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# THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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## ARTICLES

(En)Forcing a Foolish Consistency?: A Critique and Comparative  
Analysis of the Trump Administration's Proposed Standard of  
Evidence Regulation for Campus Title IX Proceedings William C. Kidder

Lessons In Leadership: How Dillard University Managed Free Speech,  
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The Development of Federal Student Loan Bankruptcy Policy John P. Hunt

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PUBLISHED BY THE NATIONAL  
ASSOCIATION OF COLLEGE AND  
UNIVERSITY ATTORNEYS AND  
THE RUTGERS LAW SCHOOL



**RUTGERS**  
Law School



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## ARTICLES

### **(En)Forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration's Proposed Standard of Evidence Regulation for Campus Title IX Proceedings**

William C. Kidder

Prevention of sexual assault and sexual harassment are major challenges at United States colleges and universities today. In recent years a vigorous law and policy debate emerged within the higher education community about Title IX and whether the "preponderance of evidence" or "clear and convincing" evidence represents the more appropriate standard of evidence in campus sexual violence and sexual harassment disciplinary procedures. During the Obama administration, the Office for Civil Rights in the U.S. Department of Education issued a 2011 "Dear Colleague" letter recognizing that the preponderance of evidence standard was the appropriate standard for Title IX investigations. The Trump administration's Office for Civil Rights rescinded this earlier guidance and in November 2018 issued a notice of proposed rulemaking regarding Title IX regulations.

pg 1

### **Lessons In Leadership: How Dillard University Managed Free Speech, Reconnected to its Mission, and Layered in the Law—All in a Matter of Days**

Robert B. Farrell

Campus free speech generates strong opinions but few consider the challenge it presents to campus leadership. Presidents espouse diversity and inclusivity while recognizing the importance of all ideas, some of which threaten those goals. Dillard University in New Orleans faced this issue. In doing so, Dillard found its core ideals and determined that as a liberal arts institution, facing controversy required an HBCU to host a former leader of the Klan. Its president placed his reputation and his job on the line for this conviction. Dillard is a story of courage in the face of adversity.

pg 50

## **The Development of Federal Student Loan Bankruptcy Policy**

John P. Hunt

Perhaps 200,000 to 250,000 student loan borrowers enter bankruptcy every year, and the large majority of student loans are issued under federal programs administered by the Department of Education (“Department”). Thus, the Department’s rules about when student-loan holders should consent to bankruptcy discharge are critically important. Nevertheless, they have received little attention compared to judicial doctrine relating to student loan bankruptcy.

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This Article presents the first detailed history of the Department’s student loan bankruptcy policy. It first describes the current rules, under which loan holders are to oppose discharge unless the repayment would cause “undue hardship”—the standard for discharge under the Bankruptcy Code—or opposing discharge would cost more than one third the outstanding loan balance. These rules call for consent to discharge only where the borrower would be able to prevail against the holder in court by showing undue hardship or where consent would make the holder financially better off.

## **Student Evaluations and The Problem of Implicit Bias**

Roger W. Reinsch, Sonia M. Goltz, Amy B. Hietapelto

This article addresses the implicit bias problems inherent in using student evaluations when making employment decisions concerning university faculty members. Research indicates that student evaluations contain implicit bias regarding race, gender, and a variety of other protected categories. We begin by looking at the current use, purpose and structure of student evaluations. We then explore what implicit bias is and the research that demonstrates that most of us have some sort of implicit bias. Once the concept of implicit bias is explained, we examine the research that indicates there is implicit bias in student evaluations. We then discuss the law and implicit bias generally, followed by specific legal issues that are raised. Next, we examine recent trends at some universities which have recognized and begun to address the problems with student evaluations. Finally, we offer recommendations as to how to evaluate faculty members’ teaching using alternative methods.

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## STUDENT NOTES

### **Alcohol: Truth and Consequences on Campus Time to Change College Binge Drinking Culture Once and For All**

Lynn Gilbert

Ensuring the safety and mental health of college students is critical to give students the potential for educational success. This paper focuses on the elephant in the room – alcohol abuse – and encourages Congress to address this endemic, long-standing issue in the Reauthorization of the Higher Education Act.

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A historical review of federal action alongside current research demonstrates college alcohol abuse is a stubborn, pervasive, and devastating problem which demands renewed attention. Disregarding the intertwined nature of alcohol, and sexual misconduct, the Obama administration avoided incorporating the topic into the administration's campus sexual assault campaign. Nonetheless, evidence shows the Obama administration was successful in altering the culture on campus. As a result, there is space to utilize its blue print to address binge drinking.

### **A Limited Review of the Post-Heller Fate of Campus Carry: Preemption and Constitutionality in New Hampshire and Beyond**

Jacob A. Bennett

While there are numerous instances of college or university mass shootings to be found in previous decades, the contemporary debate over the legal right to carry a firearm on a public college or university campus begins with the Virginia Tech massacre in 2007. It was in the aftermath of this event that the Students for Concealed Carry began a concerted effort to allow persons already permitted by their state to carry concealed firearms to also do so on college campuses—an effort that seems to have jumpstarted a vigorous debate that continues to this day.

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## BOOK REVIEW

**Review of Laura Kipnis'  
Unwanted Advances:  
Sexual Paranoia Comes To Campus**

Sarah Kern

In 2015, Laura Kipnis, a film professor in Northwestern's School of Communications, found herself at the center of a Title IX investigation. That year, she wrote an essay for the Chronicle of Higher Education questioning Title IX policies and what she saw as the unfair treatment of a fellow professor, Peter Ludlow. After the article was published, students at Northwestern filed complaints against Kipnis for creating a "hostile environment" and marched in protest. Although Kipnis was cleared of the accusations against her, she wrote *Unwanted Advances: Sexual Paranoia Comes to Campus* as a warning call to academics, bringing attention to the frenzied and opaque administration of Title IX policies at universities. She argues that paranoia, coupled with overzealous reporting, takes away and pushes feminism backwards, all while threatening academic freedom.

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# (EN)FORCING A FOOLISH CONSISTENCY<sup>1</sup>?: A CRITIQUE AND COMPARATIVE ANALYSIS OF THE TRUMP ADMINISTRATION’S PROPOSED STANDARD OF EVIDENCE REGULATION FOR CAMPUS TITLE IX PROCEEDINGS

WILLIAM C. KIDDER\*

## **Abstract**

*Prevention of sexual assault and sexual harassment are major challenges at United States colleges and universities today. In recent years a vigorous law and policy debate emerged within the higher education community about Title IX and whether the “preponderance of evidence” or “clear and convincing” evidence represents the more appropriate standard of evidence in campus sexual violence and sexual harassment disciplinary procedures. During the Obama administration the Office for Civil Rights in the U.S. Department of Education issued a 2011 “Dear Colleague” letter recognizing that the preponderance of evidence standard was the appropriate standard for Title IX investigations. The Trump administration’s Office for Civil Rights rescinded this earlier guidance and in November 2018 issued a notice of proposed rulemaking regarding Title IX regulations. The new proposed regulation reflects a “you can have more discretion, if you ratchet up” policy: a college can only use the preponderance of evidence standard if it adopts that same standard across the board in similarly serious non-Title IX student misconduct cases and in both Title IX and non-Title IX cases where the accused/respondent is a faculty member or employee. If a campus chooses to adopt the clear and convincing evidence standard in Title IX cases, the proposed regulation would not restrict campus discretion in non-Title IX student cases.*

*While the relationship between the burden of proof and outcomes is complicated and dynamic, the main tendency if campuses were to shift to the clear and convincing evidence standard in Title IX adjudications would likely be a net decrease in accuracy because the rise in “false negative” errors (student or employee commits sexual misconduct but is*

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\* Special Assistant, Chancellor’s Office, UC Santa Cruz; Research Associate, The Civil Rights Project (UCLA); B.A. and J.D., UC Berkeley. This article is dedicated to the memory of Professor/President Emeritus Robert M. O’Neil, a giant in the area of higher education law and academic freedom, who passed away at age 83 in the fall of 2018. I thank Rayman Solomon and anonymous reviewers at the *JC&UL* as well as the following scholars for their reviews and comments on the themes in this article: Ronald Allen, Katharine Baker, Deborah Brake, Erin Buzuvis, Nancy Cantalupo, Kevin Clermont, Michael Dorf, Richard Lempert, Eloise Pasachoff, Brett Sokolow and John Villasenor. Any errors and omissions are my responsibility. For context and disclosure purposes, I have previously overseen Title IX operations at public universities in California and I’ve also served as an assistant provost handling a wide range of faculty discipline cases over the years. This article was submitted for publication before I was employed at UC Santa Cruz—the views expressed in this article reflect my scholarly research conclusions and do not represent the official positions of either UCSC or other UC or CSU campuses where I previously served as an administrator.

1 Ralph Waldo Emerson, *Self-Reliance*, in *EMERSON’S ESSAYS* 45, 57 (Houghton, Mifflin, & Co. 1980) (“A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.”).

*found not responsible) would outnumber the corresponding decrease in “false positive” errors. By implication, a shift to the clear and convincing standard would also make it more difficult – other things being equal – for campuses to impose disciplinary accountability in cases of serial sexual misconduct and serial sexual harassment.*

*This article also aims to inform the debate about Title IX and faculty and student disciplinary cases by objectively identifying whether the preponderance of evidence or clear and convincing evidence standard is used in most domains that are reasonably analogous to faculty Title IX-related misconduct proceedings (a more stringent test than looking only at student-to-student Title IX cases). This review includes U.S. federal civil rights adjudications, faculty research misconduct cases linked to federal research grants, civil anti-fraud proceedings, attorney debarment/discipline cases, and physician misconduct/license cases. In a large majority of these areas, preponderance of evidence is used as the standard of evidence. This pattern highlights concerns about the Office for Civil Rights selectively referencing cases that support its proposed Title IX regulation and questionable claims about the clear and convincing evidence standard and stigma. This article also raises questions, depending on how the notice-and-comment process unfolds, about the proposed Title IX regulation and the Administrative Procedure Act.*

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## I. Overview of the POE Versus C&C Standard of Evidence Controversy

Approximately one in five female college students in the U.S. experience some form of sexual assault at some point in their college years;<sup>2</sup> prevention of faculty-on-student sexual harassment also looms as a major challenge on university campuses,<sup>3</sup> and in both of these areas there are indications of higher victimization rates among vulnerable populations like LGBTQ students and women of color.<sup>4</sup> In recent years a vigorous debate has emerged within the higher education community about Title IX and whether “preponderance of evidence” (POE) or “clear and convincing” (C&C) evidence represents the more appropriate standard of evidence in campus sexual violence and sexual harassment disciplinary procedures. The Trump administration’s pending *notice of proposed rulemaking* regarding Title IX regulations is the latest twist in this ongoing law and policy debate.<sup>5</sup>

### A. OCR and the Standard of Evidence for Title IX

The U.S. Department of Education’s Office for Civil Rights (OCR) has adopted divergent approaches to the standard of evidence under the Obama and Trump administrations in the context of sexual misconduct/sexual harassment and the civil rights enforcement of Title IX at federally-funded colleges, universities and K-12 schools. In 2011 the Obama administration OCR issued an important (and to some, controversial) Title IX “Dear Colleague” letter that, among other things, provided the following guidance in favor of the preponderance of evidence standard:

[I]n order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred). The “clear and convincing” standard (i.e., it is highly probable or reasonably

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2 Since there was some contestation of this claim several years ago when it was cited by the Obama White House, note that multiple reliable studies for this conclusion include *e.g.*, Lisa Fedina et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research From 2000 to 2015*, 19 *TRAUMA, VIOLENCE & ABUSE* 76 (2018); Claude A. Mellins et al., *Sexual assault incidents among college undergraduates: Prevalence and factors associated with risk*, 12 *PLoS ONE* (Nov. 2017), <https://journals.plos.org>; Charlene L. Muehlenhard et al., *Evaluating the one-in-five statistic: Women’s risk of sexual assault while in college*, 54 *J. SEX RESEARCH* 549 (2017); CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT xiii* (2007) (DOJ National Institute of Justice report); DAVID CANTOR ET AL., *REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT* (Sept. 2015).

3 NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, *SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE* 144 (June 2018); CANTOR ET AL., *id.*; NOËL B. BUSCH-ARMENDARIZ ET AL. *CULTIVATING LEARNING AND SAFE ENVIRONMENTS: AN EMPIRICAL STUDY OF PREVALENCE AND PERCEPTIONS OF SEXUAL HARASSMENT, STALKING, DATING / DOMESTIC ABUSE AND VIOLENCE, AND UNWANTED SEXUAL CONTACT* (Spring 2017) (survey study of 13 University of Texas campuses); Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 *UTAH L. REV.* 671 (2018) (study of 300+ actual cases).

4 CANTOR ET AL., *supra* note 2; BUSCH-ARMENDARIZ ET AL. *id.*, at 54-55; Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality, Multiracialism & Sexual Harassment of Women Students of Color*, 42 *HARV. J. L. & GENDER* 1 (2019), available at [ssrn.com](http://ssrn.com).

5 U.S. Department of Education OCR, *Title IX Notice of Proposed Rulemaking*, 83 *Fed. Reg.* 61462-61499 (Nov. 29, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-11-29/html/2018-25314.htm>.

certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.<sup>6</sup>

OCR's 2011 "Dear Colleague" letter (and a more detailed 2014 Q&A document) did not go through the formal notice and comment process associated with federal administrative rule-making,<sup>7</sup> making it vulnerable to the kind of reversal now at issue.

Soon thereafter organizations like the American Association of University Professors (AAUP) complained that OCR's 2011 "Dear Colleague" letter announced a substantive change and a "new mandate."<sup>8</sup> I am not the first to point out that such complaints about a new mandate were at least partly inaccurate.<sup>9</sup> In at least some relevant cases, for many years OCR regional offices were using POE as a requirement in higher education compliance investigations and resolutions. An important example is the Clinton administration era OCR's investigation of Evergreen State College in Washington in 1995, which is squarely on point for present purposes, as it involved a female college student who filed a sexual harassment complaint against her professor and thereby triggered the College's multi-step disciplinary procedures that required the clear and convincing evidence standard.<sup>10</sup> As part of its resolution agreement with OCR, Evergreen State agreed that POE would be the "appropriate standard of proof applied to the resolution of any and all complaints alleging action prohibited by Title IX, including final decisions as to sanctions."<sup>11</sup>

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6 U.S. Dep't of Educ. OCR Dear Colleague Letter from Ass't. Sec. Russlynn Ali 11 (April 4, 2011), archived at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. For an incisive history of the events that gave rise to the 2011 OCR Dear Colleague letter and related White House initiatives, see Karen M. Tani, *An Administrative Right to be Free From Sexual Violence?: Title IX Enforcement in Historical and Institutional Perspective*, 66 Duke L.J. 1847 (2017).

7 Janet Napolitano, "Only Yes Means Yes": An Essay on University Policies regarding Sexual Violence and Sexual Assault, 33 YALE L. & POL'Y REV. 387, 394 (2014).

8 AAUP, *The History, Uses and Abuses of Title IX*, AAUP BULLETIN 69, 79 (2016), <https://www.aaup.org/file/TitleIXreport.pdf>.

9 Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 129 (2017) ("OCR's endorsement of the preponderance of evidence standard in the 2011 DCL hardly came out of the blue.").

10 U.S. Dep't of Educ. OCR Region X, Investigation Letter in Evergreen State College Case. No. 10922064, at 9 (April 4, 1995) <https://www.nchem.org/documents/193-EvergreenStateCollege10922064.pdf>. ("When the respondent is a faculty member, as in the instant case, the resolution process shifts to the Faculty Handbook ... The primary focus of the resolution process has shifted from that of resolving the discrimination complaint to determining whether any adverse employment action should be taken against the faculty member ... and the standard of evidence required of this committee ... is one of 'clear and convincing proof,' a higher standard than that of a 'preponderance of the evidence.'") Thus, OCR concludes that, to the extent that the College's Title IX grievance process requires adherence to provisions of the Faculty Handbook "the process fail to comply with the Department's Title IX regulation requiring a prompt and equitable resolution of student complaints alleging an action prohibited by Title IX... [T]he decision reached by this group must adhere to a heavier burden of proof than that which is required under Title IX.").

11 *Id.* at 10, unnumbered pages 11-12.

OCR's resolution with Evergreen State on the POE standard did not receive wide attention (indeed, at the time OCR did not have a practice of posting such resolution and investigation close-out letters on its website).<sup>12</sup> A second letter in 2003 (Bush administration era) from an OCR regional office resolved a student peer-to-peer sexual assault complaint at Georgetown University with an agreement the University would adopt the POE standard in sexual misconduct adjudications.<sup>13</sup> The Georgetown letter received some national attention as the campus agreed to adopt the POE standard in sexual assault adjudications.<sup>14</sup>

Returning to the contemporary scene, in September 2017 the Trump administration OCR under Secretary of Education Betsy DeVos rescinded the 2011 "Dear Colleague" letter and issued a new interim guide in the form of a short Q&A document. OCR's interim guide declared that Title IX "findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard" and that a campus should apply the same standard it uses in other (non-Title IX) student cases.<sup>15</sup>

Important additional details were revealed in the DeVos OCR's *notice of proposed rulemaking* released in November 2018:

Proposed Regulations: We propose adding section 106.45(b)(4)(i) stating that in reaching a determination regarding responsibility, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.<sup>16</sup>

Significantly, unlike the proposed language above, the 2017 OCR interim guidance references consistency only with other *student* procedures, and did not specifically suggest a mandate to make faculty Title IX procedures comport with student procedures. The proposed OCR regulation can be characterized as a "you preserve more discretion, if you ratchet up"<sup>17</sup> system for the standard of evidence,

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12 Tani, *supra* note 6, at 1868 n. 100 ("[T]he Evergreen State agreement was not widely publicized.").

13 OCR D.C. Office letter to Georgetown University Counsel (Oct. 16, 2003), *available at* [http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed\\_ehd\\_1995.pdf](http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf) and <https://www.nchem.org/documents/202-GeorgetownUniversity--110302017Genster.pdf>.

14 Tani, *supra* note 6, at 1867-68 (discussing importance of the 2003 Georgetown OCR case).

15 U.S. Dep't of Educ. OCR Interim Q&A on Campus Sexual Misconduct 5 n.19 (Sept. 2017), *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

16 OCR, Title IX Notice of Proposed Rulemaking, *supra* note 5, at 83 Fed. Reg. at 61477.

17 After I posted the first draft of this article in January 2019, I noticed that Grossman and Brake had used very similar language to describe the proposed Title IX standard of evidence in an earlier essay as a "one-way ratchet." Joanna L. Grossman & Deborah L. Brake, A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence, VERDICT (Nov. 29, 2018), *available at* <https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence>

as summarized below in Figure 1. Essentially this means that conditions inside and outside the Title IX realm are imposed on college campuses that choose to stick with the POE, while not all these conditions are imposed on campuses that choose to use the C&C standard (a situation with important implications discussed in Sections III–V of this article).

**Figure 1: OCR’s Proposed “ratchet up discretion” Standard of Evidence Regulation**

Other spheres of campus misconduct:	If use POE for student Title IX proceedings	If use C&C for student Title IX proceedings
Serious non-Title IX student misconduct?	Must use same POE standard	May choose POE or C&C standard
Faculty Title IX misconduct?	Must use same POE standard	Must use C&C standard
Serious Faculty non-Title IX misconduct?	Must use same POE standard* <sup>1</sup>	May choose POE or C&C standard

OCR’s pending *notice of proposed rulemaking* justifies its proposed standard of evidence rules based upon the following claims that Part III of this article will demonstrate are unsound:

Title IX grievance processes are also analogous to various kinds of civil administrative proceedings, which often employ a clear and convincing evidence standard. See, e.g., *Nguyen v. Washington Dept. of Health*, 144 Wash. 2d 516 (2001) (requiring clear and convincing evidence in sexual misconduct case in a professional disciplinary proceeding for a medical doctor as a way of protecting due process); *Disciplinary Counsel v. Bunstine*, 136 Ohio St. 3d 276 (2013) (clear and convincing evidence applied in sexual harassment case involving lawyer). These cases recognize that, where a finding of responsibility carries particularly grave consequences for a respondent’s reputation and ability to pursue a profession or career, a higher standard of proof can be warranted.<sup>18</sup>

Likewise, the DeVos OCR proffers the justification—which Part III of this article shows is incorrect—that the correction away from the approach in the 2011 OCR “Dear Colleague” letter is needed because of the differences in due process protections between campus Title IX adjudications and civil litigation:

When the Department issued guidance requiring recipients to use only preponderance of the evidence, it justified the requirement by comparing the grievance process to civil litigation, and to the Department’s own process for investigating complaints against recipients under Title IX. Although it is true that civil litigation generally uses preponderance of the evidence, and that Title IX grievance processes are analogous to civil litigation in many ways, it is also true that Title IX grievance processes lack certain features that promote reliability in civil litigation. For example, many recipients will choose not to allow active participation by counsel;

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<sup>18</sup> *Id.* This interpretation flows from the lack of limiting specificity in the actual language of the proposed regulation 106.45(b)(4)(i), though the subsequent “reasons” paragraphs render this interpretation arguably somewhat less clear.

there are no rules of evidence in Title IX grievance processes; and Title IX grievance processes do not afford parties discovery to the same extent required by rules of civil procedure.<sup>19</sup>

To set up the critique of the Trump administration's proposed Title IX regulation analyzed in Sections III–V of this article, note that states like California and New York passed state laws requiring POE in Title IX adjudications.<sup>21</sup> I mention this not as an issue of “conflict” with state law per se, but to point out the imposition of increased federal-state law harmonization costs and burdens for universities in high-population states like New York and California seeking to avoid such conflict. In the other direction, it does not appear that any states are requiring the C&C standard (Georgia's Board of Regents did, based upon pressure from an influential lawmaker, but did so in a contradictory way<sup>22</sup>).

To further set the stage about the POE versus C&C Title IX issue, in the years after the 2011 “Dear Colleague” letter several organizations advocating in favor of the C&C evidence standard included the AAUP,<sup>23</sup> groups of Harvard and Penn law professors<sup>24</sup> and criminal defense bar organizations like the American Trial Attorney Association.<sup>25</sup> Conversely, the POE standard is supported in Title IX cases by a number of gender equality and civil rights groups, including the National

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19 *Id.* 83 Fed. Reg. at 61477.

20 *Id.*

21 Cal. S.B. 967, Cal Stats 2014 chap. 748 (at California public and private institutions linking eligibility to state financial aid like Cal Grants to a “policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.”), available at <http://leginfo.legislature.ca.gov/>; Jeremy Bauer-Wolf, *Looming State-Federal Conflict on Sex Assault*, INSIDE HIGHER ED, Sept 6, 2017.

22 Emily A. Robey-Phillips, *Federalism in Campus Sexual Violence: How States Can Protect Their Students When a Trump Administration Will Not*, 29 YALE J. LAW & FEMINISM 373, 405-13 (2018).

23 AAUP Associate Secretary George Scholtz, Letter to Dep't of Education Assistant Secretary Russlynn Ali, June 27, 2011 (“Since charges of sexual harassment against faculty members often lead to disciplinary sanctions, including dismissal, a preponderance of the evidence standard could result in a faculty member's being dismissed for cause based on a lower standard of proof than what I consider necessary to protect academic freedom and tenure.”). The AAUP has generally taken the position that procedures for discipline and due process in sexual harassment (and sexual violence) cases should be the same as other kinds of faculty discipline cases. See AAUP Statement, *Campus Sexual Assault: Suggested Policies and Procedures* (2012), available at <http://aaup.org/report/campussexual-assault-suggested-policies-and-procedures>; AAUP, *The History, Uses and Abuses of Title IX*, *supra* note 8, 79, 93-95. See also AAUP Public Comments in Response to Dep't of Ed. Notice of Proposed Rulemaking 12 (Jan. 28, 2019), available at <https://www.aaup.org/sites/default/files/AAUP%20Comments-Title-IX-Regulations-28-January-2019-0.pdf>.

24 Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE, (Oct. 15, 2014), <https://perma.cc/BQ26-9W3A>; David Rudovsky et al., *Open Letter from Members of the Penn Law School Faculty*, WASH. POST, (Feb. 18, 2015), <https://perma.cc/XU47-RH7Y>.

25 Am. Trial Lawyers Ass'n, *New Standards for Campus Sexual Assault Investigations* 16-17 (March 2017), [http://www.thealiadviser.org/wp-content/uploads/2017/03/Task\\_Force\\_Allegations\\_of\\_Sexual\\_Violence\\_White\\_Paper\\_FINAL.pdf](http://www.thealiadviser.org/wp-content/uploads/2017/03/Task_Force_Allegations_of_Sexual_Violence_White_Paper_FINAL.pdf).

Women’s Law Center<sup>26</sup> and Faculty Against Rape.<sup>27</sup> Finally, when in September 2017 the U.S. Department of Education put out a call for public comments on Executive Order 13777 (establishing a federal policy to “alleviate unnecessary regulatory burdens”) most of the comments focused on Title IX because this was the same month that OCR rescinded the 2011 “Dear Colleague” letter and issued new interim guidance. Public comments that supported upholding the OCR Dear Colleague Letter outnumbered those urging the letter be rescinded by a ratio of 94-to-1 (11,528 versus 123).<sup>28</sup>

***B. The standard of evidence shapes rates of false positive and false negative errors; if more campuses adopt the C&C standard, a loss in overall accuracy of campus Title IX proceedings can be expected***

The executive summary to the DeVos/Trump proposed Title IX regulations states the overarching goal of “producing more reliable factual outcomes”<sup>29</sup> in campus Title IX cases, a theme repeated throughout the document. Accuracy should be a paramount consideration in the Title IX context, just as it is more generally.<sup>30</sup> However, the proposed standard of evidence regulation is pulling in the opposite direction and more likely than not it would result in a *net loss* in reliability of campus Title IX outcomes. For the reasons detailed below, the consensus view among evidence law scholars is that moving from the POE standard to the C&C standard has the foreseeable effect, other things being equal, of increasing false negative errors to a greater extent that it reduces false positive errors, thus eroding overall accuracy in Title IX outcomes.

In an American due process context, federal law generally recognizes a continuum with three standards of evidence, the “preponderance of evidence” (POE) standard (i.e., “more likely than not”), the intermediate “clear and convincing” (C&C) evidence standard and the criminal law “beyond a reasonable doubt”

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26 National Women’s Law Center, Letter to the OCR regarding Sexual Harassment and Violence (Nov. 2013), available at [https://nwlc.org/wp-content/uploads/2015/08/letter\\_to\\_ocr\\_re\\_sexual\\_harassment\\_and\\_violence.pdf](https://nwlc.org/wp-content/uploads/2015/08/letter_to_ocr_re_sexual_harassment_and_violence.pdf); see also National Women’s Law Center, Public Comments in Response to Title IX Notice of Public Rulemaking (Jan. 30, 2019), available at <https://nwlc-ci49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf>.

27 Faculty Against Rape, Open Letter of Concern Regarding AAUP’s Report on Title IX (April 2016), available at <https://docs.google.com/document/d/1yXsrWoVGqN725vepBZfemKuhbUzbgYiMo0ruX38qJjY/edit>.

28 Tiffany Buffkin et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education’s Executive Order 13777 Comment Call*, 9 CAL. L. REV. ONLINE 71 (2019), <http://www.californialawreview.org/wp-content/uploads/2019/03/Cantalupo-et-al.-Widely-Welcomed-71-102-1-1.pdf>. In this study if all the comments from individuals that had the same core language (i.e., cut-and-paste) were removed, then of the remaining 1,673 comments 92% supported Title IX and 8% did not.

29 83 Fed. Reg. at 61462.

30 Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 307-08 (1994) (“Accuracy is a central concern with regard to a wide range of legal rules. One might go so far as to say that a large portion of the rules of civil, criminal, and administrative procedure and rules of evidence involve an effort to strike a balance between accuracy and legal costs.”).

standard.<sup>31</sup> (The “substantial evidence” standard, a lower standard than POE, is often all that is required in legal challenges to school disciplinary proceedings, but is not discussed further in this article.<sup>32</sup>) At bottom, this continuum reflects differences in how risk should be allocated: in a criminal context there is a much higher societal interest in ensuring that innocent parties are not convicted and imprisoned, whereas in most civil litigation the opposing parties equally share the risk allocation inherent in an erroneous decision.<sup>33</sup> The C&C standard occupies an intermediate and quasi-criminal position in this continuum.<sup>34</sup>

Expressed as mathematical shorthand, these three standards of evidence are sometimes thought of as representing the following confidence thresholds<sup>35</sup>: POE is at least a 50.1% confidence level; C&C is at least a 67%-80% confidence level (the widest range of the three standards); and beyond a reasonable doubt is at least approximately a 95% confidence level.<sup>36</sup> In any adjudicative system there will be an inevitable tradeoff of risks with “false negative” (e.g., a college student or employee commits sexual assault but is found not responsible) and “false positive”

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31 *Addington v. Texas*, 441 U.S. 418, 432-33 (1979); *Mondaca-Vega v. Holder*, 718 F.3d 1075, 1082 (9<sup>th</sup> Cir. 2013).

32 See e.g., *Gomes v. Univ. of Maine System*, 365 F. Supp. 2d 6, 15-16 (D. Me. 2005). For an overview of “substantial evidence” in the context of Title IX and campus sexual misconduct, see, Lavinia M. Weizel, *The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 BOSTON COLL. L. REV. 1613, 1633-36 (2012). For this reason, as a factual point it is not accurate where Secretary DeVos characterizes the POE standard from the Obama era as the “lowest possible standard of evidence.” See OCR, Title IX Notice of Proposed Rulemaking, 83 Fed. Reg. at 61464.

33 *Addington*, 441 U.S. at 428 (“The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free.”)

34 Elisabeth Stoffelmayr & Shari Seidman Diamond, *The Conflict Between Precision and Flexibility in Explaining “Beyond a Reasonable Doubt,”* 6 PSYCHOL. PUBLIC POL’Y & L. 769, 775 (2000); Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 LAW & HUMAN BEHAV. 159, 174 (1985).

35 I say “shorthand” because there is a dense body of scholarship contesting the fit between probability and the burdens of proof, much of which is far beyond the scope of this short article. As one court cautiously noted, “The relationship between confidence levels and the more likely than not standard of proof is a very complex one . . . and in the absence of more education than can be found in this record, we decline to comment further on it.” *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 959 n.24. (3<sup>rd</sup> Cir. 1990). To get a flavor of this scholarship, see e.g., Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254, 1259-65. (2013); Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZONA L. REV. 557 (2013); KEVIN M. CLERMONT, STANDARDS OF DECISION IN LAW: PSYCHOLOGICAL AND LOGICAL BASES FOR THE STANDARD OF PROOF, HERE AND ABROAD (2013); John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569, 1579 n.45 (2015).

I also use the term “confidence threshold” because I think that is a narrower and more meaningful concept when discussing burdens of proof as compared to making a true probability statement. See Frederick Schauer & Richard Zeckhauser, *On the degree of confidence for adverse decisions*, 25 J. LEGAL STUDIES 27, 33-34 (1996).

36 See e.g., *Althen v. Sec’y of Dep’t of Health & Human Servs.*, 58 Fed. Cl. 270, 283 (2003); *Brown v. Bowen*, 847 F.2d 342, 345 (7<sup>th</sup> Cir. 1988); *United States v. Fatico*, 458 F. Supp. 388, 405 (E.D.N.Y. 1978); Dorothy K. Kagehiro, *Defining the standard of proof in jury instructions*, 1 PSYCHOL. SCI. 194, 195 (1990); Allen & Stein, *id.* at 566; Schauer & Zeckhauser, *id.* at 33-34.

(e.g., a college employee or student is found responsible for sexual harassment that he/she/they did not commit) cases. The standard of evidence is one factor shaping the ratio of false negative and false positive errors likely to occur in an adjudicative system<sup>37</sup>, and the standard of evidence also represents a societal legal-policy judgment about what tolerance level there *should be* for false negative and false positive errors, respectively.<sup>38</sup> Moreover, to the extent the standard of evidence is relevant to outcomes, it can also shape the rate at which acts of student and faculty sexual misconduct are reported into the campus Title IX office and end up in formal proceedings.<sup>39</sup>

The preponderance of evidence standard places an equal burden on all parties, and reflects a judgment that false negative errors—which in the Title IX context are errors where the harms are absorbed by current and future victims of sexual misconduct—are of equal social policy valence in relation to false positive errors.<sup>40</sup> By contrast, the criminal law standard of beyond a reasonable doubt reflects a longstanding principle that false positive errors (e.g., wrongful prison sentence for rape) should be minimized given the gravity/liberty deprivation of criminal punishment, even if it means that false negative errors increase – and indeed, even if it means tolerating a foreseeable increase in the *aggregate* number of errors in the adjudicative system overall.<sup>41</sup> Again, the quasi-criminal C&C standard lies between the POE and beyond a reasonable doubt standards along this continuum, but C&C still represents a considerable shift away from POE in terms of the expected ratio of false negative versus false positive errors.

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37 Michael L. DeKay, *The difference between Blackstone like error ratios and probabilistic standards of proof*, 21 L. & SOC. INQUIRY 95 (1996).

38 Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1066, 1074 (2015); Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 742-43 n.7 (2012).

39 Like other adjudication systems, campus Title IX systems are dynamic, and accountability outcomes have multiple feedback effects such as the prevalence rates of misconduct, the likelihood of formal complaints being lodged, likelihood of retaliation, and so on. See Nancy Chi Cantalupo & William C. Kidder, *Systematic Prevention of a Serial Problem: Sexual Harassment and Bridging Core Concepts of Bakke in the #MeToo Era*, 52 U.C. DAVIS L. REV. 2349, 2370-81 (2019) (the absence of serious sanctions for faculty sexual harassers is associated with a syndrome that undermines comprehensive prevention); Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 72 (2017) (“It is possible, therefore, that students disciplined for sexual assault are just as litigious as they were prior to the [2011] Dear Colleague Letter—there are simply more of them today. This is not because of problems that the Letter caused; rather, it is because of the problems it corrected.”).

40 *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (“Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless ‘particularly important individual interests or rights are at stake.’”); Mike Redmayne, *Standards of Proof in Civil Litigation*, 62 MOD. L. REV. 167, 171 (1999); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 827 (8th ed. 2011).

41 See e.g., Richard H. Fallon Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1706 (2008) (“[E]rrors that results in the conviction of the innocent are more morally disturbing than errors that result in acquittals of the guilty. In light of that assessment, we have adopted a system that minimizes the most morally grievous errors, even if that system leads to more of the less grievous errors, and indeed to more total errors, than would an alternative.”).

Importantly, there exists a consensus among evidence law scholars (including empirically-oriented ones, and including among evidence scholars who disagree with each other regarding important issues) that increasing the stringency of the standard of evidence (e.g., from POE to C&C) will tend to shift the expected ratio of false negative errors versus false positive errors and thereby *lower the overall accuracy* of outcomes in the system because the rise in false negative errors will eclipse the corresponding drop in false positive errors. The following quotes from scholars on the standard of evidence underscore this central point:

- Clermont (2009): “Instead, requiring high confidence will greatly increase the number of false negatives, even if that strategy limits false positives; actually, low confidence, as long as the found fact is more likely than not, will minimize the expected number of errors.”<sup>42</sup>
- Clermont (2018): “I accept the dominant view that the standards aim at the appropriate error distribution. In particular, the civil standard of preponderance aims at minimizing errors and error costs through the pursuit of accuracy.”<sup>43</sup>
- Sherwin (2002): “Under any standard of proof, there will be a certain number of inaccurate estimates of probability, wrongly placing the probability of the required fact on one or the other side of the prescribed line. Some of the erroneous estimates of probability under a clear and convincing standard—those that wrongly conclude that the required fact is highly probable when in actuality it is merely more probable than not—will now produce correct outcomes from the standpoint of truth. But the number of outcomes that fit this description will be overshadowed by the number of wrong outcomes that result from the skewed standard.”<sup>44</sup>
- Allen and Stein (2013): “The general proof requirement for civil cases—preponderance of the evidence—performs an important role in enforcing the law. Under certain conditions, this requirement allows courts to maximize the total number of correctly decided cases. When that happens, the number of decisions that miscategorize harmful conduct as beneficial, and vice versa, decreases as well.... Other standards of proof are not calibrated to achieve this accuracy—maximizing and welfare-improving consequence. This effect of the preponderance requirement is well recognized in the law and economics literature and has a simple formal proof.”<sup>45</sup>

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42 Kevin M. Clermont, *Standards of Proof Revisited*, 33 VT. L. REV. 469, 476 n.14 (2009).

43 Kevin M. Clermont, *Common Sense on Standards of Proof*, 48 SETON HALL L. REV. 1057, 1078-79 (2018).

44 Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 463 n.47 (2002). *See also id.* at 462-63 (“[A] clear and convincing evidence standard reduces the number of decisional outcomes that are correct in the sense that the court’s judgment reflects what actually happened in the world. A preponderance standard produces the greatest number of correct decisions, within the limits of the court’s factfinding abilities. In contrast, a clear and convincing standard forces courts to make a set of incorrect decisions that they would not make under a preponderance standard....”).

45 Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZONA L. REV. 557, 591 (2013).

- Pardo (2009): “[T]he ‘preponderance’ rule in civil cases expresses a choice to treat parties roughly equally with regard to the risk of error and to attempt to minimize total errors. The ‘beyond a reasonable doubt’ decision rule in criminal cases—and to a lesser extent the “clear and convincing” rule in civil cases—expresses a choice to allocate more of the risk of error (or expected losses) away from defendants.”<sup>46</sup>
- (Kaye 1999) “The use of the more-probable-than-not standard is but one of many legal policies or procedures designed to lower the risk of factually erroneous verdicts. [T]he more-probable-than-not rule in the two-party civil case minimizes the expected number of erroneous verdicts, and it has the advantage of doing so whether the percentage of meritorious claims is 0%, 100%, or anything in between. The  $p > \frac{1}{2}$  rule may not produce the minimum number of actual errors in any finite time period, but it is hard to know what rule would do better.”<sup>47</sup>

Some empirically oriented critics of the POE standard in a Title IX context concede the basic point about how the standard of evidence shapes the probability of false negative versus false positive errors,<sup>48</sup> while other critics of the POE standard simply assert *ipse dixit* (or assume away) that the standard of evidence does not implicate major policy concerns around false negative adjudications and the cumulative share of erroneous outcomes in the system.<sup>49</sup>

To the extent that the scholarly conclusions quoted above may clash with the views and intuitive beliefs of federal officials advancing the proposed Title IX regulations and other policymakers, the following diagram (Figure 1) is intended to show visually the empirical relationships and the consequences of shifting from the POE to the C&C standard of evidence in terms of false negative and

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46 Michael S. Pardo, *Second-Order Proof Rules*, 61 FLORIDA L. REV. 1083, 1084-85 (2009).

47 David H. Kaye, *Clarifying the Burden of Persuasion: What Bayesian Decision Rules Do and Do Not Do*, 3 INT’L J. EVIDENCE & PROOF 1, 27 (1999).

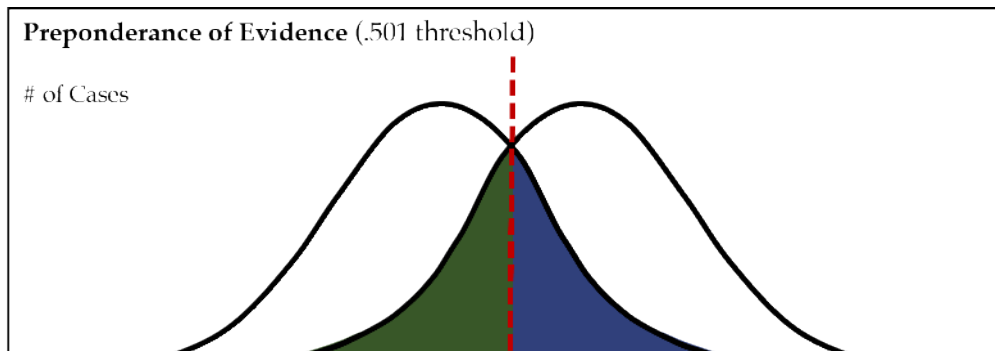
48 John Villasenor, *A Probabilistic Framework for Modelling False Title IX ‘Convictions’ Under the Preponderance of the Evidence Standard*, 15 LAW, PROBABILITY & RISK 223, 224 (2016) (“There is a trade-off between these two types of errors. If the burden of proof necessary to find a defendant guilty is very low, there will be an unacceptably high rate of innocent defendants being found guilty (i.e., too many type I errors). If the burden of proof is made higher, type I errors become less frequent but type II errors become more common.”) Note that Villasenor’s article focuses exclusively on modeling a set of simulations to explore possible scenarios of type I errors (false positive errors) in Title IX cases; his article does not attempt to evaluate the empirical tradeoff of false positive and false negative errors, the potential impact on cumulative errors, or scenarios of false negative Title IX outcomes.

49 In a recent piece in this journal, attorney Jim Newberry argued in favor of the C&C standard of evidence in Title IX adjudications, which renders problematic – for reasons detailed throughout this article – Newberry’s claim that “With the diminution of due process protections, the possibility of erroneous outcomes—false convictions—increases. Yet, this increased possibility of error has no corresponding benefit.” Jim Newberry, *After the Dear Colleague Letter: Developing Enhanced Due Process Protections for Title IX Sexual Assault Cases at Public Institutions*, 44 J.C. & U. L. 78, 83 (2018). See also Elizabeth Bartholet et al., *Fairness for All Students Under Title IX 4* (Aug. 2017), <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf?sequence=1> (“Dropping the preponderance standard into the severely skewed playing field of the new [Obama era] OCR-inspired procedures risks holding innocent students responsible.”).

false positive errors. Figure 1 is adapted from generic civil litigation models in the evidence law casebook by Allen, Swift, Schwartz, and Pardo.<sup>50</sup> The bell curve on the left side represents the cases that the accused should win and the bell curve on the right are the cases that the complainant/survivor should win. The vertical axis represents the number of cases and the horizontal axis represents the probability (or confidence level) factfinders would assign to a case (0% at far left to 100% at far right).

In Figure 2 the top panel shows the POE standard, with false negative errors (student is incorrectly found not responsible for Title IX violations) represented in the area with green/downward shading and the false positive errors (student is incorrectly found responsible for a Title IX violation) represented in the area with blue/upward shading. Note that in Figure 2 the two types of errors are roughly equal, which is how the POE standard is generally intended to function. In the bottom panel of Figure 2, holding other factors equal, the standard of evidence has been shifted to the more stringent C&C standard, with the result that false negative cases substantially increase and false positive cases substantially decrease. This is consistent with the intended purpose of the C&C standard<sup>51</sup> in certain “fundamental fairness” cases (discussed below in Section III.a) where one party faces a serious threat to liberty such as being deported by the federal government<sup>52</sup> or being involuntary committed to a psychiatric hospital indefinitely.<sup>53</sup>

**Figure 2: How a Higher Standard of Evidence can Shift the Ratio of Errors**

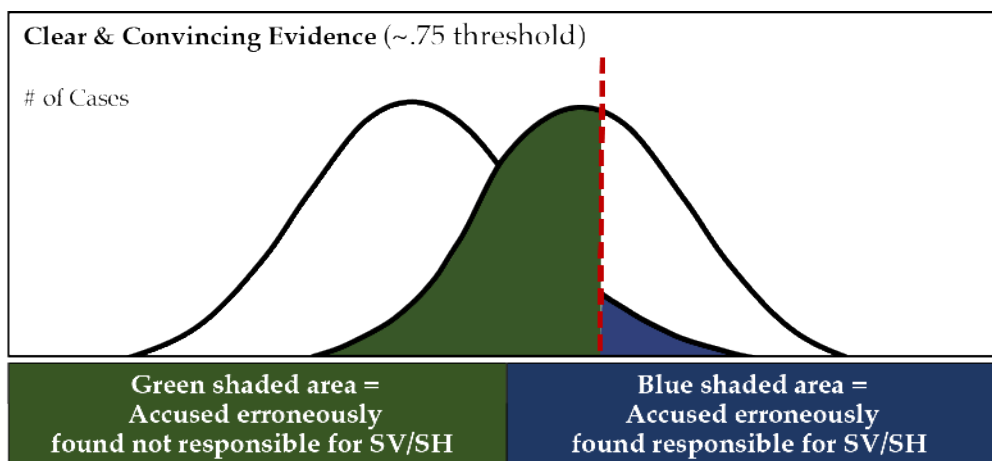


50 Adapted with permission of the authors of RONALD JAY ALLEN ET AL., AN ANALYTICAL APPROACH TO EVIDENCE: TEXT, PROBLEMS AND CASES 811-13 diagrams 10-2 & 10-3 (6<sup>th</sup> ed., 2016).

51 ALLEN ET AL., *id.* at 812.

52 *Woodby v. INS*, 385 U.S. 276 (1966).

53 *Addington*, 441 U.S. 418 (1979).



Adapted with permission from Allen et al., *An Analytical Approach to Evidence* (6<sup>th</sup> ed., 2016)

Figure 2 reflects a simplified model; in real life several other factors beyond the standard of evidence are also important to determining the ratio of false negative and false positive errors.<sup>54</sup> We would need to know, for example, the Title IX factfinders’ baseline error rates (including any systemic error patterns in one direction or another) and if there are “selection bias” factors leading the adjudicated cases to be atypical compared to the reported cases that do not go forward to the investigation stage.<sup>55</sup> For example, feminist legal scholars would have good cause to object that the rate of false reporting of campus sexual assault is, contrary to popular mythology, quite small (approximately 2–10%<sup>56</sup>), such that the Figure 2 POE model derived from general civil litigation patterns likely *overstates* the number of false positive cases and *understates* the number of false negative cases compared to a model with better Title IX verisimilitude.

Four decades ago, in *Addington v. Texas* (discussed *infra* Section III.a) the United States Supreme Court noted the dearth of “directly relevant empirical studies” addressing the practical impacts of juries/factfinders applying the C&C standard versus other standards (POE or beyond a reasonable doubt).<sup>57</sup> While the

54 ALLEN ET AL., *id.* at 812; DeKay, *supra* note 37, at *passim*.

55 For example, if weaker Title IX cases wash out because there is not enough information to investigate or because the complainant only wants to avoid further contact with the respondent, then it would not be an *a priori* policy concern or reflect pro-survivor bias if the cases making it past the investigation and hearing stage have rates of e.g., ~60% finding in favor of the complainant/survivor. Cf. Stanford University, 2017-18 Title IX/Sexual Harassment Annual Report 9 (Dec. 2018), <https://stanford.app.box.com/v/2017-18TitleIXSHPOReport> (19 of 32 cases with completed investigations resulted in a finding of a Title IX violation, but 41 other Title IX cases didn’t make it to this stage for a variety of reasons).

56 David Lisak et al., *False allegations of sexual assault: An analysis of ten years of reported cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010); Claire E. Ferguson & John M. Malouff, *Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates*, 45 ARCHIVES OF SEXUAL BEHAVIOR 1185 (2016); Dana A. Weiser, *Confronting Myths about Sexual Assault: A Feminist Analysis of the False Report Literature*, 66 FAMILY RELATIONS 46 (2017). To be clear, in Title IX cases where there are murky facts and conflicting recollections by the parties, a “false positive” outcome can result for reasons that extend beyond false reporting.

57 441 U.S. 418, 424 (1979).

situation is not totally dissimilar today, I am aware of one relevant and recent peer-reviewed empirical analysis by Kahn, Gupta-Kagan, and Hansen that reinforces my general point above distilled from several evidence law scholars. How social service agencies respond to reports of child abuse and neglect is one “natural experiment” area where there has been a shift in the (government’s) standard of evidence obligation from the POE standard to the C&C standard. Kahn et al. looked at data on nearly 8 million child abuse reports from 2000 to 2012 and found that after controlling for other factors, the shift to the C&C standard of evidence standard was associated with a lowering of the rate of substantiating child abuse by as much as 14 percent.<sup>58</sup> These data are consistent with the point above about a higher standard of evidence increasing the number of false negative errors, with parallel policy concerns about increased societal harms to victims of abuse.

### *C. The C&C standard is more confusing and difficult for factfinders to apply*

Amplifying the conclusion in the section above, and also relevant to the Department of Education’s stated overarching goal of “producing more reliable factual outcomes, with the goal of encouraging more students to turn to their schools for support in the wake of sexual harassment,”<sup>59</sup> are concerns about the reliability of the C&C standard itself. In both policy white papers and in correspondence with me, expert-level attorneys who conduct leading Title IX campus training programs confirm that the C&C standard is more difficult for factfinders to apply in the real world.<sup>60</sup> Similarly, some evidence scholars criticize the C&C standard as “unworkably vague.”<sup>61</sup>

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58 Nicholas E. Kahn et al., *The Standard of Proof in the Substantiation of Child Abuse and Neglect*, 14 J. EMPIRICAL LEGAL STUDIES 333, 356-57 (2017).

59 83 Fed. Reg. at 61462.

60 As noted by attorney and expert consultant Brett Sokolow:

Lastly, C&C is a nebulous standard that can be hard to explain, train on, and put into practice. We know that POTE is 50.01% and above, but what quantitative value of evidence does C&CE correspond to? 66%? 75%? What is clear to one person may not be so clear to another. What convinces me may not convince you, especially if the threshold is amorphous. It’s not an inherently unfair standard, but it will be more difficult for schools to provide satisfactory rationales as to how the standard was or was not reached.

See Brett Sokolow, *ATIXA Guide to Choosing between the Preponderance of the Evidence v. Clear and Convincing Evidence* 7 (Sept. 2017), <https://atixa.org/wordpress/wp-content/uploads/2017/09/ATIXA-Guide-to-Choosing-Between-Preponderance-of-the-Evidence-v.-Clear-and-Convincing-Evidence-9.22.17.pdf>.

Likewise, attorney Deborah Maddux of Van Dermyden Maddux Law Corporation and the T9 Mastered training program, confirmed with me her view that the C&C standard is more difficult for factfinders. (Maddux email, Jan. 2019).

61 Sherwin, *supra* note 44, at 462. See also Samir D. Parikh, *The Improper Application of the Clear and Convincing Standard of Proof: Are Bankruptcy Courts Distorting Accepted Risk Allocation Schemes*, 78 U. CIN. L. REV. 271, 280 (2009) (“The disadvantages of using this heightened [C&C] standard of proof are similar to those found in using the beyond-a-reasonable-doubt standard; namely, the risk of incorrect judgments increases. Further, due to the vagaries of its definition, application of the standard may unnecessarily inject confusion into the judicial system, which can only further erode confidence and increase the risk of incorrect judgments.”)

This concern about the C&C standard by Title IX experts is reinforced by broader social science and mock jury research indicating that the C&C standard can be more confusing for jurors and factfinders to operationalize relative to the POE and reasonable doubt standards:

- Stoffelmayr and Diamond, in summarizing the research literature including an important set of experimental studies by Kagehiro and Stanton,<sup>62</sup> conclude: “Empirical research indicates that jurors may have some difficulty distinguishing the clear and convincing standard of proof.”<sup>63</sup>
- In the area of mock jury research on rape cases, a widely-cited early study at the London School of Economics found that with community members it was even more difficult to “convict” under the C&C standard than under the reasonable doubt standard.<sup>64</sup>

The above point is relevant to ED’s stated goal of promoting reliability in Title IX proceedings and it cuts into OCR’s estimated monetary cost savings.

***D. A loss in accuracy associated with a shift to the C&C standard has human and economic costs, including increased difficulties addressing serial sexual misconduct and serial harassment***

It will be important as part of the OCR rulemaking process to soberly analyze how the proposed standard of evidence regulation in campus Title IX proceedings is likely to influence the ratio of false positive and false negative errors and the corresponding impact on the cumulative accuracy level of campus adjudications of sexual assault and sexual harassment (see Section I.b above). This is particularly so given the Department of Education’s stated overarching goal with the proposed Title IX regulations of “producing more reliable factual outcomes, with the goal of encouraging more students to turn to their schools for support in the wake of sexual harassment.”<sup>65</sup> A lower increment of accuracy in campus Title IX adjudications is of great human and economic concern in and of itself.

Moreover, for campuses that would shift to the more stringent C&C standard of evidence for Title IX, the decrease in cumulative accuracy of adjudications means that there will be a substantial corollary risk of making it more difficult at the aggregate level to hold to account those students, faculty and staff who are engaged in serial sexual misconduct/harassment. This policy concern is magnified by the large body of social science studies showing disconcerting rates of recidivist sexual misconduct among subsets of abusive college men:

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62 Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 L. & HUMAN BEHAV. 159 (1985).

63 Stoffelmayr & Diamond, *supra* note 34, at 774.

64 London Sch. of Econ., *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208, 210-11 (1973); see also Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt about Reasonable Doubt*, 78 TEX. L. REV. 105 (1999) (discussing the *London School of Economics* study). This study was briefly noted by the Supreme Court in *Addington*, 441 U.S. at 424 n.3.

65 83 Fed. Reg. at 61462.

- Zinzow (2015) looked at levels of repeat offending among college men and found that 68% of the men who reported committing at least one act of “sexual coercion and assault<sup>66</sup> were repeat offenders.<sup>67</sup> Within that 68% figure, 42% reported committing two instances of sexual coercion and assault, 22% offended three times, 14% offended four times and 23% offended five or more times.<sup>68</sup> Repeat offenders were more likely than single-time offenders to engage in sexual coercion and assault of higher severity.<sup>69</sup>
- Looking specifically at college campus rape, even the Swartout et al. (2015) research team—which is most associated with a cautionary approach warning against overstating “serial rapist” rates—found with a sexual experiences survey of college students that among male college students who reported perpetrating at least one rape, 27% reported they committed rapes across multiple academic years.<sup>70</sup> This is likely a conservative estimate because students who may have committed several rapes within the same academic year are effectively counted the same as a student who committed a single rape, and attempted rapes are not included.
- Toward the higher end of the spectrum of recidivism research, an influential study by Lisak and Miller (2002) found in surveying college men that of those who reported committing rape, 63% committed multiple rapes/attempted rates, with individuals in this group each committing an average of 5.8 rapes/attempted rapes.<sup>71</sup>

Other studies and meta-analytic reviews of available research on sexual assault show a range of results depending on methodological details and populations of study, but nonetheless with rates of sexual misconduct recidivism<sup>72</sup> high enough

66 This was defined as “unwanted sexual contact, sexual coercion, attempted rape, or completed rape.”

67 Heidi M. Zinzow, *A Longitudinal Study of Risk Factors for Repeated Sexual Coercion and Assault in US. College Men*, 44 ARCHIVES SEXUAL BEHAVIOR 213 (2015).

68 *Id.* at 217.

69 *Id.* at 218.

70 Kevin M. Swartout et al., *Trajectory analysis of the campus serial rapist assumption*, 169 JAMA PEDIATRICS 1148, 1152 tbl. 4 (2015). See also Kevin M. Swartout et al., *Trajectories of Male Sexual Aggression From Adolescence Through College: A Latent Class Growth Analysis*, 41 AGGRESSIVE BEHAVIOR 467, 472 (2015); Andra Teten Tharp, Kevin Swartout et al., *Key Findings: Rethinking Serial Perpetration* (2015), NSVRC policy brief, [https://www.nsvrc.org/sites/default/files/2017-06/publications\\_nsvrc\\_key-findings\\_rethinking-serial-perpetration\\_0.pdf](https://www.nsvrc.org/sites/default/files/2017-06/publications_nsvrc_key-findings_rethinking-serial-perpetration_0.pdf).

71 David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80 tbl.3 (2002).

72 See e.g., SARAH MICHAL GREATHOUSE ET AL., *A REVIEW OF THE LITERATURE ON SEXUAL ASSAULT PERPETRATOR CHARACTERISTICS AND BEHAVIORS* 14-15 (2015) Rand Corporation research report, [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1000/RR1082/RAND\\_RR1082.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1000/RR1082/RAND_RR1082.pdf) (reviewing studies of college sexual assault recidivism); R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: a Meta-Analysis of Recidivism Studies*, 73 J. CONSULTING & CLINICAL PSYCHOL. 1154 (2005); Christine A. Gidycz et al., *Reciprocal relationships among alcohol use, risk perception, and sexual victimization: A prospective analysis*, 56 J. AMERICAN COLLEGE HEALTH 5 (2007); Antonia Abbey & Pam McAuslan, *A longitudinal examination of male college students' perpetration of sexual assault*, 72 J. CONSULTING & CLINICAL PSYCHOL. 747 (2004); Gordon C. Nagayama Hall et al., *Initiation, Desistance, and Persistence of Men's Sexual Coercion*, 74 J. CONSULTING & CLINICAL PSYCHOL. 732, 732 (2006).

to justify the concern of policymakers and legal scholars.<sup>73</sup>

Just as with student peer-to-peer sexual assault, there are likewise concerns with respect to faculty-on-student sexual harassment recidivism at colleges and universities, such that –other things being equal, and across thousands of Title IX complaints that accrue over time—a shift to the more stringent C&C standard of evidence is apt to make it more difficult for colleges and universities to make findings of culpability for sexual harassment. For example, in my recent study with professor Cantalupo we looked at more than three hundred actual U.S. faculty sexual harasser cases and found that 53% (161/304) involved allegations that accused professors engaged in patterns of serial sexual harassment with multiple victims (mostly student victims).<sup>74</sup> This was not a random sample and may contain a higher share of more serious cases, but it was the largest study of its kind focused on faculty specifically, and we found disconcerting levels of serial harassment in three separate data sources: 1) among 219 cases reported in the media, 47% of faculty-on-student harassment involved serial harassment allegations; 2) among 57 Title IX enforcement actions that were a combination of victim lawsuits and OCR complaint resolutions, 60% involved serial harassment allegations; and 3) among 28 cases involving faculty fired for sexual harassment who then litigated their terminations, 86% involved serial harassment allegations by the faculty member.<sup>75</sup>

The National Academies of Sciences’ recent committee report on the *sexual harassment of women* recommended that “serial perpetrators probably should be addressed through formal channels” rather than alternative channels like restorative justice.<sup>76</sup> Moreover, the concern about the deleterious impact of the more stringent C&C standard of evidence in campus sexual harassment cases is reinforced by broader employment sector studies, such as Lucero et al.’s study of arbitration decisions finding that sexual harassers who had been disciplined in the past “demonstrated less severe current harassment than did those who had not been disciplined in the past.”<sup>77</sup>

## II. Different Posture of Faculty Title IX Cases

To foreground the further discussion below about the standard of evidence, it is necessary to situate contextual and legal differences in campus Title IX cases where the respondent/accused is a student versus a (tenure-track) faculty member. Decisions about tenure at a university represent “a defining act of

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73 Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICHIGAN L. REV. 145 (2012); Kerri Lynn Stone, *License to Harass: Holding Defendants Accountable for Retaining Recidivist Harassers*, 41 AKRON LAW REV. 1059 (2008).

74 Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 744 fig. 5B (2018), available at [ssrn.com](http://ssrn.com).

75 *Id.* at 743-44.

76 NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, *SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE* 142 (June 2018).

77 Margaret A. Lucero et al., *Sexual Harassers: Behaviors, Motives, and Change Over Time*, 55 SEX ROLES, 331, 339 (2006); see also Margaret A. Lucero et al., *An Empirical Investigation of Sexual Harassers: Toward a Perpetrator Typology*, 56 HUMAN REL. 1461, 1470 (2003).

singular importance<sup>78</sup> and given the institution of tenure, such faculty hiring and tenure choices are fateful decisions with enormous long-term consequences for the life of a university and its academic community.<sup>79</sup> The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution protects against deprivations of property or liberty interests through state action without due process of law.<sup>80</sup> Since the germinal cases of *Board of Regents v. Roth*<sup>81</sup> and *Perry v. Sindermann*,<sup>82</sup> courts recognize a tenured faculty member's property rights, and for that reason faculty possess associated procedural due process rights connected to their expectations of continued employment at their college or university.<sup>83</sup> Liberty interests are relevant too because sexual harassment falls within the rubric of "moral turpitude" under legal standards<sup>84</sup> (and academic norms/AAUP policies<sup>85</sup>) so as to implicate risks of stigmatic harm for a falsely accused/sanctioned faculty member.<sup>86</sup>

*Roth*, *Perry* and related constitutional cases apply to public universities and colleges (i.e., state actors),<sup>87</sup> but the situation at private colleges and universities is largely similar because employment contracts are enforceable under state law, colleges adopt policy statements designed to be consistent with broader academic norms and standards, and many state laws are applicable at private institutions.<sup>88</sup> As explained in *Cleveland Board of Education v. Loudermill* in the context of pre-termination hearing requirements: "The tenured public employee is entitled to

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78 *Scharf v. Regents of the Univ. of California*, 234 Cal. App. 3d 1393, 1405 (1991).

79 WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* chapters 6-7 (5th ed. 2013) (discussing tenure cases); Ralph S. Brown & Jordan E. Kurland, *Academic Tenure and Academic Freedom*, 53 L. & CONTEMP. PROB. 325 (1990); Mary Ann Connell & Barbara A. Lee, *Faculty Concerns: Academic Tenure* (NACUA outline, June 2015).

80 See e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("The Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures.").

81 408 U.S. 564 (1972).

82 408 U.S. 593 (1972).

83 See e.g., *Collins v. University of New Hampshire*, 746 F. Supp. 2d 358, 368 (D.N.H. 2010); *Cotnoir v. University of Maine*, 35 F.3d 6, 10 (1st Cir. 1994); *McDaniels v. Flick*, 59 F.3d 446, 454 (3d Cir. 1995).

84 *Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504 (10th Cir. 1998) (fired professor's sexual harassment of a student constituted grounds for termination for "moral turpitude" consistent with the faculty handbook).

85 Gregory M. Saltzman, *Dismissals, Layoffs, and Tenure Denials in Colleges and Universities*, NEA ALMANAC OF HIGHER EDUC. 51, 60 (2008) ("Grounds for moral turpitude charges include sexual harassment, fraudulent research, plagiarism, and theft of college funds."); AAUP Recommended Institutional Regulations on Academic Freedom and Tenure (updated 2013).

86 *FDIC v. Henderson*, 940 F.2d 465, 477 (9th Cir. 1991) ("Only the stigma of dishonesty or moral turpitude gives rise to a liberty interest; charges of incompetence do not.").

87 Michael J. Phillips, *The Substantive Due Process Rights of College and University Faculty*, 28 AM. BUS. L.J. 567, 575 n.41 (1991).

88 Donna R. Euben & Barbara A. Lee, *Faculty Discipline: Legal and Policy Issues in Dealing with Faculty Misconduct*, 32 J. C. & U. L. 241, 241-42 (2006); KAPLIN & LEE, *supra* note 79, at 659 ("The rights of faculty employed by private colleges and universities are governed primarily by state contract law and occasionally by state constitutions or statutes.").

oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."<sup>89</sup>

Shifting from legal standards to academic norms, AAUP standards for faculty discipline include the following key provisions:

AAUP policy encompasses the following components of academic due process: a statement of charges in reasonable particularity; opportunity for a hearing before a faculty hearing body; the right of counsel if desired; the right to present evidence and to cross-examine; record of the hearing; and opportunity to appeal to the governing board.<sup>90</sup>

While some courts apply bare minimum standards for procedural due process in faculty termination cases, most institutions maintain institutional policies that afford many to most (but not necessarily all) of the AAUP's recommended regulations.<sup>91</sup>

It is against this backdrop of tenure, property and liberty interests, and academic norms that the AAUP and affiliated scholars advocate for the C&C standard in faculty disciplinary proceedings.<sup>92</sup> Codification of this position appears (more or less) to originate with guidance in the AAUP's 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*.<sup>93</sup> Importantly, the preface of this AAUP document explains: "The exact procedural standards here set forth, however, 'are not intended to establish a norm in the same manner as the 1940 Statement of Principles on Academic Freedom and Tenure, but are presented rather as a guide.'"<sup>94</sup> The AAUP's recommended regulations likewise call for C&C as the standard of evidence in faculty dismissal hearings.<sup>95</sup>

Many universities have adopted language in their faculty handbooks (often in connection with collective bargaining) and policies requiring the C&C standard

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89 470 U.S. at 546.

90 Donna Euben (former AAUP Counsel), *Termination & Discipline* 11 (2004), available at [https://www.aaup.org/file/Termination\\_Discipline\\_2004.pdf](https://www.aaup.org/file/Termination_Discipline_2004.pdf). See also STEVEN G. POSKANZER, *HIGHER EDUCATION LAW – THE FACULTY* 245 (2002).

91 KAPLIN & LEE, *supra* note 79, at 615-22.

92 *Infra* Section I; see also ROBERT M. O'NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD* 27 (2008) ("Persistent harassment, abuse, or exploitation of a student, especially within the professor-student relationship, would also rise or fall to the level of potentially dismissible conduct—subject, of course, in any such case to clear and convincing proof at a hearing where the administration bears the burden of proof before a committee of faculty peers, where the accused may bring an attorney, and where an adverse judgment is ultimately reviewable by the governing board.")

93 Am. Ass'n Univ. Professors, 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings* (1958, rev. 1989-90), <https://www.aaup.org/report/statement-procedural-standards-faculty-dismissal-proceedings>. See also Euben, *supra* note 90, at 11 (noting role of the 1958 AAUP statement in faculty handbooks, but not commenting on C&C specifically).

94 *Id.* at 1.

95 AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure*, Section 5(c)(8) (rev. 2018), available at <https://www.aaup.org/report/recommended-institutional-regulations-academic-freedom-and-tenure>

in faculty discipline proceedings, but other colleges have not.<sup>96</sup> One “in between” example illustrating the ebb and flow in this policy area is the University of California, which adopted a faculty code of conduct in 1971,<sup>97</sup> but that first specified the C&C standard for faculty disciplinary hearings in a Senate bylaw thirty years later in 2001.<sup>98</sup> Recently UC’s president asked the academic senate to revisit the POE versus C&C question, which was raised as a policy issue (without a finding of violation) in a February 2018 OCR compliance resolution regarding Title IX procedures at UC Berkeley.<sup>99</sup>

The upshot of all the points noted here in Section II is that while reasonable minds within the academy can disagree about whether as a policy preference faculty discipline hearings should employ the C&C standard, at bottom this is not a question with federal constitutional underpinnings.<sup>100</sup> This is a specific instance of the more general proposition that academic freedom is too often poorly understood,<sup>101</sup> with many in the academy conflating the narrower constitutional jurisprudence on academic freedom with the set of self-imposed professional norms and values around academic freedom that developed over many decades within U.S. universities.<sup>102</sup> Finally, in cases where a university has adopted as its own policy certain core AAUP tenets (e.g., the 1940 statement on principles of academic freedom and tenure) but has not specifically adopted other AAUP guidance about faculty disciplinary provisions such as the 1958 statement, courts reject efforts by faculty litigants to claim that provisions of the AAUP 1958 statement are legally enforceable.<sup>103</sup>

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96 Connecticut State University system, <http://www.csuaaup.org/wp-content/uploads/2013/09/AAUP-2007-2011ContractWithModificationsFINAL.pdf> (see page 113).

97 *The Faculty Code of Conduct as Approved by the Assembly of the Academic Senate*, UNIV. (OF CALIFORNIA) BULLETIN 154-56 (June 28, 1971).

98 UC Academic Senate Bylaw 336.D.8, as amended in 2001. See UC Committee on Privilege & Tenure report to the UC Academic Assembly 82, 88 (May 2001), <https://senate.universityofcalifornia.edu/files/assembly/may2001/may2001whole.pdf>. This policy change by the Academic Senate, after years of internal deliberation, stems from a 1997 UC task force report that originally was inclined toward a “strong probability” standard of proof but members worried that such a standard was less defined in the courts than the C&C standard. Other (out-voted) members of the task force recommended adoption of the POE standard. UC SENATE-ADMINISTRATION REPORT OF THE TASK FORCE ON DISCIPLINARY PROCEDURE 14-15 (1997).

99 Resolution agreement between OCR and UC Berkeley in Case No. 09-14-2232 (Feb. 2018), <http://compliance.response.berkeley.edu/pdf/Signed%20Resolution%20Agreement.pdf>

100 Reinforcing this point, recent articles and reports by AAUP affiliated authors advocate for the C&C standard but do not specifically cite cases showing that the POE standard is constitutionally infirm in a Title IX context. See Aaron Nisenson, *Constitutional Due Process and Title IX Investigation and Appeal Procedures at Colleges and Universities*, 120 PENN ST. L. REV. 963 (2016) (Nisenson is AAUP senior counsel, but writing in his individual capacity); AAUP, *The History, Uses and Abuses of Title IX*, *supra* note 8, at *passim*; note this report does cite dicta in *Doe v. Brandeis*, which is discussed below in Section III of this article, *infra*.

101 Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third ‘Essential freedom’*, 45 STAN. L. REV. 1835, 1835 (1993).

102 Michael H. LeRoy, *How Courts View Academic Freedom*, 42 J.C. & U.L. 1 (2016); Robert Post, *Discipline and Freedom in the Academy*, 65 ARK. L. REV. 203, 215 (2012). Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988).

103 *Murphy v. Duquesne University of the Holy Ghost* (2001) 777 A. 2d 418, 434-35 (Pa. 2001); *Skehan v. Bd. of Trustees*, 669 F.2d 142, 151-52 (3<sup>rd</sup> Cir. 1982); see also POSKANZER, *supra* note 90, at 239 (“As usual, the AAUP has its own rules on the proper procedures in disciplining faculty—which are only

### III. Analysis of Comparable Legal and Administrative Domains

In the Title IX college sexual violence context, those advocating for either the POE standard or the C&C standard make claims that directly invite the empirical analysis explored here in Section III. On the one hand, several feminist legal scholars supporting POE in student peer-to-peer Title IX cases note that calls to use the C&C standard and other heightened due process protections is selective and disproportionate relative to other areas of student discipline and civil rights law,<sup>104</sup> with Professor Brake concluding that (even before the rise of #MeToo) this “pitched debate” in fact “functions as a stalking horse” for deeper divisions in American society around sexual assault.<sup>105</sup> On the other hand, critics of the POE standard like Professor Rubenfeld claim that C&C should be the standard in campus Title IX matters by asserting that student sexual assault cases are analogous to the Court’s “fundamental fairness” group of C&C cases as well how other courts treat “quasi-criminal” proceedings and attorney disciplinary proceedings.<sup>106</sup>

Critics of the POE standard in Title IX campus cases do not cite case law that is on all fours, from either a student or faculty Title IX context or another (non-Title IX) faculty discipline context, to support the position that the C&C standard is legally required.<sup>107</sup> At the time of this writing, at best there is supportive dicta in the federal

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binding on colleges and universities that choose to follow them.”); *c.f. Korf v. Ball State University*, 726 F. 2d 1222, 1224-29 (7th Cir. 1984) (in faculty sexual misconduct termination case, approvingly citing the AAUP ethical principles where Ball State adopted these principles as part of its set of faculty policies).

104 Katherine K. Baker, Deborah L. Brake & Nancy Chi Cantalupo, et al., Title IX and the Preponderance of the Evidence: A White Paper, 5-6 (Aug. 2016, revised Dec. 2017), <http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf>; Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1986 (2016) (“[O]pponents argue that the preponderance of the evidence standard fails to protect students who are accused of sexual assault from false accusations. Again, these arguments are not unique to campus sexual misconduct. They could be lodged against applying the same standard of proof in campus adjudication of other misconduct, such as theft, fraud, embezzlement, or negligent homicide. That opponents have asserted an enthusiasm for a robust standard of proof only in cases of campus sexual assault is troubling. Again, it bespeaks a concern, not for due process on campus, but for those accused of sexual assault over those accused of other misconduct.”). See also Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 282, 290 (2016); Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence & Student Discipline in Education*, 54 WAKE FOREST L. REV. 101 (2019), <https://ssrn.com/abstract=3323432>.

105 Brake, *supra* note 9, at 110; Cantalupo, *Dog Whistles and Beachheads*, *id.* at passim.

106 Jed Rubenfeld, *Privatization, State Action, and Title IX: Do Campus Sexual Assault Hearings Violate Due Process?* 96 TEX. L. REV. 15, 60-61 (2017); Newberry, *supra* note 49, at 92-93 (approvingly referencing the arguments in Rubenfeld’s article). *But see* Tamara Rice Lave, *Ready, Fire, Aim: How Universities Are Failing the Constitution in Sexual Assault Cases*; 48 ARIZ. ST. L.J. 637, 693-94 (2016) (arguing for C&C but conceding that as a legal matter POE “is likely to be deemed constitutionally sufficient” in campus Title IX proceedings).

107 Rubenfeld, *id.* at 60-61; Stephen Henrick, *A Hostile Environment for Student Defendants: The IX and Sexual Assault on College Campuses*, 49 N. KY. L. REV. 40, 62-63 (2013) (this article also strains to portray a consensus around the C&C standard rather than acknowledging that most colleges, documented in surveys ~2011, were using the POE standard even before the new 2011 Dear Colleague letter).

district court case of *Doe v. Brandeis*,<sup>108</sup> dicta in a new federal unpublished case of *Lee v. University of New Mexico* (later removed in an amended order)<sup>109</sup> cited in the OCR notice of proposed rulemaking, and a brief (and factually inaccurate) reference to C&C in the dissenting opinion in the Fifth Circuit case of *Plummer v. University of Houston*.<sup>110</sup> The *Brandeis* case, which was cited in OCR's 2017 interim guidance, appears connected with the approach taken by the Trump administration OCR.

In my own recent study with professor Cantalupo we looked at hundreds of faculty sexual harasser cases at American colleges and universities, including almost thirty legal opinions where tenure-track faculty were fired (or claimed constructive termination, in a couple instances) for sexual misconduct and then brought legal challenges.<sup>111</sup> Faculty sexual harassers had a low win rate of 21% in challenging their terminations,<sup>112</sup> and most of these cases provide no commentary on the standard of evidence POE versus C&C question. I could not find in these

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108 In *Doe v. Brandeis University*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016), the district court denied the university's motion to dismiss a legal challenge from a respondent in a student-student Title IX case, and declared:

The standard of proof in sexual misconduct cases at Brandeis is proof by a "preponderance of the evidence." For virtually all other forms of alleged misconduct at Brandeis, the more demanding standard of proof by "clear and convincing evidence" is employed. The selection of a lower standard (presumably, at the insistence of the United States Department of Education) is not problematic, standing alone; that standard is commonly used in civil proceedings, even to decide matters of great importance. Here, however, the lowering of the standard appears to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove — and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct. The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused.

The court in *Brandeis* expressly did not reach the question of "how many procedural protections Brandeis could have removed and still provided 'basic fairness' to the accused — or whether any particular procedural protection was required under the circumstances of this case." *Id.* at 607.

109 *Lee v. University of New Mexico*, No. 1:17-cv-01230-JB-LF (D. N.M. Sept. 20, 2018), <https://www.thefire.org/lee-v-university-of-new-mexico/>. In this case the court granted several motions to dismiss but also opined "Moreover, the Court concludes that preponderance of the evidence is not the proper standard for disciplinary investigations such as the one that led to Lee's expulsion, given the significant consequences of having a permanent notation such as the one UNM placed on Lee's transcript." *Id.* at 3. The judge in this case did not cite any case law or other sources in support of this dictum. Importantly, eight months later Judge Browning issued an amended order in this case ([https://www.courtlistener.com/recap/gov.uscourts.nmd.378954/gov.uscourts.nmd.378954.53.0\\_1.pdf](https://www.courtlistener.com/recap/gov.uscourts.nmd.378954/gov.uscourts.nmd.378954.53.0_1.pdf)) in which the above-quoted sentence about the POE standard was removed from the opinion.

110 *Plummer v. University of Houston*, 860 F.3d 767, 783 (5th Cir. 2017) (Jones, J., dissenting) ("Elevating the standard of proof to clear and convincing, a rung below the criminal burden, would maximize the accuracy of factfinding.") This statement by Judge Edith Jones is fundamentally inaccurate for the reasons specified in Section I.b of this article. In short, increasing the standard of evidence places a greater value on the avoidance of "false positive" errors in adjudication, but it does so at the cost of lessening aggregate accuracy of factfinding due to the eclipsing effect of increases in "false negative" errors, in Title IX cases and otherwise. The alternative (but equally problematic) interpretation is that Judge Jones' dissenting opinion could reflect a *sub silentio* lack of regard for false negative errors in Title IX cases.

111 Cantalupo & Kidder, *supra* note 74, at 728-40.

112 *Id.* at 729-30 tbl.3 and 739.

cases instances where the C&C standard was found to be a necessary prerequisite for upholding due process, and there are a couple of cases where the standard of evidence was at issue and where the harassing professors' legal arguments about the C&C standard were unavailing.<sup>113</sup> Perhaps for reasons related to all of the above, some general counsel, faculty and associations advocating for greater faculty and/or student due process rights in Title IX adjudications acknowledge that the standard of evidence is not really the fundamental issue and that there are other more direct means of ensuring fairness, consistency and due process.<sup>114</sup>

In this section I hope to shed more light than heat on the POE versus C&C policy debate implicated by the Trump administration's proposed Title IX regulations by taking up college president Chodosh's call to engage in a deeper analysis of "transsubstantive consistency"<sup>115</sup> across Title IX and other disciplinary domains. The Supreme Court has never granted certiorari in a college faculty-on-student sexual harassment case,<sup>116</sup> much less opined on the standard of evidence in such cases, which reinforces the utility of looking to several other relevant legal and administrative domains as a means of evaluating the DeVos OCR's proposed regulation.

As summarized below in Figure 3, my analysis further below confirms that in the current landscape, the POE standard is used rather than the C&C evidence standard in a strong majority of analogous legal and administrative proceedings.<sup>117</sup>

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113 *Traster v. Ohio Northern University*, 2015 U.S. Dist. LEXIS 170190 \*4-24 (N.D. Ohio 2015), *aff'd* 685 F. App'x 405 (6<sup>th</sup> Cir. 2017)(rejecting professor's argument and finding that the POE standard for faculty discipline cases specified in the campus-wide faculty handbook is controlling over more vague references in the Law School's bylaws to the AAUP principles including the C&C standard of evidence); *Winter v. Penn. State University*, 172 F. Supp. 3d 756, 771-73 (M.D. Penn. 2016) (rejecting professor's claim of a substantive due process violation partly premised on the absence of C&C evidence).

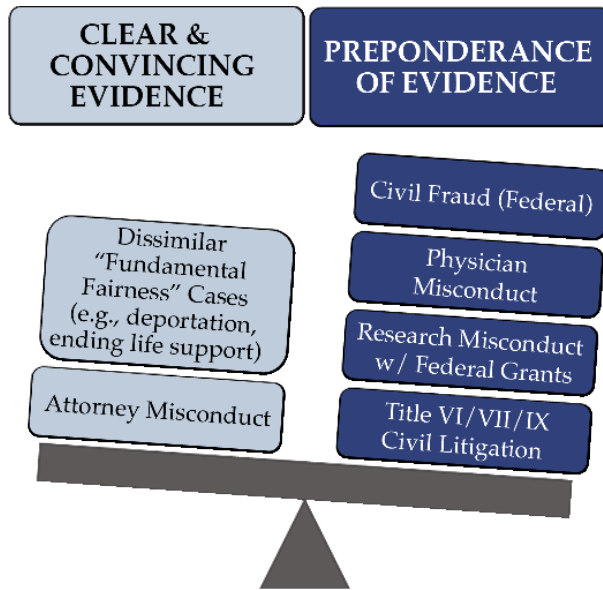
114 William E. Thro, *No Clash of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENT U. L. REV. 197, 209 (2015); ABA Criminal Justice Section's Task Force on College Due Process Rights and Victim Protection, Recommendations for Colleges and Universities Resolving Allegations of Campus Sexual Misconduct (June 2017), available at <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf> (ABA criminal law section report favors a more nuanced position emphasizing the quality of evidence rather than the burden of proof); Brian A. Pappas, *Abuse of Freedom: Balancing Quality and Efficiency in Faculty Title IX Processes*, 67 J. LEGAL EDUC. 802, 831 (2018) (observing that a campus should not raise the standard of evidence to C&C in Title IX cases as an indirect means of protecting faculty against other procedural irregularities)

115 Hiram E. Chodosh et al., *Safety and Freedom: Let's Get It Together*, 66 J. LEGAL EDUC. 702, 707 (2017) (asking about "transsubstantive consistency" in relation to Title IX sanctions and other conduct). See also Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 847 (2017) ("But the student discipline case law fits within a larger transsubstantive body of procedural due process law that recognizes that "fair" does not necessarily mean "criminal.").

116 Mark Littleton, *Sexual Harassment of Students by Faculty Members*, in ENCYCLOPEDIA OF LAW AND HIGHER EDUCATION 411, 412 (Charles J. Russo, Ed., 2010) ("To date, no case of sexual harassment of students by faculty members in colleges and universities has made its way to the U.S. Supreme Court.").

117 To varying degrees, many of the cases cited below reference the Court's balancing test in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), where the balancing factors are: 1) the interest affected by state action; 2) the risk of an erroneous deprivation; and 3) the government's interest.

Figure 3: Standard of Evidence Summary



**A. "Fundamental fairness" cases are distinguishable (C&C)**

The U.S. Supreme Court has repeatedly held that C&C evidence is necessary to protect "fundamental fairness" in a limited set of very high-stakes contexts that represent a powerful threat to liberty (or stigma) interests, including:

- parental rights termination proceedings<sup>118</sup>;
- involuntary civil (i.e., psychiatric) commitment for an indefinite period<sup>119</sup>;
- deportation proceedings<sup>120</sup>; and
- withdrawing medical life support for a patient in a persistent vegetative state.<sup>121</sup>

Here, the most salient analytical point is also the most obvious one: campus Title IX proceedings are simply very dissimilar from these four "fundamental fairness" areas where the U.S. Supreme Court requires the C&C standard of evidence because of the very high-stakes (in some cases life or death stakes) that strongly implicate liberty interests. As the Court declared a half-century ago in the deportation case of *Woodby v. INS*, "This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification."<sup>122</sup>

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118 *Santosky v. Kramer*, 455 U.S. 745 (1982).  
 119 *Addington v. Texas*, 441 U.S. 418 (1979).  
 120 *Woodby v. INS*, 385 U.S. 276 (1966).  
 121 *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).  
 122 385 U.S. at 285.

In the Title IX realm, expulsion from college or being fired from a job are the most severe consequences (and in the aggregate these outcomes only occur in a modest minority of all cases). In *Addington v. Texas*, the Court endorsed the C&C standard as constitutionally necessary – when the state decides to involuntarily commit to a state mental hospital individuals who due to mental illness are not able to care for themselves – in part based on the following balance of considerations:

The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual’s interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.<sup>123</sup>

In *Santosky* the Court reached a similar conclusion in declaring that “at a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable.”<sup>124</sup> And in the medical life support cessation case of *Cruzan*, the Court’s endorsement of the C&C standard was animated by the stark asymmetry and finality of the risks involved:

An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient’s intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.<sup>125</sup>

By contrast, in campus Title IX proceedings there is typically a complainant (or multiple complainants) who alleges that she/he/they has been harmed by the actions of the respondent(s). A longstanding principle that pre-dates the Obama and Trump eras at OCR is that Title IX complainants and respondents should be accorded equal rights, including equal due process rights.<sup>126</sup> Supporting use of the POE standard is the fact that, as described earlier in Section I.b, Title IX complainants who encounters a “false negative” campus decision incurs substantial risk with real consequences for their education and/or employment

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123 441 U.S. at 427; *Santosky*, 455 U.S. at 768 (quoting this same passage in *Addington*).

124 455 U.S. at 768.

125 497 U.S. at 283.

126 U.S. Dep’t of Educ. OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 22 (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (“The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding.... Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions.”). See also Baker et al., Preponderance White Paper, *supra* note 104, at 7.

at the university,<sup>127</sup> just as a respondents who encounter a “false positive” campus finding risks serious negative educational and/or employment consequences at the university.<sup>128</sup> Undergirding this logic of treating complainants and respondents equally with the POE standard of evidence is the core purpose of Title IX being about “protecting’ individuals from discriminatory practices carried out by recipients of federal funds.”<sup>129</sup>

Organizations like FIRE often cite *Addington* and *Santosky* in favor of the C&C standard in campus Title IX matters,<sup>130</sup> but gloss over the aforementioned important distinctions about when “fundamental fairness” conditions do and do not apply compared to the far more prevalent POE standard. Here, FIRE’s arguments are essentially political rather than doctrinal in nature, and involve a problematic reliance on “criminal law exceptionalism” and doctrinal sleight-of-hand.<sup>131</sup> For

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127 Brake, *supra* note 9, at 113 (“The educational harms make campus sexual assault an issue that implicates not just the interests criminal law is designed to vindicate—deterrence and punishment of transgressions against society—but a civil rights violation that denies survivors of sexual assault equal educational opportunities”); Cantalupo, *Dog Whistles and Beachheads*, *supra* note 104, at 130-34.

128 The NASPA/United Educators’ report in 2000 detailing a model student code of conduct articulated this equality principle as follows:

Although this principle may seem obvious, it merits repeating. For example, when a situation involves a fight, a sexual assault, or other student-on-student violence, this principle helps us to remember that student victims are just as important as the student who allegedly misbehaved. Dedication to treating each student with equal care, concern, dignity, and fairness creates a far different system than a criminal system in which the rights of a person facing jail time are superior to those of a crime victim. By contrast, under the academic discipline system, the misbehaving student, any victims, and their fellow students each have equally important interests that the discipline process takes into account in order to reach a fair resolution.

Edward N. Stoner II et al., *Reviewing Your Student Discipline Policy: A Project Worth the Investment* 7 (2000), <https://files.eric.ed.gov/fulltext/ED444074.pdf>. See also Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 517 (2012) (“[A] preponderance standard is appropriate under *Mathews* because it is the fairest allocation of power in the special context of sexual assault. A preponderance standard recognizes that the campus adjudicatory system is distinct from the criminal law context and acknowledges that the institution has competing obligations to the victim and to the accused.”). Attorney Wendy Murphy, who has filed multiple Title IX complaints against Harvard, stated wryly that the university’s previous use of the C&C standard of evidence sent a discouraging message to those making a Title IX complaints: “[W]e do believe you—we just don’t believe you that much.” Rebecca Robbins, *Harvard’s Sexual Assault Policy Under Pressure*, HARV. CRIMSON, May 11, 2012 (quoting Wendy Murphy), available at <https://www.thecrimson.com/article/2012/5/11/harvard-sexual-assault-policy/>.

129 *Gebser*, 524 U.S. at 287; *Cannon v. Univ. of Chicago*, 414 U.S. 677, 704 (1979).

130 FIRE letter to OCR Ass’t Secretary for Civil Rights, May 5, 2011, <https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/>; FIRE Newsdesk, Jan. 24, 2019, <https://www.thefire.org/problematic-campus-sexual-misconduct-bill-introduced-in-new-mexico/>.

131 These infirmities are adeptly identified in Brodsky, *A Rising Tide*, *supra* note 115, at 845-47: The *Addington* holding does not help opponents of the preponderance in student discipline. However grave a deprivation suspension or expulsion may be, removal from school does not rival forcible imprisonment, even if the imprisonment is technically not punitive.... In truth, FIRE’s strategy depends not on legal reasoning but on the reader’s intuition toward rape exceptionalism. Repeatedly, the letter cites to *Addington* dicta, noting that in state courts that the standard may be employed “in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.”.... Despite its flimsiness, FIRE’s legal argument is politically effective because

example, in contrast to the fundamental fairness cases, where the government has the burden to show that a citizen voluntarily expatriated to another country, there is a different (but still serious) balance of liberty than involuntary deportation cases, and so the POE standard is all that is required in expatriation cases.<sup>132</sup> Even in a criminal context, the POE standard is applied in a number of high-stakes contexts, including enforcement of a guilty plea agreement or the federal government showing that the terms of a plea agreement have been violated (e.g., an example in the news is Paul Manafort, who added many years to his prison term).<sup>133</sup>

## **B. POE is used in civil rights litigation and administrative proceedings as well as in OCR's case processing manual**

The preponderance of evidence standard is consistently used in litigation to adjudicate civil rights statutes, including Title IX, Title VI (prohibiting race discrimination in education) and Title VII (prohibiting discrimination in employment).<sup>134</sup> In responding to criticism of POE by the libertarian organization FIRE (Foundation for Individual Rights in Education), the Obama era OCR cited a significant number of cases using the POE, including in civil rape/sexual assault litigation, Title VII and other contexts.<sup>135</sup>

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the “quasi-criminal” label appeals to readers’ rape-exceptionalist instincts, disconnected from the term’s technical meaning....FIRE’s reliance on the “quasi-criminal” mislabel ... harness[es] rape exceptionalism to project criminal stakes onto school disciplinary proceedings and then demand criminal-like protections.

More generally, see Nancy Chi Cantalupo, *Decriminalizing Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 483 (2012).

132 *Vance v. Terrazas*, 444 US 252, 262-67 (1980).

133 *Burke v. Johnson*, 167 F.3d 276 (6th Cir. 1999) (affirming dismissal of § 1983 action against police under POE standard of evidence, which demonstrated that oral plea agreement was entered into voluntarily and defendant was represented by experienced counsel who apprised defendant of the consequences of entering into such a plea); Elliot Hannon, *Federal Judge Rules Manafort Breached Plea Deal by Lying to Special Counsel About Russia Contacts*, Slate.com, Feb. 13, 2019 (reporting the federal district court judge’s ruling: “OSC [Office of the Special Counsel] has established by a preponderance of the evidence that defendant intentionally made false statements to the FBI, the OSC, and the grand jury concerning the payment by Firm A to the law firm, a matter that was material to the investigation.”).

134 *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (“A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence.”); *Desert Palace v. Costa*, 539 U.S. 90, 99 (2003) (POE in Title VII); *Williams ex. rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 363 (6th Cir. 2005) (school district “may be liable for the sexual abuse of a student if the [p]laintiff demonstrates by a preponderance of the evidence...”); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 360 (3d Cir. 2005) (Plaintiff “has the burden of proving by a preponderance of the evidence that a school official with the power to take action to correct the discrimination had actual notice of the discrimination”). See also cases collected in Baker et al., Preponderance of the Evidence White Paper, *supra* note 104, at 4; Sokolow, ATIXA Guide, *supra* note 60.

135 *Jordan v. McKenna*, 573 So. 2d 1371, 1376 (Miss. 1990) (POE is plaintiff’s burden in civil action for rape); *Dean v. Raplee*, 39 N.E. 952, 954 (N.Y. 1885) (POE in civil case alleging sexual assault); *Ashmore v. Hilton* 834 So.2d 1131, 1134 (La. Ct. App. 2002) (POE in civil rape case). These and other cases are cited in letter from Catherine E. Lhamon, Assistant Secretary for Civil Rights, Department of Education, to Senator James Lankford, Chairman, Subcommittee on Regulatory Affairs and Federal Management at 4 n.18 (Feb. 17, 2016), <https://www.lankford.senate.gov/imo/media/doc/>

And most of the time, faculty (or students) found to have been responsible for sexual harassment through a campus Title IX process can subsequently bring a legal challenge alleging an erroneous outcome or related discrimination or due process claims that will be subject to the very same preponderance of evidence standard.<sup>136</sup> This sets the stage for an uncomfortable inconsistency vis-à-vis post-campus litigation that arises out of faculty and student sexual misconduct cases.

Finally, the U.S. Department of Education OCR's *Case Processing Manual* used in Title IX, Title VI and related civil rights enforcement investigations directs that OCR investigators are to apply the POE in determining both when colleges and K-12 schools are noncompliant and when there is insufficient evidence to make such a determination.<sup>137</sup> The most recent update to OCR's *Manual* was issued three days after OCR released its new proposed Title IX regulations, and OCR has always applied the POE in previous versions as best I can determine.<sup>138</sup> Of course, student complainants and respondents in Title IX complaints are not "parties" in OCR compliance investigations, but the example of the OCR *Case Manual* is still relevant because students' rights and dignity interests are implicated in OCR reviews in a mediated way.<sup>139</sup> Similarly, the EPA's External Civil Rights Compliance Office likewise applies the POE standard in its *case resolution manual*.<sup>140</sup> The U.S.

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DEPT.%20of%20EDUCATION%20LANKFORD%20LETTER%202-17-16.pdf; and Letter from Dep't of Educ. Acting Asst. Sec. Seth Galanter to FIRE, Aug. 23, 2013, <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20130823-harassment-due-process.pdf>.

136 *Wexley v. Michigan State Univ.* 821 F. Supp. 479, 484-85 (W.D. Mich. 1993), *aff'd* 25 F.3d 1052 (6th Cir. 1994) (tenured professor fired for sexually harassing students, then brought discrimination litigation under the preponderance of evidence standard); *Young v. Plymouth State College*, No. 96-75-JD, 1999 WL 813887 at \*12-\*14 (D. N.H. Sept. 21, 1999) (granting summary judgment to college on most claims, but allowing a professor fired for sexual harassment to bring a claim for defamation and invasion of privacy under the preponderance of evidence standard); *Kumar v. George Washington University*, 174 F.Supp.3d 172 (D.D.C. 2016) (professor found to have committed research misconduct challenged university's decision as not having met the preponderance of evidence standard, and survived the university's motion to dismiss); *Mawson v. University of Mississippi Medical Center*, 2012 WL 6649323 (S.D. Miss. 2012) (faculty member fired for non-sexual harassment, brought breach of contract challenge under the preponderance of evidence standard); *C.f.* Baker et al., Preponderance of the Evidence White Paper, *supra* note 104, at 5-6 (citing several respondent-student sexual violence cases brought under the preponderance of evidence standard).

137 U.S. Dep't of Educ OCR, Case Processing Manual §303 (Nov. 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

138 U.S. Dep't of Educ. OCR, Case Processing Manual §303 (Feb. 2015); U.S. Dep't of Educ OCR, Case Processing Manual §303 (May 2008); *cf.* U.S. Dep't of Housing, Education and Welfare – Nat'l Advisory Council on Women's Educational Programs, A Report on the Sexual Harassment of Students part II p.20 (1980), <https://files.eric.ed.gov/fulltext/ED197242.pdf> ("On the question of proof that a charge is valid, however, the distinctions between Titles VII and IX appear to have little bearing. Administrative processes generally require a lesser standard of proof at the stage of initial findings, but the proof requirement for actual enforcement under Title IX would be a preponderance of evidence, as with Title VII.")

139 Karen M. Tani, *An Administrative Right to be Free from Sexual Violence?: Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1884-89 (2017).

140 EPA External Civil Rights Compliance Office, Case Resolution Manual 28 (2017), [https://www.epa.gov/sites/production/files/2017-01/Documents/final\\_epa\\_ogc\\_eccrco\\_crm\\_january\\_11\\_2017.pdf](https://www.epa.gov/sites/production/files/2017-01/Documents/final_epa_ogc_eccrco_crm_january_11_2017.pdf).

Department of Agriculture applies the POE standard in e.g., large-scale arbitrations to address discrimination complaints from farmers,<sup>141</sup> and so on.

### **C. POE is required in federal research misconduct cases linked to federal grants; the proposed Title IX regulation sets up inter-agency contradiction in regulations covering faculty misconduct**

One important but thus far underappreciated domain for comparison with Title IX is the analogous question of what standards govern the handling of faculty research misconduct cases tied to federally funded research grants. The federal government has for two decades formally required use of the POE standard. As explained by the federal government in the December 2000 final notification concluding the public notice-and-comment period:

*Shouldn't the burden of proof be more stringent, e.g., require "clear and convincing evidence" to support a finding of research misconduct? While much is at stake for a researcher accused of research misconduct, even more is at stake for the public when a researcher commits research misconduct. Since 'preponderance of the evidence' is the uniform standard of proof for establishing culpability in most civil fraud cases and many federal administrative proceedings, including debarment, there is no basis for raising the bar for proof in misconduct cases which have such a potentially broad public impact. It is recognized that non-Federal research institutions have the discretion to apply a higher standard of proof in their internal misconduct proceedings. However, when their standard differs from that of the Federal government, research institutions must report their findings to the appropriate Federal agency under the applicable Federal government standard, i.e., preponderance.*<sup>142</sup>

In research misconduct cases the preponderance of evidence standard is codified in federal regulations, including at the Department of Health and Human Services (HHS),<sup>143</sup> the National Science Foundation,<sup>144</sup> and the U.S. Department of Agriculture.<sup>145</sup> Prior to the formal codification of this research misconduct

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141 Stephen. Carpenter, *The USDA Discrimination cases: Pigford, in re Black farmers, Keepseagle, Garcia, and Love*, 17 DRAKE J. AGRICULTURAL L. 1, 20, 25, 31 (2012), <http://aglawjournal.wp.drake.edu/past-issues/volume-17/> (in addition to class action litigation, this article notes that the POE standard also applies in several USDA arbitrations with farmers alleging discrimination).

142 U.S. Office of Science and Technology Policy, Notification of Final Policy re Federal Policy on Research Misconduct, 65 Fed. Reg. 76260, 76262 (December 6, 2000) <https://www.gpo.gov/fdsys/pkg/FR-2000-12-06/pdf/00-30852.pdf>. See also <https://ori.hhs.gov/federal-research-misconduct-policy>

143 Requirements for Findings of Research Misconduct, 42 C.F.R. § 93.104 (2016) ("A finding of research misconduct made under this part requires that ...(c) The allegation be proven by a preponderance of the evidence."). The National Institutes of Health (NIH) is one of the large research funding agencies included within these HHS regulations. See NIH Statement on Research Integrity, available at [https://grants.nih.gov/grants/research\\_integrity/research\\_misconduct.htm](https://grants.nih.gov/grants/research_integrity/research_misconduct.htm).

144 45 C.F.R. § 689.3 (2016).

145 USDA, Departmental Regulation # DR1074-001 (scientific integrity) (Nov. 2016), <https://www.ocio.usda.gov/sites/default/files/docs/2012/Final%20-%20DR%201074-001%20Scientific%20Integrity.pdf>.

regulatory requirement, preponderance of evidence had been the standard used at federal research agencies in misconduct cases since the 1980s.<sup>146</sup>

In addition, there are other parallels between federal research misconduct and Title IX requirements, including strict time limits<sup>147</sup> and the federal agency's interest in monitoring and preventing retaliation against the whistleblowers who report research misconduct.<sup>148</sup> Even critics of the POE research misconduct rule concede that in professional licensing contexts with sexual misconduct (discussed later in this section), there is a greater risk of immediate harm of victimization and that weighs in favor of the POE standard.<sup>149</sup>

On a practical level, federal research misconduct regulations raise the specter of contradiction with the DeVos OCR proposed Title IX standard of evidence regulation in two respects, which the U.S. Department of Education may not have anticipated. First, the stated rationale for the new proposed Title IX regulation is to ensure that universities “do not single out respondents in sexual harassment matters for uniquely unfavorable treatment”<sup>150</sup> But if a university elects to comply with this mandate by applying the C&C standard across-the-board in student and faculty misconduct matters – which implicitly seems to be OCR's preferred direction – then in effect universities would be forced by federal regulatory requirements to “single out” for unfavorable treatment their faculty and/or graduate students who are investigated for research misconduct linked to federally funded research grants. This is a foreseeable consequence of the DeVos OCR extending outside of Title IX's “swim lane” by applying a superficial notion of consistency.<sup>151</sup>

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146 Alan R. Price, *Research Misconduct And Its Federal Regulation: The Origin And History of The Office of Research Integrity*, 20 ACCOUNTABILITY IN RES. 291, 308-09 (2013) (“It is also noteworthy that the ‘preponderance of evidence’ (over 50%) standard of proof, formalized in the 2005 HHS regulation, had been informally adopted since 1989 by NIH/PHS counsels who were advising OSI/ORI; this was the same standard of proof that had been used in HHS administrative law and federal debarments for decades.”).

147 See e.g., ORI, *Sample Policy and Procedures for Responding to Allegations of Research Misconduct* (undated), available at <https://ori.hhs.gov/sites/default/files/SamplePolicyandProcedures-5-07.pdf>; UC Berkeley, *Research Misconduct: Policies, Definitions and Procedures* (2013), available at <http://vcresearch.berkeley.edu/research-policies/research-compliance/research-misconduct> (“When it is required by Federal funding agencies, such as ORI of DHHS, an extension of the investigation beyond 120 days must be requested from the relevant agency.”)

148 ORI, *Guidelines for Institutions and Whistleblowers: Responding to Possible Retaliation Against Whistleblowers in Extramural Research* (1995), available at <https://ori.hhs.gov/guidelines-whistleblowers>; Charles Gross, *Scientific Misconduct*, 67 ANN. REV. PSYCHOL. 693, 705 (2016).

149 Gary S. Marx, *An Overview of the Research Misconduct Process and an Analysis of the Appropriate Burden of Proof*, 42 J.C.&U.L. 311, 367 (2016) (“To the extent the courts have held that the preponderance of the evidence standard is necessary to protect the public interest in the state licensing context, there is a distinction between taking away a license from a physician or lawyer and debaring a researcher. There is an obvious immediate risk of harm to individual members of the public if an unqualified physician is allowed to treat patients (or an attorney is allowed to practice) that is absent in the researcher context.”). In research misconduct cases harms are real but tend to be more diffuse as compared to victimization in Title IX cases.

150 OCR, *Title IX Notice of Proposed Rulemaking*, 83 Fed. Reg. at 61477.

151 Pamela Bernard et al., *Key Aspects of the 2017 Title IX Q&A: Practical Tips During the Interim Regulatory Period*, NACUA Note 10 (March 2018), <http://counsel.cua.edu/res/docs/2017titleq>

The second point around contradiction is that the federal research misconduct regulation requires universities to make findings to the appropriate federal agency (NSF, NIH, etc.) under the POE standard while simultaneously providing that campuses have unencumbered “discretion to apply a higher standard of proof in their internal misconduct proceedings.”<sup>152</sup> By contrast, the proposed Title IX regulation does not allow universities domain-specific and/or unencumbered discretion for the standard of evidence in *non*-Title IX disciplinary proceedings, which reinforces questions about OCR overreach<sup>153</sup> (see conclusion in Part V of this article).

Moreover, researchers can seek judicial review of a federal research debarment decision.<sup>154</sup> Yet as best I can determine, all the legal challenges to the POE standard by faculty/researchers debarred for research misconduct have been uniformly unsuccessful.<sup>155</sup>

In addition, OCR’s proposed regulation for Title IX is grounded in the rationale that “because of heightened stigma often associated with a complaint regarding sexual harassment, the proposed regulation gives recipients the discretion to impose a clear and convincing evidence standard with regard to sexual harassment complaints even if other types of complaints are subject to a preponderance of the evidence standard.”<sup>156</sup> However, the research misconduct realm carries a substantial risk of stigmatic harm implicating liberty interests,<sup>157</sup> yet this area operates alongside the federally required POE standard of evidence.

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[amp-a-updated.pdf](#) (acknowledging the flexibility of the OCR’s 2017 interim guidance regarding the standard of evidence but cautioning, “If OCR were to adopt the position that all student conduct processes, from academic integrity to sexual misconduct, have to be consistent, it is likely some or most institutions would question whether OCR had exceeded its jurisdiction to enforce Title IX.”).

152 65 Fed. Reg. at 76262.

153 Bernard et al., *supra* note 151, at 10 (discussing possible OCR jurisdictional overreach).

154 5 U.S.C. § 706(2)(B).

155 *Brodie v. U.S. Dept. of Health and Human Services*, 796 F.Supp.2d 145, 157 (D.D.C. 2011) (“Plaintiff, moreover, readily concedes that ‘the administrative agency and this court have applied a preponderance-of-the-evidence standard [in debarment proceedings],’ ... and notes that ‘there are no debarment cases in which the clear and convincing evidence [standard] has been applied.’ ... Given the paucity of authority for [Plaintiff’s] position, this Court will follow other debarment cases which have held that debarment need only be supported by a preponderance of the evidence.”); *Textor v. Cheney*, 757 F. Supp. 51, 57 n. 4 (D.D.C.1991) (“Plaintiff has failed to demonstrate that it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law for the ALJ to use a preponderance-of-the-evidence standard.”).

In a recent JCUL article attorney Gary Marx argues that the HHS and NSF regulations are both unwise and in violation of the APA, but these are his normative arguments advocating to change the status quo. For my purposes in this article, what matters more is Marx’s descriptive conclusion. See Marx, *supra* note 149, at 355 (“However, the vast majority of [professional misconduct] decisions hold that the clear and convincing standard is not required by either the Federal Constitution or particular state constitution. It is this last category of cases that most strongly suggest that most courts would not find the clear and convincing standard constitutionally required in research misconduct cases, even ones resulting in debarment.”).

156 83 Fed. Reg. at 61477.

157 Barbara A. Lee, *Fifty Years of Higher Education Law: Turning the Kaleidoscope*, 36 J.C. & U.L. 649, 680 (2010) (The “problem of misconduct in research is a perennial one, and the gravity of charges of such misconduct—which can irrevocably alter or end a career even if the charges are disproven...”).

Namely, scholars who are federally debarred for research misconduct based on the POE standard are then subject to significant public stigma by having their names and case summaries posted on government websites<sup>158</sup> and by scientific watchdog organizations.<sup>159</sup> This is certainly on par with the stigmatic risk (in cases of false positive error) level associated with a faculty disciplinary hearing/finding in a campus Title IX sexual harassment investigation where a substantial portion of the ultimate findings may or may not be disclosed to the public. Advocates of C&C like professor Rubinfeld argue that a student sexual misconduct findings is akin to Massachusetts' sex offender registration list in order to justify the C&C standard of evidence<sup>160</sup> (an inapt and unsound comparison<sup>161</sup>), but the fact remains that the federal research misconduct public "violators list" is a more directly relevant comparison and it cuts in favor of the POE standard of evidence.

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158 U.S. Office of Research Integrity, Case Summaries, available at <https://ori.hhs.gov/case-summary> (listing a couple dozen cases in 2016-18 with named researchers currently debarred, and this does not include those previously on the list who's debarment period has since expired); NIH Statement on Research Integrity, *supra* note 143 (summarizing several high-profile misconduct cases).

159 The Center for Scientific Integrity, Retraction Watch Blog, available at <http://retractionwatch.com/>.

160 Rubinfeld, *supra* note 106, at 61-63.

161 Rubinfeld, *id.* at 62, argues from a ruling around Massachusetts and its Sexual Offense Review Board (SORB) as comparable to the campus Title IX setting:

The SORB case is hardly controlling in the Title IX context, but it can't be entirely ignored. Both SORB and Title IX hearings are noncriminal proceedings; both determine whether an individual is a sex offender; and both create a documentary record of a person's sex offender status, made available to others. Many individuals found guilty of sexual assault in Title IX hearings have also had their names disseminated over the media or Internet, subjecting them to vilification and adverse consequences. Indeed, from a certain point of view, the great accomplishment of the Dear Colleague letter was, under the aegis of an antidiscrimination statute, to turn every school in the country into a Sex Offender Registry Board.

Professor Rubinfeld's comparison is unsound because the dissimilarities between SORB registration and campus Title IX findings matter more than the similarities he attempts to identify. In the case that he cites, *Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd.*, 41 N.E.3d 1058, 1060-61 (Mass. 2015), 2015 Mass. LEXIS 841, available at <https://mitchellhamline.edu/sex-offense-litigation-policy/wp-content/uploads/sites/61/2017/10/doe-v-sorb-opinion.pdf> the sex offender registration laws involve substantially greater liberty interests; *inter alia* intensive parole conditions; registration of one's primary and secondary addresses, required GPS ankle bracelet monitoring if a registrant becomes homeless, mandatory internet dissemination leading to housing and employment discrimination and ostracism, and risk of reincarceration for not meeting extensive requirements. By contrast in higher education Title IX proceedings, the most serious sanction a student can face is expulsion. Even a student with a serious Title IX violation finding noted on their transcript or is subject to online negative publicity by *third-parties* such as other students' social media is not anything like a mandatory public registration and internet dissemination practice by a state agency. The cases Rubinfeld cites (*id.* at 62 n.21) are ones where other students post online or talk to a reporter. Indeed, a large share of Title IX legal challenges by (mostly male) student respondents are brought anonymously as "John Doe" lawsuits, which reinforces the dissimilarity with the SORB sex registration context. Rubinfeld's assertion that the 2011 Dear Colleague letter "turn[ed] every school in the country into a Sex Offender Registry Board" is hyperbole lacking in factual support. On the next page, *id.* at 63, Rubinfeld partly concedes some of the differences between SORB sex registration and Title IX, but even then he still focuses on the "life-damaging" consequences and "he said/she said" nature of a campus Title IX finding, without rigorously showing those to be sufficient and consistent "but for" criteria for a higher standard of evidence more generally across multiple U.S. legal and administrative domains.

One final point worth noting is that leading American universities quickly rallied around the codified POE standard in research misconduct cases – which contrasts sharply with the resistance in some quarters to the Title IX POE standard articulated in the Obama era “Dear Colleague” letter (and the *sturm und drang* coming from organizations and associations like FIRE).<sup>162</sup> This disjuncture is consistent with Professor Brake’s thesis that Title IX campus sexual assault policies are functioning as a stalking horse for deeper divisions in our society over sexual misconduct.<sup>163</sup>

#### D. Federal anti-fraud proceedings (POE)

Another analogous area is civil anti-fraud administrative proceedings, where the U.S. Supreme Court has repeatedly recognized (and Congress has endorsed) that the POE standard satisfies due process.<sup>164</sup> The statute amending the False Claims Act to require the POE standard has been on the books since 1986, yet in the three decades since, I am unaware of any successful legal challenges to the POE standard in this context.<sup>165</sup>

And just as in some of the other contexts where the POE standard of evidence is used, there is stigmatic harm associated with being responsible for civil fraud against the federal government, which is reflected in treble damages awards and some DOJ offices requiring False Claims Act settlements to be filed publicly with

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162 When the new federal research rules about the POE standard were promulgated in the early 2000’s the development was unremarkable in publications like the AAUP’s *Academe*, and leading institutions like Caltech jumped into action immediately to update their policies. David Goodstein, *Scientific Misconduct*, *ACADEME*, Jan.–Feb. 2002, at 28, 31 (under the new federal policies research misconduct would be “proved by a preponderance of evidence. Within weeks, Caltech adopted revised rules in precise compliance with the new government rules.”). To be sure, there were (and are) critics of the federal/ORI preponderance of evidence standard. Michelle M. Mello & Troyen A. Brennan, *Due Process in Investigations of Research Misconduct* 349 *NEW ENGLAND J. MED.* 1280, 1284 (2003); Marx, *supra* note 149. But there was nothing even close to the organized campaign in the academy objecting to the 2011 OCR Dear Colleague letter, and the libertarian advocacy organization FIRE (Foundation for Individual Rights in Education: <https://www.thefire.org/>) devoted virtually zero policy attention to POE in the research misconduct context unlike FIRE’s intense and voluminous criticism on Title IX and the preponderance of evidence.

163 Brake, *supra* note 9, at 110.

164 See, e.g., *Steadman v. S.E.C.*, 450 U.S. 91, 101 (1981) (petitioner and his companies were disciplined by the SEC under the POE standard, the Court granted certiorari on the question of the standard of evidence and rejected petitioner’s argument that the C&C standard was constitutionally required in an area where Congress endorsed the POE standard); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (civil enforcement of antifraud provisions of securities law); *Grogan v. Garner*, 498 U.S. 279, 288 (1991) (reviewing legislative history showing Congress selected the preponderance standard for substantive causes of action for fraud).

165 See summary of cases by Marx, *supra* note 149 at n. 201-202. While some critics complain that the False Claims Act departs from earlier common law in fraud cases requiring C&C evidence, such a view is simplistic and miscasts the arcane historical origins of the standard of evidence in this context. John Terrence A. Rosenthal & Robert T. Alter, *Clear and Convincing To Whom? The False Claims Act and its Burden Of Proof Standard: Why the Government Needs a Big Stick*, 74 *NOTRE DAME L. REV.* 1409, 1444 (2000) (“With the general collapse of the courts of equity and law into one system, the burden of proof standard of equity courts was carried over with little or no examination as to whether or not its original justifications were present in the new court systems. Thus, the contention by critics that the preponderance standard contained in the FCA does not follow the historical norm is unfounded.”).

admissions of wrongdoing.<sup>166</sup> Similarly, federal agencies uses the POE standard when—in order to protect the federal government from waste, fraud and abuse—agencies must make decisions about debarring or suspending contractors from procurement contracts and other agreements with the federal government.<sup>167</sup>

**E. Physician misconduct cases (majority POE)**

Another analogous area is physician license revocation/misconduct cases. These cases tend to have greater practical relevance to the Title IX context (as compared to attorney disbarment cases, fraud cases, etc.) because it more common for physician cases to involve sexual misconduct. In 2018, by my count (see Figure 4 below) 76% of the states use the POE standard in physician license cases and 24% use C&C (a few more states are difficult to categorize), and that closely mirrors a 2006 finding that three-quarters of the states used POE in this context,<sup>168</sup> and a 2006 U.S. Department of Health and Human Services-commissioned study that was a more intensive review that sampled some but not all the states that found two-thirds used POE the preponderance of evidence standard in physician misconduct cases.<sup>169</sup>

**Figure 4: Physician Misconduct Cases and the Standard of Evidence Used by Medical Boards in U.S. States, DC and Commonwealths<sup>170</sup>**

Preponderance of Evidence	Clear & Convincing Evidence	Difficult to Categorize
AK, AZ*, AR, CO, CT, DE, DC, GA, GU, HI, IN, IA, KS, KY, ME, MD, MA, MI, MN, MS, MO, NV, NH, NJ, NM, NY, NC, ND*, OH, OR, PA, RI, SC, TN, TX, VT, VI, WI	CA, FL, ID, IL, LA, NE, OK, SD, VA, WA*, WV*, WY	AL, MP, MT, PR, UT

(\* = “mostly”—see Appendix A for other details)

166 David Farber, *Agency Costs and the False Claims Act*, 83 *FORDHAM L. REV.* 219, 249 n. 217 (2014).

167 See e.g., USDA Inspector General Report, *Implementation of Suspension and Debarment Tools in the U.S. Department of Agriculture* (Sept. 2017), <https://www.usda.gov/oig/webdocs/50016-0001-23.pdf>.

168 Roy G. Spece Jr. & John J. Marchalonis, *Sound Constitutional Analysis, Moral Principle, and Wise Policy Judgment Require a Clear and Convincing Evidence Standard of Proof in Physician Disciplinary Proceedings*, 3 *IND. HEALTH L. REV.* 107, 108 (2006) (advocating for the C&C standard, but noting “... approximately three-quarters of our states that employ the preponderance of the evidence standard of proof in disciplinary proceedings” and listing these states at footnote 6).

169 RANDALL R. BOVBERG ET AL., *STATE DISCIPLINE OF PHYSICIANS 14-15* (2006), available at <https://aspe.hhs.gov/sites/default/files/pdf/74616/stdiscp.pdf> (“Nationally and among the case study states, about two-thirds of Boards use a preponderance standard and one-third the higher, ‘clear and convincing’ rule.”). See also Geoffrey W. Hymans & Daniel J. Appel, *Flip of a Coin?: The Appropriate Standard of Review in Government Licensing*, 10 *ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS* 30, 32 (2009) (“[M]ore states weighing the commands of due process have upheld the preponderance standard over the clear and convincing standard.”).

170 These are my somewhat simplified categorizations (see Appendix A, further below for additional explanation of methodology) based upon Fed. State Med. Bds., *Standard of Proof: Board-by-Board Overview* (Jan. 2018), <http://www.fsmb.org/siteassets/advocacy/key-issues/standard-of-proof-by-state.pdf>.

In terms of the physician license revocation cases applying the majority rule (POE standard), an illustrative case is *In re Polk*, where a doctor was found to have sexually abused juvenile girls.<sup>171</sup> The New Jersey Supreme Court in *Polk* concluded that the government's interest<sup>172</sup> around public health and safety through regulation of physicians was preemptive: "The right of physicians to practice their profession is necessarily subordinate to this governmental interest." A few years ago the Second Circuit in *Tsirelman v. Daines* supported the POE standard in physician misconduct cases with a rationale directly contradicting OCR's proposed Title IX regulation:

However, if a physician loses his license, he remains free to pursue other employment and otherwise participate in life's activities. For this reason, we find a physician's interest in his license to be less compelling than those interests that the Supreme Court has determined require clear and convincing proof before the state can effect a deprivation.<sup>173</sup>

Other examples of the majority rule requiring only the POE standard in physician licensure cases include the North Dakota Supreme Court,<sup>174</sup> the Connecticut Supreme Court,<sup>175</sup> the New Hampshire Supreme Court,<sup>176</sup> a Wisconsin appellate court,<sup>177</sup> and multiple state and federal rulings in New York upholding the POE standard in medical discipline in both sexual misconduct and fraud contexts.<sup>178</sup>

The Trump administration OCR's *notice of proposed rulemaking* cites as supplemental authority the case of *Nguyen v. Washington State Department of Health*.<sup>179</sup> However, this appears to be cherry-picking the case law, and the OCR proposed regulation uses the artfully blurry term "often employ" as a way to paper over and not acknowledge when OCR is selectively endorsing a minority position in the extant case law about the standard of evidence. The *Nguyen* case in Washington reflects the minority position among the states favoring C&C as the burden of proof in physician misconduct cases. In *Nguyen* the state medical commission accused a doctor of giving unprofessional care to many patients and engaging in inappropriate sexual contact with three patients. Dr. Nguyen challenged the department of health's preponderance of evidence rule and the Washington State Supreme Court

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171 *In re Polk*, 449 A.2d 7 (N.J. 1982).

172 *Id.* at 14.

173 *Tsirelman v. Daines*, 794 F.3d 310, 315 (2<sup>nd</sup> Cir. 2015).

174 *North Dakota State Board of Medical Examiners v. Hsu*, 726 N.W.2d 216 (N.D. 2007).

175 *Jones v. Connecticut Medical Examining Bd.*, 72 A.3d 1034 (2013).

176 *Petition of Grimm*, 138 N.H. (N.H. 1993).

177 *Gandhi v. State Medical Examining Board*, 483 N.W.2d 295 (Wis. Ct. App. 1992).

178 *Matter of Giffone v. DeBuono*, 693 N.Y.S.2d 691 (3d Dep't 1999) (improper sexual touching under guise of medical treatment); *Tsirelman v. Daines*, 19 F.Supp.3d 438 (E.D. N.Y. 2014) (fraud); *Matter of Bazin v. Novello*, 754 N.Y.S.2d 446 (3d Dep't 2003) (fraudulent insurance billing).

179 *Nguyen v. State Dep't of Health*, 144 Wash.2d 516 (Wash. 2001), *cert. denied*, 535 U.S. 904 (2002).

agreed with him.<sup>180</sup> The majority opinion in *Nguyen* is analytically troubling for reasons articulated in the dissenting opinion by three justices.<sup>181</sup>

In the wake of the #MeToo movement there is greater awareness of physician sexual misconduct cases that intersect with higher education.<sup>182</sup> In the horrific sexual abuse scandal at Michigan State University with sports physician Larry Nassar (who reportedly abused hundreds of female collegiate and Olympic athletes over many years) Dr. Nassar had his medical license revoked under the POE standard used in Michigan medical licensure revocations.<sup>183</sup> The POE standard was likewise applied in physician license investigations involving five others affiliated with the Nassar scandal at Michigan State, including the former medical college dean.<sup>184</sup>

## F. Attorney misconduct cases (majority C&C)

Finally, another area analogous to faculty-student sexual misconduct is attorney disbarment/discipline cases. The DeVos OCR's notice of proposed rulemaking cites the Ohio attorney misconduct case of *Disciplinary Counsel v. Bunstine*,<sup>185</sup> a case that briefly mentions the C&C standard and involved an attorney making unwelcome sexual advances toward his client.<sup>186</sup> In terms of attorney misconduct cases more generally, requiring C&C as the burden of proof is the majority position

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180 *Id.* at 526-33.

181 144 Wash.2d at 552 (Ireland, J., dissenting) (“The people of Washington certainly have a ‘compelling interest’ in disciplining doctors who fail to meet standards of professional competence... and who sexually abuse their patients. The State’s interest in regulating the practice of medicine and protecting the public from incompetent or unscrupulous practitioners is of vital significance to the State and its citizens.”). More generally, see *id.* at 535-55. Regarding the second *Matthews* factor the Washington Supreme Court seemed not to recognize any interaction effect between the standard of evidence and other features of due process like a hearing, cross-examination and the ability to be represented by counsel. Moreover, as a spokesperson for the medical commission said after the *Nguyen* ruling: “Stricter evidence requirements are especially problematic in cases involving patients who make allegations of sexual abuse.... Often it’s a ‘he said-she said’ situation...One of the big issues for us is to prevent practitioners from preying on vulnerable patients.” Carol Smith, *Decision on Doctor’s License Appealed*, SEATTLE POST-INTELLIGENCER, Nov. 23, 2001.

Washington State is an outlier regarding the C&C standard. In a 5-4 split decision the Washington State Supreme Court extended the *Nguyen* requirement of C&C evidence to all professional licensing discipline hearings in the state, including in a nursing assistant case. *Ongom v. Dep’t of Health*, 148 P.3d 1029 (Wash. 2006).

182 See e.g., Catie Edmonson, *More than 100 Former Ohio State Students Allege Sexual Misconduct*, N. Y. TIMES, June 20, 2018.

183 Michigan Dep’t of Licensing & Regulatory Affairs, Administrative Hearing Rules at 80 (undated) (Rule 792.10707, burden of proof is preponderance of evidence), [http://dmbinternet.state.mi.us/DMB/ORRDOcs/AdminCode/1612\\_2015-067LR\\_AdminCode.pdf](http://dmbinternet.state.mi.us/DMB/ORRDOcs/AdminCode/1612_2015-067LR_AdminCode.pdf)

184 Matt Mencarini, *6 current, former MSU employees with ties to Nassar scandal under state licensing inquiries*, LANSING STATE J., June 8, 2018; Matt Mencarini, *Ex-MSU doctor with ties to Nassar scandal cleared in licensing inquiry*, LANSING STATE J., Nov. 27, 2018. Michigan Attorney General administration complaint in the matter of William Strampel (May 2018), [https://www.michigan.gov/documents/lara/Strampel\\_Admin\\_Complaint-min\\_623225\\_7.pdf](https://www.michigan.gov/documents/lara/Strampel_Admin_Complaint-min_623225_7.pdf).

185 136 Ohio St. 3d 276 (2013).

186 *Id.* at 280. See also *Disciplinary Counsel v. Bunstine*, 144 Ohio St.3d 115 (2015).

in attorney misconduct/debarment cases at the federal level (including the Fourth, Fifth, Ninth and D.C. Circuits) and among the states.<sup>187</sup> At the federal level the First and Second Circuits, as well as some states including New York, follow the minority rule applying the POE standard in attorney debarment cases.<sup>188</sup>

While a majority of states use the C&C standard in attorney disbarment proceedings,<sup>189</sup> as noted above, it is also true that a majority of the states use the POE standard in physician license revocation/misconduct cases. Thus, it necessarily follows that a subset of states apply C&C in attorney misconduct cases and POE in physician misconduct cases, which naturally raises the question of why the U.S. legal profession tends to apply a higher standard of evidence than other professions and administrative domains.

This is a complicated and interesting question, and given the scope of this article revolving around Title IX campus proceedings, here I only sketch out some relevant factors to consider rather than attempt a deeper analysis.<sup>190</sup> New Jersey is one state where the Supreme court already endorsed the C&C standard in attorney disbarment cases,<sup>191</sup> when the Court later decided in the case of *In re Polk* to endorse the POE standard in physician license cases, and had occasion to address the two different standards for law and medicine.<sup>192</sup> Here the Court found that the legislature's decision to apply the POE standard in physician license cases "can be viewed as more protective of society's important interest in individual life and health and is therefore not irrational."<sup>193</sup> With respect to this "life and health" factor, Title IX adjudications are arguably closer to physician license cases than attorney license cases, given the serious magnitude of harms associated with sexual violence in higher education (*see* Introduction). That being said, I am also mindful of the risk of falling for the "seduction of coherence"<sup>194</sup> at a too-comfortable mode

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187 See e.g., *Sealed Appellant 1 v. Sealed Appellee 1*, 211 F.3d 252, 254 (5th Cir.2000) ("[A]ttorney discipline proceedings require proof only by clear and convincing evidence."); *In re Harper*, 725 F.3d 1253 (10th Cir. 2013); *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 825 (D.C. Cir. 1977); *In re Liotti*, 667 F.3d 419, 426 (4th Cir. 2011); *In re Lebbos*, 2007 WL 7540984 (9th Cir. 2007); *Crowe v. Smith*, 261 F.3d 558, 563 (5th Cir. 2001).

188 *In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008) ("[T]he use of a preponderance of the evidence standard in bar disciplinary proceedings does not offend due process."); *In re Friedman*, 609 N.Y.S.2d 578 (App. Div.), *appeal dismissed*, 635 N.E.2d 295 (N.Y.); *In re Friedman*, 51 F.3d 20, 22 (2d Cir.1995); David M. Appel, *Attorney Disbarment Proceedings and the Standard of Proof*, 24 HOFSTRA L. REV. 275, 284-85 (1995) (noting that New York is an exception to the majority rule of C&C evidence for disbarment proceedings).

189 I would have liked to include a state-by-state table on attorney misconduct and the standard of evidence, just like Figure 4 above for physicians, but I was not able to find a contemporary single-source document suitable for such a table.

190 I thank a couple of reviewers for encouraging me to address why the legal profession may be the outlier compared to the other domains covered in this article.

191 *In re Pennica*, 177 A. 2d 721, 36 N.J. 401, 419 (1962).

192 449 A.2d 7, 90 N.J. 550 (N.J. 1982).

193 *Id.* at 572.

194 Phillip J. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 435 (2005); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 698 (2000).

of analysis that favors doctrinal explanations—when non-doctrinal explanations focusing on the socio-historical conditions of the maturation and self-regulation of the U.S. legal and medical professions may be equally if not more plausible.<sup>195</sup>

Finally, the different standards of proof in attorney misconduct cases is a pattern with a very long history;<sup>196</sup> and in recent decades the ABA model rules and standards supportive of the C&C standard likely have solidified (but not caused) usage of the C&C standard in the legal profession.<sup>197</sup>

#### IV. Current Campus Practices

The earlier sections of this article build up to the question (one that is particularly important given the recent and ongoing fluidity of the current Title IX regulatory and legal environment) of what policies and practices colleges have adopted in recent years with respect to the standard of proof. Even before colleges responded to OCR's 2011 "Dear Colleague" letter, surveys of institutions indicate that roughly 70–80% of institutions were using the POE standard in student Title IX cases.<sup>198</sup> Campus practices can more or less be arrayed into four categories (see Figure 5 below): 1) those using POE for all Title IX cases, including cases involving accused faculty members; 2) campuses using POE in many student conduct cases including Title IX but that use C&C for student Honor Code violations; 3) campuses

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195 The New Jersey Supreme Court, for example, also distinguishes between the overall framework of regulatory control and extensive "disciplinary machinery" governing attorney misconduct as different from the medical profession. 90 N.J. at 572-73. C.f., Michael J. Powell, *Professional Divestiture: The Cession of Responsibility for Lawyer Discipline*, 11 AM. BAR FOUNDATION RESEARCH J. 31 (1986).

196 *Dorsey v. Kingsland*, 173 F.2d 405, 410 (D.C. Cir. 1949) (citing the collection of cases in 105 A.L.R. 984 for the conclusion that "it appears that while a few jurisdictions require only a preponderance of the evidence, or a 'fair preponderance', a larger number require a 'clear preponderance', and a still larger number of respectable authorities require 'clear and satisfactory proof,' 'clear and convincing proof' or 'proof clear and free from doubt.' A few cases have held that where crime or grave malpractice is alleged the proof must be "beyond a reasonable doubt.").

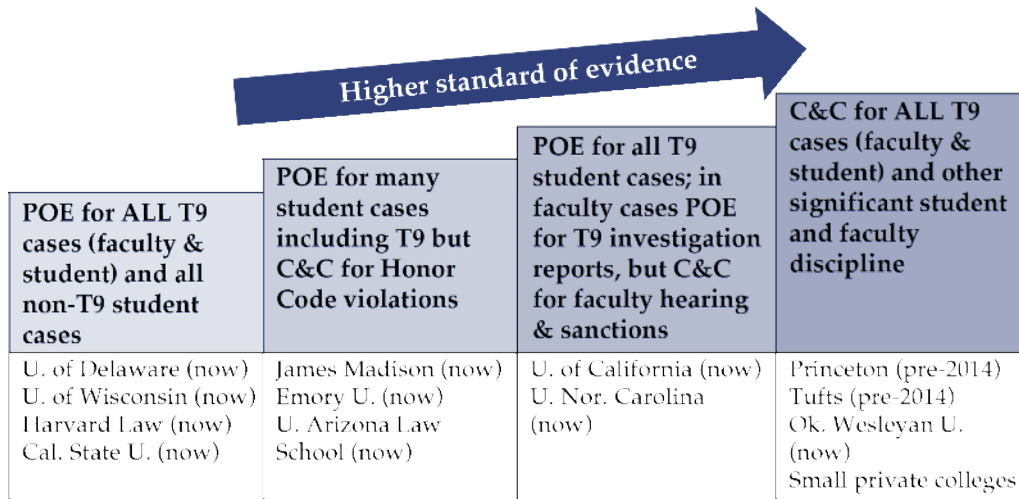
197 ABA, Model Rules for Lawyer Disciplinary Enforcement, Rule 18.c.3 (2017), [https://www.americanbar.org/groups/professional\\_responsibility/resources/lawyer\\_ethics\\_regulation/model\\_rules\\_for\\_lawyer\\_disciplinary\\_enforcement/rule\\_18/](https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_18/); ("Standard of Proof. Formal charges of misconduct, lesser misconduct, petitions for reinstatement and readmission, and petitions for transfer to and from disability inactive status shall be established by clear and convincing evidence."); ABA Joint Committee on Professional Discipline, Standards for Lawyer Disciplinary and Disability Proceedings: Tentative Draft 65 (June, 1978) (standard 8.40: "Formal charges should be established by clear and convincing evidence.").

With respect to *interim suspensions* of an attorney's ability to practice law, there appears to be more variation across the states with respect to the standard of evidence, ranging from states that require probable cause (e.g., Arizona, Wyoming), to states that use the POE standard (Texas, Massachusetts) and others require C&C evidence (Utah). Arthur F. Greenbaum, *Administrative and Interim Suspensions in the Lawyer Regulatory Process – A Preliminary Inquiry*, 47 AKRON L. REV. 65, 109 (2014).

198 OCR letter from Asst. Secretary Catharine Lhamon to Senator James Lankford 3 (Feb. 2016), <http://big.assets.huffingtonpost.com/lhamontolankford.pdf> (citing FIRE's survey of 168 institutions); Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1000 (2004); Heather M. Karjane et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 122 tbl.6.12 (2002).

using the POE standard in all student cases and in faculty Title IX investigation and related remedial actions (e.g., post-investigation “no contact” order) but that use C&C evidence in faculty misconduct hearings and to impose disciplinary sanctions on a faculty member; and 4) campuses that use C&C evidence standard for all student and faculty Title IX matters. The examples in each category are intended as illustrative; some campuses switched policies after the 2011 OCR guidance and some campuses may modify policies again depending on how the dust settles with OCR’s proposed rulemaking.

**Figure 5: Standard of Evidence at U.S. Colleges**<sup>199</sup>



The first category includes some campuses that switched to use preponderance of evidence in 2013-16 as they reviewed their faculty policies in light of OCR’s Obama era guidance. Examples include the University of Delaware, the University of Wisconsin system and Harvard Law School. Some of the institutions in this category carved out Title IX exceptions in their faculty manuals/policies that otherwise used clear and convincing evidence. Indications are that the University of Delaware does not plan to go back to clear and convincing evidence based on what was known during the Trump administration OCR interim guidance, while Harvard is reviewing its policies.<sup>200</sup>

The second category of campuses use POE in Title IX cases and often in other student misconduct cases, but use C&C for certain kinds of student “Honor Code” violations. This includes both undergraduate campuses as well as several public law schools. The pending DeVos OCR proposed Title IX regulation would

<sup>199</sup> These campus policies are cited in Appendix B. There are inevitably more nuances than can be represented in summary form in Figure 5. One illustrative example that came up during the editing process of this article is that Vassar College uses POE for all sexual violence/sexual harassment Title IX investigations, but if a faculty member is accused of violating the consensual relations policy (cases that are also handled by the same EOAA/Title IX office), per policy it will apply the C&C standard.

<sup>200</sup> Author’s communication with University of Delaware General Counsel’s Office, Sept. 2018 (note this communication was shortly before the OCR notice of proposed rulemaking); Hannah Natanson, *Harvard ‘Reviewing’ New Title IX Guidance on Standard of Proof*, HARV. CRIMSON, Sept. 25, 2017.

force these institutions to change their policies. However, a principled case can be made that sexual misconduct/Title IX cases are distinguishable from garden variety honor code cases. Title IX cases involve a complainant (victim) with equal rights to the respondent and implicate the policy tradeoff of false positive-false negative cases in a different way (see Section I discussion). By contrast, in honor code violation cases like student plagiarism there is not another student victim with equal rights,<sup>201</sup> and it is often the quasi-disciplinary feedback via the faculty instructor and the triggering of honor code policies (including with e.g., *TurnItIn* plagiarism software) that prompts the intended “teachable moment” with formal disciplinary hearings reserved for serial plagiarism and other serious misconduct—even if “on paper” a single act of plagiarism and serial plagiarism are contained within the same policy.<sup>202</sup>

The third category of campuses use a hybrid approach with POE for Title IX investigation findings but elevate to C&C evidence for the post-Title IX investigation disciplinary hearings (and sanctioning) of the faculty member, examples include the University of California system and the University of North Carolina system. Such an approach is in tension with Evergreen State College’s resolution noted earlier, but not expressly prohibited under the guidance in OCR’s 2011 “Dear Colleague” letter and 2014 Q&A. The University of California, in a 2016 Joint Faculty-Administration Task Force report on faculty sexual misconduct, justified its current practice as follows:

The Joint Committee understands that a preponderance of the evidence is required to impel Title IX and the Administration to act on the complainant’s behalf, to stop the behavior of the respondent, prevent its reoccurrence, take action to [e]nsure the safety and wellbeing of the complainant, and remedy the situation on behalf of the complainant. Clear and convincing evidence is required to invoke formal discipline of the faculty respondent beyond invoking intervention and remediation.”<sup>203</sup>

Most recently in a February 2018 OCR investigation of UC Berkeley, OCR noted that the “[Privilege & Tenure] Committee uses the clear and convincing evidence standard for the faculty discipline process. As such, the University has

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201 Michael C. Dorf, *The Department of Education’s Title IX Power Grab*, VERDICT, Nov. 28, 2018, <https://verdict.justia.com/2018/11/28/the-department-of-educations-title-ix-power-grab> (“For example, a school can permit a student accused of plagiarizing a term paper to remain on campus absent clear and convincing evidence of such plagiarism without worrying that his victims will stop going to class for fear of encountering him and being re-traumatized. In such cases, the cost of some extra ‘false negatives’ is tolerable. By contrast, in a case of alleged sexual violence, the costs of false negatives and false positives are both high, which argues for an evidentiary standard that favors neither side.”).

202 See e.g., Gary Pavela, *Applying the power of association on campus: A model code of academic integrity*, 24 J.C. & U. L. 97 (1997); Jason M. Stephens, *Creating Cultures of Integrity: A Multi-level Intervention Model for Promoting Academic Honesty*, in HANDBOOK OF ACADEMIC INTEGRITY 1-10 (2015); Andrew D. Garner & Larry Hubbell, *Institutional models for adjudicating plagiarism in the United States*, 9 INT’L J. FOR EDUCATIONAL INTEGRITY 72 (2013).

203 University of California, Report of the Joint Committee of the Administration and Academic Senate 42 (April 2016), available at [http://sexualviolence.universityofcalifornia.edu/files/documents/Joint-Committee\\_Report-Faculty-Discipline-Process.040416.pdf](http://sexualviolence.universityofcalifornia.edu/files/documents/Joint-Committee_Report-Faculty-Discipline-Process.040416.pdf)

a two-tier system with different standards of proof.”<sup>204</sup> This resolution agreement with UC Berkeley transpired during the 2017–18 interim guidance periods and the “two-tier” use of C&C evidence in a faculty disciplinary hearing was not explicitly flagged by OCR as a violation.<sup>205</sup>

The fourth category includes other campuses that did not amend their C&C policies after the 2011 Dear Colleague letter, including (according to a U.S. Senate survey in 2014) nearly one-fifth (19%) of small colleges and universities (those with enrollment below 1,000) and 14% of private non-profit institutions of higher learning surveyed in 2014.<sup>206</sup>

## V. Conclusion: Will OCR Overreach Vis-à-Vis the APA?

The fundamental purpose of Title IX is about “‘protecting’ individuals from discriminatory practices carried out by recipients of federal funds.”<sup>207</sup> This august purpose of Title IX occurs against a backdrop in which—as noted at the beginning of this article—approximately one in five female college students in the U.S. experience some form of sexual assault at some point in their college years, prevention of faculty-on-student sexual harassment also looms as a large challenge on university campuses today, and there are higher rates of victimization among vulnerable populations within higher education.

The Administrative Procedure Act (APA) requires administrative agencies to follow notice-and-comment rulemaking procedures in order to promulgate substantive rules, a process that is important both for purposes of genuine input and deliberation as well as for establishing a written record in subsequent litigation.<sup>208</sup> Accordingly, OCR “must cogently explain why it has exercised its discretion in a given manner” and the agency’s rule may be deemed arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product

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204 OCR investigation letter to UC Berkeley Chancellor Carol Christ 11 (Feb. 28, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09142232-a.pdf>.

205 UC Berkeley - OCR Resolution Agreement (Feb. 2018), <http://compliance.response.berkeley.edu/pdf/Signed%20Resolution%20Agreement.pdf>.

206 U.S. Senate Subcommittee on Financial & Contracting Oversight (Claire McCaskill, Chair), Sexual Violence on Campus app. Item F4 (July 2014), available at <https://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf> as archived in the Internet Archive: <https://archive.org/web/> (from a national stratified sample of 350 higher education institutions yielding responses from 236 schools (67% response rate).

207 *Gebser*, 524 U.S. at 287; Title IX Notice of Proposed Rulemaking, 83 Fed. Reg. at 61466 (quoting “*Cannon v. Univ. of Chicago*, 414 U.S. 677, 704 (1979) (noting that a primary congressional purpose behind the statutes was “to avoid the use of federal resources to support discriminatory practices”).

208 See 5 U.S.C. § 553; *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 741 (1996) (APA notice-and-comment “designed to assure due deliberation”); JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 282-84, 321-28 (2006).

of agency expertise.”<sup>209</sup> In other words, “a court must examine the reasons for agency decisions, or, as the case may be, the absence of such reasons.”<sup>210</sup> Moreover, “the APA requires an agency to provide more substantial justification when ‘its new policy rests upon factual findings that contradict those which underlay its prior policy...’”<sup>211</sup> Agencies are granted a high level of deference by federal courts under the arbitrary and capricious standard.<sup>212</sup>

It is an open question how the notice-and-comment process for the Trump/ DeVos OCR’s proposed Title IX regulations will unfold. Looking to the future and the Department of Education’s final rule that will emerge from the notice-and-comment process, this paper raises several questions and concerns in response to OCR’s initial notice of proposed rulemaking that afforded a 60-day public comment period ending in late-January 2019.

First, the proposed Title IX regulation tilts the procedural playing field more toward the C&C standard than at any time in the past (both pre- and post-2011 “Dear Colleague” letter). Section I documents how and why a shift toward the C&C standard will – other things being equal, as a generalization across thousands of college and university Title IX adjudications – likely erode cumulative accuracy because the increase in false negative errors will outnumber the decrease in false positive errors. Second and relatedly, if many campuses move to the higher C&C standard of evidence, there is likely to be a cumulative increase in the difficulty of imposing appropriate discipline on students who commit serial sexual assault as well as faculty and employees who commit serial/repeat sexual harassment. These two concerns also highlight tension between the DeVos OCR’s proposed Title IX regulation and Title IX’s fundamental purpose of “‘protecting’ individuals from discriminatory practices carried out by recipients of federal funds.”<sup>213</sup> The approach taken in this article is to evaluate these issues based upon available social science and policy research,<sup>214</sup> and to disfavor justifications based upon mere recitation of abstract first principles and/or misapplied maxims from criminal law.<sup>215</sup>

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209 *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

210 *Angeles v. Johnson*, 121 F. Supp. 3d 997, 1001 (S.D. Cal. 2015) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

211 *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015).

212 *Kern County, Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006); *Prof’l Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C.Cir.1983).

213 *Gebser*, 524 U.S. at 287; Title IX Notice of Proposed Rulemaking, *supra* note 5, at 83 Fed. Reg. at 61466 (quoting “*Cannon v. Univ. of Chicago*, 414 U.S. 677, 704 (1979) (noting that the primary congressional purpose behind the statutes was ‘to avoid the use of federal resources to support discriminatory practices’”).

214 This is consistent with a research-based public health prevention approach for Title IX and higher education that I explore in another article. See Cantalupo & Kidder, *Systematic Prevention of a Serial Problem*, *supra* note 74, at *passim* (urging a public health prevention approach to address campus sexual violence/harassment).

215 See e.g. OCR Proposed Rulemaking, *supra* note 5, at 83 Fed. Reg. at 61464 (“Secretary DeVos stated that in endeavoring to find a ‘better way forward’ that works for all students, ‘non-negotiable principles’ include the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined.”). Another example in the public debate over Title IX is in Alan Dershowitz, *Innocent until proven guilty? Not under “yes means yes”* WASH. POST, October

A third category of criticism in this article relates to the lack of support for the following rationale offered by OCR to justify what I call OCR's "you can more have discretion, if you ratchet up" approach to Title IX:

In contrast, because of the heightened stigma often associated with a complaint regarding sexual harassment, the proposed regulation gives recipients the discretion to impose a clear and convincing evidence standard with regard to sexual harassment complaints even if other types of complaints are subject to a preponderance of the evidence standard.<sup>216</sup>

Section III and Figure 3 of this article document the extent to which OCR's explanation runs counter to the evidence. A number of high-stakes administrative proceedings have just as much of a "heightened" risk of stigmatic harm for the respondent's reputation and professional prospects as a typical campus Title IX proceeding involving a student, and yet these other domains operate under the POE standard, including in *federally mandated* procedures involving research misconduct implicating federal research grants, in most state physician misconduct/license cases such as the horrible serial sexual abuser case of Dr. Nassar at Michigan State University, in civil fraud cases, and in some (but not a majority of) state attorney disbarment proceedings.

Fourth and related to the point above, in the proposed rule justification the DeVos OCR states that using C&C in Title IX adjudications is "analogous to various kinds of civil administrative proceedings, which often employ a clear and convincing evidence standard...where a finding of responsibility carries particularly grave consequences for a respondent's reputation and ability to pursue a profession or career,"<sup>217</sup> but the "often employ" language is an obfuscating way of saying that in only a modest minority of civil administrative proceedings is the C&C standard required. Simply put, risk of stigmatic harm is not enough to consistently trigger the higher standard of evidence in U.S. civil administrative proceedings, and OCR's justification approaches the water's edge of asserting an incorrect legal conclusion or premise.<sup>218</sup>

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14, 2015. Professor Dershowitz misappropriates Blackstone's classic maxim of English criminal law to claim in the non-criminal context of campus sexual assault "it is better for 10 individuals who did not obtain consent *to go free* than for even one individual who did obtain consent to be wrongfully punished. Being wrongfully punished can be catastrophic for a student." In this op-ed Dershowitz also repeats a common but fundamental misunderstanding (or he does understand but indulges misleading rhetoric) about the relationship of the standard of evidence to conclusions about probability. *Id.* ("While that lower standard makes convictions easier to reach, it also means that for every 100 students who are disciplined under this standard, as many as 49 of them may well be innocent. That ratio is unacceptable in any civilized society that cares about the rule of law and the principle of fairness.")

216 OCR Proposed Rulemaking, *supra* note 5, at 83 Fed. Reg. at 61477. This concern about the "stigma and reputational harm that accompany an allegation of sexual misconduct" is also mentioned in another section of OCR's notice of proposed rulemaking. *Id.* at 61473.

217 *Id.*, 83 Fed. Reg. at 61477.

218 An incorrect legal conclusion can render agency action unlawful under the APA. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (EPA's action was unlawful under the APA because the agency based its decision on an incorrect legal conclusion); *Safe Air For Everyone v. EPA*, 488 F.3d 1088, 1101 (9th Cir. 2007) ("Because that flawed premise is fundamental to EPA's determination...

A fifth point of criticism that emerges from this article relates to the fact that “the APA requires an agency to provide more substantial justification when its new policy rests upon factual findings that contradict those which underlay its prior policy.”<sup>219</sup> The 2011 Dear Colleague letter communicated to colleges an expectation about the POE standard that was already being enforced by some OCR regional offices dating as far back as the mid-1990s (see Section I.b), and the OCR 2001 revised guidance on sexual harassment (which went through public notice-and-comment) was silent on the question of the standard of evidence.<sup>220</sup> OCR’s new proposed Title IX standard of evidence regulation – because it imposes additional regulatory burdens inside and outside the Title IX realm on institutions choosing to use the POE standard (but not if the C&C standard is used) and does so for the first time dating back to the Department of Education’s precursor agency in the 1970s – should be regarded as a “new policy” that requires “more substantial justification” under the APA. OCR offers little explanatory detail for its consistency rationale that purports to reach beyond Title IX and restrict campus discretion in non-Title IX disciplinary cases with student and faculty/employee respondents, and OCR does not cite prior administrative precedents for its proposed approach.

#### **Appendix A: Details on Categorization Decisions in Figure 4 on Physician Misconduct and Standard of Evidence Used by U.S. States**

The Figure 4 table is a list based upon recent information that state physician licensing boards provided to the Federation of State Medical Boards (FSMB), which cautions that the list it is “not intended as a comprehensive statement of the law”<sup>221</sup> For Figure 4, I used slightly simplified categories from a multi-category FSMB spreadsheet.

An asterisk next to the name of a state indicates “mostly.” For example, Arizona (AZ) is “mostly” categorized as preponderance of evidence since that is used in sexual misconduct cases with M.D. physicians and in all D.O. (osteopathic) cases; and North Dakota (ND) is “mostly” preponderance of evidence because the clear and convincing standard is used in a limited way for an *ex parte* medical license suspension application. Conversely, West Virginia (WV) is “mostly” clear and convincing evidence since that is used in all M.D. physician cases and even though D.O. physician use preponderance of evidence, osteopathic doctors represent a far smaller share of the physician workforce.<sup>222</sup> A couple states (Kansas and Michigan)

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EPA’s outcome on those statutory interpretation questions is arbitrary, capricious, or otherwise not in accordance with law.”).

219 *Perez*, 135 S. Ct. at 1209.

220 U.S. Dep’t of Educ. OCR, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

221 Fed. State Med. Bds., Standard of Proof: Board-by-Board Overview (Jan. 2018), <http://www.fsmb.org/siteassets/advocacy/key-issues/standard-of-proof-by-state.pdf>.

222 Ass’n of Am. Med. Colleges, Active Physicians with a U.S. Doctor of Osteopathic Medicine (DO) by Specialty, 2015, <https://www.aamc.org/data/workforce/reports/458502/1-6-chart.html> (showing the D.O. doctors are 7.6% of the active physician workforce in the U.S.)

apply the higher C&C standard when a physician previously found to have engaged in misconduct is attempting to be reinstated/rehabilitated as a doctor in good standing—this is ignored for purposes of Figure 4 because it addresses a converse “due process” scenario not relevant to the focus of this article.

The “difficult to categorize” cases are as follows: Alabama did not provide data to FSMB and other reporting indicates there is not a simple answer to how Alabama uses the standard of evidence.<sup>223</sup> The Northern Mariana Islands (abbreviated MP in Figure 4 and the underlying source) checked four criteria. Montana checked none of the standards and only explained that “reasonable cause” is the standard for *moving forward* with a complaint (a different question than the focus of this article). Puerto Rico (PR) and Utah (UT) checked three different criteria.

### Appendix B: Summary of Referenced Campus Discipline Policies (alphabetical)

(\* Links and policies accurate as of January 2019 except when archival policy is noted)

University of Arizona Law School
<a href="https://law.arizona.edu/sites/default/files/Honor_Code_2015.pdf">https://law.arizona.edu/sites/default/files/Honor_Code_2015.pdf</a> <a href="http://www.titleix.arizona.edu/code_of_student_conduct">http://www.titleix.arizona.edu/code_of_student_conduct</a>
California State University (23 campuses)
Chancellor’s Executive Order 1095, <a href="https://www.calstate.edu/eo/EO-1095-rev-6-23-15.html">https://www.calstate.edu/eo/EO-1095-rev-6-23-15.html</a> Chancellor’s Executive Order 1096, <a href="https://www.calstate.edu/eo/EO-1096-rev-10-5-16.html">https://www.calstate.edu/eo/EO-1096-rev-10-5-16.html</a> Chancellor’s Executive Order 1097, <a href="https://www.calstate.edu/eo/EO-1097-rev-10-5-16.html">https://www.calstate.edu/eo/EO-1097-rev-10-5-16.html</a> California Faculty Association’s CBA with the California State University, extended to 2020 ( <a href="https://www.calfac.org/resource/collective-bargaining-agreement-contract-2014-2017">https://www.calfac.org/resource/collective-bargaining-agreement-contract-2014-2017</a> (see Article 19.29))
University of California (10 campuses)
UC Sexual Violence and Sexual Harassment Policy, <a href="https://policy.ucop.edu/doc/4000385/SVSH">https://policy.ucop.edu/doc/4000385/SVSH</a> UC Faculty Code of Conduct (APM – 015), <a href="https://www.ucop.edu/academic-personnel-programs/files/apm/apm-015-and-016-issuance1/apm-015-7-1-17.pdf">https://www.ucop.edu/academic-personnel-programs/files/apm/apm-015-and-016-issuance1/apm-015-7-1-17.pdf</a> University of California, Academic Senate Bylaw 336.D.8, <a href="http://senate.universityofcalifornia.edu/bylaws-regulations/bylaws/blpart3.html#bl336">http://senate.universityofcalifornia.edu/bylaws-regulations/bylaws/blpart3.html#bl336</a> UC Berkeley Sexual Violence and Sexual Harassment local procedures for Senate Faculty, <a href="https://ophd.berkeley.edu/sites/default/files/berkeley_senate_faculty_svsh_invadj_procedures_10.10.2017.pdf">https://ophd.berkeley.edu/sites/default/files/berkeley_senate_faculty_svsh_invadj_procedures_10.10.2017.pdf</a>
University of Delaware
University of Delaware, Committee on Faculty Welfare and Privileges Termination and Complaint Procedures 3 (amended Jan. 2015) <i>available at</i> <a href="http://facsen.udel.edu/Sites/FWP%20Cte/FWP-Policy-Final-Version-As-Amended-During-January-12-2015-Faculty-Senate-Meeting.pdf">http://facsen.udel.edu/Sites/FWP%20Cte/FWP-Policy-Final-Version-As-Amended-During-January-12-2015-Faculty-Senate-Meeting.pdf</a> University of Delaware, Transcript of Faculty Senate Open Hearing on the Revised Termination and Complaint Procedures of the Faculty Welfare and Privileges Committee 23 (Nov. 10, 2014) ( <a href="http://facsen.udel.edu/Sites/agenda/2014UDel11-10-14hearing.pdf">http://facsen.udel.edu/Sites/agenda/2014UDel11-10-14hearing.pdf</a> ) Matt Butler, <i>Standard of proof in sexual assault cases debated by professors</i> , THE REVIEW—UNIV. OF DELAWARE, Nov. 10, 2014

223 See also Spece & Marchalonis, *supra* note 168 at n.5 regarding Alabama’s “confusing amalgam” of standards of evidence).

Emory University (Emory College of Arts & Sciences)
<a href="http://catalog.college.emory.edu/academic/policies-regulations/honor-code.html">http://catalog.college.emory.edu/academic/policies-regulations/honor-code.html</a> <a href="https://emory.ellucid.com/documents/view/16836/?security=4f94881ac0ddcbae-11c4a4115a74ae7de40de24b">https://emory.ellucid.com/documents/view/16836/?security=4f94881ac0ddcbae-11c4a4115a74ae7de40de24b</a>
Harvard Law School
Harvard Law School, Interim Sexual Harassment Procedures (Dec. 2014), <i>available at</i> <a href="http://hls.harvard.edu/content/uploads/2014/09/hls-titleix-interimpolicy1.pdf">http://hls.harvard.edu/content/uploads/2014/09/hls-titleix-interimpolicy1.pdf</a> (Section C on page 12) Harvard Law School, Procedures for Disciplinary Cases (2017-18) (noting that Harvard's other policy applies in Title IX cases), <a href="https://hls.harvard.edu/dept/academics/handbook/rules-relating-to-law-school-studies/xii-administrative-board/b-procedures-for-disciplinary-cases-except-for-cases-covered-under-the-law-schools-interim-sexual-harassment-policies-and-procedures-see-appendix-viii/">https://hls.harvard.edu/dept/academics/handbook/rules-relating-to-law-school-studies/xii-administrative-board/b-procedures-for-disciplinary-cases-except-for-cases-covered-under-the-law-schools-interim-sexual-harassment-policies-and-procedures-see-appendix-viii/</a>  Cory Cole, <i>Reinstating Student Rights or Criminalizing Title IX? The Struggle to Define Sexual Harassment at Harvard Law School</i> , 2 WOMEN LEADING CHANGE 4 (2017) (case study providing additional context on process leading to changes in Harvard Law's policy in 2014-15)
James Madison University
<a href="https://www.jmu.edu/honorcode/code.shtml">https://www.jmu.edu/honorcode/code.shtml</a> <a href="https://www.jmu.edu/osarp/handbook/OSARP/sexual-misconduct-accountability-process.shtml">https://www.jmu.edu/osarp/handbook/OSARP/sexual-misconduct-accountability-process.shtml</a>
University of North Carolina (17 campuses)
UNC Policy Manual, Chapter 100.1 Section 603(8), <i>available at</i> <a href="http://www.northcarolina.edu/apps/policy/index.php?pg=vs&amp;id=4433">http://www.northcarolina.edu/apps/policy/index.php?pg=vs&amp;id=4433</a>
Oklahoma Wesleyan University
Oklahoma Wesleyan announced in a lawsuit against the Obama administration OCR (since dropped) that it uses the clear and convincing evidence standard, but its Title IX policy is seemingly not available on its website ( <a href="https://www.okwu.edu/search">https://www.okwu.edu/search</a> )
Princeton University (pre-2014)
<a href="https://odoc.princeton.edu/sites/odoc/files/950045_AcademicIntegrity2018-19_FINAL_PDF.pdf">https://odoc.princeton.edu/sites/odoc/files/950045_AcademicIntegrity2018-19_FINAL_PDF.pdf</a> (current) <a href="https://www.ed.gov/news/press-releases/princeton-university-found-violation-title-ix-reaches-agreement-us-education-department-address-prevent-sexual-assault-and-harassment-students">https://www.ed.gov/news/press-releases/princeton-university-found-violation-title-ix-reaches-agreement-us-education-department-address-prevent-sexual-assault-and-harassment-students</a>
University of Wisconsin (26 campuses)
University of Wisconsin System Procedures for Dismissal, UWS 4.06(1) (amended 2016), <i>available at</i> <a href="https://docs.legis.wisconsin.gov/code/admin_code/uws/4">https://docs.legis.wisconsin.gov/code/admin_code/uws/4</a> See also Board of Regents of the University of Wisconsin System, Proposed Order to amend the Wisconsin Administrative Code, Chapters <a href="#">UWS 4</a> , Procedures for Dismissal of Faculty and UWS 7, Dismissal of Faculty in Special Cases (2015), <i>available at</i> <a href="http://docs.legis.wisconsin.gov/code/register/2015/718A2/register/rule_notices/cr_15_061_hearing_information/cr_15_061_rule_text/?up=1">http://docs.legis.wisconsin.gov/code/register/2015/718A2/register/rule_notices/cr_15_061_hearing_information/cr_15_061_rule_text/?up=1</a>



# LESSONS IN LEADERSHIP: *How Dillard University Juggled the Complexities of Campus Free Speech, the Demands of its Mission, and the Boundaries of the Law — All in a Matter of Days*

ROBERT B. FARRELL\*

## **Abstract**

*Campus free speech generates strong opinions but few consider the challenge it presents to campus leadership. Presidents espouse diversity and inclusivity while recognizing the importance of all ideas, some of which threaten those goals. Dillard University in New Orleans faced this issue. In doing so, Dillard found its core ideals and determined that as a liberal arts institution, facing controversy required an HBCU to host a former leader of the Klan. Its president placed his reputation and his job on the line for this conviction. Dillard is a story of courage in the face of adversity.*

## INTRODUCTION

Headlines trumpet an epidemic of free speech intolerance on American college campuses.<sup>1</sup> Similar concerns have been expressed in the United Kingdom.<sup>2</sup> Consider the prominent case of Middlebury College as an example. There, a group of students shouted down Charles Murray, noted libertarian and father of a Middlebury graduate, who had been invited to speak about his latest book focused on the divide between rich and poor in the United States. Twenty years earlier, Murray (1994) co-authored the book, *The Bell Curve*, about which the students' protests were centered.<sup>3</sup> Murray's detractors argued that *The Bell Curve* made the case that Blacks are genetically inferior to whites. Murray disputes that interpretation. Nevertheless, a student group, the American Enterprise Club, invited Murray to speak on

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1 [Abrams v. United States](https://www.nytimes.com/2015/06/02/opinion/david-brooks-the-campus-crusaders.html), 250 U.S. 616 (1919). David Brooks, *The campus crusaders*, The New York Times, June 2, 2015. Available at <https://www.nytimes.com/2015/06/02/opinion/david-brooks-the-campus-crusaders.html>. Matthew Continetti, *Charles Murray's attackers*, Commentary Magazine, 2017. Available at <https://www.commentarymagazine.com/articles/charles-murrays-attackers/>. Conor Freidersdorf, *The glaring evidence that free speech is threatened on Campus*, The Atlantic, March 4, 2016. Available at <https://www.theatlantic.com/politics/archive/2016/03/the-glaring-evidence-that-free-speech-is-threatened-on-campus/471825/>. Greg Lukianoff & Jonathan Haidt, *The coddling of the American mind*. The Atlantic, 2015, Available at <https://www.theatlantic.com/>. Heather MacDonald, *Those "snowflakes" have chilling effects even beyond the campus*. The Wall Street Journal, April 21, 2017. Available at <https://www.wsj.com/articles/those-snowflakes-have-chilling-effects-even-beyond-the-campus-1492800913>.

2 Brendan O'Malley, *Minister demands action to protect campus free speech*, University World News, May 4, 2018. Available at <https://www.universityworldnews.com/post.php?story=20180503235513311>

3 Charles Murray, *The bell curve*. New York, NY: Simon & Schuster, 1994.

his latest book. Middlebury President, Laurie Patton, provided an introduction and cautioned the audience that she disagreed with Murray but thought the students should listen to him and question him. However, as Murray took the stage, protesters stood, turned their backs on him, and read in unison a prepared statement about why Murray should not be at Middlebury. Following the reading, the students began chanting. With signs waving, students dancing, and intoned chants, such as “anti-women, anti-gay, Charles Murray go away,” the protesters maintained the din and disruption for 20 minutes. During that time, Murray stood at the podium, silently watching. Finally, a collection of Middlebury administrators, along with the faculty representative there to question and debate him, Allison Stanger, joined him on stage and decided to move the talk.<sup>4</sup> Murray was escorted to another location where the talk and interview were recorded. At its conclusion, a band of masked protesters waited for the speaker and assaulted Murray and Stanger as they made their way across a parking lot to their car. Stanger suffered neck injuries. The protest continued as the group rocked the car until it could make its way out of the crowd. President Patton, a front row witness of the events of the evening, faced a challenge. She and the majority of students at the talk were vehemently opposed to Murray’s views. Those views challenge, among others, the fundamental values of inclusion and diversity. By defending Murray’s right to speak, she placed herself on his side. Condone the protests, and she would strike a blow against free speech. President Patton chose to condemn the violence and the disruptive protest.<sup>5</sup> While she promised that the college would deal with the matter through its disciplinary process, she acknowledged that free speech requires an understanding of its effect on those at the margins. Further, she stressed disappointment at the way Middlebury students dealt with adverse ideas.<sup>6</sup> Middlebury disciplined 67 students within the next three months.<sup>7</sup> News coverage of the protest was widespread<sup>8</sup> as was readily available video of the whole event.<sup>9</sup>

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4 Will DiGravio, *Students protest lecture by Dr. Charles Murray at Middlebury College* [Video file] YouTube, March 2, 2017. Available at <https://www.youtube.com/watch?v=a6EASuhfeI>.

5 Laurie Patton, *Letter from President Patton Concerning Last Night’s Events*, Middlebury, March 3, 2017. Available at <http://www.middlebury.edu/about/president/addresses/2017-addresses/node/545919>.

6 Id.

7 Nell Gluckman, *Middlebury punishes 67 students for Charles Murray Protest*, The Chronicle of Higher Education, May 23, 2017, Available at <https://www.chronicle.com/blogs/ticker/middlebury-punishes-67-students-for-charles-murray-protest/118607>

8 Continenti, supra note 1. MacDonald, supra note 1. Sasha Goldstein, *Middlebury College to investigate violent protest of Murray lecture*, SevenDays, 2017. Available at <https://www.sevendaysvt.com/OffMessage/archives/2017/03/06/middlebury-police-to-investigate-violent-protest-of-murray-lecture>. Daniel Henninger, *McCarthyism at Middlebury: The silencing of Charles Murray is a major event in the annals of free speech*, The Wall Street Journal, March 8, 2017. Available at <https://www.wsj.com/articles/mccarthyism-at-middlebury-1489016328>

Scott Jaschik, *Dillard didn’t invite David Duke, but must host him*. Inside Higher Ed., Oct. 24, 2016. Available at <https://www.insidehighered.com/quicktakes/2016/10/24/dillard-didnt-invite-david-duke-must-host-him>. Scott Jaschik, *Middlebury engages in soul-searching after speech is shouted down and professor is attacked*, Inside Higher Ed, Mar. 6, 2017. Available at <https://www.insidehighered.com/news/2017/03/06/middlebury-engages-soul-searching-after-speech-shouted-down-and-professor-attacked>.

9 DiGravio, supra note 1.

Given a case such as Middlebury, its stakes, profile, and the issues weighed, a president must be careful in choosing words and taking positions on the issues at hand—in effect, walking a leadership tightrope. Those situations often find presidents trying to lead in a situation that pits fundamental principles of diversity and inclusivity against freedom of speech and inquiry. Does the president side with free speech at the expense of inclusivity? Does diversity of opinion, some of which may be distressing to certain students, create problems for overall campus diversity and inclusion? Is the dignity of each campus member the coin of the realm, even if promoting that value suppresses speech? Is the campus too sensitive or not sensitive enough? Is the issue erupting today symptomatic of larger societal issues? If so, how does the campus learn from that while not doing harm to the fleeting experiences of the students who sojourn there? That is not to say that other factors remain sidelined. Those might include the negative publicity or the angry calls from parents, alumni, donors, and friends.

In these moments, the president is called upon and expected not only to speak, but to lead.<sup>10</sup> Before a president can act, the situation needs to be understood, and factors need to be identified and weighed and balanced. Ultimately, a decision needs to be articulated and supported and a case made justifying the approach that is cogent and carries the gravitas that recognizes the importance of the values at stake.

## I. The Free Speech Issue

Free speech is a complex leadership challenge facing many university presidents and likely to face more. What is “free speech”? It is the right to express in words or in actions an opinion or position.<sup>11</sup> It is what the U.S. Supreme Court has called the central ingredient of all other forms of freedom.<sup>12</sup> Its first amendment siblings—freedom of the press and freedom of religion—are both forms of speech.<sup>13</sup> Neither are the focus of this research, nor is the right of someone to speak their mind on public issues on public property. These issues, while controversial in application and headline grabbing, present a different challenge to a leader. The type of speech under examination here is the voluntary recognition of free speech on private property and the priority given to speech by the academy allowing institutions to pursue the purpose of teaching and learning. Thus, a threat to free speech on campus becomes a threat to the mission of higher education itself. The weight of that burden exacerbates the challenge. Free speech is further complicated by the academy’s tradition of academic freedom. Academic freedom represents a corollary to free speech found uniquely on college campuses. Academic freedom,

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10 Stephen Nelson, *Leaders in the crucible: The moral voice of college presidents*, Westport, CT: Greenwood (2000). Robert Birnbaum, *How academic leadership works: Understanding success and failure in the college presidency*. San Francisco, CA: Jossey-Bass, (1992). Stephen Nelson, *College presidents: Voices of civic virtue and the common good of democracy*. *Journal of Leadership Studies*, 8(3), 11–28, 2002. doi:10.1177/107179190200800302.

11 Erwin Chemerinsky & Howard Gillman, *Free speech on campus*. New Haven, CT: Yale University Press (2017).

12 *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

13 U.S CONST. amend. I.

as defined by the American Association of University Professors (AAUP, n.d.) in its *1940 Statement of Principles on Academic Freedom and Tenure*,<sup>14</sup> stands for the freedom of professors to teach, research, publish, and speak without fear of rebuff by their institutions. This article intends to focus on the leadership challenges of balancing multiple leadership options where answers are not easily found or legally defined.

As the Middlebury facts and other examples demonstrate, free speech and leadership intersect. This intersection is shaped by a number of factors. First, the application of free speech on public versus private campuses is complicated. It has a constitutional component derived from the First Amendment to the U.S. Constitution and a long history of Supreme Court precedent interpreting the meaning of the right.<sup>15</sup> In some ways, the constitutional component, while complicated and nuanced, is the easy part. For example, as an arm of the government, a public university may not restrain speech.<sup>16</sup> This fact gives the controversial speaker who desires to speak on a public campus a right to be there in a way that does not exist on a private campus. Harder still is the application of free speech on a private college campus. At a private university, the application of First Amendment legal precedent is instructive but not controlling.<sup>17</sup> Unlike a public university leader, a private leader is not the government, nor can that leader fall back upon a legal obligation to avoid a difficult balancing. The private leader may consider school policies that sound like first amendment rights and may weigh those policy interpretations with other important and possibly infringed rights (e.g., to be free from racist speech).<sup>18</sup> The idea and purpose of free speech become the focus, as does its place at the core of American higher education. As one advocate put it, “Free speech is bred into the bones of a modern university, and any institution that sets those principles aside can no longer be meaningfully regarded as a proper institution of higher education.”<sup>19</sup>

The complicated and high stakes issue of campus free speech manifests itself differently on different campuses. For example, as stated above, if private, nonprofit schools are considered, then issues that pertain to strict First Amendment rights, as

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14 American Association of University Professors (AAUP). (n.d.). 1940 statement of principles on academic freedom and tenure. Available at <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

15 *Abrams v. United States*, 250 U.S. 616 (1919). *Cohen v. California*, 403 U.S. 15 (1971). *Roth v. United States*, 354 U.S. 476 (1957). *Snyder v. Phelps*, 562 U.S. 443 (2011). *Texas v. Johnson*, 491 U.S. 397 (1989). *Whitney v. California*, 274 U.S. 357 (1927).

16 Amicus, *First Amendment on Private Campuses*, Harvard Civil Rights-Civil Liberties Law Review, Dec. 1, 2015. Available at <https://harvardcrcl.org/first-amendment-on-private-campuses/>.

17 Scott Bomboy, *The boundaries of free speech at public colleges*. Constitution Daily, Aug. 16, 2017. Available at <https://constitutioncenter.org/blog/the-boundaries-of-free-speech-at-public-colleges>. Dana Scaduto & Debra Fourlas, *Campus free speech policies and managing unpopular speakers*. Harrisburg: The Pennsylvania Bar Association Quarterly, 2017.

18 Id.

19 Keith Whittington, *Speak freely: Why universities must defend free speech*. Princeton, NJ: Princeton University Press (2018).

applied to a public campus, become instructive but not controlling.<sup>20</sup> Additionally, the nonprofit sector represents the larger percentage of place-based students compared to the for-profit sector.<sup>21</sup> The widely reported free speech incidents in the last several years have occurred on physical campuses. The issue of whether the institution is sectarian may play a role as a factor weighed and evaluated among others.<sup>22</sup> Limitations that may apply to the views allowed or honored on a sectarian campus add a layer of consideration for leaders of those institutions.<sup>23</sup> The common example of this conflict plays out on Catholic campuses each year as pro-choice politicians appear, speak, and receive honorary degrees invoking the ire of local bishops, usually without mentioning that subject. Such battles raise the risk of reputational damage for a Catholic college or university.

As with the sectarian conflicts mentioned previously, free speech incidents in higher education find their way to the front page of newspapers—some local, but others national. Not only will media coverage add a public relations consideration, it may extend or distort the duration of an incident by either follow-up articles or drawing attention to a flashpoint while ignoring the longer-term effects or a harmonious solution. At the point where regional or national news takes notice, the pressures of the response on campus leadership include reputational risk to a greater extent than if the matter had remained a localized or unreported campus controversy.<sup>24</sup>

Third, free speech incidents as they relate to leadership are fluid. The president may speak out in anticipation of an event.<sup>25</sup> The president may attend the event or respond to the immediate incident via a public statement or a statement to the internal community in the aftermath of the events.<sup>26</sup> The president may choose not to make a statement at all.<sup>27</sup> Public and internal comments may be the same day, the next day, or a week later as the facts become known. The comments are covered by the media. Not covered is the ongoing effort to understand the root of

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20 Scaduto, *supra* note 17.

21 Doug Lederman, *Online Education Ascends*, Inside Higher Education, 2018. Available at <https://www.insidehighered.com/digital-learning/article/2018/11/07/new-data-online-enrollments-grow-and-share-overall-enrollment>.

22 Whittington, *supra* note 19.

23 Joseph Fiorenza & Dennis Schnurr, *The application for Ex corde Ecclesiae for The United States*, 2000. Available at The United States Conference of Catholic Bishops website <http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/higher-education/the-application-for-ex-corde-ecclesiae-for-the-united-states.cfm>. Scott Jaschik, *Holy Cross Defends Professor Attacked as Blasphemous*. Inside Higher Ed, Apr. 2, 2018. Available at <https://www.insidehighered.com/news/2018/04/02/holy-cross-defends-professor-under-attack-his-writings-jesus-and-sexuality>.

24 Jaschik, *supra* note 8. Kathryn Theus, *Academic reputations: The process of formation and decay*, Public Relations Review, 19, 277-291, 1993. doi:10.1016/0363-8111(93)90047-G

25 Jeff Abernathy, *Statement by President Jeff Abernathy*, Alma College Newsroom, 2015. Available at <https://www.alma.edu/live/news/452-pediatric-neurosurgeon-ben-carson-to-speak-at-alma>.

26 Patton, *supra* note 5.

27 Natalie Kahn, *Campus is abuzz over Penn Law professor Amy Wax's controversial op-ed, called for a return of 'bourgeois' cultural values*. The Daily Pennsylvanian, 2017. Available at <https://www.thedp.com/article/2017/08/penn-law-professor-amy-wax-graduate-union>.

the issue or to heal fissures revealed by the dispute, its handling, and any aftermath. On a college campus, that follow up may extend through the remainder of that academic term, or it may spark a response that is a year or more in the making.<sup>28</sup> Thus, though the “incident” may attract news coverage, the focus of this research extends beyond that.

## II. Campus Leadership

Leadership is a contested space. Leadership on a college or university campus is particularly so as stakeholders represent often divergent interests and perspectives. Students may believe strongly that any speaker who threatens the inclusive community is not welcome. A recent Knight Foundation (2018) poll revealed that students value diversity more than free speech, for example.<sup>29</sup> A subsequent survey revealed a different perspective from faculty<sup>30</sup> who overwhelmingly support free speech rights. Leaders must consider other voices as well. Trustees may weigh in on the reputation of the university or any threat to its mission, which has been entrusted to them to safeguard. As mentioned earlier, sectarian authorities may hold certain speakers in contempt in contradiction to the desires of campus constituencies. Community interests may care about the speaker as well. Thus, leadership must consider if and how to engage the viewpoint of the community.

Different institutional leaders may take the lead depending on the institution and the incident. Sometimes the primary leader may be the president, but it need not be.<sup>31</sup> Internal free speech incidents may fall under the responsibility of a dean or a provost.<sup>32</sup> One such example was the controversy surrounding the instructor at Yale, Erica Christakis (2015), who sent an email to students arguing that students should have greater latitude when it comes to offending—specifically with their choice of Halloween costumes.<sup>33</sup> She and her husband, also at Yale, faced strident

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28 Sarah Brown, *I don't want to back down*, The Chronicle of Higher Education, Apr. 23, 2017. Available at <https://www.chronicle.com/article/A-Liberal-Student-Questions/239858>. Gluckman, supra note 7. Amy Wax, *What can't be debated on campus*. The Wall Street Journal, Feb. 16, 2018. Available at <https://www.wsj.com/articles/what-cant-be-debated-on-campus-1518792717>.

29 Knight Foundation, *Free expression on campus: What college students think about first amendment issues*, 2018. Available at <https://knightfoundation.org/reports/free-expression-on-campus-what-college-students-think-about-first-amendment-issues>.

30 Samuel Abrams, *Professors support free speech*. The American Interest, Apr. 18, 2018. Available at <https://www.the-american-interest.com/2018/04/18/professors-support-free-speech/>.

31 Jonathan Haidt, *In defense of Amy Wax's defense of bourgeois values*. Heterodox Academy, 2017. Available at <https://heterodoxacademy.org/in-defense-of-amy-waxs-defense-of-bourgeois-values/>. Katie Reilly, (2016). *University of Chicago tells students not to expect “trigger warnings” or safe spaces*, Fortune, Aug. 25, 2016.. Available at <http://fortune.com/2016/08/25/university-of-chicago-trigger-warnings-safe-spaces/>. Susan Svrluga, *Williams College cancels a speaker who was invited to bring in provocative opinions*, The Washington Post, Feb. 20, 2016. Available at <https://www.washingtonpost.com/news/grade-point/wp/2016/02/20/williams-college-cancels-a-speaker-invited-as-part-of-a-series-designed-to-bring-in-provocative-opinions/>.

32 Haidt, supra note 31.

33 Erika Christakis, Email from Erika Christakis: “Dressing yourselves,” email to Silliman College (Yale) students on Halloween costumes, 2015. Available at <https://www.thefire.org/email-from-erika-christakis-dressing-yourself-email-to-silliman-college-yale-students-on-halloween-costumes/>

criticism due to her e-mail in a matter that did not rise to the level of a presidential controversy.<sup>34</sup> A member of the campus community speaking on a controversial issue may arouse a set of considerations different from those stirred when the speaker is invited to campus from the outside.<sup>35</sup> External issues such as external speakers, particularly with media coverage, often involve a presidential response, though not always.<sup>36</sup> The eye of the media may turn an internal issue of academic freedom into an external issue, thus generating an equal response to a controversy imported from outside the gates.<sup>37</sup> The internal versus external distinction may impact from whom the response is delivered.

The literature on the role and power of the president presents a fascinating dichotomy. Prominent among these views are those who believe that the president does nothing more than accompany the natural progress of the institution and is thus, by the nature of the position, a symbol.<sup>38</sup> By contrast, others have pointed to the essential power of the president and the characteristics of the president as the driver of the educational enterprise.<sup>39</sup> Cohen and March (1974) offered a striking assessment of the role of the president:

The president is a bit like the driver of a skidding automobile. The marginal judgments he makes, his skill, and his luck may possibly make some difference to the survival prospects for his riders. As a result, his responsibilities are heavy. But whether he is convicted of manslaughter or receives a medal for heroism is largely outside his control. (p. 203)<sup>40</sup>

Fisher and Koch stressed the need for good leadership. The authors pointed out what they viewed as the debacle of faculty-run institutions, historically, namely the University of Paris, Oxford, Cambridge, and the New School. All realized their folly and returned to administrative structures. Believing that the president makes a difference, and the faculty and the institution need a good president, the authors offered: "The effective president is a strong, caring, action-oriented visionary who acts out of educated intuition. He or she is transformational rather than transactional and less collegial and more willing to take risks than the usual president."<sup>41</sup>

From the results of a survey of successful presidents cited by the authors, the collegial president is the first to exit in the time of a crisis. Fisher and Koch (1996)

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34 Haidt, *supra* note 31.

35 Whittington, *supra* note 19.

36 Goldstein, *supra* note 8.

37 Jaschik, *supra* note 8.

38 Robert Birnbaum, *The cybernetic institution: Toward an integration of governance theories*. *Higher Education*, 18, 239–253, 1989. Available at <http://www.jstor.org/stable/3447084>. Michael Cohen & James March, *Leadership and Ambiguity: The American College President*, New York: McGraw Hill (1974).

39 James Fisher & James Koch, *Presidential leadership making a difference*, Phoenix, AZ: American Council on Education Oryx Press (1996).

40 Cohen, *supra* note 38.

41 Fisher, *supra* note 39.

claimed that being presidential requires distance.<sup>42</sup> Collegial behavior is respected but not to the extent that it hampers their ability to lead and make difficult decisions. Friendships with those the president must lead, for example, are not favored. An effective president will be warm and concerned about those in their care, but they will not befriend them lest that make more difficult the job of leading and deciding. The authors urged the president to surround themselves with advisors who are brighter than they are and to include them in many decisions. However, they should be kept at a cordial distance. Any socializing with the staff, according to the authors, is a waste of the president's time.<sup>43</sup>

It is important to consider how academic leaders lead. Birnbaum (1992) suggested that understanding the needs and complexities of a given college campus is paramount.<sup>44</sup> However, certain common characteristics of good leadership can be generalized across campuses. Birnbaum (1992) listed the 10 characteristics of good academic leadership as follows:

... making a good impression, knowing how to listen, balancing governance systems, avoiding simplistic thinking, de-emphasizing institutional bureaucracy, re-emphasizing core value, focusing on institutional strengths, encouraging others to be leaders, evaluating your own performance, and knowing when to leave. (p. 172)<sup>45</sup>

Birnbaum (1992) stressed what he calls "cognitive complexity" (p. 180).<sup>46</sup> He argued that presidents with this characteristic have the ability to solve problems faster, make fewer mistakes, use information wisely, allow better for uncertain situations, and welcome contrary evidence.<sup>47</sup>

The role of leadership when faced with a difficult, seemingly unmanageable task, is illuminated by the work of Ronald Heifetz. Heifetz developed a framework for analyzing these leadership challenges, which he termed adaptive problems.<sup>48</sup> According to Heifetz, leaders faced with adaptive problems need to employ a series of what he terms "strategic assets" that are unique powers held by a leader. These assets include the ability to frame the issue, and the ability to contain, manage, and strategically release stress, among others. The use of issue framing and managing stress will be explored in the analysis of the case below.<sup>49</sup>

Therefore, the latest iteration of the free speech battle presents a challenge to college and university leadership. The challenge requires leaders to respond, in

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42 Id.

43 Id.

44 Birnbaum, *supra* note 10.

45 Id.

46 Id at 180.

47 Id.

48 Ronald Heifetz, *Leadership without easy answers*. Cambridge, MA: Belknap Press of Harvard University Press (1994).

49 Id.

some way, and confront issues fundamental and important to a diverse group of constituents. This article attempts to understand how a team of leaders at one non-profit university understood, framed, and responded to a free speech controversy on campus. The study examines Dillard University in New Orleans, LA. The insights into the facts of the Dillard case study derive from interviews with Dillard's president and vice presidents for communications and student success.

### III. Methodology

**Research Design.** Case study research was appropriate for this topic. Its focus is on recent events; thus, it involves observation of actions, accounts of those actions or incidents, and interviews with the participants.<sup>50</sup> Yin (2018) described six sources of evidence that may be useful in conducting a case study. These sources consist of documentation, archival records, interviews, direct observations, participant observation, and physical artifacts.<sup>51</sup> Most of the above evidence played some role in the case studies conducted for this research. Interviews were the central data collection vehicle in this study. Yin divided interviews into shorter and longer categories depending on the time. An hour or less is short. Two or more hours, or extending over multiple days, is long.<sup>52</sup> All of the interviews herein were thus short at one-hour long. Documents, archival records, and campus observations were all important to understanding the adaptive, free speech problem as it played out at Dillard and how leaders responded. All have been used. Direct and participant observations were not a possibility given that these events have already happened. Physical artifacts, such as a sign used in a protest, or a damaged article of property, were not used.

**Data Collection.** Data were collected primarily from interviews. The interview process was semi-structured.<sup>53</sup> Each interview participant was presented a series of questions regarding the event and the ways in which the problem was identified, articulated, and solved. The participants' views are important, as are the sources of support relied upon by those leaders to formulate an answer and make sense of the issues. As the participants engaged in the interview process, however, additional questions emerged, triggering additional inquiries and follow-up questions, or a different focus based on the unique perceptions of each participant.

The review of news accounts, records, and archival sources, coupled with interviews, interview notes, and any follow-up questions, allowed for the triangulation of information.<sup>54</sup> That use of cross-referenced sources enabled piecing together a more accurate picture of the events and allowed for questions that tugged at the validity of the responses. The chronology of events derives primarily from the three interviews conducted with the three senior leaders at the point of this

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50 Robert Yin, *Case study research and applications*, Los Angeles, CA: Sage (2018).

51 Id.

52 Id.

53 Sharon Ravitch & Nicole Carl, *Qualitative research bridging the conceptual, theoretical, and methodological*, Los Angeles, CA: Sage (2016).

54 Nigel Fielding & Jane Fielding, *Linking data*. Beverly Hills, CA: Sage (1986).

incident. Where information originated from a source other than interviews, the source appears in a citation.

#### IV. Case Study: David Duke visits Dillard University

David Duke, former grand wizard of the Knights of the Ku Klux Klan, appeared on the campus of Dillard University, in New Orleans, LA, a historically Black college and university, on November 2, 2016. Dillard's president, Dr. Walter Kimbrough, defended the appropriateness of Duke's appearance to the campus community. In Kimbrough's words, "If we say we're liberal arts, you're go[ing to] protect free speech. You have to have this. It has to happen."<sup>55</sup> Duke's visit incited a rash of events: students arrived in bus loads from neighboring universities to protest, arrests were made, pepper spray was used on both officers and crowd members, protestors laid across streets, and national and international news coverage appeared at the campus—all causing the administrators to fear for their safety and that of their students. These complications were made more difficult by the fact that Dillard had only short notice that Duke would appear on campus.<sup>56</sup>

Dillard officials initially thought they had an out: they had not invited David Duke. Duke was there to participate in a candidate debate. He was running for the Senate seat from Louisiana. He had polled just high enough, 5%, in a recent statewide survey, to qualify as a viable candidate according to the debate rules.<sup>57</sup> Though Dillard had only rented out its space for the debate to Raycom Media, the event's actual host, Dillard had a history of allowing this type of event to be held on its campus and considered its engagement with the community important above and beyond any legal obligation for space rental. It wanted its students to have the opportunity to see democracy in action and to know that important and hard conversations could take place on its campus. To that end, Dillard had directly invited controversial speakers to campus before. In fact, Duke had spoken on the campus in the 1970s, not as part of a large-scale political debate but as a solo speaker to the students and community members who attended. Given the fact that Duke had been granted direct contact with Dillard students before, the university underplayed the debate on November 2, 2016, which was scheduled to be taped by a film crew in an empty auditorium with no handlers, supporters, protestors, or cheering sections.<sup>58</sup>

Based on the fact that Dillard had a contract to provide the space for the event and nothing more, including no obligation for further involvement, its leaders thought the school was insulated from controversy and absolved from responsibility. Its legal counsel, Dr. Denise Wallace, advised the president that Dillard was under contract, and that to violate that contract just because it did not

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55 Interview with Walter Kimbrough, President, Dillard University, in New Orleans, LA (Oct. 22, 2018) (on file with author).

56 Seltzer, *supra* note 16.

57 *Id.*

58 Kimbrough interview, *supra* note 55.

like the views of one of the candidates would amount to a breach of contract that she could not defend. In her mind, this was straightforward; this was not a free speech controversy.<sup>59</sup>

Despite these facts, Kimbrough realized that another issue was at play. He knew that hosting the event had larger implications and presented a practical learning environment for his students. The ability to confront people and ideas that may be alarming and controversial was a skill that Kimbrough wanted his students to learn. Technical distinctions remained, but Kimbrough determined to defend the underlying propriety and importance of the event rather than relying on a legal backstop.<sup>60</sup>

### *A. Dillard University*

Dillard is a four-year liberal arts college. It is affiliated with the United Church of Christ and the United Methodist Church. It enrolls 1,300 students and just over 200 graduate students. Its enrollment is overwhelmingly female at 76% and African American at 91%. The university consists of three colleges: the College of Arts and Sciences, which graduates the largest number of Dillard students; the College of Business; and the College of Nursing. Its most popular majors include public health, biology, nursing, and communications, according to its website.<sup>61</sup>

Formed by the merger of Straight College and New Orleans University, both of which date to 1869, Dillard University was founded in 1935 to serve men and women of all races, but with a focus on providing the African American community with a Christian education.<sup>62</sup> The institution was named after a well-known African American educator, James Hardy Dillard. The school has a tradition of bringing in the outside world to the campus. William Stuart Nelson, Dillard's first president, established an arts festival that invited leaders from the local and national arts community. The school's third president, Broadus Butler, began what was known as the Scholars-Statesmen Lecture Series, which outside educators, judges, artists, and writers attended. Butler's successor, Samuel DuBois Cook, in addition to making the admission requirements more rigorous and demanding more terminal degrees for faculty, initiated the National Conference on Black-Jewish Relations, which became a national center.<sup>63</sup> That tradition continues today under Kimbrough in the form of his lecture series titled Brain Food.<sup>64</sup>

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59 Id.

60 Id.

61 Dillard, Quick Facts, 2019. Available at [http://www.dillard.edu/\\_academics/institutional-research-and-effectiveness/quick-facts.php](http://www.dillard.edu/_academics/institutional-research-and-effectiveness/quick-facts.php).

62 Dillard University, A brief history of Dillard University, 2018. Available at [http://www.dillard.edu/\\_about-dillard/history-of-dillard.php](http://www.dillard.edu/_about-dillard/history-of-dillard.php).

63 Id.

64 Dillard University, The Brain Food Story, 2018. Available at [http://www.dillard.edu/\\_office-of-the-president/brainfood-folder/brain-food-lecture.php](http://www.dillard.edu/_office-of-the-president/brainfood-folder/brain-food-lecture.php).

## ***B. Walter Kimbrough***

Dr. Walter M. Kimbrough was selected by the Board of Trustees of Dillard University to serve as its seventh president beginning July 1, 2012.<sup>65</sup> For the eight years before that, Kimbrough held the position of president, a position he assumed when he was thirty-six years old, at Philander Smith College in Little Rock, Arkansas, a small, historically Black college with 750 students. Known at Philander Smith by his Twitter username of “HipHopPrez,” Kimbrough developed a reputation for being able and willing to communicate with students about issues that mattered to them, ones that were not always easy to discuss. For example, Kimbrough decided to take on the issue of sexually transmitted disease and out-of-wedlock children in the African American community at Philander Smith.<sup>66</sup>

He is fond of noting that he is a preacher’s son from Atlanta, Georgia. When he was lambasted on social media for hosting the debate with Duke, he thought it was funny that some were concerned for him based on what was being written. His response: “I just said, ‘Look, I know some of y[ou] all out there are cussing me out on social media.’ I said, ‘Well, I’m a preacher’s kid, I’ll cuss you all out too.’”<sup>67</sup> Kimbrough matriculated at the University of Georgia, then did graduate work at Miami University in Oxford, Ohio, before earning his doctorate in education from Georgia State University. Kimbrough worked at multiple higher education institutions in the student affairs division before landing in 2000 as the vice president of student affairs at Albany State University in Georgia when he was thirty-two years old. In 2004, he became the president of Philander Smith.<sup>68</sup>

Kimbrough was a member of Alpha Phi Alpha fraternity at the University of Georgia, and his writing has focused on the Greek systems at historically Black colleges and universities (HBCUs). He authored the book *Black Greek 101: The Culture, Customs, and Challenges of Black Fraternities and Sororities*. He has been honored as one of the twenty-five to watch by *Diverse Issues in Higher Education* in 2009. In 2010, he was listed on the Power 100 list in the African American community by *Ebony* magazine. He shared that honor with Barack and Michelle Obama. In 2014, he was named the male HBCU president of the year by *HBCU Digest*.<sup>69</sup>

Kimbrough, like his predecessor presidents at Dillard, established a lecture series to foster greater community spirit, promote the arts, or promote social awareness. He established/continued a series at Dillard called Brain Food. He decided that a school in New Orleans, known for its food, should have a series to feed the brain. Inspiration came from a Kenyan proverb that stresses it is wise to fill the brain before emptying the mouth. Kimbrough made a point of enlisting

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65 Dillard, *supra* note 62.

66 Bruce Nolan, *Walter Kimbrough, “HipHopPrez,” chosen as Dillard University’s 7th president*, New Orleans Metro Daily News, Nov. 2, 2011, Available at [https://www.nola.com/education/index.ssf/2011/11/dillard\\_picks\\_walter\\_kimbrough.html](https://www.nola.com/education/index.ssf/2011/11/dillard_picks_walter_kimbrough.html)

67 Kimbrough interview, *supra* note 55.

68 Dillard University, *President Walter M. Kimbrough, 2018*. Available at <http://www.dillard.edu/office-of-the-president/>.

69 *Id.*

diverse viewpoints for this series, including Candace Owens, a conservative communications director and African American from Turning Point USA, and Lena Waithe, an Emmy Award–winning actress, producer and screenwriter.<sup>70</sup>

### *C. Dillard’s Gentilly Neighborhood*

“Gentilly is one of the most celebrated neighborhoods in New Orleans” said Dr. Roland Bullard, the vice president of student success at Dillard.<sup>71</sup> It was the neighborhood where rich African Americans settled for three decades in the early twentieth century, and it is home to Dillard. Dillard is known colloquially as the “Jewel of Gentilly.” Bullard was surprised at first that residents of Gentilly did not raise any concerns about the Duke incident. He thought that everybody would be upset that Dillard would hold an event with a figure like Duke. Then he realized that Dillard was known for hosting controversy. It became clear to Bullard that Dillard serves the community and that the community trusts Dillard to be competent with these events. As Bullard commented, “We’ve got a couple of projects and things going on in the community, and we hear from them in one minute if something’s out of the way. A blade of grass is out of the way, they’ll call.”<sup>72</sup> He noted that Dillard was getting grief from New York and California, but Gentilly was quiet.<sup>73</sup> If Gentilly served as a bellwether for the Duke event, then it appeared as if all would be well. That quiet turned out to be more “calm before the storm” than bellwether.

### *D. The Debate That Brought Duke Back to Dillard*

Roland Bullard met with representatives of a news station who were preparing the details of the upcoming Louisiana Senate debate to be held on the campus of Dillard. He was brought into the conversation as they considered where on the campus to hold the event. Although this type of event would normally work through auxiliary services, Bullard was brought in to make sure that security was in place given the high-profile participants coming to campus, one of them a sitting senator. This was several weeks ahead of the November 2, 2016, event.<sup>74</sup>

Weeks after the meeting, the names of the candidates who qualified for the event came out. When the bar for qualification was first determined, five candidates passed the 5% polling and \$1 million fundraising cutoff. For this debate however, the rules changed, and the only qualification was polling percentage—the fundraising total was dropped. With the bar thus lowered, David Duke qualified for the debate. Regardless of fundraising, it was also the first time his polling numbers had appeared that high. The Mason-Dixon poll used for the debate showed Duke at 5.1% despite being shunned by the national Republican Party and having no

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70 Id.

71 Interview with Roland Bullard, Vice President of Student Success, Dillard University in New Orleans, LA (October 22, 2018)(on file with author).

72 Id.

73 Id.

74 Id.

real campaign, fundraising, or statewide organization.<sup>75</sup> *The Baton Rouge Advocate* reported on the irony of Duke appearing at the debate at historically Black Dillard, a fact that Duke found “amazing,” adding that he still intended to appear for the debate.<sup>76</sup> Duke worried about the appearance too, noting that he had been critical of the Black Lives Matter movement and that “Dillard is pretty supportive of Black Lives Matter.”<sup>77</sup>

That did not sit well with Kimbrough. “This is rigged,” he said. “Every poll after that and on election day, he was below. It’s the only time in the entire cycle he was over [five] so that he could qualify for this debate. I still believe that somebody did this on purpose.”<sup>78</sup> Now the debate that was to have five candidates had six with Duke’s qualification. Raycom, the television outlet, was not the first to notify Dillard. Dillard officials found out on social media. Marc Barnes, vice president of the Division of Institutional Advancement, was the first to discover it, and he spoke to Kimbrough. Kimbrough’s reaction: “We were like, ‘What the hell is going on?’”<sup>79</sup> Kimbrough described it as a shock to find out in that way. He was not happy with the station’s general manager for not alerting him directly, and he would be equally incensed later as the station did not step up as Dillard was under fire and share responsibility for “inviting” Duke. Kimbrough was in Washington, D.C., at the time, at a reception at the home of Howard University’s president. “My phone just started blowing up,”<sup>80</sup> Kimbrough said. His wife told him that Rachel Maddow was reporting that Duke would be at Dillard. He stayed up to watch her report, which he describes as sympathetic and symptomatic of the larger craziness of the election cycle.<sup>81</sup> Maddow (2016) described Duke as the “former grand *lizard* [emphasis added] of the Ku Klux Klan.” In Maddow’s (2016) words, from the night of the debate:

Dillard, of course, agreed out of the kindness of their heart to be a host for the debate. At the outset of the campaign, they had no idea that [it] would ultimately involve an invitation to the nations’ best self-promoting Klansman and white supremacist.<sup>82</sup>

Kimbrough’s first communication was to his Board of Trustees. He explained that Dillard was not aware of Duke’s participation until the last minute. The conversations with the board and cabinet centered on Dillard’s relationship to the event. From those conversations, they came to a conclusion. “We rent it out,

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75 Steve Benen, *David Duke, former KKK Leader, Qualifies for Louisiana Debate*. MSNBC, The Rachel Maddow Show / The MaddowBlog. Oct. 24, 2016.

76 Id.

77 Scott Jaschik, *Dillard didn’t invite David Duke, but must host him*. Inside Higher Ed, Oct. 24, 2016. Available at <https://www.insidehighered.com/quicktakes/2016/10/24/dillard-didnt-invite-david-duke-must-host-him>.

78 Kimbrough interview, supra note 55.

79 Id.

80 Id.

81 The Rachel Maddow Show, Transcript Nov. 2, 2016, MSNBC.

82 Id.

let's do it,"<sup>83</sup> was the final call, the message that Dillard officials used, in part, to distance themselves from the invitation. The general counsel argued that the issue was simply contractual. The rental agreement contained no clause that would allow Dillard to cancel the event if it did not like one of the candidates. Kimbrough took the legal advice but went further in his logic:

So, she [the general counsel] was just like, "If we need to think about this going forward, that's fine, but right now we really don't have a clause to break it." So her [opinion] was just based on the law....For me it was much more like if we say we're liberal arts, you're going to protect free speech. You have to have this; it has to happen. You don't run from this because you have this one person.<sup>84</sup>

Kimbrough admitted candidly, however, that if the board had told him to shut it down, he would have. But they did not. As such, Kimbrough kept insisting that Dillard did not invite Duke and that its role was limited to renting the space.<sup>85</sup>

It was at that time that Kimbrough began to hear a counternarrative that Dillard should not have Duke on its campus. Against that narrative, some reminded Kimbrough of the fact that Duke has been to Dillard before, in the early 1970s when Duke, then a member of the Klan, was doing a campus speaking tour. He spoke at Dillard in front of the student body. Kimbrough heard from former Dillard students who saw Duke speak there. They argued that this setup, as one of six debaters, was no big deal. Kimbrough thought, "Why do you cancel the whole thing because of one person?"<sup>86</sup> Beyond that, Kimbrough knew that one of the people invited to the event would be their next senator, and he would need that person to help with, among other things, the money needed to fix Hurricane Katrina damage. He wanted whoever that new senator would be "to be on campus, to have a personal experience at Dillard."<sup>87</sup>

Duke's candidacy, the appearance at Dillard, and the outcry against it, amounted to a publicity stunt by Duke, Kimbrough thought. He argued that Duke had been chasing relevance for decades and that any battle over his right to appear on campus only helped Duke's cause.<sup>88</sup> He opined that Duke would win the battle if his appearance turned into a big deal. Kimbrough wished that the focus could be on the real needs of students, particularly students in the flood-ravaged areas of New Orleans, instead of on a candidate who was not at all likely to win.<sup>89</sup>

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83 Kimbrough interview, *supra* note 55.

84 Id.

85 Id.

86 Id.

87 Id.

88 Id.

89 Jessica Williams, *David Duke heads to a debate at Dillard, and some students are unhappy*, The New Orleans Advocate, Oct. 30, 2016. Available at <https://www.nwfdailynews.com/article/20161030/ELECTIONS/161039939>.

Kimbrough, Barnes, and Bullard all pointed to a nascent grassroots group called Take 'Em Down NOLA that had formed in New Orleans to remove Confederate monuments and its impact on the events of November 2. Several months earlier, David Duke had spoken against the removal of a monument drawing the ire and attention of the group. Barnes described the issue as “hot” in the New Orleans community and the cause of real tension. This group was expected to populate the crowd that night and would incite some of the violence that erupted.<sup>90</sup>

A few days before the scheduled event, Kimbrough received an anonymous list of demands from a group purporting to be Dillard students. Kimbrough was not impressed: “I don’t do demands. We’re too small for that. You got a question, you come see [me].”<sup>91</sup> Upon finding out later who some of the authors of the note were, Kimbrough was nonplussed. They were students who had asked him for football tickets and had shared Thanksgiving dinner at his house. He feared that students could not have a conversation over something about which they disagreed without it being anonymous and adversarial. “I don’t do either. That doesn’t work for me,”<sup>92</sup> replied Kimbrough. Bullard noted that students at this time started to get more interested in what was happening:

The students are becoming a lot more interested in the conversation because folks are talking to them on social media, and they’re going, “Hey, how can you go to this school?” or really giving them sort of a tough time about it. Then, they start to get an opinion about what this looked like.<sup>93</sup>

Bullard decided the best way to address student concerns was to engage with them. He had only started at Dillard the previous July and did not really know many students. He described their reaction to him as one of faint familiarity. He took the opportunity to address the students shortly before the debate, telling them to stop and think for themselves and not to simply react to what they were hearing on social media. According to Bullard:

So, I asked them to go out and look at the history of this thing. The fact that he had been on campus before in the seventies and what that looked like. Really starting to think about what it meant to have critical discourse on a college campus and the fact that that really was our purpose. That was messaging that actually had come from the president, which I absolutely agreed with.<sup>94</sup>

Eventually, Bullard engaged the Student Government Association and asked them to take on the issue. The SGA agreed. They thought the event should go on as planned and that Dillard should be the site of “critical discussion.”<sup>95</sup> Bullard was

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90 Interview with Marc Barnes, Vice President for Institutional Advancement, Dillard University, in New Orleans (Oct. 22, 2018)(on file with author).

91 Kimbrough interview, supra note 55.

92 Id.

93 Bullard interview, supra note 71.

94 Id.

95 Id.

extremely proud of the way that the SGA stood up in that moment. He recalled writing a letter of recommendation for one of the association's members sometime later in which he recounted the courage exhibited in that moment. The SGA planned a counter-event. They called it Brownies and Ballots where they handed out brownies and talked about the ballot, how to fill it out, how to register to vote, and the critical issues on it. These events were happening in advance of the debate night while the press coverage was heating up—as was the criticism of Dillard. Despite that, Bullard felt pretty good about what was happening and how the narrative around it was being perceived.<sup>96</sup>

On the morning of the debate, Kimbrough took to Twitter to reiterate his belief that the polling was rigged. He said, "Pretty clear polling rigged as Trump would say for ratings. Any protests become part of [a] reality show masquerading as news."<sup>97</sup> Bullard left campus at around 3:30 p.m. to grab an early dinner so he could return in time for the event. As he exited the campus, he noticed about ten students picketing in front of the campus. Their messages were not anti-Duke per se or critical of Dillard for hosting him. The messages centered on Duke's beliefs. Bullard said:

I remember thinking that was a[n] interesting distinction that the student had made was, that it wasn't Dillard's so terrible for bringing him, or the president was this, or it wasn't that. It was, "Hey, we're not aligning with your beliefs." Which I thought was fine.<sup>98</sup>

Bullard got word from Kimbrough that the student protesters had been contacting him to complain about harassment by the media, including such outlets as the BBC, CNBC, and CNN. Kimbrough asked the students to keep marching despite the difficulty and tasked Bullard with making sure that additional police were dispatched to watch over their safety. Bullard described that moment as follows:

I thought that was one of the most powerful things that happened that night is when I was telling you, the students were picketing. They emailed the president and he says, "Keep marching." I thought that was amazing. It's one of the things that gives me goosebumps, because that just makes me say, "This is why we're doing this."<sup>99</sup>

The plan for Duke's security was to get him in and out of the facility quickly. He was to be brought in via a back gate, delivered to the back of the auditorium, and escorted out the same way as inconspicuously as possible.<sup>100</sup>

Bullard returned to campus around 5 p.m. to find approximately 250 people/community members milling about campus. He was concerned at this point having not anticipated this many people would appear on a campus with a student population

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96 Id.

97 Seltzer, *supra* note 16, paragraph 21.

98 Bullard interview, *supra* note 71.

99 Id.

100 Id.

of 1,300. Around 6:15 p.m., he walked over to the auditorium to check on the event, which was scheduled to start at 7 p.m.. No one was to be present for the debate beyond the candidates. As Bullard arrived, he found the candidates on the stage, a moderator, and two boom operators—he described it as nine people in a room that holds 400. He deemed the room to be fine and received the “all clear” from the chief of police. The police had secured all doors into the building, except for one where students could access evening classes upstairs. In addition, because of the volume of media requests, they had set up a media room with television screens in the building. The media sat at long tables and reacted to the debate on social media or other forms of communication. Dillard had arranged for press credentials for several of its students so they could experience the event with the press. Again, in Bullard’s words, “We kinda thought we had it kinda zipped up.”<sup>101</sup> Then Bullard turned and looked down the hallway.<sup>102</sup>

At the glass entrance to the building, Bullard describes the scene as “an angry mob outside the door. They [were] just irate, and [they were] pressed against the door. We literally [had] to keep everybody out.”<sup>103</sup> Among the crowd were people with megaphones who were leading chants about Duke. Bullard still thought that he could handle the situation. He believed in the power of addressing students. In his own words, Bullard said:

So, me in all my wisdom, I decided I was go[ing to] go out and have a conversation with our students and say, “Hey, look. This is what the situation is. Everybody know[s] you’re upset. This is what it is.” So I walk out, and I grab the mic....So I was like, “Hey, this is our situation. We are hoping that everybody can really settle down.” As I’m looking across the crowd, they aren’t our students. Then they became angry. Who is this guy? They started yelling. I was like, “Oh no.”<sup>104</sup>

Bullard retreated into the building and the crowd began pressing against the door. Eventually, seven to eight officers were deployed at the door to keep it closed. The crowd began to throw water bottles and other items at the door. Bullard learned later that several local universities had bussed their students to the Dillard campus to protest. He was not happy to find out that this had happened without any advance communication or offer to send security or staff, a point he conveyed to at least one of the universities after the event.<sup>105</sup>

Footage of the chaos at the doorway made the national news. One image showed a man swinging down upon the heads of state and local police officers as one officer pointed what looked like a gun (but was in fact a taser) at the man. As the man was taken down and arrested, the decision was made to use pepper spray on the crowd. A number of officers were impacted by the use of the spray, but it enabled

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101 Id.  
102 Id.  
103 Id.  
104 Id.  
105 Id.

them to get the door closed and secured. The crowd violence diminished at that point.<sup>106</sup>

Advancement Vice President Marc Barnes became afraid. He described the scene as follows:

The night of the event, I was actually afraid for my safety because people were trying to get into the building. They were throwing stuff. We didn't know if people were going to bring in weapons, like we just didn't know. It was really scary inside that building. Particularly as people began starting to infiltrate the building from other spaces so now, we're calling in for police reinforcement. There was no way for us to get out because the people were at that point all over the building.<sup>107</sup>

Barnes thinks that their response was not forceful enough from the beginning and that the crowd would have relented under a stronger display. He said, "We almost allowed the crowd to just bully us for a while."<sup>108</sup>

Kimbrough was not on campus during the debate, but he was on the phone with Barnes and being kept up to date on the evening's events. He was trying to get back to campus to deal with the situation. Barnes told him to stay away. He described Kimbrough as being really upset and wondering if this would be the end of his presidency. Barnes was convinced that they had made the right decision, however, not only to protect the president physically but also to avoid having him try to answer the questions of the protestors. Barnes noted that he was worried about Kimbrough. He had not seen him face a situation like this in the several years that they had worked together. He described a moment after the event was over that evening when Kimbrough's wife was spotted on campus leaving another event. Members of the crowd began screaming at her. Barnes described the whole episode as "pretty scary." Kimbrough was also in contact with the secretary of the SGA, and she gave him the same advice: stay away from campus. Kimbrough recalled Barnes' practicality as well, as he told Kimbrough to stay away so that resources would not have to be diverted to protect him.<sup>109</sup>

Kimbrough could only follow the event through third parties. He remained in touch with his board. He told them, "[If] we feel like it did not go well, it's the president's responsibility. I'll be happy to resign."<sup>110</sup> Kimbrough notes that he told his wife in advance that he felt strongly about the need to bring Duke to campus and not cancel the event. He warned her that this decision may cost him his job and that he would resign rather than cancel. Kimbrough was adamant that Dillard and its community should not give Duke that power. He described him as one man in an empty auditorium speaking for no more than ten minutes, at the most. Shutting him down would offer him publicity and power. He told his board these

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106 Id.

107 Barnes interview, supra note 90.

108 Id.

109 Id.

110 Kimbrough interview, supra note 55.

thoughts and reiterated that he was willing to stake his job on that choice. The board told him to stop speaking about resignation.<sup>111</sup>

As the crowd began to thin and the event came to a close, Bullard thought that it was all over. What he did not know was that the crowd had moved over to the suspected exit of the auditorium to await Duke. Fortunately, they had the wrong door. The candidates left but not before some of the debate participants began to criticize Dillard's handling of the evening as a restraint on free speech. Bullard noted that many outside the hall were angered that they had not been allowed into the event and believed that Dillard had arranged it this way in order to quell protest. Bullard also described a "scrum" of their students who were angry with Dillard for bringing this situation to their campus. Although he tried to talk to them, it did not go well.<sup>112</sup>

As debate participants were leaving the campus, one of the two main entrances to campus was shut down. The two entrances connect in a large horseshoe. For some reason, people believed that the candidates were still on campus, and to prevent anyone from entering, they lay across the street to stop any traffic. This resulted in a backup of fifty to sixty cars trying to enter the campus. At this point, Dillard asked the police to arrest those blocking traffic. Of the six arrested, only one was a Dillard student. After this, the protests and the events of the evening that had started seven hours earlier settled down around 11 p.m.<sup>113</sup>

The night was not over for Bullard, Barnes, and their cabinet colleagues, however. Kimbrough held a conference call at midnight to find out how everyone was doing and to debrief the evening. They planned to have the president address the student body the next day and tell them why Dillard had done what it did. Some students had begun a call on social media to fire the president.<sup>114</sup>

At the assembly the next day, Kimbrough asked the students to locate the people who arrived before the event, told the Dillard students what to do, and pledged their support. He said, "Where are they now? Have they been back? Have they been back to check on you?"<sup>115</sup> Kimbrough noted to the students that many sought what he termed "social media activism." In his words, "People came so they could put it on social media and be in the paper to say, 'Yeah, we protested David Duke.' But if there were real issues over here, they abandoned you so quickly."<sup>116</sup> He noted an adjunct faculty member who encouraged her students to protest and decry the administration's actions. He recalled that he received a text message from her later indicating that she had it wrong.<sup>117</sup>

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111 Id.

112 Bullard interview, supra note 71.

113 Id.

114 Kimbrough interview, supra note 55.

115 Id.

116 Id.

117 Id.

Kimbrough's favorite story of the events of that week occurred on the Friday following the debate. His secretary told him that he had an unannounced visitor. It was Dyan French Cole, known simply as "Mama D," a noted civil rights activist in New Orleans. Mama D passed away in 2017.<sup>118</sup> She was there with one of the students who had been arrested. Mama D had been the first woman president of the NAACP chapter in New Orleans in 1975. Former New Orleans mayor Marc Morial relied upon Cole as a resource and someone who would not take no for an answer. Senator Barack Obama, campaigning for president in New Orleans, conferred with Cole to determine what the city needed most (Reckdahl, 2017). Kimbrough recalls of his encounter:

My secretary called to say, "Mama D is here to see you." I was like, "Oh Lord, I'm about to get...I'm about to get beat up." So I see her walking with this student, and I was like, "Oh my God, I'm about to really get it." And she said, "Look, I'm here to tell you something. When David Duke was on your campus the last time in the seventies, I was here. I had lunch with him that day."<sup>119</sup>

He described her as "the most radical person in the city."<sup>120</sup> She told Kimbrough that people like Duke, and those like him in the local community, only want to start a fight. She told him not to pay attention. She told Kimbrough that when Duke was on campus, she determined that she was going to be in that space with him, even though she was the NAACP president at the time, and he was in the Klan. The meeting was a seminal moment for Kimbrough. He discovered that she had sat down and shared a meal and a conversation with someone who wouldn't even be welcomed on campus today. As Kimbrough thought from that moment forward, "If you don't like it, you go talk with Mama D."<sup>121</sup>

Kimbrough wanted to ensure that communication channels were open to all the constituencies on campus and that everyone knew what had happened. He explained the process that Dillard followed and acknowledged his decisions. He reiterated that he believed that Dillard had acted in the right way. If the events surrounding Duke's visit had somehow damaged the fabric of the university, he was willing to accept responsibility and to step down. A journalist who was a former student of Kimbrough's at another school contacted him in support. He told him that if Dillard could not handle David Duke on its campus for one night out of its 140-year history, then it should close. Kimbrough considered that a powerful message.<sup>122</sup>

Bullard was left with a lingering sense that he had lost sight of himself and his role in student affairs in the course of the evening. He thinks that he should have

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118 Katy Reckdahl, *Dyan French Cole, "simply Mama D," dies at 72: "She was the rock of New Orleans."* The New Orleans Advocate, May 20, 2017. Available at [https://www.theadvocate.com/new-orleans/news/article\\_b0e17566-3d7f-11e7-b88b-c7a4d2da0418.html](https://www.theadvocate.com/new-orleans/news/article_b0e17566-3d7f-11e7-b88b-c7a4d2da0418.html).

119 Kimbrough interview, supra note 55.

120 Id.

121 Id.

122 Id.

made sure the students got the most out of the evening. He felt that the evening devolved into crisis management as agitators were dealt with, and it was all the more frustrating that most of them were not even Dillard students. He noted that all of the pieces came together to conspire against him, particularly the external forces and his status as a newcomer to campus. He suggested that if faced with a situation like this again, he would advise himself to “stay in that moment, [trust] your instincts to say, ‘This is what I’ve been trained to do up to this point.’ That’s what you have to sort of stick with.”<sup>123</sup>

Of note, Bullard regrets that he thought he needed to have the answer to the problem: “I felt like, in that moment I had to have the answer. I didn’t have to have an answer.”<sup>124</sup> He wished that he had stopped at some point in the evening to ask himself what his students needed. He thought that it would have been easy for him to separate what was happening in the moment from the needs of the students because the students were not really at the center of the events. He observed Dillard students in the midst of the melee and felt terrible. He wishes that he could have identified the Dillard students and brought them into the building to talk to them. Instead, he reacted by treating everyone on the outside of the glass as an enemy. In the final analysis, Bullard acknowledged that he possessed the tools to deal with the situation but that he wished he had used them differently.<sup>125</sup>

Bullard noted that the impact on the whole campus was misunderstood. He spoke to people the next day who asked what happened the night before. They were surprised. He thought the critics of Dillard’s actions overplayed the impact on the campus. Those critics were reacting to the student complaints, many of which came from those who did not even know a debate was taking place. He used as an example the student assembly the next day when Kimbrough answered questions about the event, at which he did not observe any adverse student reaction, such as demanding answers or refusing to return to class. Kimbrough’s event, held at the chapel on campus, attracted faculty, students, and staff. Kimbrough explained that the university was prepared to demand its community to think critically, and events like the one held the night before served as an example. Kimbrough also addressed a separate group of students who had brought forth anonymous concerns focusing on the needs of the LGBTQ community. Kimbrough chastised them for leveraging the Duke appearance for their own gain. He told them that the needs of their community were important and worth public discussion. Instead, their anonymous protests of Duke empowered him, and they should be mindful of that.<sup>126</sup>

Bullard noted that his staff practiced events like this afterward. If another Duke event were to take place, they asked themselves, what would they do differently? The police updated their protocols. A new student handbook came out with updated language on protests that would give the division some advance notice.

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123 Bullard interview, supra note 71.

124 Id.

125 Id.

126 Id.

Bullard noted that the division and Dillard have no problem with protests, “none whatsoever.” For his part, Bullard wished that he had not been wearing a suit that evening because he looked too much like “administration” and could not deal as effectively with students and protesters in that outfit.<sup>127</sup>

Kimbrough still encounters lingering animosity from the events of November 2. He occasionally runs into people who question the police’s use of pepper spray and the clashing with protesters at the doors to the event.<sup>128</sup> Barnes remains in touch with an alumnus who emails him regularly about the Duke event and who rebuffs any attempts by Dillard to explain it position to him. The alumnus remains stuck on the fact that Dillard is the place that allowed David Duke to speak on campus. On the other side of the equation, conservative alumni and students applauded Dillard’s actions, pointing out that the students and community of the university are not of a single political voice. They also applauded Kimbrough’s Brain Food lecture series that invites, among others, conservative speakers.<sup>129</sup>

Barnes on the other hand dealt with the Duke backlash and then the backlash surrounding Owens. Barnes expressed the following takeaway from the Duke incident:

I think that we have to create a space, particularly on a campus like ours, we’re predominantly African American, traditional student, and by traditional, I mean the traditional eighteen- to twenty-two-year-old student. We have to create a space where they understand, not everybody thinks like them. And we have to create space where they can be comfortable listening to people who may even make them mad in terms of what they’re saying, but understand the right way to react to that. . . I think that when we don’t allow people to come on our campus because 90% of our campus disagrees with that individual, then I think we are doing them a disservice. And we are not doing our job as educators to teach them how to deal with stuff that they’re go[ing to] face in the real world. The world does not look like the university.<sup>130</sup>

Barnes is convinced that the right decision was made at Dillard. He wished only that he had taken the opportunity to have conversations with students about their convictions or that Kimbrough’s talk following the event had happened prior to it.<sup>131</sup>

The following March, notably after Charles Murray was shouted down at Middlebury, Kimbrough authored an op-ed for *The Chronicle of Higher Education*. He wrote about his experiences during his presidency at Philander Smith College and its speaker series called “Bless the Mic.” Kimbrough reflected on being in his second year of his first presidency at Philander Smith and being only thirty-eight

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127 Id.

128 Id.

129 Kimbrough interview, supra note 55.

130 Barnes interview, supra note 90.

131 Id.

years old. While there, he had invited Ann Coulter to speak. She appeared, spoke to over five hundred guests, answered tough questions, and left. The purpose of the series was to “make people uneasy,” in Kimbrough’s words. Another of his guests was Charles Murray. He lamented in his editorial that colleges do not engage ideas anymore, and those that do are put to extreme tests. Riots, police activity, injury, and outside agitators make the cost questionable. As Kimbrough put it:

I’ll admit. I’m scared. The robust discussion I have always sought to expose my students to doesn’t seem to be worth it anymore. It feels as if the best thing to do is to play it safe and simply invite either entertainers and athletes to speak as feel-good events or hard-core academics whose presence will go unnoticed. It means going in the opposite direction of my “Bless the Mic” days and finding that boring lecture on dark matter.<sup>132</sup>

He illustrated the power of open dissent with the story of an alumnus of Philander Smith who wrote an open letter criticizing the invitation to Murray. The alumnus wrote a similar letter when Coulter was invited. The power of the argument and the thoughtfulness of the alumnus’ position persuaded Kimbrough to hire him as the director of an institute at Philander Smith. He used that story as an example of thoughtful discussion, illustrating that it is the kind of dialog that would be lost if everyone played it safe.<sup>133</sup>

## V. Analysis of the Case Study

The leadership team at Dillard faced a unique set of circumstances. To understand their response, the case study is analyzed below from two, general perspectives: how the leaders framed and understood the challenges, and what the leaders did in response. Through the lens of these responses, a picture develops of the challenges faced at colleges and universities when a controversial speaker arrives.

### *A. Framing and Understanding the Problem*

**The nature of the problem.** Leaders have the opportunity to frame controversy as educational and not simply respond to a crisis thrust upon them. Walter Kimbrough is an example of this. At a time when controversial speakers are chased off campuses, what could be more provocative than a former leader of the Ku Klux Klan coming to the campus of a historically Black university? Further, he appeared as a candidate for office, running for senator from Louisiana. Despite the high stakes and the fact that Duke’s appearance did indeed spark protest and riot (for which the police had to deploy pepper spray), Kimbrough took the position both before and after the talk that this former Klan leader should be able to appear and speak on a campus like Dillard.

Kimbrough had options to distance himself and Dillard from the controversy. Though he flirted with those options at first, he chose not to rely on them exclusively, instead deeming the appearance of controversial speakers to be a Dillard hallmark.

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132 Kimbrough interview, supra note 55.

133 Id.

His general counsel gave him a legal way out: he could assert that Dillard had a contract to rent space for the political debate and that the contract did not have a clause that would allow Dillard to cancel an event if it did not like the views of one of the candidates. Though compelling and true, Kimbrough chose not to rely upon an excuse but to make an assertion. He chose to embrace the challenge of difficult ideas. He realized that this type of challenge was not one that Dillard only faced today but one it had also faced throughout its history, dating back to its founding. Kimbrough had continued a long-standing tradition of Dillard presidents who bring speakers to campus. He had his Brain Food lecture series through which he hoped to fill the heads of Dillard students before they chose to empty their mouths.

What is startling about Kimbrough's leadership in this instance is that he reacted, framed, and reframed his stance in a matter of days. Upon hearing that Duke had qualified for the debate, he had to manage the attention and controversy of this matter in only a short period of time. In that time, he managed to reassess his position. His conclusion: difficult speakers should appear at Dillard, and Dillard should embrace the challenge. Further, student protest done right is an important lesson, and he wanted his students to learn the skill.

A matter that begins as a controversy rather than an outright crisis may give leaders more latitude and control over the issues. In the case of Dillard, the arrival of Duke sparked a controversy but not a crisis, at least at first. In that window, short though it was, Kimbrough was able to frame the event as a matter of educational importance to the students in keeping with the mission and history of Dillard. As Kimbrough asserted, Dillard could not consider itself a "liberal arts" institution if it were not willing to confront difficult ideas.

**Institutional and national context.** The Duke appearance attracted outsiders who added fuel to the fire and transformed the controversy into a crisis. This process was impacted by the timing and geographic proximity to other smoldering issues. In the lead-up to the 2016 presidential election, the nation was experiencing increasingly polarized politics. The fury around the Duke appearance germinated in that political atmosphere. The senate election was a major event itself, and Duke was a polarizing figure hoping to capitalize on the extremes at play in the national elections.

The charged environment included controversy over the history of racism in the south, particularly in the form of Confederate monuments. This controversy intensified the attention on Duke and escalated the response by students and the media. A group called Take 'Em Down NOLA dedicated to the removal of such monuments had formed in New Orleans. If that cause were not controversial enough, Duke had recently spoke out against the removal of one such monument. The proximity of Dillard to the activities of Take 'Em Down NOLA, Duke's insertion into their cause, and the opportunity to push back as Duke took the stage at nearby Dillard made the debate an opportune event for protest. The core group of Take 'Em Down NOLA protestors, along with busloads of students from other schools, mixed with Dillard students and others, both outraged and curious, to complete the crowd of protestors, some of whom turned violent over the course of the evening.

Dillard had the option to assess these risks and decide to avoid the controversy. For example, as Kimbrough noted, if his board told him to cancel the event, he

would have done so. Dillard and Kimbrough decided that such a course of action was not in keeping with the kind of school Dillard was. Its institutional context was important. As an HBCU, Dillard is a homogeneous place. Over 90% of its student body is African American.<sup>134</sup> In this setting, Kimbrough, as did his predecessors, felt the need to import diverse ideas and controversy to allow the students to engage with issues that would not otherwise appear on campus.

**How leaders framed issues, and how that evolved.** The controversy / crisis at Dillard proved to be fluid, and its leaders initially struggled to understand what was happening. However, Kimbrough picked a frame and began to act accordingly. Kimbrough's struggle had the added complication of a small amount of time with which to work. As the controversy became known to him, he tested several frames. First, he removed Dillard from responsibility. He claimed that the polling was rigged to generate controversy. In his imagination, someone wanted the spectacle of Duke at Dillard and manipulated the polling numbers to allow that to happen. In that frame, Dillard was merely the passive victim of political shenanigans. Next, Kimbrough framed the issue legally. He again removed Dillard from the center of the event by sidelining its involvement. He positioned Dillard merely as the unsuspecting host with a legal contract that it could not break. His thinking eventually evolved to embrace the event and place Dillard at the center as an intentional actor in this play. Kimbrough framed Dillard as the place where difficult conversations could take place, as well as the institution that historically brought difficult issues of the day to campus, including a visit from Duke in the 1970s when he was still a Klan leader and had spoken directly to the student body. Kimbrough framed the controversy as one where he as the president of a liberal arts school, like his predecessors, was proud to bring in controversial speakers. Once he framed it in that way, it was clear to Kimbrough that the debate must occur, that the campus must be ready, and that he would live (or leave) with the decision.

**Stress: Individual and institutional, and how that needed to be addressed.** Kimbrough endured a high level of personal and professional stress and turmoil. It is clear that the stress impacted Kimbrough. He wanted to be on campus the night of the protests and felt helpless as the controversy enveloped Dillard. He told his wife that he was willing to lose his job over the decision to not challenge Duke's participation in the debate. He told his Board of Trustees the same thing. He told them that if the campus suffered as a result of his actions, he would be willing to step down. He knew that he was in a precarious position relative to his board. As he put it, if the board had told him to cancel the event, he would have. However, his board made the situation easier for him by supporting his stance regarding the debate and telling him to stop talking about resignation.

These events were stressful for Dillard as an institution too. The situation on campus the night of the debate was described as a riot.<sup>135</sup> That said, Dillard was

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134 Dillard, *supra* note 61.

135 James Wilkinson, *Ex-KKK leader David Duke's visit to historically black Louisiana university sparks violence as protesting students clash with cops*, The Daily Mail, Nov. 2, 2016. Available at <https://www.dailymail.co.uk/news/article-3899832/Furious-students-clash-police-David-Duke-s-appearance-Dillard-University.html>.

fortunate that the stress seemed to end when the evening did. Once the outside agitators left campus, the controversy left with them. Kimbrough was quick to highlight their absence when he addressed the Dillard community the day after the debate.

Real and lasting institutional stress can inoculate a campus from the strain of a passing controversy or crisis. Such was the case with Dillard. It had suffered staggering financial losses due to Hurricane Katrina. Its students had to live in hotels because all of its dormitories were flooded. Its student body remains significantly diminished from before the storm. The campus today bears the scars from the storm as work continues to make it less susceptible to floods. Beyond Katrina, Dillard had hosted controversial speakers before the Duke debate, and it would again. As stated above, Duke had appeared on the campus as the Klan leader in the 1970's. In that role, and as an invited speaker, he was arguably more controversial. The fact that Dillard had survived that kind of direct interaction added evidence of resilience and a sense of confidence to Kimbrough's perspective on the current visit of the former Klansman. Further, Kimbrough's predecessors at Dillard had invited controversy to campus for years, a tradition that Kimbrough embraced and continued with his Brain Food series. To a campus like Dillard, the brief rioting of outside agitators for one evening was not as impactful as it might have been on an institution not thusly inoculated. Consider as evidence that Kimbrough had a pragmatic reason to keep the debate on campus. One of the debaters would be elected senator, and that official would decide on continuing aid for Dillard for Katrina damage. He knew that the financial issue was larger and more important for Dillard, and he wanted that future senator to appear on his campus.

### ***B. What Leaders Did***

**The role of the president and the role of the team.** At Dillard, Kimbrough had to understand when it was important for him to lead and when it was important to allow his team to lead. The night of the debate is a key example of this. Kimbrough was off campus and wanted to return to manage the unfolding situation. Marc Barnes, his vice president for advancement, and Roland Bullard, the vice president for student success, were both on campus that evening. Each one told Kimbrough to stay away. Kimbrough spoke to a student government officer who told him the same thing. Barnes and Bullard realized that the situation on campus was getting dangerous. Kimbrough's wife was on campus and ended up being verbally assaulted by members of the crowd who recognized her. Barnes had additional and practical reasons to keep Kimbrough away: he needed all the police and security he could get, and he couldn't spare any to protect Kimbrough if he decided to come to campus. Bullard needed to get out in front of the students even though he was relatively new on campus at the time. He attempted, albeit unsuccessfully, to speak to the crowd and calm them once he realized they were not Dillard students. Kimbrough himself was personally anguished over not leading in this moment of controversy / crisis, but he knew that his team had worked hard to plan for the night and had contingencies in place, such as establishing a covert entrance and exit to the auditorium for Duke. Kimbrough also knew that backup law enforcement was on campus to help with the crowd. Confident in their preparation, Kimbrough left the night to his team.

The time for Kimbrough to lead occurred before and after the event. Before it, he took the reins and framed the event as important for Dillard and central to its mission. Kimbrough had to decide whether Dillard would stick with the legal deflection argument or embrace the debate. After the event, it was Kimbrough who stood on stage and addressed the Dillard community the next day. He explained what had happened the night before, which was news to many in the audience, and he told them why Dillard and its leadership had acted as they did. The following year, when more speaker controversies occurred around the country, Kimbrough again took the lead to write about the difficulty of these issues, thereby leveraging the controversy to gain positive attention for Dillard.

**How leaders communicated, and how the campus communicated back.** Kimbrough was a savvy communicator. For example, he was intentional about using social media and engaging the community face-to-face. Social media indeed played an important role in the Duke debate controversy. The president learned of Duke's participation through Barnes via social media. Dillard students were agitated by outsiders via social media to protest the appearance of Duke. The social media storm made the Dillard students question how they could allow someone like Duke on their campus. Students made demands of Kimbrough using these outlets on which they could appear anonymous. (Kimbrough was not happy with the anonymous communication. He refused to deal with student demands thus placed. As a small school, he believed that Dillard community members should speak to each other.) Finally, Kimbrough derided the outside agitators who arrived, rioted, and left. He stated that they simply wanted to have their social media moment where they could post that they protested David Duke.

Kimbrough was no stranger to social media and thus aware of the way that messages could stray in that setting. The student voices on social media reacted quickly and gravitated toward the conclusion that a former Klan leader had no business on the campus of an HBCU. On the day of the debate, once Kimbrough had firmly framed the situation, he took a different approach, encouraging students on social media not to make a big deal out of Duke's appearance. He indicated that such a disturbance only gave Duke the controversy, attention and power that he wanted.

Kimbrough strategically and effectively shifted from impersonal to personal communication. He addressed the Dillard community the day after the debate. He was quick to point out that those who acted as agitators the night before were not currently present with the Dillard community. He made sure that the community knew that he and his team were there that day and would be there the next too. Using this vehicle of personal address, Kimbrough was able to solidify his point that those who really cared about Dillard were there to help them, educate them, and stand with them in the wake of this controversy, just as they had done through an event as difficult as Katrina. Kimbrough spoke directly in contrast to the anonymous demands made by students. He wanted to stress that Dillard was small and a family and that as such, communication happened out in the open and face to face. This is not a message he could deliver, authentically, via Twitter.

**Stakeholders on and off campus and coalitions.** Certain stakeholders, both on and off campus, made the Dillard event more intense, but others had a calming

influence. The Take 'Em Down NOLA group exacerbated tensions during the debate with Duke. Further stoking the tension was the underlying challenge of the history of racism in the Deep South that undergirds the controversy surrounding the Confederate monument removals. Both of these factors fanned the flames of the Duke debate appearance.

There were elements of the situation that had the opposite effect as well. Consider that Dillard and New Orleans had survived Katrina. Consider too that Dillard had invited Duke directly to its campus in the past. This point was made clearly to Kimbrough by Dyan French Cole, aka Mama D. She told him that to create a fight over Duke's appearance was just what Duke wanted. When he had appeared on campus in the 1970s, she had joined him for lunch. She reminded Kimbrough that he was the Klan leader at that time and that Cole was the leader of the NAACP. This helped to put the current controversy into perspective for Kimbrough and provide him with an example of civil confrontation.

A final stakeholder to consider is the neighborhood in which Dillard is located. Gentilly was not disturbed by Duke's appearance. As Bullard pointed out, if something was amiss in Gentilly, even of a small nature, Dillard would hear about it. Gentilly, however, was quiet. Social media was filled with protest from New York and California, but Gentilly remained still.

**The aftereffect on institution and people.** At Dillard this controversy offered the campus an opportunity to achieve clarity of its values and its preparedness for future types of similar events. Kimbrough used the Duke debate to understand better both the history and the role of Dillard as a place where difficult talks can occur. He added his Brain Food series to the long line of presidential speaker events at Dillard. He learned of the challenges Dillard had faced in the past from his encounter with Mama D. He took the position that Dillard should stand its ground as a liberal arts college and embrace difficult conversations. Yet despite finding clarity around Dillard's values, Kimbrough remains afraid that higher education institutions will shy away from controversy in the future to avoid crisis.

Dillard understood the need for future preparedness. It took the opportunity to revisit its protocols. The Student Success division has done tabletop exercises to practice for this type of event. Bullard noted that he now knows how to find himself in these moments and not get caught up in the crisis. He wishes that he had remembered his training that evening instead of trying to quell the disturbance at all costs.

### *C. Leadership Lessons*

#### *The General Counsel*

The Duke appearance at Dillard offers an instructive lesson for lawyers representing higher education institutions. Dillard's General Counsel was correct in her interpretation of the contract controlling the rental of the space at Dillard and, in that sense, she gave good advice. However, lawyers need to understand their advice in the larger context. Stepping back from the Duke controversy at Dillard, the question is rightly asked whether this was a contractual matter or

a free speech one. A nuanced response would argue both. Kimbrough however pointed out that the contractual matter was but a factor in a larger debate about the purpose of higher education, particularly at Dillard. He admitted that if his board had not supported his decision and wanted him to prevent Duke's appearance, he would have done so. Instead, the board supported his instinct to allow the event to proceed. Further, the event gave Kimbrough and Dillard a chance to examine what it is, what it has been, and what it wants to be as a university. Seen in this light, the interpretation of a contract is but a bit player in this larger play. Legal advice, in this setting, is just that: advice. The lawyer can identify what will or is likely to occur with a given action but the picture is far larger than that. To miss that point in the case of Dillard would be to reduce to a contractual controversy Duke's visit to this HBCU.

### *The President*

To understand an incident, and potentially plan for one, a president should keep a finger on the pulse of both the external environment and the internal campus values. The political context in which a president leads is important and filtered into the case study as a driving force behind the events. The 2016 presidential election polarized American politics. The opposing sides found little common ground: one side was horrified at the prospect of a President Trump, and the other side thought that Hillary Clinton belonged in jail. Although easier to see in hindsight, a leader needs to have a sense of this polarization and the impact it may be having on campus. This strain from outside forces could result in reactions to events on campus that would not otherwise occur. The failure of a leader to anticipate this strain could leave a campus exposed to controversies such as those that occurred in these free speech incidents.

Related to understanding the political environment, presidents need to understand what is fundamental and essential to their institution and its community. If it is the idea of community or the idea that the campus is home, then the president needs to know this and determine whether it is threatened by the incident at hand. The president could get it wrong, or they may need to adjust and evolve with this understanding as events progress.

Presidents must understand the importance of taking a position and framing it properly. This position becomes particularly important when a president is faced with what could be perceived as a lose/lose situation. Make one choice, and the president will anger conservatives. Make another choice, and the president will be perceived as an adherent to the right wing or, worse, as racist. Constituents will each want their own resolution, and not everyone will be happy. Kimbrough still encounters alumni who are angry over the Dillard response.

As the president frames the understanding of the essence of the university, the president needs to act with integrity and confront the possibility that this position may come with a cost. Kimbrough felt that he reached an understanding of the true purpose and mission of Dillard. Having reached that conclusion, he took this understanding as his guiding light.

A president should act logically but also emotionally. The logical side responds to policy and procedure. The emotional side reflects how the campus is feeling. An

incident can spark a necessary and important review of policy and procedure to address a controversy. Those policies and procedures, and their logical application, do not address the campus's critical need to have their emotional response understood and respected. If a president is going to understand and frame an event on the campus, the president needs to be able to plug into the emotion surrounding it.

Presidents must be prepared for personal and institutional stress. Part of understanding a situation on campus is understanding the personal stress on the president. The president needs to have some vehicle for addressing the personal and psychic stress encountered. It could take the form of a support group. It could manifest itself as experience or knowledge that he or she had been through something like this before. Institutional stress must be managed as well. A president needs to understand how the campus is managing its level of stress. Once the president has sensed and understood it, he or she should find ways to manage, mitigate, or release it. The use of a town hall, open forum, or other form of listening session may be an effective means of managing institutional stress, depending on its intensity.

Beyond framing and understanding the problem, a necessary implication for presidents facing a free speech incident is action. In other words, presidents should be ready to do something in response to an incident like those in the case studies.

The first piece of advice is to be present. A president cannot "mail in" their leadership and expect to manage the issues presented by a controversy. Kimbrough made his presence known and used that as an important tool. Though his team kept him from campus the night of the Duke debate, he was there the next day to address the community. He stressed that he was there, among them, and would be there the next day, week, month, and year. He emphasized, through his and his team's presence, that they cared for Dillard in a way that the protestors did not.

Presidents must be aware that what may seem like a campus issue can spill beyond its boundaries. If Dillard had limited the events to their students, the outcome would have been different. This is a logical and rational response: review policy to allow only internal attendees. Worrying about policy from the relative comfort of post-event calm makes more sense than relying on a policy response as a first response.

Finally, presidents need to be wary of responding and acting based on a fear of damage to the institutional reputation. Though the reputation may indeed be damaged by such an incident, the difficulty lies in the vagueness of this goal in the heat of the moment. Presidents need to act decisively and the impact on reputation is a risk no matter what decision the leader makes. The reputation may be enhanced or hurt by any decision in a difficult situation such as faced by Dillard. Kimbrough chose to rest on his fundamental understanding of what Dillard is and was. If wrong, he was willing to take responsibility.

### *The Senior Team*

The senior team plays an important role in helping the leader frame, understand, and respond to an event like those covered in the case study.

Presidents should rely on their senior leadership team to help them make sense of the campus community and frame or counterframe the issues based on what other stakeholders have said. Whether the president is strategically or unintentionally keeping distance from the community, the team can help either by managing the scene, as occurred at Dillard.

In an incident such as Dillard experienced, the support for the president goes above and beyond the day-to-day understanding of that requirement that most leadership teams would intuitively consider part of their job. Teams need to understand how personally taxing these events are on the person standing at the front of a town hall audience. They need to understand that the president is likely staring at the potential loss of her or his job as decisions are made and responses are crafted. Understanding this level of stress is important when the leadership team thinks about how best to support the president. This support is not always agreement. Consider Kimbrough's team. The night of the Duke debate, Kimbrough was off campus. He wanted to return. Roland Bullard and Marc Barnes told him to stay away because the temperature on the campus was too hot. In this sense, they helped Kimbrough by knowing that the evening of the Duke debate was a time to allow them to lead. This decision came during a time when Barnes recognized that he had never seen Kimbrough under such stress.

What leaders do is critically important as well. Leadership teams need to plan, assemble other teams that can respond in an incident, follow the policies and procedures that are in place, and be ready to accept that their precautions may not be enough. It may be a cliché, but leadership teams must "expect the unexpected" and know that some event will stretch their planning in unforeseen ways.

Policy, procedures, and plans are important. Leaders must follow and rely on them with an understanding of their limitations. Dealing with the immediate and critical aspect of campus emotion is an example of the limitation of policy. Stakeholders, students, faculty, and staff may all be upset. Policy and procedure will not address that emotion. However, following through on policy and procedure, such as the imposition of discipline, is a needed part of the menu of responses to the event.

Leaders must be willing to recognize that they cannot prepare enough. What may seem like a controversial speaker event can morph a crisis once a large crowd of agitators from outside the campus arrive. Bullard offered a good example that one can always prepare further. He was trained as a competent student affairs administrator, but that training did not allow him to address an angry mob of protestors, almost none of whom were students.

Finally, leaders must understand that the work can continue after the incident. This requires an understanding of how to prioritize responses. Deal with the emotion first. Know that the policy, procedure, and related responses will be important but may not be the first consideration. Know too that incidents such

as these may take years to resolve. Though that realization may be daunting, it allows breathing room to structure and prioritize responses in both the shorter and longer term.

### *The Board*

The Association of Governing Boards of Universities and Colleges (2018) released a guide for trustees that covers the top strategic concerns for boards for 2018-2019.<sup>136</sup> Among these concerns is free speech. The suggestions in this publication both align and diverge from the findings in these cases. For example, the AGB suggests that legal issues will be an important part of the considerations of any governing body. However, it urges universities not to frame their responses in terms of legal rights. It suggests instead that the university should state its position in terms of its mission statement and the values of its community.<sup>137</sup> This suggestion is consistent with the findings from this study, in which campus values mattered and shaped responses. However, the AGB doesn't fully acknowledge the emotion behind the necessary campus responses. The need to address the emotion of the campus should come first, and the leader's response should match that emotional intensity. Additionally, though they may be similar, the framing of the response should center on the common and lived values of the community, not simply on the words of the mission. Thus, it is critical for leaders and their boards to have a clear understanding of the core values of their community as those values are evolving. While it is helpful to state that understanding in terms of the mission, the core values may be held and understood in words and ideas that may or may not found in the mission statement.

The AGB article differs from the case findings in that it puts the board on the front lines of these issues. The AGB suggests that the board should engage with students about their concerns on free speech. Dillard did not put its board on that front line. Though the board was an important voice behind the scenes (for example, Kimbrough's discussions with the board about stepping down if he acted to harm Dillard), the board did not take such an integrated role in the management of these issues. Given the importance of the president as leader, both from a strategic and symbolic standpoint, the injection of the board in this process would serve to diminish the president's role. The president and the leadership team wield the power to frame issues and must manage the community stress, as identified by Heifetz (1994). These roles should be played by the leader or the leader's team. These tools are rendered less effective when a higher authority injects itself into the management of the institution. That authority, the board, may counterframe a response, counterinterpret the mission or values of the institution, or attempt to inject or release the stress by means other than the actions of the leader. Any of these actions leave the leader on the sidelines, which is no place for a leader to be when responding to such controversy.

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136 Association of Governing Boards of Universities and Colleges, *Strategic Issues for Boards 2018-2019*.

137 Id.

## VI. Conclusion

The experience of Dillard University and its leadership team will likely occur on other campuses. The facts will be different but similarities weave their way through many of these controversies. The polarized politics rampant in America today indicates a greater likelihood that ideas, expressed from one viewpoint or the other, will be met with protest, even violence. Speakers who have spoken before without incident may not be welcome the second time. Further, as higher education becomes tagged with the label of left-wing seminary, expect that speakers wishing to challenge or instigate will target campuses to test whether the free and open exchange of ideas remains a value of higher education. Leaders and leadership teams are well advised to discuss if not rehearse what an incident like this would look like on their campuses. To truly understand the complexity of these cases, the stakes must be high. The values pitted against one another must be fundamental, the answers not apparent, constituents angry, and the president's job, and those of senior staff, must be on the line. Only then does one grasp the difficulty inherent in these incidents.



# THE DEVELOPMENT OF FEDERAL STUDENT LOAN BANKRUPTCY POLICY

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## **Abstract**

*Perhaps 200,000 to 250,000 student loan borrowers enter bankruptcy every year, and the large majority of student loans are issued under federal programs administered by the Department of Education (“Department”). Thus, the Department’s rules about when student-loan holders should consent to bankruptcy discharge are critically important. Nevertheless, they have received little attention compared to judicial doctrine relating to student loan bankruptcy.*

*This Article presents the first detailed history of the Department’s student loan bankruptcy policy. It first describes the current rules, under which loan holders are to oppose discharge unless the repayment would cause “undue hardship” — the standard for discharge under the Bankruptcy Code—or opposing discharge would cost more than one third the outstanding loan balance. These rules call for consent to discharge only where the borrower would be able to prevail against the holder in court by showing undue hardship or where consent would make the holder financially better off.*

*The Article identifies the source of the Department’s analytical framework in rules adopted under Secretary William Bennett in 1987. The Article traces the history from that point, identifying where gaps and ambiguities have crept in and where the Department has increased holders’ discretion without explanation. It shows that the Department has never adopted regulations to govern consent to discharge of loans it holds itself, a formerly small category that now accounts for the majority of student loans outstanding.*

*The Article concludes with recommendations for improving the Department’s rules. First, it should consider amending the regulations to cure the gaps and ambiguities they contain. Second, it should cabin the tremendous discretion holders enjoy by adopting bright-line rules providing for consent to discharge under certain objectively defined circumstances. Third, recognizing that an overly strict policy undermines the purposes of the student loan programs, it should liberalize its policy, for example by permitting discharge when student loans have turned out to be harmful to the borrower.*

## INTRODUCTION

Student loan bankruptcy is a critical subject: one million borrowers default on student loans every year,<sup>1</sup> and there are perhaps 200,000 to 250,000 bankruptcies each year in which the debtor has student loans.<sup>2</sup> Because most student loans are

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1 See U.S. Dep’t of Educ., *New Direct Loan Defaults*, FEDERAL STUDENT AID, <https://studentaid.ed.gov/sa/about/data-center/student/default> (reporting 1.08 million defaults on federal student loans in 2018). The one million figure includes only defaults on student loans issued under federal programs and thus understates the total.

2 The only estimate of this number of which the author is aware is 238,446, posited by

issued under federal programs that the Department of Education (“Department”) administers,<sup>3</sup> understanding the Department’s bankruptcy rules is critical. This Article traces the history of those rules, identifies themes that emerge from that history, and makes recommendations for how the rules could be improved.

As explained in Part I, the Department’s rules require holders to consider the borrower’s hardship and the cost-effectiveness of fighting discharge in deciding whether to consent to bankruptcy discharge of student loan debt. If repayment would cause the borrower undue hardship or opposing discharge is estimated to cost more than one-third of the amount owing, a federal student loan holder is to consent to discharge. Otherwise, the holder is to oppose discharge.

Part II traces the evolution of the Department’s regulations in this area.<sup>4</sup> The Department adopted the basic structure of its policy with little explanation in 1987 under Secretary William Bennett. The policy was embodied in rules for the smallest major federal student loan program, the Federal Perkins Loan Program (“Perkins” program). The Department has subsequently applied the same without explanation to the much larger Federal Family Education Loan Program (“FFELP” or “FFEL” program) and William D. Ford Federal Direct Loan Program (“Ford” program).

The most important developments since the 1980s have been in tension with one another. One series of changes appears to grant ever-increasing discretion to holders. By contrast, a poorly worded change adopted in 1999 added language that could be read to reduce discretion by requiring holders to adopt an extremely draconian policy.

Part III evaluates the regulations and makes suggestions for improvement.<sup>5</sup> The Department apparently has spent little effort over the years considering its bankruptcy-discharge policies. The resulting regulations are incomplete and ambiguous and require holders to perform an analysis that is not transparent to borrowers. An interpretive letter the Department issued in July 2015 addresses some (but not all) of these issues. The letter, however, is only a guidance document, and is not as authoritative as revised regulations would be.

As for the substantive content of the regulations, the factors the rules direct holders to consider—borrower hardship and the cost-effectiveness of opposing

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Jason Iuliano for bankruptcy filings in 2007. See Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 504 (2012). Although the number of bankruptcy filings varies greatly from year to year as a general matter, the total number of consumer bankruptcy filings was similar in 2007 (822,596) and 2018 (773,418), suggesting that Iuliano’s estimate may still be in the ballpark. See *id.* (2007 figure); Ed Flynn, *How Long Will the Era of Bankruptcy Stability Last?*, ABI J., Aug. 2019, at 38 (2018 figure).

3 See THE COLLEGE BOARD, TRENDS IN STUDENT AID 2018, Fig. 6 (indicating that nonfederal loans have varied between 7% and 26% of student loans issued each academic year between 1997-98 and 2017-18).

4 A companion paper also discusses the history of these regulations, but in much less detail. See John Patrick Hunt, *Consent to Student-Loan Bankruptcy Discharge*, 95 IND. L.J. (forthcoming 2020).

5 The evaluation and suggestions in Part III draw on two companion papers. See Hunt, *supra* note 4; John Patrick Hunt, *Tempering Bankruptcy Nondischargeability to Promote the Purposes of Student Loans*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3399987&dgcid=ejournal\\_html\\_email\\_consumer:law:ejournal\\_abstractlink](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3399987&dgcid=ejournal_html_email_consumer:law:ejournal_abstractlink).

discharge—are certainly reasonable. However, the specific analysis the Department requires is unnecessarily borrower-unfriendly, is not transparent to borrowers, and is based on an incomplete understanding of what the Department’s goals in borrower bankruptcy should be. The Article concludes that the Department should adopt clear rules calling for consent to discharge when certain objectively hardship-related circumstances are met and should liberalize its discharge policy in other respects to better serve the purposes of the student loan programs.

## I. Background

### A. Student-Loan Bankruptcy

Most debts—credit-card debts, medical debts, home mortgages, auto loans—can be discharged in bankruptcy.<sup>6</sup> That means that after the bankruptcy, the creditor may not sue the debtor to collect the loan or otherwise try to get the debtor to pay it.<sup>7</sup> Some debts, by contrast, are not dischargeable at all in bankruptcy. These include criminal fines,<sup>8</sup> debts arising out of willful or malicious injury to another,<sup>9</sup> and recent tax debts.<sup>10</sup> Creditors on these types of loans may pursue the debtor after the bankruptcy is complete.

Student loans occupy a unique middle ground. They can be discharged, but only if the borrower starts an action against the creditor, known as an “adversary proceeding,”<sup>11</sup> and proves that repaying the student loans would cause “undue hardship” to the borrower or the borrower’s dependents.<sup>12</sup> Few bankrupt debtors start such a proceeding (0.2%, according to a study of 2007 bankruptcies),<sup>13</sup> and student loans are therefore rarely discharged in bankruptcy.

The adversary proceeding for discharge is a form of litigation and can be settled: the creditor, if it so chooses, can consent to the borrower’s discharge.<sup>14</sup> For

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6 See 11 U.S.C. § 727(a) (2019) (with exceptions, “the court shall grant the debtor a discharge” in Chapter 7 bankruptcy); *id.* § 523(a) (specifying nondischargeable debts).

7 See 11 U.S.C. § 524(a)(2) (2019) (“A discharge ... operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [discharged] debt as a personal liability of the debtor, ....”). The creditor does still have the right to foreclose on any collateral, such as a house securing a home mortgage. See 4 COLLIER ON BANKRUPTCY ¶ 524.02[2][d] (16th ed. 2019). That right is generally irrelevant to student loans, which usually are not secured by collateral.

8 See 11 U.S.C. § 523(a)(7) (2019).

9 See *id.* § 523(a)(6) (2019).

10 See *id.* §§ 523(a)(1), 507(a)(8).

11 See Fed. R. Bankr. P. 7001(6) (designating “a proceeding to determine the dischargeability of a debt” as an adversary proceeding).

12 See 11 U.S.C. § 523(a)(8) (2019).

13 The referenced data come from Iuliano, *supra* note 2, at 504-05. For details on the 0.2% calculation, which reflects changes Iuliano made to his numbers after criticism, see Hunt, *supra* note 4, at 15 n.108.

14 See Letter from Lynn Mahaffie, Deputy Assistant Secretary for Policy, Planning, and Innovation, Office of Postsecondary Education, Department of Education to “Dear Colleague” (July 7, 2015), DCL ID: GEN-15-13, at 1 [hereinafter “2015 Dear Colleague Letter”] (discussing federal student loan holders’ ability to “consent or not object to a borrower’s claim of undue hardship”).

loans issued under federal programs, which are the large majority of student loans, the decision to consent or not is governed by rules issued by the Department.

### ***B. The Department's Current Policies: the 2015 Dear Colleague Letter***

The Department set forth its discharge consent policies in a so-called “Dear Colleague Letter” dated July 7, 2015.<sup>15</sup> The letter instructs loan holders to use a two-step framework in deciding whether to consent to discharge.

In the first step, the holder is to determine whether the borrower will endure “undue hardship” unless the loan is discharged.<sup>16</sup> The letter indicates that the holder is to define “undue hardship” the same way the term is used in the Bankruptcy Code, as interpreted by courts.<sup>17</sup> If undue hardship is present, the letter probably directs the holder to consent to discharge.<sup>18</sup> However, the letter is not totally free of ambiguity and may provide that the holder has discretion to decide whether to consent.<sup>19</sup>

In the second step, undertaken if undue hardship is absent, the holder determines whether opposing discharge will cost more than one-third the amount the borrower owes on the loan.<sup>20</sup> If costs exceed the one-third threshold, indicating that opposing discharge would not be cost effective, the holder “may” consent to discharge.<sup>21</sup> Conversely, if costs fall below the one-third threshold, the holder “must” oppose discharge.<sup>22</sup>

The letter is the most recent statement of the Department’s discharge policy. It is based on, and interprets, two separate sets of regulations: one for the Perkins Loan program and one for the Federal Family Education Loan Program.<sup>23</sup> It applies its interpretation to the William D. Ford Federal Direct Loan program, which does not have its own regulations on the subject of borrower bankruptcy<sup>24</sup> despite being the largest federal student loan program.<sup>25</sup> The Article now examines each of the programs in turn, summarizing the current regulations for the program before describing the regulations’ history.

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15 *Id.*

16 *Id.* at 1-2.

17 *Id.* at 3 (holder’s decision about undue hardship “would necessarily be made according to the legal standards set by the Federal courts.”).

18 *See id.* at 10-11 (if holder concludes undue hardship is absent, “the holder should consent to, or not oppose discharge”).

19 *See id.* at 2 (holder “can” consent to discharge if undue hardship is present. A companion paper discusses the ambiguity in the letter and why it should be resolved in favor of requiring consent to discharge when undue hardship is present. *See Hunt, supra* note 4, at 10.

20 *See* 2015 Dear Colleague Letter, *supra* note 14, at 3.

21 *Id.* at 3-4.

22 *Id.* at 11.

23 *See id.* at 1.

24 *See id.*

25 *See* discussion *infra* Part II.C.1.

## II. History of the Student Loan Bankruptcy Discharge Consent Rules

This Part discusses in turn the three major federal student loan programs: the Perkins program, the FFEL program, and the Ford program. For each program, Part II gives a brief description, surveys the current rules, and traces the history.

### A. The Federal Perkins Loan Program

The Perkins Loan program, which Congress allowed to expire in September 2017,<sup>26</sup> was the oldest federal student loan program. It had roots in the 1958 National Defense Education Act,<sup>27</sup> which provided for direct loans to students in higher education.<sup>28</sup> The program has had three names: it was known as the National Defense Student Loan Program until 1972,<sup>29</sup> as the National Direct Student Loan Program from 1972 to 1986,<sup>30</sup> and as the Perkins Loan Program starting in 1986.<sup>31</sup>

The Perkins program is not just the oldest but also the smallest of the three major federal student loan programs, with \$6.6 billion in loans outstanding as of the middle of 2019.<sup>32</sup> Despite its small size, it is important because the current rules governing objection to bankruptcy discharge originated in rules the Department adopted for the Perkins program in 1987.

Under the Perkins program, higher education institutions entered into agreements with the federal government under which the institution and the government each contributed to a revolving loan fund, which the higher education institution used to make loans to students.<sup>33</sup> The lion's share of the funds used to make Perkins loans came from the government,<sup>34</sup> but the institution itself was the lender (and, for Perkins loans still outstanding, usually is still the lender).

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26 See *Congress Fails to Reauthorize Federal Perkins Loan Program*, NH JOURNAL, Oct. 2, 2017, <https://www.insidesources.com/congress-fails-reauthorize-federal-perkins-loan-program-heres-impact-students/>.

27 Pub. L. 85-864, 72 Stat. 1580 (Sept. 2, 1958).

28 See *id.* §§ 201-09, 72 Stat. at 1583-87.

29 See National Direct Student Loan Program, 40 Fed. Reg. 48,252, 48,252 (Oct. 14, 1975) [hereinafter "1975 NDSL NPRM"] (Section 137 of the Education Amendments of 1972 ... established the National Direct Student Loan Program... The National Direct Student Loan Program is deemed to be a continuation of the National Defense Student Loan Program ....").

30 *Id.*

31 See Perkins Loan Program, 52 Fed. Reg. 45,552, 45,552 (Nov. 30, 1987) [hereinafter "1987 Perkins Rules"] ("The Higher Education Amendments of 1986 (Pub. L. 99-498) changed the name of the National Direct Student Loan Program to the Perkins Loan Program.").

32 U.S. DEP'T OF EDUC., FEDERAL STUDENT AID PORTFOLIO SUMMARY, <https://studentaid.ed.gov/sa/about/data-center/student/portfolio> (last visited Aug. 8, 2019).

33 See Nat'l Ass'n of College & Univ. Bus. Officers, NACUBO ADVISORY GUIDANCE 18-03: PERKINS PROGRAM CLOSE-OUT (2018), <https://www.nacubo.org/-/media/Nacubo/Documents/AdvisoryGuidance182PerkinsLoanProgramwinddown81618.ashx?la=en&hash=6090553A8E2D44FBCAC24FD0CF50A25E62743847>, at 3 [hereinafter NACUBO Guidance].

34 *Id.* at 3.

The higher education institution is also typically the holder of the loan at the time of borrower bankruptcy and therefore is typically charged with deciding whether to oppose a borrower's petition for discharge.<sup>35</sup> The Department regulations discussed in the next section govern the institution's decision, but the institution often retains significant discretion. The structure of the Perkins program affects the incentives facing the institution when it exercises that discretion and decides whether to oppose discharge.

When the Perkins program was operating, the institution's Perkins loan fund was used to finance future Perkins loans.<sup>36</sup> Thus, the discharge of otherwise collectible loans harmed the institution, because the loss reduced the institution's ability to make Perkins loans going forward. Moreover, because some of the Perkins loan fund's capital came from the institution, part of the fund (the "institutional share") belonged in a sense to the institution, even though in another sense the money did not belong to the institution because it was committed to Perkins loans and not available for unrestricted use. Depending on one's perspective, some of the institution's "own money" could be seen as having been at risk in a bankruptcy. For these reasons, the institution had an incentive to contest the discharge of loans that could be collected if not discharged.

Now that the Perkins program is being wound down, it appears that the institution can make unrestricted use of the institutional share of Perkins repayments that it collects.<sup>37</sup> Institutions' incentives to contest discharge of loans that can be collected if discharge is denied are now even clearer, because they no longer have to use monies collected to make new Perkins loans. It is clearer that the institution's own money is at risk in a Perkins loan bankruptcy.

The Perkins regulations make opposing discharge even more attractive by authorizing the institution to recover funds laid out to oppose discharge. The regulations permit the institution to recover the costs of opposing discharge from the borrower.<sup>38</sup> If the borrower does not pay, the institution is permitted to charge its Perkins fund for expenses it incurs in opposing discharge, as long as the institution's actions are "required or authorized" under the regulations.<sup>39</sup>

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35 See 2015 Dear Colleague Letter, *supra* note 14, at 1-2 (institution as holder decides whether to oppose discharge). Although the Dear Colleague letter treats the institution's holding the loan in borrower bankruptcy as the typical case, it appears that the Department may become the loan holder if the institution is unable to collect. See 34 C.F.R. § 674.50(a)(1) (2019) (providing for assignment of defaulted note to United States); *id.* § 674.50(f)(1) (providing that United States acquires all "rights, title, and interest in" the loan upon assignment); *id.* § 674.50(c)(12) (providing that assigning institution must cooperate with Secretary to "enforce the loan or loans.").

36 NACUBO Guidance, *supra* note 33, at 3.

37 U.S. DEP'T OF EDUC., ANNOUNCEMENT, PERKINS LOAN PROGRAM—FEDERAL PERKINS LOAN REVOLVING FUND DISTRIBUTION OF ASSETS AND TIMELINES FOR 2018-19 (July 11, 2018), <https://ifap.ed.gov/eannouncements/071118CBPerkinsLoanRevolFundDistributionOfAssets1819.html>. ("Institutions must return to the Department the federal share and return to the institution the institutional share of an institution's Perkins Fund."). Institutions may decide not to continue collecting their Perkins loans. They have the option of assigning the loans to the Department of Education for collection, forfeiting the institutional share but avoiding the costs of continuing to administer the loans. See NACUBO Guidance, *supra* note 33, at 4.

38 See 34 C.F.R. § 674.47(b)(1) (2019).

39 See *id.* §§ 674.47(b)(2); 674.47(e)(6)(ii). Even if the institution's actions are not "required or

Thus, the institution has significant incentives to oppose borrower discharge. As will be seen, under the regulations it has significant discretion to do so.

### 1. Current Perkins Program Regulations

The Perkins regulations govern the institution's decision whether to oppose discharge.<sup>40</sup> As the 2015 Dear Colleague Letter suggests, the regulations set up a two-step process that involves assessing undue hardship and the cost of collection. In the first step, the institution "must determine on the basis of reasonably available information, whether repayment of the loan under either the current repayment schedule or any adjusted schedule authorized under subpart B or D of this part would impose an undue hardship on the borrower or his or her dependents."<sup>41</sup> The reference to "Subpart B or D" indicates Perkins-specific provisions for deferment of payments (Subpart B)<sup>42</sup> and for cancellation based on criteria such as service in the military or as a Head Start teacher (Subpart D).<sup>43</sup> The reference is not to the more familiar income-driven repayment programs or to Public Service Loan Forgiveness. Neither IDR nor PSLF is available for Perkins loans unless they are consolidated.<sup>44</sup>

In the second step, taken "[i]f the institution concludes that repayment would not impose an undue hardship,"<sup>45</sup> the institution evaluates the cost-effectiveness of opposing discharge. The institution is to "determine whether the costs reasonably expected to be incurred to oppose discharge will exceed one-third of the total amount owed on the loan, including principal, interest, late charges, and collection costs."<sup>46</sup> If the expected costs of opposing discharge are one third or less of "the total amount owed on the loan," the institution "shall oppose the borrower's request for a determination of dischargeability"<sup>47</sup> and, if the borrower is in default, "seek a judgment for the amount owed on the loan."<sup>48</sup>

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authorized," the institution is nevertheless allowed to charge the fund for bankruptcy costs up to 40 percent of any judgment received. *See id.* § 674.47(e)(6)(iii).

40 *See id.* § 674.49(c).

41 *Id.* § 674.49(c)(3). Special rules govern bankruptcies commenced before October 7, 1998. *See id.* § 674.49(c)(2).

42 *See* 34 C.F.R. Subt. B, Ch. VI, Pt. 674, Subpart B (34 C.F.R. §§ 674.31-674.40) (2019) ("Terms of Loans") (providing for deferments in certain circumstances).

43 *See* 34 C.F.R. Subt. B, Ch. VI, Pt. 674, Subpart D (34 C.F.R. §§ 674.51-674.64) ("Loan Cancellation") (2019); *id.* § 674.59 (military service); *id.* § 674.58 (service as a full-time staff member in a Head Start program).

44 Public Service Loan Forgiveness and income-driven repayment are not available for Perkins loans (unless they are consolidated into direct loans), *see Income-Driven Plans*, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven#eligible-loans> (last visited Aug. 14, 2019). Subparts B or D of the Perkins regulations do not provide for PSLF or IDR. *See* 34 C.F.R. §§ 674.31-674.40 (2019) (Subpart B); *id.* §§ 674.51-674.64 (Subpart D).

45 34 C.F.R. § 674.49(c)(4) (2019).

46 *Id.* § 674.49(c)(4).

47 *Id.* § 674.49(c)(5)(i).

48 *Id.* § 674.49(c)(5)(ii).

The regulations have notable gaps. They do not specify what the institution is to do if the costs of opposing discharge exceed the one-third limit.<sup>49</sup> Nor do they expressly provide what the institution is to do if it determines that repayment would result in undue hardship. The fact that the analysis proceeds to a second step if undue hardship is absent suggests that the institution either may or must not oppose discharge if undue hardship would result from repayment. There is no indication, however, whether the operative verb is “may” or “must.”

The regulations also are ambiguous. They contain provisions of uncertain scope that could be read to require the institution to oppose discharge in all circumstances. Specifically, they open by stating that the institution “must use due diligence and may assert any defense consistent with its status under applicable law to avoid discharge of the loan”<sup>50</sup> and that “the institution must follow the procedures in this paragraph to respond to a complaint for dischargeability ... unless discharge would be more effectively opposed by avoiding that action.”<sup>51</sup> These provisions are not expressly qualified and thus arguably require the institution always to oppose discharge. However, given that the regulation provides for a specific process to decide whether to oppose discharge, the quoted provisions are probably better understood as instructing the institution on how to proceed once it has decided not to consent to discharge. In any event, the provisions are unclear.

## 2. Perkins Program Regulatory History

The first mention of borrower bankruptcy in the regulatory history of the Perkins program and its predecessors came in 1975 with a notice of proposed rulemaking (NPRM)<sup>52</sup> issued by the Office of Education of the Department of Health, Education, and Welfare, the predecessor to the Department of Education. The 1975 NPRM led to an interim rule in 1976,<sup>53</sup> an interim final rule in 1978,<sup>54</sup> and a final rule in 1979.<sup>55</sup> These rules did not address opposition to borrower discharge

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49 The FFEL regulations provide more guidance for this situation. They state that the agency “may, but is not required to” oppose discharge in this circumstance. *Id.* § 682.402(i)(1)(iii).

50 *Id.* § 674.49(c)(1).

51 *Id.*

52 1975 NDSL NPRM, *supra* note 29, at 48,262 (proposing regulations to be codified at 45 C.F.R. § 144.32).

53 See Title 45 – Public Welfare, Chapter I – Office of Education, Department of Health, Education, and Welfare, Part 144 – National Direct Student Loans, Part 176 – Supplemental Educational Opportunity Grants, 41 Fed. Reg. 51,946, 51,969 (Nov. 24, 1976) [hereinafter 1976 NDSL Interim Rules] (adopting interim regulations to be codified at 45 C.F.R. § 144.49).

54 See Title 45 – Public Welfare, Chapter I – Office of Education, Department of Health, Education, and Welfare, Part 144 – National Direct Student Loans, Part 175 – College Work-Study Program, Part 176 – Supplemental Educational Opportunity Grants, 43 Fed. Reg. 37,896, 37,920 (Aug. 24, 1978) (adopting interim final regulations to be codified at 45 C.F.R. § 144.50). The 1978 action made changes to the interim rule; all the changes appear to be directed to making the regulation more readable rather than changing the substance.

55 See National Direct Student Loan Program; College Work-Study Program; and Supplemental Educational Opportunity Grant, 44 Fed. Reg. 47,444, 47,471 (Aug. 13, 1979) [hereinafter 1979 NDSL Rules] (to be codified at 45 C.F.R. § 174.50). The 1979 action also made changes to the rule; they consist of breaking the rule into three subsections and further simplifying the wording. *Id.*

in bankruptcy; instead, they governed when an institution was to stop collection efforts due to borrower bankruptcy<sup>56</sup> and when an institution was permitted to write off NDSL loans, as they were then called.<sup>57</sup>

#### a. The 1985 NPRM and 1987 Rules: Origin of the Two-Step Test

In 1985, the Department, under Secretary William Bennett, proposed the first regulations for the NDSL program governing opposition to borrower discharge.<sup>58</sup> The proposed rules provided that the institution was to oppose discharge unless the borrower had “clearly proven” that repayment would entail undue hardship<sup>59</sup> or that the debt had been in repayment for five or more years.<sup>60</sup> The five-year exception dovetailed with the bankruptcy law of the time, which provided that student loans that had been in repayment for five years or more were nondischargeable without a showing of undue hardship.<sup>61</sup>

In the first example of what would become a pattern, the Department explained the proposal in only a cursory way. The entire explanation was, “Provisions regarding collection from debtors in bankruptcy have been substantially expanded to reflect changes in bankruptcy law that have become effective since this Subpart was last revised.”<sup>62</sup> Given the new reference to undue hardship in the 1985 NPRM,<sup>63</sup> the changes to which the Department was referring presumably included

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56 The 1975 NDSL NPRM proposed a prohibition on collection activity against a borrower “who has been adjudicated a bankrupt.” 1975 NDSL NPRM, *supra* note 29, at 48,262 (proposing regulations to be codified at 45 C.F.R. § 144.32). The 1976 interim rule added the condition that “such loan has been discharged.” 1976 NDSL Interim Rules, *supra* note 53, at 51,969. *See also id.* at 51,955-56 (discussing changes from proposed to interim rules). The Office noted, that although it supported legislation to restrict bankruptcy dischargeability in the first five years of repayment and such legislation had been introduced, no such legislation had been enacted. *Id.*

57 The 1975 NDSL NPRM proposed that an institution be able to write off loans because of borrower bankruptcy after “an official notice of the adjudication has been received by the institution.” 1975 NDSL NPRM, *supra* note 29, at 48,262 (to be codified at 45 C.F.R. § 144.32). The advantage of writing off a loan presumably was that doing so terminated the institution’s duty to “exercise due diligence” in collection of that loan, although the proposed rules apparently did not specify this. *See* 1975 NDSL NPRM, *supra* note 29, at 48,261 (to be codified at 45 C.F.R. § 144.31).

58 *See* National Direct Student Loan Program, 50 Fed. Reg. 7872, 7878 (Feb. 26, 1985) [hereinafter 1985 NDSL/Perkins NPRM] (to be codified at 34 C.F.R. § 674.49).

59 *Id.* (to be codified at 34 C.F.R. § 674.49(c)(1)(i)). In evaluating whether the borrower had “clearly proven” the allegation of undue hardship, the institution was to “consider all possible payment plans that are acceptable to the institution and that are allowed by law.” *Id.* (to be codified at 34 C.F.R. § 674.49(c)(1)(ii))

60 *See id.* at 7878 (to be codified at 34 C.F.R. § 674.49(c)(2) (if borrower sought discharge on ground debt had been in repayment for five or more years, institution was to “oppose that request ... unless it determines that the borrower has clearly proven that allegation.”).

61 *See* Bankruptcy Reform Act, Pub. L. No. 95-598, § 523, 92 Stat. 2549, 2590–91 (1978) (requiring a showing of undue hardship for discharge only if loan has been in repayment for less than five years.

62 1985 NDSL/Perkins NPRM, *supra* note 58, at 7873.

63 *See* 1979 NDSL Rules, *supra* note 55 (not mentioning “undue hardship”).

Congress's adoption of the undue-hardship requirement in 1976.<sup>64</sup> Although that requirement had been in place when the interim, interim final, and final rules were adopted in 1976, 1978, and 1979 respectively, the Department apparently had not previously updated the regulations to reflect it.

In 1987, the Department adopted a rule on opposition to bankruptcy discharge<sup>65</sup> that departed from the 1985 NPRM and adopted the two-step test in effect today. The 1987 rules dropped the requirement that the borrower "clearly prove[]" the allegation of hardship.<sup>66</sup> Instead, the institution was to assess undue hardship.<sup>67</sup> If undue hardship was absent, the institution was to compare one third of the loan balance to expected litigation costs<sup>68</sup> and oppose discharge if expected costs fell below the one-third threshold.<sup>69</sup> Each of these requirements was phrased in language identical to that used in the regulations today.

Thus, the 1987 Perkins rule appears to be the origin of the requirements to evaluate undue hardship and compare the costs of opposing discharge to one third of the outstanding loan balance that apply to all three major programs today. The Department adopted these requirements for the much larger Federal Family Education Loan program in 1992,<sup>70</sup> and the 2015 Dear Colleague Letter applies them to the Direct Loan program.<sup>71</sup>

The Department explained the changes from the 1985 proposed rules to the 1987 rules. It stated, "Based on comments received, this section has been revised to present more clearly the actions required to protect the Fund's interest in the event of borrower recourse to bankruptcy."<sup>72</sup> The Department went on:

It is not the purpose of these regulations to attempt to set forth each provision of bankruptcy law that applies to student loan collection, and institutions must expect to retain counsel to handle student loan accounts in bankruptcy. However ... the Secretary considers it appropriate to explain

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64 See John Patrick Hunt, *Help or Hardship? Income-Driven Repayment in Student-Loan Bankruptcies*, 108 GEO. L.J. 1287, 1302-03 (2018) (describing adoption of nondischargeability in 1976).

65 See 1987 Perkins Rules, *supra* note 31.

66 The 1987 rules also deleted the requirement that the borrower "clearly prove[]" an allegation that the student loan had been in repayment for five or more years. See *id.* at 45,560 (codified at 34 C.F.R. § 674.49(b)(2)).

67 *Id.* at 45,560 (to be codified at 34 C.F.R. § 674.49(c)(3)) ("determine, on the basis of reasonably available information, whether repayment of the loan under either the current repayment schedule or any adjusted schedule authorized under Subpart B or D of this part would impose an undue hardship on the borrower and his or her dependents.").

68 *Id.* at 45,560 (to be codified at 34 C.F.R. § 674.49(c)(4)).

69 *Id.* at 45,560 (to be codified at 34 C.F.R. § 674.49(c)(5)) (institution "shall oppose" discharge request).

70 See discussion *infra* Part II.B.2.b.

71 See discussion *supra* Part I.B. The 1987 rule also retained the provision forbidding the institution from opposing discharge if the borrower's loan had been in repayment for more than five years. 1987 Perkins Rules, *supra* note 31, at 45,555; see discussion *supra* note 60 and accompanying text.

72 1987 Perkins Rules, *supra* note 31, at 45,555.

here those enforcement steps which institutions should be prepared to take in bankruptcy proceedings, the information they should consider in choosing whether or not to contest a bankruptcy, and the weight to be given to the cost of litigation.<sup>73</sup>

The explanation also indicated the Department's interest in protecting the government from inefficient collection efforts: "[B]ecause the regulations now permit institutions to charge to the Fund the costs of the litigation required in bankruptcy, it is appropriate to prescribe here the circumstances in which particular activities are reasonable and cost-effective."<sup>74</sup> As discussed earlier, the amounts in Perkins funds come primarily from the federal government,<sup>75</sup> so the federal investment is at risk in litigation that such funds pay for.

The sentences just quoted make up the fullest explanation of the Department's policy on opposition to bankruptcy discharge to be found anywhere in the regulations for any of the federal student loan programs. They focus less on the substance of the regulation than the decision to regulate. The only substantive purpose they embrace is that of protecting the federal FISC from cost-ineffective collection efforts.<sup>76</sup> The rule was designed to protect federal financial interests, rather than to advance the overall purposes of the student-loan programs. Somewhat surprisingly, the only federal pecuniary interest it mentioned was that in not wasting money on cost-ineffective discharge opposition, rather than that in collecting money from student borrowers.

The statutory basis for these crucial regulations seems surprisingly weak. The critical 1987 rules cited as authority 20 U.S.C. Section 424 and 20 U.S.C. Section 1087cc.<sup>77</sup> Section 424 requires that "an agreement with any institution of higher education under this title" have particular characteristics.<sup>78</sup> Section 1087cc provides that "[a]n

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73 *Id.*

74 *Id.*

75 *See* discussion *supra* Part II.A.

76 It is not clear that the rules accomplished that purpose. The provision that authorized institutions to recover bankruptcy-related costs from Perkins loan funds allowed (and allows) institutions to charge the Perkins fund for the cost of bankruptcy-related action "required or authorized under" the bankruptcy provisions. *See* 1987 Perkins Rules, *supra* note 31, at 45,559 (codified at 34 C.F.R. §§ 674.47(e)(5)(i)), 674.47(e)(6)(ii) (2019). Given that the rules did not explicitly forbid the institution from opposing discharge, with a possible exception for loans that were over five years old, *see* 1987 Perkins Rules, *supra* note 31, at 45,560 (codified at 34 C.F.R. § 674.49(c)(2)), institutions may well have been able to recover the costs of opposing bankruptcy discharge even if they determined that repayment would entail undue hardship or that litigation costs would exceed one-third of the loan balance.

77 *Id.* at 45,561.

78 *See* National Defense Education Act, Pub. L. 85-864, § 204, 72 Stat. 1580, 1584, (1958). Section 204 of the NDEA was codified at 20 U.S.C. § 424. *See* Pub. L. 88-665, § 204, 78 Stat. 1100, 1101, (1964) (indicating codification of NDEA § 204 at 20 U.S.C. § 424). The provision of Section 424 most relevant to this Article appears to be Section 424(a)(5), which provides that the agreements referenced in the section must "include such other provisions as may be necessary to protect the financial interest of the United States and promote the purposes of this title and as are agreed to by the Commissioner and the institution." Although Section 204 has been amended several times since 1958, none of the amendments affects subsection (a)(5). *See* Pub. L. 88-665, § 204(a), 78 Stat. 1101 (1964); Pub. L. 89-329, §§ 462, 466(b), 79 Stat. 1252, 1254, (1965); Pub. L. 90-575, §§ 172, 175, 82 Stat. 1030, 1034, 1035, (Oct. 16, 1968).

agreement with any institution of higher education for capital contributions under this part shall” contain certain provisions.<sup>79</sup> Moreover, the vitality of Section 424, which was enacted as part of the 1958 National Defense Education Act<sup>80</sup> may be in doubt. It is now omitted from the U.S. Code; the reporter’s note states that “this subchapter has not been funded since fiscal year 1975.”<sup>81</sup> Thus, neither cited provision clearly confers the authority to regulate and one of them may be defunct. Although other provisions of the Education Code probably grant the Secretary the authority to issue the regulations,<sup>82</sup> it is not clear the Secretary could rely on statutory provisions not cited in the administrative record if the present rules were challenged.<sup>83</sup>

### **b. Post-1987 Developments: Introducing Ambiguity**

Changes to the Perkins bankruptcy discharge opposition regulations since 1987 appear to have been minor. The Department amended the regulations to react to the contraction (in 1990)<sup>84</sup> and elimination (in 1998)<sup>85</sup> of the borrower’s ability to get a discharge of older student loans without showing undue hardship.

In 1999, the Department added a provision, parallel to one for the FFELP adopted a few days later,<sup>86</sup> that “[t]he institution must use due diligence and may assert

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79 See 20 U.S.C. § 1087cc(a) (2019).

80 See *supra* note 78; see also 20 U.S.C. ch. 17 (“National Defense Education Act”) (containing 20 U.S.C. §§ 401-602).

81 See 20 U.S.C. §§ 421-25, [uscode.house.gov](http://uscode.house.gov) (last visited Feb. 5, 2019). Presumably this has to do with the replacement of the National Defense Student Loan Program with the National Direct Student Loan Program and then the Perkins Loan Program. The Department did continue to rely on the NDEA provisions as authority for the Perkins regulations in the 1999 Perkins rules. Federal Perkins Loan Program, 64 Fed. Reg. 58,298, 58,308 (Oct. 28, 1999) [hereinafter 1999 Perkins Rules] (citing 20 U.S.C. §§ 421-29 as authority).

82 See 20 U.S.C. § 1221e-3 (2019) (conferring on Secretary the authority to make “rules and regulations” “in order to carry out functions otherwise vested in the Secretary”); *id.* § 3474 (granting Secretary authority to make “rules and regulations” “as the Secretary deems necessary or appropriate to administer and manage the functions of the Secretary or the Department.”).

83 See *Global Van Lines v. ICC*, 714 F.2d 1290, 1297 (5th Cir. 1983) (refusing to allow agency to rely on provision not mentioned in NPRM as statutory basis for its authority to issue regulation) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). However, the *Chenery* doctrine would not prevent the Department from using these provisions as the statutory basis for new regulations.

84 See Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(2), 104 Stat. 4789, 4965 (extending undue-hardship requirement, which had previously applied to loans that had been in repayment up to five years, to loans that had been in repayment up to seven years); Perkins Loan Program, College Work-Study Program, and Supplemental Educational Opportunity Grant Program, 57 Fed. Reg. 32,342, 32,346 (July 1, 1992) (providing that institution may not oppose petition for discharge if loan has been in repayment for seven or more years) (to be codified at 34 C.F.R. § 674.49(c)(2)); see also *id.* at 32,343 (stating that regulations are being amended to reflect Crime Control Act of 1990).

85 See Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1581, 1837 (requiring undue hardship for all student-loan discharges in bankruptcy); 1999 Perkins Rules. *supra* note 81, at 58,313 (amending rules to forbid institution from opposing discharge based on the length of time the loan has been in repayment only when the loan has been in repayment for seven or more years at filing of petition and the petition is filed before October 8, 1998) (to be codified at 34 C.F.R. § 674.49(c)(2)).

86 See discussion *infra* Part II.B.2.c.

any defense consistent with its status under applicable law to avoid discharge of the loan.”<sup>87</sup> The due-diligence requirement seems at least arguably superfluous because institutions were already required to “exercise due diligence in collecting loans.”<sup>88</sup> Neither the NPRM nor the final rule explained what the added due diligence requirement was supposed to accomplish or why it was being adopted. As explained, the added sentence introduces ambiguity into the regulations.<sup>89</sup> As for the assert-any-defense language, the Department explained that the change clarified that the regulations did not bar state-related institutions from relying on sovereign immunity.<sup>90</sup> These changes went into effect on July 1, 2000,<sup>91</sup> and the regulations have not changed since.

### **c. Treatment of Federally Held Perkins Loans**

The regulations are directed to institutions, the parties that normally decide whether to oppose a borrower’s petition for discharge. It appears that the Secretary can become responsible for handling a borrower bankruptcy. For example, the institution may assign the loan to the Secretary if the institution has been unable to collect after following prescribed procedures.<sup>92</sup> In such a situation the Secretary apparently would be responsible for collection, including handling the borrower’s bankruptcy. However, the regulations do not contain, and apparently have never contained, any rules governing the Secretary’s conduct in borrower bankruptcies. The Secretary’s unwillingness to be bound by regulations for the Perkins programs seems to presage the complete absence of borrower-bankruptcy regulation for the Ford program, where the federal government is the lender.<sup>93</sup>

## ***B. The Federal Family Education Loan Program***

Congress created the Guaranteed Student Loan (GSL) program, predecessor to the Federal Family Education Loan (FFEL) program, in the Higher Education Act of 1965.<sup>94</sup> Congress renamed the GSL program the FFEL program in the Higher Education Amendments of 1992.<sup>95</sup> The Health Care and Education Reconciliation Act of 2010 terminated the FFEL program and no new loans have been made under

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87 1999 Perkins Rules, *supra* note 81, at 58,313 (to be codified at 34 C.F.R. § 674.49(c)(1)).

88 34 C.F.R. § 674.41(a) (in effect as of January 1, 1999). Nevertheless, the Department described the due-diligence language as “amend[ing] the regulations.” Federal Perkins Loan Program, Notice of Proposed Rulemaking, 64 Fed. Reg. 41,232, 41,238 (July 29, 1999).

89 See discussion *supra* notes 50-51 and accompanying text.

90 1999 Perkins Rules, *supra* note 81, at 58,307.

91 *Id.* at 58,298 (establishing July 1, 2000 effective date).

92 See 34 C.F.R. Part 34 (2019).

93 See *infra* Part II.C.1.

94 See U.S. DEP’T OF EDUC., FEDERAL STUDENT LOAN PROGRAMS DATA BOOK, FY 1997 – FY 2000, <https://www2.ed.gov/finaid/prof/resources/data/fslpdata97-01/edlite-intro.html> (last visited Feb. 5, 2019).

95 See *id.*

the program since June 30, 2010.<sup>96</sup> Congress repeatedly changed the GSL and FFEL programs over their 45-year life.<sup>97</sup>

The amount of debt outstanding under the FFEL program was \$517 billion in 2010.<sup>98</sup> That amount has dwindled to \$272 billion as of the middle of 2019, but the FFEL program is still the second-largest program by amount of loans outstanding.<sup>99</sup>

To understand how FFEL creditors are to respond to a borrower's bankruptcy, it is helpful to understand how the various entities in the program interact. Under the FFELP, private lenders made loans to students. "Guaranty agencies,"<sup>100</sup> which could be state government or nonprofit organizations, guaranteed FFELP loans (and continue to guarantee loans that are still outstanding).<sup>101</sup> Under the guarantee arrangements, the guaranty agency reimburses the lender for losses arising from certain events, such as default.<sup>102</sup> The Department in turn reinsures the guaranty agencies.<sup>103</sup> That is, the Department reimburses the guaranty agency for its payments to the private lender upon the occurrence of certain conditions.<sup>104</sup>

Guaranty agencies did not guarantee all GSL program and FFELP loans. The Department has guaranteed some student loans directly, without the intermediary of a guaranty agency. These "federal GSL programs"<sup>105</sup> were to operate as a backup to the guaranty agency program in states where guaranty agencies did not operate or did not serve all eligible students.<sup>106</sup> Although such programs earlier received significant regulatory attention,<sup>107</sup> the Department withdrew regulations governing the programs in 2013 and the 2015 Dear Colleague Letter does not mention them.<sup>108</sup>

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96 See Pub. L. 111-152, §§ 2201-2208, 124 Stat. 1029, 1074-1077 (2010).

97 See ANGELICA CERVANTES ET AL., *OPENING THE DOORS TO HIGHER EDUCATION: PERSPECTIVES ON THE HIGHER EDUCATION ACT 40 YEARS LATER* (2005), at 29-42 (summarizing history of Higher Education Act from 1965 to 2005 and describing changes to the GSL and FFEL programs).

98 U.S. DEP'T OF EDUC., *supra* note 32.

99 *Id.*

100 See 34 C.F.R. § 682.401(b)(5) (2019) (specifying what percentage of loan balance the guaranty agency is to guarantee).

101 See *id.* § 682.200, "Guaranty Agency."

102 See *id.* § 682.100(b)(1) (with exception for loans guaranteed directly by government, "a guaranty agency guarantees a lender against losses due to default by the borrower on a FFEL loan").

103 See *id.* § 682.404 (providing for Secretary's entering into reinsurance agreements with guaranty agencies).

104 See *id.* § 682.404(a) (specifying that government will pay guaranty agency 95 to 100 percent of the agency's default claim losses on FFEL loans, depending on when loan was made).

105 See *id.* § 682.100(b)(2)(i)-(ii) (listing types of loans, under the "Federal GSL Programs" that the federal government has guaranteed directly).

106 See *id.* § 682.100(b)(2)(iii).

107 See, e.g., Guaranteed Student Loan Program, 44 Fed. Reg. 53,866, 53,884 (Sept. 17, 1979) [hereinafter 1979 GSL Final Rule] (codified at 45 C.F.R. § 177.503(a)(2) (describing basic structure of federally insured student loan program contract).

108 See Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family

The FFELP regulations establish a process for claims and payments in the event of the borrower's Chapter 7 bankruptcy. If the borrower begins an action to have the loan obligation determined to be dischargeable on the grounds of undue hardship, the lender is to file a claim with the guaranty agency.<sup>109</sup> Upon timely<sup>110</sup> presentation of proper documentation,<sup>111</sup> the guaranty agency is "promptly"<sup>112</sup> to pay the lender "the unpaid balance of principal and interest"<sup>113</sup> and the lender assigns the loan to the guaranty agency.<sup>114</sup> Apparently the government then pays the agency on a reinsurance claim as though the borrower had defaulted.<sup>115</sup> This amount is apparently 95 percent of the amount the agency paid the lender, at least for loans disbursed since October 1998.<sup>116</sup>

If the bankruptcy court declares the student loan dischargeable<sup>117</sup> and certain additional conditions are met,<sup>118</sup> the Secretary "reimburses the guaranty agency

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Education Loan Program, and William D. Ford Federal Direct Loan Program, 78 Fed. Reg. 65,768, 65,820 (Nov. 1, 2013) (removing and reserving subpart E of 34 C.F.R. Part 682, which had governed guaranteed loans guaranteed directly by the federal government without the involvement of a guaranty agency). The author has been unable to locate information about outstanding balances under the program.

109 See 34 C.F.R. § 682.402(f)(5)(i)(C) (2019). If the borrower does not seek to have the loan discharged on the ground of undue hardship, the lender continues to hold the loan and, after the bankruptcy is completed, treats the loan as though it had been in forbearance for the duration of the proceeding. See *id.* § 682.402(f)(5)(ii). Different rules apply to bankruptcies started before October 8, 1998. See *id.* § 682.402(f)(5)(i)(B).

110 See *id.* § 682.402(g)(2)(v) (setting forth deadlines for submission of bankruptcy-based claim to guaranty agency).

111 See *id.* § 682.402(g)(1) (detailing required documentation supporting lender's bankruptcy-based claim on guaranty agency). Proper documentation includes the promissory note or a copy, *id.* § 682.402(g)(1)(i), an assignment of the proof of claim filed in the bankruptcy, *id.* § 682.402(g)(1)(v)(A), and a statement of any facts of which the lender is aware that may form the basis for an objection to discharge. *Id.* § 682.402(g)(1)(v)(B).

112 *Id.* § 682.402(h)(1)(i).

113 *Id.* § 682.402(h)(2)(i)(B).

114 See *id.* § 682.401(b)(8)(i)(B) (providing for assignment of loans to guaranty agency in event borrower files a bankruptcy petition).

115 See *id.* § 682.402(k)(2) ("The Secretary pays a ... bankruptcy ... claim ... on a loan held by a guaranty agency after the agency has paid a default claim to the lender thereon and received payment under its reinsurance agreement.").

116 See *id.* § 682.404(a)(1). Higher reimbursements are available for loans disbursed before October 1998. *Id.*

117 See *id.* § 682.402(k)(1)(i)(A). Under earlier rules, the government paid out when the borrower was "adjudicated a bankrupt," 1979 GSL Final Rule, *supra* note 107, at 53,878 (codified at 34 C.F.R. § 177.402(b)(1)-(2)) subject to the guaranty agency's obligation to the government for a portion of the claim if the loan was not actually discharged. *Id.* (codified at § 177.402(f)(3)). The Department adopted the current rule that the government pays out on the bankruptcy claim only after the debt is discharged, in 1986. See Guaranteed Student Loan and PLUS Programs, 51 Fed. Reg. 40,886, 40,905 (Nov. 10, 1986) [hereinafter 1986 GSL PLUS Final Regulations] (codified at 34 C.F.R. § 682.402(h)(1)(i)).

118 See 34 C.F.R. § 682.402(k)(2)(i)-(v) (2019) (listing conditions for Secretary's payment of bankruptcy claim to guaranty agency).

for its losses” on the bankruptcy claim.<sup>119</sup> The conditions that must be met for the agency to be paid at this step include the agency’s exercise of due diligence up until discharge.<sup>120</sup> If the loan is declared nondischargeable, the lender must repurchase the loan from the guaranty agency<sup>121</sup> and the agency reimburses the government for the reinsurance payment it previously received.<sup>122</sup>

Scholars have posited that guaranty agencies have a financial incentive to oppose discharge.<sup>123</sup> It is difficult to discern the guaranty agency’s incentives from the regulations because it is not clear what the guaranty agency receives if the discharge is granted or what it receives if discharge is denied. If discharge is granted, the Department pays the agency “a percentage of the outstanding principal and interest that is equal to the complement of the reinsurance percentage paid on the loan,”<sup>124</sup> but the percentage is not clearly specified.<sup>125</sup> If discharge is denied, the lender “repurchases” the loan from the guaranty agency<sup>126</sup> and the agency reimburses the government for the reinsurance payment it previously received.<sup>127</sup> However, the regulations do not appear to specify how the repurchase price is calculated or whether it includes bankruptcy litigation costs.<sup>128</sup>

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119 *Id.* § 682.402(k)(1)(i)(A).

120 *See id.* § 682.402(k)(2)(v).

121 *Id.* § 682.402(j)(1)(i) (providing for lender repurchase of loan in event of denial of borrower discharge, unless guaranty agency sells loan to another lender).

122 *See id.* § 682.402(k)(1)(ii).

123 *See* Dalié Jiménez, Matthew Bruckner, Pamela Foohey, Brook Gotberg, & Chrystin Ondersma, *Comments of Bankruptcy Scholars on Evaluating Undue Hardship Claims in Bankruptcy*, 21 J. CONS. & COM. L. 114, 119 (2018).

124 *Id.* § 682.402(k)(5). It thus appears that the Secretary pays 100% of the principal and interest on loans that are discharged in bankruptcy, subject to the rule that interest accrues for only 60 days after the bankruptcy petition. *See id.* § 682.402(k)(5)(i).

125 The regulations do not appear to specify what “the complement” is. They also do not explicitly define the “reinsurance percentage,” although that term presumably refers to the 95 percent of the default payment to the lender for which the agency already has been reimbursed. Although it is not clear, the “complement” could be the other five percent. If so, the guaranty agency might not recover its bankruptcy litigation costs, as its default payment to the lender is calculated without reference to such costs. *See id.* § 682.402(h)(2)(i)(B) (guaranty agency to pay “unpaid principal and interest” to lender in event of bankruptcy). However, that is only conjecture.

126 *See id.* § 682.402(j)(1)(i).

127 *See id.* § 682.402(k)(1)(ii).

128 A manual that guaranty agencies prepared for FFELP lenders suggests that the repurchasing lender does reimburse the guaranty agency for collection costs incurred unless the agency waives reimbursement. Thus, there is some evidence that the guaranty agency recovers its bankruptcy litigation costs if it defeats discharge, but this is not entirely clear. *See* COMMON MANUAL GOVERNING BOARD, 2018 COMMON MANUAL: UNIFIED STUDENT LOAN POLICY § 13.5, at 13 (2018), <http://commonmanual.org/wp-content/uploads/2018/07/ECM2018.pdf>. Notably, a guaranty agency is to charge the borrower for costs it incurs in collecting a loan on which it has paid a bankruptcy claim, including attorney’ fees and court costs. *See* 34 C.F.R. 682.410(b)(2) (2019). Chargeable collection costs are subject to limitations in the promissory note. *Id.* They also are capped at the amount the Department would collect if it held the loan. *Id.* § 682.410(b)(2)(ii). Finally, they cannot exceed an amount given by a formula that accounts for commissions the Department pays to collection agencies. *Id.* § 682.410(b)(2)(i).

A complete analysis of a given guaranty agency's incentives in deciding whether to resist borrower discharge probably entails reviewing agreements specific to that agency. The author has not been able to locate a readily, publicly available set of such documents, so a firm conclusion about guaranty-agency incentives must await further research.<sup>129</sup>

### 1. Current FFELP Regulations

If a debtor in bankruptcy seeks to discharge FFELP loans, the regulations provide that the guaranty agency decides whether to oppose the discharge request.<sup>130</sup> The regulations set forth rules for the guaranty agency's decision.<sup>131</sup> The regulations are emphatic; they declare that the guaranty agency "shall immediately take" whatever action the rules require upon receipt of the claim from the lender.<sup>132</sup>

Following the Perkins regulations, the FFEL regulations set up a two-step structure for deciding whether to oppose discharge.<sup>133</sup> First, the guaranty agency "must determine whether repayment under either the current repayment schedule or any adjusted schedule authorized under this part would impose an undue hardship on the borrower and his or her dependents."<sup>134</sup> The reference to "this Part" means Part 682, the FFEL regulations. These provide for eligibility for one IDR program, income-based repayment (IBR), so presumably the agency is to consider IBR as a way of repaying the loans.<sup>135</sup> The FFEL regulations do not

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129 The relevant contracts could include guarantee and reinsurance agreements, as well as contracts with additional parties such as Educational Credit Management Corporation, *see infra* note 130, and loan servicers.

130 The Department has delegated control of much FFELP student-loan bankruptcy litigation by contract to third parties, most notably Educational Credit Management Corporation (ECMC). *See* Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101, 2143-44 (2014). A 2006 contract between the Department and ECMC provides, "ECMC is authorized to accept assignment of all FFELP loans on which the borrower has filed a petition for relief under the U.S. Bankruptcy Code" and that "ECMC shall fulfill all remaining guaranty agency responsibilities for any loan in this category." Letter from Gary D. Whitman, Reg'l Inspector Gen. for Audit Servs., U.S. Dep't of Educ., to Richard Boyle, Chief Exec. Officer, ECMC Grp., Inc., at 19 (Mar. 3, 2011) (contract attached to letter). The 2006 contract appears to have no expiration term, and ECMC continues to be a substantial presence in student loan bankruptcy even as FFELP balances diminish: A Westlaw search indicates that ECMC was listed as a party in 13 student loan undue-hardship decisions in 2018. Nevertheless, the regulations and the 2015 Dear Colleague letter are addressed to guaranty agencies, so this Article focuses on them.

131 *See* 34 C.F.R. § 682.402(i) (2019) (setting forth rules for guaranty agency's participation in bankruptcy proceedings).

132 *See id.* § 682.402(h)(1)(ii).

133 *See id.* § 682.402(i)(1)(ii)-(iii).

134 34 C.F.R. § 682.402(i)(1)(ii) (2019) (FFEL). An additional exception applies to bankruptcies (1) filed before October 8, 1998 and (2) in which the first payment on the loan was due more than seven years before the bankruptcy. In such cases, the guaranty agency apparently is not to oppose discharge. *See id.* § 682.402(i)(1)(i).

135 *See id.* § 682.215 (providing for IBR). The Department of Education confirms that unconsolidated FFEL loans are eligible for IBR but not for other IDR programs. *See Income-Driven Plans*, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven#eligible-loans> (last visited Feb. 5, 2019).

provide for other IDR programs or PSLF,<sup>136</sup> so presumably these programs do not affect the agency's undue-hardship analysis.

Then, "[i]f the guaranty agency determines that repayment would not constitute an undue hardship," the agency must evaluate the cost-effectiveness of opposing discharge. It "must determine whether the expected costs of opposing the discharge petition would exceed one-third of the total amount owed on the loan, including principal, interest, late charges, and collection costs."<sup>137</sup> If the "expected costs of opposing the discharge petition" do exceed the one-third threshold, then the agency "may, but is not required to, engage in the activities described in paragraph (i)(1)(iv) of this section"<sup>138</sup> oppose discharge.

The referenced "paragraph (i)(1)(iv)" provides guidance for how to oppose discharge:

The guaranty agency must use diligence and may assert any defense consistent with its status under applicable law to avoid discharge of the loan. Unless discharge would be more effectively opposed by not taking the following actions, the agency must – (A) Oppose the borrower's petition for a determination of dischargeability; and (B) If the borrower is in default on the loan, seek a judgment for the amount owed on the loan.<sup>139</sup>

Like the Perkins regulations, the FFEL regulations contain gaps. They do not say what the guaranty agency is to do if undue hardship is present, nor what to do if undue hardship is absent and expected litigation costs fall below the one-third threshold. The FFEL regulations also contain an ambiguity comparable to that in the Perkins regulations: the "must use due diligence ... to avoid discharge" provision quoted above is of unclear scope and could be read to conflict with the two-part test by imposing an unqualified duty to oppose discharge.

The regulations confer a great deal of discretion on holders. In the case where undue hardship is absent and opposing discharge is not cost-effective, they affirmatively grant holders discretion: the holder "may, but is not required to" oppose discharge.<sup>140</sup> In other cases, the regulations do not clearly instruct the holder to do or not do anything in particular. As discussed below, the regulations evolved from 1986 to 2001 to give holders more and more discretion.<sup>141</sup>

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136 See 34 C.F.R. § 685.219 (2019) (providing for PSLF for direct loans). The FFEL regulations have no comparable provision, and the Department of Education confirms that FFEL loans must be consolidated to be eligible for PSLF. See *Public Service Loan Forgiveness*, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service#eligible-loans> (last visited Feb. 5, 2019). Arguably, the guaranty agency could consider the borrower's ability to become eligible for PSLF or other IDR programs by consolidating. The regulations and 2015 Dear Colleague Letter provide no guidance on this point.

137 34 C.F.R. § 682.402(i)(1)(iii).

138 *Id.* § 682.402(i)(1)(iii).

139 *Id.* § 682.402(i)(1)(iv).

140 *Id.* § 682.402(i)(1)(iii).

141 See discussion *infra* Part II.B.2.c.

## 2. FFELP Regulation History

It appears that the first FFEL /GSL program rulemaking document to mention bankruptcy is an NPRM for the GSL program dated November 5, 1976.<sup>142</sup> This NPRM, which did not lead to final rules, did not describe any substantive standards for holders' opposition to discharge.<sup>143</sup> This is unsurprising because student loans were fully dischargeable when the NPRM was drafted so there would have been little reason to oppose discharge.<sup>144</sup>

However, a new NPRM issued in 1978<sup>145</sup> and the resulting final rules promulgated in 1979<sup>146</sup> also omitted any mention of the question when to oppose borrower discharge, as did a 1981 NPRM<sup>147</sup> and 1982 final rule<sup>148</sup> for the new PLUS program, under which the federal government guaranteed loans parents took out for their children's education.<sup>149</sup> This was so even though the 1979 rules recognized the possibility that the loans might not be discharged.<sup>150</sup>

### a. 1985 NPRM and 1986 Rules: "Shall Diligently Contest" Discharge

The Department of Education proposed its first substantive standards for guaranty agencies' conduct in the case of borrower bankruptcy in a 1985 NPRM<sup>151</sup> and the Department adopted final rules based on the NPRM in 1986.<sup>152</sup> For the

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142 See Guaranteed Student Loan Program, Notice of Proposed Rulemaking, 41 Fed. Reg. 48,862 (Nov. 5, 1976) [hereinafter 1976 GSL NPRM].

143 Most significantly, it provided that for loans insured directly by the federal government without the intermediary of a guaranty agency, a lender who had filed a default claim with the government was not permitted to file a proof of claim in the borrower's bankruptcy, but was instead required to forward relevant information to the Office of Education so that it could file a claim on behalf of the government. *Id.* at 48,871.

144 See Hunt, *supra* note 64, at 1302-04 (describing enactment of nondischargeability in 1976); 1976 GSL NPRM, *supra* note 142, at 48,862 (NPRM drafted before nondischargeability enacted).

145 Guaranteed Student Loan Program, Proposed Rulemaking, 43 Fed. Reg. 14,376 (April 5, 1978) [hereinafter 1978 GSL NPRM].

146 1979 GSL Final Rule, *supra* note 107, at 53,875-83 (codified at 45 C.F.R. §§ 177.400-177.408) (establishing regulations for guaranty program without providing guidance as to when guaranty agency should oppose borrower's bankruptcy discharge).

147 See Parent Loans for Undergraduate Students (PLUS) Program, Notice of Proposed Rulemaking, 46 Fed. Reg. 4956 (Jan. 19, 1981).

148 See PLUS Program, 47 Fed. Reg. 17,200, 17200 (April 21, 1982) [hereinafter 1982 PLUS Final Rules].

149 The only difference between the PLUS program and existing GSL program bankruptcy rules related to continuing collection against a spouse in the event of a co-borrower spouse's discharge. See *id.* at 17,200 (PLUS loans have "same terms, conditions, and benefits" as GSL loans); *id.* at 17,216 (codified at 34 C.F.R. § 683.32(a) (co-borrower discharge for guaranty agency PLUS loans); *id.* at 17,227 (codified at 34 C.F.R. § 683.63(c)(1) (co-borrower discharge for federally insured PLUS loans)).

150 1979 GSL Final Rule, *supra* note 107, at 53,878 (codified at 45 C.F.R. § 117.402(f)(3)) (providing for treatment of loans for which the Commissioner pays a bankruptcy claim but that are not actually discharged in bankruptcy).

151 Guaranteed Student Loan Program and PLUS Program, 50 Fed. Reg. 35,964, 35,964 (Sept. 4, 1985) [hereinafter 1985 GSL PLUS NPRM]

152 See 1986 GSL PLUS Final Regulations, *supra* note 117.

first time, guaranty agencies were told what to do in case of borrower bankruptcy. The Department issued the 1985 FFEL NPRM several months after the bankruptcy rules it had proposed for the Perkins program,<sup>153</sup> and it took a different tack. Rather than requiring the holder to evaluate whether the borrower had clearly proven the allegation of undue hardship, as the Perkins proposal directed, the FFEL regulations provided that the guaranty agency “shall diligently contest the discharge of the loan by the bankruptcy court.”<sup>154</sup> The guaranty agency’s exercise of due diligence through discharge was a condition of the federal reimbursement otherwise available to the guaranty agency upon borrower discharge.<sup>155</sup>

The Department has said even less to justify the GSL and FFEL rules than it has to justify the Perkins rules. The 1985 GSL NPRM offered only the vaguest of explanations. It announced that the overall purpose of the rules, including the bankruptcy discharge opposition standards, was to “incorporate recent statutory changes.”<sup>156</sup> The NPRM also stated that the rules were intended to “implement various policy initiatives intended to prevent student loan defaults and to effect repayment of loans once default has occurred.”<sup>157</sup> The latter justification probably did not literally cover the bankruptcy discharge opposition rules, because bankruptcy apparently is not an event of default for FFELP loans.<sup>158</sup> The NPRM

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153 See *supra* Part II.A.2.a.

154 See 1986 GSL PLUS Final Regulations, *supra* note 117, at 40,905 (codified at 34 C.F.R. § 682.402(g)(1)); 1985 GSL PLUS NPRM, *supra* note 151, at 35,981 (to be codified at 34 C.F.R. § 682.402(d)(1) (same)). Previously, a guaranty agency’s requirement apparently had ceased at an earlier stage of the case, when the debtor was “adjudicated a bankrupt.” See 1979 GSL Final Rule, *supra* note 107, at 53,878 (codified at 45 C.F.R. § 117.402(f)(1)(iii)) (establishing as prerequisite for government payment on guaranty agency’s borrower bankruptcy claim that “[t]he guarantee agency exercised due diligence in the collection of the loan until the borrower ... was adjudicated a bankrupt.”). The 1978 Bankruptcy Reform Act eliminated the concept of “adjudication as a bankrupt.” See 4 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 68.12[2] (Richard Levin & Henry J. Sommer eds., 2018).

155 See 1986 GSL PLUS Final Regulations, *supra* note 117, at 40,905 (codified at 34 C.F.R. §§ 682.402(g)(1)(i), (g)(2)) (reimbursement of guaranty agency on discharge, provided certain conditions met); *id.* (to be codified at 34 C.F.R. § 682.402(h)(1)(iv)) (conditions include guaranty agency’s due diligence through discharge). If the discharge was not granted, the guaranty agency could choose either to require the lender to repurchase the loan or to sell the loan to another lender. See *id.* at 40,905 (codified at 34 C.F.R. § 682.402(g)(1)(ii)).

156 1985 GSL PLUS NPRM, *supra* note 151, at 35,964.

157 *Id.*

158 The FFELP regulations define default as “[t]he failure of a borrower .... to make an installment payment when due, or to meet other terms of the promissory note, the Act, or regulations as applicable,” provided the failure has persisted for 270 days for loans repayable in monthly installments (330 days for a loan repayable in less frequent installments) and “the Secretary or guaranty agency finds it reasonable to conclude that the borrower ... no longer intend[s] to honor the obligation to repay.” 34 C.F.R. § 682.200. The author has located no provision of the Act or regulations making borrower bankruptcy a default, and the only basis the Department of Education’s indicates for default on FFELP or Ford program loans is nonpayment for 270 days. *How to Repay Your Loans: Understanding Delinquency and Default*, U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/default#default> (last visited Feb. 5, 2019). The FFELP master promissory note does not define bankruptcy as an event of default, although it defines default and indicates that the loan can be discharged in bankruptcy only on a showing of undue hardship. See FFELP Federal Stafford Loan

did not offer any specific rationale for the proposed rules governing guaranty agencies' response to bankruptcy. The rules apparently attracted no comment from the public,<sup>159</sup> and the Department adopted them without change in the 1986 regulations.<sup>160</sup>

#### **b. The 1990 NPRM and 1992 Rules: Adopting the Two-Step Test**

The Department proposed further revisions to the rules governing guaranty agencies' response to borrower petitions for bankruptcy discharge in 1990<sup>161</sup> and adopted the revision in 1992.<sup>162</sup> The 1992 rules relaxed the previously unqualified duty to oppose discharge. They paralleled the regulations the Department had adopted for the Perkins program in 1987,<sup>163</sup> and were substantially similar to the regulations in effect today.

Under the 1992 rules, the guaranty agency was to take action "immediately" upon receipt of a claim from the lender.<sup>164</sup> It was to determine whether repayment would impose an undue hardship.<sup>165</sup> If the guaranty agency determined that repayment "would not constitute an undue hardship," it was to determine whether opposing discharge would cost more than one third the outstanding balance on the loan.<sup>166</sup> If the guaranty agency determined that opposing discharge would cost less than one-third of the amount owed, it was to oppose discharge.<sup>167</sup>

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Master Promissory Note, <https://ifap.ed.gov/dpccletters/attachments/FP0608StaffApp2008.pdf> (last visited Feb. 5, 2019). The FFELP regulations treat default and bankruptcy claims as separate categories. *See, e.g.*, 34 C.F.R. Part 682 App. D, Part I.E (2019) (setting out different rules for lender cure of violations relating to "default claims" and "bankruptcy claims"); *id.* § 682.402(i)(1)(iv)(B) (requiring guaranty agency to seek a judgment in borrower's bankruptcy discharge proceeding "if the borrower is in default on the loan").

159 *See* 1986 GSL PLUS Final Regulations, *supra* note 117, at 40,941 (discussing public comments to proposed 34 C.F.R. § 682.402 and not mentioning rules for guaranty agencies' opposition to discharge).

160 *Compare* 1985 GSL PLUS NPRM, *supra* note 151, at 35,981 (to be codified at 34 C.F.R. § 682.402(d)(1) (guaranty agency "shall diligently contest the discharge of the loan by the bankruptcy court")) *with* 1986 GSL PLUS Final Regulations, *supra* note 117, at 40,905 (codified at 34 C.F.R. § 682.402(g)(1)) (same).

161 Guaranteed Student Loan Programs, Proposed Rules, 55 Fed. Reg. 48,324, 48,332 (Nov. 20, 1990) [hereinafter 1990 GSL NPRM] (explaining proposed new rules "regarding the actions required of guaranty agencies in bankruptcy proceedings").

162 *See* Federal Family Educational Loan Programs, Rules and Regulations, 57 Fed. Reg. 60,280 (Dec. 18, 1992) [hereinafter 1992 FFEL Rules].

163 *See* discussion *supra* Part II.A.2.a

164 1992 FFEL Rules, *supra* note 162, at 60,349 (codified at 34 C.F.R. § 682.402(f)(1)(ii)).

165 *See id.* at 60,349 (codified at 34 C.F.R. § 682.402(g)(1)(i)(B)). The agency was also to determine whether the loans had been in repayment for seven or more years. *Id.* (to be codified at 34 C.F.R. § 682.402(g)(1)(A)). Presumably, the guaranty agency was not generally expected to fight discharge if the loans had been in repayment for seven years, because student-loan dischargeability did not at that time cover loans of that vintage. *See* Hunt, *supra* note 64, at 1300-12 (explaining evolution of student-loan nondischargeability).

166 1992 FFEL Rules, *supra* note 162, at 60,349 (codified at 34 C.F.R. § 682.402(g)(1)(ii)).

167 *Id.* at 60,349 (codified at 34 C.F.R. § 682.402(g)(iii)).

For justification, the 1990 NPRM that gave rise to the 1992 rules again cited “various policy initiatives designed to reduce defaults and increase collections on loans that do go into default.”<sup>168</sup> The NPRM’s specific discussion of the new bankruptcy rule simply summarized the rule and did not offer a justification.<sup>169</sup> The proposed rules on consent to discharge again apparently attracted no public comment, and the Department adopted them without change from the NPRM and without offering further justification.<sup>170</sup>

### c. Post-1992 Developments: Ambiguity and Increased Holder Discretion

The changes to the rules since 1992 have not altered the core requirements to evaluate undue hardship and estimate litigation costs. A 1999 rule added an explicit statement that the agency “must use diligence and may assert any defense consistent with its status under applicable law to avoid discharge of the loan”<sup>171</sup> and “must ... oppose the borrower’s petition,” “[u]nless discharge would be more effectively opposed” by not doing so.<sup>172</sup> This paralleled a rule the Department had adopted just a few days earlier for the Perkins program.<sup>173</sup> As with the Perkins rule, the scope of this duty is unclear. According to an analysis paralleling that of the Perkins rules, the duty seems likely to have governed the agency’s conduct once it had decided to oppose discharge.<sup>174</sup>

The 1999 rule also removed the requirement that the guaranty agency “shall” oppose discharge if litigation costs were expected to fall below the one-third threshold and did not replace it. That had been the only provision directing the guaranty agency to take or not take particular action based on the two-step analysis. Thus, after the change, guaranty agencies were still told to carry out the two-step analysis, but had no explicit instructions about what to do with the results.<sup>175</sup> The

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168 1990 GSLNPRM, *supra* note 161, at 48,324. Although some rules in the NPRM were to “implement new statutes,” as opposed to policy initiatives, *id.* at 48,324, the statute-implementing rules did not include the discharge consent provisions. *See id.* at 48,324-27. *See also id.* at 48,332 (discharge consent provisions are “Other Regulatory Changes”).

169 *See id.* at 48,332 (summarizing proposed changes to 34 C.F.R. 682.402(g) without providing justification).

170 *See* 1992 FFEL Rules, *supra* note 162, at 60,285-322 (describing Department responses to comments and changes from NPRM to final rule without mentioning 34 C.F.R. § 682.402(g)).

171 *See* Federal Family Education Loan Program and William D. Ford Federal Direct Loan Program, 64 Fed. Reg. 58,938, 58,960 (Nov. 1, 1999) [hereinafter 1999 FFEL Ford Final Rules] (codified at 34 C.F.R. § 682.402(i)(1)(iv)). The codification of the bankruptcy rules at 34 C.F.R. § 682.402(i) indicates that they had been renumbered since the 1992 rulemaking. A comparison of historical versions of the Code of Federal Regulations on LEXIS/NEXIS indicates that the renumbering took place in 1993. The author has been unable to find more information on the renumbering.

172 *Id.* at 58,938 ((codified at 34 C.F.R. § 682.402(i)(1)(iv)).

173 *See* discussion *supra* Part II.A.2.b.

174 *See* discussion *supra* Part II.A.2.b.

175 It is possible that 34 C.F.R. § 682.402(i)(1)(iv) governed the decision whether to oppose discharge. If so, the agency would have been under an unqualified duty to use due diligence, or to use due diligence to avoid discharge. As explained above for the parallel Perkins rules, *supra* notes 50-51 and accompanying text, such a reading is probably incorrect.

Department described the 1999 changes as amendments to “filing procedures” and did not further explain them.<sup>176</sup>

The Department restored some guidance in 2001. In that year, it added a sentence expressly stating that the guaranty agency “may, but need not” oppose discharge if it determines that doing so would cost more than one third the amount owed on the loan.<sup>177</sup> Thus, from 1986 to 2001, the rules evolved from providing that the holder “shall diligently contest” discharge in all cases to silence in most possible cases, coupled with an affirmative grant of discretion in the case where undue hardship is absent and opposing discharge would be cost-ineffective.

By addressing that one case, the change provided some clarity that had been lacking. But even after the change, the regulations did not specify what was supposed to happen if the guaranty agency found that repayment would entail undue hardship or if it expected that opposing discharge would cost less than one third of the balance. The 2001 amendment was the last change to date to the FFELP bankruptcy discharge opposition rules.

The Department did not explain its reasoning in 2001. It described the change as one of a series of “needed technical corrections and other clarifying changes to the FFEL and Direct Loan program regulations” that did “not affect the substantive rights or obligations of any affected parties.”<sup>178</sup>

#### **d. Treatment of Federally Held FFELP Loans**

During the history of the GSL/FFEL program, the Department would litigate some GSL/FFEL bankruptcies itself. The most common situation in which this occurred seems to have been the bankruptcy of a borrower of a loan that was directly insured by the federal government rather than by a guaranty agency.<sup>179</sup>

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176 1999 FFEL Ford Final Rules, *supra* note 171, at 58,938; Federal Family Education Loan Program and William D. Ford Federal Direct Loan Program, Notice of Proposed Rulemaking, 64 Fed. Reg. 43,428, 43,432 (Aug. 10, 1999). The 1999 rules also contained a change to reflect the elimination of any exception to nondischargeability for older student loans. *See id.* at 58,960 (codified at 34 C.F.R. § 682.402(i)(1)(i)-(ii)) (providing that inquiry into whether loans are seven or more years old applies only to bankruptcies filed before October 8, 1998).

177 Federal Family Education Loan Program and William D. Ford Federal Direct Loan Program, 66 Fed. Reg. 34,762, 34,763 (June 29, 2001) [hereinafter 2001 FFEL Ford Final Rules] (codified at 34 C.F.R. § 682.402(i)(1)(iii)).

178 2001 FFEL Ford Final Rules, *supra* note 177, at 34,762.

179 Under the 1978 proposed rules for federally insured loans, upon the government’s payment of a bankruptcy claim to the lender, the lender assigned the note and a proof of claim, accompanied by a statement of grounds for an objection to discharge, to the federal government. *See* 1978 GSL NPRM, *supra* note 145, at 14,412 (proposing 45 C.F.R. § 177.64(b), “[p]ayment of a claim shall be contingent upon receipt of an assignment” of the note and any proof of claim); *id.* (proposing 45 C.F.R. § 177.64(a), claim to include “a statement as to any objections to the discharge in bankruptcy of which the holder may be aware.”). The 1979 rules adopted the assignment and statement-of-basis provisions. *See* 1979 GSL Final Rule, *supra* note 107, at 53,891 (codified at 45 C.F.R. § 177.516(a)(4) & (a)(4)(ii)); *id.* at 53,892 (codified at 45 C.F.R. § 177.516(e)(4)(iv)). The holder was not required to note the undue-hardship provision as a basis for objection, but was expected to provide notice of the fact that “the debtor has assets available to pay the debt,” if that was known to be true. *Id.* at 53,915-16. The Commissioner of the Office of Education, and not the lender, was responsible for fighting discharge

The Department has never set any rules governing its decision whether to oppose bankruptcy discharge.<sup>180</sup> The 1976 and 1978 NPRMs did not mention the United States' decision whether to oppose discharge at all, and the 1979 rules indicated only that, "[t]he Commissioner [of the Office of Education, Department of Health, Education, and Welfare (HEW)] will contest the bankruptcy discharge if the case warrants such action."<sup>181</sup> Indeed, in a response to a comment HEW suggested that the fact the government would handle the bankruptcy was precisely why a regulation was unneeded.<sup>182</sup>

The 1985 NPRM and ensuing 1986 rules also said nothing about what the government would do in the case of borrower bankruptcy.<sup>183</sup> Presumably, this absence reflected the Secretary's intention, declared in the 1985 NPRM, to "exercise the full discretion accorded by 20 U.S.C. 1082(a)(5) and (a)(6) to decide, on a case-by-case basis, whether the interests of the United States are served by refraining from collection on all or part of a defaulted loan."<sup>184</sup> Subsequent bankruptcy rules, including the landmark 1992 rules, did not adopt any policy governing the Secretary's behavior.

### ***C. The William D. Ford Federal Direct Loan Program***

Under the Ford program, the federal government makes loans to students. Ford is the largest federal loan program, with a balance of \$1.198 trillion outstanding as

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of federally insured loans, where there was no guaranty agency. See 1979 GSL Final Rule, *supra* note 107, at 53,915 (explaining that the time necessary "to expedite the Commissioner's objection to a discharge in bankruptcy" was a consideration in setting the deadline for submission of bankruptcy claims); *id.*, at 53,914 (after lender files proof of claim, it has "no other responsibilities for contesting the discharge in bankruptcy). The 1986 rules for bankruptcies involving federally guaranteed loans were similar to the 1979 rules. The government would pay the lender and take an assignment of the note upon the borrower's filing a bankruptcy petition. See 1986 GSL PLUS Final Regulations, *supra* note 117, at 40,917 (codified at 34 C.F.R. § 682.511(a)(1)(iii) & 682.511(c)).

180 The Department has issued regulations governing its own conduct with respect to other aspects of the FFELP. See, e.g., 34 C.F.R. § 682.300(a) (2019) ("The Secretary pays a lender, on behalf of a borrower" certain interest payments).

181 1979 GSL Final Rule, *supra* note 107, at 53,914.

182 *Id.* ("Several commenters asked how the provision in the Education Amendments of 1976 ... limiting discharges in bankruptcy during the first five years after leaving school would affect these regulations. *Response:* Since the 5-year nondischargeability provision affects the loan after the lender assigns to [the Office of Education], the provision has no effect on the payment of claims or on the lender's responsibilities."). The conduct of the bankruptcy after assignment to the federal government was outside the scope of the regulation.

183 See 1986 GSL PLUS Final Regulations, *supra* note 117, at 40,913-19 (codified at 34 C.F.R. §§ 682.500-682.515) (providing rules for federally insured GSL and PLUS loans and not addressing whether government would oppose borrower's petition for discharge).

184 1985 GSL PLUS NPRM, *supra* note 151, at 35,966. 20 U.S.C. §§ 1082(a)(5) and (a)(6) provide that the Secretary "may" "(5) enforce, pay, or compromise, any claim on, or arising because of, any such insurance or any guaranty agreement under section 1078(c) of this title; and (6) enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of redemption." Section 1078(c) covers guaranty agency programs. 20 U.S.C. § 1078(c) (2019).

of the middle of 2019.<sup>185</sup> It is also, after expiration of the Perkins loan program in September 2017,<sup>186</sup> the only major generally available federal student loan program under which loans are made.<sup>187</sup>

Because the federal government is the lender in the Ford program, the analysis of involved entities and incentives is less complex than for the Perkins or FFEL programs. The Department apparently conceives its goals in deciding whether to consent to discharge as “balanc[ing] its obligation to collect debts with judging whether the repayment of loans would constitute an undue hardship to borrowers.”<sup>188</sup> In the Department’s view, whether undue hardship exists is to be determined according to tests developed by the federal courts.<sup>189</sup>

### 1. Ford Program Current Rules

The Department’s regulations collected under the heading “William D. Ford Federal Direct Loan Program” do not address whether or when the Department will oppose bankruptcy discharge of direct loans.<sup>190</sup> The 2015 Dear Colleague Letter applies to all three programs, and insofar as it is based on the FFEL and Perkins regulations, it applies those regulations to the Ford program.<sup>191</sup> As discussed,<sup>192</sup> the Department has not adopted discharge consent regulations governing loans it holds under the Perkins and FFEL programs, so perhaps it is unsurprising that there are no regulations governing discharge consent for government-held loans under the Ford program.

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185 U.S. DEP’T OF EDUC., *supra* note 32.

186 See, e.g., Madeline St. Amour, *Perkins Loan Program Expires Despite Attempts to Save It*, PORTLAND MORNING SENTINEL (Oct. 14, 2017) <https://www.pressherald.com/2017/10/14/perkins-loan-program-expires-despite-attempts-to-save-it/> (reporting that Perkins program expired Sept. 30, 2017).

187 TEACH grants, which are aimed at teacher education, convert to loans if the recipient does not complete a service obligation. See *Federal Student Aid*, U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/sa/types/grants-scholarships/teach> (last visited Feb 5, 2019).

188 2015 Dear Colleague Letter, *supra* note 14, at 1.

189 *Id.* at 3.

190 See William D. Ford Federal Direct Loan Program, 34 C.F.R. Part 685 (2019) (not addressing opposition or consent to discharge). The regulations do provide for administrative forbearance pending the bankruptcy. See *id.* § 685.205(b)(4). They also explicitly provide that the Secretary will not require any further payments on a loan discharged in bankruptcy. *Id.* § 685.212(c). This provision may be unnecessary because the Bankruptcy Code forbids actions to collect a discharged debt. See 11 U.S.C. § 524(a)(2) (2019).

191 The regulations governing guaranty agencies’ opposition to FFEL loan discharge arguably apply, through incorporation by reference, to the Department’s decision to oppose discharge of a Ford loan. The Higher Education Act provides that direct loans “shall have the same terms, conditions, and benefits ... as loans made to borrowers, and first disbursed on June 30, 2010 under sections 1078, 1078-2, 1078-3, and 1078-8”. 20 U.S.C. § 1087e(a)(1) (2019). The enumerated provisions govern various types of FFEL loans. Thus, if the rules governing a guaranty agency’s response to a borrower’s petition for discharge are “terms, conditions [or] benefits” of the loan, rules borrowed from these other provisions might govern the Department’s conduct. This argument would have to contend with the fact that the FFEL rules govern guaranty agencies, not the Department, so that they cannot literally govern the Department’s conduct when the borrower seeks to discharge a direct loan. However, discharge policies might appear to be “terms, conditions, or benefits” from the borrower’s perspective, whether implemented by the guaranty agency or the Department.

192 See discussion *supra* Parts II.A.2.c, II.B.2.d.

## 2. Ford Program Rules History

The only statement of Department policy relating to the Direct Loan Program appears to be the 2015 Dear Colleague Letter. The author has been unable to locate any materials bearing directly on the history of the letter or of Department policy for direct-loan bankruptcies more generally. According to the letter, the substantive standards for deciding whether to oppose direct-loan discharge are identical to those for deciding whether to oppose discharge of direct loans under the FFEL and Perkins programs, suggesting that those programs' regulations are the source for the direct-loan bankruptcy policy.

### D. The 2015 Dear Colleague Letter in Light of the Regulations

The 2015 Dear Colleague Letter interprets the regulations just described. In so doing, it purports to fill the gaps and resolves the ambiguities identified above. Unlike the Perkins and FFEL regulations, the letter probably tells holders what to do when repayment would cause undue hardship: they are to consent to discharge.<sup>193</sup> It resolves the scope of the awkward 1999 amendments that potentially instruct holders to oppose discharge under any and all circumstances<sup>194</sup> by not discussing them, thus essentially reading them out of the rules. Unlike the regulations,<sup>195</sup> the letter provides clear guidance about what to do if undue hardship is absent and the holder applies the one-third-of-balance test.<sup>196</sup> Most importantly, the letter sets out borrower-bankruptcy rules for the largest federal loan program, the William D. Ford Direct Loan program.<sup>197</sup> That is important because there are no regulations governing borrower bankruptcies under this program.<sup>198</sup>

The letter is clearly a step toward addressing the technical issues with the regulations. However, the letter is a guidance document.<sup>199</sup> Such documents cannot contradict the regulations and therefore cannot fix their more fundamental problems.

## II. Evaluating the Student Loan Bankruptcy Discharge Rules in Light of Their History

This Part identifies three problems with the Department's regulations that are apparent from the historical review and proposes approaches to mitigating them. They are presented in ascending order of generality.

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193 See Hunt, *supra* note 4, at 10, for discussion of the letter's ambiguity on this point and how that ambiguity should be resolved.

194 See discussion *supra* Parts II.A.2.c, II.B.2.d.

195 See discussion *supra* Parts II.A.1, II.B.1.

196 See discussion *supra* Part I.B.

197 See discussion *supra* Part I.B.

198 See discussion *supra* Part II.C.1.

199 See 2015 Dear Colleague Letter, *supra* note 14, at 1.

First, the history reveals that the Department's regulations have been ambiguous and incomplete since the 1980s,<sup>200</sup> and that the Department introduced more ambiguity in 1999.<sup>201</sup> The Department should consider clarifying the language in the regulations themselves, not just in an interpretive letter. It should revise the unclear language added in 1999 to the Perkins and FFELP program regulations to make clear that there is no unqualified requirement to oppose discharge. The Department should also make clear that when undue hardship is present, the holder is to consent to discharge.<sup>202</sup>

Second, our review has shown that holders have tremendous discretion under the regulations and that how they decide to exercise that discretion is not transparent to borrowers. We have seen how discretion for FFEL program holders steadily expanded from 1986 to 2001.<sup>203</sup> We have also seen that the Department never adopted any formal rules governing the government's consent to discharge of loans it holds – now by far the largest category of loans outstanding.<sup>204</sup>

The Department should adopt bright-line rules that at least create a presumption in favor of discharge when certain objectively defined conditions are met, such as when the borrower has income at or near the poverty line and is recognized by a federal agency as disabled. Such rules would alleviate borrower uncertainty and constrain the very broad discretion holders currently enjoy.<sup>205</sup> Professors Matthew Bruckner, Pamela Foohey, Brook Gotberg, Dalié Jiménez, and Chrystin Ondersma have presented a detailed proposal along these lines.<sup>206</sup>

Third, the Department has devised its policy using an unduly cramped frame of reference that takes into account only legal constraints and cost-effectiveness. This was apparent in the explanation of the original 1987 Perkins program rules, where the only expressed substantive value was protecting federal finances. The situation has not improved since then. Nothing requires the Department to use the undue-hardship standard from the Bankruptcy Code in deciding whether holders should consent to discharge.<sup>207</sup>

Instead, the Department should be guided by the overall purposes of the student-loan programs in crafting its discharge policy.<sup>208</sup> The Department should

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200 See discussion *supra* Parts II.A.1, II.A.2.a, II.B.1, II.B.2.a.

201 See discussion *supra* Parts II.A.2.b, II.B.2.c.

202 See Hunt, *supra* note 4, at 17-22, for more detail.

203 See discussion *supra* Part II.B.2.c.

204 See discussion *supra* Parts II.A.2.c, II.B.2.d, II.C.1.

205 See Hunt, *supra* note 4, at 22-29, for more detail.

206 See Matthew Bruckner, Brook Gotberg, Dalié Jiménez & Chrystin Ondersma, *A No-Contest Discharge for Uncollectable Student Loans*, COLO. L. REV. (forthcoming 2020) (manuscript at 6-7), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3366707](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3366707) (describing nine objectively defined sets of circumstances in which the authors argue that the Department should consent to student-loan discharge in bankruptcy); Jiménez et al., *supra* note 123, at 115 (2018) (presenting earlier version of proposal).

207 The companion paper *Consent to Student-Loan Bankruptcy Discharge* develops this argument in more detail. See Hunt, *supra* note 4, at 29-30, 43-56.

208 See Hunt, *supra* note 4, at 30-34, for more detail.

recognize that overly strict policies interfere with underlying goals of student loans such as providing access to education, giving the country the benefit of an educated population, and not allowing loans to interfere unduly with career choice.<sup>209</sup> As an executive agency, the Department is better situated than the courts to devise a bankruptcy policy that balances monetary recovery and combating borrower bad faith against avoiding borrower suffering and achieving the overarching education-related goals of the loan programs.

Concretely, the Department should abandon its policy of opposing discharge whenever undue hardship is absent and the cost of opposing discharge falls below the one-third threshold. It should craft a more generous policy, one that takes account of the overarching goals of the student loan programs it administers. Such a policy could include consenting to discharge where the borrower is successful in a low-paying field for which the borrower was trained, allowing a high debt-to-income ratio to create a rebuttable presumption that discharge should be allowed, and developing rules providing for consent to discharge when student loans have turned out to be harmful to the borrower.<sup>210</sup>

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209 See Hunt, *supra* note 5, at 5-40, for more detail.

210 See Hunt, *supra* note 5, at 49-62, for more detail.



# STUDENT EVALUATIONS AND THE PROBLEM OF IMPLICIT BIAS

ROGER W. REINSCH, SONIA M. GOLTZ, AMY B. HIETAPELTO\*

*"It is easy to believe that there is more going on in people's minds than they say; it is not easy to believe that there is more going on in my mind than I say."<sup>1</sup>*

## INTRODUCTION

This article addresses the implicit bias problems inherent in using student evaluations when making employment decisions concerning university faculty members. Research indicates that student evaluations contain implicit bias regarding race, gender, and a variety of other protected categories. We begin by looking at the current use, purpose and structure of student evaluations. We then explore what implicit bias is and the research that demonstrates that most of us have some sort of implicit bias. Once the concept of implicit bias is explained, we examine the research that indicates there is implicit bias in student evaluations. We then discuss the law and implicit bias generally, followed by specific legal issues that are raised. Next, we examine recent trends at some universities which have recognized and begun to address the problems with student evaluations. Finally, we offer recommendations as to how to evaluate faculty members' teaching using alternative methods.

### I. Use and Purpose of Student Evaluations of Teaching:

Student Evaluations of Teaching<sup>2</sup> are recognized as a common performance measure used by universities to make employment decisions with regard to faculty, as Emery and colleagues noted: "A current practice among colleges and universities in the USA is for the administration to use a student evaluation instrument of teaching effectiveness as part of the faculty member's performance evaluation."<sup>3</sup>

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1 Brian A Nosek, Carlee Beth Hawkins and Rebecca S. Frazier, *Implicit Social Cognition: From Measures to Mechanisms*, 15 Trends Cogn. Sci. 152 (2011).

2 SETs hereafter.

3 Charles R. Emery, Tracy R. Kramer and Robert G. Tian, *Return to Academic Standards: A Critique of Student Evaluations of Teaching Effectiveness*, 11 Quality Assurance in Education 37, 37 (2003).

Faculty at most colleges and universities today in the United States are subject to summative student evaluations.<sup>4</sup> These summative student evaluations are used to make several employment decisions, such as when determining pay increases, tenure and promotion.<sup>5</sup>

Summative student evaluations of teaching regularly use numerical scores to assess whether a faculty member is a good teacher.<sup>6</sup> The intended purpose of summative evaluations is to provide information to administrators about the faculty member's teaching ability. However, student ratings may represent essentially little more than opinions, raising the issue of potential student bias as Hornstein noted: "The validity of anonymous students' evaluations rests on the assumption that, by attending lectures, students observe the ability of the instructors, and that they report it truthfully"<sup>7</sup>. Institutions are typically not unaware of the likelihood of bias coloring evaluations, but use them anyway largely because of their convenience, as noted by Flaherty: "While some institutions have acknowledged the biases inherent in SETs, many cling to them as a primary teaching evaluation tool because they're easy -- almost irresistibly so. That is, it takes a few minutes to look at professors' student ratings on, say, a 1-5 scale, and label them strong or weak teachers. It takes hours to visit their classrooms and read over their syllabi to get a more nuanced, and ultimately more accurate, picture."<sup>8</sup> Therefore, many administrators seem willing to discount or overlook the possibility of bias so they can continue to rely on SETs.

As stated, the evaluations typically use a Likert scale anchored with numbers, often from 1-5. These numbers are often associated with verbal anchors—for example, five usually means a high rating. Student evaluations are then compiled, producing a mean score for each question, and finally an overall mean score for that faculty member in that class. Those making employment decisions generally will rely mostly on the overall mean scores.<sup>9</sup> At most institutions, although a mean

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4 See generally, S. Surbhi, *Difference Between Formative and Summative Assessment*, (July 1, 2017), <https://keydifferences.com/difference-between-formative-and-summative-assessment.html>. Summative assessment is an assessment of learning that is normally done at the end of the semester. Essentially students are asked to evaluate their learning in a course once it is over. In effect, it is their opinion of what they learned. In contrast, formative assessment is done on an on-going basis during the semester to assess learning at each of those intervals. Its purpose is to assess whether the pedagogy used is conducive for learning. It provides information that may be used to change the pedagogy during the semester. Whereas, summative assessment does not provide an opportunity to change anything during that semester.

5 See, Henry A. Hornstein, *Student Evaluations of Teaching are an Inadequate Assessment Tool for Evaluating Faculty Performance*, 4 *Cogent Education* 1 (2017).

6 See, John W. Lawrence, *Student Evaluations of Teaching are Not Valid*, AAUP, (May-June 2018), <https://www.aaup.org/article/student-evaluations-teaching-are-not-valid#.XF6j6fZFyUk>.

7 Hornstein, *supra* note 5 at 3.

8 Coleen Flaherty, *Teaching Eval Shake-Up*, Inside Higher Ed (May 22, 2018) at <https://www.insidehighered.com/news/2018/05/22/most-institutions-say-they-value-teaching-how-they-assess-it-tells-different-story>.

9 For example, at one of the authors' institutions this is used: Level 3 – truly meritorious Exceeds expectations. Faculty member (1) is a highly effective teacher, (2) engages students in a variety of meaningful ways, and (3) has student-based teaching evaluations that consistently include

of 3 is usually designated as “acceptable” with the scale’s verbal anchor, being in the 3 range is considered by administrators not to be very good and, in fact, may be seen as problematic. The expectation is that everyone will be at 4 or above. This expectation is a false one and could be viewed as a manifestation of the Garrison Keillor syndrome, namely that “everyone is above average.”<sup>10</sup>

Because the expectation is that everyone should be rated above average, the presence of implicit bias is even more concerning. Bias is likely to lower a particular faculty member’s mean score while at the same time raising another faculty member’s score. This makes it difficult for certain groups of people—usually underrepresented group members—to achieve “above average” ratings while making it easier for members of majority groups to do so. Therefore, if implicit bias involves any of the protected categories under the law and evaluations are used to make employment decisions, then those employment decisions are based on some factors that are discriminatory and therefore illegal. For instance, a lower mean could result in the faculty member receiving lower merit increases or not getting promoted. This would be discriminatory under The Equal Pay Act<sup>11</sup> and Title VII of the Civil Rights Act of 1964 as amended Civil Rights Act of 1991.<sup>12</sup>

For these reasons it is important to look at the types of biases that might be in these evaluations. The issue of likely bias should not be dismissed because it is inconvenient or a challenge to come up with alternative unbiased measures of performance; we believe instead that it should be treated as a critical issue because student evaluations of faculty are used frequently and in a variety of employment related decisions: SETs play a role in the hiring process, tenure decisions, promotion decisions, salary decisions, and other benefits such as faculty awards. This is not a new concern and has been recognized in the education literature, such as by Basow and Martin, who noted: “The question of whether student evaluations can be biased is a critical one for those using them, whether for formative or summative purposes.”<sup>13</sup> Therefore, we will look at some of the research on implicit bias.

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a significant number of item scores  $\geq 5$  (on a 6-point scale).

Level 2 – solid and sound Meets expectations. Faculty member (1) is an effective teacher, (2) engages students in meaningful ways, and (3) has student-based teaching evaluation scores that are average (not significantly high or low). (3.6-4.9)

Level 1 – substandard does not meet expectations. Faculty member (1) needs improvement in the area of teaching effectiveness, (2) does not demonstrate meaningful student engagement, and (3) has student-based teaching evaluations that consistently include a significant number of item scores  $\leq 3.5$  (6-point scale).

10 [https://www.brainyquote.com/quotes/garrison\\_keillor\\_137097](https://www.brainyquote.com/quotes/garrison_keillor_137097).

11 Equal Pay Act of 1963, 29 U.S. Code Chapter 8 § 206(d).

12 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

13 Susan A. Basow and Julie L. Martin, *Bias in Student Evaluations* at 39. In M. E. Kite (Ed.), *Effective Evaluation of Teaching: A Guide for Faculty and Administrators*. Retrieved from the Society for the Teaching of Psychology, at <http://teachpsych.org/ebooks/evals2012/index.php>; for a definition of summative and formative evaluations *see supra*, note 4.

## II. Implicit Bias: What is it?

Humans perceive other people's behavior through filters that are socially conditioned. None of us sees the world through neutral, objective lenses. Instead, our minds classify individuals according to race, gender, age, and other socially salient categories with dizzying speed.<sup>14</sup> Studying these social attitudes can be tricky, however; impression management, for example, can influence self-reports of social attitudes that are frowned on by society.<sup>15</sup> Also, individuals often have attitudes of which they are not fully aware. Therefore, in the 1980s, psychologists began to use indirect measures of attitudes that bypass conscious awareness, such as by relying on response latency<sup>16</sup> in order to better ascertain underlying mental processes.<sup>17</sup> In other words, these "implicit measures" do not require individuals to be aware of their attitudes.<sup>18</sup> Implicit measures are now widely used in personality and social psychology with about 20 implicit measurement methods having been developed.<sup>19</sup>

These measures are responsible for much of what we now know about implicit social cognition, a term Greenwald and Banaji introduced describing cognitive processes that occur outside of conscious awareness or control in relation to social psychological constructs - attitudes, stereotypes, and self-concepts.<sup>20</sup> There appear to be two distinct levels of social cognition. Much of human cognition that influences judgement and action seems to occur outside of conscious awareness or conscious control.<sup>21</sup> "At the lower level there are fast, relatively inflexible routines that are largely automatic and implicit and may occur without awareness. At the higher level there are slow, flexible routines that are explicit and require the expenditure of mental effort."<sup>22</sup> These two levels of decision making have been referred to as "System 1 and System 2" or "Fast and Slow" thinking.<sup>23</sup> "System I

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14 See, Nalini Ambady, Frank J. Bernieri & Jennifer A. Richeson, *Toward a Histology of Social Behavior: Judgmental Accuracy from Thin Slices of the Behavioral Stream*, 32 *Advances in Experimental Social Psychology* 201, 247 (2000)

15 See, e.g. Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 *Annual Review of Psychology* 297, 300-303 (2003).

16 Fazio & Olson, *Id.* at 298-299

17 Generally, see, R. Duncan Luce, *Response Times: Their Role in Inferring Elementary Mental Organization*, New York, NY: Oxford University Press (1986).

18 Brian A. Nosek & Anthony G. Greenwald, (*Part of*) *The Case for a Pragmatic Approach to Validity: Comment on DeHouwer, Teige-Mocigemba, Spruyt, and Moors*, 135 *Psychol Bull.* 373, 374 (2009).

19 See, Judith Znanewitz, Lisa Braun, David Hensel, Claudia Fatapie Altobelli, & Fabian Hattke, *A Critical Comparison of Selected implicit Measurement Methods*, 11 *Journal of Neuroscience, Psychology, and Economics* 249 (2018).

20 See, Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-esteem, and Stereotypes*, 102 *Psychol Rev.* 4, 4-5 (1995).

21 See, Brian A. Nosek, Carlee Beth Hawkins and Rebecca S. Frazier, *Implicit Social Cognition: From Measures to Mechanisms*, 15 *Trends in Cognitive Science* 152 (2011).

22 Chris D. Frith and Uta Frith, *Implicit and Explicit Processes in Social Cognition*, 60 *Neuron* 503, 504 (2008).

23 Kahneman, D. 2011. *Thinking, Fast and Slow*. Publishers, Farrar, Straus, and Giroux. Kindle Edition.

is rapid, intuitive, and error-prone; System II is more deliberative, calculative, slower, and often more likely to be error-free."<sup>24</sup>

The Implicit Association Test<sup>25</sup> (IAT) is one of the more well-known implicit measures found in social psychology and is designed to assess implicit bias, which refers to a preference for or against something that is outside of awareness.<sup>26</sup> The IAT measures the association between categories such as old and young, black and white, female and male, and value attributes such as pleasant and unpleasant or good and bad.<sup>27</sup> Meta-analyses indicate that, in contrast to explicit measures of stereotypes, implicit measures like the IAT are predictive across target groups and also predict equally well across behaviors that vary in controllability and conscious awareness.<sup>28</sup> Furthermore, they have been found to be more predictive of behavior than self-reported attitudes for socially sensitive topics.<sup>29</sup> In fact, in several areas, including law, healthcare, and business, implicit measures are used to answer questions of why inequities are still present even though expressed attitudes are often neutral.<sup>30</sup>

Implicit bias is based on stereotypes that are learned as part of growing up in a certain culture and /or environment. A stereotype is construct, in other words, a set of thoughts and beliefs, that contains a theory about a social group and influences social behavior.<sup>31</sup> For example, gender stereotypes are very prescriptive—the characteristics ascribed to women and men tend to set up expectations of behaviors from those groups.<sup>32</sup> This is true as well for other cultural stereotypes, such as race.<sup>33</sup> Stereotypes are based on a kernel of truth about differences between groups

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24 Christine Jolls and Cass R. Sunstein, *The Law of Implicit Bias*, 94 Calif. L. Rev. 969, 974 (2006) (citations omitted).

25 See, <http://implicit.harvard.edu>.

26 See, e.g. John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 Journal of Social Issues, 829, 838-839 (2001); Anthony G. Greenwald, T. Andrew Poehlman, Eric Luis Uhlmann & Mahzarin R. Banaji, *Understanding and Using the Implicit Association Test: III. Meta-analysis of Predictive Validity*, 97 J Pers Soc Psychol. 17, 18 (2009).

27 See, Anthony G. Greenwald, Debbie E. McGhee & Jordan L. K. Schwartz, *Measuring Individual Differences in implicit Cognition: The Implicit Association Test*, 74 Journal of Personality and Social Psychology 1464, 1465 (1998). <http://doi.org/10.1037//0022-3514.74.6.1464>

28 Benedek Kurdi, Allison E. Seitchik, Jordan R. Axt, Timothy J. Carroll, Arpi Karapetyan, Neela Kaushik, Anthony J. Greenwald and Mahzarin R. Banaji, (2018, June 20). *Relationship Between the Implicit Association Test and Intergroup Behavior: A Meta-analysis*, 10 American Psychologist 1047 (2018).

29 Greenwald et al, *supra* note 27 at 1476.

30 John T. Josta, Laurie A. Rudman, Irene V. Blair, Dana R. Carney, Nilanjana Dasgupta, Jack Glaser & Curtis D. Harding, *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies That No Manager Should Ignore*, 29 Research in Organizational Behavior 39, 46-53 (2009).

31 Richard D. Ashmore and Frances K. Del Boca, *Sex Stereotypes and Implicit Personality Theory: Toward a Cognitive-Social Psychological Conceptualization*, 5 Sex Roles 219, 228-229 (citations omitted) (1979).

32 Deborah A. Prentice, & Erica Carranza, *What Women and Men Should Be, Shouldn't Be, Are Allowed to Be, and Don't Have to Be: The Contents of Prescriptive Gender Stereotypes*, 26 Psychology of Women Quarterly 269 (2002).

33 Susan A. Basow and Julie L. Martin, *Bias in Student Evaluations* 40-49 (Mary E. Kite, ed., *Effective*

but beliefs about individuals in those groups then tend to be distorted toward the representative types rather than reflective of the fact that individuals typically fall along a normal distribution on every dimension.<sup>34</sup>

In effect, stereotypes make life simpler for the individual doing the stereotyping because the individual does not have to deal with the identifying complexities of another. Stereotypes serve as a shortcut or, in more academic terms, as a decision heuristic. In fact, stereotypes are thought to be a type of “representativeness heuristic,” which is essentially an assessment of a probability that an individual will have a certain characteristic.<sup>35</sup> Decision heuristics such as stereotypes are used particularly when there is a lack of information about a situation or person and when there is a lack of time to obtain the needed information.<sup>36</sup> Decision heuristics are often useful,<sup>37</sup> but of course, there is the inherent risk they will be inaccurate. This is often the case with stereotypes. Stereotypes may describe generalities across large groups of people based on historical circumstances but will not describe everyone accurately and will contain assumptions that are likely to be inaccurate.<sup>38</sup> This inaccuracy is largely a function of the fact that implicit bias tends to be triggered rapidly with little deliberation, as noted by Jolls and Sunstein: “We believe that the problem of implicit bias is best understood in light of existing analyses of System I processes. Implicit bias is largely automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly, in the relevant tests, that people have no time to deliberate.”<sup>39</sup>

These implicit biases affect people’s responses towards others, which then can adversely impact those individuals. Social psychologists have documented how a rater’s perception of and reaction to another person can be affected by bias, either consciously or unconsciously, explaining behaviors such as the backlash towards agentic women in hiring decisions.<sup>40</sup> Implicit bias has been discussed as a factor significantly affecting various outcomes for individuals, ranging from work experiences to psychological and physical health, and has been found to be as

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*Evaluation of Teaching: A Guide for Faculty and Administrators*, Society for Teaching of Psychology) (2012).

34 Pedro Bordalo, Katherine Coffman, Nicola Gennaioli & Andrei Shleifer, *Stereotypes*, 131 *The Quarterly Journal of Economics* 1753 (2016).

35 Bordalo, et al *Id.* at 1753.

36 See, e.g., Gerd Gigerenzer & Wolfgang Gaissmaier, *Heuristic Decision Making*, 62 *Annual Review of Psychology*, 451, 452-453 (2011).

37 Gigerenzer et al *Id.* at 473.

38 Generally, see, Jordan Carpenter, Daniel Preotiu-Pietro, Lucie Flekova, Salvatore Giorgi, Courtney Hagan, Margaret L. Kern, Anneke E.K. Buffone, Lyle Ungar & Martin E. P. Seligman, *Real Men Don’t Say “Cute”: Using Automatic Language Analysis to Isolate Inaccurate Aspects of Stereotypes*, 8 *Social Psychological and Personality Science* 310 (2017).

39 Christine Jolls and Cass R. Sunstein, *The Law of Implicit Bias*, 94 *Calif. L. Rev.* 969, 975 (2006).

40 See, e.g., Monica Biernat, *Toward a Broader View of Social Stereotyping*, 58 *American Psychologist* 1019 (2003); Alice H. Eagly and Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 *Psychological Review* 573 (2002); Julie E. Phelan, Corinne A. Moss-Racusin & Laurie A. Rudman, *Competent Yet Out in the Cold: Shifting Criteria for Hiring Reflect Backlash Toward Agentic Women*, 32 *Psychology of Women Quarterly* 406 (2008).

damaging as overt discrimination.<sup>41</sup> Implicit bias can even affect whether a person lives or dies. The nature of individuals' interactions with health care professionals, for example, appears to be affected by implicit bias,<sup>42</sup> as is whether police use additional force during interventions.<sup>43</sup> The latter research has been used to account for the greater incidence of police shootings with certain racial groups.<sup>44</sup> For example, a study by Joshua Correll, et al, found that unconscious race bias played a large factor in an experiment when participants played a game in which the researchers systematically varied the race of a series of men who appeared on the computer screen.<sup>45</sup> The participants were instructed to shoot men holding guns and not to shoot men holding something innocent such as a wallet. Results were that the players were significantly more likely to shoot blacks holding innocent objects versus whites holding those same objects.<sup>46</sup> Collectively, then, research on implicit social cognition provides "incontrovertible evidence that thoughts, feelings, and actions are shaped by factors residing largely outside conscious awareness, control, and intention."<sup>47</sup> Despite this evidence, addressing implicit bias is not easy. Implicit attitudes are rooted in habitual responses and therefore are persistent and more difficult to alter than are explicit ones.<sup>48</sup> A major result of implicit bias towards certain groups of people is that over time, even seemingly minor behaviors accumulate and can have substantial impact. For example, implicit bias results in a tendency for women to be consistently underrated<sup>49</sup> and for women's work to be devalued.<sup>50</sup> Over time, this results in a large advantage for

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41 See, e.g., Kristen P. Jones, Chad I. Peddie, Veronica L. Gilrane, Eden B. King, Alexis L. & Gray, *Not So Subtle: A Meta-Analytic Investigation of the Correlates of Subtle and Overt Discrimination*, 42 *Journal of Management* 1588, 1592-1593 and 1599-1605 (2016).

42 See, e.g. Chloe FitzGerald & Samia Hurst, *Implicit Bias in Healthcare Professionals: A Systematic Review*, 18 *BMC Med Ethics* (2017); William J. Hall, Mimi V. Chapman, Kent M. Lee Yesenia M. Merino, Tainayah W. Thomas, B. Keith Payne, Eugenia Eng, Steven H. Day, and Tamera Coyne-Beasley (2015). *Implicit Racial/Ethnic Bias Among Health Care Professionals and Its Influence on Health Care Outcomes: A Systematic Review*, 105 *American Journal of Public Health* e60 (2015), <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2015.302903>.

43 Lorie Fridell & Hyeyoung Lim, *Assessing the Racial Aspect of police Force Using the Implicit-and Counter-Bias Perspectives*, 44 *Journal of Criminal Justice* 36, 43-44 (2016).

44 See, Justin Nix, Bradley A. Campbell, Edward H. Byers & Geoffrey P. Alpert, *A Bird's Eye View of Civilians Killed by Police in 2015: Further Evidence of Shooter Bias*, 16 *Criminology & Public Policy* 309, 328-329 (2017).

45 See, Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 *J. Personality & Soc. Psychol* 1314 (2002).

46 *Id.* Correll et al at 1318-1319.

47 Kristin A. Lane, Jerry Kang, and Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 *Annual Review of Law and Social Science* 427, 428 (2007) (citations omitted).

48 Timothy D. Wilson, Samuel Lindsey & Tonya Y. Schooler, *A Model of Dual Attitudes*, 107 *Psychological Review*, 101, 120-121 (2000).

49 See, Madeline E. Heilman, Aaron S. Wallen, Daneilla Fuchs & Melinda Tamkins, *Penalties for Success: Reactions to Women Who Succeed at Male Gender-type Tasks*, 89 *Journal of Applied Psychology* 416 (2004).

50 See, Kristen Monroe, Saba Ozyurt, Ted Wrigley & Amy Alexander, *Gender Equality in Academia: Bad News from the Trenches, and Some Possible Solutions* 6 *Perspectives on Politics* 215 (2008).

men in terms of career progress and pay,<sup>51</sup> helping to explain the leaky pipeline, the glass ceiling, and pay inequities that occur in many professions.

Both private and public organizations have responded to this bias by introducing bias literacy training that brings these biases to conscious awareness so they can be addressed.<sup>52</sup> Examples found at universities include Harvard's Project Implicit,<sup>53</sup> the Gender Bias Learning Project,<sup>54</sup> Center for Worklife Law,<sup>55</sup> and the University of Michigan's STRIDE (Strategies and Tactics for Recruiting to Improve Diversity and Excellence).<sup>56</sup> Workshops often apply practices associated with adult learning and participants are taught evidence-based methods to reduce the likelihood of implicit bias.<sup>57</sup> Indications are that, although this training is often met with resistance, it can be effective at reducing implicit bias.<sup>58</sup>

Next, we consider implicit bias with respect to student evaluations.

### III. Student Evaluations and Bias:

Student evaluations can contain overt bias, such as explicit statements by students that a person with a certain characteristic (e.g., gender, disability, age) should not be teaching a certain topic. However, this kind of bias is relatively rare today. More commonly now, bias is not so explicit, but arises implicitly. As the research literature indicates, even those who are explicitly supportive of equity and sure they are unbiased can demonstrate implicit bias. The types of implicit bias that could exist in student evaluations include gender, race, national origin, religion, sexual orientation, age and other dimensions that could create potential legal liability under the applicable statutes. For this paper we are not looking at the Constitutional issues under the Equal Protection Clause or the Due Process Clause, because that liberty or property interest only attaches to the right to tenure, and not to the other employment related decisions that are made using student evaluations, such as promotion, hiring decisions and merit pay increases.<sup>59</sup>

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51 See, Alice H. Eagly & Linda L. Carli, *THROUGH THE LABYRINTH: THE TRUTH ABOUT HOW WOMEN BECOME LEADERS*, 1-13 (2007).

52 See, Molly Carnes, Patricia G. Devine, Carol Isaac, Linda Baier Manwell, Cecelia E. Ford, Angela Byars-Winston, Eve Fine & Jennifer Sheridan, *Promoting Institutional Change Through Bias Literacy*, 5 *Journal of Diversity in Higher Education* 63 (2012).

53 <https://implicit.harvard.edu/implicit/>

54 <https://genderbiasbingo.com/>

55 Worklife Law, University of California, Hastings College of the Law, <https://worklifelaw.org/>

56 <https://advance.umich.edu/stride/>

57 e.g., see, Sonia M. Goltz & Patty J. Sotirin, *From Academics to Change Agents in a Gender Equity Initiative*, 11 *Organizational Management Journal* 194, 196 (2014); Carnes, et al *supra* note 52 at 66; C. Isaac, Linda Baier Manwell, Patricia G. Devine, Cecelia Ford, A. Byars-Winston, E. Fine, Jennifer Sheridan & Molly Carnes, *Difficult Dialogues: Faculty Responses to a Gender Bias Literacy Training Program*, 21 *The Qualitative Report* 1243, 1257-1258 (2016).

58 See, Sabine Girod, Magali Fassiotto, Daisy Grewal, Manwai Candy Ku, Natarajan Sriram, Brian A. Nosek & Hannah Valentine, *Reducing Implicit Gender Leadership Bias in Academic Medicine with an Educational Intervention*, 91 *Academic Medicine* 1143 (2016).

59 For a discussion of the Due Process issues see, Roger W. Reinsch; Susan M. Des Rosiers;

(P)eople who seek to challenge governmental action under the due process clause must first demonstrate to the court they have a constitutionally protected liberty or property interest. If they do, and only if they do, does the court then take the next step and determine what process is due them.” Therefore, not all college and university faculty members may be constitutionally protected, but for some faculty members this protected liberty or property interest does exist.<sup>60</sup>

### *A. Student Evaluations as Prompts for Bias*

As discussed, the research demonstrates that the human mind functions along two very different tracks, one that generates automatic, instinctive reactions and another that produces more reflective, deliberative decisions.<sup>61</sup> The format of SETs, which tend to use short questions with a Likert scale, often taps into instinctive reactions instead of encouraging reflection. Additionally, many students fill these forms out in a hurry, such as at the end of class. This means that the open-ended questions that do exist and encourage reflection, which are often posted at the end of the survey, generally go unanswered or receive short responses. Therefore, the method most universities now use allows for, and even encourages, immutable characteristics such as gender, race, national origin, and age to color the results, as has been noted: “Implicit measures predict behavior to a greater extent if people do not have an opportunity to interrupt automatic processes because the behavior occurs spontaneously, or they are otherwise distracted or cognitively busy with other activities.”<sup>62</sup>

Student evaluations also tend to ask a lot of opinion questions, creating another opening in which bias is likely to creep in. For example, here are some typical questions:

- The instructor stimulated my interest in the subject.
- The instructor demonstrated in-depth knowledge of the subject.
- The instructor appeared enthusiastic and interested.
- The instructor communicated course ideas in a clear and understandable manner.
- The instructor made it possible for me to increase my knowledge, skills, and understanding of the subject.
- My overall rating of the instruction in this course is \_\_\_.

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Amy B. Hietapelto, *Evidentiary and Constitutional Due Process Constraints on the Uses by Colleges and Universities of Student Evaluations*, 32 J.C. & U.L. 75 (2005).

60 Id. at 88 (citations omitted).

61 Steven A. Sloman, *Two Systems of Reasoning*, at 379 (Thomas Gilovich D. Griffin, & D. Kahneman, Eds., *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 379-396) (2002).

62 Brian A Nosek, Carlee Beth Hawkins and Rebecca S. Frazier, *Implicit Social Cognition: From Measures to Mechanisms*, 15 Trends Cogn. Sci. 152, 156 (2011).

All these questions have the potential for implicit bias to affect the answers. The students give their opinions since these are items that ask for judgements of performance to be made without directing raters to their observation of actual behaviors. For example, “The instructor demonstrated in-depth knowledge of the subject” is strictly asking for an opinion from the student, when the student has no “in-depth knowledge of the subject” but is asked to decide whether the instructor has in-depth knowledge. All types of implicit biases may affect this answer – gender, race, age, accent, etc. The accent issue is most problematic in “the instructor communicated course ideas in a clear and understandable manner.” Though most accents are perfectly understandable, they may trigger implicit bias. Therefore, this question invites the biases of students who do not want to learn to deal with the various accents they will encounter their university career.

Without anchoring these judgements in actual behaviors, expected behaviors based on stereotypes are likely to be elicited even without the rater being aware of this: “implicit and explicit social cognition exist as separate mental spheres with communication channels that are present but don’t always work... Implicit and explicit measures appear to tap separate constructs that operate differently: They both predict behavior (which one predicts better appears to depend on the person and situation).”<sup>63</sup>

The literature on performance appraisal clearly backs up our assessment that many items in teaching evaluations are formed in a way that encourages or elicits, rather than discourages, the application of stereotypes to evaluating performance. Research indicates that performance appraisal items that are focused on behaviors or behavioral objectives tend to be more valid and less biased than measures that are more general and couched in the form of traits.<sup>64</sup> Asking raters to engage in a recall of behaviors has been found to reduce the impact of stereotypes on performance ratings.<sup>65</sup> This is because raters’ focus is moved from their preconceptions to actual behaviors that were observed. Notably, organizations are more likely to be able to defend themselves in court cases when the performance appraisal instrument is behavioral in focus and has been documented to be reliable and valid.<sup>66</sup> The format and content of most student rating instruments, however, suggests this would be difficult to do if the use of SETs were to be challenged legally. SET items rarely ask about behaviors and they rarely ask students to recall behaviors. Also, as will be discussed more in the next paragraph, their validity is modest at best and their reliability can be questioned as well.

The research literature on student evaluations has been building substantially recently. What used to be the focus of just a few studies that generated mixed results

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63 Kristin A. Lane, Jerry Kang, and Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 Annual Review of Law and Social Science 427, 431-432, (2007) (parentheses in original).

64 R. Stuart Murray, *Managerial Perception of Two Appraisal Systems*, 3 California Management Review 92, 92-93(1980).

65 Cara C. Bauer and Boris B. Baltes, *Reducing the Effects of Gender Stereotypes on Performance Evaluations*, 47 Sex Roles: A Journal of Research 465, 473 (2002).

66 Gary P. Latham, Joan Almost, Sara Mann and Celia Moore, *New Developments in Performance Management*, 34 Organizational Dynamics 77, 78 (2005).

has burgeoned and effects are now clearer. Many recent studies characterized by strong research methodology have presented evidence that these biases should not be dismissed, as will be discussed in the next section. We also know much more about the characteristics of student evaluations generally. Recent advances in research methodology, such as through the examination of multilevel effects, has allowed for the separation of rating variance due to the dimensions of teachers, courses, and students.<sup>67</sup> These studies indicate that a large proportion of the variance in student evaluations of teaching—from 11 to 21% - is due to aspects of the students themselves rather than to aspects of teaching such as the course or instructor. Furthermore, about 25-30% of the variance results from an interaction of student and teacher characteristics. Characteristics of courses are also a strong source of variance (about 15%), meaning that, when rating teaching, students are also significantly influenced by aspects of the course the teacher cannot control.<sup>68</sup> These findings, in addition to the specific biases that will be discussed next, lead one to seriously question both the validity and reliability of the student ratings. In other words, the research indicates that SETs don't measure what they are intended to measure or are used for--evaluating teacher performance--because student and course characteristics play a large role, accounting for as much as 66% of the variance in ratings of instruction. This is important in that one of the key aspects courts tend to look at in performance appraisal cases is whether there is rater agreement on ratings (i.e., reliability).<sup>69</sup> Further, reliability is a precondition for validity, which as discussed earlier, is a factor that can affect whether defendants win court cases.<sup>70</sup>

### ***B. Gender and Race Bias Effects***

Gender bias has been found in student evaluations. In a recent study on gender bias in student evaluations, the researchers, Kristina Mitchell and Jonathan Martin, said, "The data are clear: a man received higher evaluations in identical courses, even for questions unrelated to the individual instructor's ability, demeanor, or attitude...Students appear to evaluate women poorly simply because they are women."<sup>71</sup> Other studies have had similar results and conclusions, including one by Boring-- "Female professors receive lower SET scores, despite evidence that female professors are as efficient instructors as their male colleagues"<sup>72</sup>--and another by Anderson and Miller--"Student expectations of the instructor, including expectations based on gender role beliefs, play a significant role in student

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67 Generally, see, Daniela Feistauer & Tobias Richter, *How Reliable are Students' Evaluations of Teaching Quality? A Variance Components Approach*, 42 *Assessment & Evaluation in Higher Education*, 1263 (2017).

68 See generally, Feistauer & Richter *Id.* at 1273.

69 Jon M. Werner & Mark C. Bolino, *Explaining U.S. Courts of Appeals Decisions Involving Performance Appraisal: Accuracy, Fairness, and Validation*, 50 *Personnel Psychology* 1, 17 (1997)

70 See, *Supra* note 67, at 1264.

71 Kristina M. W. Mitchell & Jonathan Martin, *Gender Bias in Student Evaluations*, 51 *Political Science & Politics* 648, 651 (2018) (*Italics in original*).

72 Anne Boring, *Gender Biases in Student Evaluations of Teaching*, 145 *Journal of Public Economics* 27, 27 (2016).

evaluations<sup>73</sup> There is also research demonstrating that the race of a professor is a factor in student evaluation results.<sup>74</sup> For that reason a female minority faculty member is likely to experience double the bias in SETs.<sup>75</sup> Professors of color have published poignant accounts of harshly negative student evaluations. The few empirical studies examining instructor race and student ratings confirm that minority faculty receive significantly lower evaluations than their White colleagues. The contradictory nature of the student comments on evaluations of minority faculty, the high levels of expressed hostility, and the occasional direct

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73 Kristi Andersen & Elizabeth D. Miller, *Gender and Student Evaluations of Teaching*, 30 PS: Pol. Sci. & Pol. 216 (1997), arguing that “student expectations of the instructor, including expectations based on gender role beliefs, play a significant role in student evaluations” at 217; Also see, Susan A. Basow, *Student Evaluations of College Professors: When Gender Matters*, 87 J. Educ. Psychol. 656, (1995), finding that professor gender interacts with the gender of the student, the discipline of the course, and the questions being asked on the evaluation form at 664; Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 Yale J.L. & Feminism 333 (1996), law students exhibit gender-based stereotypes in their evaluations of female law professors; Christine M. Bachen, Moira M. McLoughlin & Sara S. Garcia, *Assessing the Role of Gender in College Students’ Evaluations of Faculty*, 48 Comm. Educ. 193 (1999), a qualitative analysis to show how students’ gender schema influences students’ assessments of faculty; Marilyn S. Chamberlin & Joann S. Hickey, *Student Evaluations of Faculty Performance: The Role of Gender Expectations in Differential Evaluations*, 25 Educ. Res. Q. 3 (2001), gender can be an important factor as to how students evaluate professors; Joey Sprague & Kelley Massoni, *Student Evaluations and Gendered Expectations: What We Can’t Count Can Hurt Us*, 53 Sex Roles 779 (2005), finding gender bias in an analysis of students’ descriptions of instructors; Kristin A. Lane, Jerry Kang, & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 Annual Review of Law and Social Science 427, 439, (2007); also see, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995), One of the first law journal articles on implicit bias and employment discrimination; John W. Curtis, *Persistent Inequity: Gender and Academic Employment* (2011) at [https://www.aaup.org/NR/rdonlyres/08E023AB-E6D8-4DBD-99A0-24E5EB73A760/0/persistent\\_inequity.pdf](https://www.aaup.org/NR/rdonlyres/08E023AB-E6D8-4DBD-99A0-24E5EB73A760/0/persistent_inequity.pdf); Lisa L. Martin, *Gender, Teaching Evaluations, and Professional Success in Political Science*, 49 Political Science & Politics 313 (2016); JoAnn Miller & Marilyn Chamberlin, *Women Are Teachers, Men Are Professors: A Study of Student Perceptions*, 28 Teach. Soc. 283 (2000); Kristin J. Anderson & Gabriel Smith, *Students’ Preconceptions of Professors: Benefits and Barriers According to Ethnicity and Gender*, 27 Hisp. J. Behav. Sci. 184 (2005), revealing in an experimental study Latina professors being more affected than male or female Anglo professors by the interactive effects of gender and ethnicity in students’ ratings of professors’ warmth and capability.

74 See, e.g. David A. Dilts, Hedayah Samavati, Mashalah Rahnama Moghadam & Lawrence J. Haber, *Student Evaluation of Instruction: Objective Evidence and Decision Making*, 2 J. Individ. Emp. Rts. 73 (1993), finding from student self-reports, race of instructor to be significantly correlated with student ratings; Jai Ghorpade & J. R. Lackritz, *Student Evaluations: Equal Opportunity Concerns*, 7 Thought & Action 61 (1991), reporting highly significant differences in student ratings favoring white over minority faculty; Katherine Grace Hendrix, *Student Perceptions of the Influence of Race on Professor Credibility*, 28 J. Black Stud. 738 (1998), suggesting that students employ different criteria to assess, and are more likely to question, the credibility and competence of Black professors than their white counterparts; Theresa A. Huston, *Race and Gender Bias in Higher Education: Could Faculty Course Evaluations Impede Further Progress toward Parity?*, 4 Seattle J. Soc. Just. 591 (2006), pointing to bias in student ratings against faculty of color; Jeannette M. Ludwig & John A. Meacham, *Teaching Controversial Courses: Student Evaluations of Instructors and Content*, 21 Educ. Res. Q. 27 (1997), demonstrating through an experimental study how race and gender interact with course content in students’ expectations of professors; Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 St. John’s L. Rev. 235 (2008), arguing that the conventional practices of collecting student ratings generates bias stemming from social stereotypes; Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 Wm. & Mary J. Women & L. 53 (1999), discussing racial stereotypes in student ratings of teaching.

75 See, Andersen, et al, *supra* note 73.

references to gender or race raise troubling questions about the role of bias in these assessments.<sup>76</sup>

### C. Other Types of Biases

In addition to race and gender, student evaluations are associated with other types of biases that fall within a category protected from discrimination. These biases include age, disability, and sexual orientation. Additionally, there are implicit bias effects that seem unrelated to gender, race, and other protected categories but that disproportionately affect certain groups. For example, studies demonstrate that attractiveness of a faculty member is a factor in SETs, leading to attractive faculty being rated nearly a full point more on a 5-point scale.<sup>77</sup> Even though “attractiveness” per se is not a protected category, this could easily create bias against older faculty member and disabled faculty members since they are generally viewed as being not as attractive as younger physically fit adults. Also, one study found that being attractive or not affects ratings of men more than it does ratings of women.<sup>78</sup> However, main effects of gender also still exist: The attractiveness study still showed that attractive women received lower ratings than attractive men.<sup>79</sup> This also happens in studies on age. In one study, students rated a “young” male professor higher than they rated a “young” female professor in a laboratory study that used the exact same lecture but varied the description of the professor in terms of age and gender.<sup>80</sup> In addition, sexual orientation, while not protected under federal law as a protected class, is protected under various city and state laws.<sup>81</sup> Also, recent court cases have interpreted Title VII as applying

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76 Deborah J. Merritt, *Bias, The Brain, and Student Evaluations of Teaching*, 82 St. John’s L. Rev. 234, 235-236 (2012) (Citations omitted).

77 See, e.g., Daniel S. Hamermesh & Amy M. Parker, *Beauty in the Classroom: Instructors’ Pulchritude and Putative Pedagogical Productivity*, 24 Econ. Educ. Rev. 369 (2005); James Felton, John Mitchell & Michael Stinson, *Web-Based Student Evaluations of Professors: The Relations between Perceived Quality, Easiness, and Sexiness*, 29 Assess. & Eval. Higher Educ. 91 (2004); James Felton, Peter T. Koper, John B. Mitchell & Michael Stinson, *Attractiveness, Easiness and Other Issues: Student Evaluations of Professors on RateMyProfessors.Com*, 33 Assess. & Eval. Higher Educ. 45 (2008); Todd C. Riniolo, Katherine C Johnson, Tracy R Sherman & Julie A Misso, *Hot or Not: Do Professors Perceived as Physically Attractive Receive Higher Student Evaluations?*, 133 J. Gen. Psychol. 19 (2006); Robert A. Lawson & E. Frank Stephenson, *Easiness, Attractiveness, and Faculty Evaluations: Evidence from RateMyProfessors.Com*, 33 Atlantic Econ. J. 485 (2005); Jennifer Bonds-Raacke & John D. Raacke, *The Relationship between Physical Attractiveness of Professors and Students’ Ratings of Professor Quality*, 1 J. Psych., Psychol. & Mental Health 1 (2007); Scott Freng & David Webber, *Turning up the Heat on Online Evaluations: Does “Hotness” Matter?*, 36 Teaching Psychol. 189 (2009); Kathleen M. Silva, Francisco J. Silva, Megan A. Quinn, Jill N. Draper, Kimberly R. Cover & Alison A. Munoff, *Rate My Professor: Online Evaluations of Psychology Instructors*, 35 Teaching Psychol. 71 (2008).

78 See generally, Hamermesh & Parker *Id.*

79 Hamermesh, *et al Id.* See discussion at 375.

80 Julianne Arbuckle, & Benne D. Williams, *Students’ Perceptions of Expressiveness: Age and Gender Effects on Teacher Evaluations*, 49 Sex Roles, 507 (2003); also see, William C. Levin, *Age Stereotyping College Student Evaluations*, 10 Research on Aging 134 (1988), in a study using a hypothetical male professor of three different ages (25, 53, 73), college students tended to rate the oldest professor most negatively.

81 Is Sexual Orientation a Protected Class: Everything You Need to Know, Upcounsel, <https://www.upcounsel.com/is-sexual-orientation-a-protected-class>.

to sexual orientation.<sup>82</sup> Therefore, it is important to note that research also shows that sexual orientation may have an impact on student evaluations.<sup>83</sup>

A related area of study that also focuses on implicit bias is the use of customer feedback by employers to make employment decisions. Even though it is debatable, students often view themselves as customers and others have also argued they should be viewed as customers.<sup>84</sup> Whether universities view students as customers or not, research on customer feedback is related in the sense that an employer is using third party information to make employment decisions. In a recent study of customer ratings, the authors stated:

We set out to determine if and how customer satisfaction ratings are influenced by racial and gender biases. Across three studies we found evidence that customer satisfaction ratings are susceptible to systematic and predictable racial and gender biases. Customers tended to provide lower ratings for women and nonwhite employees and for organizations that employ such employees, than for men and white employees and their employing organizations.... Our main theoretical contributions are to show that bias appears in customer satisfaction ratings, that the bias is included in ratings of the person and the context and that it can include implicit biases. These contributions are important because they help highlight the ways and reasons that biases might appear in (any) organizational contexts.<sup>85</sup>

Another author stated that “Moreover, customer feedback is highly susceptible to being distorted by social group-based stereotypes and bias.”<sup>86</sup>

Thus, the SET studies and the customer rating studies have obtained similar results and, combined, provide robust evidence that there is implicit bias in student evaluations of teaching. The next section will look at some of the discussions of implications of implicit bias for the law.

#### IV. Discussion of Implicit Bias and the Law

As the preceding sections indicate, research evidence is accumulating that people operate with implicit bias and that this bias shows up in different ways. Based on this type of research, Anthony G. Greenwald and Linda Hamilton

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82 e.g. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2018) (The Second Circuit Court of Appeals ruled that Title VII protects employees from discrimination based on sexual orientation.).

83 See, Danny Osborne, Anne Duran, Paul G. Davies, William Wagner III, & Beth Rienzi, *Does Sexual Orientation Matter? An Experimental Assessment of Student Evaluations of a Gay Professor*, pp. 49-63 (2007) (Elizabeth M. Vargios, Ed. Educational Psychology Research Focus).

84 See generally, Melodi Guilbault, *Students as Customers in Higher Education: Reframing the Debate*, 46 J. of Markt. for Higher Educ. 132 (2016).

85 David R. Hekman, Karl Aquino, Bradley P. Owens, Terence R. Mitchell, Pauline Schilpzand & Keith Leavitt, *An Examination of Whether and how Racial and Gender Biases Influence Customer Satisfaction Ratings*, 53 The Acad. of Mgt. J. 238 (2010).

86 Lu-in Wang, *When the Customer is King? Employment Discrimination as Customer Service*, 23 Va. J. Soc. Pol’y & L. 249, 281 (2016)

Kriegert introduced the concept of implicit bias into the legal arena, suggesting that it has substantial bearing on discrimination law, particularly to the extent it is predictive of behavior, especially behavior diverging from avowed beliefs.<sup>87</sup> They noted that “evidence that implicit attitudes produce discriminatory behavior is already substantial and will continue to accumulate. The dominant interpretation of this evidence is that implicit attitudinal biases are especially important in influencing nondeliberate or spontaneous discriminatory behaviors.”<sup>88</sup> Similarly, other authors noted: “Most important, implicit bias--like many of the heuristics and biases emphasized elsewhere--tends to have an automatic character, in a way that bears importantly on its relationship to legal prohibitions.”<sup>89</sup>

Specifically, legal scholars note that implicit bias differs from the usual legal inquiries because many legal inquiries rely on determining the underlying intent behind a behavior or practice, whereas: “(t)he science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation and judgment that motivate their actions.”<sup>90</sup> Therefore, the issue of intent is taken out of the picture for claims of implicit bias. This is why Greenwald and Kriegert said, “Indeed, ... implicit social cognition has the potential to influence the understanding of intent in bodies of law. For instance, constitutional and statutory law governing civil rights and the equal treatment of individuals is clearly subject to revision because implicit social cognition destabilizes conventional understandings of disparate treatment, disparate impact, hostile environments, and color or gender consciousness.”<sup>91</sup>

Along these lines, discussions of implicit bias and the law sometimes invoke the notion of second-generation discrimination, a term introduced by Susan Sturm,<sup>92</sup> meaning the discrimination common today is not of the overt type typical of the first-generation discrimination cases that courts have been set up for. For example, Reinsch, Goltz and Tuoriniemi argued that second generation discrimination is not made up of the discrete intentional acts typical of first-generation discrimination that courts are more comfortable with handling, but instead is due to unconscious bias triggered by the target individual’s membership in a certain group.<sup>93</sup> This

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87 Anthony G. Greenwald Linda Hamilton Kriegert, *Implicit Bias: Scientific Foundations*, 94 California Law Rev. 945 (2006)

88 Greenwald, et al *Id* at 961 (citations omitted); also see, Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 Calif. L. Rev. 969, “A growing body of evidence, summarized by Anthony Greenwald and Linda Hamilton Krieger, suggests that the real world is probably full of such cases of ‘implicit,’ or unconscious, bias. This is likely to be true not only with respect to race, but also with respect to many other traits.” at 970-971 (2006) (citations omitted).

89 Jolls et al *Id* at 973.

90 Greenwald *Id* at 946; also see, Kristin A. Lane, Jerry Kang and Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 Annu. Rev. Law Soc. Sci. 427 (2007).

91 Lane, et al *Id* at 439.

92 See, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458, 460 (2001).

93 See generally, Sonia Goltz, Roger Reinsch, Joel Tuoriniemi, *University Women’s Experiences in Bringing Second Generation Sex Discrimination Claims: Further Support for Adoption of a Structural Approach*, 18 Tex. J. Women & L. 145 (2009).

means that justifications for employment actions that appear on the surface to be legitimate and nondiscriminatory in reality can be justifiably questioned. In other words, an individual, group, or organization may have had the best of intentions and not ever have shown any overt discrimination, but still have been affected by implicit bias.

In addition to the above professional journal articles recognizing implicit bias, there are cases that recognize the existence of implicit bias. For example, in *Adarand Constructors, Inc. v. Peña*<sup>94</sup>, Justice Ginsburg said, “Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.”<sup>95</sup> Justice Ginsburg reaffirmed that opinion in her dissent in *Gratz v. Bollinger*<sup>96</sup> by using that exact phrase again.<sup>97</sup> In her concurring opinion in *Grutter v. Bollinger*<sup>98</sup> she said, “It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”<sup>99</sup> Justice O’Connor, in her dissent in *Georgia v. McCollum*<sup>100</sup> said, “(i) t is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.”<sup>101</sup>

In a more recent Supreme Court decision,

Justice Blackmun noted, discrimination has survived into our times, and is “not less real or pernicious” for “[p]erhaps... tak[ing] a form more subtle than before.” *Mitchell*, 443 U.S. at 558-59, 99 S. Ct. 2993. The sense of a shift away from the more explicit prejudice underlying the traditional definition of discrimination has spurred the recent explosion of studies into implicit bias — that phenomenon involving the brain’s use of mental associations so deeply ingrained as to operate without awareness, intention, or control. In their natural operation, implicit biases allow individuals to efficiently categorize their experiences, and these categories allow people to easily understand and interact with their world. Implicit biases can be positive or negative; it is the negative biases, however, that give rise to problems that we struggle to combat in the law and, more broadly, in our society...

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94 515 U.S. 200, 115 S. Ct. 209, 7132 L.Ed.2d 158 (1995).

95 515 U.S. at 274 (citations omitted).

96 539 U.S. 244, 123 S. Ct. 241, 1156 L.Ed.2d 257 (2003).

97 539 U.S. at 300-301.

98 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

99 539 U.S. at 345.

100 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

101 505 U.S. at 68; *also see*, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 171, 290 L.Ed.2d 69 “A prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is ‘sullen,’ or ‘distant,’ a characterization that would not have come to his mind if a white juror had acted identically. A judge’s own conscious or unconscious racism may lead him to accept such an explanation as well supported.” U.S. 476 at 106.

Research has revealed the profusion of implicit attitudes that people hold towards a wide range of characteristics, chief among them the more salient and immutable traits like race and gender.<sup>102</sup>

With both professional journals and courts, including the Supreme Court, recognizing implicit bias, it is clear that this concept is integral to a changing legal landscape. Next, we consider the specific employment decisions that are at risk of being discriminatory because of implicit bias in SETs.

## V. Specific Legal Issues Raised

As we have shown there is a risk of implicit bias being present in the answers given by student to SETs. This potential for bias raises several legal issues regarding employment discrimination. Discrimination could begin by being denied a position as a faculty member since a faculty member's student evaluations from the prior institution are often considered in the hiring process.<sup>103</sup> After a faculty member is hired, discrimination could occur in tenure decisions, promotion decisions and merit pay increases because SETs usually play a role in making those decisions. Poor student evaluations could be the deciding factor in whether to tenure a faculty member, which means that that faculty member is now out of a job. Merit pay decisions, although not resulting in a loss of a position, are affected more frequently by implicit bias since they generally occur yearly. Faculty in groups affected more adversely by implicit bias are likely to have lower evaluations and therefore, lower pay increases.

Thus, the result of using potentially biased SETs in hiring decisions, promotion decisions and tenure decisions could be that minority, female, and other faculty who are victims of implicit bias will not be hired, retained and/or promoted and will receive fewer rewards such as recognition and merit pay. This will result in a majority of Caucasian males who are hired, retained and/or promoted to a higher rank. This could help explain, for example, the decreasing proportions of women in academia at increased ranks that has existed for many years despite large proportions of women receiving graduate degrees as well as many efforts, such as by the National Science Foundation's ADVANCE grant program, to rectify this problem.<sup>104</sup> This could also help explain the pay gap between men and women

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102 US Supreme Court Recognizes Role of Unconscious Bias in Disparate Treatment, <https://www.psychologicalscience.org/news/releases/us-supreme-court-recognizes-role-of-unconscious-bias-in-disparate-treatment.html>, see, *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015).

103 See, e.g. Patrick Campbell, *Student Evaluations Crucial for Hiring and Training Faculty Members*, "Each semester BYU-Hawaii students are invited to complete online class evaluations and leave comments for each of their professors, and BYUH Vice President of Academics John Bell said the school values and uses students' opinions for the hiring, retention, and classroom performance of faculty members." <https://kealakai.byuh.edu/content/student-evaluations-crucial-hiring-and-training-faculty-members>; also see, Candidate Evaluation Worksheet, d. Evidence of excellence in teaching (e.g. awards, accolades, evaluations, reviewers comments), [https://advance.uncc.edu/sites/advance.uncc.edu/files/media/rubric%205\\_0.pdf](https://advance.uncc.edu/sites/advance.uncc.edu/files/media/rubric%205_0.pdf).

104 E.g., see, VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* (1998); ABIGAIL STEWART AND VIRGINIA VALIAN, *AN INCLUSIVE ACADEMY: ACHIEVING DIVERSITY AND EXCELLENCE* (2018).

that has existed in pretty much the same form since the 1970s: academic women make on average 80% of what academic men do across all disciplines, potentially resulting in over \$1 million discrepancy across the lifetime of a career.<sup>105</sup> Over a period of several years implicit bias is likely to lead to a significant pay difference among faculty member for no other reason than some are repeated victims of implicit bias.

All these employment related decisions would violate Title VII of the Civil Rights Act of 1964.<sup>106</sup> Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees based on sex, race, color, national origin, and religion. It generally applies to employers with 15 or more employees, including federal, state, and local governments. Title VII forbids discrimination in any aspect of employment, including hiring and firing, compensation, promotion, recruitment, use of company facilities, fringe benefits, pay, retirement plans, and disability leave and other terms and conditions of employment.<sup>107</sup> In addition, there is also the Age Discrimination in Employment Act<sup>108</sup> which prohibits discrimination in employment against anyone over the age of 40 years old. Even though there is no specific federal legislation that prohibits discrimination on the basis of sexual orientation, the EEOC has interpreted Title VII as preventing discrimination based on gender identity or sexual orientation.<sup>109</sup> There are also various state laws that prevent discrimination based on sexual orientation.<sup>110</sup> There are two additional pieces of legislation that could apply. The Civil Rights Restoration Act of 1987 , also covers all educational institutions receiving federal funds and prevents discrimination on the basis of race, color, religion, sex, national origin, are and handicap. Finally, there is the Equal Pay Act of 1963 which prohibits pay discrepancies based on gender for substantially equal work. All of these federal laws would be relevant to situations in which SETs are used to make employment related decisions due to the types of implicit bias likely in these evaluations.

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105 *See generally*, KRISTINE DE WELDE AND ANDI STEPNIK, EDs., *DISRUPTING THE CULTURE OF SILENCE: CONFRONTING GENDER INEQUALITY AND MAKING CHANGE IN HIGHER EDUCATION*, 2015.

106 Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964). Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion. It generally applies to employers with 15 or more employees, including federal, state, and local governments.

107 UNLAWFUL EMPLOYMENT PRACTICES, SEC. 2000e-2. [Section 703]

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

108 Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 (1967).

109 Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex...Discrimination against an individual because of gender identity, including transgender status, or because of sexual orientation is discrimination because of sex in violation of Title VII, <https://www.eeoc.gov/laws/types/sex.cfm>.

110 For a list of the various protections by states as of 6/16/2019 see <https://www.wisconsin.edu/lgbtq-resources/employment-non-discrimination-laws/>.

Specifically, the use of student evaluations which contain implicit bias would create a claim for disparate impact because although it seems to be a facially neutral policy, as we have shown, SETs contain implicit bias. Since this is a case of unintentional discrimination, their use would be analyzed under the disparate impact framework. Even though the Civil Rights Act of 1964 did not directly address any employment policies that create a disparate impact, in *Griggs v. Duke Power Co.*, the Supreme Court said, “The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation.”<sup>111</sup> This principle was codified in the Civil Rights Act of 1991,<sup>112</sup> which says the Act is violated when the employer engages in “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.”<sup>113</sup> Thus, the use of potentially biased student evaluations to make employment related decisions would clearly fall within “a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin.”

*Griggs* went on to say that an employment practice that does discriminate may be used if “requirements fulfill a genuine business need.”<sup>114</sup> The Civil Rights Act of 1991 codifies this part of *Griggs*.<sup>115</sup> SETs do not need to be used to fulfill a “genuine business need”. Since there are many other ways to evaluate teaching, some of which do not contain implicitly biased information, SETs are not necessary for a genuine business need. Other materials that can be used to evaluate teaching are often included in what has been called a “teaching portfolio,” meaning files such as syllabi, exams and assignments, and a statement of teaching philosophy. Also, some universities use peer evaluations in which colleagues visit the classroom in addition to collecting these other materials.

## VI. Recent Developments in the Use of Student Evaluations

The research with regard to bias in student evaluation has created some relatively new developments in regard to using SETs to evaluate professors. A handful of institutions have chosen not to use SETs at all to make employment decisions or to use SETs very minimally when evaluating teaching. Others have been studying the matter and generating recommendations within reports.

There are three relatively recent decisions which resulted in the stopping of the use of SETs in employment decisions altogether. These two decisions were applied to very specific institutions but have broader implications. One was an arbitrator’s decision in a case involving Ryerson University in Toronto, Canada.

An arbitration case between Ryerson University in Toronto and its faculty association that had stretched on for 15 years finally concluded with a

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111 *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

112 Civil Rights Act of 1991.

113 42 U.S. Code § 2000e-2 (k)(1)(A)(i).

114 *Griggs* at 432;

115 “and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;” 42 U.S. Code § 2000e-2 (k)(1)(A)(i).

ruling that course surveys can no longer be “used to measure teaching effectiveness for promotion or tenure” ...Arbitrator William Kaplan said that “insofar as assessing teaching effectiveness is concerned – especially in the context of tenure and promotion – SETs [student evaluations of teaching] are imperfect at best and downright biased and unreliable at worst”.<sup>116</sup>

Granted, this is a Canadian decision, however, Philip Stark, associate dean of the Division of Mathematical and Physical Sciences at the University of California, Berkeley, who was an expert witness in the Ryerson case, said:

(t)he impact could be much broader... Professor Stark added that he hoped that other unions representing academics in Canada, the US and elsewhere would “negotiate to reduce or eliminate reliance on student evaluations” and that universities of their own accord would “move towards more sensible means of evaluating teaching” ....“I think that the time is right for class-action lawsuits on behalf of women and under-represented minorities against universities that continue to rely on student evaluations as primary input for employment decisions [and that this] will induce universities to do the right thing,”<sup>117</sup>

Thus, Stark was calling for unions, universities, and the courts all to take action to stop the use of SETs in making employment decisions and he was calling for this to occur internationally. Also, in 2017, the University of Southern California instituted significant changes in the use of student evaluations. This change was similar to the decision in Canada because the decision was that SETs will no longer be used in tenure and promotion decisions by the University of Southern California; however, it occurred without a union action and arbitration decision, demonstrating what Stark was calling for—voluntary action. An October 18, 2017 memo from the Vice Provost for Academic and Faculty Affairs encouraged SETs to be used to give context and provide feedback about student learning, but, “not as a primary measure of teaching effectiveness during faculty review processes given their vulnerability to implicit bias and lack of validity as a teaching measure.”<sup>118</sup> The recommendations in this memo were then implemented by the University of Southern California:

In a dramatic shift in faculty assessment, University of Southern California Provost Michael Quick announced that student evaluation of teaching (SETs) will no longer be an element of tenure and promotion review at the institution, Inside Higher Ed reported. Multiple studies suggest that student evaluation inherently favors white men over women and minority faculty members.... USC said it will continue to use student assessment to help professors improve their instructional design, and to shape their teaching reflection statements that will remain a part of tenure review protocols...

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116 Ellie Bothwell, *'Tide turning' against using student evaluations to rate staff*, (July 26, 2018), <https://www.timeshighereducation.com/news/tide-turning-against-using-student-evaluations-rate-staff>.

117 Id.

118 <https://academicsenate.usc.edu/files/2016/09/Revising-the-Student-Course-Evaluation-at-USC.pdf>

Student assessments will also be redesigned to gauge student engagement and personal responsibility taken within a course. According to Inside Higher Ed, students now will be asked about the number of hours they dedicated to course study, engagement with the professor outside of class time, and their approaches to learning course material in independent study.<sup>119</sup>

The University of Oregon has also made significant changes, including stopping the use of student numerical ratings in reviews and other decisions and using a more holistic approach to evaluate teaching.<sup>120</sup> The Oregon policy specifically states, “As of Fall 2018, faculty personnel committees, heads, and administrators will stop using numerical ratings from student course evaluations in tenure and promotion reviews, merit reviews and other personnel matters.”<sup>121</sup>

Other universities have not taken significant action, but are studying the issue. This sometimes involves relying on recommendations from specific groups within the university that serve as task forces. For example, the University of Minnesota Women’s Faculty Cabinet created a task force to look at student ratings of teaching (SRTs) to consider how they are being used across the university. In the Spring of 2019, the task force issued a report. The task force said SRT scores are being used to assess teaching performance, which impacts a variety of employment situations such as compensation and tenure. The report stated that:

the WFC has spent the last few years investigating and compiling the strong, rigorous, and increasing evidence that SRTs are prone to bias and may have an adverse impact on women faculty, as well as faculty from other underrepresented and historically marginalized backgrounds.” (Therefore), “The Cabinet has created a proposal that advocates the assembly of a diverse, university-wide and gender-balanced advisory task force to propose solutions to the SRTs are currently used, and to make suggestions on how the University can implement a more holistic evaluation process to achieve teaching excellence.<sup>122</sup>

Similarly, the University of Massachusetts Amherst created a faculty working group in the fall of 2017 to look at student evaluations. The working group was created to study a more robust approach to evaluate teaching and come up with recommendations. Part of the reason for this working group was that “research findings about discriminatory response biases and the sacrifice of quality for higher ratings show a complementarity of these limitations that may amplify when underrepresented faculty try to engage in novel teaching practices. These limitations in student ratings suggest that they should, at a minimum, be part of

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119 Jarrett Carter, *USC nixes student evaluations as part of tenure review*, May 24, 2018, <https://www.educationdive.com/news/usc-nixes-student-evaluations-as-part-of-tenure-review/524163>.

120 Revising UO’s Teaching Evaluations, <https://provost.uoregon.edu/revising-uos-teaching-evaluations>.

121 Colleen Flaherty, *Teaching Eval Shake-Up*, (May 22, 2018), <https://www.insidehighered.com/news/2018/05/22/most-institutions-say-they-value-teaching-how-they-assess-it-tells-different-story>.

122 <https://faculty.umn.edu/sponsored-organizations/wfc/news>.

a set of multiple measures, as is the practice when evaluating faculty research.”<sup>123</sup> The working group came up with a proposal that was more holistic, and we will include some of those specific alternatives to SETs in the recommendations section. The University of Pittsburgh is also looking at this issue. “Provost Ann Cudd told members of Faculty Assembly on Oct. 30 that she was looking into how student evaluations are used, especially as to how they relate to the University’s promotion and tenure process... This comes as the Educational Policies Committee decided in an Oct. 15 meeting to examine whether student evaluations of professors are an accurate, trustworthy measurement of teaching effectiveness. Research has found that such evaluations may hold inherent biases.”<sup>124</sup>

This list of universities reconsidering their use of SETs is not exhaustive but is provided to demonstrate that there is broad recognition among university faculty and administrators that SETs contain bias and are problematic when the numbers are used to make employment decisions. These recent events are significant and may forecast the future in terms of the use of student evaluations. In fact, Ann Owen says “Relying on biased instruments to evaluate faculty members is institutional discrimination. Indeed, it is simply a matter of time before a class-action lawsuit is filed against an institution for knowingly using biased instruments in evaluating its faculty.”<sup>125</sup> However, these changes might take quite some time and until most or all universities stop using SETs, we have the following recommendations as to how using them and avoid or mitigate the effects of the implicit bias they contain.

## VII. Recommendations

Given their flaws, our basic recommendation is to stop using summative SETs for any employment decisions. The reason for this recommendation is that it is quite difficult to reduce the implicit bias in SETs and virtually impossible to eliminate it. For that reason, the risk of a lawsuit always exists. That does not mean that SETs would no longer exist, rather they would be used differently. For example, “SETs remain important at USC. Faculty members are expected to explain how they used student feedback to improve instruction in their teaching reflection statements, which continue to be part of the tenure promotion process... But evaluation data will no longer be used in those personnel decisions.”<sup>126</sup>

However, admittedly, entirely dropping the use of SETs in employment decisions will be difficult to do; faculty members’ job descriptions include teaching,

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123 [https://www.umass.edu/oapa/sites/default/files/pdf/program\\_assessment/teaching\\_evaluation\\_working\\_group\\_recommendations\\_finalfebruary\\_2018.doc.pdf](https://www.umass.edu/oapa/sites/default/files/pdf/program_assessment/teaching_evaluation_working_group_recommendations_finalfebruary_2018.doc.pdf).

124 <http://www.utimes.pitt.edu/news/are-student-evaluations>.

125 Ann Owen, *The Next Lawsuits to Hit Higher Education*, Inside Higher Ed, (June 24, 2019), [https://www.insidehighered.com/views/2019/06/24/relying-often-biased-student-evaluations-assess-faculty-could-lead-lawsuits-opinion?utm\\_source=Inside+Higher+Ed&utm\\_campaign=975eb5ed6e-DNU\\_2019\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_1fcbc04421-975eb5ed6e-199462181&mc\\_cid=975eb5ed6e&mc\\_eid=1d1653e71a](https://www.insidehighered.com/views/2019/06/24/relying-often-biased-student-evaluations-assess-faculty-could-lead-lawsuits-opinion?utm_source=Inside+Higher+Ed&utm_campaign=975eb5ed6e-DNU_2019_COPY_01&utm_medium=email&utm_term=0_1fcbc04421-975eb5ed6e-199462181&mc_cid=975eb5ed6e&mc_eid=1d1653e71a).

126 Colleen Flaherty, *Teaching Eval Shake-up*, Inside Higher Ed (May 22, 2018), <https://www.insidehighered.com/news/2018/05/22/most-institutions-say-they-value-teaching-how-they-assess-it-tells-different-story>.

research and service, so each of those areas should be evaluated for retention, promotion, tenure, and merit pay decisions. Research is fairly easy to evaluate because there is objective evidence of the amount of research the faculty member has produced in the form of quantity of publications. Evidence of quality can be found in journal ranks, impact factors, and citation rates. The service component is also relatively straightforward--the evidence is based on the number of committees and other types of service the faculty member has participated in. That leaves the issue of evaluating teaching which is more difficult but more critical since teaching is the primary responsibility of faculty in the majority of institutions. The challenge is to evaluate teaching objectively, fairly and without bias; therefore, due to the potential for bias, the impact of SETs on employment decisions needs to be mitigated as much as possible. As discussed previously, there are a variety of methods to mitigate the impact of the implicit bias. For example, using multiple methods would create a more holistic approach for the evaluation of teaching.

In the holistic approach, SETs would continue to be used, but their impact on the employment decision would be significantly reduced. Such an approach could include such things as a peer-review model. The peer reviewers could be faculty members in the same school as the person being reviewed or they could be faculty members at other universities in the same discipline as the person being reviewed. In our experience, however, peer reviews have their own set of problems. One of the key problems encountered personally by the authors is that, in a small department, the peer reviewers may not understand the subject area. For example, one author, who teaches organizational behavior, was asked to do a peer review of an economist. The other key problem is that every faculty member knows that his/her "peers" will also review them, therefore, there review is likely to suffer from positive leniency bias. In other words, peer reviews won't truly reflect performance because they often tend to be inflated. In addition, this type of peer review may not eliminate bias, since although faculty members may know more about the dimensions of knowledgeability and effective teaching than students, they are also likely to have implicit bias in regard to gender, race, national origin, etc. To mitigate these problems, any peer reviews conducted should be behavior-based rather than trait-based and raters should be trained to avoid both implicit bias and common performance appraisal biases like leniency. An alternative to the use of internal peer reviews is to use outside peer reviewers who also teach the same course(s) at similar institutions by sending course materials including tapes of the professor teaching the course. Of course, there is a tradeoff—outside reviewers may have more expertise, but at the same time, the institution may have less control over whether they receive bias training prior to reviewing. Also, this method is likely to be time-consuming. Therefore, we suggest this be done for promotion and/or tenure decisions, since these are already time consuming and occur less often, but suggest not relying on it or not doing it as frequently when conducting merit increases.

The peer reviews in either case would not be based on sending the summative student evaluations to the peers. Instead, the reviewer would be provided with teaching materials and contextual information such as a teaching philosophy statement and told the level of each class taught, the size of each class taught, whether it is an elective or a requirement, and so forth. For example, the faculty member being reviewed would provide a syllabus of the class, the teaching

materials for the class and all the evaluation instruments used – tests, quizzes, projects, papers, etc. Then the reviewer might be told that a legal environment class is a required course for virtually every student who is majoring in some area of business and that this is typically a freshman or sophomore level class, made up of a large number of students, none of whom have an interest in that class. If the SETs are included, the instructor should be allowed to provide a written narrative about how they have, or will, respond to problematic areas. The narrative could include explanations of their teaching philosophy, why they designed the course the way they did and what they are trying to accomplish. In other words, it would be an opportunity to provide additional insight into the design and delivery of the course. The purpose of all this information would be to provide a “picture” of the class and its students to the peer reviewer so that the reviewer has some context to use for the evaluation. The point of the evaluation is to have multiple sources of data, so that the evaluator can be as objective as possible. Essentially “more information is better,” a philosophy underlying the popular 360-degree feedback method.<sup>127</sup> Additionally, procedural justice research indicates performance appraisals are viewed as being more fair when ratees can provide input such as about important contextual factors affecting performance.<sup>128</sup> Perceptions about procedural fairness are associated with whether an individual is likely to see legal remedies or not.

Other recommendations for a more holistic assessment of teaching can be found in the report from the University of Massachusetts Amherst, including the following principles to guide teaching evaluation, which are paraphrased here for purposes of simplification and space:

- Evaluation should include multiple dimensions of teaching to capture the teaching endeavor in its totality, including aspects that take place outside of the classroom.
- Evaluation should include multiple sources and types of data, including faculty self-report, peer input, and student voices.
- Evaluation should involve the triangulation of measures including an acknowledgement of the ways in which these measures provide reinforcing and/or conflicting perspectives.
- Both formative and summative uses of the data should be used to maximize the impact on teaching effectiveness and a longitudinal view of teaching improvement should be taken.
- There must be a balance between uniformity across departments and customization to different disciplines.<sup>129</sup>

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127 See, generally, Ronald A. Berk, *Using the 360° Multisource Feedback Model to Evaluate Teaching and Professionalism*, 31 *Medical Teacher* 1073 (2009).

128 See generally, Jerald Greenberg, *Determinants of Perceived Fairness of Performance Evaluations*, 71 *Journal of Applied Psychology* 340 (1986).

129 [https://www.umass.edu/oapa/sites/default/files/pdf/program\\_assessment/teaching\\_evaluation\\_working\\_group\\_recommendations\\_finalfebruary\\_2018.doc.pdf](https://www.umass.edu/oapa/sites/default/files/pdf/program_assessment/teaching_evaluation_working_group_recommendations_finalfebruary_2018.doc.pdf).

Another article emphasized looking at the various learning objectives, activities, and materials and how effective they each were at generating student learning but also included considering information from the standardized evaluation form such as comments on strengths and weaknesses of the course.<sup>130</sup>

Essentially, what we and others are recommending is a holistic approach. As Michelle Falkoff says, what is needed are “clearer institutional policies, more mentoring of new instructors, and multiple sources of assessment. Likewise, the University of Michigan’s Center for Research on Learning and Teaching emphasizes the importance of using more than one method – evaluating how faculty members deliver instructions, how they plan their courses, how they assess their students—and gathering feedback from students, colleagues, and supervisors.”<sup>131</sup> As stated, the ideal would be to stop using SETs for any employment decisions, but if an institution decides that it must still use them, the holistic approach would at least mitigate the impact of the potential bias.

Another method to mitigate this bias could be to use data analytics to identify student evaluations that are especially egregious. These then would be culled before calculations of mean ratings. Factors that could be flagged using either Big Data methods or other statistical processes might include whether a student tends to evaluate male professors better than female professors across time or, within an evaluation, whether a student’s answers to overall dimensions do not correlate with their average ratings for more specific behaviors or traits. *Airbnb*, for example, protects hosts from inconsistent evaluations by providing reviewers with alerts when their more specific and more global ratings are inconsistent with each other and asks them if they want to change any of their ratings. Another possible mitigation strategy is to extend bias literacy training to students prior to their rating instruction, much like organizations and universities have done for faculty and staff who are involved in employment decisions. Discussions of this possibility have occurred at one of the authors’ universities recently. The problem is that the student body frequently changes, so this training would require quite a bit of additional time, effort, and other resources. However, it might be important to student education more generally; therefore, some institutions might decide that it is an important investment of resources.

Ultimately, it will still be up to a court to decide how much bias is too much bias. So, if the holistic approach or other mechanisms mitigate the bias, but do not eliminate it, is that still too much bias? There are no cases that have tested this issue yet, but we contend that it is a step in the right direction. As Falkoff said “if academic institutions do not take steps to assess teaching more holistically, they run the risk of losing talented faculty members for reasons that are not only

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130 W. Lee Hansen, *Rethinking the Student Course Evaluation: How a Customized Approach Can Improve Teaching and Learning*, <https://www.aacu.org/publications-research/periodicals/rethinking-student-course-evaluation>.

131 Michelle Falkoff, *Why We Must Stop Relying on Student Ratings of Teaching*, *The Chronicle of Higher Education* (APRIL 25, 2018), [https://www.chronicle.com/article/Why-We-Must-Stop-Relying-on/243213?cid=wb&utm\\_source=wb&utm\\_medium=en&elqTrackId=173fa4ce32fa4625a8ac1fed3c6e23d1&elq=3a6dc5692327489c8a44e6bf1bf72344&elqaid=18849&elqat=1&elqCampaignId=8491](https://www.chronicle.com/article/Why-We-Must-Stop-Relying-on/243213?cid=wb&utm_source=wb&utm_medium=en&elqTrackId=173fa4ce32fa4625a8ac1fed3c6e23d1&elq=3a6dc5692327489c8a44e6bf1bf72344&elqaid=18849&elqat=1&elqCampaignId=8491).

inappropriate but may well be illegal.”<sup>132</sup> Essentially, mitigation is a step toward both the retention of faculty who are performing effectively although SETs don’t indicate that and toward avoiding possible litigation. In case litigation happens, efforts at mitigation will demonstrate that the university took substantive steps to avoid discrimination.

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132 Falkoff, Id.



# ALCOHOL: TRUTH AND CONSEQUENCES ON CAMPUS

## **Time to Change College Binge Drinking Culture Once and For All**

LYNN GILBERT\*

### ***Abstract***

*Ensuring the safety and mental health of college students is critical to give students the potential for educational success. This paper focuses on the elephant in the room – alcohol abuse – and encourages Congress to address this endemic, long-standing issue in the Reauthorization of the Higher Education Act.*

*A historical review of federal action alongside current research demonstrates college alcohol abuse is a stubborn, pervasive, and devastating problem which demands renewed attention. Disregarding the intertwined nature of alcohol, and sexual misconduct, the Obama administration avoided incorporating the topic into the administration's campus sexual assault campaign. Nonetheless, evidence shows the Obama administration was successful in altering the culture on campus. As a result, there is space to utilize its blue print to address binge drinking.*

*I propose Congress create a Health and Campus Safety Center, a federal multi-agency initiative, to coordinate the informational services and oversight required to ensure a much-needed campus alcohol culture change.*

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*“Binge drinking, or heavy episodic drinking, is higher education’s dirty little secret. It is arguably the number one public health problem facing American college students. Despite considerable recent effort, rates of college student binge drinking haven’t changed much.”<sup>1</sup>*

–Sen. Joseph R. Biden, Jr., 2000

## INTRODUCTION

The Kavanaugh Supreme Court confirmation hearings were a reminder of the common knowledge that high-risk drinking frequently results in unexpected, unintended, and out-of-character consequences. In the search for evidence about whether an attempted sexual assault occurred thirty years prior, Senators grilled Judge Kavanaugh live on television about his drinking habits in high school and college.<sup>2</sup> The media and the public also focused on Kavanaugh’s relationship with alcohol by analyzing the verbal exchanges in the hearings, scouring the memories of Kavanaugh’s friends, and searching dusty yearbooks.<sup>3</sup> After Kavanaugh was confirmed and sworn in as an Associate Justice, concerns about the impact the hearings had on sexual assault remained in the headlines<sup>4</sup> while the worrisome link to the topic of high-risk drinking quietly slipped away.<sup>5</sup> This paper confronts our

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1 JOSEPH R. BIDEN, JR., *EXCESSIVE DRINKING ON AMERICA’S COLLEGE CAMPUSES* (2000), at 5, available at [http://compelledtoact.com/Involvement categ/Federal law/Biden Resol Report.pdf](http://compelledtoact.com/Involvement%20categ/Federal%20law/Biden%20Resol%20Report.pdf).

2 See PBS NewsHour, *We ‘Drank Beer’ and Sometimes Had Too Many, Kavanaugh Says at Hearing*, YOUTUBE (Sept. 27, 2018), <https://www.youtube.com/watch?v=AOr808UXOgE>; see also CBS This Morning, *Amid FBI Probe, New Questions Over Kavanaugh Testimony on Drinking Habits*, YOUTUBE (Oct. 1, 2018), <https://www.youtube.com/watch?v=WqQ-XC33kyE>.

3 See Glenn Kessler, *Brett Kavanaugh and Alcohol: Two Dueling Narratives*, WASH. POST (Oct. 2, 2018), [https://www.washingtonpost.com/politics/2018/10/02/brett-kavanaugh-alcohol-two-dueling-narratives/?utm\\_term=.57c88d5a0c95](https://www.washingtonpost.com/politics/2018/10/02/brett-kavanaugh-alcohol-two-dueling-narratives/?utm_term=.57c88d5a0c95); see also Mike McIntire & Ben Protess, *At the Center of the Kavanaugh Accusations: Heavy Drinking*, N.Y.T. (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/kavanaugh-drinking-yale-high-school.html>; see also Martin Longman, *Kavanaugh’s Drinking Has Caused All His Problems*, WASH. MONTHLY (Oct. 1, 2018), <https://washingtonmonthly.com/2018/10/01/kavanaughs-drinking-has-caused-all-his-problems/>.

4 See, e.g., Christal Hayes, *‘We Believe Survivors’; BrettKavanaugh.com Now an Outlet for Sexual Assault, Rape Victims*, USA TODAY (Oct. 10, 2018, 5:12 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2018/10/10/brett-kavanaugh-website-sexual-assault-survivors/1591819002/>; see also, e.g., Joe Heim, Steve Hendrix, and Mike DeBonis, *Demonstrators at U.S. Capitol protest Kavanaugh Confirmation*, WASH. POST (Oct. 6, 2018), [https://www.washingtonpost.com/local/demonstrators-at-us-capitol-protest-impending-kavanaugh-appointment/2018/10/06/0b40cb10-c98e-11e8-b1ed-1d2d65b86d0c\\_story.html?utm\\_term=.5c3e09f02f41](https://www.washingtonpost.com/local/demonstrators-at-us-capitol-protest-impending-kavanaugh-appointment/2018/10/06/0b40cb10-c98e-11e8-b1ed-1d2d65b86d0c_story.html?utm_term=.5c3e09f02f41) (protestors chanting “we believe survivors”); see also, e.g., Sabrina Issa, *Brett Kavanaugh’s Confirmation Reveals the Moral Rot that Allows America to Ignore so Many Assault Survivors*, NBC NEWS (Oct. 6, 2018, 12:10PM), <https://www.nbcnews.com/think/opinion/brett-kavanaugh-s-confirmation-reveals-moral-rot-allows-america-ignore-ncna917341>; see also, e.g., Sheryl Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y.T. (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html> (Kavanaugh confirmation process “concluded with a national reckoning over sexual misconduct”); see also, e.g., Roxanne Jones, et al., *After Kavanaugh, What Have We Learned?*, CNN (Oct. 6, 2018, 6:00 PM), <https://www.cnn.com/2018/10/06/opinions/supreme-court-brett-kavanaugh-vote-reaction/index.html> (contains nineteen references to the impact on sexual assault survivors but does not include a single reference to alcohol abuse).

5 The author found countless articles in a wide spectrum of news outlets addressing sexual assault concerns *after* the confirmation of Kavanaugh to the Supreme Court, see fn. 4, *infra*; however, the

national reluctance to tackle the alcohol abuse culture on campus and encourages Congress to empower a much needed sea change.

The tentacles of the toxic campus drinking culture can reach even those students whose best intentions are to be diligent, law abiding citizens. There are then repercussions for the wider society when young-drinking students metamorphosis into adult alcoholics entering the workforce. Public reporting of student deaths due to overindulgence in alcohol<sup>6</sup> strike fear in the heart of every parent and administrator in institutions of higher education (colleges).<sup>7</sup> In terms of the number of students involved and the breadth of adverse consequences, campus alcohol abuse<sup>8</sup> is the largest problem colleges face.<sup>9</sup> And yet, drinking remains ubiquitous on campus.<sup>10</sup> According to the Surgeon General, “alcohol is the

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author only found three articles post Kavanaugh’s confirmation on October 6, 2019 stating the proposition that the takeaway from the hearings should include both confronting alcohol abuse culture and reducing sexual assault. See Bill Schier, *After Kavanaugh, #MeToo Should Launch a New Temperance Movement*, POLITICO (Oct. 9, 2018), <https://www.politico.com/magazine/story/2018/10/09/kavanaugh-metoo-temperance-suffragettes-221141>; see also Nicole Russell, *3 Things We Learned From the Kavanaugh Drama That Have Nothing to Do With Politics*, <https://www.washingtonexaminer.com/opinion/3-things-we-learned-from-the-kavanaugh-drama-that-have-nothing-to-do-with-politics> (“underage drinking ... is not only common but was the elephant in the room in one of the most controversial confirmation hearings”); see also Dillon Browne, *Trauma 101 in the Aftermath of the Ford-Kavanaugh Saga*, *The Conversation* (Oct. 11, 2018, 5:58 PM), <http://theconversation.com/trauma-101-in-the-aftermath-of-the-ford-kavanaugh-saga-104313> (“any serious initiative to curb sexual assault must also take a close look at binge-drinking culture”).

6 See e.g. Caitlin Flanagan, *Death At A Penn State Fraternity*, *THE ATLANTIC* (Nov. 2017 issue), <https://www.theatlantic.com/magazine/archive/2017/11/a-death-at-penn-state/540657/>; see also Sarah Ellis, *Coroner: USC Student Terreni Died Of ‘Toxic’ Blood Alcohol Level (+ Video)*, *THE STATE* (Apr. 8, 2015 12:41 PM), <http://www.thestate.com/news/local/article17854100.html>.

7 See e.g. Lisa C. Johnson, *Using a Public Health and Quality Improvement Approach to Address High-Risk Drinking with 32 Colleges and Universities*, at iv, (March 2014) (White Paper Nat’l. C. Health Improvement Program), available at <https://safesupportivelearning.ed.gov/sites/default/files/NCHIP%20WhitePaper%205%208%2014FINAL.pdf>.

NCHIP, at iv. [hereinafter NCHIP] (reporting the “biggest fear as a college president [is] receiving a middle-of-the-night phone call that a student had been injured or died from an incident involving acute alcohol intoxication”).

8 Acknowledging there are definitional differences between the terms alcohol abuse, high-risk drinking, risky drinking, binge drinking, and black-out drinking, for the purposes of this paper the terms will be used interchangeably, except where noted otherwise, both because college students colloquially treat them interchangeably and generally the consequences are equivalent.

9 See Darby Dickerson & Peter F. Lake, *Alcohol and Campus Risk Management* (labeling alcohol the highest risk factor for colleges), 18 *CAMPUS ACTIVITIES PROGRAMMING*, Oct. 2006, at 19, available at <https://ssrn.com/abstract=1097120>; see also Henry Wechsler & Toben Nelson, *What We Have Learned from the Harvard School of Public Health College Alcohol Study: Focusing Attention on College Student Alcohol Consumption and the Environmental Conditions That Promote It*, 69 *J. STUD. ALCOHOL AND DRUGS* 1, 3-4 (2008) [hereinafter Wechsler & Nelson *Harvard*]; see also Henry Wechsler & Toben F. Nelson, *Will Increasing Alcohol Availability by Lowering the Minimum Legal Drinking Age Decrease Drinking and Related Consequences Among Youths?* 100 *Am J Public Health* 986, 987 (June 2010) [hereinafter Wechsler & Nelson *Consequences*]; see also U.S. DEP’T OF HEALTH AND HUMAN SERVS., NAT’L INST. OF HEALTH, NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, *COLLEGE DRINKING* (Dec. 2015), available at <https://pubs.niaaa.nih.gov/publications/collegefactsheet/Collegefactsheet.pdf> [hereinafter *COLLEGE DRINKING*].

10 Because some college students are over twenty-one years old and drink responsibly, not all campus drinking is problematic or illegal.

most widely used substance of abuse among America's youth."<sup>11</sup> Approximately 16 million students, equaling 80.5 percent of all college students, drink.<sup>12</sup> It is estimated that 40 percent of college students binge drink, roughly eight million students,<sup>13</sup> which is a higher rate than their non-college peers.<sup>14</sup> College alcohol abuse is a problem for both sexes because males and females on campus engage in binge drinking in almost equal numbers.<sup>15</sup>

The head-in-the-sand refusal to confront assumptions about the inevitability and inconsequential nature of the campus drinking culture has frightening consequences for students and the public.<sup>16</sup> While not every student engages in risky drinking, the majority of college students are impacted directly or indirectly. The problems that result from campus drinking fall into four categories: safety, health, civic impact, and academic performance. First, safety concerns include drinking and driving, sexual assault, injuries, and physical assaults.<sup>17</sup> Second, health issues include alcohol use disorder, alcohol poisoning, risky sexual behavior, pregnancy, sexually transmitted diseases, negative interplay with eating disorders, depression, suicide, and other mental health issues.<sup>18</sup> Third, civic impact results from students

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11 See U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFF. OF THE SURGEON GEN., *THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND REDUCE UNDERAGE DRINKING* (2007), at v, available at [http://www.camy.org/docs/resources/fact-sheets/Call\\_To\\_Action.pdf](http://www.camy.org/docs/resources/fact-sheets/Call_To_Action.pdf) [hereinafter *SURGEON GENERAL'S CALL TO ACTION*].

12 See U.S. DEP'T OF HEALTH AND HUM. SERVS., 5 ANN. REP. TO CONGRESS ON THE PREVENTION AND REDUCTION OF UNDERAGE DRINKING (2013), available at <http://www.nabca.org/sites/default/files/assets/files/Report-to-Congress-on-Prevention-Reduction-Underage-Drinking.pdf>; <https://store.samhsa.gov/shin/content/PEP13-RTCUAD/PEP13-RTCUAD.pdf>, at 10. [hereinafter *REP. UNDERAGE DRINKING*]; see also *FAST FACTS*, NAT'L CENTER FOR EDUC. STATS., U.S. DEP'T OF EDUC., [HTTPS://NCES.ED.GOV/FASTFACTS/DISPLAY.ASP?ID=372](https://nces.ed.gov/fastfacts/display.asp?id=372) (last visited Jan. 11, 2019) (calculating the number of students who drink by applying the percentage of students who drink to total number of college students) [hereinafter *FAST FACTS*].

13 See Wechsler & Nelson *Harvard*, *supra* note 9, at 3; see also *FAST FACTS*, *supra* note 12, (calculating the number of students who drink by applying the percentage of students who drink to total number of college students).

14 See Wechsler & Nelson *Consequences*, *supra* note 9, at 987.

15 U.S. DEP'T OF HEALTH AND HUM. SERVS., CTR. FOR DISEASE CONTROL AND PREVENTION, *PRESS RELEASE ON BINGE DRINKING IS AN UNDER-RECOGNIZED PROBLEM AMONG WOMEN AND GIRLS* (2013). Available at [https://www.cdc.gov/media/releases/2013/p0108\\_binge\\_drinking.html](https://www.cdc.gov/media/releases/2013/p0108_binge_drinking.html); see also Cara Rosenbloom, *New Concern On College Campuses: 'Drunkorexia,' A Combination Drinking And Eating Disorder*, *WASH. POST* (Mar. 11, 2019), [https://www.washingtonpost.com/lifestyle/wellness/new-concern-on-college-campuses-drunkorexia-a-combination-drinking-and-eating-disorder/2019/03/08/093cf47c-4028-11e9-9361-301ffb5bd5e6\\_story.html?utm\\_term=.c89da024730e](https://www.washingtonpost.com/lifestyle/wellness/new-concern-on-college-campuses-drunkorexia-a-combination-drinking-and-eating-disorder/2019/03/08/093cf47c-4028-11e9-9361-301ffb5bd5e6_story.html?utm_term=.c89da024730e) (reporting between 34 to 81 percent students, mostly college women, dangerously combine starvation with binge drinking).

16 Amanda Tidwell, *Generation Addicted: College Students Lobby For Campus Cops, Ras To Carry Narcan*, *COLLEGE FIX* (Jan. 30, 2018), <http://www.thecollegefix.com/post/41444/> (assuming a student was drunk masked an opioid overdose which lead to death).

17 See Wechsler & Nelson *Harvard*, *supra* note 9, at 3-4; see also NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, U.S. DEP'T OF HEALTH AND HUMAN SERVS., NIH PUB. NO. 02-5010, *A CALL TO ACTION: CHANGING THE CULTURE OF DRINKING AT U.S. COLLEGES* (2002) at 4, 9 [hereinafter *A CALL TO ACTION*]; see also *SURGEON GENERAL'S CALL TO ACTION*, *supra* note 11, at 10-11; see also *REP. UNDERAGE DRINKING*, *supra* note 12, at 57-62; see also *COLLEGE DRINKING*, *supra* note 9.

18 See *id.*

causing property damage or law enforcement entanglement.<sup>19</sup> Fourth, academic problems related to drinking include missing classes, falling behind with work, and poor grades.<sup>20</sup> Lastly, there is also a growing understanding that non-drinkers face second-hand effects, such as disruption of sleep or study, from their classmates drinking.<sup>21</sup> And the effects of the toxic drinking culture also migrate off campus. When students graduate, incorporating binge drinking into their adult lifestyle, the economic cost to society is estimated to be a quarter trillion dollars.<sup>22</sup>

Having excised a similarly unhealthy, albeit trendy phenomena, in smoking, Congress should be confident that the normalization of campus alcohol abuse can be reformed. With the Obama administration's actions in the rearview mirror<sup>23</sup> and the Trump administration yet to take a stance on campus alcohol policy, the current reauthorization of the Higher Education Act of 1965 (HEA) creates the opportunity for Congress to incentivize colleges to reduce high-risk drinking on campus by emphasizing prevention through culture change.

In Part I of this paper, I will argue that the Obama administration missed an important opportunity to address the wide-spread problem of alcohol abuse on campus when they excised drinking from the multi-agency campaign to stop college sexual assault.<sup>24</sup> The discussion begins with a historical framework, demonstrating that the federal government's plethora of legislative actions and reports leave no doubt that high-risk drinking at colleges is a long-standing recognized national problem.<sup>25</sup> At colleges, one consequence of the ubiquitous commingling of risky drinking and sex is that at times it is necessary to address the topics of alcohol abuse and campus assault together.<sup>26</sup> However, the policy decision to uncouple high-risk drinking from sexual assault prevention led to the complete bifurcation of the two issues in the Obama administration's actions.<sup>27</sup>

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19 *See id.*

20 *See id.*

21 *See Wechsler & Nelson Harvard, supra note 9, at 4.*

22 *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., *Excessive Drinking is Draining the U.S. Economy*, <https://www.cdc.gov/features/costsofdrinking/index.html> (July 13, 2018).

23 *See* Press Release from U.S. Dep't of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), *available at* <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> (rescinding the 2011 Dear Colleague guidance document which was the basis for much of the Obama administration's sexual assault policy).

24 The term sexual assault in this paper encompasses all activities defined as sexual harassment in the educational setting. *See* U.S. Dep't of Educ., Off. Of Civil Rights, *Sexual Harassment: It's Not Academic*, (2008) (defining sexual harassment as "conduct that 1) is sexual in nature; 2) is unwelcome; and 3) denies or limits a student's ability to participate in or benefit from a school's education program").

25 Argued in further detail in Section I.A., *see specifically* the 1976 National Institute on Alcohol Abuse and Alcoholism report *The Whole College Catalog About Drinking: A Guide to Alcohol Abuse, infra* note 44.

26 Argued in further detail in Section I.B., *see specifically* BIDEN, *supra* note 1, at 51 ("Alcohol is involved in violence against college women").

27 Argued in further detail in Section I.C., *see specifically* U.S. Dep't of Justice, Off. On Violence

At the same time, the Obama administration reinitiated enforcement of the previously ignored federal regulations pertaining to college alcohol policies.<sup>28</sup> Due to the lack of governmental support, including defunding of the center explicitly tasked with providing colleges compliance and prevention assistance as well as conveying confusing signals regarding alcohol in the sexual assault realm, these efforts were insufficient to impact the drinking culture on campus.<sup>29</sup>

Nonetheless, I explain in Part II that the Obama administration was successful in empowering a change in the campus culture surrounding sexual assault.<sup>30</sup> The policy choice to work across agencies,<sup>31</sup> utilize monetary levers,<sup>32</sup> increase regulation oversight,<sup>33</sup> employ publicity,<sup>34</sup> and engage community volunteers<sup>35</sup> was effective in gaining the attention of college officials and students. The result was a shift in attitudes and policies surrounding campus sexual assault.

Part III focuses on suggestions for the HEA reauthorization. There is a need for continued action as the current campus culture demonstrates the alcohol problem has not abated and continues to create serious and far reaching consequences. HEA is the right vehicle to provide colleges with incentives and oversight; but, the proposed legislation in the House of Representatives from both parties must be revamped to focus on preventing alcohol abuse.<sup>36</sup> Moreover, federal action coordinated through the Department of Education (ED) and the Centers for Disease Control (CDC) is the proper remedy in order to influence all students

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Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2011) *infra* note 140 (denying grants aimed at preventing college sexual assault if linked to addressing substance abuse).

28 Argued in further detail in Section I.D., *see specifically* *The Resurgence of the Drug-Free Schools and Communities Act: A Call to Action*, at 3, *infra* note 171.

29 Argued in further detail in Section I.D., *see specifically* Higher Education Center *infra* note 113 (defunding of the Higher Education Center in 2011); *see also* REP. UNDERAGE DRINKING *supra* note 12, at 10 (finding college drinking rates have shown little decline since 1993).

30 Argued in further detail in Section II., *see specifically* *It's ON Us*, *infra* note 191 (wide-spread success of the Obama administration's sexual assault prevention campaign in engaging students and influence the campus conversation).

31 Argued in further detail in Section II., *see specifically* THE SECOND REPORT, *supra* note 135, at 24 (promoting grants through DOJ, OVW, the HHS's Office of Women's Health, and the CDC by the Obama administration).

32 Argued in further detail in Section II., *see specifically* Dear Colleague Letter *supra* note 99, at 16 (threatening the loss of all federal funding for noncompliance with the 2011 DCL)..

33 Argued in further detail in Section II., *see specifically* *Jacob Gersen & Jeannie Suk, The Sex Bureaucracy*, *supra* note 187 (ED oversight resulted in the creation of a Title IX bureaucracy)..

34 Argued in further detail in Section II., *see specifically*, White House, Off. Of the Press Sec'y on The "It's On Us" Campaign Launches new PSA, *infra* note 193.

35 Argued in further detail in Section II., *see specifically*, *It's ON Us* *infra* note 191 (encouraging campus activism).

36 Argued in further detail in Section III.A., *see specifically* Prosper Act *infra* note 226 (Republican proposed HEA legislation); *see also* Aim Higher Act, *infra* note 228 (Democrat proposed HEA legislation).

enrolled at both public and private colleges throughout the country.<sup>37</sup> A jointly created campus health and safety team complemented by the ED's financial tools and accurate public campus alcohol information will provide the launching pad to empower all stakeholders to change the pernicious drinking culture.

## I. FEDERAL ACTION RELATED TO ALCOHOL ON CAMPUS

Federal policy makers from both parties over the past four decades have taken the stance that the alcohol culture on campus must change for the well-being of all college students. However, the Obama administration minimized the college drinking issue in their efforts to protect students from sexual assault when the ED focused their college safety efforts on Title IX,<sup>38</sup> the White House led interagency task force publicized reducing campus sexual assault as a presidential priority,<sup>39</sup> the Department of Justice (DOJ)'s sexual assault grant program was expanding while continuing to exclude funding for programs which addressed alcohol abuse,<sup>40</sup> and the CDC obscured the connection to alcohol in their college sexual abuse prevention publications.<sup>41</sup> Furthermore, while the Obama administration rightly drew attention to the widespread lack of compliance with federally mandated campus alcohol requirements, offering a pathway to address campus drinking, the lack of support for prevention programming was a missed opportunity to change the wider campus culture.<sup>42</sup> Given the all-encompassing high-risk drinking culture which affects almost every aspect of campus life with consequences inclusive of sexual assault, Congress should not be distracted by allowing alcohol abuse to remain a "dirty little secret."<sup>43</sup>

### A. Federal Government's History on Campus Drinking

In recognizing the role government can play to protect students, the federal government took an important step to address student drinking in 1976, during

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37 Argued in further detail in Section III.B., *see specifically* CONGRESSIONAL RESEARCH SERVICE, THE HIGHER EDUCATION ACT (HEA): A PRIMER 1 *infra* note 221 (authorizing ED to administer the HEA authorized federal aid to colleges); *see also* CDC, *infra* note 231 (the CDC is "the nation's health protection agency).

38 Argued in further detail in Section I.C.1., *see specifically* Dear Colleague Letter, *infra* note 99.

39 Argued in further detail in Section I.C.2., *see specifically* Memorandum from the White House, Off. Of the Press Sec'y on Establishing a White House Task Force to Protect Students from Sexual Assault, *infra* note 122.

40 Argued in further detail in Section I.C.3., *see specifically* U.S. Dep't of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2011), at 4, *infra* note 140.

41 Argued in further detail in Section I.C.4., *see specifically* Report for the *White House Task Force to Protect Students from Sexual Assault*, *infra* note 128.

42 Argued in further detail in Section I.D., *see specifically compare* Michael M. DeBowes, *The Resurgence of the Drug-Free Schools and Communities Act: A Call to Action*, *infra* note 171; *with* HIGHER EDUCATION CENTER, *infra* note 113 (defunding the organization tasked with supporting colleges in developing alcohol prevention programming).

43 *See* Biden, *supra* note 1, at 5.

the Ford administration, when the National Institute on Alcohol Abuse and Alcoholism (NIAAA) issued the report, *The Whole College Catalog About Drinking: A Guide to Alcohol Abuse Prevention*.<sup>44</sup> Driven by the belief that high-risk drinking was “one of the great enormous problems of our times,” the catalog’s purpose was to be a resource document for colleges to create programs to prevent alcohol abuse.<sup>45</sup>

The legal landscape for college-age drinking was foundationally laid by Congress during the Reagan administration. In 1984, the National Minimum Drinking Age Act<sup>46</sup> was enacted with the stated purpose to reduce drunk driving. The effect of the Supreme Court upholding the constitutionality of conditioning federal highway funds on states adopting a minimum drinking age in *South Dakota v. Dole*<sup>47</sup> led to every state adopting 21 as the legal drinking age.<sup>48</sup> It also created a culture shift in the American attitude toward driving under the influence of alcohol. But in encouraging the establishment of a universal drinking age, applicable to the majority of college-age students, Congress also created federal ramifications to colleges which would subsequently be required to police illegal drinking.

As much of the drinking on campus was now illegal, Congress in the 1980’s and 1990’s was in a position to address campus “alcohol abuse [which was] widespread among the Nation’s students,” and “constitute[d] a grave threat to their physical and mental well-being and significantly impede[d] the learning process.”<sup>49</sup> Utilizing their spending powers, Congress amended the HEA in 1989 with the Drug-Free Schools and Communities Act Amendments (DFSCA) attaching federal funding to the condition that colleges establish alcohol prevention programs.<sup>50</sup> The DFSCA required the ED Secretary to periodically review college prevention programs with the authority to impose sanctions for non-compliance.<sup>51</sup> Additionally, to create transparency and gather data on the extent of illegal drinking, Congress enacted the Crime Awareness and Campus Security Act,<sup>52</sup> also known as the Clery Act.<sup>53</sup> The Act required all colleges to report campus crimes, including sexual assault and illegal drinking, granting the ED Secretary the authority to impose financial penalties for misrepresentations.<sup>54</sup>

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44 U.S. DEP’T OF HEALTH, EDUC., AND WELFARE, *THE WHOLE COLLEGE CATALOG ABOUT DRINKING* (1976), available at [https://archive.org/details/ERIC\\_ED140152](https://archive.org/details/ERIC_ED140152) [hereinafter *WHOLE COLLEGE CATALOG*].

45 *Id.* at xii.

46 23 U.S.C. § 158 (2012).

47 *See S. Dakota v. Dole*, 483 U.S. 203 (1987).

48 Mary Pat Treuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. Legis. & Pub. Pol’y 303, 312 (2006).

49 Drug-Free Schools and Communities Act of 1986, Pub. L. No. 99-570, § 4102, 100 Stat. 3207-125 (prior to 1988 amendment).

50 Drug-Free Schools and Communities Act Amendments of 1989, Pub. L. No. 101-226, § 1213, 103 Stat. 1928 (1989).

51 20 U.S.C. § 1011i(c)(1)(B) (1998).

52 Student Right-To-Know and Campus Security Act, Title II, Pub. L. 101-542, 104 Stat 2381 (1990).

53 20 U.S.C. § 1092(f)(18) (1990).

54 20 U.S.C. § 1092(f)(13) (1990).

Federal agencies devoted resources to help colleges adopt policies to reduce the drinking culture on campus in furtherance of Congress' goals. In 1995, during the Clinton administration, the ED created the Higher Education Center (HEC)<sup>55</sup> "to assist institutions of higher education in developing, implementing, and evaluating alcohol and other drug abuse and violence prevention policies and programs that will foster students' academic and social development and promote campus ... safety."<sup>56</sup> The HEC also produced a guide for colleges entitled, *Complying with the Drug-Free Schools and Campuses Regulations*.<sup>57</sup>

Congress once again took legislative action in the late 1990's demonstrating frustration that colleges had not decreased their student alcohol problems. Congress amended the HEA in 1998 to include the Collegiate Initiative to Reduce Binge Drinking and Illegal Alcohol Consumption. The Act created federal grant programs aimed at reducing the use of alcohol and mandating every college president create an alcohol task force.<sup>58</sup> Congress also established the Enforcing Underage Drinking Laws Program within the U.S. Department of Justice.<sup>59</sup>

These Congressional actions were followed by several government reports reinforcing the position that college alcohol abuse was a major policy concern. In 2000, the Surgeon General's *Healthy People 2010* defined binge drinking as a national problem particularly for young adults who attend college.<sup>60</sup> The same year, Senator Joseph R. Biden, Jr.'s *Excessive Drinking on America's College Campuses* report urged colleges to end the silence and denial surrounding binge drinking and take action on this major public health problem facing their students.<sup>61</sup> The NIAAA published *A Call to Action: Changing the Culture of Drinking at U.S. Colleges* in 2002.<sup>62</sup> The NIAAA outlined the severe consequences of college drinking suggesting a three-in-one framework approach addressing individual drinkers, the entire student body, and the college within its greater community.<sup>63</sup>

Taking the message of the reports seriously, Congress acted again in 2006. It passed the Sober Truth on Preventing Underage Drinking Act (STOP Act), establishing the Interagency Coordinating Committee on the Prevention of Underage Drinking (ICCPUD) with representatives from six agencies and

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55 See HIGHER EDUCATION CENTER, <http://hecaod.osu.edu/about/> (last visited on Jan. 11, 2019) (stating in the brief background that the now private HECAOD is based upon ED's HEC which was publicly funded from 1995 to 2012).

56 U.S. Dep't of Educ., Higher Education Center for Alcohol and Other Drug Abuse and Violence Prevention, *Complying with the Drug-Free Schools and Campuses Regulations* (2006), at last page, available at <http://www.higheredcompliance.org/resources/resources/dfscr-hec-2006-manual.pdf>.

57 See *id.*

58 Higher Education Amendments Of 1998, Pub. L. No. 105-244, §119-120, 112 Stat 1581 (1998).

59 See DEP'T OF JUSTICE, OFF. OF JUSTICE PROGRAM, DOJ 06-045, (NEWS RELEASE) DEPARTMENT OF JUSTICE ANNOUNCES \$17 MILLION IN AWARDS TO ENFORCE UNDERAGE DRINKING LAWS (Apr. 13, 2006).

60 See Biden, *supra* note 1, at 41.

61 See Biden, *supra* note 1, at 52-53.

62 See A CALL TO ACTION, *supra* note 17.

63 See A CALL TO ACTION, *supra* note 17, at ix-x.

multiple sub-agencies. The committee was tasked with issuing annual reports summarizing all federal agency activities related to the problem<sup>64</sup> and creating grants to “reduce the rate of underage alcohol consumption including binge drinking among students at institutions of higher education.”<sup>65</sup> The HEA 2008 reauthorization included additional reporting requirements for colleges regarding alcohol violations and fatalities on their campuses.<sup>66</sup>

Additional reports published during the Bush administration confirmed the alcohol problem on college campuses, reinforcing the necessity of an all hands on deck approach with Congressional, intra-branch, and multi-agency action. The NIAAA Task Force published *What Colleges Need to Know Now: An Update on College Drinking* in 2007.<sup>67</sup> The report detailed the increased rate of serious alcohol related consequences since the first 2002 report and found college students were more likely to drink than their non-college peers.<sup>68</sup> Also in 2007, the U.S. Surgeon General in collaboration with NIAAA and the Substance Abuse and Mental Health Services Administration (SAMHSA)<sup>69</sup> issued the *Call to Action to Prevent and Reduce Underage Drinking*.<sup>70</sup> Colleges were admonished to “change [their] campus culture that contributes to underage alcohol use”<sup>71</sup> because college drinking has become normalized by administrators, parents, and students with the unacceptable drinking rate of eighty percent of college students drinking and forty percent engaging in binge drinking.<sup>72</sup> Three years later, the Office of Disease Prevention and Health Promotion in the Department of Health and Human Services, in conjunction with an interagency workforce, published *Healthy People 2020*<sup>73</sup> including as an objective a recommendation to reduce the number of college students who binge drink.<sup>74</sup>

The insistent call for action on campus drinking that transcended administrations and political parties continued during the Obama administration. The NIAAA

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64 Sober Truth on Preventing Underage Drinking Act, Pub. L. No. 109–422, §2(b)(1), 120 Stat 2890 (2006).

65 *Id.* at §2(e)(1).

66 Higher Education Opportunity Act, Pub. L. 110–315, § 107, 122 Stat 3078 (2008).

67 See U.S. DEP’T OF HEALTH AND HUM. SERVS., NAT’L INSTS. OF HEALTH, NAT’L. INSTIT. ON ALCOHOL ABUSE AND ALCOHOLISM, PUB. NO. 07-5010, WHAT COLLEGES NEED TO KNOW NOW AN UPDATE ON COLLEGE DRINKING RESEARCH (2007) [hereinafter WHAT COLLEGES NEED TO KNOW], available at [https://pubs.niaaa.nih.gov/publications/UpdateCollegeDrinking/1College\\_Bulletin-508\\_361C4E.pdf](https://pubs.niaaa.nih.gov/publications/UpdateCollegeDrinking/1College_Bulletin-508_361C4E.pdf).

68 See generally, *id.*

69 SAMHSA is an agency within the U.S. Dep’t of Health and Hum. Services.

70 See SURGEON GENERAL’S CALL TO ACTION, *supra* note 11.

71 SURGEON GENERAL’S CALL TO ACTION, *supra* note 11, at 41.

72 *Id.* at 12.

73 See generally, Press Release from U.S. Dep’t of Health and Hum. Servs., OASH Press Office on HHS Announces the Nation’s New Health Promotion and Disease Prevention Agenda (Dec. 2, 2010), available at [https://www.healthypeople.gov/sites/default/files/DefaultPressRelease\\_1.pdf](https://www.healthypeople.gov/sites/default/files/DefaultPressRelease_1.pdf).

74 See *HealthyPeople 2020*, U.S. DEP’T OF HEALTH AND HUM. SERVS., OFF. OF DISEASE PREVENTION AND HEALTH PROMOTION, <https://www.healthypeople.gov/2020/topics-objectives/topic/substance-abuse/objectives#5205> (last modified 3/16/18).

formed the College Presidents Working Group in 2011 to bring national attention to high-risk alcohol prevention at colleges.<sup>75</sup> The 2013 ICCPUD *Report to Congress on the Prevention and Reduction of Underage Drinking* emphasized the need for more research, collaboration, and commitment to address the underage drinking problem on campus by the federal government agencies, colleges, and researchers<sup>76</sup> as “underage alcohol use is not inevitable, and parents and society are not helpless to prevent it.”<sup>77</sup> The report found (1) “alcohol consumption rates on college campuses constitute a significant public health problem;”<sup>78</sup> (2) college underage drinking is the only category where efforts to reduce alcohol consumption have not been effective;<sup>79</sup> and (3) “approximately 25 percent of college students report academic consequences of their drinking, including missing class, falling behind, doing poorly on exams or papers, and receiving lower grades overall.”<sup>80</sup> In other words, binge drinking not only plays a part in college students dying, developing life-long health issues, and suffering sexual assaults, but also strikes at the heart of the mission of the college—the ability for 20 percent of students to obtain full educational benefits.<sup>81</sup> Most recently in 2015, the NIAAA launched the *CollegeAIM*<sup>82</sup> website enabling colleges to access comprehensive data on research, strategies, and prevention programs in order to design a bespoke overall campus strategy to address high-risk drinking by combining individual and environmental level programming.<sup>83</sup>

Currently, the absence of public comment means it is unknown if the Trump administration will echo the refrain of “change the campus drinking culture.” The federal government will be acting soon as both the HEA is up for reauthorization this year and the ED initiated the notice and comment process for a new Title IX regulation in November 2018.<sup>84</sup>

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75 See U.S. DEP’T OF HEALTH AND HUM. SERVS., NAT’L INSTS. OF HEALTH, NAT’L. INSTIT. ON ALCOHOL ABUSE AND ALCOHOLISM, SUMMER 2011 ISSUE 23, NIAAA NEWS NIAAA COLLEGE PRESIDENTS WORKING GROUP (2011), available at <https://pubs.niaaa.nih.gov/publications/Newsletter/Summer2011/article03.htm>.

76 See REP. UNDERAGE DRINKING, *supra* note 12, at 16.

77 *Id.* at 26.

78 *Id.* at 14.

79 *Id.* at 10.

80 *Id.* at 14.

81 The author calculated 20 percent of all college students report adverse academic consequences from drinking because the 25 percent of students who drink and report academic consequences, *see infra* note 80, out of the 80.5 percent of all college students who drink, *see infra* note 12, equals 20.125 percent of all students.

82 See *The NIH Almanac*, U.S. DEP’T OF HEALTH AND HUM. SERVS., NAT’L. INST. OF HEALTH, (last modified 5/9/17), available at <https://www.nih.gov/about-nih/what-we-do/nih-almanac/national-institute-alcohol-abuse-alcoholism-niaaa>; *see also* Event Announcement from the U.S. Dep’t of Health and Hum. Servs., Nat’l. Inst. Of Health on NIAAA CollegeAIM Launch (Sept. 22, 2105), available at <https://www.niaaa.nih.gov/news-events/meetings-events-exhibits/niaaa-collegeaim-launch>.

83 COLLEGEAIM ALCOHOL INTERVENTION, NAT’L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, <https://www.collegedrinkingprevention.gov/CollegeAIM/EnvironmentalStrategies/default.aspx#close> (last visited Jan. 11, 2019) [hereinafter COLLEGEAIM].

84 See Press Release from U.S. Dep’t of Educ., Press Office of Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All (Nov.

The federal government's past actions throughout Democratic and Republican administrations repeatedly emphasized both the need to address the dangerous drinking culture on college campuses and that it is government's role in a deliberative democracy to lead on issues where there is a collective desire for change. Between 1989 and 2006, after national establishment of 21 as the drinking age, Congress addressed the campus drinking problem in five pieces of legislation. Over fifteen federal agencies are involved in efforts to reduce dangerous underage drinking.<sup>85</sup> Since the first NIAAA warning in 1976, the federal government has remained consistent in the message that alcohol abuse is a major health and safety risk to America's college students.

### ***B. High-Risk Drinking and Sexual Assault***

Campus alcohol abuse results in safety, health, and academic consequences. One high-risk situation, both for health and safety reasons, is when college students who are drinking engage in sexual activity. The Obama administration prioritized preventing campus sexual assault without addressing the complex relationship between drinking and college sex. Approximately 72 percent of students who allege sexual assault on campus were under the influence of alcohol at the time of the incident.<sup>86</sup> An ethnographer involved in a large campus sexual assault study found the project challenging as "he had not dealt with as many people who were using substances, especially alcohol" in his previous research, finding "there's a lot of drunk sex, and it's actually kind of intentional."<sup>87</sup> The confluence of drinking and sexual assault is especially difficult to tease apart as many college students consume alcohol purposefully as "drunk hooking up is part of the fun."<sup>88</sup>

Being careful to avoid victim blaming, but acknowledging the correlation between drinking and sexual assault, Sen. Biden, in a report addressing the college alcohol problem, wrote in 2000:

Alcohol is involved in violence against college women. While the precise causal role alcohol plays in such violence is still to be determined, enough evidence exists for its powerful correlation with violence perpetration and victimization to warrant special attention. Recent evidence suggests that alcohol plays much more than an exacerbating role, and probably plays a causal role in violent crime, both in perpetration and in raising the risk of victimization. While it is absolutely correct that alcohol use should never

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16, 2018), available at <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all>.

85 See Sober Truth on Preventing Underage Drinking Act, Pub. L. No. 109-422, 120 Stat. 2890 (2006).

86 Meichun Mohler-Kuo et al., *Correlates of Rape while Intoxicated in a National Sample of College Women*, J. OF STUD. ON ALCOHOL, Jan. 2004, at 37, 42, available at <http://archive.sph.harvard.edu/cas/Documents/rapeintox/037-Mohler-Kuo.sep1.pdf>.

87 Marc Parry, *The Sex Study That Could Alter Our Understanding of Campus Assault*, CHRON. OF HIGHER EDUC. (Feb. 9, 2018), <https://www.chronicle.com/article/The-Sex-Study-That-Could-Alter/242484>.

88 See *id.*

function as an excuse for violence, it is also true that alcohol abuse plays a role in creating violence.<sup>89</sup>

Furthermore, the Obama administration relied upon the one in five women are sexually assaulted during college figure from the 2007 *Campus Sexual Assault Study* (CSA) as the basis for taking imperative action.<sup>90</sup> Significantly, the report concluded that colleges “need to incorporate alcohol and drug messages into sexual assault prevention and risk reduction programming.”<sup>91</sup>

Regardless that it might seem logical to combine the advice from the highly vaunted CSA Study with Biden’s conclusion about excessive drinking on campus, especially as many experts subsequently have also opined that sexual assault prevention programs should be combined with alcohol abuse programs,<sup>92</sup> the Obama administration chose a different path. Sexual assault specialists understand “interventions that target binge drinking ‘offer the most hope’ as the vast majority of sexual assaults on college campuses involve alcohol”<sup>93</sup> and that colleges will not solve the problem of sexual assault “unless we also address the issue of excessive drinking.”<sup>94</sup> Addressing alcohol abuse in coordination with sexual assault prevention programs, if framed properly, will avoid victim blaming and can be especially empowering for women.<sup>95</sup> Nevertheless, as the next section illustrates, the Obama administration chose to avoid the binge drinking topic when addressing campus sexual assault.

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89 BIDEN, *supra* note 1, at 51.

90 See generally Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts, U.S. Dep’t of Educ., Off. For Civil Rights (Apr. 4, 2011), at 1 n.4, available at [https://obamawhitehouse.archives.gov/sites/default/files/fact\\_sheet\\_sexual\\_violence.pdf](https://obamawhitehouse.archives.gov/sites/default/files/fact_sheet_sexual_violence.pdf); see also CHRISTOPHER KREBS ET AL., THE CAMPUS SEXUAL (CSA) STUDY: FINAL REPORT xviii (Dec. 2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [hereinafter CSA STUDY]; see also Emily Yoffe, *The Problem with Campus Sexual Assault Surveys*, SLATE (Sept. 24, 2015, 3:34 PM), [http://www.slate.com/articles/double\\_x/doublex/2015/09/aau\\_campus\\_sexual\\_assault\\_survey\\_why\\_such\\_surveys\\_don\\_t\\_paint\\_an\\_accurate.html](http://www.slate.com/articles/double_x/doublex/2015/09/aau_campus_sexual_assault_survey_why_such_surveys_don_t_paint_an_accurate.html).

91 See CSA STUDY, *supra* note 90, at vii.

92 See Mohler-Kuo et al, *supra* note 86, at 37; see also Elizabeth A. Armstrong et al., *Sexual Assault on Campus: A Multilevel, Integrative Approach to Party Rape*, 53 SOC. PROBS. 483, 496 (2006) (“[endorsing] a focus on the role of alcohol in sexual assault”); Rana Sampson, *Acquaintance Rape of College Students*, PUB. HEALTH RESOURCES, Aug. 2003, at 25, <http://digitalcommons.unl.edu/publichealthresources/92> (stating “researchers agree about the importance of combining rape prevention programs for college students with substance abuse prevention programs, especially regarding binge drinking”); Lloyd Vries, *Binge Drinking, Rape Are Related*, CBS/AP (Feb. 12, 2004, 12:38 PM), <https://www.cbsnews.com/news/binge-drinking-rape-are-related/> (“I think it’s very important to do the education about alcohol consumption, together with education about rape, since such a large proportion of rapes are connected to drinking,” Wechsler said.).

93 Alice Park, *Frats ask for Sexual Assault Workshops*, YALE NEWS (Mar. 28, 2018), <https://yaledailynews.com/blog/2018/03/28/frats-ask-for-sexual-assault-workshops/>.

94 Raynard S. Kington, *The Missing Factor*, INSIDE HIGHER ED (May 8, 2014), <https://www.insidehighered.com/views/2014/05/08/essay-asks-why-white-house-efforts-combat-sexual-assault-arent-more-focused-alcohol>.

95 Antonia Abbey et al., *Alcohol and Dating Risk Factors for Sexual Assault Among College Women*, 20 PSYCHOLOGY OF WOMEN QUARTERLY 147, 165 (1996); see also Sarah Brown, ‘Empowerment Self-Defense’ Programs Make Women Safer. Why Don’t More Colleges Use Them?, THE CHRON. OF HIGHER EDUC., Apr. 19, 2019, available at <https://www.chronicle.com/article/Empowerment-Self-Defense-/246144> (finding self-defense classes “cut the women’s rate of sexual victimization by 37 percent”).

### *C. Purging Alcohol from the Sexual Assault Debate*

It is important to distinguish prevention from determinations of responsibility in individual situations. The purpose of prevention is “the action of stopping something from happening or arising.”<sup>96</sup> Risk reduction, “a decrease in the probability of an adverse outcome,”<sup>97</sup> is an important component of prevention. As the consequences of sexual assault are potentially severe, taking every possible precaution to lessen the likelihood of an incident is preferable to allowing harm to occur and then determining punishment.

Sexual assault prevention is distinct from and must be divorced from discussions of after the fact punishment or blame. The Obama administration neglected to address this important distinction and thereby missed the opportunity to address the interplay between alcohol and college sexual assault. On April 4, 2011, the ED’s Office of Civil Rights (OCR) distributed a “significant guidance document,”<sup>98</sup> referred to as the 2011 Dear Colleague Letter (DCL), to provide the public and colleges information on the Obama’s administration’s interpretation of Title IX rights and requirements.<sup>99</sup> The DCL which purportedly “explains schools’ responsibility to take immediate and effective steps to end sexual harassment and sexual violence,”<sup>100</sup> has three paragraphs outlining education and prevention whereas the remainder of the nineteen pages addresses reporting, treatment, and adjudication for sexual violence.<sup>101</sup>

The campus sexual assault messaging from the Executive Branch was framed in victim centered language with the focus on never blaming the alleged victim.<sup>102</sup> The concern for victims is undeniably important and the Obama Administration’s description of the problem works well in many formats. However, without losing sight of the need to stop “rapists [who] are primarily responsible for preventing rape,”<sup>103</sup> it is also possible to simultaneously focus on prevention through the lens

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96 English Oxford Living Dictionaries, <https://en.oxforddictionaries.com/definition/prevention> (last visited Jan. 11, 2019).

97 Medical Dictionary, <https://medical-dictionary.thefreedictionary.com/risk+reduction> (last visited Jan. 11, 2019).

98 See JARED P. COLE AND TODD GARVEY, CONG. RESEARCH SERV., R44468, General Policy Statements: Legal Overview (2016) (explaining guidance document are exempt from the Administrative Procedure Act (APA) whereas “legislative rules’ carry the force of law and are required to undergo the notice and comment procedures of the [APA]”).

99 See generally Dear Colleague Letter: Sexual Violence from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Off. For Civil Rights (Apr. 4, 2011) available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

100 *Id.* at 2.

101 See *id.*

102 See generally WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, OFFICE OF THE VICE PRESIDENT AND WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, NOT ALONE, (Apr. 2014) available at [http://www.changingourcampus.org/resources/not-alone/WH\\_Task\\_Force\\_First\\_Report.pdf](http://www.changingourcampus.org/resources/not-alone/WH_Task_Force_First_Report.pdf) [hereinafter WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 2014].

103 See Tara Culp-Ressler, *Obama Launches Initiative To Combat Rape: ‘I Want Every Young Man To Feel Some Strong Peer Pressure,’* THINKPROGRESS (Jan. 22, 2014), [https://thinkprogress.org/obama-launches-initiative-to-combat-rape-i-want-every-young-man-to-feel-some-strong-peer-pressure-566ab3bbb2a2/;](https://thinkprogress.org/obama-launches-initiative-to-combat-rape-i-want-every-young-man-to-feel-some-strong-peer-pressure-566ab3bbb2a2/)

of reducing the number of high risk situations all college students face, which by definition includes sexual violence.<sup>104</sup>

Additionally, college policies based on personal responsibility that do not encompass the message that alcoholic abuse is detrimental to decision making are ineffective, especially in relation to a harm that mostly occurs within the confines of the campus drinking culture.<sup>105</sup> In an effort to encourage reporting, the Obama administration decided to rely primarily on bystander intervention, consent education, and the threat of punishment to prevent sexual assault.<sup>106</sup> If students are drunk when attempting to apply their training from either bystander intervention or consent education, both programs are likely to be ineffective.<sup>107</sup> Similarly, an incapacitated or highly inebriated student is likely not focused on the long-term consequences of their actions. Thus, reducing binge drinking is important to ensure proper implementation of sexual assault prevention policies. Nonetheless, the messaging from ED, the White House, the DOJ, and the CDC ensured the topic of alcohol consumption was excised from the college sexual assault conversation by removing drinking from prevention materials.

### 1. Department of Education

The DCL, which primarily focused on the alleged victim, laid out procedural requirements by mandating each college designate a Title IX coordinator and implement proscribed grievance processes, investigation parameters, remedies, enforcement, as well as preventive education.<sup>108</sup> When addressing prevention, the DCL uses the word “alcohol” twice; not in reference to stopping sexual assault, but to ensure colleges understand it “never makes the victim at fault for sexual violence” and underage drinking should not deter reporting.<sup>109</sup> Both of the references refer to a post hoc look at an alleged victim’s alcohol consumption, completely ignoring the importance in curbing excessive drinking to reduce the occurrence of assaults in the first place.

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see also Vries, *supra* note 92 (“rapists alone are responsible”).

104 See Robin Wilson, *Why Campuses Can’t Talk About Alcohol When It Comes to Sexual Assault*, THE CHRON. OF HIGHER EDUC., Sept. 4, 2014, available at <https://www.chronicle.com/article/Why-Campuses-Can-t-Talk/148615>; see also Emily Yoffe, *Emily Yoffe Responds to Her Critics*, SLATE (Oct. 18, 2013 12:05 PM), [http://www.slate.com/blogs/xx\\_factor/2013/10/18/rape\\_culture\\_and\\_binge\\_drinking\\_emily\\_yoffe\\_reponds\\_to\\_her\\_critics.html](http://www.slate.com/blogs/xx_factor/2013/10/18/rape_culture_and_binge_drinking_emily_yoffe_reponds_to_her_critics.html) (discussing the response to her article advising women that the binge drinking culture is toxic was personal attack that she was promoting a rape culture).

105 See Meichun Mohler-Kuo et al., *supra* note 86, at 27, 42.

106 See Fact Sheet from the White House, Off. of the Press Sec’y on Final It’s On Us Summit and Report of the White House Task Force to Protect Students from Sexual Assault (Jan. 5, 2017), available at <https://obamawhitehouse.archives.gov/the-press-office/2017/01/05/fact-sheet-final-its-us-summit-and-report-white-house-task-force-protect> [hereinafter Final It’s On Us Summit]; see also Dear Colleague Letter, at 9–12, *supra* note 99.

107 See Ruschelle Leone & Dominc Parrott, *Acute Alcohol Intoxication Inhibits Bystander Intervention Behavior for Sexual Aggression Among Men with High Intent to Help*, 43 ALCOHOLISM: CLINICAL AND EXPERIMENTAL RESEARCH 170, 178 (2019) (finding to be effective bystander intervention programs should incorporate alcohol abuse prevention). A person incapacitated due to alcohol is incapable of gaining or giving consent.

108 See Dear Colleague Letter, *supra* note 99.

109 *Id.* at 15.

Sublimating alcohol abuse prevention to sexual assault prevention may not necessarily create the desired outcome in reporting. In a footnote, the DCL refers to the HEC as a resource for colleges to develop best practices for addressing alcohol problems.<sup>110</sup> However, the context of the reference is not sexual assault prevention but the possible “chilling effect” of alcohol disciplinary policies on the reporting of sexual assaults.<sup>111</sup> Ensuring barriers to reporting sexual assault are minimized is a laudable goal but is not unrelated to the purpose of the HEC—to reduce alcohol and substance abuse. If fewer students abuse alcohol, fewer students will be fearful of being blamed when reporting sexual assault. Significantly, a student cannot be fearful of reporting that they were unable to give consent due to incapacitation if the school has successfully educated that student not to binge drink in the first place. Eliminating alcohol abuse can be an additional tool to increase reporting.

Unfortunately, the HEC which was funded by the Secretary with the ED’s discretionary fund,<sup>112</sup> was eliminated within a year of promulgating the DCL.<sup>113</sup> With the termination of the program, a 2011 guidance letter intended for every college president “[making] the case that addressing alcohol and other drug abuse on [college] campuses is critical to meeting [college] academic goals, as well as meeting the President’s College Graduation Goal”<sup>114</sup> was apparently never sent.<sup>115</sup> The Office of Safe and Drug-Free Schools that had housed the HEC was renamed the Office of Safe and Healthy Students and subsumed within the Office of Elementary and Secondary Education in 2011.<sup>116</sup> By placing the student alcohol and drug programs under the auspices of an office focusing on preschool through high school students, the ED thereby effectively eliminated the programming connections with colleges. The Obama administration shifted priorities from funding the HEC, which combined college alcohol, drug, and violence prevention under one roof to focusing almost exclusively on efforts to combat campus sexual assault. In addition, by 2011 the discretionary grant programs managed by the ED which specifically addressed high-risk drinking among college students had been defunded.<sup>117</sup>

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110 *See id.* at n.40.

111 *See id.* at 15.

112 E-mail from William DeJong, Prof. Dep’t of Cmty. Health Sci., Boston U. Sch. Pub. Health, to author (March 7, 2018, 16:54 EST) (on file with author).

113 *See* HIGHER EDUCATION CENTER, <http://hecaod.osu.edu/about/> (last visited Jan. 11, 2019).

114 Dep’t of Educ., Off. Of Safe and Drug-Free Schs., Working Draft on Recovery/Relapse Prevention in Educational Settings, (May 13, 2011 ), *available at* <https://www2.ed.gov/about/offices/list/osdfs/recoveryrpt.pdf> at 15.

115 The author could not find any evidence the HEC draft guidance letter was finalized, approved, or sent.

116 OFF. OF SAFE AND DRUG-FREE SCHS., DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/osdfs/index.html> (July 22, 2018).

117 *See* Prevention Grants Inventory, Off. Of Safe and Drug-Free Schools, Dep’t of Educ., *available at* [https://obamawhitehouse.archives.gov/sites/default/files/ondcp/prevention/safe\\_and\\_drug-free\\_schools\\_and\\_communities\\_national\\_activities.pdf](https://obamawhitehouse.archives.gov/sites/default/files/ondcp/prevention/safe_and_drug-free_schools_and_communities_national_activities.pdf); *see also* Funding Status Grant Competition to Prevent High-Risk Drinking or Violent Behavior among College Students, U.S. DEP’T OF EDUC., *available at* <https://www2.ed.gov/programs/dvphighrisk/funding.html>; *see also* Funding Status Grants for Coalitions to Prevent and Reduce Alcohol Abuse at Institutions of Higher Education, U.S. DEP’T OF EDUC., *available at* <https://www2.ed.gov/programs/stopact/funding.html>; *see also* Funding

Furthermore, the ED's promotion of sexual assault and alcohol misconduct campus crime statistics that are not formulated on a comparable basis misrepresent the frequency of alcohol induced harms. The federal Clery Act statute requires colleges that receive federal funding to maintain and disclose campus crime statistics.<sup>118</sup> However, the data underreports alcohol violations compared to sexual assault because the threshold for including a particular crime for the two categories is fundamentally different. All reported sexual misconduct complaints are tallied, even if not investigated, not proven in a college disciplinary proceeding, or recanted;<sup>119</sup> whereas, only liquor violations contrary to state law for which the college has made a positive determination and may impose a disciplinary sanction are recorded.<sup>120</sup> Alcohol problems that are not counted unless there was a disciplinary referral include drunkenness, driving under the influence, and alcohol disciplinary actions where sanctions are imposed but the law was not violated.<sup>121</sup> The result is an apples to oranges problem wherein every sexual assault complaint is considered a crime regardless of the existence of any level of evidence yet only the subset of student alcohol misconduct violations that are proven illegal are included. Given the variability in harm suffered for all but the most heinous crimes, the numbers can only show the likelihood of an individual becoming the victim of a given type of crime on campus. The combination of counting even unproven sexual assaults while undercounting alcohol problems skews the perception of the relative risks to students on campus.

## 2. *The White House*

The White House, too, sought to downplay the role of alcohol in their public campaign to end college sexual assault. President Obama announced the formation of an interagency White House Task Force to protect students from sexual assault on January 22, 2014.<sup>122</sup> The group's remit included "providing institutions with evidence-based best and promising practices for preventing ... rape and sexual assault."<sup>123</sup> In the Task Force's first report titled *Not Alone* in April 2014, the word

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Status Models of Exemplary, Effective, and Promising Alcohol or Other Drug Abuse Prevention Programs on College Campuses, U.S. DEP'T OF EDUC., available at <https://www2.ed.gov/programs/dvpcollege/funding.html>.

118 See FED. STUDENT AID, U.S. DEP'T OF EDUC., available at <https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports>.

119 See *The Handbook for Campus Safety and Security Reporting*, U.S. DEP'T OF EDUC. (2016) available at <https://ifap.ed.gov/eannouncements/attachments/HandbookforCampusSafetyandSecurityReporting.pdf> (a Clery crime may be categorized as unfounded only if law enforcement determine "the crime did not occur and was never attempted").

120 See *The Handbook for Campus Safety and Security Reporting*, U.S. DEP'T OF EDUC. (2016) available at <https://ifap.ed.gov/eannouncements/attachments/HandbookforCampusSafetyandSecurityReporting.pdf>.

121 See *id.*

122 See generally Memorandum from the White House, Off. of the Press Sec'y on Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), available at <https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a> (including in the membership of the Task Force: Att'y Gen., Sec'y Interior, Sec'y Health and Human Servs., Sec'y, U.S. Dept. of Ed., as well as "heads of agencies or offices as the Co Chairs may designate").

123 See *id.*

“alcohol” did not appear in the section on prevention.<sup>124</sup> The report promoted Bystander Intervention programs, which encourage witnesses to take action if they see someone at risk of assault, as a promising prevention strategy with plans for the President to support the concept in Public Service Announcements.<sup>125</sup>

The Task Force’s silence on alcohol is at best an oversight or at worst, purposely misleading. Within the twenty-page *Not Alone* document, the word “alcohol” appears only once referencing facilitated assaults.<sup>126</sup> However, an electronic link for “best practices for better prevention”<sup>127</sup> leads to the CDC’s *Preventing Sexual Violence on College Campuses: Lessons from Research and Practice*.<sup>128</sup> Within the second document, under promising strategies, the CDC finds that as “research has shown that alcohol use and sexual violence are associated . . . alcohol policy has the potential to prevent or reduce sexual violence perpetration.”<sup>129</sup> The CDC further references research finding that “alcohol policy approaches may be useful components of comprehensive sexual violence perpetration prevention strategies.”<sup>130</sup> This suggests the Task Force was aware that alcohol is a risk factor in sexual assault, yet the *Not Alone* report does not recommend teaching students to refrain from excessive drinking. In an effort to make victims feel comfortable reporting, the Obama administration removed references to alcohol thereby ignoring risk reduction as a component of prevention in the campus environment.

The White House launched the high profile “It’s On Us” program on September 19, 2014 “to advance the goal of preventing sexual assault.”<sup>131</sup> The public awareness and education campaign supported by public-private partners “focused on three core pillars—consent education, increasing bystander intervention, and creating an environment that supports survivors.”<sup>132</sup> Obama mentioned “bystander” eight times during the “It’s On Us” rollout but never addressed the topic of alcohol.<sup>133</sup>

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124 See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 2014, *supra*, note 102, at 9-10.

125 See *id.*

126 *Id.* at 13.

127 *Id.* at 9.

128 See Report for the White House Task Force to Protect Students from Sexual Assault, CENTERS FOR DISEASE CONTROL AND PREVENTION (2014) available at <https://www.justice.gov/ovw/page/file/909811/download>.

129 *Id.* at 10.

130 *Id.* at 10.

131 See generally Fact Sheet from the White House, Off. of the Press Sec’y on Launch of the “It’s On Us” Public Awareness Campaign to Help Prevent Campus Sexual Assault (Sept. 19, 2014), available at <https://obamawhitehouse.archives.gov/the-press-office/2014/09/19/fact-sheet-launch-it-s-us-public-awareness-campaign-help-prevent-campus>.

132 See generally Final It’s On Us Summit, *supra* note 106.

133 See Remarks by The President At “It’s On Us” Campaign Rollout, 2014 WL 4651795, at \*5; see also Fact Sheet: Resource Guide And Recent Efforts To Combat Sexual Violence On College And University Campuses, 2015 WL 5460724.

The initiative disregarded considerations that limiting drinking could decrease sexual assaults or even the possibility that inebriated bystanders will be ineffective.<sup>134</sup>

The Task Force's second report on January 5, 2017 continued to endorse bystander initiatives and did not include the word "alcohol" in the twenty-five page document except once in an appendix.<sup>135</sup> The report linked to the group's *Guide for College Presidents, Chancellors, and Senior Administrators*.<sup>136</sup> Once again, the prevention section within the referenced guide did not mention the word "alcohol"; moreover, alcohol was not included anywhere in the document.<sup>137</sup> Thus, by 2017, the Task Force had moved away from suggesting the broader campus community, including bystanders, should even consider alcohol in the same conversation as sexual assault prevention.

### 3. Department of Justice

The DOJ also refused to endorse sexual assault prevention programming that included decreasing alcohol consumption as part of the solution. The DOJ's Office on Violence Against Women (OVW) administers a grant program, originally created in 2000,<sup>138</sup> to develop comprehensive campus sexual assault prevention and response programs.<sup>139</sup> The grant solicitation guidance explicitly excludes funding for "projects that focus primarily on alcohol and substance abuse" as "Out-of-Scope Activities."<sup>140</sup> This constraint is significant given comparable programs addressing campus alcohol problems had been eliminated by the ED. In 2011, the year of the DCL, the grant solicitation document overview for the first time included three paragraphs drawing attention to the rationale for denying funds for

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134 See Dominic Parrott & Ruschelle Leone, *Alcohol probably makes it harder to stop sexual violence – so why aren't colleges talking about?*, THE CONVERSATION (Feb. 20, 2018 6:40 AM), <https://theconversation.com/alcohol-probably-makes-it-harder-to-stop-sexual-violence-so-why-arent-colleges-talking-about-it-87048>; see also COLLEGEAIM, *supra* note 83 (ranking by CollegeAIM of bystander interventions in the lowest category as "too few robust studies to rate effectiveness—or mixed results").

135 See generally WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, OFFICE OF THE VICE PRESIDENT AND WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, THE SECOND REPORT, (Jan. 5, 2017), available at <https://obamawhitehouse.archives.gov/sites/obamawhitehouse.archives.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF> [hereinafter THE SECOND REPORT].

136 *Id.* at 2.

137 See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, OFFICE OF THE VICE PRESIDENT AND WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, PREVENTING AND ADDRESSING CAMPUS SEXUAL MISCONDUCT: A GUIDE FOR UNIVERSITY AND COLLEGE PRESIDENTS, CHANCELLORS, AND SENIOR ADMINISTRATORS, (Jan. 2017) at 8 – 9, available at <https://obamawhitehouse.archives.gov/sites/obamawhitehouse.archives.gov/files/images/Documents/1.4.17.VAW%20Event.Guide%20for%20College%20Presidents.PDF>.

138 See Garrine P. Laney, *Violence Against Women Act: History and Federal Funding*, Congressional Research Service (2010), [https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1716&context=key\\_workplace](https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1716&context=key_workplace) (VAWA 2000 "created new grant programs to address sexual assaults on campuses").

139 42 U.S.C. §14045b (2017).

140 U.S. Dep't of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2014), at 13-14, available at <https://www.justice.gov/sites/default/files/ovw/legacy/2014/01/14/fy2014-campus-solicitation.pdf>.

alcohol projects.<sup>141</sup> The OVW explained that alcohol abuse “is disproportionately high among college students ... [and] may be an important, and all too frequent, exacerbating factor” in campus assault, but that “addressing substance abuse will solve only the substance abuse problem” and can inhibit reporting of campus crimes.<sup>142</sup> The statement by the OVW is contradictory. If decreasing substance abuse will eliminate a “frequent, exacerbating factor” in sexual assaults, reducing the number of students abusing alcohol will mitigate the offenses to some degree and increase the effectiveness of bystander intervention. Additionally, if reporting is inhibited by having to acknowledge personal alcohol abuse, the first step to increase reporting would be to ensure the students are not abusing alcohol. By eliminating binge drinking and removing this inextricably entwined factor, campuses would expect to see decreases in violence, increases in reporting, or at a minimum put to rest the correlation versus causation uncertainty surrounding campus sexual assault and alcohol.

The subsequent grant solicitation materials effectively eliminated the references to high-risk drinking. The word “alcohol”<sup>143</sup> appeared only one or two times in each of the 2012 to 2015 solicitation documents.<sup>144</sup> The 2016 and 2017 documents, each over sixty pages in length, both used the word “alcohol” twice with a secondary purpose to express the mandate that grantees train all disciplinary panels “on the issue of consent in ... alcohol and drug facilitated sexual assault.”<sup>145</sup>

After the OVW started collaborating on campus issues with the Obama White House in 2014,<sup>146</sup> the Congressionally funded grant program grew from \$6 million

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141 See U.S. Dep’t of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2011), at 4, available at <https://apply07.grants.gov/apply/opportunities/instructions/oppOVW-2011-2901-cfda16.525-instructions.pdf>.

142 See *id.*

143 Alternatives for the word “alcohol” also did not appear in the documents.

144 See U.S. Dep’t of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2012), available at <https://www.justice.gov/archive/ovw/docs/campus-solicitation.pdf>; see also U.S. Dep’t of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2013), available at <https://www.justice.gov/archive/ovw/docs/2013-campus-program.pdf>; see also U.S. Dep’t of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2014), available at <https://www.justice.gov/sites/default/files/ovw/legacy/2014/01/14/fy2014-campus-solicitation.pdf>; see also U.S. Dep’t of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2015), available at [https://www.justice.gov/sites/default/files/ovw/pages/attachments/2015/02/09/campus\\_program\\_solicitation2.pdf](https://www.justice.gov/sites/default/files/ovw/pages/attachments/2015/02/09/campus_program_solicitation2.pdf).

145 See U.S. Dep’t of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2016), at 5, available at <https://www.justice.gov/ovw/file/811241/download>; see also U.S. Dep’t of Justice, Off. On Violence Against Women, OMB No. 1122-0020, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation (2017), at 5, available at <https://www.justice.gov/ovw/page/file/923431/download>.

146 See U.S. Dep’t of Justice, Off. On Violence Against Women, Accomplishments of the Office

awarded to eighteen colleges in 2014 to \$25 million awarded to forty-five colleges in 2016.<sup>147</sup> The DOJ's grant program aimed at reducing sexual assault on campus not only ignored the fact that alcohol can be an important factor but, given the demise of other ED college alcohol programs,<sup>148</sup> denied the opportunity for a school to develop programming focused on high-risk drinking.

One of the grants from the OVW funded the Center for Changing Our Campus Culture: An Online Resource to Address Sexual Assault, Domestic Violence, Dating Violence, and Stalking.<sup>149</sup> Alcohol is not mentioned on the website.<sup>150</sup> In the ninety-three-page comprehensive report entitled *Addressing Gender-Based Violence on College Campuses: Guide to a Comprehensive Model*, the sole reference to alcohol appears under the community engagement goals as a warning that "some people ... still misconstrue risk reduction (... watching your alcohol consumption ...) as prevention."<sup>151</sup> The OVW rightly understands that blaming the victim after the fact for drinking is not prevention and is counterproductive; but, reducing alcohol abuse can allay a major risk factor for campus assault.<sup>152</sup> If the goal is elimination of college sexual assault, stopping excessive drinking is a necessary preventative piece of the puzzle.

The OVW went as far as to ask a presenter at one of their functions to remove the word "alcohol" from the title of her talk "Hooking Up, Alcohol, and Sexual Assault: Understanding the Connections and Reducing the Problem."<sup>153</sup> The DOJ considered highlighting the uncontroverted connection between high-risk drinking and sexual assault to be controversial.

#### 4. Centers for Disease Control and Prevention

The CDC could not avoid the issue of alcohol when writing about sexual assault, but the agency buried the connection in their documents. As previously mentioned, the CDC's report to the White House's task force, *Preventing Sexual Violence on College Campuses: Lessons from Research and Practice*, calls out "alcohol policy [as

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on Violence Against Women (Jan. 2017), at 3, available at <https://www.justice.gov/ovw/page/file/929506/download>.

147 See THE SECOND REPORT, *Supra* note 135; compare to Press Release from U.S. Dep't of Justice, Office of Public Affairs on Justice Department Awards \$25 Million to Address Sexual Violence on Campuses (Sept. 29, 2016), available at <https://www.justice.gov/opa/pr/justice-department-awards-25-million-address-sexual-violence-campuses>.

148 See Section I.C.1., *supra*.

149 CENTER FOR CHANGING OUR CAMPUS CULTURE, <http://changingourcampus.org> (last visited Jan. 11, 2019).

150 See *id.*

151 *Addressing Gender-Based Violence on College Campuses: Guide to a Comprehensive Model*, Off. On Violence Against Women, Dep't. of Just. Grant No. 2015-TA-AX-K063 (2017), at 13, available at <http://changingourcampus.org/documents/FINAL-GBV-Comprehensive-Model-22117.pdf>.

152 See CSA STUDY, *supra* note 90, at 2-6.

153 Wilson, *supra* note 104.

having] the potential to prevent or reduce sexual violence perpetration.”<sup>154</sup> The report suggests that “college prevention efforts should focus on risk and protective factors that are most relevant in young adulthood and in the college environment, such as ... alcohol use.”<sup>155</sup> Nonetheless, alcohol is minimized in the document and is not included in the full page highlight section of the document.<sup>156</sup> Alcohol is not included in the descriptions of the four selected best prevention programs. Similarly, only one of the 135 CDC-funded Rape Prevention and Education (RPE) programs were related to decreasing drinking.<sup>157</sup>

The second CDC report for the White House Task Force, focusing on “Strategies for Prevention,” in 2016 included a few more references to alcohol, but the topic continues to be minimized.<sup>158</sup> The report acknowledged that “the use of alcohol and drugs can contribute to perpetration and victimization,” while making it clear that “victim-blaming should never occur and always be taken into consideration when developing prevention messages.”<sup>159</sup> Reduction of alcohol use is to be accomplished solely by limiting student access to alcohol or enforcement of drinking laws, as opposed to educating individuals not to binge drink by teaching students responsibility for their own behavior.<sup>160</sup> The message is reinforced in the CDC’s two-page summary of approaches to stop sexual assault where alcohol falls under the category of a community-level risk which should be managed by the government and businesses, as opposed to assigning primary responsibility to colleges or students.

Most telling is that neither the current CDC activity summary document on *Preventing Sexual Violence on College*<sup>161</sup> nor the CDC’s “Sexual Violence: Prevention Strategies” webpage include the words “drinking” or “alcohol”.<sup>162</sup>

#### ***D. Missed Opportunity – Underutilizing The Drug-Free Schools and Communities Act***

In direct contrast to the attention and resources given to Title IX and the Clery Act by the Obama administration, the enforcement efforts aimed at the DFSCA

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154 Report for the *White House Task Force to Protect Students from Sexual Assault*, *supra* note 128, at 10.

155 *Id.* at 36.

156 *Id.* at 2.

157 *Id.* at 19–27.

158 Dills J, Fowler D, Payne G. *Sexual Violence on Campus: Strategies for Prevention*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 2016. <https://www.cdc.gov/violenceprevention/pdf/campusv-prevention.pdf>.

159 *Id.* at 10.

160 *Id.* at 16

161 See CENTERS FOR DISEASE CONTROL AND PREVENTION, PREVENTING SEXUAL VIOLENCE ON COLLEGE AND UNIVERSITY CAMPUSES: A SUMMARY OF CDC ACTIVITIES, <https://www.cdc.gov/violenceprevention/pdf/campusvsummary.pdf> (last visited on Jan. 11, 2019).

162 See CENTERS FOR DISEASE CONTROL AND PREVENTION, SEXUAL VIOLENCE: PREVENTION STRATEGIES, <https://www.cdc.gov/violenceprevention/sexualviolence/prevention.html> (last visited Jan. 11, 2019).

mandated campus alcohol policies have remained largely under supported. The ED demonstrated an initial surge of support in the form of establishing the HEC in 1995, which then published a DFSCA compliance handbook in 1997.<sup>163</sup> The handbook was subsequently updated in 2006.<sup>164</sup> Regardless that the ED was tasked with enforcing compliance with the regulations and authorized the ED Secretary to issue monetary penalties for noncompliance,<sup>165</sup> in 2012 the Office of Inspector General found the ED “performed no oversight activities of [colleges] ... alcohol abuse prevention programs from 1998 to 2010.”<sup>166</sup> In a 2011 “Dear Higher Education Partner” letter, the Obama administration reminded colleges of their obligations to address high-risk drinking and put colleges on notice that the ED would increase monitoring of college compliance.<sup>167</sup> The ED secretary promised colleges expanded resources would be available from the HEC for the creation of effective programming, educational campaigns, and grant investments for a “Healthy Colleges Campuses competition”<sup>168</sup> It is unclear if or in what form the ED provided assistance to colleges with managing their DFSCA compliance;<sup>169</sup> but as previously mentioned, the HEC was defunded in 2011, within months of the letter from the ED secretary effectively abandoning his pledge. On the other hand, the ED did follow through with additional oversight of the DFSCA requirements.<sup>170</sup>

The increased enforcement by the ED did not initially lead to colleges proactively complying with the DFSCA. A survey of colleges in 2015 suggests that close to half of all colleges were out of compliance.<sup>171</sup> During 2014 and 2015, fifty-seven colleges were found out of compliance with the DFSCA regulations and six colleges were fined. In 2016, a letter announcing the outcome of the two-year Penn State Sandusky investigation included ten violations of the Clery Act and

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163 U.S. DEP’T OF EDUC., PUB. NO. ED/OPE97-2, *COMPLYING WITH THE DRUG-FREE SCHOOLS AND CAMPUSES REGULATIONS [EDGAR PART 86]: A GUIDE FOR UNIVERSITY AND COLLEGE ADMINISTRATORS* (1997).

164 U.S. DEP’T OF EDUC., PUB. NO. ED-04-CO-0137, *COMPLYING WITH THE DRUG-FREE SCHOOLS AND CAMPUSES REGULATIONS [EDGAR PART 86]: A GUIDE FOR UNIVERSITY AND COLLEGE ADMINISTRATORS* (2006).

165 34 C.F.R. § 86.301 (1996).

166 Letter from Wanda A. Scott, Asst. Inspector Gen., U.S. Dept. of Ed. Off. Of Inspector Gen., to James W. Runcie, Chief Operating Officer, U.S. Dept. of Ed., Federal Student Aid, *Institution of Higher Education Compliance with Drug and Alcohol Abuse Prevention Program Requirements* (Mar. 14, 2012), at 1, available at <https://www2.ed.gov/about/offices/list/oig/aireports/i1310002.pdf>.

167 See Letter from Arne Duncan, Sec’y, U.S. Dept. of Ed., R. Gil Kerlikowske, Dir., Off. Of Natl. Drug Control Policy, to Inst. Of Higher Ed. Administrators, *2011 National Drug Control Strategy for Inst. Of Higher Ed.* (Sept. 23, 2011), available at [https://obamawhitehouse.archives.gov/sites/default/files/ondcp/ondcp\\_higher\\_ed\\_letter.pdf](https://obamawhitehouse.archives.gov/sites/default/files/ondcp/ondcp_higher_ed_letter.pdf).

168 See *id.*

169 The author could not find records on the “Healthy Colleges Campuses” competition or Federal educational campaigns aimed at college high-risk drinking.

170 See Michael M. DeBowes, *The Resurgence of the Drug-Free Schools and Communities Act: A Call to Action*, StanleyCSS.com (2016), at 3, available at <https://info.stanleycss.com/rs/692-VCY-483/images/Resurgence-of-the-Drug-Free-Schools.pdf?aliId=11153710>.

171 David S. Anderson & Glenn-Milo S. Santos, *Results of the 2015 College Alcohol Survey* (2015), <https://caph.gmu.edu/assets/caph/CollegeAlcoholSurvey2015FinalResults.pdf> (finding 53% of sample institutions failed to comply with evaluating program effectiveness as mandated by 34 C.F.R. 86.100(b) in the required biannual review of campus drug and alcohol programs).

one of the DFSCA.<sup>172</sup> Penn State was fined over \$2 million and the DFSCA portion was 1.1 percent of the total.<sup>173</sup> Though 2018, the ED continues to find colleges in violation of the DFSCA<sup>174</sup> and yet has not provided the resources to update the 2006 compliance handbook.

Paradoxically, during the years the federal government insufficiently supported colleges in alcohol abuse prevention efforts while prioritized the fight against sexual violence on campus, DFSCA determinations drew the connection that ignoring high-risk drinking obligations could create liability for violence that occurred on campus. DFSCA program review reports during 2014 included the statements “data compiled by the Department shows that ... alcohol abuse is highly correlated to increased incidents of violent crimes on campus”<sup>175</sup> and that “more than 90% of all violent campus crimes are drug and alcohol-related.”<sup>176</sup> The Penn State letter directly connected the dots between campus alcohol abuse and crime prevention—the need to abide by the DFSCA in order to avoid liability for violent campus crimes,<sup>177</sup> which by definition includes sexual assault.

The campus drinking culture results in wide ranging consequences to a large number of students and to colleges as institutions. As reducing alcohol abuse on campus is arguably more imperative now than it was when the federal government first rang the warning bell in 1976, binge drinking must be addressed to solve the wide-ranging health and safety problems that include sexual assault.<sup>178</sup>

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172 See Letter from Susan D. Crim, Dir., Admin. Actions & Appeals Service Group, Fed. Student Aid Enforcement Unit, to Eric J. Barron, Pres., Pa. St. U., OPE-ID 00332900 (Nov. 3, 2016), <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PennStateFineLetter.pdf> [hereinafter Penn. State Letter].

173 See Letter from Susan D. Crim, Dir., Admin. Actions & Appeals Service Group, Fed. Student Aid Enforcement Unit, to Eric J. Barron, Pres., Pa. St. U., OPE-ID 00332900 (Nov. 3, 2016), <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PennStateFineLetter.pdf> (total fine of \$2,397,500 of which DFSCA was \$27,500).

174 See Letters published on U.S. Dep’t of Educ. website: <https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports> (post Penn State 2016 letter, at least eleven colleges received Determination Letters which included findings of noncompliance with DFSCA).

175 Letter from Ralph LoBosco, Div. Dir., U.S. Dep’t of Educ., to Steven Spann, Pres., John A. Gupton C., OPE-ID-00885900 (June 10, 2014), at 15, available at [https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/FPRD/JohnAGuptonCollege\\_TN\\_008859\\_06102014\\_FPRD.pdf](https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/FPRD/JohnAGuptonCollege_TN_008859_06102014_FPRD.pdf).

176 Letter from Ralph LoBosco, Div. Dir., U.S. Dep’t of Educ., to Carla Sunberg, Pres., Nazarene Theological Seminary (June 17, 2014), (OPE-ID-00249400), at 15, available at [https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/FPRD/NazareneTheologicalSeminary\\_MO\\_002494\\_06172014\\_FPRD.pdf](https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/FPRD/NazareneTheologicalSeminary_MO_002494_06172014_FPRD.pdf).

177 See Letter from James L. Moore, III, Sen. Advisor, Clery Act Compliance Team, to Eric J. Barron, Pres., Pa. St. U., OPE-ID 00332900 (Nov. 3, 2016), available at <https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/cleryact/pennstate/PSCFPRD10327991.pdf> (the language used in the Pa. St. U. determination is commonly inserted in program review letters, including those of Occidental College, South Carolina State University, University of Jamestown, University of St. Thomas, and Green River College all published in 2017 – 2018, available at <https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports>).

178 See Andrew Johnson, *Alcohol, Drugs a Factor in Vast Majority of Campus Sexual Assaults, University Finds*, THE COLLEGE FIX (Feb. 28, 2018), <https://www.thecollegefix.com/post/42423/>.

## II. EMPOWERING CAMPUS CULTURE CHANGE

The actions by the Obama administration significantly transformed the campus culture by eliminating the silence and stigma surrounding campus sexual assault. To promote the federal government's Title IX policy many levers of power were utilized, all coordinated by the executive branch. The Obama administrative incentivized campus action through creating multiple grant programs. Funding opportunities were available to address sexual assault for the purposes of prevention, enforcement, services, and research.<sup>179</sup> In 2017, the White House promoted grant programs totaling more than \$17 million available through the DOJ's OVV, the HHS's Office of Women's Health, and the CDC.<sup>180</sup>

The Obama administration utilized Title IX as a monetary lever. Through threatening the loss of all federal funding for noncompliance with the DCL, the government affected the way colleges addressed sexual assault claims.<sup>181</sup> The ED interpreted Title IX to require every college to have at least one Title IX coordinator.<sup>182</sup> In response, colleges not only complied but created an industry of Title IX administrators, which were nonexistent prior to 2011, and grew to over 5,000 members in 2016.<sup>183</sup> Harvard has over 50 Title IX administrators and Yale nearly 30.<sup>184</sup> Colleges are spending millions of dollars on "Title IX employees, ... lawyers, investigators, case workers, survivor advocates, peer counselors, workshop leaders and other officials" to comply with federal regulations.<sup>185</sup> In response to federal pressure, an entirely new field of Title IX bureaucracy was created.<sup>186</sup>

To influence school policy, OCR publicly announced college Title IX investigations. The ED published what some have referred to as a "list of shame" denoting every

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179 See generally Release from the White House, Off. Of the Vice President, FACT SHEET: Resource Guide and Recent Efforts to Combat Sexual Violence on College and University Campuses (Sept. 17, 2015), available at <https://obamawhitehouse.archives.gov/the-press-office/2015/09/17/fact-sheet-resource-guide-and-recent-efforts-combat-sexual-violence>. [hereinafter FACT SHEET].

180 See THE SECOND REPORT, *supra* note 135, at 24.

181 See Dear Colleague Letter, *supra* note 99, at 16; see also Will Creely, *Why the Office for Civil Rights' April 'Dear Colleague Letter' Was 2011's Biggest FIRE Fight*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Jan. 3, 2102), <https://www.thefire.org/why-the-office-for-civil-rights-april-dear-colleague-letter-was-2011s-biggest-fire-fight/>.

182 See generally Dear Colleague Letter on Title IX Coordinators from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights (Apr. 24, 2015), at 2, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

183 See Anemona Hartocollis, *Colleges Spending Millions to Deal With Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 29, 2016), <https://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html>.

184 See *id.*

185 See *id.*

186 See generally Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Cal. Law Review 881 (2016); see also, Kylie Cheung, et al., *Federal Government Concludes Investigation into USC's Title IX policies, Finds USC Complied with Recommended Changes*, DAILY TROJAN (Mar. 16, 2018), <https://dailytrojan.com/2018/03/16/federal-government-concludes-investigation-into-uscs-title-ix-policies-finds-usc-complied-with-recommended-changes/> (listing in timeline format over twenty different title ix committees, new employees, training programs, and resources put in place from 2013 to 2017 at USC).

campus that was under investigation for possible Title IX violations.<sup>187</sup> OCR's policy was to list the names of all colleges that had current open investigations for possible violations of the law. Many people, and the press, interpreted the list to mean colleges were presumed guilty prior to a final determination of wrongdoing. While originally proclaiming the list served the purpose of "[driving] a national conversation on sexual violence,"<sup>188</sup> the publication of college names under investigation was later justified as important for transparency and accountability purposes.<sup>189</sup> The decision to publicly promote a list of names based merely on the opening of an investigation likely influenced colleges to behave in a manner to avoid being included among the named and shamed.

Publicity was also utilized to promote a national conversation and encourage student activism. Utilizing the internet and mass media, the Obama administration's message permeated the country. The executive branch's "It's On Us" campaign was promoted through a website with an on-line pledge capability and merchandise shop.<sup>190</sup> "It's On Us" delivered materials to at least 500 campuses, has over eighty sponsors, and has trained almost 5,000 student leaders.<sup>191</sup> The White House launched multiple public service announcements with famous actors and artists, utilizing more than 20,000 media outlets and reaching more than ten million viewers.<sup>192</sup> Inspired by the Obama administration's actions, including his proclamation creating an annual sexual assault awareness month,<sup>193</sup> multiple activist groups were started by college

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187 See Press Release from U.S. Dep't of Educ., Press Off. On U.S. Dep't of Educ. Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), available at <https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>; see also Amy Rock, *Dept. of Ed. Publishes Database of Pending Civil Rights Investigations*, CAMPUS SAFETY (Jan. 19, 2018), <https://www.campussafetymagazine.com/university/dept-ed-civil-rights-database/>.

188 Nick Anderson, *At First, 55 Schools Faced Sexual Violence Investigations. Now the List Has Quadrupled*, THE WASH. POST (Jan. 18, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled/?utm\\_term=.e4a037c32541](https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled/?utm_term=.e4a037c32541).

189 Jennifer Steinhauer and David Joachim, *55 Colleges Named in Federal Inquiry Into Handling of Sexual Assault Cases*, N.Y. TIMES (May 1, 2014), <https://www.nytimes.com/2014/05/02/us/politics/us-lists-colleges-under-inquiry-over-sex-assault-cases.html>.

190 See *It's ON US*, <http://www.itsonus.org> (last visited Jan. 11, 2019).

191 See *id.*

192 See Fact Sheet from the White House, Off. of the Press Sec'y on The "It's On Us" Campaign Launches new PSA, Marks One-Year Since Luanch of "It's On Us" Campaign to End Campus Sexual Assault (Sept. 1, 2015), available at <https://obamawhitehouse.archives.gov/the-press-office/2015/09/01/fact-sheet-its-us-campaign-launches-new-psa-marks-one-year-launch>; see also *1 Is 2 Many*, THE WHITE HOUSE, PRES. BARACK OBAMA, <https://obamawhitehouse.archives.gov/1is2Many> (last visited Jan. 11, 2019) (includes 1 is 2 Many PSA video).

193 See Press Release from Off. of the Press Sec'y, Presidential Proclamation Marking National Sexual Assault Awareness Month, 2009 (Apr. 8, 2009), available at <https://obamawhitehouse.archives.gov/the-press-office/presidential-proclamation-marking-national-sexual-assault-awareness-month-2009>; see also Press Release from Off. of the Press Sec'y, Presidential Proclamation—National Sexual Assault Awareness and Prevention Month (Mar. 31, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/31/presidential-proclamation-national-sexual-assault-awareness-and-preventi>; see also Press Release from Off. of the Press Sec'y, Presidential Proclamation — National Sexual Assault Awareness and Prevention Month, 2013 (Mar. 29, 2013) <https://obamawhitehouse.archives>.

women.<sup>194</sup> The campus advocates reacted vigorously and loudly, most famously with the Columbia “mattress girl” whose “Carry That Weight” performance art piece was recreated on campuses all over the United States and earned her an invitation to the State of the Union from Sen. Gillibrand.<sup>195</sup> “The Hunting Ground,” a movie about campus sexual assault, was promoted by vice-president Biden at the Oscars,<sup>196</sup> screened at the White House<sup>197</sup> and on more than 1,000 campuses.<sup>198</sup> The film’s website is digitally linked to “It’s On Us.”<sup>199</sup> Paradoxically, the White House and the ED were marginally involved in the Rolling Stone’s Jackie of UVA article<sup>200</sup> that set off arguably the most controversial campus moral panic<sup>201</sup> post the Duke lacrosse scandal.<sup>202</sup> The extensive publicity allowed the administration’s message to influence activities on almost every college campus.

Furthermore, the tactics utilized by the Obama administration not only spread their message by changing the campus conversation concerning sexual assault

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[gov/the-press-office/2013/03/29/presidential-proclamation-national-sexual-assault-awareness-and-preventi](http://www.whitehouse.gov/the-press-office/2013/03/29/presidential-proclamation-national-sexual-assault-awareness-and-preventi).

194 See generally KNOW YOUR TITLE IX, <https://www.knowyourix.org> (last visited on Jan. 11, 2019); with END RAPE ON CAMPUS, <http://endrapeoncampus.org> (last visited on Jan. 11, 2019); with SURVJUSTICE, <http://www.survjustice.org> (last visited on Jan. 11, 2019); with CALLISTO, <https://www.projectcallisto.org> (last visited on Jan. 11, 2019); with ULTRAVIOLET, <https://weareultraviolet.org> (last visited on Jan. 11, 2019).

195 See Alexandra, Svokos, *Students bring Out Mattresses In Huge ‘Carry That Weight’ Protest Against Sexual Assault*, HUFFPOST (Oct. 29, 2014 4:21 PM, updated Dec. 6, 2017), [https://www.huffingtonpost.com/2014/10/29/carry-that-weight-columbia-sexual-assault\\_n\\_6069344.html](https://www.huffingtonpost.com/2014/10/29/carry-that-weight-columbia-sexual-assault_n_6069344.html); see also Kirsten Gillibrand, *Carrying Their Weight: Giving Voice to Survivors of Campus Sexual Assault*, HUFFPOST (Jan. 21, 2015 11:51 AM, updated Mar. 23, 2015), [https://www.huffingtonpost.com/rep-kirsten-gillibrand/carrying-their-weight-giv\\_b\\_6516630.html](https://www.huffingtonpost.com/rep-kirsten-gillibrand/carrying-their-weight-giv_b_6516630.html).

196 Leora Yashari, *Documentary The Hunting Ground Are Still Telling Sexual Assault Survivors, “We Believe You”*, Vanity Fair (Jan. 8, 2016 6:01 PM), available at <https://www.vanityfair.com/hollywood/2016/01/the-hunting-ground-annie-clark-andrea-pino>.

197 THE HUNTING GROUND, <http://thehuntinggroundfilm.com/story/> (last visited Jan. 11, 2019).

198 Maria Cuomo Cole & Jimmie Briggs, *The Hunting Ground is Shifting the Culture on Campuses*, HUFFPOST (Jan. 19, 2016 8:09 AM, updated Jan. 19, 2017), [https://www.huffingtonpost.com/maria-cuomo-cole/the-hunting-ground-shifting-culture\\_b\\_9008356.html](https://www.huffingtonpost.com/maria-cuomo-cole/the-hunting-ground-shifting-culture_b_9008356.html).

199 See THE HUNTING GROUND, *supra* note 198.

200 See *Eramo v. Rolling Stone*, No. CL15000205-00, complaint (Va. Cir. Ct. May 12, 2015), available at <http://pdfserver.amlaw.com/nlj/Eramo%20v%20Rolling%20Stone%20complaint> (Rolling Stone’s author was first introduced to Jackie by Emily Renda); see also Renda-Testimony, U.S. SEN. COMM. HEALTH, EDUC. LABOR & PENSIONS, [HTTPS://WWW.HELP.SENATE.GOV/DOWNLOAD/RENDA](https://www.help.senate.gov/download/renda) and <https://www.help.senate.gov/imo/media/doc/Renda.pdf> (consulted with the Whitehouse’s Task Force to Protect Students from Sexual Assault); see also Jeffrey Shapiro, *Rolling Stone Says White House Adviser Introduced U.Va. Rape Accuser*, WASH. TIMES (July 19, 2015), <https://www.washingtontimes.com/news/2015/jul/19/rolling-stone-says-university-of-virginia-rape-accl> (the ED fact checked Rolling Stone’s article before publication).

201 Rolling Stone withdrew the article “A Rape on Campus” in 2015, four months after publication, because the account of Jackie being gang raped at UVA fraternity which was first widely accepted as true was quickly exposed as farcical. The resulting litigation from the article cost Rolling Stone millions of dollars.

202 A rush to judgement similar to the Jackie story occurred in 2016 when members of the Duke Lacrosse team were falsely accused of rape and publicly pilloried. In 2017, the players were declared innocent and the prosecuting attorney was disbarred.

but were overpowering enough that colleges chose to comply even at the risk of suffering a new type of lawsuit with potential significant financial consequences.<sup>203</sup> The DCL arguably increased the legal liability of colleges administratively beyond the pre-existing judicial standard in individual suits for damages under Title IX. In *Davis v. Monroe Cty. Bd. of Educ.*, the Supreme Court held that colleges may be liable in damages for their own misconduct in cases of peer sexual assault.<sup>204</sup> The DCL additionally imposed an affirmative duty of care on colleges to not only respond appropriately, but also to prevent sexual assault. OCR interpreted Title IX without going through the Administrative Procedure Act (APA) rulemaking process<sup>205</sup> yet required “more than what reasonable care would demand in court and [did] so with a massive list of specific compliance requirements.”<sup>206</sup> In response to lawsuits, colleges settled multimillion-dollar complaints from alleged college victims.<sup>207</sup> Given the legal precedent, settlements, and additional pressure from the OCR, colleges took notice and changed their Title IX disciplinary procedures to comply with the guidance regardless of concerns that it might result in unfair systems.<sup>208</sup>

An unintended consequence of compliance with the overt pressure applied by the Obama administration on colleges was the filing of close to 400 lawsuits by students accused of sexual misconduct, usually men alleging due process violations or gender discrimination since 2012.<sup>209</sup> As “some federal courts[] have observed . . . this spate of cases can be traced to the now-rescinded April 4, DCL from the OCR, which, on threat of withholding federal funds, instructed universities to replace the ‘beyond a reasonable doubt’ or ‘clear and convincing’ evidence standards previously used by many universities when adjudicating sexual assault complaints with a ‘preponderance of the evidence’ standard.”<sup>210</sup> Moreover,

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203 See *John Doe v. Alger*, No. 5:15-cv-35 (W.D. Va. 2018) (awarding John Doe \$849,231.25 in attorney fees and litigation costs); see also George Leef, *Another University Will Have to pay for Its Title IX Zealotry*, FORBES (Feb. 25, 2018 10:30 AM), <https://www.forbes.com/sites/georgeleef/2018/02/25/another-university-will-have-to-pay-for-its-title-ix-zealotry/#4323c5d9b033>.

204 See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999).

205 COLE, *supra* note 98.

206 PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY* 194 (2d ed. 2013), at 166.

207 See Howard Pankratz, *\$2.8 Million Deal In CU Rape Case*, DENVER POST (Dec. 5, 2007 7:41 AM), <https://www.denverpost.com/2007/12/05/2-8-million-deal-in-cu-rape-case/> (settlement with two women who filed Title IX lawsuits after allegations of rape by classmates); see also Tatiana Schlossberg, *Uconn to Pay \$1.3 Million to End Suit on Rape Cases*, N.Y. TIMES (July 18, 2014), <https://www.nytimes.com/2014/07/19/nyregion/uconn-to-pay-1-3-million-to-end-suit-on-rape-cases.html> (settlement with five students who claimed the school treated them with indifference after bringing claims of sexual assault and harassment).

208 Elizabeth Bartholet et al., *Fairness For All Students Under Title IX*, HLS Scholarly Articles (Aug. 21, 2017), available at <https://dash.harvard.edu/handle/1/33789434>.

209 TITLE IX FOR ALL, <http://www.titleixforall.com/data-resources/> (last visited Feb. 20, 2019); see also Patricia Hamill and David Rudovsky, *Comments of Concerned Lawyers and Educators in Support of Fundamental Fairness for All Parties in Title IX Grievance Proceedings*, Dep’t of Educ. Notice of Proposed Rulemaking Docket No. ED-2018-OCR-0064, RIN 1870-AA14 (submitted Jan. 28, 2019), fn. 2, available at <https://conradobrien.com/uploads/attachments/cjrjac2cb0cmt01iw4vzo4aev-comments-of-concerned-lawyers-and-educators-in-support-of-fundamental-fairness-for-all-parties-in-title-ix-grievance-proceedings-1-28-2019.pdf>.

210 *Doe v Marymount Univ.*, 297 F.Supp.3d 573 (E.D. Va. 2018).

the men are winning cases with courts finding “reasonable inference of gender discrimination” based upon “external pressure from the federal government ... to combat vigorously sexual assault on college campus and the severe potential punishment—loss of all federal funds.”<sup>211</sup> An expert in the field of law and policy in higher education said “in over 20 years of reviewing higher education law cases, I’ve never seen such a string of legal setbacks for universities, both public and private, in student conduct cases. ... Something is going seriously wrong. These precedents are unprecedented.”<sup>212</sup> Colleges were placed legally between a rock and a hard place. By toeing the line with the Obama administration’s Title IX policies, colleges traded the potential risks from noncompliance for institutional liability arising from accused student lawsuits.

The Obama administration’s actions changed the campus culture on both student and administrative levels. While there is no apparent evidence that the Obama administration’s actions impacted campus sexual assault rates,<sup>213</sup> there are positive takeaways from their policy strategy including increased reporting of sexual assault.<sup>214</sup> The federal government demonstrated the significant impact its actions can have on changing the attitudes, behaviors, and procedures on college campuses. Utilizing financial incentives as a carrot and a stick combined with both positive and negative publicity campaigns, the government created incentives for colleges to comply.

### III. PATH FORWARD

The past demonstrates Congress can be confident in their ability to shift the attitude towards campus drinking for the social and economic benefit of all Americans. Once upon a time, smoking was culturally cool and normalized, like alcohol abuse is today on American campuses. More recently, the Obama administration helped change the campus culture surrounding sexual assault.<sup>215</sup> By publicizing the risks and costs associated with binge drinking, similar to how the effective public health messaging regarding the negative effects of smoking shifted the public’s view about cigarettes, we need to make campus alcohol abuse

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211 *Doe v. Miami Univ.*, 882 F.3d 579, 594 (6<sup>th</sup> Cir. 2018).

212 Jake New, *Out of Balance*, INSIDE HIGHER ED (Apr. 14, 2016), <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault>.

213 See Laura Kerner et al., *Sexual Assaults on College Campus*, 13 J. OF ACAD. ADMIN. IN HIGHER EDUC. 41, 41 (2017) (finding it “significant that the percentage of women being sexually assaulted on college campuses has not decreased significantly over the years”); see also 2018 Nat’l Crime Victims’ Rights Week Resource Guide: Crime and Victimization Fact Sheets, Off. For Victims of Crime, Dep’t of Justice, available at [https://ovc.ncjrs.gov/ncvrw2018/info\\_flyers/fact\\_sheets/2018NCVRW\\_SexualViolence\\_508\\_QC.pdf](https://ovc.ncjrs.gov/ncvrw2018/info_flyers/fact_sheets/2018NCVRW_SexualViolence_508_QC.pdf) (stating rates of sexual violence between 2006 and 2015 showed no significant change).

214 See Musu-Gillette et al., INDICATORS OF SCHOOL CRIME AND SAFETY: 2016, Nat’l Center for Ed. Statistics, Dep’t of Ed., Bureau of Justice Statistics, Off. Of Justice Programs, Dep’t of Justice, at 122, available at <https://nces.ed.gov/pubs2017/2017064.pdf> (finding the number of reported campus sex crimes increased 34 percent between 2013 and 2014 continuing the trend which showed a 205 percent increase between 2001 and 2014).

215 See Section II., *supra*.

and black-out drinking culturally uncool, too.<sup>216</sup> There is no need for Congress to hesitate in heeding the experts' advice and act as "we still have a long way to go in changing the conditions that support underage drinking in our country."<sup>217</sup>

By utilizing the techniques that the Obama administration successfully implemented to empower change in the campus attitude towards sexual assault, the federal government similarly has the capacity to alter the binge drinking culture. Congress can authorize the ED and the CDC to work across agencies, use monetary levers combined with regulation oversight to ensure accurate information is disseminated, and utilize their public platform to ensure buy-in to the cause.

To garner public understanding and support, the message should be trumpeted that Congress is working to save lives, increase educational benefits, make students healthier and safer, as well as protect all citizens from the civic harms associated with drinking. Colleges must be forced to reckon publicly with the aggravating role alcohol plays in almost every facet of campus life. The harms of campus drinking, including the link to encroachment of college's core academic mission for drinkers and non-drinkers alike, must be as clear as damaged lung photos on cigarette packages. On the economic front, Congress can emphasize the benefits to be gained from lowering health care costs, decreasing property damages, and increasing work productivity.<sup>218</sup> It is currently estimated that "the cost of excessive alcohol use in the United States reached **\$249 billion** in 2010," which was mostly attributable to binge drinking.<sup>219</sup> Congress in the reauthorization of the HEA should utilize the powers of the purse to empower the ED together with the CDC to apply pressure on colleges to address the campus drinking culture through the following recommendations.

#### *A. Higher Education Act*

The federal government has the connections, power, and resources to best influence alcohol policy on colleges. As colleges are located in all fifty states, the federal government is the only entity with the ability to reach every campus. The federal government can spearhead a major cultural change by inspiring college presidents, campus administrators, students, and parents to tackle this difficult issue together. As there is a plethora of information available and many individuals and organizations with good intentions, what is needed is leadership from the federal government to encourage a national movement inclusive of all stakeholders.

The HEA is a vehicle through which the federal government reaches almost every college. The HEA authorizes federal aid to college students and colleges

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216 See U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L INSTS. OF HEALTH, NAT'L INST. ON ALCOHOL ABUSE AND ALCOHOLISM, Video Bank: *Alcohol Education, Prevention, and Treatment – Creating a Climate of Trust*, <https://www.niaaa.nih.gov/alcohol-education-prevention-and-treatment-creating-climate-trust> (Dec. 27, 2016).

217 REP. UNDERAGE DRINKING *supra* note 12, at ii.

218 See CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., *Excessive Drinking is Draining the U.S. Economy*, <https://www.cdc.gov/features/costsofdrinking/index.html> (July 13, 2018).

219 *Id.*

that is administered through the ED.<sup>220</sup> In 2016, the federal government provided approximately \$125.7 billion in financial assistance to students and their families as well as \$2.2 billion to colleges.<sup>221</sup> As previously stated, the DFSCA currently ties college federal funding to alcohol prevention programs.<sup>222</sup> Therefore, Congress can build on the strong monetary connection between the HEA and colleges to strengthen the pressure on colleges to change the alcohol culture.

The last comprehensive reauthorization of the HEA was the “Higher Education Opportunity Act” of 2008 which included authorizations for most programs through 2014.<sup>223</sup> After Congress provided authorization to extend the expired 2008 HEA, it is currently up for reauthorization this year.<sup>224</sup> Both Republicans and Democrats have proposed changes to the alcohol and drug policy in the HEA. The current proposed Republican legislation in the House of Representatives is named the “Prosper Act” and has been referred to the Committee on Education and Workforce.<sup>225</sup> The bill includes a provision to amend the HEA Alcohol Abuse Prevention section by creating a minimum standard requiring colleges to distribute their alcohol policy, including information on sanctions for illegal alcohol use and descriptions of the available alcohol support programs to all students.<sup>226</sup> Similar to the Obama administration’s mistaken strategy, the “Prosper Act” neglects to focus on the importance of stopping alcohol abuse before it occurs and instead relies on institutional after the fact punishment or treatment. Because campus alcohol abuse remains a long-standing problem that states and schools have not adequately addressed through punitive responses, federal efforts should now be focused on promoting risk reduction to significantly limit campus drinking to ensure fewer students need treatment.

The Democrats proposed legislation in the House of Representatives is the “Aim Higher Act.”<sup>227</sup> While House Democrats initially proposed eliminating tying federal funding to alcohol and drug prevention programs on college campuses, concerns about the opioid epidemic led to partially reinstating the requirement.<sup>228</sup> The proposal continues the current HEA delineation between alcohol and drug abuse programming, but tweaks the language and places a greater emphasis what is now labeled “substance misuse.”<sup>229</sup> The second-place status of alcohol in the proposal furthers the complacency attached to dealing with college drinking

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220 See CONGRESSIONAL RESEARCH SERVICE, THE HIGHER EDUCATION ACT (HEA): A PRIMER 1 (Aug. 25, 2017) (prepared by Alexandra Hegji), available at <https://fas.org/sgp/crs/misc/R43351.pdf>.

221 See *id.*

222 Drug-Free Schools and Communities Act Amendments of 1989, *supra* note 50.

223 Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat 3078 (2008).

224 *Id.* at 1.

225 Prosper Act, H.R. 4508, 115<sup>th</sup> Cong. (2017).

226 *Id.*

227 Aim Higher Act, H.R. 6534, 115<sup>th</sup> Cong. (2017).

228 Aim Higher Act, H.R. 6534 Bill Summary, HOUSE COMM. EDUC. & LABOR, at 12, available at <https://edlabor.house.gov/imo/media/doc/Aim%20Higher%20Act%20--%20Bill%20Summary.pdf>.

229 Aim Higher Act, H.R. 6534, 115<sup>th</sup> Cong. (2017).

problems. Congress must do better than the “Prosper Act” or the “Aim Higher Act” by bringing campus alcohol abuse to the forefront of HEA legislation thereby signaling the intent of Congress to support and encourage the eradication of this serious problem.

### ***B. Roles of the Department of Education and Centers for Disease Control and Prevention***

The ED and the CDC are the appropriate agencies to run the necessary alcohol prevention programming, research, and oversight necessary to promote safe and healthy campus life because combined the two agencies have the ability to grab the attention of colleges, understand the public health risks, and can communicate effectively with all parties. As the campus binge drinking problem is unique to the campus culture created and sustained by colleges it is important to harness the expertise. The CDC houses the scientific information and connection to leaders in the field on alcohol abuse.<sup>230</sup> Whereas, the ED has demonstrated the ability to command colleges’ attention and elicit responses through Title IX and Clery enforcement under the Obama administration. The DFSCA can be leveraged by the ED and CDC team by providing updated compliance handbook, expertise resources, and more powerful enforcement.

Because preventing alcohol abuse on college campuses is a complex problem demanding cultural change, one of the goals of the ED and CDC team must be to foster involvement and investment in developing solutions by all community members. The most promising research by the Government calls for a multi-prong approach simultaneously combining individual interventions, campus-wide programming, and community-based policies.<sup>231</sup> When grassroots efforts emerge, such as college presidents who have shown an interest in working together to combat high-risk alcohol culture on their campuses,<sup>232</sup> the ED and CDC team will be positioned to leverage such initiatives by encouraging other stakeholders to participate or emulate the programs.

Separation of oversight responsibilities for enforcement by the ED as opposed to safety research and prevention by the CDC is practical for procedural and policy reasons. From a management perspective, the current regulations necessitate distinct assessments of compliance and determinations of fines for Title IX, DFSCA, and the Clery Act. Also, to incentivize colleges to utilize the CDC for prevention resources, colleges should not fear punishment when seeking advice or sharing failures as part of the learning process. On the other hand, the safety goals underlying the DFSCA for alcohol, Title IX for sexual assault, and Clery Act for crimes are the same—to protect students. Significantly, the interplay between

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230 See Centers for Disease Control and Prevention, gov <https://www.cdc.gov/about/organization/mission.htm> (last visited on May 6, 2019) (CDC’s role is to be “the nation’s health protection agency”).

231 See, WHAT COLLEGES NEED TO KNOW, *supra* note 68, at 3.

232 See AMETHYST INITIATIVE, <http://www.theamethystinitiative.org/why-sign/> (last visited on Jan. 11, 2019) (creating the Amethyst initiative in 2008 when 136 school Presidents signed on to collaborate on the issue of campus high-risk drinking culture); see also NCHIP, *supra* note 7, at iv (creating a coalition of 32 college presidents in 2011 to address high-risk drinking on campus).

alcohol and campus violence as articulated in DFSCA determinations<sup>233</sup> should not be ignored. To effectively address these interrelated campus problems, it is logical to take a unified approach under an ED and CDC partnership to promote prevention.

The ED and the CDC should coordinate a campus safety team.<sup>234</sup> Congress should specify the appropriate role of other agencies including the NIAAA, SAMHSA, and OVW to ensure overlapping college alcohol and safety issues create synergies as opposed to compete with the new ED and CDC team decisions.

### *C. Legislative Recommendations*

In the reauthorization of the HEA, Congress should pool the expertise from all sources to develop comprehensive campus alcohol prevention legislation. The Federal government over the years in reports from multiple offices and agencies has provided the necessary language and tools to successfully address campus drinking problems. Drawing on the lessons from the Obama administration's sexual assault model, the ED and the CDC should be forcefully empowered to utilize a multi-prong approach to combat campus alcohol abuse. There is no need to reinvent the wheel.

Importantly, my solutions are not cost intensive. The Trump administration is unlikely to increase funding to the ED and the CDC, regardless that Trump himself does not drink and might personally support campus alcohol prevention efforts.<sup>235</sup> The utilization of current research available within the CDC; pre-existing DFSA, Title IX, and Clery Act tools; the ED's relationships with colleges; and the reorganization of current agency responsibilities that create synergies for dealing with campus alcohol problem will avoid the need to request additional funding. The proposed legislative changes are to signal a priority shift to focus on alcohol culture change by empowering stakeholders rather than creating additional costs.

First, Congress must start with a clear mission statement as a rallying cry. Second, Congress should authorize a campus health and safety team comprised of ED and CDC personnel. Third, monetary levers must be used to incentivize responses from colleges. Fourth, the extent that alcohol abuse is involved in campus crimes must be reported and published similar to the use by the Obama administration of the one in five women is sexually assaulted statistic.

#### *1. Purpose Statement*

Congress should replace "underage" with "college" and adopt the mission statement from SAMHSA's 2013 Report:

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233 See Section I.D., *supra*.

234 See Section III.C.4., *supra*.

235 Ashley Parker and Philip Rucker, *Kavanaugh likes beer — but Trump is a teetotaler: 'He doesn't like drinkers.'*, WASH. POST (Oct. 2, 2018), [https://www.washingtonpost.com/politics/kavanaugh-likes-beer-but-trump-is-a-teetotaler-he-doesnt-like-drinkers/2018/10/02/783f585c-c674-11e8-b1ed-1d2d65b86d0c\\_story.html?utm\\_term=.0174c235d3b2](https://www.washingtonpost.com/politics/kavanaugh-likes-beer-but-trump-is-a-teetotaler-he-doesnt-like-drinkers/2018/10/02/783f585c-c674-11e8-b1ed-1d2d65b86d0c_story.html?utm_term=.0174c235d3b2) (because of witnessing the negative effects of alcoholism on his brother, Trump abstains from drinking).

The congressional mandate to develop a coordinated approach to prevent and reduce [college] drinking and its adverse consequences recognizes that alcohol consumption by those [in college] is a serious, complex, and persistent societal problem with significant financial, social, and personal costs. Congress also recognizes that a long-term solution will require a broad, deep, and sustained national commitment to reducing the demand for, and access to, alcohol among young people. That solution will have to address not only the youth themselves but also the larger society that provides a context for that drinking and in which images of alcohol use are pervasive and drinking is seen as normative. ... Through leadership and financial support, the federal government can influence public opinion and increase public knowledge about [college] drinking; enact and enforce relevant laws; fund programs and research that increase understanding of the causes and consequences of [college] alcohol use; monitor trends in [college] drinking and the effectiveness of efforts designed to reduce demand, availability, and consumption; and lead the national effort.<sup>236</sup>

## 2. Campus Health and Safety Center

Congress should put the focus back on prevention by authorizing the ED and the CDC to create a new team modeled after the HEC, the Campus Health and Safety Center (CHSC), as a campus health and safety resource group. A single hub is needed because according to Prof. DeJong, former head of the HEC, “right now, there is no one place, aside from individual consultants ... to help colleges and universities do a better job”<sup>237</sup> in addressing campus alcohol prevention. As the consequences of alcohol abuse reach into almost every aspect of college life, the problem cannot be solved in a vacuum. Including sexual assault and crime prevention in the CHSC remit, a one-stop-shopping resource for college safety, will create synergies that benefit all students and colleges. Coordinating DFSCA, Title IX, and Clery regulation requirements from a data collection, education, and prevention perspective makes sense. Including a health component can help colleges not only plan effectively for dealing with the effects of alcohol abuse or violent crimes but also cope with the burgeoning mental health crisis on campus.<sup>238</sup>

Moreover, the CHSC format should serve as a model for campus organizations. To directly address the highly intertwined health and safety issues between alcohol and sexual assault, sexual violence prevention programs on campus should be joined with alcohol abuse programming. The Title IX offices and Deans of Student Life should be partnered, akin to the new ED and CDC team, to prioritize prevention efforts on student health over after-the-fact punishment.<sup>239</sup> Currently,

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236 REP. UNDERAGE DRINKING, *supra* note 12, at 68.

237 E-mail from William DeJong, Prof. Dep’t of Cmty. Health Sci., Boston U. Sch. Pub. Health, to author (March 7, 2018, 16:54 EST) (on file with author).

238 Campus Mental Health, AM. PSYCHOL. ASS’N, <https://www.apa.org/advocacy/higher-education/mental-health/index.aspx> (last visited Jan. 11, 2019) (labeling the growing increase in psychological problems on camps a mental health crisis).

239 William DeJong and Kimberly Timpf, *Complying with the Drug-Free Schools and Campuses Regulations [EDGAR Part 86]*, CAMPUS PREVENTION NETWORK, at 4, available at <https://shs.uconn.edu/wp->

unlike Title IX, every college does not have a dedicated alcohol prevention coordinator.<sup>240</sup> The CHSC should work with colleges to determine best practices for the administration oversight of safety concerns on campus, recognizing the need for individual campus flexibility. The proposed CHSC would have the bandwidth necessary to tailor responses to individual colleges based on size, location, and other distinguishing campus characteristics.

The CHSC would create a national springboard for experts and colleges to work together on issues which are unique in the campus setting, including sexual assault and alcohol abuse. The CHSC must encourage the development of grassroots efforts to change attitudes surrounding alcohol abuse. The threat of sanctions as a prevention tool has proven ineffective as demonstrated by the continued presence of large-scale drinking problems on campus. Instead, the CHSC will emphasize prevention strategies through managing grants, encouraging research, sharing information, formulating compliance handbooks, and publicity.

In the consultant role, CHSC should evaluate the usefulness of the NIAAA's *CollegeAIM* interactive website, a "College Alcohol Intervention Matrix."<sup>241</sup> The site was developed as "a new resource to help schools address harmful and underage student drinking" which includes the latest research and interventions on all levels which encourages colleges to implement multi-level prevention strategies.<sup>242</sup> CHSC will need a web presence providing access to a wide variety of information in a user friendly format for students, parents, college officials, and experts. It is important that CHSC serves the entire college community.

Lastly, publicity is important to change the culture. The "It's On Us" campaign motivated college students to engage and encouraged dialogue about campus sexual assault.<sup>243</sup> CHSC should develop a creative kick-off video to promote the reinvigorated efforts of Congress to address campus health and safety. Invoking a social media campaign and involving public figures, such as sports stars or actors, similar to the Obama administration's utilization of "The Hunting Ground"<sup>244</sup> would be effective in inducing cultural change.

### 3. Conditional Spending and Grants

Money speaks and Congress must also effectively use financial incentives to ensure colleges tackle the campus high-risk drinking problem by focusing on prevention at least to the same degree as reporting. The ED currently has the

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*content/uploads/sites/344/2018/06/Complying-With-the-Drug-Free-Schools-and-Campuses-Regulations-CPN-final.pdf* (suggesting colleges should combine oversight for compliance with Title IX, Clery, and DFSCA as ED determinations are comingling the findings).

240 See U.S. DEP'T OF HEALTH AND HUMAN SERVS., NAT'L INSTS. OF HEALTH, Video Bank: *Targeting Harmful and Underage Student Drinking with NIAAA's CollegeAim*, <https://www.niaaa.nih.gov/targeting-harmful-and-underage-student-drinking-niaaas-collegeaim> (Apr. 11, 2016).

241 See COLLEGEAIM, *supra* note 83.

242 See *id.*

243 See Section III.E., *supra*.

244 See Section III.E., *supra*.

power to withhold “funds or any other form of financial assistance under any Federal program” from colleges who do not provide alcohol prevention programs for underage drinkers on their campus.<sup>245</sup> The ED, however, has only scratched the surface in applying their fiscal fire power to DFSCA when compared to Clery fines. The ED Office of Inspector General found in 2012 that there was no assurance of compliance with the statutory requirements<sup>246</sup> for alcohol prevention programs.<sup>247</sup> The lack of monetary support for addressing the alcohol problem was further compounded by the withdrawal of funding since at least 2011<sup>248</sup> for the ED’s discretionary alcohol and drug prevention grant programs originally authorized in 1998.<sup>249</sup> While there is no need to create new financial tools, colleges are under the impression that the current laws are not a federal priority and, therefore, will continue to be underenforced and underfunded.

The all or nothing approach to funding is problematic. While the ability to sanction colleges by rescinding all federal education funding appeared to work for the Obama administration as a threat to comply with Title IX mandates,<sup>250</sup> it is heavy handed. Years of inaction on DFSCA statutory requirements were followed by oversight resulting in fines.<sup>251</sup> However, the DFSCA violations were overshadowed by the Clery Act within the office of Federal Student Aid (FSA). First, the DFSCA determinations are subsumed in what are publicly titled Clery Act Reports.<sup>252</sup> Second, DFSCA violations cost colleges significantly less in total than Clery Act violations. For HEA violations, the ED Secretary “may impose a fine up to \$55,907 per violation.”<sup>253</sup> When applied to the DFSCA, if a college is in violation of both prongs of the statutory requirements the maximum assessment is \$111,814.<sup>254</sup> In contrast, Clery violations can be found in unlimited quantities.<sup>255</sup> The largest fine

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245 20 U.S.C. § 1011i(a) (1998).

246 34 C.F.R. § 86.101 (2018) (requiring the ED Sec’y to annually conduct a review of college drug prevention program at a selection of college’s).

247 U.S. Dep’t of Educ., Off. of Inspector Gen., Final Inspection Report on ED’s Process for Ensuring Compliance with HEA and Part 86 Requirements (March 14, 2012), *available at* <https://www2.ed.gov/about/offices/list/oig/aireports/i13i0002.pdf> (documenting the government’s lack of oversight to ensure compliance with statutory requirements for college alcohol prevention).

248 See Section I.C.1., *supra*.

249 Higher Education Amendments of 1989, Pub. L. No. 105-244, 112 Stat. 1581 (1989).

250 See Dear Colleague Letter, *supra* note 99, at 16; see also Will Creely, *Why the Office for Civil Rights’ April ‘Dear Colleague Letter’ Was 2011’s Biggest FIRE Fight*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Jan. 3, 2102), <https://www.thefire.org/why-the-office-for-civil-rights-april-dear-colleague-letter-was-2011s-biggest-fire-fight/>.

251 See Section I.D., *infra*.

252 CLERY ACT REPORTS, FED. STUDENT AID, U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports> (last visited Jan. 11, 2019) (DFSCA determinations are located within the Clery Report search engine and the website does not inform the public of how to locate DFSCA findings).

253 34 C.F.R. § 668.84 (2019).

254 20 U.S.C. § 1011i (2008) (requirements (1) annually distribute alcohol and drug programming and (2) biennial review of institution’s program).

255 See Penn State Letter, *supra* note 173 (assessment of fines for each of over 300 separate Clery violations).

ever for Clery violations totaled \$2,369,500 to Penn State University.<sup>256</sup> The Penn State case was unusual, but the differential in risk to colleges is unmistakable. Unless the profile of DFSCA is raised to stress the importance of prevention, colleges might understandably view any new alcohol prevention mandates as less important than Clery reporting requirements.

Therefore, in the reauthorization of the HEA, Congress should create new financial incentives tied to alcohol prevention programs by encouraging parity between DFSCA and Clery penalties for violations. The ED should change the FSA website to publicly recognize the oversight and findings of DFSCA distinct from Clery determinations. If the government focuses colleges attention to the investigation and levying fines for failure to meet DFSCA alcohol requirements, similar to the actions for the Clery Act and Title IX colleges will be incentivized to prioritize creating alcohol safe campus communities both to avoid fines and the negative publicity<sup>257</sup> attached to large monetary payouts.

From the positive reinforcement perspective, just as the sexual assault campaign successfully encouraged participation of various groups through grants,<sup>258</sup> Congress should follow the same blueprint for alcohol prevention. The current STOP grant programs should be funded and new grants should be created through the HEA. The Obama administration's successful use of grants to encourage research and implementation for sexual assault programs should be mirrored for alcohol abuse prevention.

#### 4. Accuracy in Reporting the Campus Alcohol Problem

There is power in information. To support efforts in changing the culture, accurate information is essential. To ensure the all stakeholders have access to the data, mandated reporting which already occurs under the Clery Act and DFSCA should be tailored to accurately reflect the scope of the alcohol related problems. Currently, the Clery numbers under-report alcohol violations.<sup>259</sup> The reporting should include alcohol related violations beyond liquor law violations including public drunkenness, noise violations, hospital visits, injuries, missed classes. Additionally, to understand the full extent of alcohol problems, data must be available to document the number of alcohol violations that occur in tandem with other crimes.

In the reauthorization of the HEA, Congress should amend the Clery Act to include a category for crimes that occurred when alcohol abuse was involved.

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256 *Id.* (total fine was \$2,397,000 comprised of \$2,369,500 for Clery violations and \$27,500 assessed for DSCA failures).

257 See Jake New, *Historic Fine for Penn State*, INSIDE HIGHER ED (Nov. 4, 2016), <https://www.insidehighered.com/news/2016/11/04/education-departments-historic-sanction-against-penn-state-clery-violations>; see also Tyler Kingkade, *Yale Faces \$165,000 Clery Act Fine for Failing to Report Sex Offenses on Campus*, HUFFPOST (May 15, 2013 6:59 PM, updated May 16, 2013), available at [https://www.huffingtonpost.com/2013/05/15/yale-clery-act\\_n\\_3280195.html](https://www.huffingtonpost.com/2013/05/15/yale-clery-act_n_3280195.html).

258 See THE SECOND REPORT, *supra* note 135, at 24.

259 See *The Handbook for Campus Safety and Security Reporting*, *supra* note 94 (reporting encompasses all sexual misconduct allegations regardless of validity while narrows alcohol reports to proven violations of the law notwithstanding that students can be sanctioned for violations of alcohol policies unrelated to the legal system).

The additional classification would mirror the current requirement to “collect[] and report[] crimes according to category of prejudice.”<sup>260</sup> I propose the following clause to the Clery Act:

For all violent crimes<sup>261</sup> in which the victim or perpetrator violates alcohol laws, college alcohol policy, or is incapacitated by alcohol at the time of the incident that are reported to campus security authorities or local police agencies, data shall be collected and reported according to category of alcohol related crimes.

The financial costs of alcohol abuse should be added to the Clery reporting statistics.<sup>262</sup> Actual or estimated dollar values for property damages, medical treatment, insurance, administrative time on disciplinary procedures, legal costs of lawsuits, and other alcohol related consequences can be tabulated. Reporting the number of students affected and the estimated figures of annual costs of underage drinking together would be valuable in educating the public about the full scope of the problem and would be an invaluable tool for publicity campaigns.

Additionally, in the reauthorization of the HEA, the DFSCA should be similarly amended to ensure all violations which involve alcohol abuse are documented and prevention programs evaluated to address the full range of high-risk drinking consequences. I propose adding the italicized language to the current DFSCA statute:

(A) determine the program’s effectiveness and implement changes to the program if the changes are needed;

(B) determine the number of drug and alcohol-related violations and fatalities, *including non-charged alcohol violations where high-risk drinking was involved in student crimes, health issues, and educational failures*

that—

(i) occur on the institution’s campus ... or as part of any of the institution’s activities; and (ii) are reported to campus officials;

(C) determine the number and type of sanctions ... that are imposed by the institution as a result of drug and alcohol-related violations, *including sexual assaults involving alcohol abuse*

and fatalities on the institution’s campus or as part of any of the institution’s activities; and

(D) ensure that the sanctions ... are consistently enforced<sup>263</sup>

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260 20 U.S.C. § 1092 (f)(1)(F)(ii) (2010).

261 Violent crimes can be designated by reference as in the category of prejudice clause: “of the crimes described in subclauses (I) through (VIII) of clause (i) and in clause (ii), of larceny-theft, simple assault, intimidation, and destruction, damage, or vandalism of property, and of other crimes involving bodily injury to any person” 20 U.S.C. § 1092 (f)(1)(F)(ii) (2010).

262 Alternatively, this could be a project for the CHSC.

263 20 U.S.C. § 1011i(a)(2) (2017) (italicized language added).

Crimes involving alcohol abuse would include instances where either party was in violation of alcohol laws, policies, incapacitated, or black-out drunk. Underage student hospitalizations from alcohol poisoning should be counted as alcohol-related violations even when Good Samaritan policies prohibit punishing the student for their actions. Similarly, if a college is aware that uncharged drinking problems are the cause of missed classes or exams,<sup>264</sup> such alcohol-related problems should be accounted for. The goal in the revised DFSCA is to publicly account for alcohol-related problems, not to double count or increase student sanctions.

#### IV. Conclusion

Alcohol abuse is a tremendous risk factor for students and colleges with far reaching negative consequences touching every aspect of campus life—health, safety, civic impact, and academics—as well as impacting society in general. The executive branch has demonstrated the ability to change the culture on college campuses surrounding sexual assault through its wide-range of programs, messages, and enforcement of Title IX and the Clery Act. Congress, with affirmation from the Supreme Court, effectively mandated a national underage drinking law and shifted the culture regarding drunk driving. Similarly, the government’s actions encompassing the public health risks of cigarettes changed the smoking culture. When the federal government unites behind an issue and uses its power, seismic cultural changes are possible.

The federal government’s legacy of legislation and pronouncements clearly identifies alcohol abuse on college as a serious national problem and a priority. Congress is uniquely situated to utilize the spending power to require programing and mandate compliance of all colleges, inclusive of public and private colleges in every state. The reauthorization of the HEA is the opportunity for Congress to exert its influence. Congress can look to the successes of the sexual assault campaign and reconnect the dots to alcohol prevention. By creating the CHSC under the ED and the CDC to function as a safety resource for colleges—collecting data, researching program effectiveness, bringing together experts, encouraging community engagement, and publicizing information—Congress can effectuate its long-standing goal of reducing alcohol abuse on college campuses to save lives and money. There is no need to wait for more students to suffer. The time to act is now with the reauthorization of the HEA.

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<sup>264</sup> Colleges may need to rely on self-reporting through surveys or mental health services to account for the academic consequences from alcohol abuse.



A LIMITED REVIEW OF THE POST-HELLER  
FATE OF CAMPUS CARRY:  
*Preemption and Constitutionality in  
New Hampshire and Beyond*

JACOB A. BENNETT\*

**Abstract**

*While there are numerous instances of college or university mass shootings to be found in previous decades, the contemporary debate over the legal right to carry a firearm on a public college or university campus begins with the Virginia Tech massacre in 2007. It was in the aftermath of this event that the Students for Concealed Carry began a concerted effort to allow persons already permitted by their state to carry concealed firearms to also do so on college campuses—an effort that seems to have jumpstarted a vigorous debate that continues to this day. At the time, the Virginia Tech shooting resulted in the highest death and injury tolls on an American campus since Charles J. Whitman, the “Texas Tower Sniper,” shot and killed 15 and injured more than 30 at the University of Texas at Austin in 1966. It is this historic scale that helps define the current era. Against that backdrop, and in light of persistent efforts to deregulate firearms on and off campuses in New Hampshire, this article both considers and answers the question: Upon what legal bases do the systems and campuses under control of the University System of New Hampshire and the Community College System of New Hampshire prohibit the carrying of firearms on their premises? Along the way, Section I reviews firearms policies in place within both the University System of New Hampshire (USNH) and the Community College System of New Hampshire (CCSNH); Section II reviews New Hampshire state laws establishing and describing the character and governance of those systems of higher education; and Section III reviews New Hampshire state laws regarding possession and carrying of firearms. After those reviews, Section IV presents analysis of a court decision out of New Hampshire addressing issues of preemption and Second Amendment rights, as well as decisions from Oregon and Texas that touch on similar issues; and Section V concludes this analysis by highlighting connections between cases, including Supreme Court decisions Heller and McDonald, and suggesting possible impact of the decisions for policy makers at public campuses across the country.*

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## INTRODUCTION

It is difficult to make sweeping statements about the status of campus carry laws and policies across the nation (see Figure 1),<sup>1</sup> laws that explicitly grant the right to individuals to carry firearms onto college and university campuses. To begin with, there is disagreement about the empirical basis underlying advocacy for, and opposition to, campus carry as a self-defense measure,<sup>2</sup> wide variability of state laws<sup>3</sup> and public university and college system policies,<sup>4</sup> and diverging decisions across federal court districts.<sup>5</sup> Add to the mix the fact that the Supreme Court reconstrued the purpose and scope of the Second Amendment just over ten years ago.<sup>6</sup> This means that states with very strict preemption laws may firearms

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1 National Conference of State Legislatures, *Guns on campus: Overview* (2018, August 14), available at [www.ncsl.org/research/education/guns-on-campus-overview.aspx](http://www.ncsl.org/research/education/guns-on-campus-overview.aspx).

2 Robert Birnbaum, *Ready, Fire, Aim: The College Campus Gun Fight*, Change: The Magazine of Higher Learning (Sept-Oct, 2013).

3 Danielle Kurtzleben, *Here's Where Gun Laws Stand in Your State*, NPR Politics (June 14, 2016), available at <https://www.npr.org/2015/12/09/458829225/heres-where-gun-laws-stand-in-your-state>. (Note: this story preceded the 2017 repeal by the New Hampshire legislature and governor of any requirement for concealed carry permits, making the state a "no permit" state.)

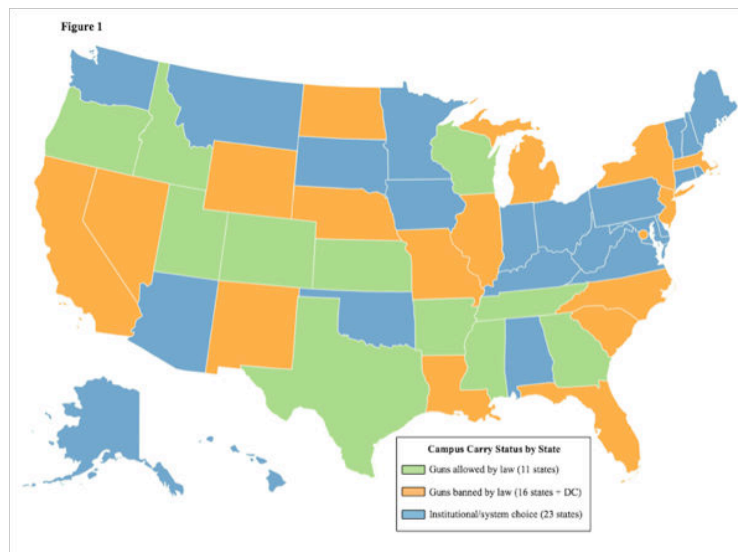
4 Andrew Morse et al., *Guns on Campus: The Architecture and Momentum of State Policy Action* (NASPA: Student Affairs Professionals in Higher Education, 2016), available at [https://www.naspa.org/images/uploads/main/ECS\\_NASPA\\_GunsOnCampus.pdf](https://www.naspa.org/images/uploads/main/ECS_NASPA_GunsOnCampus.pdf) (last visited Sept. 19, 2018).

5 *Oregon Firearms Educational Foundation v. Board of Higher Education and OUS*, 264 P3d 160 (2011). See also, *Glass et al. v. Paxton et al.*, 900 F.3d 233 (2018).

6 See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

prohibitions on public college campuses,<sup>7</sup> and it may feel that the only agreement to be found is that the debates rage on.

Among the facets of the debate over gun rights in America, campus carry has only recently come to the fore. While there are numerous instances of college or university mass shootings to be found in previous decades,<sup>8</sup> the contemporary debate over the legal right to carry a firearm on a public college or university campus begins with the Virginia Tech massacre in 2007.<sup>9</sup> It was in the aftermath of this event that the Students for Concealed Carry began a concerted effort to allow persons already permitted by their state to carry concealed firearms to also do so on college campuses—an effort that seems to have jumpstarted a vigorous debate that continues to this day. At the time, the Virginia Tech shooting resulted in the highest death and injury tolls on an American campus since Charles J. Whitman, the “Texas Tower Sniper,” shot and killed 15 and injured more than 30 at the University of Texas at Austin in 1966.<sup>10</sup> It is this historic scale that helps define the current era.



7 North Dakota, as just one example, has a strict preemption law, N.D. Cent. Code § 62.1-01-03, and another law, N.D. Cent. Code § 62.1-02-05, that allows firearms prohibitions at “public events” (a category including “an athletic or sporting event, a school, a church, and a publicly owned or operated building” such as a public college or university).

8 See Connie Post, *Deadliest College Campus Shootings in U.S. History*, Dayton Daily News, Nov. 28, 2016, available at <https://www.daytondailynews.com/news/crime--law/the-deadliest-college-campus-shootings-history/bx9GETTkckx0on6k8QiyCN/> (last visited Sept. 19, 2018).

9 Adam Weinstein, *The Secret History of the Campus Carry Movement*, The Trace (July 5, 2015), available at <https://www.thetrace.org/2015/07/the-making-of-the-campus-carry-movement/> (last visited Sept. 19, 2018).

10 Associated Press, *Beginning of an Era: The 1966 University of Texas Clock Tower Shooting*, NBC News, July 31, 2016, available at <https://www.nbcnews.com/news/us-news/beginning-era-1966-university-texas-clock-tower-shooting-n620556> (last visited Sept. 19, 2018). (Note: the death toll of 15 includes a survivor who died a week later from wounds, as well as another survivor who was shot in his only functioning kidney and who much later elected to cease dialysis. The figure does not include Whitman’s mother and wife, whom he killed by knife at their homes before heading to UT Austin.) See also JoAnn Ponder, *From the Tower Shootings in 1966 to Campus Carry in 2016: Collective Trauma at the University of Texas at Austin*, 15 Int’l J. of Applied Psychoanalytic Stud. 239 (2018).

Against that backdrop, and in light of persistent efforts to deregulate firearms on and off campuses in New Hampshire, this article both considers and answers the question: *Upon what legal bases do the systems and campuses under control of the University System of New Hampshire and the Community College System of New Hampshire prohibit the carrying of firearms on their premises?* Along the way, Section I reviews firearms policies in place within both the University System of New Hampshire (USNH) and the Community College System of New Hampshire (CCSNH); Section II reviews New Hampshire state laws establishing and describing the character and governance of those systems of higher education; and Section III reviews New Hampshire state laws regarding possession and carrying of firearms. After those reviews, Section IV presents analysis of a court decision out of New Hampshire addressing issues of preemption and Second Amendment rights, as well as decisions from Oregon and Texas that touch on similar issues; and Section V concludes this analysis by highlighting connections between cases, including Supreme Court decisions *Heller* and *McDonald*,<sup>11</sup> and suggesting possible impact of the decisions for policy makers at public campuses across the country.

### **I. Firearms Policies at New Hampshire's Public Colleges and Universities**

The University System of New Hampshire governs the four-year public higher education institutions of the state; USNH has a policy governing the presence of firearms, and three of its four institutions have adopted their own policies. The Community College System of New Hampshire governs the two-year public higher education institutions of the state; CCSNH also has a policy governing firearms on its constituent institutions, with each of its institutions adopting similar language at the campus level (see Table 1). The firearms policies for USNH and CCSNH are fairly straightforward; while there are slight variations in language between the two systems policies (e.g., specific campus locations), and while there are differences between USNH and CCSNH policy language and placement (e.g., under general policy or student codes of conduct), the substantive purpose is the same across all public higher education institutions in the state: to limit the carrying of firearms on campuses. With exceptions for public safety or law enforcement

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11 *McDonald v. Chicago*, 561 U.S. 742 (2010).

**Table 1: Firearms Policies Across New Hampshire Public Higher Education Systems**

<b><u>University System of New Hampshire</u></b> <sup>12</sup>	[T]he use or possession of any firearms, other dangerous weapons that could be used to inflict injury, or explosives is absolutely prohibited on any property owned, controlled, or operated by the System Office.
UNH Durham/Manchester <sup>13</sup>	The use and possession of all firearms, other dangerous weapons intended to inflict injury, or explosives are prohibited on the Durham and Manchester core campuses of the University of New Hampshire. Law enforcement officers duly authorized to carry such instruments are excepted.
Plymouth State University <sup>14</sup>	[U]se and possession of all firearms, other dangerous weapons intended to inflict injury, or explosives are prohibited on any property owned, controlled or operated by Plymouth State University.
Granite State College <sup>15</sup>	No person, except law enforcement officers while actively engaged in carrying out their duties as such, shall have in possession any deadly weapon as defined in RSA 625:11, V, while in any building or facility used by the College for administration or classes or on the grounds adjacent thereto.
Keene State College	<i>No campus-specific policy; covered by USNH policy above.</i>
<b><u>Community College System of New Hampshire</u></b> <sup>16</sup>	[Prohibits] possession of firearms, explosives, other weapons, or dangerous chemicals on college premises (including in vehicles) except as authorized by the college for instructional, maintenance, or law enforcement purposes.
Great Bay, <sup>17</sup> Lakes Region, <sup>18</sup> Manchester, <sup>19</sup> Nashua, <sup>20</sup> River Valley, <sup>21</sup> White Mountains, <sup>22</sup> and NH Technical Institute <sup>23</sup>	<i>General college policy: Students, staff, faculty, and guests are not allowed to have a weapon on campus or in any vehicle on campus. Student Handbook/Code of Conduct language identical to CCSNH policy above.</i>

12 USA.III.F.1, available at <https://goo.gl/ciufe4>. (Note: policy in place at the time of the district court case described in section IV of this article varies from current policy, but is in substance and function nearly indistinguishable.)

13 UNH.III.J.2, available at <https://goo.gl/c2LhrD>.

14 PSU.III.D.1, available at <https://goo.gl/STvoCX>.

15 GSC.III.J.1, available at <https://goo.gl/Bmyzxr>.

16 CCSNH Student Code of Conduct, §B.5, available at <https://goo.gl/BxfuDC>.

17 Great Bay CC Student Code of Conduct, §A.18, available at <https://goo.gl/sNV9pH>.

18 Lakes Region CC Student Code of Conduct, §B.5, available at <https://goo.gl/29QPwR>. There is additional language about Housing Community Standards and Health & Safety mirroring policy embedded in Student Code of Conduct.

19 Manchester CC Student Code of Conduct, §A.17, available at <https://goo.gl/VFPtxo>. Mirrors General College Policy, §G.8, available at <https://goo.gl/95ugRy>.

20 Nashua CC Student Code of Conduct, §B.5, available at <https://goo.gl/3VuAlt>.

21 River Valley CC Student Code of Conduct, §A.17, available at <https://goo.gl/oi5JMK>.

22 White Mountains CC Student Code of Conduct, §B.5, available at <https://goo.gl/qm3Y35>.

23 NHTI Campus Firearms and Weapons Policy, available at <https://goo.gl/yuy2b8>. NHTI Student Code of Conduct, §B.5, available at <https://goo.gl/TrkZCF>.

officers, there are also campus-specific prohibitions within USNH at the Durham and Manchester locations of the University of New Hampshire, at Plymouth State University, and at Granite State College, though not at Keene State College (which is nonetheless covered by the system-wide policy). The policy for CCSNH includes similar exceptions, and also includes language stating that it is a violation of the Student Code of Conduct to possess a firearm on campus premises. The CCSNH campuses each mirror that System policy and place it in the Student Code of Conduct, but also include policy language that more broadly prohibits carrying of firearms on campus, and not just by students. Generally, all policies prohibit the student from possessing firearms on campus.

At the University of New Hampshire and Plymouth State University, in addition to an exception for law enforcement, the Chief of Police or Director of Public Safety “may grant permission in writing to an individual, academic or research department, or operational department to possess a weapon or ammunition on campus *for instructional or other qualified purposes*”<sup>24</sup> (emphasis added). Inquiries with the UNH Police Department suggest that the final clause allows for training courses or perhaps ROTC-related events, but that “other qualified purposes” has been invoked to allow hunting on limited plots of university-owned land, and never to allow anyone except law enforcement officers to carry a firearm on campus. The CCSNH policy also includes exceptions for instructional purposes, and for maintenance purposes, presumably to allow for the use of “dangerous chemicals” for cleaning.<sup>25</sup> In each case, the rationale for prohibiting firearms is both to safeguard public safety and to preserve an environment dedicated to the free exchange of ideas for the purposes of education. Implied in these policies, and their justifications, is the notion that the presence of firearms pose an inherent risk to the health and safety of students, staff, faculty, and visitors, and that such a risk is disruptive of the missions and functions of institutions of higher education.

## II. New Hampshire State Law Establishing USNH and CCSNH

Both USNH and CCSNH, as well as their constituent campuses, are established by state statute. USNH “is established and made a body politic and corporate, the main purpose of which shall be to provide a well coordinated system of public higher education offering liberal undergraduate education encompassing the major branches of learning, emphasizing our cultural heritage, and cultivating the skills of reasoning and communication.”<sup>26</sup> CCSNH is “established and made a body politic and corporate, the main purpose of which shall be to provide a well-coordinated system of public community college education offering, as a primary mission, technical programs to prepare students for technical careers as well as general, professional, and transfer programs, and certificate and short term training programs which serve the needs of the state and the nation.”<sup>27</sup> Key language in these nearly identical

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24 *Id. supra* note 13, at J.4, and *supra* note 14, at D.2.

25 *Id. supra* note 16.

26 RSA 187-A:1.

27 RSA 188-F:1.

establishment statutes includes the purpose of education, but also the reference to both systems as “bod[ies] politic and corporate,” indicating that the state views these systems as separate from the state, and effectively treats them as corporate citizens rather than arms of the state (more on this in section III below).

In addition to these indications of educational mission and governmental separateness, there is clear statutory language in the case of each system that gives their boards of trustees wide legal berth within which to govern their respective campuses. While there are parallel descriptions of the state’s interest in receiving annual reports from both systems of public higher education, including financial matters, there is also recognition and affirmation of “the need to protect the institutions of the [university and community college systems] from inappropriate external influence that might threaten the academic freedom of faculty members or otherwise inhibit the pursuit of academic excellence.”<sup>28</sup> To this end, the boards of trustees of both systems have been imbued with “broad authority” to manage and control properties and affairs. This authority is especially sweeping in the case of USNH campuses: “the institutions are to be permitted to operate with the highest measure of autonomy and self-governance, subject to the supervision of the board of trustees.”<sup>29</sup>

### III. New Hampshire State Law Regarding Firearms

There are laws in some states that require a permit or license to carry a firearm, and in some of those states there are distinctions in the law between licenses to openly carry firearms and licenses to carry them in a concealed fashion;<sup>30</sup> New Hampshire no longer has such a licensing requirement, and makes no such distinctions as to the manner of carry. At the time of the case described in the next section of this article, state law required licensing for the ownership or possession of handgun,<sup>31</sup> and also required licensing for concealed carry.<sup>32</sup> In 2017, the concealed license requirement was repealed and the open carry requirement was effectively repealed, as clarified in the newly-adopted Section III of the law:

The *availability* of a license to carry a loaded pistol or revolver under this section or under any other provision of law *shall not be construed to impose a prohibition* on the unlicensed transport or carry of a firearm in a vehicle, or on or about one’s person, whether openly or concealed, loaded or unloaded, by a resident, nonresident, or alien if that individual is not otherwise prohibited by statute from possessing a firearm in the state of New Hampshire.<sup>33</sup> [emphasis added]

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28 See RSA 187-A:2-b:I Legislative Oversight; RSA 187-A:22 Reports (in the case of USNH). See also RSA 188-F:3:I Legislative Oversight; RSA 188-F:11 Report (in the case of CCSNH).

29 See RSA 187-A:16 Authority of the Trustees (in the case of USNH). See also RSA 188-F:6 Authority of the Board of Trustees (in the case of CCSNH).

30 *Id. supra* note 9.

31 RSA 159:6 §I(a).

32 RSA 159:4.

33 RSA 159:6 (as amended by SB12, passed by the General Court Feb. 15, 2017, and signed into law Feb. 22, 2017).

In other words, licenses are available but not required. This new provision may be viewed as an attempt to avoid the same kind of situation created by Texas' campus carry law,<sup>34</sup> which achieved sufficient support only after limiting campus carry to those already licensed to carry by the state. In the event that New Hampshire legislators pass and the governor signs a campus carry bill like the one that failed in 2018,<sup>35</sup> the lack of state licensing requirements for handguns carried on or about the person will mean the campuses of the state's colleges and universities may not be able to implement policies to the contrary.

There are certain exceptions to the rights of New Hampshire citizens to carry loaded pistols and handguns without obtaining a license, alluded to in the section quoted above. First, while there is no license requirement for carrying a firearm, there is a license requirement to sell firearms;<sup>36</sup> second, there are restrictions on owning or possessing firearms for convicted felons, armed career criminals, and minors.<sup>37</sup> There are caveats to these restrictions, though, as in the case of law enforcement officers or on-duty armed service members, exempted from the felony exception, and in the case of minors receiving firearms from parents, guardians, grandparents, trainers, or licensed hunters accompanying minors for the purpose of legal taking of game.<sup>38</sup> Despite this fairly permissive legal framework governing sales and possession of firearms, it is a misdemeanor in New Hampshire to own, possess, or sell "any blackjack, slung shot, or metallic knuckles,"<sup>39</sup> suggesting a distinction between weapons construed by state legislators as useful for self-defense and those without any apparent *defensive* purpose.

Importantly, state law denies "a political subdivision" the ability to "regulate the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms."<sup>40</sup> A political subdivision is defined as a "division of a state that exists primarily to discharge some function of local government,"<sup>41</sup> including such geographic or territorial divisions as a school district or municipality. If an entity such as a municipality, for example, sought to prohibit the carrying, whether open or concealed, of any firearm, whether loaded or not, this statute would prevent its enforceability. This kind of narrowly-tailored preemption against local regulation of firearms became common by the 1980s, a

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34 Tex. Gov't Code §411.2031. See also Texas State University, *Campus Carry Rules* (2017), available at [www.txstate.edu/campuscarry/rules.htm](http://www.txstate.edu/campuscarry/rules.htm).

35 See An Act Relative to Carrying a Pistol or Revolver on University System and Community College System Property, H.B. 1542, N.H. General Court (2018).

36 RSA 159:8.

37 RSA 159:3, RSA 159:3-a, and RSA 159:12, respectively.

38 RSA 159:5, and RSA 159:12 §II(a-d), respectively.

39 RSA 159:16.

40 RSA 159:26 Firearms, Ammunition, and Knives; Authority of the State (according to this statute, all such regulatory power resides with the state).

41 *University System of New Hampshire v. Bradley Jardis, et al.*, Grafton Superior Court, Docket No. 215-2011-CV-00553 (2012), at 5 (citing Black's Law Dictionary 1277, 9th ed. 2009).

trend that followed intensified and targeted lobbying by groups like the National Rifle Association.<sup>42</sup>

USNH and CCSNH are each defined by law as a “body politic and corporate,” so the question remains whether the systems and their campuses are political subdivisions of the state, whether restrictions on the presence of firearms contradicts state law allowing the same, and whether or not they may enforce policies in contradiction to state law. There are no state laws specifically guaranteeing the right to carry firearms on the premises of the state’s public institutions of higher education, whether concealed or openly, or laws limiting on that right. Because there is no such explicit prohibition, and because there is legal ambiguity regarding the relationship of the systems and the state, there have been challenges to the legal merit of prohibitive firearms policies, including an attempt by individuals to carry firearms openly on one of the state’s public campuses, in defiance of that campus’ stated policy. The next section takes up the questions, rules, and conclusions of a state Superior Court decision in a case regarding plans by individuals to openly carry loaded rifles onto a public university campus, and also reviews cases out of Oregon and Texas that address similar issues.

#### IV. Campus Carry Cases in New Hampshire, Oregon, and Texas

##### A. New Hampshire

The legal questions in *University System of New Hampshire v. Bradley Jardis, et al.*<sup>43</sup> a case concerning a legal challenge to system and campus firearms policies, are whether or not USNH has legal autonomy from the state whose legislature established it in the first place, and whether that autonomy is sufficient to allow for the implementation of policies in apparent conflict with state law and the doctrine of preemption. Jardis (a member of and contributor to the blog for *Free Keene*, a libertarian, anti-government organization) and other individuals planned to protest USNH firearms policy by openly carrying loaded rifles onto the campus of Plymouth State University. Jardis announced these plans via a blog post on Monday, December 5, 2011, with the date of protest set for Friday, December 9, 2011. Sympathetic response to the post included “numerous electronic comments from other individuals, some of whom stated that they intended to join the respondents at Plymouth State University on December 9th ‘with their weapons.’”<sup>44</sup> One day before the planned protest, December 8, 2011, USNH filed a petition for temporary restraining order, as well as for preliminary and permanent injunction against Jardis et al. In issuing the preliminary injunction, the court confirmed that USNH adequately presented a case that it would suffer irreparable harm should Jardis

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42 See Grassroots Change, *Preemption Watch* (2019), available at <https://grassrootschange.net/preemption-watch/#/category/guns>. See also Giffords Law Center to Prevent Gun Violence, *Preemption of Local Laws* (2018), available at <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/>.

43 *Id. supra* note 41.

44 *Id. supra* note 41, at 3, 4.

prevail, and that the argument in favor of USNH prohibitions on firearms was likely to succeed on the merits.<sup>45</sup>

The respondents, Jardis, et al., based their argument on the claim that USNH is a political subdivision of the state, preempting any policies contrary to state law:

To the extent consistent with federal law, the state of New Hampshire shall have authority and jurisdiction over the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms, firearms components, ammunition, firearms supplies, or knives in the state. Except as otherwise specifically provided by statute, no ordinance or regulation of a political subdivision may regulate the sale, purchase, ownership, use, possession, transportation, licensing, permitting, taxation, or other matter pertaining to firearms[...].<sup>46</sup>

In attempting to capture USNH within the category of “political subdivision,” the respondents cited *USNH v. U.S. Gypsum*,<sup>47</sup> in which the district court refers to the university system as a “political subdivision.” That decision turned on whether the university system was a state, which is not a citizen, or a political subdivision (such as a county or local school district), which is a citizen, for diversity jurisdiction purposes. The court in *Gypsum* considered several factors to assess whether an entity is an arm of the state or not, including “whether [a political subdivision or agency] performs a government function, whether it functions with substantial autonomy, [and] to what extent it is financed independently of the state treasury.”<sup>48</sup> The court noted that “it is not agency status *per se* that gives rise to the alter ego designation; the crucial question is the agency’s degree of autonomy from the state.”<sup>49</sup> In refusing to dismiss the suit, the *Gypsum* court explains that “[w]ith sufficient autonomy from the state, especially with regard to financial matters, an agency, political subdivision, or state university [...] is thus a ‘citizen.’”<sup>50</sup> The court considered that, in 1991, only one quarter of the USNH operational budget came through state apportionment, and noted the statutory authority given to that system’s Board of Trustees to manage and control properties and affairs. The court also highlighted that the USNH establishing legislation sought to protect the system from “inappropriate external influence.” Ultimately, the *Gypsum* decision held that USNH was not an arm of the state, but rather “a governmental corporation of sufficient autonomy to escape designation as an alter ego of the state.”<sup>51</sup>

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45 *Id. supra* note 41, at 4 (internal quotations and citations omitted).

46 RSA 159:26, Firearms, Ammunition, and Knives; Authority of the State.

47 *University System of New Hampshire v. U.S. Gypsum Company*, 756 F.Supp. 640, 644 (1991) (“although it is a political subdivision of the state, it is not an ‘alter ego’ of the state”).

48 *Id.* at 645 (noting that the test is the same as that for diversity jurisdiction).

49 *Id. supra* note 47, at 646, 647.

50 *Id. supra* note 47, at 645.

51 *Id. supra* note 47, at 647.

Citing *Gypsum*, the respondents in *Jardis* also argued the USNH firearms policy is unconstitutional under both the state and federal constitutions. The court denied both claims. As to the Second Amendment in the U.S. Constitution, the court, citing *Heller*, reaffirmed the authority to limit the “right to bear arms,” explaining that “[l]ike most rights, the right secured by the Second Amendment is not unlimited. . . . (The Second Amendment) right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>52</sup> The *Jardis* court added that “‘laws forbidding the carrying of firearms in sensitive places such as schools and government buildings’ are ‘presumptively lawful regulatory measures.’”<sup>53</sup> In framing the argument at the state level, the court quoted the New Hampshire State Constitution, which says that “[a]ll persons have the right to keep and bear arms in defense of themselves, their families, their property and the State.”<sup>54</sup> However, the court also quoted previous State Supreme Court precedent that “‘the State constitutional right to bear arms is not absolute and may be subject to restriction and regulation.’”<sup>55</sup> The ability to regulate the state right to bear arms is subject to a “reasonableness test,” under which the court “focuses on the balance of the interests at stake.”<sup>56</sup> Reasonably speaking, the court determined that *Jardis et al.* were not armed in defense of themselves, their families, their property, or the state; rather, they were marching onto a public university campus in a manner “disruptive, highly visible, and intended to bring about a confrontation,”<sup>57</sup> which “carries with it ‘the virus of violence,’ and, thus, it is subject to reasonable restraint.”<sup>58</sup>

In enjoining *Jardis et al.*, the court held that USNH, though established by and required to submit annual reports to the state, is not a political subdivision of the state, unlike a municipality or school district.<sup>59</sup> The legislative establishments of both USNH and CCSNH (were someone to challenge *that* system’s firearms policies) clearly intended for the state, through the General Court, to provide sufficient autonomy to the public college and university systems to provide for

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52 *Id. supra* note 41, at 10 (quoting *District of Columbia v. Heller*, 554 U.S. 570 (2008), at 626). An example of this is a law signed years before in 2000 by then-Governor Jeanne Shaheen prohibiting firearms in courthouses, which passed in an evenly-divided State Senate (12R, 12D) and a State House of Representatives with a significant Republican majority (245R, 155D). See *Relative to the Carrying of Firearms in Courthouses*, H.B. 312, N.H. General Court (2000). Enacted into law as RSA 159.19.

53 *Id. supra* note 41, at 10 (quoting *District of Columbia v. Heller*, 554 U.S. 570 (2008), at 626-27 n.26).

54 Part I, Article 2-a, New Hampshire State Constitution.

55 *Id. supra* note 41, at 11 (quoting *State v. Smith*, 132 N.H. 756 (1990), at 758).

56 *Id. supra* note 41, at 11 (quoting *Bleiler v. Chief, Dover Police Dep’t*, 155 N.H. 693 (2007), at 700).

57 *Id. supra* note 41, at 5.

58 *Id. supra* note 41, at 12 (quoting *Lieberman v. Marshall*, 236 So. 2d 120 (Fla. 1970), at 123).

59 In early 2019, the New Hampshire state legislature began hearings for a bill, HB101, which “allows a school district, school administrative unit, or chartered public school to adopt and enforce a policy regulating firearms, firearms components, ammunition, firearms supplies, or knives within its jurisdiction.” Control at this level is rare, with preemption against local firearms regulation in effect in 43 states, according to the Giffords Law Center to Prevent Gun Violence, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/>.

and encourage an environment conducive to education and the free exchange of ideas. It is this educational environment the *Jardis* court has in mind when quoting from an earlier district court decision in Florida: “The State and its citizens, through their University and public school officials, have a valid interest in the orderly, peaceful, and nondisrupted operation of the University system.”<sup>60</sup>

## B. Oregon

Turning to another example, a case out of the Oregon Court of Appeals presents useful comparison. In *Oregon Firearms Educational Foundation v. Board of Higher Education and Oregon University System*,<sup>61</sup> the petitioners argued that an Oregon University System (OUS) firearms policy was in excess of authority granted by relevant statute. That statute grants the Board of Higher Education authority to “adopt rules and bylaws for the government thereof, including the faculty, teachers, students and employees therein,”<sup>62</sup> while the OUS policy asserted control over “any person”<sup>63</sup> found using or in possession “of firearms, explosives, dangerous chemicals, or other dangerous weapons or instrumentalities on institutionally owned or controlled property.”<sup>64</sup> In its decision, the court held invalid the policy in question, which gave OUS effective regulatory authority over use or possession of firearms on its property. State law stipulates, in part, that any administrative rule will be deemed invalid in the courts if that rule “exceeds the statutory authority of the agency”<sup>65</sup> enforcing the rule. The petitioner in *Oregon Firearms* also claimed a violation of the Second Amendment, but because the court eventually finds grounds for preemption, “the Court of Appeals therefore need not address when it also violates the Second Amendment.”<sup>66</sup>

The success of the petitioner’s case relied on statutory language that vests “the authority to regulate in any matter whatsoever [...] solely in the Legislative Assembly,”<sup>67</sup> and so requires preemption of the Board of Higher Education policy in question. Citing a previous decision by the same court, in which a school district’s policy regulating firearms possession by district employees was deemed legal despite an apparent conflict with state law, the court remembers that “[consistent] with what the legislative history suggests, the legislature intended the preemptive effect of

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60 *Lieberman v. Marshall*, 236 So. 2d 120, 123 (Fla. 1970).

61 245 Or. App 713 (2011). See also *Regents of University of Colorado v. Students of Concealed Carry on Campus, LLC*, 271 P.3d 496 (Colorado 2012). The court in this case comes to a conclusion similar to the court in the Oregon case: “In sum, we hold that the [Concealed Carry Act] divested the Board of Regents of its authority to regulate concealed handgun possession on campus” (271 P.3d 496, at 502).

62 *Id.* at 716 (quoting ORS 351.070(4)) [emphasis added].

63 Oregon Administrative Rule 580-022-0045.

64 *Id.* at §3.

65 *Id. supra* note 61, at 715 (quoting ORS 183.400(4)(b)).

66 *Id. supra* note 61, at 713.

67 ORS 166.170(1).

ORS 166.170(1) to be limited to the *lawmaking authority* of local governments.”<sup>68</sup> In that school district decision, the court viewed the rule in question as an employment policy and “concluded that the school district’s policy was not the exercise of that sort of ‘authority to regulate’ and that, therefore, it was not preempted.”<sup>69</sup> The *Oregon Firearms* decision, on the other hand, construes the OSU policy as an overreaching regulation. Citing a case in which the Oregon state Bureau of Labor’s rules were found to “have the effect of statutory law,”<sup>70</sup> and another holding that “[g]enerally, administrative rules and regulations have the same regulatory force as statutes,”<sup>71</sup> the court agrees that “[a]dministrative rules, unlike internal employment policies, have the regulatory force and effect of law.”<sup>72</sup> Because the OSU policy was created through the Board of Higher Education’s “quasi-legislative ‘lawmaking’ authority,”<sup>73</sup> the court concludes that the policy must be viewed as “an exercise of an ‘authority to regulate’ firearms”<sup>74</sup> exceeding that Board’s authority to do so.

### C. Texas

Another, more recent, decision out of the 5th Circuit Court of Appeals, *Glass, et al., v. Paxton, et al.*,<sup>75</sup> considers constitutional rather than preemption claims in a case about the alleged impact of the Campus Carry Law<sup>76</sup> enacted after passage of Senate Bill 11 in 2015. In its decision, the court held that allowing firearms onto the University of Texas at Austin campus, and into its classrooms, does not violate the First, Second, or Fourteenth Amendments rights of professors at the university. Glass claimed that the presence of weapons in class, or even the notion that it might be possible that some students in class could be carrying concealed weapons, would have a chilling effect on the pursuit of knowledge, and should therefore be restricted in the pursuit of “nondisrupted”<sup>77</sup> educational environments.

The First Amendment claim was that “classroom speech would be ‘dampened to some degree by the fear’ it could initiate gun violence in the class by students who have ‘one or more handguns hidden but at the ready if the gun owner is

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68 *Id. supra* note 61, at 721 (quoting *Doe v. Medford School Dist.* 549C, 232 Or App 38, 60, (2009)) [emphasis added].

69 *Id. supra* note 61, at 721 (quoting *Doe v. Medford School Dist.* 549C, 232 Or App 38, 61, (2009)).

70 *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 157, 903 P2d 351 (1995).

71 *Atchley v. GTE Metal Erectors*, 149 Or App 581, 586, 945 P2d 557, rev den, 326 Or 133 (1997).

72 *Id. supra* note 61, at 722.

73 *Id. supra* note 61, at 723.

74 *Id.*

75 900 F.3d 233 (2018). (The lower court decision does not take up the Second or Fourteenth Amendment questions, and Glass argued that the appellate court should also decline, but the court decided to do so anyhow.)

76 TEX. GOV’T CODE § 411.2031.

77 *Id. supra* note 60, at 126.

moved to anger and impulsive action.”<sup>78</sup> The court rejects this as a “subjective chill,”<sup>79</sup> and effectively describes as self-censorship any choice by the petitioners (all three of them professors) to avoid topics of discussion because of a vague fear or “speculation” of possible future violence: “Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.”<sup>80</sup> The court also cited previous Supreme Court cases considering claims that military surveillance would violate free speech rights through an “attenuated chain of possibilities” and “the decisions of independent actors.”<sup>81</sup> Linking this previous analysis to the *Glass* decision, the court observes that Glass’ allegation of harm is contingent on the possibility of “(1) harm from concealed-carrying students incited by classroom debate and (2) harm from University disciplinary action,” both of which “must be ‘certainly impending.’”<sup>82</sup> Because harm has not yet occurred, and despite the “concession by [the University] that consequences would follow if she were to ban concealed carry,” the court finds that Glass’ “decision to self-censor her speech rests on a harm that is not certainly impending.”<sup>83</sup> This all suggests that any similar claims of First Amendment violation as a result of a campus carry policy would have to flow *directly* from an *actual* harm, “consequences” such as firing or some other sanction following Glass’s or some other UT Austin professor’s classroom ban in violation of the policy.

The Second Amendment claim made by Glass is that “firearm usage in her presence is not sufficiently ‘well regulated,’”<sup>84</sup> and is therefore a violation of her rights under the Amendment. This represents a novel interpretation of the Amendment’s prefatory clause<sup>85</sup> that describes the need for a well-regulated militia. In order for Glass to prevail in this portion of her argument, the Amendment must be read to guarantee not only a right to bear arms in service of a militia, but also to guarantee that “persons not carrying arms have a right to the practice being well-regulated.”<sup>86</sup> However, “Glass’s argument is foreclosed by *Heller*.”<sup>87</sup> That decision held<sup>88</sup> that the prefatory clause of the Second Amendment, “A well regulated Militia, being necessary to the security of a free State,” does not limit the operative clause, that “the right of the people to keep and bear Arms, shall not be infringed.” Because the

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78 *Id. supra* note 75, at 238.

79 *Id. supra* note 75, at 238 (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)).

80 *Id.*

81 *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410-14 (2013). See also *Laird v. Tatum*, 408 U.S. 1 (1972).

82 *Id. supra* note 75, at 239 (citing *Clapper* at 410-14).

83 *Id. supra* note 75, at 240.

84 *Id. supra* note 75, at 243.

85 *Id. supra* note 75, at 244.

86 *Id. supra* note 75, at 244.

87 *Id. supra* note 75, at 244.

88 *Id. supra* note 6, at 577.

protections of the Amendment have been interpreted, since *Heller*, as accorded to individuals, and because the foundation of Glass’s argument requires a reading of those rights as belonging to a collective, the militia, or to individuals in connection with militia service<sup>89</sup> her argument in this area falls apart: “She has failed to state a claim under the Second Amendment.”<sup>90</sup>

As with the Second Amendment claim, the court found that Glass “fail[ed] to meet her burden”<sup>91</sup> in her equal protection claim under the Fourteenth Amendment. The application of rational basis review was applied “because the professors are not part of a protected class,”<sup>92</sup> and Glass argued that “[t]here is no rational basis for the division in the state’s policies between where concealed carry of handguns is permitted and where it may be prohibited.”<sup>93</sup> Specifically, Glass argued that there was “no rational basis for Texas to allow private universities to ban concealed carry but not public universities” and “no rational basis for the University to allow concealed carry in classrooms while simultaneously prohibiting the practice in other campus locations such as faculty offices, research laboratories, and residence halls.”<sup>94</sup> The argument on behalf of the University was that distinguishing between public and private institutions is a means to protect property rights and that distinguishing between busy classrooms and less-frequented spaces promotes public safety and self-defense, which are specific goals of the Concealed Carry Act. To the point, the University argues that “public safety and self-defense cannot be achieved if concealed carry is banned in classrooms because attending class is a core reason for students to travel to campus.”<sup>95</sup> Glass made no real effort to respond to these arguments, describing the University concealed-carry zoning as “inexplicable hodge-podge.”<sup>96</sup> In the final sentences of the *Glass* decision, the court quoted Supreme Court precedent that “when conceiving of hypothetical rationales for a law, the assumptions underlying those rationales may be erroneous so long as they are ‘arguable.’”<sup>97</sup> Because “Texas’s rationales are arguable at the very least” and because “Glass fail[ed] to [...] ‘negative every conceivable basis which might support’ Texas’s purported rational basis,”<sup>98</sup> the court did not find any violations of equal protection under the Fourteenth Amendment.

What this decision means in a broader context is that claimants must prove a harm is “certainly impending” in order to make a First Amendment claim that

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89 Justice John Paul Stevens, in his dissenting opinion in the split 5-4 *Heller* case, argues that the proper interpretation is to consider the right as tied to militia service.

90 *Id.*

91 *Id. supra* note 75, at 246.

92 *Id. supra* note 75, at 246

93 *Id. supra* note 75, at 245.

94 *Id. supra* note 75, at 245.

95 *Id. supra* note 75, at 245.

96 *Id. supra* note 75, at 245.

97 *Id. supra* note 75, at 246. Quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 320 (1993).

98 *Id. supra* note 75, at 246. Quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

speech has been chilled by implementation of campus carry law or policy, and cannot rely on a bad feeling about a possible but not yet obvious harm; further, the claims must be made against a named party, and not against unnamed third parties such as hypothetical students. As to Second Amendment claims, the court here suggests that *Heller* carves out room for arguments that certain spaces like classrooms and hospitals and courts may be given special regulatory consideration because of their purpose or vulnerability, but does not allow for any arguments about militia-related activity. Lastly, the decision suggests that the Fourteenth Amendment can only provide faculty with a rational basis review of policy justification,<sup>99</sup> and that the bar for “rational” is fairly easy for institutions to meet.

## V. Conclusion

One of the persistent findings across more than 130 years of court decisions between 1876 and 2008<sup>100</sup> is that the rights to keep and bear arms are not absolute. Even in *District of Columbia v. Heller*, which construed, for the first time at the Supreme Court level, the right to bear arms as an individual right rather than a state’s or collective’s right, the court recognized that the right is not unlimited:

...nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.<sup>101</sup>

While this decision reinforced the argument that individuals have a right to own and possess firearms regardless of militia service, it also upheld the notion that reasonable limitations on ownership and possession are well within current interpretation of the Second Amendment.

*Jardis* was not primarily a case about registration or licensing, as *Heller* and *McDonald* were. At the time of the planned protest, the state of New Hampshire only had requirements for registering concealed weapons.<sup>102</sup> Nor was *Jardis* about excessive prohibitions on the ownership or possession of handguns, “the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and

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99 Had the challenge been made by Black or Muslim faculty claiming discriminatory impact on the basis of race or religion, and had the challengers proven discriminatory intent by the legislature, then strict scrutiny would have required the government to prove that there was a compelling state interest for such discrimination and that the law was narrowly tailored to achieve its end. Had the challenge, made as it was by three women, included claims of discriminatory impact on the basis of gender, and had they proven discriminatory intent, then intermediate scrutiny would have required the government to prove that the law served an important government purpose and that it was substantially related to that purpose. The challengers made no such claims, and so the burden was theirs to prove that the state had no interest in the control of firearms and that the law provided no reasonable link to that interest.

100 Gregg Lee Carter, *Gun Control in the United States* 42 (ABC-CLIO 2017).

101 *Id. supra* note 6, at 626.

102 *Id. supra* note 32.

family,”<sup>103</sup> nor a case about defense of the home, “where the need for defense of self, family, and property is most acute.”<sup>104</sup> As a case about carrying firearms in a public space dedicated to education, rather, *Jardis* was concerned with preemption and the question of the bounds and authorities of the state and the university system. The decision left the injunction and temporary restraining order in effect “because RSA 159:26 [state law establishing USNH and granting it broad authority] likely does not preempt the Firearms policy and the Firearms policy is likely valid under the Federal and State Constitutions.”<sup>105</sup> The lack of conflict between statute and policy indicates the *likely* result should other cases arise in the state, but that result is only possible because of the way statutory and policy language interact.

While the decision in *Oregon Firearms* found a compelling argument for preemption, and while the decision in *Glass* found no compelling argument that a campus carry law violates First, Second, or Fourteenth Amendment rights, the decision in *Jardis* denies preemption, denies violation of the Second Amendment, and gives credence to the fear of possible or contingent harm: “If the respondents were permitted to bring firearms onto the Plymouth State campus in violation of the Firearms policy, it would introduce an element of volatility and a heightened risk of harm to the students, faculty, and staff present on the campus.”<sup>106</sup> The decision presents one possible argument to be made that unregulated open *or* concealed carry of firearms on campuses poses a threat to the tradition of academic freedom,<sup>107</sup> but in light of the *Glass* decision, it seems as though stronger evidence is required to prove harm, and that evidence is available. As long as those tasked with maintaining the safety and security on campus believe that there is “no credible evidence to suggest that the presence of students carrying concealed weapons would reduce violence on our college campuses,”<sup>108</sup> there is no good reason to experiment and risk the lives of students, faculty, staff, administrators, or their visitors. And as long as the link between levels of gun ownership and levels of gun violence remains strong, it is likely that others<sup>109</sup> will challenge the claim that campuses will be safer from the “virus of violence”<sup>110</sup> if more of their population carried weapons to classrooms, to offices, to residence halls, to gyms, to cafeterias, or to libraries.<sup>111</sup> It is no guarantee that a Supreme Court decision on the matter would end this debate, but the trend is also unlikely to fade before such a decision is reached.

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103 *Id. supra* note 6, at 628.

104 *Id. supra* note 6, at 628.

105 *Id. supra* note 41, at 13.

106 *Id. supra* note 41, at 13.

107 Laura Houser Oblinger, *The Wild, Wild West of Higher Education: Keeping the Campus Carry Decision in the University’s Holster*, 53 Washburn L.J. 87-117 (2013)

108 Lisa A. Sprague, *IACLEA Position Statement: Concealed Carrying of Firearms Proposals on College Campuses*, Int’l Ass’n of Campus Law Enforcement Administrators (Aug. 12, 2008). See also Jesus M. Villahermosa, Jr., *Guns Don’t Belong in the Hands of Administrators, Professors, or Students*, 54 Chron. High. Ed. A56 (2008).

109 See *GeorgiaCarry.org, Inc., v. Code Revision Commission, et al.*, 299 Ga 896 (2016).

110 *Id. supra* note 60, at 126.

111 Higher Educ. Ctr. for Alcohol, Drug Abuse, & Violence Prevention, *E-Fact Sheet: Guns on Campus: A Current Debate* (U.S. Dep’t of Educ. 2010).



*Review of Laura Kipnis'*

UNWANTED ADVANCES:  
*Sexual Paranoia Comes To Campus*

BY SARAH KERN\*

In 2015, Laura Kipnis, a film professor in Northwestern's School of Communications, found herself at the center of a Title IX investigation. That year, she wrote an essay for the Chronicle of Higher Education questioning Title IX policies and what she saw as the unfair treatment of a fellow professor, Peter Ludlow. After the article was published, students at Northwestern filed complaints against Kipnis for creating a "hostile environment" and marched in protest. Although Kipnis was cleared of the accusations against her, she wrote *Unwanted Advances: Sexual Paranoia Comes to Campus* as a warning call to academics, bringing attention to the frenzied and opaque administration of Title IX policies at universities. She argues that paranoia, coupled with overzealous reporting, takes away and pushes feminism backwards, all while threatening academic freedom.

Title IX of the Education Amendments of 1972 states "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>1</sup> Almost all post-secondary schools in the U.S. receive federal funds and are required to comply with Title IX regulations. The U.S. Department of Education Office for Civil Rights issues guidance with legal standards and potential repercussions for failure to comply as "Dear Colleague Letters." In response to growing concerns about rampant and unaddressed sexual harassment and assault on college campuses, the Department of Education released Dear Colleague Letters in 2011 and 2014 with further guidance on how colleges and universities should respond to sexual misconduct.<sup>2</sup> In response, colleges and universities created new Title IX offices, implemented campus-wide prevention training, and utilized the "preponderance of the evidence" standard in hearings for sexual misconduct.

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1 Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681-1688 (2012)).

2 Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence 11 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 24, 2014).

In *Unwanted Advances*, Kipnis uses a narrative of Ludlow's and her personal Title IX experience to illustrate how campuses are caught up in sexual harassment hysteria. According to Kipnis, a student wrongfully accused Ludlow of forced drinking and unwanted groping after a night of bar hopping. The student claimed the incident led to a failed suicide attempt the next morning. At the same time, Ludlow was also the subject of sexual assault claim by a former graduate student with whom he had a relationship. Kipnis had a front seat to Ludlow's Title IX hearing as his faculty support person. Ludlow resigned before he was fired, and with his academic profession forever ruined, he resides in Mexico.

The book's examination of Ludlow's case is based only upon interviews with him, his documentation, and Kipnis' own experience. She focuses on discrediting the character of Ludlow's accusers and challenging their version of events. In Kipnis' opinion, the embittered students making Title IX claims are full of psychodrama and fueled by sexual regrets. Kipnis tries to mitigate the power differential between faculty and students; she claims "youth and attractiveness offset power".<sup>3</sup> Like Ludlow, Kipnis reveals she also dated her students, and defends this practice as an adult's personal freedom. Ludlow points to his past as a divorced man to show that he has difficulty communicating in relationships, and Kipnis accepts this as the reason Ludlow could not see how manipulative younger women could ruin him.

Kipnis contends there is permanent danger in the Title IX policies for both men and women. She believes that the outcome of Ludlow's ordeal reinforces the male/predator and female/prey stereotype. Throughout her narrative, rape culture is equated to terrorism, which makes women believe they are in a state of perpetual vulnerability. Title IX policies remove women's agency, their choice, and makes it look as though they do not have their own sexual desires. Further, she maintains the policies support the narrative that sex is dangerous, promotes enfeebled and traditional forms of femininity, and make wrongfully accused male students distrustful and loathe women.

The author's caustic analysis of Title IX processes is useful to the current debate about proper limits of federal agency regulations on campus sexual assault policies. Kipnis took a chance by ignoring administrative directives to keep her investigation confidential to share a picture of a frustratingly unclear process with unknown motivations and potentially ruinous results. She shines a light on the decisions made behind closed doors that have an effect on an entire campus community, such as the definition of consent, and exposes a system that nearly requires one to be a legal scholar to be protected by the Title IX process. Also explored in the book is the notion that academic freedom is at stake when the focus of education shifts from the ideas of teachers to their institutional roles. Her argument is that faculty are increasingly afraid of complaints from students about content and the potential to create a hostile environment. As a result, faculty stifle their creativity and academic material. She reflects wistfully about her time in college, when no one cared that her greatest artistic influence was a womanizing genius professor. Kipnis' view may be anachronistic, but it brings up points well worth discussion.

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3 Laura Kipnis, *Unwanted Advances: Sexual Paranoia Comes to Campus* 94 (2017).

The primary weakness in *Unwanted Advances* is the lack of journalistic fairness.<sup>4</sup> It is difficult to accept the author's arguments about the inequality of the sexual complaint process when only portrayed through the lens of the accused. Although the confidentiality rules around Title IX complaints would prevent Kipnis from reviewing documents from Ludlow's and her accusers, accounts from accusers in other cases would add credibility to her investigation. Further, objective statistics and expert advice are replaced with hearsay and the commentary from those unfamiliar with the details of Ludlow's case throughout the text. Kipnis repeatedly reminds the reader that she is a left-wing feminist, but undercuts this claim when she tries to provide the "real" reasons why Title IX complaints are filed. Old stereotypes about women are trotted out: scorned women, regretful women, women looking for payback, and ladder-climbers willing to use Title IX investigations to get ahead. Most egregious of these stereotypes is the histrionic woman, a common theme used throughout the book to paint accusers as melodramatic attention seekers instead of exploring deeper reasons for their actions.

Kipnis' outrageous style while dealing with sensitive topics is difficult to appreciate. The men in her book are, at the most, guilty of being bad communicators and prognosticators. Women, on the other hand, are typecast in the roles of power-seeking, vengeful vixens that may have financial motivations to file Title IX complaints. According to the author, this isn't the fault of women but rather it is symptom of the fanatical, overly bureaucratic, rape culture crusade that makes women believe they are sexually vulnerable. She refuses to identify with women accusers, and mocks the effects of trauma on sexual assault survivors, claiming that much of used to be called "learning experiences" is now labeled "trauma".

*Unwanted Advances* is timely and the charismatic writing borders on gossip, which is perhaps why it is so entertaining to read. However, Kipnis should understand the value of a fair investigation and an even-handed analysis given her own experience with the Title IX process<sup>5</sup>. With the reader's attention in her grasp, the author missed an opportunity to effect change when she failed to bolster her narrative with support. While the book fails in this respect, it does offer an important perspective in the broader conversation around Title IX's reach on campus. Current proposed regulations to replace the Obama-era guidance on sexual assault espouse the same push for greater due process rights of the accused advocated by Kipnis.<sup>6</sup> Further, the academic freedom/free speech arguments found in the book are echoed by opponents to expansion of Title IX sexual harassment

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4 Indeed, this failure has formed the basis for a lawsuit filed against Kipnis. See Katherine Mangan, *Laura Kipnis is Sued Over Portrayal of Graduate Student in Book on Campus 'Sexual Paranoia'*, CHRON. HIGHER EDUC. (May 18, 2017), <https://www.chronicle.com/article/Laura-Kipnis-Is-Sued-Over/240105> for a description of the lawsuit and a timeline of events.

5 See Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), <https://www.chronicle.com/article/My-Title-IX-Inquisition/230489?cid=rclink>.

6 Some of the proposed changes to policy guidance that push for increased rights for the accused; including the ability to cross-examine victims, a more narrow definition of sexual harassment, and a higher standard of proof. See Q&A on Campus Sexual Misconduct, U.S. Dep't of Educ., <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>; Proposed Title IX Regulation Fact Sheet, U.S. Dep't of Educ., <https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf>.

regulations on campus.<sup>7</sup> These current trends may move the needle farther away from justice for graduate school women who are most often the victims of sexual harassment misconduct by faculty”.<sup>8</sup> Kipnis may not have supported her argument well, but she did reignite a worthy debate over what constitutes sexual harassment on campus and the role faculty play in sexual harassment on campus.

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7 See e.g. *NCAC to Dept. of Ed: Vague Definition of Harassment Under Title IX Threatens Student Free Speech*, NAT'L. COAL. AGAINST CENSORSHIP, <https://ncac.org/resource/are-department-of-education-policies-hurting-campus-free-speech>.

8 See Nancy Chi Cantalupo & William C. Kidder, *Mapping the Title IX Iceberg: Sexual Harassment (Mostly) in Graduate School by College Faculty*, 66 J. Legal Educ. 850 (2017); Brian A. Pappas, *Abuse of Freedom: Balancing Quality and Efficiency in Faculty Title IX Processes*, 67 J. Legal Educ. 802 (2018).