the corporate institution by maximizing student enrollment, Greek alumni donations and football program support, regardless of the human and social costs entailed.

The timing of the charges

The timing of DA Stacy Parks Miller's May 5 public announcement of criminal charges against the Penn State students in the alcohol poisoning, bodily injury and death of Timothy Piazza has raised some eyebrows. It was carefully orchestrated to occur at graduation weekend during a Penn State Board of Trustees meeting to maximize national press coverage two weeks before a crucial primary election.

I find the timing and orchestration fairly unremarkable.

Parks Miller is, above all else, a skilled politician motivated primarily by a passion for the survival of her own political career. Politicians are expected to manipulate circumstances for maximum personal gain and exposure at critical electoral moments.

So she did.

Ethical failures, bystander syndrome, and duty to rescue

The fact that none of the young men in the fraternity house on the night of February 2-3 called for emergency medical assistance until almost 12 hours after Piazza's original injury is tragic, and devastating to his family and friends.

However, it's not incomprehensible. As a group, men between the ages of 18 to 22 are not known for their sound judgment at the best of times, even when sober. The Beta brothers were extremely intoxicated – alcohol poisoned to roughly the same blood alcohol content as Piazza, which virtually eliminates the moral, cognitive and physical competency of anyone, of any age.

They were further subject to the well-documented "bystander syndrome" exemplified by the 1964 Kitty Genovese murder case in New York City.

According to Wikipedia,

"the bystander effect, or bystander apathy, is a social psychological phenomenon in which individuals are less likely to offer help to a victim when other people are present. The greater the number of bystanders, the less likely it is that any one of them will help. Several factors contribute to the bystander effect, including ambiguity, cohesiveness and diffusion of responsibility."

The Wikipedia article cites research by Latané and Darley, listing five characteristics of emergencies that affect bystanders. Emergencies involve threat of harm or actual harm; are unusual and rare; the type of action required in an emergency differs from situation to situation; they cannot be predicted or expected; and they require immediate action.

Latane and Darley further listed five required cognitive and behavioral processes that must happen before a bystander will get involved. Bystanders must notice that something is going on; interpret the situation as being an emergency; develop a threshold degree of responsibility felt; choose a form of assistance; and then implement the action choice.

As Gillian Fournier put it, "there are two reasons that seem to jump out" to explain the bystander effect:

"One, when you are in a crowd you automatically assume that someone has done something or will eventually make the call. Two, no one wants to be the person who is behaving differently. If no one is reporting it, clearly it is not socially acceptable."

Parks Miller is undoubtedly aware of this social phenomenon. She alluded to the bystander effect in response to questions posed at her May 5 press conference,

about the culpability of Tim Bream, 56, Director of Athletic Training Services and Head Football Athletic Trainer at Penn State and the senior “residential advisor” living at the Beta Theta Pi house.

When asked by a reporter whether Bream was in the house the night of Piazza’s catastrophic injury, and if so, why Bream was not being charged with crimes similar to the fraternity members, Parks Miller said she believed Bream was in the house, but that the grand jury had not seen him in any of the surveillance video clips presented to them, and therefore they had not recommended charges.

Parks Miller further commented that “Pennsylvania has no bystander law,” thus, although she acknowledged Bream may bear moral responsibility, he can’t be criminally prosecuted without probable cause, even if he was aware of the situation and failed to intervene.

“You can’t be charged with a crime just because you know it’s happening and don’t stop it,” she explained.

Although the technical term is “duty to rescue,” Parks Miller is correct. Again, from Wikipedia:

“in the common law of most English-speaking countries, there is no general duty to come to the rescue of another. Generally, a person cannot be held liable for doing nothing while another person is in peril.”

One exception is when the individual who created the danger to the victim fails to rescue the victim. However, in this case, it will be very difficult to identify an individual fraternity member who created the danger. They created the alcohol poisoning danger as a group and they also experienced the consequences – clouded ethical judgment, cognitive impairment and physical incoordination – as a group.

To the extent that the surveillance videos show individuals slapping and restraining Piazza, they are likely to make a compelling argument that those were drunken, incompetent attempts to revive Piazza or protect him from further self-inflicted injury, not criminal attempts to injure him rising to the level of simple or aggravated assault.

Furthermore, Bream had been living at the house since the 2015-2016 school year. The grand jury presentment states that illegal hazing and underage drinking were regular occurrences at the house during at least three consecutive semesters: Spring 2016, Fall 2016, and the Spring 2017 semester when Piazza died.

All of these hazing and underage drinking incidents violated the fraternity’s internal policies, Penn State Interfraternity Council policies, and state law as enforced by State College police.

Yet there’s been no evidence presented to the public that Bream reported *any* of the preceding violations to the Beta Theta Pi corporation, the Penn State Interfraternity Council or their private security firm (St. Moritz Security Services), the Penn State Office of Student Conduct, or the State College Police Department for investigation or disciplinary action. Neither Bream, nor the Penn State corporation, have been charged with criminal acts the 18 fraternity members and the Beta corporation now face.

It appears, therefore, that someone involved in managing the grand jury deliberately broke the chain of responsibility connecting the Penn State students’ health and welfare to Penn State employee Tim Bream, and through Bream, to the Penn State Interfraternity Council, the Penn State Office of Finance and Business (led by Vice President David Gray) and the Penn State Office of Student Affairs (led by Vice President Damon Sims).

Setting those thorny facts aside, if Bream, Penn State administrators and the Penn State corporation are immune from criminal culpability because they had no duty to rescue, by the same argument, none of the individual drunk fraternity members nor the Beta Theta Pi corporation had a responsibility to intervene, and they bear no criminal culpability for failing to intervene or even for intervening incompetently and abusively because they were so extremely incapacitated themselves.

Although grotesque under the circumstances, it’s arguable that their drunken, incompetent attempts to revive Piazza and prevent further injury were protected under “Good Samaritan” laws shielding those who attempt to aid a victim from legal liability for harms inflicted during efforts to render assistance.

As such, criminal convictions of any of the fraternity brothers on the involuntary manslaughter and aggravated assault charges are as likely to induce future bystanders to walk away from emergency situations as they are to induce those future bystanders to call for help.

And criminal convictions of the fraternity brothers, so long as Bream and the Penn State corporate administrators walk free, will likely reinforce the growing public understanding that Centre County courts operate at least two tiers of criminal justice: one for the politically-connected ensuring their impunity, and another for low-level offenders, maximizing their punishment.

Grand jury recap – purpose and risks

As reported previously, the investigating grand jury is one tool in the public toolbox for holding government officials and criminal organizations accountable for criminal misconduct and political corruption. It’s a group of ordinary citizens from a community called to work together to investigate alleged wrongdoing within their community.

However, it’s a multi-purpose tool whose effectiveness and the legitimacy of the public outcomes both depend very much on the motives, knowledge and skills of the three individuals most in control the group’s work: the prosecutor, the jury foreman and the supervising judge.

Because investigating grand juries use a non-adversarial framework with minimal burdens of proof and all participants are sworn to secrecy, the IGJ tool carries serious risks for the community using it.

Parks Miller went through a secret statewide investigating grand jury investigation as a potential criminal defendant between February and July 2015, and she quickly recognized the extraordinary power of the grand jury to work without public oversight.

In August 2015, in her capacity as District Attorney, she parlayed her experience to convene a secret Centre

County investigating grand jury under her direct control. The jury worked intermittently for 18 months between November 2015 and May 2017.

Reasons for grand jury secrecy

The IGJA secrecy provisions have two intended purposes: to protect grand jury targets from reputational damage in the event that they are not charged with the crimes for which they're being investigated, and to protect witnesses from retaliation by targets, to encourage their full testimony.

However, because there is no public oversight of the process, evidence can be suppressed and non-credible witnesses can present evidence without being subjected to cross-examination, tainting the grand jury's final, published conclusions.

If the targeted individual is wrongly accused, the subsequent public trial will provide an opportunity to clear his or her name. But if the targeted individual is wrongly cleared, the public has no recourse through appellate review of the investigating grand jury's process or decision.

Secrecy, texting evidence and tampering

At the press conference, Parks Miller also stated that text messages between fraternity members during the planning and execution of the alcohol poisoning rituals provided key evidence supporting the charges, including evidence that the fraternity members were aware of their liability risks and interested in avoiding responsibility by covering up or destroying evidence. Some of the texting evidence is unavailable, she explained, because it was sent through Groupme chats, which are not stored long-term. Such chats are "not like regular texts, where our forensic guys can get it back," she said.

As reported previously, since March 2015, Parks Miller and several Centre County judges have vigorously fought against efforts for their own text and email records to be released to confirm or refute allegations of *ex parte* communications, up to and including destruction of evidence.

As noted by Judge Michael Williamson in a Dec. 22, 2016 ruling in *Commonwealth v. McClure*, "All of these phones were wiped clean, destroyed or otherwise made unavailable after the issue of the texting between [former Common Pleas Judge Bradley] Lunsford and the District Attorney's Office had been raised by defense counsel [Bernie Cantorna]."

Subsequent to Judge Williamson's order, defense attorneys identified a forensic technician – Brian Sprinkle of PATC Tech – who is one of those "forensic guys" and managed to "get back" many of the deleted DA-judge texts, which the defense attorneys for Jalene McClure and Barry Grove intended to present in support of their clients' interests.

And, as reported previously, as soon as she became aware of Sprinkle's likely testimony in January 2017, Parks Miller moved swiftly to suppress the public production of that evidence, by moving the McClure and

Grove cases to state Superior Court and having the proceedings sealed and rendered secret.

Secrecy in grand jury investigation of Piazza's death

At the May 5 press conference, Parks Miller stated that the county grand jury played a key role in collecting and evaluating evidence to charge the Penn State students and the Beta Theta Pi corporation.

In particular, she emphasized the importance of grand jury secrecy, which she claimed, made it possible to compel testimony regarding the fraternity's ritualized alcohol-poisoning practices that would otherwise have been kept secret by the fraternity members, to uphold their cult's secrecy codes.

Parks Miller's claim that she needed a grand jury to investigate hazing and underage drinking rings false. Hazing and underage drinking – even when they lead to death – are straightforward crimes, unlike the organized crime or political corruption that are the intended targets of grand jury investigations.

Moreover, much of the evidence reported in the grand jury presentment came from testimony provided by State College Police Detective David Scicchitano, who relayed to the grand jury testimony he obtained through police interviews with fraternity members, apparently in the course of a standard police investigation.

Grand jury parallels and questions raised

The grand jury investigation of the Beta fraternity members, the grand jury investigation of Parks Miller's "fake" bail order, and the sealing of the McClure and Grove cases on appeal in Superior Court raise the same set of questions.

Is the secrecy being used as a shield to protect the innocent from the injustice of a false accusation?

Is it being used to protect witnesses from potential retaliation?

Is it being used to facilitate retaliation by those privy to the secret witness testimony who find it damaging to their personal interests?

Is it being used to suppress evidence, to help the guilty evade accountability?

With respect to Centre County grand jury investigations one through 10, the public knows very little. There are a few news reports about charges filed in the Corinne Pena murder and 200 counts of child sex abuse filed against Lawrence O'Shell in a case dating back to 1998. But other than the Beta presentment, there have been no publicly released reports or presentments.

Has the grand jury been used for any of those ten secret investigations to interrogate individuals who have sought public accountability for official wrongdoing or obtain and destroy incriminating evidence to protect politically connected individuals?

In general, are there any substantive difference between grand jury secrecy in the Beta and Parks Miller investigations, secret Superior Court proceedings in McClure and Grove, secrecy codes used by fraternities to

protect themselves from prosecution for hazing and underage drinking, and prosecutorial and judicial secrecy Penn State's administrative secrecy enforced through Right to Know exemptions?

If so, what are those substantive difference?

Above all else, how is the public interest in sound, ethical governance and fair adjudication served by all this secrecy?

Grand jury request for a report on alcohol culture at Penn State

The grand jury presentment, in addition to recommending charges against the Penn State students and the fraternity corporation, directed Parks Miller to supervise drafting of a report on fraternity, binge drinking and hazing culture at Penn State and make recommendations to the Pennsylvania legislature to address identified problems.

Parks Miller referred to the alcohol culture as "a social health crisis" during the May 5 press conference, and said that among other things, her office would recommend that the legislature increase the level of furnishing alcohol to a minor from a misdemeanor 3 crime (on par with disorderly conduct) to a higher level with more severe penalties upon conviction.

In my view, the production of such a report would be redundant and therefore meaningless.

The binge drinking culture at Penn State as it's evolved over the past several decades is already well-known and well-understood. There was, for example, an extensive and widely-heard National Public Radio series on the topic in 2009 (*This American Life*, Episode 396.)

Many individuals and organizations have lobbied for years with the Penn State Board of Trustees, State College Borough Council, State College Police Department, and Pennsylvania legislature, for strong political leadership to address the issues.

The problem is not a lack of awareness or understanding.

The problem is that financial incentives for corporate Penn State make it more profitable to facilitate fraternities and alcohol abuse than to control them, and until the incentive structure changes, corporate Penn State's behavior will not change. Failure is built into the corporate structure, crocodile tears and public condolences notwithstanding.

This is what's most troubling about the death of Timothy Piazza and the prosecutions stemming from it.

It's David Gray's job, as corporate Penn State's chief financial officer, to maximize internal profits, including student tuition and fees from unwitting parents and corporate lenders backed against default by US taxpayers; football, tailgating and ticket fees; and alumni donations disproportionately provided by Greek alumni.

This goal requires a viral marketing strategy, which is in fact thoroughly-implemented, promoting the reputation of Penn State as a hard-drinking, football-loving, frat-supporting academic tourism destination for high school graduates and Penn State alumni.

Another key profiteering strategy is to externalize liabilities, and one of corporate Penn State's most effective tactics is to keep fraternities off-campus, as putative "private" organizations outside direct University responsibility.

A third profiteering strategy is to maintain wide-open front and back channels of communication between University administrators and those in positions that theoretically could hold the corporation and its leadership accountable for misconduct, such as the county DA and state legislators.

David Gray is very good at his job.

And he's ably assisted his endeavors by the placement of his wife Margaret Gray, a former government affairs lobbyist in Harrisburg, who served as Penn State's first Director of Local Government and Community Relations (appointed in February 2015) and is now Centre County Administrator, the chief executive of the Centre County government.

Interestingly, Mrs. Gray filled a position vacated by former County Administrator Timothy Boyde after Boyde fulfilled the Right to Know requests filed by defense attorneys that initially revealed the *ex parte* texting and prosecutorial and judicial misconduct, only to find himself sued by Parks Miller and the embroiled county judges.

Again, to the extent that Margaret Gray's job is to smooth out the political and legal bumps in the road for the largest regional wealth pump, she's great at it.

Conclusion

Parks Miller, Lunsford and others in Centre County court system – along with Penn State administrators - serve as excellent role models for others in the community seeking to withhold, suppress or destroy evidence to evade public accountability for their actions and failures to act.

Thus it's difficult to see public condemnation of Penn State students evading responsibility and tampering with evidence as anything other than rank hypocrisy, and another example of our dual-track system of law enforcement: one for the politically-connected including Parks Miller herself as the chief law enforcement officer, and one for the unprotected.

So long as Parks Miller has free rein to operate the Centre County criminal justice system largely in secret, we will have at least two tiers of county "justice." So long as David and Margaret Gray perform their respective jobs competently, and deflect responsibility for community tragedies from high-level administrators to low-level offenders, there can be no change to corporate Penn State and municipal State College complicity in the maintenance of the binge drinking culture and the human suffering stemming from it.

Change will not come from the top of the power hierarchy, because the top is where the moral rot starts.

Citizens acting in our civic capacities as voters, students, and parents are in the best, perhaps the only position to reform Centre County courts to ensure fair, public adjudication and reform Penn State from a profiteering corporation focused on fraternities, football

and finance into a credible, legitimate educational institution.

Prospective students and their families are in good position to force cultural change, by either boycotting Penn State, or, since alternatives are often even more ridiculously cost-prohibitive, sending a disclaimer with their tuition checks:

“The undersigned student and his/her parents acknowledge the inherent risks involved in Penn State attendance, including but not limited to severe alcohol poisoning, accidental injury, simple assault, aggravated assault, sexual assault, loss of bodily functions, loss of cognitive functions, loss of mobility (paralysis) and death. The student acknowledges that participation in alcohol poisoning activities will result in his/her parents discontinuing financial support for Penn State enrollment. The student and his/her parents hereby waive all civil and criminal claims against corporate Penn State for such injury, maiming and death.”

Football fans are in a position to force cultural change, by refusing to tailgate or attend football games.

Alumni donors are in a position to force cultural change, by withholding donations.

And state legislators are in a position to force cultural change, by refusing to subsidize Penn State’s profiteering, and opening up Penn State’s administrative secrecy to public scrutiny by enacting legislation to bring Penn State and the other state-related universities under the provisions of the Pennsylvania Right to Know Law.

There are good teachers and good academic programs at Penn State. But the higher education cartel has taken over in the last several decades, driving tuition and fees beyond reach, pushing college-educated people into massive debt, and exploding the ranks of corporate middle managers on university payrolls.

Teachers, students and the generational transfer of knowledge do not drive the mission of corporate universities anymore. Profiteers do.

We need citizens to vote for and then support local, county and and state legislators and a district attorney willing to stand firmly against corporate Penn State’s secrecy and profiteering. We need family decisions to avoid Penn State in the higher education marketplace. We need donor decisions to avoid Penn State in the philanthropic marketplace. We need state legislator decisions to withhold funding for the corporate Penn State racket and open the administrative suites to public scrutiny.

Without those actions, alcohol poisoning, hazing, injury and death of Penn State students are likely to continue, alongside prosecutorial and judicial misconduct, including grand jury abuse.

But those individual choices – if undertaken by a critical mass of Penn State stakeholders – can break the secrecy down and open two of our core public institutions up to public accountability and reform.

We’ll know something has changed when county court proceedings again become public and accountable; when Penn State application numbers, enrollment, football attendance, alumni donations and state subsidies drop; when the Penn State administration opens its’ records and daily functions to public review and analysis; and when the streets of downtown State College are no longer clogged with packs of stumbling drunk students Thursday through Sunday whenever Penn State is in session.

Until then, it’ll be business as usual.

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KW INVESTIGATIONS LLC
156 W. Hamilton Ave.
State College PA 16801
(814) 237-0996
kw.investigations.llc@gmail.com
steadystatecollege.wordpress.com

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