

(EN)FORCING A FOOLISH CONSISTENCY¹?: 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 The Trump administration’s Office for Civil Rights rescinded this earlier guidance and in November 2018 issued a notice of proposed rulemaking regarding Title IX regulations.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

* 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;² prevention of faculty-on-student sexual harassment also looms as a major challenge on university campuses,³ and in both of these areas there are indications of higher victimization rates among vulnerable populations like LGBTQ students and women of color.⁴ 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.⁵

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

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.

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.⁶

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,⁷ 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."⁸ I am not the first to point out that such complaints about a new mandate were at least partly inaccurate.⁹ 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.¹⁰ 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."¹¹

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).¹² 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.¹³ The Georgetown letter received some national attention as the campus agreed to adopt the POE standard in sexual assault adjudications.¹⁴

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.¹⁵

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.¹⁶

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"¹⁷ system for the standard of evidence,

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 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 <u>POE</u> for student Title IX proceedings	If use <u>C&C</u> 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* ¹	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.¹⁸

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;

¹⁸ *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.¹⁹

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.²¹ 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 way²²).

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,²³ groups of Harvard and Penn law professors²⁴ and criminal defense bar organizations like the American Trial Attorney Association.²⁵ Conversely, the POE standard is supported in Title IX cases by a number of gender equality and civil rights groups, including the National

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.

Women’s Law Center²⁶ and Faculty Against Rape.²⁷ 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).²⁸

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”²⁹ 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.³⁰ 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”

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; 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-ciw49tixgw5lbab.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.³¹ (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.³²) 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.³³ The C&C standard occupies an intermediate and quasi-criminal position in this continuum.³⁴

Expressed as mathematical shorthand, these three standards of evidence are sometimes thought of as representing the following confidence thresholds³⁵: 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.³⁶ 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”

31 *Addington v. Texas*, 441 U.S. 418, 432-33 (1979); *Mondaca-Vega v. Holder*, 718 F.3d 1075, 1082 (9th 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. (3rd 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 (7th 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 system³⁷, 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.³⁸ 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.³⁹

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.⁴⁰ 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.⁴¹ 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.

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.”⁴²
- 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.”⁴³
- 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.”⁴⁴
- 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.”⁴⁵

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.”⁴⁶
- (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.”⁴⁷

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,⁴⁸ 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.⁴⁹

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

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).

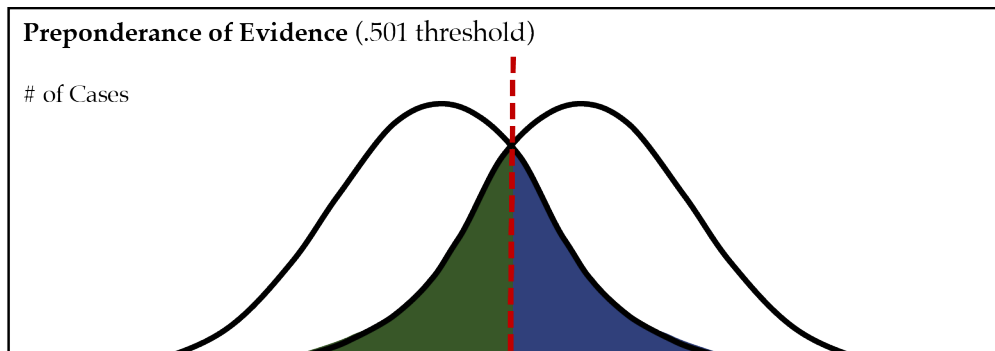
48 John Villasenor, *A Probabilistic Framework for Modelling False Title IX ‘Convictions’ Under the Preponderance of the Evidence Standard*, 15 LAW, PROBABILITY & RISK 223, 224 (2016) (“There is a trade-off between these two types of errors. If the burden of proof necessary to find a defendant guilty 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.⁵⁰ 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 standard⁵¹ 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 government⁵² or being involuntary committed to a psychiatric hospital indefinitely.⁵³

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

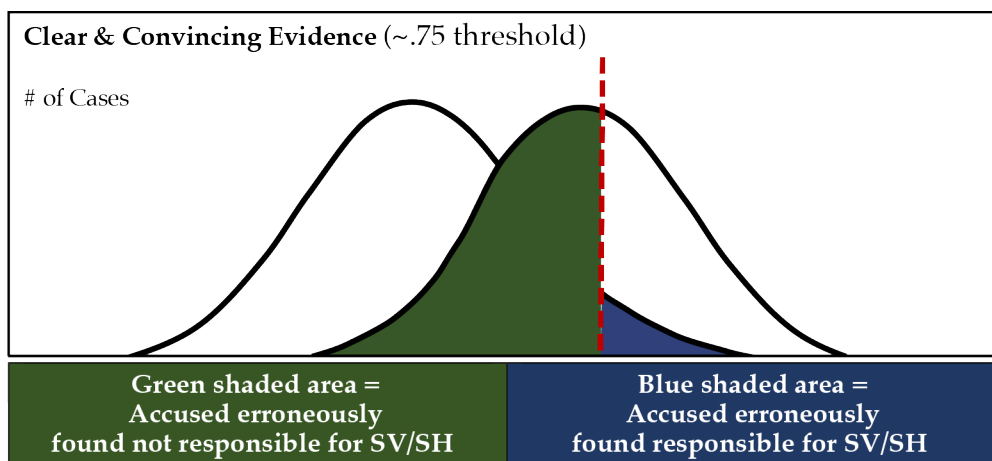


50 Adapted with permission of the authors of RONALD JAY ALLEN ET AL., AN ANALYTICAL APPROACH TO EVIDENCE: TEXT, PROBLEMS AND CASES 811-13 diagrams 10-2 & 10-3 (6th ed., 2016).

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* (6th 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.⁵⁴ 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.⁵⁵ 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%⁵⁶), 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).⁵⁷ 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.⁵⁸ 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,”⁵⁹ 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.⁶⁰ Similarly, some evidence scholars criticize the C&C standard as “unworkably vague.”⁶¹

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,⁶² conclude: “Empirical research indicates that jurors may have some difficulty distinguishing the clear and convincing standard of proof.”⁶³
- 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.⁶⁴

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.”⁶⁵ 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:

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 assault⁶⁶ were repeat offenders.⁶⁷ 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.⁶⁸ Repeat offenders were more likely than single-time offenders to engage in sexual coercion and assault of higher severity.⁶⁹
- 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.⁷⁰ 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.⁷¹

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 recidivism⁷² 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.

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 (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.⁷³

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).⁷⁴ 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.⁷⁵

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.⁷⁶ 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.”⁷⁷

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

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.

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 importance⁷⁸ 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.⁷⁹ 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.⁸⁰ Since the germinal cases of *Board of Regents v. Roth*⁸¹ and *Perry v. Sindermann*,⁸² 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.⁸³ Liberty interests are relevant too because sexual harassment falls within the rubric of "moral turpitude" under legal standards⁸⁴ (and academic norms/AAUP policies⁸⁵) so as to implicate risks of stigmatic harm for a falsely accused/sanctioned faculty member.⁸⁶

Roth, *Perry* and related constitutional cases apply to public universities and colleges (i.e., state actors),⁸⁷ 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.⁸⁸ As explained in *Cleveland Board of Education v. Loudermill* in the context of pre-termination hearing requirements: "The tenured public employee is entitled to

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."⁸⁹

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.⁹⁰

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.⁹¹

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.⁹² 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*.⁹³ 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.'"⁹⁴ The AAUP's recommended regulations likewise call for C&C as the standard of evidence in faculty dismissal hearings.⁹⁵

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

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. 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.⁹⁶ 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 1971,⁹⁷ but that first specified the C&C standard for faculty disciplinary hearings in a Senate bylaw thirty years later in 2001.⁹⁸ 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.⁹⁹

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.¹⁰⁰ This is a specific instance of the more general proposition that academic freedom is too often poorly understood,¹⁰¹ 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.¹⁰² 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.¹⁰³

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 (3rd 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,¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷ At the time of this writing, at best there is supportive dicta in the federal

binding on colleges and universities that choose to follow them.”); *c.f. Korff 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*,¹⁰⁸ dicta in a new federal unpublished case of *Lee v. University of New Mexico* (later removed in an amended order)¹⁰⁹ 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*.¹¹⁰ 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.¹¹¹ Faculty sexual harassers had a low win rate of 21% in challenging their terminations,¹¹² and most of these cases provide no commentary on the standard of evidence POE versus C&C question. I could not find in these

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) 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.¹¹³ 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.¹¹⁴

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"¹¹⁵ across Title IX and other disciplinary domains. The Supreme Court has never granted certiorari in a college faculty-on-student sexual harassment case,¹¹⁶ 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.¹¹⁷

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 (6th 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).

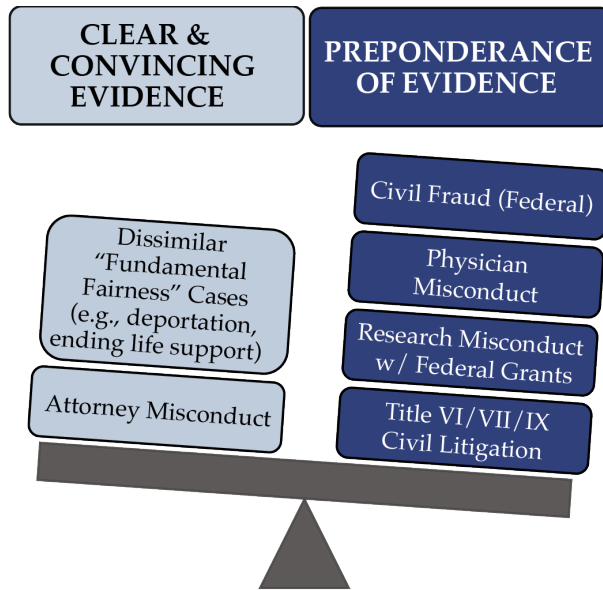
114 William E. Thro, *No Clash of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENT U. L. REV. 197, 209 (2015); ABA Criminal Justice Section's Task Force on College Due Process Rights and Victim Protection, Recommendations for Colleges and Universities 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 proceedings¹¹⁸;
- involuntary civil (i.e., psychiatric) commitment for an indefinite period¹¹⁹;
- deportation proceedings¹²⁰; and
- withdrawing medical life support for a patient in a persistent vegetative state.¹²¹

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.”¹²²

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.¹²³

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.”¹²⁴ 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.¹²⁵

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.¹²⁶ 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

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,¹²⁷ just as a respondents who encounter a “false positive” campus finding risks serious negative educational and/or employment consequences at the university.¹²⁸ 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.”¹²⁹

Organizations like FIRE often cite *Addington* and *Santosky* in favor of the C&C standard in campus Title IX matters,¹³⁰ 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.¹³¹ For

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.¹³² 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).¹³³

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).¹³⁴ 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.¹³⁵

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.¹³⁶ 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.¹³⁷ 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.¹³⁸ 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.¹³⁹ Similarly, the EPA's External Civil Rights Compliance Office likewise applies the POE standard in its *case resolution manual*.¹⁴⁰ The U.S.

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.

Department of Agriculture applies the POE standard in e.g., large-scale arbitrations to address discrimination complaints from farmers,¹⁴¹ 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.*¹⁴²

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

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.

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.¹⁴⁶

In addition, there are other parallels between federal research misconduct and Title IX requirements, including strict time limits¹⁴⁷ and the federal agency's interest in monitoring and preventing retaliation against the whistleblowers who report research misconduct.¹⁴⁸ 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.¹⁴⁹

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”¹⁵⁰ 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.¹⁵¹

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.”¹⁵² 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 overreach¹⁵³ (see conclusion in Part V of this article).

Moreover, researchers can seek judicial review of a federal research debarment decision.¹⁵⁴ 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.¹⁵⁵

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.”¹⁵⁶ However, the research misconduct realm carries a substantial risk of stigmatic harm implicating liberty interests,¹⁵⁷ yet this area operates alongside the federally required POE standard of evidence.

[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 websites¹⁵⁸ and by scientific watchdog organizations.¹⁵⁹ 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 evidence¹⁶⁰ (an inapt and unsound comparison¹⁶¹), 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.

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).¹⁶² 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.¹⁶³

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.¹⁶⁴ 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.¹⁶⁵

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

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.¹⁶⁶ 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.¹⁶⁷

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,¹⁶⁸ 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.¹⁶⁹

Figure 4: Physician Misconduct Cases and the Standard of Evidence Used by Medical Boards in U.S. States, DC and Commonwealths¹⁷⁰

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.¹⁷¹ The New Jersey Supreme Court in *Polk* concluded that the government's interest¹⁷² 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.¹⁷³

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

The Trump administration OCR's *notice of proposed rulemaking* cites as supplemental authority the case of *Nguyen v. Washington State Department of Health*.¹⁷⁹ 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

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

172 *Id.* at 14.

173 *Tsirelman v. Daines*, 794 F.3d 310, 315 (2nd 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.¹⁸⁰ The majority opinion in *Nguyen* is analytically troubling for reasons articulated in the dissenting opinion by three justices.¹⁸¹

In the wake of the #MeToo movement there is greater awareness of physician sexual misconduct cases that intersect with higher education.¹⁸² 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.¹⁸³ 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.¹⁸⁴

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*,¹⁸⁵ a case that briefly mentions the C&C standard and involved an attorney making unwelcome sexual advances toward his client.¹⁸⁶ In terms of attorney misconduct cases more generally, requiring C&C as the burden of proof is the majority position

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

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.

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.¹⁸⁷ 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.¹⁸⁸

While a majority of states use the C&C standard in attorney disbarment proceedings,¹⁸⁹ 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.¹⁹⁰ New Jersey is one state where the Supreme court already endorsed the C&C standard in attorney disbarment cases,¹⁹¹ 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.¹⁹² 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."¹⁹³ 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"¹⁹⁴ at a too-comfortable mode

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.¹⁹⁵

Finally, the different standards of proof in attorney misconduct cases is a pattern with a very long history;¹⁹⁶ 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.¹⁹⁷

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.¹⁹⁸ 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

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/; ("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. Colleges¹⁹⁹

POE for ALL T9 cases (faculty & student) and all non-T9 student cases	POE for many student cases including T9 but C&C for Honor Code violations	POE for all T9 student cases; in faculty cases POE for T9 investigation reports, but C&C for faculty hearing & sanctions	C&C for ALL T9 cases (faculty & student) and other significant student and faculty discipline
U. of Delaware (now) U. of Wisconsin (now) Harvard Law (now) Cal. State U. (now)	James Madison (now) Emory U. (now) U. Arizona Law School (now)	U. of California (now) U. Nor. Carolina (now)	Princeton (pre-2014) Tufts (pre-2014) Ok. Wesleyan U. (now) Small private colleges

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.²⁰⁰

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

¹⁹⁹ 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.

²⁰⁰ 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,²⁰¹ 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.²⁰²

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.”²⁰³

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

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

a two-tier system with different standards of proof.”²⁰⁴ 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.²⁰⁵

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 2014.²⁰⁶

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.”²⁰⁷ 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.²⁰⁸ 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

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.”²⁰⁹ In other words, “a court must examine the reasons for agency decisions, or, as the case may be, the absence of such reasons.”²¹⁰ 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...’”²¹¹ Agencies are granted a high level of deference by federal courts under the arbitrary and capricious standard.²¹²

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.”²¹³ The approach taken in this article is to evaluate these issues based upon available social science and policy research,²¹⁴ and to disfavor justifications based upon mere recitation of abstract first principles and/or misapplied maxims from criminal law.²¹⁵

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.²¹⁶

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,"²¹⁷ 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.²¹⁸

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.”²¹⁹ 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.²²⁰ 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”²²¹ 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.²²² A couple states (Kansas and Michigan)

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.²²³ 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
https://law.arizona.edu/sites/default/files/Honor_Code_2015.pdf http://www.titleix.arizona.edu/code_of_student_conduct
California State University (23 campuses)
Chancellor’s Executive Order 1095, https://www.calstate.edu/eo/EO-1095-rev-6-23-15.html Chancellor’s Executive Order 1096, https://www.calstate.edu/eo/EO-1096-rev-10-5-16.html Chancellor’s Executive Order 1097, https://www.calstate.edu/eo/EO-1097-rev-10-5-16.html California Faculty Association’s CBA with the California State University, extended to 2020 (https://www.calfac.org/resource/collective-bargaining-agreement-contract-2014-2017 (see Article 19.29))
University of California (10 campuses)
UC Sexual Violence and Sexual Harassment Policy, https://policy.ucop.edu/doc/4000385/SVSH UC Faculty Code of Conduct (APM – 015), https://www.ucop.edu/academic-personnel-programs/files/apm/apm-015-and-016-issuance1/apm-015-7-1-17.pdf University of California, Academic Senate Bylaw 336.D.8, http://senate.universityofcalifornia.edu/bylaws-regulations/bylaws/blpart3.html#bl336 UC Berkeley Sexual Violence and Sexual Harassment local procedures for Senate Faculty, https://ophd.berkeley.edu/sites/default/files/berkeley_senate_faculty_svsh_invadj_procedures_10.10.2017.pdf
University of Delaware
University of Delaware, Committee on Faculty Welfare and Privileges Termination and Complaint Procedures 3 (amended Jan. 2015) available at http://facsen.udel.edu/Sites/FWP%20Cte/FWP-Policy-Final-Version-As-Amended-During-January-12-2015-Faculty-Senate-Meeting.pdf 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) (http://facsen.udel.edu/Sites/agenda/2014UDel11-10-14hearing.pdf) 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)
http://catalog.college.emory.edu/academic/policies-regulations/honor-code.html https://emory.ellucid.com/documents/view/16836/?security=4f94881ac0ddcbae-11c4a4115a74ae7de40de24b
Harvard Law School
Harvard Law School, Interim Sexual Harassment Procedures (Dec. 2014), <i>available at</i> http://hls.harvard.edu/content/uploads/2014/09/hls-titleix-interimpolicy1.pdf (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), 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/ 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
https://www.jmu.edu/honorcode/code.shtml https://www.jmu.edu/osarp/handbook/OSARP/sexual-misconduct-accountability-process.shtml
University of North Carolina (17 campuses)
UNC Policy Manual, Chapter 100.1 Section 603(8), <i>available at</i> http://www.northcarolina.edu/apps/policy/index.php?pg=vs&id=4433
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 (https://www.okwu.edu/search)
Princeton University (pre-2014)
https://odoc.princeton.edu/sites/odoc/files/950045_AcademicIntegrity2018-19_FINAL_PDF.pdf (current) 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
University of Wisconsin (26 campuses)
University of Wisconsin System Procedures for Dismissal, UWS 4.06(1) (amended 2016), <i>available at</i> https://docs.legis.wisconsin.gov/code/admin_code/uws/4 See also Board of Regents of the University of Wisconsin System, Proposed Order to amend the Wisconsin Administrative Code, Chapters UWS 4 , Procedures for Dismissal of Faculty and UWS 7, Dismissal of Faculty in Special Cases (2015), <i>available at</i> http://docs.legis.wisconsin.gov/code/register/2015/718A2/register/rule_notices/cr_15_061_hearing_information/cr_15_061_rule_text/?up=1

