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## ARTICLES

### **He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments**

Eric D. Bentley 451

We live in a time when a smart phone and two fast-working thumbs are all an athlete needs to instantly post comments, videos, or pictures online for millions to see. It is a time when being the first to tweet on a subject is desirable and having videos go “viral” on YouTube can even become lucrative. However, this instant access to a hungry audience of millions comes with significant risk and a potential for severe regret.

Some college coaches are reacting to this potential for inappropriate postings from their athletes by banning their athletes’ use of social media altogether or disciplining athletes for their social media postings. The purpose of this article is to address whether it is legally defensible to limit or restrict the use of social media by college athletes, or to discipline athletes for their social media activity, and to suggest best practices for avoiding a valid First Amendment claim.

### **“Decriminalizing” Campus Institutional Responses to Peer Sexual Violence**

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There are relatively few studies that give some insight into the causes of both the problem of peer sexual violence and its persistence. Despite this lack of attention, institutional responses are a key factor in the peer sexual violence

epidemic. Institutional responses likely to break the cycle need to be designed, on the front end, to encourage victim reporting as well as other sources of information about violence occurring at that institution, and, on the back end, to hold perpetrators accountable, including through some kind of effective disciplinary process. For a variety of complicated reasons, at the current time and at many colleges and universities, neither of these responses is generally occurring. Instead, as the cases, journalistic accounts, and empirical studies reviewed in this article suggest, on the front end, many institutions do their best to avoid knowledge of the peer sexual violence, both in general and in specific cases, and on the back end, they adopt disciplinary procedures that make it more difficult to find students accused of sexual violence responsible for that violence.

The remainder of this Article will look at three areas of law to see how these laws encourage institutions to adopt certain methods of dealing with campus peer sexual violence. It will ultimately conclude that, both to comply with their legal obligations and ultimately to end the violence, institutions need to “decriminalize” their institutional responses to the problem, both on the front end and on the back end. Finally, it will make two recommendations of specific methods that institutions can use to begin the decriminalization process.

### **How Tri-Valley University Fell Off the Diploma Mill: Student Immigration and Façade Education**

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and its President, Susan Xiao-Ping Su. Additionally, we discuss some of the political fallout from TVU and other instances of student visa fraud. In section four, we explore the implications of the current student visa scheme as applied to for-profit colleges and universities. Finally, we conclude by offering three proposals to improve the current system of admitting foreign students to study at for-profit institutions.

## **The Ethical and Educational Imperative of Due Process**

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Due process—broadly defined as an inclusive mechanism for disciplined and impartial decision making—is essential to the educational aims of contemporary higher education and to fostering a sense of legitimacy in college and university policies. Even if due process were not required by law (as it typically is), colleges and universities would want to provide it as a matter of policy. An immediate risk is that persistent internal and external pressure on institutions to lower due process thresholds and to impose mandatory sanctions (initially in sexual violence cases, but possibly moving into other categories of student misconduct as well) will unnecessarily tip the balance of procedural due process toward reassertion of greater paternalistic control by college and university administrators. Reassertion of such control—even when disguised by progressive-sounding euphemisms—is precisely the wrong direction for institutions to take as young adults seek to develop and demonstrate new leadership skills and as more older students (including returning veterans) arrive on campus expecting to be treated like adults. Furthermore, consistent with the aims of educational institutions to model ethical behavior expected of others, core due process procedures defined in campus publications should be honored in the same way other enterprises (commercial or otherwise) are expected to keep their stated commitments.

## **NOTES**

### **The Commercial Speech Doctrine Barely Survives *Sorrell***

This Note seeks to explain the significance of *Sorrell* and evaluate its effect on the future of the commercial speech doctrine. Part I explores the winding and shaky history of commercial speech law in First Amendment jurisprudence, culminating in an evaluative test that has proven difficult to apply. Problems with the test have produced inconsistent holdings not only across the district and circuit courts, but also within the Supreme Court's own case law. The first Part of this Note examines those inconsistencies and highlights one facet of the test with which courts have had particular trouble. Part II describes the circuit split resulting from *Pitt News* and *Swecker* in order to illustrate the areas of *Central Hudson* that are sufficiently vague and unworkable to permit inconsistent holdings. Part III introduces and explains *Sorrell*, making careful note of the take-away lessons relevant to the commercial speech doctrine. Part IV applies the lessons from *Sorrell* to the alcohol advertisement bans in order to see the new rules in practice. Finally, this note concludes in Part V by taking stock of the newest developments in the commercial speech doctrine and highlighting the ends left loose by *Sorrell*.

### **Guns on Campus: Continuing Controversy**

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After the numerous tragic rampages that have occurred on college and university campuses, some observers have suggested that the tragedies could have been avoided or stopped if even one student had been armed and able to defend himself or herself with a firearm. Others have suggested that if firearms are allowed on college and university campuses, even if such rampages could be prevented, the rate of homicides and violence will rise due to students routinely carrying firearms. States have historically restricted the exercise of individual gun rights in varying forms. These restrictions have, often times, taken the form of banning firearms on college and university campuses. Across America, state legislators have annually introduced bills pertaining to the "guns on campus" issue, and 2011 was no exception. In fourteen states, legislators introduced bills to allow licensed individuals to carry concealed weapons on campus. Additionally, in two states, legislators introduced bills to explicitly forbid individuals from carrying concealed weapons on campus. All sixteen bills failed. This note will analyze and discuss various cases and legislation pertaining to the individual right to possess firearms for self-defense and personal security in the college and university campus setting. After considering the current Second Amendment jurisprudence, this Note will discuss potential standards of

review applicable to firearm regulations on public, but not private, college and university campuses.

**HE TWEETED WHAT?  
A FIRST AMENDMENT ANALYSIS OF THE  
USE OF SOCIAL MEDIA BY COLLEGE  
ATHLETES AND RECOMMENDED BEST  
PRACTICES FOR ATHLETIC DEPARTMENTS**

ERIC D. BENTLEY \*

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## INTRODUCTION

Think back to a simpler time in college sports when basketball players wore long socks and short shorts and Nike Air Jordan shoes were not yet considered “retro.” It was a time when, after a devastating loss in a college game, an athlete would use a landline phone to call a close friend or teammate and complain about the coaching decisions or a blown call by a referee. Later, the athlete might visit with more friends over pizza and continue to vent about the tough loss.

In the above scenario, how many friends actually heard the athlete complain about the coach or referee? Maybe five or ten close friends? And of those five or ten close friends, how likely is it that any of them would immediately divulge this conversation to the coach, referee, athletic director, school president, or anyone else who would listen? Worse yet, send each individual a transcript of the conversation? In that simpler time in college sports, the athlete likely woke up the next morning to business as usual with no repercussions—no suspension from the team for violating team rules and no early morning meeting with the athletic director to discuss the situation.

We live in a different time. It is a time when a smart phone and two fast-working thumbs are all an athlete needs to instantly post comments, videos, or pictures online for millions to see. It is a time when being the first to tweet on a subject is desirable and having videos go “viral” on YouTube can even become lucrative.<sup>1</sup> However, this instant access to a hungry audience of millions comes with significant risk and a potential for severe regret. Just ask the UCLA student who, shortly after the devastating tsunami in Japan, posted a three minute video on YouTube with derogatory and insensitive comments about Asians who were talking on their cell phones in the library. Within days, the video was viewed by millions, the

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1. For example, consider “The Annoying Orange,” which is a compilation of short video clips posted on YouTube of a talking orange that is, well, annoying, but has raked in an estimated \$288,000 for the person who created the videos. See Megan O’Neill, *How Much Money Do the Top Grossing YouTube Partners Make?*, SOCIAL TIMES (Aug. 26, 2010, 1:45 PM), [http://socialtimes.com/money-youtube-partners\\_b21335](http://socialtimes.com/money-youtube-partners_b21335).

student and her family received death threats, and the student withdrew from UCLA.<sup>2</sup>

Some college coaches are reacting to this potential for inappropriate postings from their athletes by banning their athletes' use of social media altogether or disciplining athletes for their social media postings.<sup>3</sup> The purpose of this article is to address whether it is legally defensible to limit or restrict the use of social media by college athletes, or to discipline athletes for their social media activity, and to suggest best practices for avoiding a valid First Amendment claim.

### I. FIRST AMENDMENT CLAIMS—ENEMY OF THE STATE

It is well settled that in order for an individual to bring a valid First Amendment claim (or any other claim under the U.S. Constitution), there must be state action.<sup>4</sup> This means that the actions taken by employees of public colleges and universities are subject to potential First Amendment and other constitutional claims while actions taken by employees of private colleges and universities are not. Because of the complexity of the First Amendment and the fact that a First Amendment lawsuit must be brought directly against an individual as opposed to the college or university,<sup>5</sup>

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2. Kate Parkinson-Morgan, *Alexandra Wallace Apologizes, Announces She Will No Longer Attend UCLA*, DAILY BRUIN (Mar. 28, 2011, 12:10 AM), [http://www.dailybruin.com/index.php/blog/timestamp/2011/03/alexandra\\_wallace\\_apologizes\\_announces\\_she\\_will\\_no\\_longer\\_attend\\_ucla](http://www.dailybruin.com/index.php/blog/timestamp/2011/03/alexandra_wallace_apologizes_announces_she_will_no_longer_attend_ucla).

3. See e.g., *New Mexico Coach Bans Players from Twitter*, 12 LEGAL ISSUES IN COLLEGIATE ATHLETICS 10, Aug. 2011, at 10 (reporting that the use of Twitter has been banned by coaches for the University of New Mexico's men's basketball team, Mississippi State University's men's basketball team, Villanova's men's basketball team, Boise State University's football team, University of South Carolina's football team, and Kansas State University's football team). USA Today initially reported that Urban Meyer had, within hours of taking over the Ohio State head football coaching job, banned his athletes from posting comments on Twitter. The USA Today subsequently reported that two of Meyer's football players indicated there was a misunderstanding and there was no such ban. See Erick Smith, *Ohio State Players Dispute Coach Urban Meyer Banned Twitter*, USA TODAY (Jan. 3, 2012, 5:13 PM), <http://content.usatoday.com/communities/campusrivalry/post/2012/01/ohio-state-urban-meyer-twitter-ban/1>.

4. See *Bryant v. Miss. Military Dep't.*, 519 F. Supp. 2d 622, 627 (S.D. Miss. 2007), *aff'd sub nom*, *Bryant v. Military Dep't of Miss.*, 597 F.3d 678 (5th Cir. 2010) ("A claim for violation of the First Amendment to the United States Constitution must be brought pursuant to 42 U.S.C. § 1983, which requires state action. To state a claim under § 1983, a plaintiff must allege facts showing a person acting under color of state law deprived the plaintiff of a right, privilege or immunity secured by the United States Constitution or the laws of the United States.").

5. See *Farias v. Bexar Cnty. Bd. of Tr. for Mental Health Mental Retardation Servs.*, 925 F.2d 866, 875 n.9 (5th Cir. 1991) (stating that the Eleventh



coaches and athletic directors must be well versed in complex constitutional issues to avoid valid claims. On the other hand, coaches and athletic directors at private colleges and universities have no need to study constitutional issues such as freedom of speech and expression, freedom of association, the separation of church and state, due process, or the freedom of religion.<sup>6</sup>

For example, consider Brandon Davies, the BYU basketball player who was suspended in the final week of BYU's 27-2 season in 2011.<sup>7</sup> Davies was a key player for a BYU team that was arguably the best in school history and that was on the verge of dominating in the NCAA tournament.<sup>8</sup>

BYU, a private religious university, suspended Davies for a violation of a BYU honor code provision prohibiting premarital sex.<sup>9</sup> Because the U.S. Constitution does not apply to private colleges or universities, BYU's actions were justified from a constitutional law standpoint—there is no First Amendment claim for free expression and free association and no First Amendment establishment clause claim for forcing Davies to adhere to the moral principles of the Mormon religion.

In fact, because BYU is a private university, it could go even further in its honor code if it so desires and state that its athletes cannot “friend” any members of the opposite sex on Facebook or that they must quote a Bible passage before every foul shot and there still would be no First Amendment implications. However, similar actions by a public college or university would have dire legal consequences under the First Amendment.

Another example of the private/public distinction under the First Amendment in the athletic context is how the NCAA, a private entity, responded to football players such as Tim Tebow who displayed

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Amendment bars claims against a state brought pursuant to 42 U.S.C. § 1983); *see also* Aguilar v. Tex. Dept. of Criminal Justice, 160 F.3d 1052, 1052–53 (5th Cir. 1998) (“ . . . a plaintiff's suit alleging a violation of federal law must be brought against individual persons in their official capacities as agents of the state, and the relief sought must be declaratory or injunctive in nature and prospective in effect.”) (*citing* Saltz v. Tenn. Dep't of Emp't Sec., 976 F.2d 966, 968 (5th Cir. 1992)).

6. *See, e.g.*, Key v. Robertson, 626 F. Supp. 2d 566 (E.D. Va. 2009) (holding there was no First Amendment claim against a private law school where the law school dean required a student to remove an image on his Facebook account of the dean scratching his nose with his middle finger).

7. *See* Ian Saleh, *Brandon Davie Suspended from BYU Basketball Team for Honor Code Violation*, WASH. POST (Mar. 4, 2011, 8:39 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/04/AR2011030401742.html>.

8. *See* Pat Forde, *BYU Puts Principle Over Performance*, ESPN (Mar. 2, 2011), [http://sports.espn.go.com/ncb/columns/story?columnist=forde\\_pat&id=6175251](http://sports.espn.go.com/ncb/columns/story?columnist=forde_pat&id=6175251).

9. *Id.* To access BYU's honor code, see *Church Educational System Honor Code*, BYU, <http://saas.byu.edu/catalog/2011-2012ucat/GeneralInfo/HonorCode.php#HCOfficeInvolvement>.

handwritten Bible passages on their eye black.<sup>10</sup> In response to this perceived “problem,” the NCAA came up with rules in 2011 prohibiting college football players from placing symbols or letters on their eye black.<sup>11</sup> Because the First Amendment protects even non-verbal expression, a player’s use of Bible passages on eye black would be considered expressive activity that is subject to First Amendment protection if a coach from a public college or university told the player he could not cite Bible passages on his eye black.<sup>12</sup> However, because the eye black rule was enacted by the NCAA as a private entity, there would not be a valid First Amendment claim against the NCAA for limiting this expressive activity.

In summary, private colleges or universities and other private entities (including the NFL, MLB, and the NBA) can enact strict social media policies or discipline an athlete for an inappropriate tweet or Facebook posting without risking a valid First Amendment claim by the athlete.<sup>13</sup> However, public colleges and universities should adhere to the best practices detailed in Sections III–V below with regard to athletes’ use of social media.

## II. THE SOCIAL MEDIA FORUM—A WORLD WIDE WEB OF ITS OWN

Generally, the first step in analyzing a potential First Amendment claim is to perform a forum analysis.<sup>14</sup> A forum analysis focuses on whether the speech occurred in a (1) traditional public forum, (2) designated public

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10. Joe Schad, *Eye Black Messages, Wedge Blocks Out*, ESPN (Apr. 16, 2010, 2:44 PM), <http://sports.espn.go.com/ncf/news/story?id=5092774>.

11. *Id.*

12. Expressive activity encompasses much more than just words that are spoken. *See Steadman v. Texas Rangers*, 179 F.3d 360, 367 (5th Cir. 1999):

“Speech,” as we have come to understand that word when used in our First Amendment jurisprudence, extends to many activities that are by their very nature non-verbal: an artist’s canvas, a musician’s instrumental composition, and a protester’s silent picket of an offending entity are all examples of protected, non-verbal “speech.”

*See also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (“ . . . nude dancing . . . is expressive conduct within the outer perimeters of the First Amendment . . .”).

13. For an example of the NFL’s and NBA’s social media policies restricting the use of Twitter, see Don Reisinger, *NFL Bans Tweeting Before, During, and After Games*, CNET NEWS (Sept. 1, 2009, 8:36 AM), [http://news.cnet.com/8301-17939\\_109-10322904-2.html](http://news.cnet.com/8301-17939_109-10322904-2.html); *NBA Issues Policy on Twitter Use Before, After Games*, NBA (Sept. 30, 2009, 11:28 PM), <http://www.nba.com/2009/news/09/30/nba.twitter.rules.ap/index.html>.

14. *Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008).

forum, or (3) limited/nonpublic forum,<sup>15</sup> in order to then determine the level of scrutiny that is applied to governmental regulation of speech within the forum.<sup>16</sup> For a traditional public forum and a designated public forum, any regulation of speech must survive the highest level of First Amendment scrutiny.<sup>17</sup> For a limited public forum or a non-public forum, a regulation of speech will be upheld so long as the regulation is reasonable and viewpoint-neutral.<sup>18</sup> However, this forum analysis is only performed when evaluating restrictions placed on speech or expressive activity conducted or seeking to be conducted on government property.<sup>19</sup> For example, in *Axson-Flynn*, the Tenth Circuit found that “[a university] classroom constitutes a nonpublic forum, meaning that school officials could regulate the speech that takes place there ‘in any reasonable manner.’”<sup>20</sup> Moreover, the Tenth Circuit also noted that courts should give substantial deference to a college or university’s decision to regulate classroom speech so long as its actions are related to legitimate pedagogical concerns.<sup>21</sup> As a result, professors have wide latitude to restrict speech within the classroom setting as long as the restriction is reasonably based on the professor’s desire to benefit or maintain the appropriate learning environment.<sup>22</sup>

Regulating student-athletes’ use of social media, however, presents a much different analysis under the First Amendment than the typical forum

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15. See *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1138 (9th Cir. 2011) (“Regardless of whether the [forum is] a limited public forum or a nonpublic forum, the test is the same, as several of our sister circuits have noted.”) (citing *Victory Through Jesus Sports Ministry Found. v. Lee’s Summit R-7 Sch. Dist.*, 640 F.3d 329, 334–35 (8th Cir. 2011); *Byrne v. Rutledge*, 623 F.3d 46, 54 n.8 (2d Cir. 2010); *Miller v. City of Cincinnati*, 622 F.3d 524, 535–36 (6th Cir. 2010); *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 865 n.2 (7th Cir. 2006); *Goulart v. Meadows*, 345 F.3d 239, 252 n.23 (4th Cir. 2003); cf. *Galena v. Leone*, 638 F.3d 186, 197 n.8 (3d Cir. 2011) (stating that “[r]ecently the Court has used the term ‘limited public forum’ interchangeably with ‘nonpublic forum,’ thus suggesting that these categories of forums are the same[,]” and declining to distinguish between limited public fora and nonpublic fora) (citations omitted)).

16. *Byrne*, 623 F.3d at 53.

17. *Id.*

18. *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

19. *Id.* (“[U]nder the prevailing constitutional framework, speech restrictions imposed on *government-owned property* are analyzed under a ‘forum-based’ approach that divides *government property* into three categories—the traditional public forum, the designated public forum, and the nonpublic forum.” (emphasis added)).

20. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004).

21. *Id.* at 1290.

22. *Id.* at 1289 (“Few activities bear school’s ‘imprimatur’ and ‘involve pedagogical interests’ more significantly than speech that occurs within a classroom setting as part of a class curriculum.”).

analysis conducted for classroom speech or other on-campus speech. Unless a college or university or athletic department maintains its own social media site that is open to the public for social media postings, a student-athlete's use of social media will not result in a forum analysis because the social media site will not be considered government property.<sup>23</sup> The Third Circuit recognized the unique characteristics of social media sites when it stated,

For better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.<sup>24</sup>

Instead of applying a forum analysis for social media postings by college and university students, courts typically treat social media postings as “off-campus speech” and will only uphold a college or university's regulation of a student's social media activity if the college or university can prove the speech was (1) a material disruption to the school, and/or (2) falls under another category of unprotected speech.<sup>25</sup> Because student-athletes do not possess any greater First Amendment rights than other students,<sup>26</sup> courts will apply the same First Amendment scrutiny for social media postings of students to student-athletes.

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23. For a detailed analysis of whether a government actor's own Facebook page opened up for public comment is a public forum, see Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975 (2011). It should be noted, however, that even if a college or university athletic department seeks to regulate the social media postings by a student-athlete on its own social media site, the best practice tips in this article should still be adhered to.

24. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 220–21 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

25. See *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1372 (S.D. Fla. 2010) (“Therefore, the Court finds that Evan's speech—her publication of the Facebook page—is off-campus speech. But, the inquiry does not end because schools can discipline off-campus speech if it is unprotected speech.”).

26. See *Williams v. Eaton*, 468 F.2d 1079, 1079–84 (10th Cir. 1972) (applying the *Tinker* student disruption standard set forth by the Supreme Court to University of Wyoming student-athletes who were dismissed from the football team for intending to wear black arm bands to protest certain religious views); *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 946 (D. Kan. 1987) (holding that the *Tinker* exception to protected speech could be narrowly applied to university football players who boycotted practice in response to the administration's reaction to complaints of alleged racial injustice.); *Dunham v. Pulsifer*, 312 F. Supp. 411, 417 (D. Vt. 1970) (analyzing an athletic department's grooming policy in the context of *Tinker* and stating, “it should be observed that the Constitution does not stop at the public school doors like a puppy waiting for his master, but instead it

In summary, it is much more difficult for a college or university to justify its restriction of its student-athletes who are expressing themselves in the social media setting as opposed to the classroom or other on-campus setting. As a result, it is imperative for colleges and universities to adhere to the best practice tips below before regulating student-athletes' use of social media.

### III. BEST PRACTICE TIP #1: DO NOT BAN ATHLETES' USE OF SOCIAL MEDIA

A coach would never tell an athlete "don't talk to any friends or family members during the season." So why is it that a coach would tell a player he or she cannot use Twitter or Facebook during the season when that may be an athlete's primary method of communicating with certain family members and friends? From LeBron James tweeting he was "taking mental notes of everyone taking shots at [him] this summer"<sup>27</sup> to Chad Ochocinco tweeting during the middle of an NFL game that one day he was going to "jump up and start throwing hay makers,"<sup>28</sup> athletes, as well as a good portion of the U.S. population, are in love with posting random material on social media outlets.

Understandably, a coach would not be thrilled to discover his or her players did something juvenile and then instantly announced it to the whole world like the Bethany College golf team that posted a nude team photo on Facebook.<sup>29</sup> Or the University of Arkansas point guard who, just weeks after three members of the Arkansas basketball team were accused of an alleged rape, tweeted, "Im getting it at workouts like a dude who doesnt understand the word no from a drunk girl lol."<sup>30</sup> That is hardly the type of attention a coach or athletic director wants directed towards the athletic department or team. As a result, it is not surprising that a coach would want to adopt a team rule prohibiting the use of social media sites such as Facebook, Google Plus, and Twitter.

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follows the student through the corridors, into the classroom, and onto the athletic field . . . .") (*citing* *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969)).

27. J.A. Adande, *LeBron's Summer of Wrong*, ESPN (Aug. 10, 2010, 11:11 PM), [http://espn.go.com/blog/truehoop/post/\\_id/18887/lebrons-summer-of-wrong](http://espn.go.com/blog/truehoop/post/_id/18887/lebrons-summer-of-wrong).

28. Chris Burke, *Chad Ochocinco Fined \$25K for Tweeting During Preseason Game*, AOL NEWS (Aug. 24, 2010, 2:25 PM), <http://www.aolnews.com/2010/08/24/chad-ochocinco-fined-25k-for-tweeting-during-preseason-game/>.

29. *See Bethany Men's Team Suspended for Nude Photo*, GOLF WEEK, (Aug. 23, 2011, 4:39 PM), <http://www.golfweek.com/news/2011/aug/23/bethany-mens-team-suspended-nude-photo/>.

30. *Twenty Tweets Heard 'Round the World*, SPORTS ILLUSTRATED, [http://sportsillustrated.cnn.com/multimedia/photo\\_gallery/1107/tweets-heard-round-the-world/content.14.html](http://sportsillustrated.cnn.com/multimedia/photo_gallery/1107/tweets-heard-round-the-world/content.14.html) (last visited Apr. 27, 2012).

However, because online speech is still considered speech subject to possible protection under the First Amendment, coaches must adhere to the longstanding principles of the First Amendment when attempting to discipline an athlete for his or her social media activity. For example, the court in *Beverly Hills Unified School District* held that “Supreme Court precedents apply to Plaintiff’s YouTube video” and determined that a school district violated a student’s First Amendment rights when it disciplined her for posting a YouTube video of her friends calling a classmate a “slut,” saying she is “spoiled,” and that she is the “ugliest piece of sh[\*#] I’ve ever seen in my whole life.”<sup>31</sup>

One such longstanding First Amendment principle to be adhered to when addressing social media issues is that a college or university policy restricting speech or expressive activity must not burden substantially more speech than is necessary to achieve the college or university’s interest in enacting the policy.<sup>32</sup>

For example, in *Justice For All*, the Fifth Circuit decided a case in which the University of Texas adopted a literature distribution policy which, in part, required students to identify themselves on the leaflets so the University could determine whether the individuals were students who were authorized by policy to distribute literature on campus.<sup>33</sup> A student anti-abortion group filed suit against University of Texas officials and complained that being required to reveal their identity was a violation of their First Amendment right to anonymous speech. The Fifth Circuit held that although the University of Texas had an interest in determining whether individuals distributing literature were students who were authorized by policy to be on campus, there were much less restrictive means of accomplishing this goal.<sup>34</sup> The court explained that the University of Texas could have simply required individuals to produce a student ID if asked by university officials, as opposed to requiring the individuals to divulge their names on each leaflet they distributed on campus.<sup>35</sup>

Although it is understandable why a coach may want to ban the use of Twitter or Facebook by student-athletes, doing so could be viewed by a court applying the *Justice for All* reasoning as impermissibly burdening more speech than is necessary to achieve the coach’s goals. For example, while a coach’s ban on the use of Twitter and Facebook would ban a golf team from posting a nude team photo, a basketball player from posting insensitive comments about women, or a football player from posting

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31. See, e.g., *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1098, 1109 (C.D. Cal. 2010).

32. See, e.g., *Justice For All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005).

33. *Id.*

34. *Id.* at 770–72.

35. *Id.*

comments on Twitter during the middle of a game, it would also ban a Facebook posting that an athlete and his roommate found a good pizza place, a posting that the athlete wants the president to be reelected, or a posting with his or her view on the war on terrorism. In a First Amendment claim by a student-athlete complaining of a ban on the use of social media, a court would likely apply the same reasoning the Fifth Circuit applied in *Justice for All* and determine the coach's ban on social media was overbroad and burdened more speech than was necessary to achieve the coach's objectives. Just as the court reasoned in *Justice for All*, a court addressing a coach's ban on social media would likely question why the coach did not attempt to enact the below recommended reasonable limitations on the athlete's use of social media instead of banning it altogether.

Instead of banning social media, athletic directors and coaches would be in a much better legal position by placing reasonable limitations on athletes' use of social media, educating athletes about the dangers associated with inappropriate or insensitive postings, and addressing the content of particular postings on a case-by-case basis.

#### IV. BEST PRACTICE TIP #2: PLACE REASONABLE RESTRICTIONS ON THE USE OF SOCIAL MEDIA AND THEN EDUCATE THE ATHLETES ON THE DANGERS

Although broad policies such as a ban on social media may be subject to scrutiny under the First Amendment, it is well settled that a college or university is authorized to “. . . establish reasonable time, place, and manner regulations” on expressive activity.<sup>36</sup> One such regulation could be to follow the lead of the NFL and NBA and ban the use of Twitter and other social media, but only at certain times. In 2009, Charlie Villanueva, a forward for the Milwaukee Bucks at the time, found himself in hot water with his coach by posting the following comment on Twitter during halftime of an NBA game: “In da locker room, snuck to post my twitt. We're playing the Celtics, tie ball game at da half. Coach wants more toughness. I gotta step up.”<sup>37</sup>

To address situations like the posting by Villanueva, NBA rules now prohibit a player from using Twitter and other social media sites from forty-five minutes before game time until after the players have finished their responsibilities after games.<sup>38</sup> Similarly, according to NFL rules, a player is banned from using Twitter and other social media sites beginning ninety minutes before games and until all post-game interviews are completed.<sup>39</sup>

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36. *Widmar v. Vincent*, 454 U.S. 263, 278 (1981).

37. *Twenty Tweets*, *supra* note 30.

38. *See Reisinger*, *supra* note 13.

39. *See id.*

As explained above, the NBA and NFL are not subject to the First Amendment, because both leagues are private entities; however, if a public college or university enacted a social media policy with time limitations similar to those of the NFL and NBA above, the policy would likely be defensible from a First Amendment standpoint because such a policy would only be placing reasonable time, place, and manner regulations on expressive activity. But what if, to borrow a line from former NBA star Allen Iverson, “we’re talking about practice” instead of a game?<sup>40</sup> A coach at a college or university could go even further and adopt a policy that not only prohibits the use of social media during games but also prohibits the use of social media during other team functions such as practice, pep rallies, and study hall. Thus, if an athlete sneaks a smart phone into practice and starts “tweetin’ bout practice” in violation of team rules, the athlete can, and should, be disciplined.

Additionally, it would be defensible from a First Amendment perspective to enact a policy that prohibits the other categories of “unprotected” speech listed in Section V below. For example, a disgruntled football player who did not get the starting quarterback job would not have a First Amendment right to post the team’s playbook on Facebook before the upcoming game because that would clearly be a substantial disruption to the athletic department. Likewise, as will be discussed in further detail below, an athlete does not have a First Amendment right to post a picture of himself violating criminal law, a reasonable team rule, or a college or university policy such as breaking into another institution’s athletic office and stealing the championship trophy. It should also be noted that even if a coach’s social media policy does not address the categories of “unprotected speech” listed in Section V below, an athlete could still be disciplined for such postings.<sup>41</sup>

After adopting these reasonable time, place, and manner regulations on the use of social media, a coach should also educate his or her athletes about what can go wrong with a misguided tweet or Facebook posting. Under the First Amendment, a coach is authorized to, and should, describe in detail to his or her players examples of the dangers of social media activity including potential personal liability for posting defamatory statements, lewd pictures, or copyrighted information; the possibility of being subjected to stalking or identity theft; the potential for future employers accessing an athlete’s social media activity even years after it

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40. For a transcript of the infamous rant by former NBA star Allen Iverson when addressing questions from the media about his coach’s displeasure of him missing practice, see *Allen Iverson News Conference Transcript*, SPORTS ILLUSTRATED (May 10, 2002, 3:36 AM) [http://sportsillustrated.cnn.com/basketball/news/2002/05/09/iverson\\_transcript/](http://sportsillustrated.cnn.com/basketball/news/2002/05/09/iverson_transcript/).

41. See *infra* note 45 (regarding due process and consistent treatment of athletes).



occurred;<sup>42</sup> as well as many other dangers typically associated with online activity.<sup>43</sup>

If a coach enacts a social media policy as recommended above and the coach educates his or her athletes about the dangers of online activity including the use of social media, what does the coach do when an athlete posts a picture on Facebook of the athlete smoking marijuana or a nude picture of a teammate in the locker room? In general, it would be ill-advised from a First Amendment perspective to delve into the content of an athlete's online expressive activity, but it can be accomplished with care as described below.

#### V. BEST PRACTICE TIP #3: EVALUATE THE CONTENT OF SOCIAL MEDIA POSTINGS ON A CASE BY CASE BASIS AND WITH EXTREME CAUTION

The general rule under the First Amendment is that a college or university is prohibited from regulating speech based on the content or viewpoint of the message or expressive activity.<sup>44</sup> As a result, punishing an

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42. Some employers are now scouring social media sites as a way to screen job applications and the background checks some employers are purchasing from consumer reporting agencies even include a search of social media websites for the past seven years. See Alan Farnham, *Background Checks Now Include Twitter, Facebook*, ABC NEWS (June 24, 2011), <http://abcnews.go.com/Business/job-tweets-background-checks-employers-now-include-postings/story?id=13908874>.

43. The University of the Pacific posted a helpful guide for its students detailing the risks and dangers of the use of social media. See *Online Social Networking Dangers and Benefits*, UNIV. OF THE PACIFIC (last visited Jan. 25, 2012), <http://www.pacific.edu/Campus-Life/Safety-and-Conduct/Safety-and-Security/Online-Social-Networking-Dangers-and-Benefits-.html>.

44. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); see also *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 96, (1972). *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) is illustrative of this general rule. There, a man and his church group staged a protest on public property near a military funeral held for a deceased marine. The protestors displayed signs such as "'God Hates the USA/Thank God for 9/11,' 'America is Doomed,' 'Thank God for Dead Soldiers,' 'Pope in Hell,' 'Priests Rape Boys,' 'God Hates Fags,' 'You're Going to Hell.'" *Id.* at 1213. The father of the deceased marine saw the news coverage of the protest after the funeral, suffered depression, and sued the protestors for intentional infliction of emotional distress. The jury awarded \$10 million in damages to the father of the marine, which was reduced to \$5 million by the district court, but the Fourth Circuit reversed. The Supreme Court held that the protestors could not be sued for intentional infliction of emotional distress for speech on matters of public concern uttered in a traditional public forum in conformance with local time, place, and manner regulations. The Court noted:

"[s]peech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the

athlete for the content or viewpoint of his or her postings could result in a valid First Amendment claim being brought against a coach or athletic director. However, there are some limited circumstances when it is legally defensible from a First Amendment standpoint to delve into the content of what an athlete posted online at sites such as Facebook, Google Plus, or Twitter.

The three categories below (Green Light, Yellow Light, and Red Light) illustrate examples of social media postings where, under the First Amendment, the coach or athletic director (1) may discipline an athlete (Green Light Category), (2) must exercise extreme caution before disciplining an athlete (Yellow Light Category); or (3) should not take any disciplinary action based on the content of the posting (Red Light Category).

A. Green Light Category (Unprotected Speech)—Athlete Can Be Disciplined Based on the Content of the Posting<sup>45</sup>

There are certain categories of content of speech that have been recognized by courts as “unprotected speech.”<sup>46</sup> This means that even if state action (e.g., discipline rendered by a coach at a public college or

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facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”

*Id.* at 1220.

45. Although this article does not address the disciplinary process for student-athletes, any discipline for student-athletes must be consistently rendered to avoid discrimination or similar claims. In other words, if the Hispanic second string punter is disciplined for a Facebook posting, the White starting quarterback should also be disciplined. Additionally, although some states have held student-athletes do not possess a constitutionally protected interest in their participation in extracurricular activities that would invoke due process protections, the general principals of due process should be applied to ensure that athletes have notice of the complained of conduct and an opportunity to respond and tell their side of the story before disciplinary action is taken. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Yeo*, 171 S.W.3d 863 (Tex. 2005); *Awrey v. Gilbertson*, 2011 WL 2619540 (E.D. Mich. June 30, 2011) (“The interest Plaintiff had in playing football at SVSU for the final month of the 2007 season, while undoubtedly important to him, is simply not the type of property interest the Due Process Clause was intended to protect.”).

46. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383–84 (1992) (“... [A]reas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.”).

university) is taken against an individual based on the content of his or her speech, the individual will not have a valid First Amendment claim if the content falls into one of the following categories.

i. Fighting Words / True Threat

Under the fighting words / true-threat doctrine, expressive activity loses First Amendment protection “. . . where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>47</sup> The Eleventh Circuit expounded on this doctrine to define a true threat as follows:

A communication is a threat when in its context it would have a reasonable tendency to create apprehension that its originator will act according to its tenor. In other words, the inquiry is whether there was sufficient evidence to prove beyond a reasonable doubt that the defendant intentionally made the statement under such circumstances that a reasonable person would construe them as a serious expression of an intention to inflict bodily harm. Thus, the offending remarks must be measured by an objective standard.<sup>48</sup>

The true threat doctrine is a much stricter standard for college and university athletic departments to prove than the materially disruptive speech standard described below in Section V(B)(ii). For example, in *J.S. v. Bethlehem*, a student created a website that included a drawing of the school principal with her head cut off and blood dripping from her neck, contained a caption stating, “Why Should She Die?” and requested twenty dollars from the readers to pay for a hit man to kill the principal.<sup>49</sup> The court first analyzed the postings under the true threat standard, and held,

. . . [W]e conclude that the statements made by J.S. did not constitute a true threat, in light of the totality of the circumstances present here. We believe that the web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm.<sup>50</sup>

However, even though the court concluded the website did not constitute a true threat, the court found the website constituted materially disruptive speech. The court held that because “. . . [the] web site caused

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47. *See* *Virginia v. Black*, 538 U.S. 343, 359, 362 (2003) (holding that Virginia’s ban on cross burning with intent to intimidate did not violate the First Amendment because such actions would constitute a true threat).

48. *United States v. Alaboud*, 347 F.3d 1293, 1296–97 (11th Cir. 2003) (internal citations, quotations, and alterations omitted).

49. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 851 (Pa. 2002).

50. *Id.* at 859.

actual and substantial disruption of the work of the school,” the school did not violate the student’s First Amendment rights when it permanently expelled the student from school.<sup>51</sup>

If an athlete submits a Facebook posting stating that after practice, he will tie his roommate up and beat him with a golf club for sleeping with his girlfriend, the athlete could be disciplined because the posting clearly loses First Amendment protection since it would be a true threat.<sup>52</sup> Additionally, such a Facebook posting would likely also be considered materially disruptive speech as explained in Section V(B)(ii) below, and as a result, the athlete could be disciplined because the athlete’s speech would not be considered protected speech.

## ii. Defamatory Statements

Defamatory statements also lose First Amendment protection.<sup>53</sup> The key factor is whether the false and damaging statement is a statement of opinion that warrants First Amendment protection or a statement of fact that loses First Amendment protection.<sup>54</sup> For example, an athlete may have a First Amendment right to tweet on Twitter that the football coach is the worst coach for whom he has ever played (unless the college or university could prove the tweet is materially disruptive speech under Section V(B)(ii) below). However, an athlete who falsely posts on Twitter that his

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51. *Id.* at 869.

52. In addition to a posting such as this possibly being a violation of state criminal law, it may be a violation of federal criminal law. *See, e.g.,* United States v. Elonis, Crim. Action. No. 11-13, 2011 WL 5024284 (E.D. Pa. Oct. 20, 2011) (denying a motion to dismiss an indictment by a defendant who was charged under federal law (18 U.S.C. § 875(c)) for threatening communications posted on Facebook and who claimed he had a First Amendment right to his postings). First and foremost, a coach or athletic director who has knowledge of this type of posting or other postings involving potential criminal activity should immediately report this information to law enforcement to be dealt with from a law enforcement perspective. Then, the athletic department should evaluate the potential discipline of the athlete.

53. *See* New York v. Sullivan, 376 U.S. 254 (1964).

54. *See* Parsi v. Daiouleslam, 595 F. Supp. 2d 99, 109 (D.D.C. 2009):

The First Amendment protects statements of opinions—“[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” To assist courts in distinguishing between facts and opinions, this circuit has set out a four-factor test: (1) the common usage or meaning of the specific language used in the statement; (2) the statement's verifiability; (3) the full context of the statement; and (4) the broader context in which the statement appears.

*citing* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) and Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984).

football coach robbed a liquor store because he is an alcoholic could be disciplined for his posting, because it would likely lose First Amendment protection since it may be a defamatory statement. It should also be noted that even if an athlete's social media posting does not satisfy the standard for defamation, the athletic department may still be able to regulate the speech if it meets the materially disruptive speech category of unprotected speech in Section V(B)(ii) below. For example, imagine a tweet by the starting quarterback which claims, "I think we lost the game tonight because the football kept clanking off my receivers' skillet-like hands..it's not that hard, just catch the ball!" The tweet would not satisfy the defamation standard, in part, because it is the athlete's opinion, but such a posting could result in punishment to the athlete if a material disruption to the cohesiveness of the team can be proven.

### iii. Obscenity

Social media postings satisfying the U.S. Supreme Court's definition of "obscenity" also lose First Amendment protection. However, before a player is forced to sit out a game because he posted curse words on his Facebook page or a link to Playboy Magazine, consider that the Supreme Court's definition of "obscenity" is actually quite narrow. In *Miller v. California*, the U.S. Supreme Court defined the standard for determining "obscenity" as:

- (a) [W]hether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>55</sup>

As a result, a coach could discipline an athlete who posts a link to a hard core pornographic website or a video of sexual intercourse because the posting would likely meet the definition of "obscenity" and would lose First Amendment protection. However, it should be noted that there are many other types of social media postings that would not meet this narrow definition. For example, an athlete may post the lyrics to the athlete's favorite song on Facebook where the lyrics continuously use the "F word." Although not everyone would agree such music would have "artistic value," the Supreme Court's definition in *Miller* would categorize such lyrics as protected speech. In fact, though many individuals would consider the "F word" to be obscene, the Supreme Court determined the "F word" actually can warrant First Amendment protection in *Cohen v.*

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55. *Miller v. California*, 413 U.S. 15, 24 (1973).

*California*.<sup>56</sup> In that case, the defendant was convicted of the California offense of disturbing the peace when he walked through a courthouse corridor in the late 1960s wearing a jacket bearing the words “Fu[ @#] the Draft” to protest the Vietnam War. The Supreme Court determined the conviction was not justified because the individual was engaging in protected speech.<sup>57</sup> Unless an athlete’s social media posting falls into this narrow category of obscenity, an athlete cannot be disciplined for the content of his or her posting. It should also be noted, however, that even if an athlete’s social media posting does not meet the criteria of “obscenity,” there could still be a chance, as explained below, that the posting would be considered unlawful harassing speech, which could warrant discipline. In fact, the college or university may actually be legally required under Title VI or Title IX to investigate and take action based on such postings.<sup>58</sup>

#### iv. Posting Indicates Violation of Criminal Law

When the picture of Olympic gold medalist Michael Phelps surfaced online depicting Phelps using a bong, Phelps was forced to admit he made a mistake in judgment.<sup>59</sup> The picture became an instant media craze just months after Phelps brought home multiple gold medals for the U.S. during the Summer Olympics in Beijing.<sup>60</sup> Could an athlete at a college or university be disciplined for posting a picture of himself online using a bong? The answer is: most likely. So long as a criminal law is not unconstitutional, an individual does not have the right to violate criminal laws and seek protection under the cloak of the First Amendment. For example, if an athlete posted a picture of himself on Facebook using a bong, and it was proven that the athlete was in fact smoking marijuana in violation of criminal law, the athlete cannot claim the athlete’s “expressive activity” of smoking marijuana is protected by the First Amendment.<sup>61</sup> Other criminal law violations, such as distributing links or pictures of child pornography or posting a picture of the athlete vandalizing the locker room,

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56. *Cohen v. California*, 403 U.S. 15 (1971).

57. *Id.* at 26.

58. *See infra* Section V(B)(i).

59. Associated Press, *Phelps: Photo With Marijuana Pipe Real*, ESPN (Feb. 2, 2009, 7:40 AM), <http://sports.espn.go.com/oly/swimming/news/story?id=3876804>.

60. *Id.*

61. *See supra* note 45 (regarding providing the athlete with notice of the alleged inappropriate posting and an opportunity to respond). For example, even low budget editing software would allow an individual to edit a picture so it looks like his or her friend is using a bong when they are, in fact, drinking a soda. Obviously, disciplining an athlete before they have an opportunity to explain the photo was doctored would not be appropriate or advisable.

would lose First Amendment protection and the athlete could be disciplined for the posting.<sup>62</sup>

v. Posting Indicates Violation of Reasonable Team or NCAA Rules

In *Healy v. James*, the Supreme Court recognized a University's right under the First Amendment to exclude activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.<sup>63</sup> After a tough loss to Pittsburgh during the 2011 football season, University of Louisville football coach Charlie Strong expressed his displeasure with his athletes staying up late playing the video game *Call of Duty: Modern Warfare 3* ("MW3").<sup>64</sup> Coach Strong apparently became aware of some of his players' obsession with MW3 after reading tweets from his players, such as his sophomore strong safety who tweeted, "Call of Duty at Midnight."<sup>65</sup> A coach can, and should, set reasonable team rules such as a curfew on road trips requiring all athletes to be in their assigned hotel rooms by 10:00 p.m. with lights out by 11:00 p.m. Then, if an athlete submits a social media posting demonstrating they are in violation of a team rule, such as posting a picture of ten of the athletes in a hotel room at midnight playing MW3, the coach could discipline the athletes for the posting without running afoul of the First Amendment. Likewise, the coach could also discipline an athlete for postings that indicate violation of other reasonable team rules, including skipping class or study hall.

Additionally, an athlete does not possess a First Amendment right to submit a social media posting that demonstrates a violation of NCAA policies. Consider the following tweet from a University of North Carolina defensive tackle: "I live in club LIV so I get the tenant rate, bottles comin like it's a giveaway."<sup>66</sup> This tweet and others reportedly resulted in attention being drawn to the athlete, who was later suspended for his senior season for violating NCAA rules regarding receiving improper extra benefits.<sup>67</sup> Finally, an athlete could also be disciplined for a social media

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62. Again, any time an athlete is suspected of having committed a violation of criminal law, the coach or individual with knowledge of the potential criminal violation should immediately contact law enforcement authorities.

63. See *Healy v. James*, 408 U.S. 169, 188 (1972).

64. Erick Smith, *Louisville's Charlie Strong Chides Team for Playing 'Call of Duty' Before Loss*, USA TODAY (Nov. 15, 2011, 3:02 PM), <http://content.usatoday.com/communities/campusrivalry/post/2011/11/louisville-charlie-strong-call-of-duty-loss-to-pittsburgh/1>.

65. *Id.*

66. *Twenty Tweets*, *supra* note 30.

67. *Id.*

posting indicating a violation of reasonable college or university policies, such as a posting of the athlete cheating on an exam.

B. Yellow Light Category (Possibly Unprotected Speech)—An Athlete Can Be Disciplined Based on The Content of the Posting But Only After a Detailed Review of Multiple Factors

i. Harassing Speech

There are times when an athlete can, and should, be disciplined for a social media posting that indicates the athlete may be harassing another student on the basis of a protected category such as sex or race.<sup>68</sup> However, a coach is placed in a difficult position to balance the First Amendment rights of his or her player who posted something allegedly harassing with the rights under Title IX or other federal anti-discrimination statutes (such as Title VI) of the student who was allegedly harassed. For example, if a coach reacted too quickly and disciplined a male athlete for one sexual proposition posted on a female athlete's Facebook "wall," it is possible the coach's actions would be considered a violation of the male athlete's First Amendment rights, because (1) the content of the posting would not fall under one of the above categories of unprotected speech, and (2) the posting would not be severe or pervasive enough to rise to the level of creating a sexually hostile learning environment under Title IX.<sup>69</sup> However, if a coach receives a complaint from a female athlete who complained of a sexual proposition posted on her Facebook "wall" by a male athlete, and the coach does not facilitate an investigation to see if there are additional postings and conduct, the coach could be seen as violating the female athlete's rights under Title IX.<sup>70</sup> Before issuing discipline for a posting that is allegedly harassing, the coach should refer the matter to the college or university official who investigates allegations

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68. See *supra* note 45 (regarding providing the athlete with notice of the alleged inappropriate posting and an opportunity to respond).

69. See, e.g., *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999):  
Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

70. See, e.g., *Pederson v. La. State Univ.*, 213 F.3d 858, 882 (5th Cir. 2000) ("Where the school has control over the harasser but acts with deliberate indifference to the harassment or otherwise fails to remedy it, liability will lie under Title IX.") (*citing* *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999)). See also *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin Cnty., Okla.*, 334 F.3d 928, 934 (10th Cir. 2003) (applying the Title IX deliberate indifference standard for a Title VI claim by a student alleging racial harassment by other students).



of student discrimination. If the investigation concludes that the student engaged in severe or pervasive conduct through social media postings to harass another student on the basis of a protected category, the athlete can be disciplined for the social media postings. Because harassing speech is fact intensive based on the particular circumstances surrounding the speech, this category of potentially unprotected speech must be evaluated on a case by case basis and with extreme caution before any disciplinary action is taken against an athlete.<sup>71</sup>

## ii. Materially Disruptive Speech

Although an athlete may be disciplined for a social media posting that is proven to be materially disruptive to the college or university, athletic department, or team, any discipline based on this standard must be initiated only after a detailed review of all factors.

*Tinker v. Des Moines Independent Community School District* is a landmark Supreme Court case addressing the materially disruptive category of speech.<sup>72</sup> In that case, two high school students wore black armbands to school to protest the Vietnam War and would not remove the armbands even after being asked by school officials to do so.<sup>73</sup> After receiving a suspension for their actions, the students filed a lawsuit claiming the school violated their First Amendment rights.<sup>74</sup> The Supreme Court determined the students possessed a First Amendment right to wear the armbands, wearing the armbands was not a substantial disruption to the school's activities, and in one of the Court's most often quoted opinions regarding First Amendment school cases, stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>75</sup> However, the Court carved out this materially disruptive category of speech by noting that a school can discipline students for expressive activity "by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."<sup>76</sup> Although *Tinker* and other subsequent Supreme Court cases allowing students to be disciplined for materially disruptive speech

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71. *See, e.g., DeJohn v. Temple*, 537 F.3d 301, 305, 314 (3d Cir. 2008) (holding that it was a violation of a student's First Amendment rights for the university to enforce a policy that broadly prohibited "all forms of sexual harassment" including conduct of a "gender-motivated nature" when a student claimed the policy had a chilling effect on his willingness to express his opinions in class concerning women in the military.').

72. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

73. *Id.*

74. *Id.*

75. *Id.* at 506.

76. *Id.* at 513.

were high school cases,<sup>77</sup> as opposed to college or university cases, the *Tinker* standard has also been applied in the college and university setting, including social media postings at a college or university.

For example, in *Tatro v. University of Minnesota*, a student in the University's mortuary-science program was found to have lost First Amendment protection for the following posting on her Facebook page:

Who knew embalming lab was so cathartic! I still want to stab a certain someone [who the student later indicated was her ex-boyfriend] in the throat with a trocar though. Hmm...perhaps I will spend the evening updating my 'Death List # 5' and making friends with the crematory guy. I do know the code...<sup>78</sup>

The University of Minnesota disciplined the student for the Facebook posting and the student filed a lawsuit against the university claiming her First Amendment rights were violated.<sup>79</sup> The *Tatro* court declined to analyze the case under the true threat doctrine, but instead analyzed the case under the substantially disruptive doctrine set forth in *Tinker*. The court held that “[b]ecause Tatro's Facebook posts materially and substantially disrupted the work and discipline of the university, we conclude that the university did not violate Tatro's First Amendment rights by responding with appropriate disciplinary sanctions.”<sup>80</sup>

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77. *See also* *Morse v. Frederick*, 551 U.S. 393 (2007) (holding that a principal's action of suspending a high school student for unfurling a banner during a school activity of watching the Olympic Torch Relay, which stated, “BONG HiTS 4 JESUS” was justified under the First Amendment because the banner promoted illegal drug use in violation of school policy); *see also* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

78. *See* *Tatro v. Univ. of Minn.*, 800 N.W.2d 811, 814 (Minn. Ct. App. 2011), affirmed by the Minnesota Supreme Court in *Tatro v. Univ. of Minnesota*, 2012 WL 2328002 (Minn. June 20, 2012) regarding the sanctions imposed by the university without separately addressing Tatro's threatening speech.

79. *Id.* at 815.

80. *Id.* at 822. *See also* *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004) (“Refusing to differentiate between student speech taking place on-campus and speech taking place off-campus, a number of courts have applied the test in *Tinker* when analyzing off-campus speech brought onto the school campus.”) (*citing* *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 827–28 (7th Cir.1998) (student disciplined for an article printed in an underground newspaper that was distributed on school campus); *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071, 1075–77 (5th Cir.1973) (student punished for authoring article printed in underground newspaper distributed off-campus, but near school grounds); *LaVine v. Blaine Sch. Dist.*, 257 F.3d at 989 (9th Cir. 2001) (analyzing student poem composed off-campus and brought onto campus by the composing student under *Tinker*); *Killion v. Franklin Reg'l Sch. Dist.*, 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (student disciplined for composing degrading top-ten list distributed via e-mail to school friends, who then brought it onto campus; author had been disciplined before for bringing top-ten

Although athletic departments have the ability to discipline an athlete based on expressive activity that is substantially disruptive to the institution's athletic department or team, it becomes even more fact intensive and difficult to rely on this theory as it relates to social media postings as opposed to other expressive activity. For example, a college or university student-athlete who continues to stand up and interrupt the athletic director who is speaking at an awards banquet could be disciplined because the student-athlete would clearly be engaging in materially disruptive speech. However, what about a student-athlete who, after the awards banquet, returns to his apartment, posts a picture of the athletic director on Facebook, and draws fake horns on the picture? It would become fact intensive as to whether the student-athlete's off-campus social media activity was materially disruptive to the college or university, athletic department, or team.

The Third Circuit in *Layshock* recognized the difficulty in relying on the substantially disruptive theory in relation to social media postings.<sup>81</sup> In that case, the court analyzed the discipline of a high school student who created a fictitious social media profile on his grandmother's computer with fake answers to fake questions about the school's principal.<sup>82</sup> The Third Circuit stated,

It would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her actions there to the same extent that it can control that child when he/she participates in school sponsored activities. Allowing the District to punish Justin for conduct he engaged in while at his grandmother's house using his grandmother's computer would create just such a precedent, and we therefore conclude that the district court correctly ruled that the District's response to Justin's expressive conduct violated the First Amendment guarantee of free expression.<sup>83</sup>

Likewise, the *Doninger* court recognized this difficulty in regulating off-campus social media activity when it stated, “[i]f courts and legal scholars cannot discern the contours of First Amendment protections for student internet speech, then it is certainly unreasonable to expect school

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lists onto campus); *Emmett v. Kent Sch. Dist.* No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (applying *Tinker* to mock obituary website constructed off-campus); *Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (student disciplined for article posted on personal internet site); *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387, 1392 (D. Minn. 1987) (student disciplined for writing article that appeared in an underground newspaper distributed on school campus)).

81. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 205–22 (3d Cir. 2011) *cert. denied*, 132 S. Ct. 1097 (2012).

82. *Id.*

83. *Id.* at 260.

administrators, such as Defendants, to predict where the line between on- and off-campus speech will be drawn in this new digital era.”<sup>84</sup>

Courts have yet to apply the Supreme Court’s *Garcetti* standard for speech from a public employee that automatically loses First Amendment protection to that of a student or student-athlete’s speech. In *Garcetti*, the Supreme Court held that a public employee who is speaking as an employee pursuant to his or her official job duties does not have First Amendment protection, but if the public employee is speaking as a citizen on a matter of public concern, the employee may enjoy First Amendment protection.<sup>85</sup> For example, consider the chief financial officer for Texas A&M’s athletic department who was found to have posted the following comment about the Texas A&M president on a Texas A&M fan message board: “Guy is a putz...hopelessly underqualified puppet.”<sup>86</sup> Under the *Garcetti* standard, it would be difficult for the Texas A&M employee to prove he was speaking as a citizen on a matter of public concern rather than as a public employee, and as such, Texas A&M could likely fire him based on the content of his posting without risking a valid First Amendment claim.<sup>87</sup>

It is conceivable for a court to apply the *Garcetti* standard on public employee speech to student and student-athlete speech by determining that a student or student-athlete does not have a First Amendment right when speaking pursuant to the individual’s duties as a student or student-athlete. For example, consider a student-athlete who shouts at the offensive coordinator during football practice or tweets after practice that the coach’s play calling is brutal and he could not coordinate his own way out of a phone booth. If a court were to apply a *Garcetti* type standard, the court would conclude the student-athlete’s speech was not protected speech because he was speaking as an athlete pursuant to his duties as an athlete rather than as a citizen on a matter of public concern. In other words, there would be no need to analyze the content of the speech because the speech would automatically lose First Amendment protection simply because the student-athlete was speaking in his role as a student-athlete.

However, courts have yet to apply the *Garcetti* standard to student or student-athletes. Unless a *Garcetti* standard is applied to student or student-athlete speech, courts will likely continue to apply the materially

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84. *Doninger v. Niehoff*, 594 F. Supp. 2d 211, 224 (D. Conn. 2009).

85. *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006).

86. Robert Cessna, *A&M Athletics CFO Jeff Toole Calls Loftin Names Online*, THE EAGLE (Nov. 30, 2011, 12:07 AM), <http://www.theeagle.com/am/A-amp-M-official-calls-Loftin-names-online--6809601>.

87. *See Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007) (holding that a high school athletic director who was fired after submitting a memo that was critical of the financial decisions of the principal was speaking as a public employee, and as such, was not entitled to First Amendment protection).

disruptive standard set forth in *Tinker* to the above scenario, which is actually more difficult for a college or university to prove. For example, in the above scenario, it would be much easier to only prove the student-athlete was speaking in his role as a student-athlete as opposed to proving how the student-athlete's speech was a substantial disruption to the college or university, athletic department, or team.

Because there is no black and white standard by which to prove an athlete's actions are substantially disruptive, an athletic director or coach must only discipline an athlete under this substantially disruptive theory if he or she can easily articulate how the social media posting was or is a substantial disruption to the college or university, athletic department, or team.

### C. Red Light Category (Protected Speech)—Do Not Discipline the Athlete

Unless an athlete's social media posting clearly falls into one of the categories of unprotected speech in the "green light category"<sup>88</sup> or "yellow light category"<sup>89</sup> above, a coach or athletic director should not discipline the athlete based on the content of the posting. Doing so would likely be viewed by a court as content or viewpoint discrimination in violation of the athlete's First Amendment rights. Unfortunately for athletic directors and coaches, an instance could arise in which no disciplinary action can be taken against an athlete who posts a controversial or offensive social media posting. For example, North Carolina State University decided it could not discipline a basketball player who tweeted that he would rather not have a gay player in the locker room.<sup>90</sup> Although the tweet was clearly offensive, this tweet would likely not fall under any of the categories of unprotected speech provided above, and as such, the University correctly concluded that it should not discipline the athlete based on the content of the athlete's tweet. In order to avoid a successful First Amendment claim, athletic directors and coaches must take this same approach and recognize there may be some misguided and offensive social media postings for which an athlete cannot be disciplined.

## VI. CONCLUSION

In these high-tech times, a student-athlete could instantly submit a harmful or offensive social media posting for millions to see and the athlete may have First Amendment protection against disciplinary action by a

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88. See *supra* Section V(A).

89. See *supra* Section V(B).

90. Viviana Bonilla Lopez, *Student Tweets Causing Controversy for Universities*, USA TODAY (Sept. 18, 2011), <http://www.usatodayeducate.com/staging/index.php/ccp/student-tweets-causing-controversy-for-universities>.

coach or athletic director at a state college or university. Although it is not advisable for a coach or athletic director to completely ban athletes' use of social media, a coach or athletic director could restrict the use of social media during team functions as well as enforce other reasonable team rules and then educate the athletes regarding the potential dangers involved with social media postings. Finally, although a coach or athletic director should, as a general rule, never discipline an athlete based on the content of his or her social media posting, there are certain instances in which doing so would be authorized if the posting falls into a category of unprotected speech (e.g., fighting words/true threat, defamatory statements, obscenity, violation of criminal law, violation of reasonable team or NCAA rules, harassing speech, or materially disruptive speech).

APPENDIX A: UNIVERSITY OF HOUSTON ATHLETICS  
SOCIAL MEDIA POLICY<sup>91</sup>

Participation in intercollegiate athletics at the University of Houston ("University" or "Houston") is a privilege, not a right. While the Houston Department of Athletics does not prohibit student-athletes from participating in social media avenues such as Twitter, Facebook, Google +, LinkedIn or Blogs, all postings and writings must be in compliance with the guidelines set forth by your student-athlete and university handbooks, applicable Texas and federal law, as well as NCAA, conference, and university bylaws, policies, rules, and regulations.

Facebook, Twitter and other social media sites have dramatically increased in popularity over the years. As such, fans, media, faculty, future employers and NCAA officials may have the information you post about yourself to social media avenues sent directly to them. Protect yourself, your team and your university by adhering to the guidelines below. The University of Houston student code of conduct can, in some circumstances, extend to online activity, and civil and criminal laws can also apply to online activity; as a result, the responsibility for your social media postings falls squarely on you.

The University of Houston reserves the right to take action against currently enrolled student-athletes that engage in online and social media behaviors that violate applicable laws, policies, rules, and regulations. This

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<sup>91</sup> Special thanks to General Counsel Dona Cornell, Vice President for Intercollegiate Athletics Mack Rhoades, Associate Athletics Director David Reiter, and Associate Athletics Director and Senior Women's Administrator DeJuena Chizer at the University of Houston for their efforts in formulating this policy.

action may include education, counseling, suspension and/or expulsion from the team and reduction, cancellation or nonrenewal of athletics aid.

Houston Athletics and/or third parties under contract with the University reserve the right to regularly monitor student-athletes' public profiles and the materials posted on those accounts to ensure compliance with this policy.

When participating in social media activity, please adhere to the following guidelines:

1. Make sure your social media activity is in compliance with applicable Texas and federal law, as well as NCAA, conference, and university bylaws, policies, rules, and regulations.
2. Consider setting your security settings so that only your friends can view your profile/Twitter feed(s). If you do not know how to do this, please contact the Athletics Communications Office and they will be happy to assist you. Do not give out your passwords to anyone. Make sure to change your passwords regularly.
3. You should not post your email, home address, local address, telephone numbers, social security number, birthdate, banking information or other personal information as it could lead to unwanted behavior such as stalking or identity theft. For additional tips to avoid cybercrimes, see <https://www.ncjrs.gov/internetsafety/>.
4. Be aware of who you add as "friends" or "followers" to your social media venues. Many people may not have your best interests at heart and may look to take advantage of you or seek unwanted interaction.
5. Use common sense. Respect differences, appreciate the diversity of opinions and speak or conduct yourself in a professional manner at all times. For example, you should refrain from posting items that are physically threatening, defamatory (e.g., false statements that are damaging to a person's reputation), obscene (as commonly defined by applicable federal and Texas law), in violation of copyright law, unlawfully harassing or discriminatory, or items that are materially disruptive to the University, the Department of Athletics, or your team.
6. Monitor what others post about you and remove posts from your

social media page as you determine necessary.

7. Make sure that your online activities do not interfere with your responsibilities as a member of your team. In this regard, do not engage in social media activity four hours before your upcoming athletics event or during competition or other official athletic department or team events. Additionally, do not engage in social media activity between the hours of midnight and 5 a.m. of the night before your team's athletic event/competition. Give yourself a break from social media, get some rest, and get ready for your team's event/competition.
8. Do not post any information that is proprietary to the Athletic Department, which is not public information such as tentative or future schedules, team playbooks or strategies, or information that is sensitive or personal in nature, such as travel plans and itineraries.
9. Behave on social media as you would in front of a crowd of strangers – be proud of where you come from and where you are at. Do not let anyone have a reason to dilute that pride by sullyng your name through social media comments.
10. Remember, a great deal of damage can be done in just 140 characters, so think before you Tweet. If you have any doubts about the appropriateness of a social media comment, do not share it!
11. Try to conduct yourself as if you were doing a live interview with a media organization. There is no such thing as privacy on your social media pages. The speed with which a negative comment can spread in social media can be staggering. The best advice is to imagine that ESPN is sitting in your room and double-checking your comments before you decide to hit the SHARE or TWEET button. Once you post your comment, it may last in cyberspace forever, including being accessible to professional sports organizations or your future employer.

#### Social Media Discipline Procedures



If a student-athlete's social media activity is found to be inappropriate in accordance with this policy, he/she may be subject to the following penalties:

1. A written warning
2. A meeting with the Director of Athletics and Head Coach
3. Penalties as determined by the athletics department, including but not limited to, possible suspension from his/her athletics team, expulsion from his/her team and/or loss of some or all of his/her athletics financial aid.

Student-Athlete Acknowledgement and Agreement

By my signature below, I acknowledge that I have read and understand the University of Houston Department of Intercollegiate Athletics Social Media Policy. I understand that if I fail to adhere to this policy, I may be subject to disciplinary action up to and including suspension and/or expulsion from my team and loss of some or all of my athletics financial aid.

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Student-Athlete Name

Team

Date



# “DECRIMINALIZING” CAMPUS INSTITUTIONAL RESPONSES TO PEER SEXUAL VIOLENCE

NANCY CHI CANTALUPO \*

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## INTRODUCTION

Peer sexual violence<sup>1</sup>—when one student sexually harasses another in a

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1. This Article updates and unifies more extensive discussions regarding specific aspects of how institutions of higher education should respond to campus peer sexual violence as both a legal and policy matter. Those more extensive discussions may be found at Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1829425](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1829425), and Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613 (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1457343](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1457343).

manner that includes physical contact<sup>2</sup>—is an epidemic on campuses across the nation. Between twenty and twenty-five percent of college and university women are victims of attempted or completed nonconsensual sex during their time at college or university,<sup>3</sup> overwhelmingly at the hands of

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2. A note about language: Other than when I am discussing studies or other sources that use terms such as “sexual assault” or “rape,” I use “sexual violence” instead of terms such as “sexual assault” or “rape” because in my view “sexual violence” is a broader, more descriptive term that is not a term of art, and which I regard to include a wider range of actions that may not fit certain legal or readers’ definitions of “sexual assault” or “rape.” The term therefore includes “sexual assault” or “rape,” as well as other actions involving physical contact of a sexual nature (while I acknowledge that non-physical actions can constitute violence, including those forms of violence is beyond the scope of this article). When I am discussing studies or other sources that use terms such as “sexual assault” or “rape,” I retain use of those terms as the original researchers and authors used them.

Similarly, my definition of “report” and “reporting” is not a technical one. I regard a report as any time a victim discloses the violence to any professional with any role or authority to help victims, including but not limited to medical, counseling, security or conduct-related, residential life or other student affairs personnel, as well as faculty and community or campus advocates.

In addition, I use “victim” and “survivor” interchangeably to refer to people who say that they have been victims of sexual violence. Therefore, “victim” is again not a term of art used to indicate a finding of responsibility for sexual violence. I use “perpetrator” or “assailant” when someone accused of sexual violence has been found responsible or in discussions where it can be assumed the person perpetrated the sexual violence, such as statistical analyses. I use “accused” or “alleged” to indicate when I am referring to those who have been charged but not found responsible for committing sexual violence and “accuser” when discussing the role of the victim/survivor in a disciplinary proceeding. Because studies confirm that the majority of victims are women and the majority of perpetrators and accused students are men, I use female pronouns to refer to victims and male pronouns to refer to perpetrators and accused students.

Finally, I use “school” and “institution” to identify either K–12 schools or higher education institutions, although I also use “college,” “university,” “campus,” or “higher education” to refer to the latter category of schools.

3. Brenda J. Benson et al., *College Women and Sexual Assault: The Role of Sex-related Alcohol Expectancies*, 22 J. FAM. VIOLENCE 341, 348 (2007); CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT, 5-3 (Nat’l Criminal Justice Reference Serv., Oct. 2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (finding that nineteen percent of students in the sample had experienced attempted or completed sexual assault since entering college, but noting that over fifty percent of the sample had completed less than two years of college and therefore discussing the incidence reported by college seniors, where twenty-six percent had experienced attempted or completed sexual assault since entering college, to predict a woman’s risk during her overall college career). See also BONNIE S. FISHER ET AL., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), available at

someone they know.<sup>4</sup> Moreover, college and university women are particularly vulnerable to sexual violence, since “[w]omen ages 16 to 24 experience rape at rates four times higher than the assault rate of all women... [and] [c]ollege women are more at risk for rape and other forms of sexual assault than women the same age but not in college.”<sup>5</sup> Six to approximately fifteen percent of college and university men “report acts that meet legal definitions for rape or attempted rape,”<sup>6</sup> and a small number of repeat perpetrators commit most of the sexual violence and likely contribute to other violence problems as well.<sup>7</sup> College and university men can also be victims of sexual violence, but because so few male victims report instances of abuse, there is a limited amount of information about the extent of campus peer sexual violence against men. Despite the low rate of

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gov/pdffiles1/nij/182369.pdf; CAROL BOHMER & ANDREA PARROT, *SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION* 6 (Lexington Books 1993). Although some of the studies that are cited here are somewhat old, they are included because the findings of the older studies are quite consistent with the most recent ones, even when the studies have been conducted in different decades. This indicates that the findings of older studies are still valid in terms of what we see today.

4. See BOHMER & PARROT, *supra* note 3, at 26. See also KREBS ET AL., *supra* note 3, at 5–18; FISHER ET AL., *supra* note 3, at 17.

5. See RANA SAMPSON, OFFICE OF CMTY. ORIENTED POLICING SERV., U.S. DEP’T OF JUSTICE, *PROBLEM-ORIENTED GUIDES FOR POLICE SERIES NO. 17, ACQUAINTANCE RAPE OF COLLEGE STUDENTS 2* (2003), available at <http://www.cops.usdoj.gov/pdf/e03021472.pdf>. But see KATRINA BAUM & PATSY KLAUS, BUREAU OF JUST. STAT., U.S. DEP’T OF JUSTICE, *VIOLENT VICTIMIZATION OF COLLEGE STUDENTS, 1995–2002*, at 3 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/vvcs02.pdf> (finding that college students were less likely to be the victim of sexual assault than non-students). The discrepancy in these two findings is due to the wording of questions asked during data collection. The conclusions of Baum and Klaus are based on the National Crime Victimization Survey, which gathers information on sexual assault by asking category-centered questions, such as “[h]as anyone attacked or threatened you in [this way]: rape, attempted rape or other type of sexual attack.” *Id.* The conclusions that Sampson cites are based on studies such as the National College Women Sexual Victimization study, which use behavior-oriented questions, such as “[h]as anyone made you have sexual intercourse by using force or threatening to harm you or someone close to you?” See FISHER, ET AL., *supra* note 3, at 6, 13 (explicitly comparing the difference between the National Crime Victimization Survey methodology and results and the National College Women Sexual Victimization study methodology and results). Other than the wording of the questions, the basic methodology of the two studies was identical, yet behavior-oriented questions have been found to produce 11 times the number of reported rapes. *Id.* at 11.

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

7. See *id.* at 76.

male victim reporting, statistics do show that when men are raped, it is usually done by other men.<sup>8</sup>

These statistics show not only epidemic rates of violence, but because they are drawn from studies conducted as early the mid-1980s<sup>9</sup> and as late as 2007,<sup>10</sup> they also show the persistence of this problem. Indeed, a comprehensive journalistic account of campus peer sexual violence published in 2009–10 by Kristen Lombardi of the Center for Public Integrity (CPI)<sup>11</sup> shows that we are now moving into our fourth decade of dealing with this problem.

While there are relatively few studies that give some insight into the causes of both the problem and its persistence, a series of studies have used the Routine Activities Theory to posit that sexual violence occurs so much on college and university campuses because there are a surfeit of “motivated offender[s] [and] suitable target[s] and an absence of capable guardians all converg[ing] in one time and space.”<sup>12</sup> One notable study, which the authors describe as using a feminist version of the Routine Activities Theory, suggests that all three of these elements must be present for there to be a significant crime problem and that the failure of schools to act as “capable guardians”<sup>13</sup> elevates the influence of peer support on

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8. See SAMPSON, *supra* note 5, at 3; BOHMER & PARROT, *supra* note 3, at 6.

9. See ROBIN WARSHAW, *I NEVER CALLED IT RAPE* (1988).

10. See KREBS ET AL., *supra* note 3; Benson et al., *supra* note 3.

11. See *Sexual Assault on Campus*, CENTER FOR PUBLIC INTEGRITY, (Feb. 25, 2011), [http://www.publicintegrity.org/investigations/campus\\_assault/](http://www.publicintegrity.org/investigations/campus_assault/).

12. Amy I. Cass, *Routine Activities and Sexual Assault: An Analysis of Individual- and School-Level Factors*, 22 *VIOLENCE AND VICTIMS* 350, 351 (2007). The Routine Activities Theory originated with L. E. Cohen and M. Felson in *Social Changes and Crime Rate Trends: A Routine Activities Approach*, 44 *Am. Soc. Rev.* 588 (1979).

13. See Martin D. Schwartz et al., *Male Peer Support and a Feminist Routine Activities Theory: Understanding Sexual Assault on the College Campus*, 18 *JUST. Q.* 623, 630 (2001). See also Elizabeth Ehrhardt Mustaine & Richard Tewksbury, *Sexual Assault of College Women: A Feminist Interpretation of a Routine Activities Analysis*, 27 *CRIM. JUST. REV.* 89, 101 (2002). Schwartz and his colleagues provide an explanation for the history and use of the routine activities theory in explanations of criminal violence generally and sexual violence on college campuses specifically. The original theory apparently focused almost entirely on the victims as “suitable targets” and has been criticized for seeking to “deflect[] attention away from offenders’ motivation.” Schwartz et al., *supra* note TK, at 625. Schwartz and various colleagues have therefore deliberately focused on the “motivated offender” part of the equation, including by proposing a feminist version of routine activities theory. *Id.* at 628. In addition, while they note that the “absence of capable guardians” aspect of the theory’s equation is the least studied, they highlight the effect that a rape-supportive culture has on all three parts of the equation, in that it “gives men some of the social support they need... to victimize women [while women’s] internalization of [the same culture] can contribute both

“motivated offenders” (i.e. college and university men) to assault “suitable targets” (i.e. college and university women).<sup>14</sup>

In light of this theory, other studies can be viewed as elucidating different parts of the “suitable target,” “motivated offender,” and “incapable guardian” triangle. For instance, studies have focused on the “suitable targets” when studying the high rate of victim non-reporting and on “the motivated offenders” when studying the widespread presence of sexual harassment- and rape-supportive attitudes among college and university students as serious contributing factors to the campus peer sexual violence problem. Such studies estimate that ninety percent or more of survivors of sexual assault on college and university campuses do not report the assault,<sup>15</sup> due to fear of hostile treatment or disbelief by legal and medical authorities,<sup>16</sup> not thinking a crime had been committed or that the incidents were serious enough to involve law enforcement,<sup>17</sup> not wanting family or others to know,<sup>18</sup> lack of proof,<sup>19</sup> and the belief that no one will believe them and that nothing will happen to the perpetrator.<sup>20</sup> These fears are not surprising when campuses regularly appear in the news for incidents such as the infamous Yale fraternity pledge chant of “No means yes! Yes means anal!”<sup>21</sup> and sociological studies have confirmed wide subscription to such attitudes among college and university men well beyond those at Yale.<sup>22</sup> Many studies regarding the role of alcohol in

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to the availability of ‘suitable targets’ and to the lack of deterrence structures to act as effective guardianship.” *Id.* at 630.

14. *Id.* at 646.

15. See FISHER ET AL, *supra* note 3, at 24.

16. See *id.* at 23. See also BOHMER & PARROT, *supra* note 3, at 13, 63; WARSHAW, *supra* note 9, at 50.

17. See FISHER ET AL, *supra* note 3, at 23.

18. See *id.* at 24.

19. See *id.*

20. See FISHER ET AL, *supra* note 3, at 23; BOHMER & PARROT, *supra* note 3, at 13, 63; WARSHAW, *supra* note 3, at 50.

21. See Michael Kimmel, *The Men, And Women, of Yale*, MS. MAGAZINE BLOG, Oct. 17, 2010, <http://msmagazine.com/blog/blog/2010/10/17/the-men-and-women-of-yale/>. Note that this incident was not an isolated one, but was merely a repeat of an incident involving fraternity men, the campus Women’s Center, and the same chant in 2006. *Id.* A student member of the Women’s Center said that such incidents “tend to repeat themselves every year or two” at Yale. Jordi Gasso & Sam Greenberg, *DKE Apologizes for Pledge Chants*, YALE DAILY NEWS (Oct. 15, 2010), <http://www.yaledailynews.com/news/2010/oct/15/dke-apologizes-for-pledge-chants/>. The October 2010 incident spurred a group of Yale students to file a Title IX complaint against Yale. *Yale is Subject of a Title IX Inquiry*, N.Y. TIMES, Mar. 31, 2011, available at <http://www.nytimes.com/2011/04/01/us/01-yale.html>.

22. For instance, a 2001 study found significant peer support for sexual violence among college men. Schwartz et al., *supra* note 13, at 641. A study in

campus peer sexual violence focus on both the “suitable targets” and “motivated offenders.”<sup>23</sup> Yet relatively few studies have focused on the role of the “(in)capable guardians,” i.e. the colleges and universities, and how their institutional responses factor into the persistent campus peer sexual violence problem.

Despite this lack of attention, however, institutional responses are a key factor in the peer sexual violence epidemic. As the studies on this violence cumulatively show, the rate of campus peer sexual violence and the high non-reporting rate perpetuate a cycle whereby perpetrators commit sexual violence because they think they will not get caught or because they actually have not been caught. Then, because survivors do not report the violence, perpetrators are not caught, continue to believe they will not get caught, and continue to perpetrate. Moreover, because victim non-reporting is closely linked to the documented disbelieving and/or hostile reactions of others, particularly those in authority, the choice of institutional response when victims do report has the potential either to break the cycle of violence and non-reporting or to feed that cycle. Therefore, responses likely to break the cycle need to be designed, on the front end, to encourage victim reporting as well as other sources of information about violence occurring at that institution, and, on the back end, to hold perpetrators accountable, including through some kind of effective disciplinary process.

For a variety of complicated reasons, at the current time and at many colleges and universities, neither of these responses is generally occurring. Instead, as the cases, journalistic accounts, and empirical studies reviewed in this article suggest,<sup>24</sup> on the front end, many institutions do their best to avoid knowledge of the peer sexual violence, both in general and in specific cases, and on the back end, they adopt disciplinary procedures that make it more difficult to find students accused of sexual violence responsible for that violence. In between these two points exist any number of other, largely unhelpful and often harmful, institutional

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1993 found that five to eight percent of college men commit rape knowing it is wrong; ten to fifteen percent of college men commit rape without knowing that it is wrong; and thirty-five percent of college men indicated some likelihood that they would rape if they could be assured of getting away with it. BOHMER & PARROT, *supra* note 3, at 6–8, 21. Finally, a 1987 study indicated that thirty percent of men in general say they would commit rape and fifty percent would “force a woman into having sex” if they would not get caught. WARSHAW, *supra* note 9, at 97.

23. See, e.g., Benson et al., *supra* note 3.

24. These various sources also comport with the knowledge I have gained of institutional responses to campus peer sexual violence in over 16 years of experience working on these issues, first as a university administrator and then as an attorney.



responses.<sup>25</sup> As a result, many institutions truly are incapable guardians and provide the critical third leg in the “motivated offender”-“suitable target”-“lack of capable guardian” tripod.

Yet evidence suggests that these unhelpful and harmful institutional responses are motivated or encouraged not so much by direct anti-survivor animus, but by other incentives, including “false” incentives born of various myths about sexual violence. Chief among these myths is that sexual violence is not just a crime, but a particular kind of crime: one committed by strangers on victims who they do not know. In the public imagination, a rapist is still a depraved criminal who jumps a woman in a dark alley, late at night, someone who she has never seen before and may never see again, depending on whether he is caught.<sup>26</sup> Yet in reality—a reality that has been confirmed repeatedly in the college and university context—the vast majority of sexual violence perpetrators are those who are known to the victims: acquaintances, dates, friends, husbands, family members, religious advisors, employers, supervisors, and others,<sup>27</sup> none of whom need to jump a woman in a dark alley. Instead, they typically have access to her home, her room, her workplace. They are around her when she is most vulnerable and when the least amount of force, if any at all, is needed to overcome her will and lack of consent.

Because of the myth of sexual violence as a stranger crime, the responses adopted by many policymakers at institutions of higher education suggest that these policymakers believe they should respond to such violence in a manner similar to the criminal justice system both on the front end and on the back end. Thus, on the front end, institutions’ reporting mechanisms generally direct students to report sexual violence to campus police,<sup>28</sup> who for the most part take a traditional law enforcement approach

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25. A summary of such responses may be found in Cantalupo, *Burying*, *supra* note 1, at 214–17.

26. SAMPSON, *supra* note 5, at 9.

27. See *The Offenders*, RAPE, ABUSE & INCEST NAT’L NETWORK, <http://www.rainn.org/get-information/statistics/sexual-assault-offenders>.

28. An informal and non-exhaustive survey of schools whose sexual violence reporting procedures are accessible via the web confirms that campus police and other law enforcement authorities factor prominently in the reporting procedures that most schools have adopted. Although these schools provide varying degrees of detail regarding the procedures for reporting an assault, as well as varying degrees of consistency regarding the process on different websites and publications at the same school, many schools lead their list of reporting options with calling local or campus police and/or strongly encourage students to contact police. See, e.g., <https://students.asu.edu/wellness/SVHelp> (in advising students as to “what to do” if “you’ve experienced sexual violence,” listing contacting 911 first under the first subheading of “find a safe place,” addressing filing a police report under the third subheading of “filing a police report is optional,” and mentioning no other reporting procedures, although the medical, counseling and student affairs

to that report, often with all of the well-documented deficiencies of that traditional approach in the sexual violence context.<sup>29</sup> On the back end, institutions create disciplinary procedures that adopt standards of proof, evidentiary, and due process requirements provided to criminal defendants,<sup>30</sup> an approach that has been criticized for not keeping up with

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resources available are mentioned); <http://handbook.fas.harvard.edu/icb/icb.do?keyword=k79903&pageid=icb.page418723> (stating in the Harvard College Student Handbook that the policy of the Faculty of Arts and Sciences is that “any student who believes that she or he has suffered a rape or indecent assault and battery is strongly encouraged to report the incident to the H[arvard] U[niversity] P[olice] D[eartment] immediately” and listing other offices under “Harvard Resources,” but providing slightly different information in the Harvard University Faculty of Arts and Sciences Handbook, available at [http://webdocs.registrar.fas.harvard.edu/ugrad\\_handbook/2009\\_2010/chapter6/rape\\_indecent.html](http://webdocs.registrar.fas.harvard.edu/ugrad_handbook/2009_2010/chapter6/rape_indecent.html), although still listing the HUPD as the first on a larger list of reporting options); <http://www.temple.edu/studentaffairs/heart/links/sexualassault.html> (specifying that the first thing to do “if you HAVE been sexually assaulted” is to “contact Campus Safety Services [the campus police department]...”); <http://tulane.edu/studentaffairs/violence/sexualassault/sa-reporting-options.cfm> (under “Sexual Assault Reporting Options,” asking “Are you safe?” and advising victims to call the Tulane University Police Department or the New Orleans Police Department at 911, then stating “Consider calling a trusted friend, relative, a counselor, the Office of Violence Prevention & Support Services, or a trained Sexual Aggression Peer Hotline & Education (SAPHE) advocate”); [http://www.registrar.ucla.edu/archive/catalog/2011-12/ucla\\_generalcatalog11-12.pdf](http://www.registrar.ucla.edu/archive/catalog/2011-12/ucla_generalcatalog11-12.pdf), p. 639 (advising that “Those who believe that they are the victims of sexual assault should 1. Immediately call the police department.”) (emphasis in original); <http://wwwold.uchicago.edu/sexualassault/whattodo.html> (urging victims to “Report the Incident. Call the University Police or Chicago Police as soon as possible. If you are a student, contact the Sexual Assault Dean-on-Call.”); <http://www.usm.maine.edu/ocs/policy-sexual-assault> (indicating that “students, employees, or visitors are strongly encouraged to make an official report of any incident of sexual assault to the USM Police and/or Office of Community Standards whether the incident occurred on or off campus”); <http://www.utexas.edu/student/studentaffairs/sexualassault.html> (stating that “Procedures to follow if a sex offense occurs: [are to] 1. Call 911 immediately to report the offense and seek medical attention without delay. 2. Contact the University Police... and/or the Austin Police Department to report the offense”); [http://www.virginia.edu/sexualviolence/documents/sexual\\_misconduct\\_policy070811.pdf](http://www.virginia.edu/sexualviolence/documents/sexual_misconduct_policy070811.pdf) (stating that students who “may be victims of sexual misconduct” are “strongly urged to seek immediate assistance” from a number of resources, “Police” being first on the list).

<sup>29</sup> See generally Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 468-69, n. 3-13 (2005).

<sup>30</sup> Examples of schools that incorporate criminal justice system requirements into their student discipline systems are most clearly seen in the recent focus on standards of proof raised by the April Dear Colleague Letter’s clarification that the proper standard of proof for sexual violence cases is a preponderance of the

rape law reforms initiated and adopted decades ago in the criminal justice system of nearly all states,<sup>31</sup> as well as for its lack of fit with the purposes of student discipline and the institution’s powers.<sup>32</sup> These responses are not only not solving the problem, as already indicated, but they are also contrary to both the spirit and letter of the applicable law—particularly three areas of federal law: Title IX of the Educational Amendments of 1972

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evidence standard. *See infra* note 91 and related text. Several sources confirm that a substantial number of schools used a standard of proof higher than a “preponderance of the evidence” standard prior to that date. For instance, newspaper accounts after April 2011 discuss schools that were changing their standards as a result of the Dear Colleague Letter. *See, e.g., Daniel de Vise, University of Virginia’s Proposed Rules Aimed at Empowering Victims of Sexual Misconduct*, WASH. POST, May 7, 2011, at B1, available at [http://www.washingtonpost.com/local/education/univ-of-virginias-proposed-rules-would-lower-standard-for-sexual-misconduct/2011/05/05/AFwQVt1F\\_story.html](http://www.washingtonpost.com/local/education/univ-of-virginias-proposed-rules-would-lower-standard-for-sexual-misconduct/2011/05/05/AFwQVt1F_story.html) (showing how the University of Virginia is implementing new policies to conform to the new national guidelines, including a new standard of review for sexual assault cases); Editorial, *New Standard of Proof Better, But Still Needs Work*, STAN. REV., Apr. 18, 2011, available at <http://stanfordreview.org/article/editorial-new-standard-of-proof-better-but-still-needs-work> (discussing Stanford University’s decision to lower the standard of proof in cases involving sexual misconduct); Jon Ostrowsky, *New Federal Guidance on Univ Sexual Assault: Brandeis Follows Biden Lead on Title XI*, THE BRANDEIS HOOT, Apr. 8, 2011, at 1, available at <http://thebrandeishoot.com/articles/10159> (highlighting Brandeis University’s decision to lower the standard of proof for internal hearings on sexual assault); Rebecca D. Robbins, *Harvard’s Sexual Assault Policy Under Pressure*, THE HARVARD CRIMSON (May 11, 2012), <http://www.thecrimson.com/article/2012/5/11/harvard-sexual-assault-policy/> (discussing pressure being placed on Harvard to change standard of proof to preponderance of evidence). Earlier studies have indicated that the vast majority of schools do not articulate a standard of proof, but of those that do, a substantial minority required a standard of proof higher than a preponderance standard. *See Anderson*, 1000-01, Karjane, 120-21. *See also* Drake University, CODE OF STUDENT CONDUCT, available at: <http://www.drake.edu/dos/pdf/conductbrochure.pdf> (specifying that accused students have a right to “cross-examine the complainant,” and that accused students will receive any “exculpatory evidence” possessed by the University);

<sup>31</sup> See 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, 949 (2004). See also Heather M. Karjane et al., CAMPUS SEXUAL ASSAULT: HOW AMERICA’S INSTITUTIONS OF HIGHER EDUCATION RESPOND 115 (2002), available at: <http://www.rainn.org/pdf-files-and-other-documents/Public-Policy/Legislative-Agenda/mso44.pdf> (noting that fewer than 1 in 10 of the schools surveyed responded that they had policies comparable to “rape shield” laws).

<sup>32</sup> See EDWARD N. STONER II, REVIEWING YOUR STUDENT DISCIPLINE POLICY: A PROJECT WORTH THE INVESTMENT (2000), available at: <http://www.eric.ed.gov/PDFS/ED444074.pdf> and discussion *infra*, notes 149–154.

(“Title IX”),<sup>33</sup> the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”),<sup>34</sup> and case law regarding the due process rights of students at state institutions when they stand accused of any offense that could result in their suspension or expulsion.<sup>35</sup>

The remainder of this Article will look at these three areas of law to see how these laws encourage institutions to adopt certain methods of dealing with campus peer sexual violence. It will ultimately conclude that, both to comply with their legal obligations and ultimately to end the violence, institutions need to “decriminalize” their institutional responses to the problem, both on the front end and on the back end. Finally, it will make two recommendations of specific methods that institutions can use to begin the decriminalization process.

#### I. LAWS APPLICABLE TO INSTITUTIONAL RESPONSIBILITIES REGARDING CAMPUS PEER SEXUAL VIOLENCE

The three legal regimes listed above constitute the three areas of national law applicable to a higher education institution’s responsibilities to respond to incidents of campus peer sexual violence. Title IX and Clery are federal statutes with accompanying administrative and court enforcement structures that focus mainly on how an institution responds to victims and reports of violence. The due process precedents are based on U.S. Supreme Court and federal courts of appeals interpretations of the U.S. Constitution and focus on the institution’s obligations to students accused of perpetrating violence. It is important to note that, in any given case, various state laws may also be applicable, but those laws are beyond the scope of this article. This section will discuss each set of federal laws in turn and demonstrate that, with regard to the back end of an institution’s responses, not only do none of these legal regimes require institutions to imitate the criminal justice system in their disciplinary procedures but they also often affirmatively require institutions to respond in a way that is significantly different from a criminal approach. In addition, this section will show that, on the front end, these laws are largely ineffective in addressing the campus peer sexual violence problem because these laws—largely through silence—inadvertently encourage institutions to take a criminal justice system-like approach to victim reporting and gathering information about campus peer sexual violence.

##### A. Title IX

Title IX provides a good example of mixed legal incentives that collectively show that imitating the criminal justice system on either the

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33. 20 U.S.C. § 1681 (2006 & Supp. V 2011).

34. 20 U.S.C. § 1092(f) (2006 & Supp. V 2011).

35. *See infra* Part II.C.

front end or the back end of an institutions’ response will be ultimately ineffective in solving the campus peer sexual violence problem and may actually perpetuate it. As the review below will show, Title IX’s requirements for institutions’ responses to a report of sexual violence are both quite protective of student survivors’ rights and do not encourage schools to take a “criminal” approach to their investigations and hearings regarding such reports. However, because current enforcement of Title IX does not account for the victim-non-reporting problem discussed above, Title IX does not intervene in front end institutional responses related to reporting, and allows—even provides incentives—for institutions to adopt a criminal approach to reporting. This approach acts as an obstacle to institutions preventing and ending peer sexual violence because, if the studies discussed above are any judge, the criminal approach is a significant deterrent to victim reporting.

Title IX prohibits sexual harassment in schools as a form of sex discrimination.<sup>36</sup> Peer sexual violence is generally considered a case of hostile environment sexual harassment that is “so severe, pervasive and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”<sup>37</sup> Because of the severity of sexual violence, even a single instance of violence will generally be considered hostile environment sexual harassment.<sup>38</sup>

Title IX is enforced in two ways when peer sexual violence is at issue: first, through a survivor’s private right of action against her school<sup>39</sup> and second, through administrative enforcement by the Office of Civil Rights (“OCR”) of the Department of Education (“ED”).<sup>40</sup> Both enforcement jurisdictions derive from the fact that schools agree to comply with Title IX

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36. See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 (2001), available at: <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf> [hereinafter REVISED GUIDANCE].

37. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 632 (1999).

38. See REVISED GUIDANCE, *supra* note 32, at 6:

The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e.g., attempts to grab a female student’s breasts or attempts to grab any student’s genital area or buttocks, it need not be as persistent to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.

*Id.*

39. See *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992).

40. See REVISED GUIDANCE, *supra* note 32, at i.

in order to receive federal funds.<sup>41</sup>

The private right of action requires a plaintiff/survivor to reach the standard set out by two Supreme Court cases, *Gebser v. Lago Vista Independent School District*<sup>42</sup> and *Davis v. Monroe County Board of Education*.<sup>43</sup> In order to make out a violation of Title IX, this standard requires that a school act with “deliberate indifference” in the face of “actual knowledge” of an incident of sexual violence.<sup>44</sup> If a plaintiff can meet that standard, the damages that the school could be required to pay are quite significant. While most cases settle out of court, the settlements give a sense of what both sides anticipate the damages awarded by a jury would be. The largest settlement in a Title IX case to date was in *Simpson v. University of Colorado Boulder*,<sup>45</sup> when two college women were gang-raped as a part of an unsupervised football recruiting program that the university had evidence was leading to sexual violence. The university ultimately paid \$2.85 million to the plaintiffs, hired a special Title IX analyst and fired some thirteen university officials, including the President and football coach.<sup>46</sup> Other large settlements include an \$850,000 settlement by Arizona State University in a case where a student was raped by a football player who had been expelled for misconduct, including sexual harassment, but was readmitted after intervention by the coach.<sup>47</sup> In addition, the University of Georgia paid a six-figure settlement to a plaintiff who was raped by several athletes, including one who the university knew had a criminal record before he was admitted to the university.<sup>48</sup>

Beyond these high-profile cases, there have been many cases where courts have allowed cases to proceed to a jury for a determination as to

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41. *Id.* at 2–3.

42. 524 U.S. 274 (1998).

43. 526 U.S. 629 (1999).

44. See, e.g., *S.S. v. Alexander*, 177 P.3d 724, 726 (Wash. Ct. App. 2008); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258–59 (6th Cir. 2000); *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999).

45. 500 F.3d 1170 (10th Cir. 2007).

46. See Diane L. Rosenfeld, *Changing Social Norms? Title IX and Legal Activism: Concluding Remarks*, 31 HARV. J.L. & GENDER 407, 418 (2008).

47. Tessa Muggeridge, *ASU Settlement Ends in \$850,000 Payoff*, STATE PRESS (Feb. 3, 2009), available at <http://www.statepress.com/archive/node/4020>. ASU has been sued again by a student who says she was raped by members of a fraternity where the university knew there was a pattern of sexual violence and where suspected mishandling of the investigation by campus police made criminal charges impossible. Kyle Patton & Joseph Schmidt, *Former Student Sues ABOR Over Sexual Assault Case*, STATE PRESS (July 18, 2010), available at <http://www.statepress.com/2010/07/18/former-student-sues-abor-over-sexual-assault-case/>.

48. See Rosenfeld, *supra* note 42, at 420.

whether the school violated Title IX. Schools have been found to have acted with deliberate indifference for the following general categories of institutional responses to a report of sexual violence:

- 1) The school does nothing at all;<sup>49</sup>
- 2) The school talks to the alleged perpetrator, who denies the allegations, makes no determination as to which story is more credible,<sup>50</sup> and then does nothing, including nothing to protect the victim from any retaliation from the alleged perpetrator or other students as a result of her report;<sup>51</sup>

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49. See, e.g., *Estate of Brown v. Ogletree*, 2012 U.S. Dist. LEXIS 21968 (S.D. Tex. Feb. 21, 2012); *Estate of Carmichael v. Galbraith*, 2012 U.S. Dist. LEXIS 857 (N.D. Tex. Jan. 4, 2012); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135 (N.D.N.Y. 2011) (for a more complete fact statement, see <http://www.lambdalegal.org/in-court/cases/pratt-v-indian-river-central-school-district>); *Walsh v. Tehachapi Unified School Dist.*, 2011 U.S. Dist. LEXIS 125175 (E.D. Cal. Oct. 28, 2011); *Rinsky v. Boston Univ.*, 2010 U.S. Dist. LEXIS 136876 (D. Mass. Dec. 23, 2010); *T.Z. v. City of New York*, 634 F. Supp. 2d 263 (E.D.N.Y. 2009); *McGrath v. Dominican College*, 672 F. Supp. 2d 477 (S.D.N.Y. Nov. 25, 2009); *Doe ex rel Doe v. Coventry Bd. of Educ.*, 630 F. Supp. 2d 22 (D. Conn. 2009); *C.T. v. Liberal Sch. Dist.*, 562 F. Supp. 2d 1324 (D. Kan. 2008); *Dawn L. v. Greater Johnstown Sch. Dist.*, 586 F. Supp. 2d 332, 365 (W.D. Pa. 2008); *S.G. v. Rockford Bd. of Educ.*, 2008 U.S. Dist. LEXIS 95522, at \*15–16 (N.D. Ill. Nov. 24, 2008); *James v. Indep. Sch. Dist. No. 1-007*, 2008 U.S. Dist. LEXIS 82199, at \*6 (W.D. Okla. Oct. 16, 2008); *Bruning v. Carroll Cmty. Sch. Dist.*, 486 F. Supp. 2d 892, 915–16 (N.D. Iowa 2007); *Doe v. Southeastern Greene Sch. Dist.*, 2006 U.S. Dist. LEXIS 12790 (W.D. Pa. Mar. 24, 2006); *Bashus v. Plattsmouth Cmty. Sch. Dist.*, 2006 U.S. Dist. LEXIS 56565, at \*10 (D. Neb. Aug. 3, 2006); *Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 447–48 (D. Conn. 2006); *Doe v. E. Haven Bd. of Educ.*, 430 F. Supp. 2d 54, 63–65 (D. Conn. 2006), *aff'd*, 200 F. App'x 46, 49 (2d Cir. 2006); *Martin v. Swartz Creek Cmty. Schools*, 419 F. Supp. 2d 967, 974 (E.D. Mich. 2006); *Jones v. Ind. Area Sch. Dist.*, 397 F. Supp. 2d 628, 645–46 (W.D. Pa. 2005); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1301 (D. Kan. 2005); *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809 (S.D. Iowa 2004); *Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869 (N.D. Ohio 2003); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001); *O. H. v. Oakland Unified Sch. Dist.*, 2000 U.S. Dist. LEXIS 21725 (N.D. Cal. Apr. 14, 2000); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000).

50. See, e.g., *Alexander*, 177 P.3d at 740.

51. See, e.g., *Patterson v. Hudson Area Sch.*, 2009 U.S. App. LEXIS 25, at \*33 (6th Cir. 2009); *Doe v. Galster*, 2011 U.S. Dist. LEXIS 77706 (E.D. Wis. Jul. 14, 2011); *Terrell v. Del. State Univ.*, 2010 U.S. Dist. LEXIS 74841 (D. Del. July 23, 2010); *Coventry Bd. of Educ.*, 630 F. Supp. 2d at 226; *Liberal Sch. Dist.*, 562 F. Supp. 2d at 1324; *Jones v. Kern High Sch. Dist.*, 2008 U.S. Dist. LEXIS 74040 (E.D. Cal. Aug. 13, 2008); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); *Doe v. Hamden Bd. of Educ.*, 2008 U.S. Dist. LEXIS 40269, at \*17 (D. Conn. May 19, 2008); *M. v. Stamford Bd. of Educ.*, 2008 U.S. Dist.

- 3) The school waits or investigates so slowly that it takes months or years for the survivor to get any redress;<sup>52</sup>

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LEXIS 51933, at \*28 (D.Conn. 2008); *James*, 2008 U.S. Dist. LEXIS 82199, at \*6; S.G., 2008 U.S. Dist. LEXIS 95522 at \*10, \*14–15; *Bashus*, 2006 U.S. Dist. LEXIS 56565, at \*10–11; *Derby Bd. of Educ.*, 451 F. Supp. 2d at 444–45; *Doe v. Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780, at \*39 (D.S.C. May 25, 2006); *E. Haven Bd. of Educ.*, 430 F. Supp. 2d at 59–60; *Martin*, 419 F. Supp. 2d at 974; *Jones*, 397 F. Supp. 2d at 645–46; *Theno*, 394 F. Supp. 2d at 1310–11. In addition to these cases, in two cases where the school was granted summary judgment on the plaintiff’s deliberate indifference claim, the courts allowed the plaintiff’s claim alleging that the school itself retaliated to proceed to a jury: *Pemberton v. West Feliciana Parish Sch. Bd.*, 2012 U.S. Dist. LEXIS 17138 (M.D. La. Feb. 10, 2012) (finding that the school did not act with deliberate indifference but denying the school’s motion for summary judgment on plaintiff’s retaliation claim when the school initiated an investigation into her residency and dropped her from the school when she complained after three male students attacked and groped her after school); *Marcum ex rel. C.V. v. Board of Educ. of Bloom-Carroll Local School Dist.*, 727 F. Supp. 2d 657 (S. D. Ohio 2010) (denying deliberate indifference claim but granting retaliation claim of 12 year-old girl who was sexually assaulted on the school bus by a 17 year-old boy, suspended along with the boy for 10 days, complained about students harassing her by calling her a “slut” and “whore” for four days after her return to school, and was then suspended and expelled for the alleged theft of a wallet and iPod). Finally, one case is a further outlier on this issue: *Doe v. Univ. of the Pacific*, 2012 U.S. App. LEXIS 1844 (9th Cir. 2012) (concluding in an unpublished opinion that the district court “did not err” in its decision rejecting plaintiff’s claims that the school had not adequately investigated suspicions that one of the men who raped plaintiff was involved in the gang-rape of another woman the month prior to plaintiff’s rape, had acted with deliberate indifference to plaintiff’s rape “by requiring her to be in contact with her assailants when it refused to expel two of the men” and had retaliated against plaintiff for her Title IX complaint).

52. See, e.g., *Williams v. Bd. of Regents*, 477 F.3d 1282, 1297 (11th Cir. 2007) (finding the school took eight months to respond to reports of a gang rape); *Evans v. Bd. of Educ. Southwestern Sch. Dist.*, 2010 U.S. Dist. LEXIS 72926 (S. D. Ohio 2010) (denying school’s motion for summary judgment on Title IX claims when school did not respond to two 12 year-old girls’ reports of sexual harassment by male students on school bus [including escalating incidents of verbal harassment, pulling down the girls’ pants, exposing their breasts and forcing one to perform oral sex] and eventually suspended both the victim and the perpetrator of the forced oral sex incident, even when the perpetrator pled guilty to attempted assault in a separate criminal proceeding); *Coventry Bd. of Educ.*, 630 F. Supp. 2d at 22 (denying summary judgment to school when a male student sexually assaulted a female student off school grounds and the school took no disciplinary action against the assailant [permitting him “to continue attending school with [plaintiff] for three years after the assault, leaving constant potential for interactions between the two”], engaged in unreasonable delay by allowing the two students to share a lunch period and class for over six months after the school was notified of the assault, and allowed the assailant’s “friends [to] verbally harass[ and



- 4) School officials investigate in a biased way, such as through their treatment of the survivor or characterization of her case;<sup>53</sup>
- 5) The school determines or acknowledges that the sexual violence did occur, but does not discipline the assailant or other students engaging in retaliatory harassment, minimally disciplines the assailant or other students engaging in retaliatory harassment, or also disciplines the victim of the violence;<sup>54</sup>
- 6) School officials investigate and determine that the sexual violence did occur and proceed to remove the victim from classes, housing, or transportation services where she would encounter her assailant, resulting in significant disruption to the victim’s education but none to the assailant’s;<sup>55</sup>

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threaten] her in school, calling her ‘slut,’ ‘cow,’ ‘whore,’ ‘liar,’ and ‘bitch,’” and to send her a text message stating “‘You better watch your back if my boy goes to jail...’”)

53. See, e.g., *Galster*, 2011 U.S. Dist. LEXIS 77706; *Albiez v. Kaminski*, 2010 U.S. Dist. LEXIS 59373 (E.D. Wisc. June 14, 2010); *Terrell*, 2010 U.S. Dist. LEXIS 74841; *Babler v. Arizona Board of Regents*, Case 2:10-cv-01459-RRB (D. Ariz. Feb. 15, 2010); *Marcum*, 727 F. Supp. 2d at 657; *McGrath*, 672 F. Supp. 2d at 477; *Greater Johnstown Sch. District*, 586 F. Supp. 2d at 365; *Patterson*, 2009 U.S. App. LEXIS 25, at \*4; *Brimfield Grade Sch.*, 552 F. Supp. 2d at 823; S.S., 177 P.3d at 740; *Siewert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007); *Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780 at \*33–34; *Theno*, 394 F. Supp. 2d at 1310–11; *Kelly v. Yale Univ.*, 2003 U.S. Dist. LEXIS 4543, at \*3 (D. Conn. Mar. 26, 2003); *Snelling v. Fall Mt. Regional Sch. Dist.*, 2001 U.S. Dist. LEXIS 3591 (D.N.H. 2001).

54. See, e.g., *Brown*, 2012 U.S. Dist. LEXIS 21968; *Galster*, 2011 U.S. Dist. LEXIS 77706; *Pratt*, 803 F. Supp. 2d at 135; *Evans*, 2010 U.S. Dist. LEXIS 72926; *Terrell*, 2010 U.S. Dist. LEXIS 74841; *Marcum*, 727 F. Supp. 2d at 657; *Coventry Bd. of Educ.*, 630 F. Supp. 2d at 226; *City of New York*, 634 F. Supp. 2d at 263; *Liberal Sch. Dist.*, 562 F. Supp. 2d at 1324; *Kern High Sch. Dist.*, 2008 U.S. Dist. LEXIS 74040; *Annamaria M v. Napa Valley Unified Sch. Dist.*, 2006 U.S. Dist. LEXIS 38641 (N.D. Cal. May 30, 2006); *Southeastern Greene Sch. Dist.*, 2006 U.S. Dist. LEXIS 12790; *Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d at 809; *Schroeder*, 296 F. Supp. 2d at 869; *Henkle*, 150 F. Supp. 2d at 1067; *Snelling*, 2001 U.S. Dist. LEXIS 3591 (D.N.H. 2001); *Oakland Unified Sch. Dist.*, 2000 U.S. Dist. LEXIS 21725 (N.D. Cal. Apr. 14, 2000); *Vance*, 231 F.3d at 262 (6th Cir. 2000); S.S., 177 P.3d at 739 2008; *Hamden*, 2008 U.S. Dist. LEXIS 40269, at \*5; *Stamford*, 2008 U.S. Dist. LEXIS 51933, at \*28; *Siewert*, 497 F. Supp. 2d at 954; *Theno*, 394 F. Supp. 2d at 1310-1; *Erskine Coll.*, 2006 U.S. Dist. LEXIS 35780, at \*35; *Derby Bd. of Educ.*, 451 F. Supp. 2d at 447; *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 481 (D.N.H. 1997).

55. See, e.g., *Terrell*, 2010 U.S. Dist. LEXIS 74841 (D. Del. July 23, 2010) (denying the school’s motion to dismiss because, when plaintiff reported that another student assaulted and beat her, the school permitted him to continue attending classes without restriction, “informed [plaintiff] that she would be

- 7) School officials take some action to address the sexual violence, but when that action is ineffective, do not change the response to address its ineffectiveness or do anything more to address the violence;<sup>56</sup>
- 8) School officials tell the victim not to tell anyone else, including parents and the police;<sup>57</sup>
- 9) The school requires or pressures the survivor to confront her assailant or to go through mediation with him before allowing her to file a complaint for investigation.<sup>58</sup>

In addition, the case law in this area increasingly gives a sense of what school responses *are* adequate under Title IX, since two clear trends emerge from cases where courts have granted schools' motions for summary judgment or to dismiss the plaintiffs' Title IX claims. First, once a school has knowledge of an incidence of sexual violence, the case law suggests that separating the students involved can help a school avoid a "deliberate indifference" finding.<sup>59</sup> Moreover, in the majority of these

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required to adjust her schedule and transfer out of [a shared] class," and "punished [her] equally with her male assailant," by initiating disciplinary proceedings against her); *Siewert*, 497 F. Supp. 2d at 954 (finding that after victim repeatedly harassed and assaulted the only action the school took was to move the victim to a different classroom); *James*, 2008 U.S. Dist. LEXIS 82199, at \*6 (W.D. Okla. 2008) (same). *But see Pemberton*, 2012 U.S. Dist. LEXIS 17138 (M.D. La. Feb. 10, 2012) (finding that the school did not act with deliberate indifference after plaintiff was sexually assaulted by three male students who attacked and groped her after school, the school suspended the boys, the plaintiff was subjected to verbal harassment by the assailants and their friends, and the school only offered to switch her out of the class if she wanted to avoid her harassers).

56. *See S.S.*, 177 P.3d at 739; *Vance*, 231 F.3d at 261; *Jones*, 397 F. Supp. 2d at 645; *Martin*, 419 F. Supp. 2d at 974; *Patterson*, 2009 U.S. App. LEXIS 25, at \*32; *Napa Valley Unified Sch. Dist.*, 2006 U.S. Dist. LEXIS 38641.

57. *See, e.g., Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1248 (10th Cir. 1999) (finding that after a male student repeatedly raped a student with spastic cerebral palsy, the school did not inform and told the victim not to inform her mother); *Oyster River Coop. Sch. Dist.*, 992 F. Supp. at 479 (finding that two girls were harassed repeatedly by a boy who exposed himself to them and touched them on their legs and breasts on the school bus and in school; when they reported the behavior, the school's guidance counselor told them not to tell their parents because it could subject the school to lawsuits).

58. *See, e.g., Alexander*, 177 P.3d at 740.

59. *See, e.g., Porto v. Town of Tewksbury*, 488 F.3d 67, 2007 U.S. App. LEXIS 12444 (1st Cir. Mass. 2007); *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist.* 163, 315 F.3d 817 (7th Cir. Ill. 2003); *Watkins v. La Marque Indep. Sch. Dist.*, 308 Fed. Appx. 781, 2009 U.S. App. LEXIS 1500 (5th Cir. Tex. 2009); *P.K. v. Caesar Rodney High Sch.*, 2012 U.S. Dist. LEXIS 9572 (D. Del. Jan. 27, 2012); *Brooks v. City of Philadelphia*, 747 F. Supp. 2d 477 (E.D. Pa. Oct. 5, 2010); *Marshall v. Batesville Sch. Dist.*, 2008 U.S. Dist. LEXIS 99663 (E.D. Ark. Dec. 9,

cases, the separation of the students was achieved by moving the alleged perpetrator,<sup>60</sup> suspending the alleged perpetrator,<sup>61</sup> or both. Second, a smaller group of schools have avoided being found deliberately indifferent because they expelled the perpetrators after determining them to be responsible for peer sexual violence.<sup>62</sup>

These cases show that schools can face significant liability if they respond to a report of sexual violence in a way that is not protective of student survivors. This is a significant difference from the criminal justice

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2008); *Addison v. Clarke County Bd. of Educ.*, 2007 U.S. Dist. LEXIS 56166 (M.D. Ga. July 30, 2007); *Lewis v. Booneville Sch. Dist.*, 2007 U.S. Dist. LEXIS 24976 (N.D. Miss. Apr. 2, 2007); *Theriault v. Univ. of S. Me.*, 353 F. Supp. 2d 1, 2004 U.S. Dist. LEXIS 17364 (D. Me. 2004); *Doe v. Lennox Sch. Dist. No. 41-4*, 329 F. Supp. 2d 1063 (D.S.D. 2003); *Ings-Ray v. Sch. Dist. of Phila.*, 2003 U.S. Dist. LEXIS 7683 (E.D. Pa. Apr. 30, 2003); *C.R.K. v. U.S.D. 260*, 2002 U.S. Dist. LEXIS 6326 (D. Kan. Jan. 30, 2002); *Clark v. Bibb County Bd. of Educ.*, 174 F. Supp. 2d 1369, 2001 U.S. Dist. LEXIS 20561 (M.D. Ga. 2001); *KF's Father v. Marriott*, 2001 U.S. Dist. LEXIS 2534 (S.D. Ala. Feb. 23, 2001); *Wilson v. Beaumont Indep. Sch. Dist. & Thom Amons*, 144 F. Supp. 2d 690 (E.D. Tex. 2001); *Manfredi v. Mount Vernon Bd. of Educ.*, 94 F. Supp. 2d 447 (S.D.N.Y. 2000); *Vaird v. School Dist. of Philadelphia*, 2000 U.S. Dist. LEXIS 6492 (E.D. Pa. May 12, 2000). Only three cases differ in some respects from the clear weight of this authority regarding separating students involved in sexual violence. See *Univ. of the Pacific*, 2012 U.S. App. LEXIS 1844; *Pemberton*, 2012 U.S. Dist. LEXIS 17138 (M.D. La. Feb. 10, 2012); *O'Hara v. Colonial Sch. Dist.*, 2002 U.S. Dist. LEXIS 12153 (E.D. Pa. Mar. 25, 2002) (dismissing Ps claims when she was sexually assaulted repeatedly through sexual touching of breasts and genitalia by a male classmate, only reporting the assaults when the assailant became violent, after which the school suspended the assailant for 70 days, and then allowed him to return to school, when he “could occasionally be found in the same vicinity as the plaintiff and . . . would stare at her”);

60. Of the seventeen cases listed in footnote 55, above, thirteen schools separated the students by moving the alleged perpetrator or separating the students in an unspecified or equal manner. See *Porto*, 488 F.3d at 67; *Gabrielle M.*, 315 F.3d at 817; *Watkins*, 308 Fed. Appx. at 781; *Addison*, 2007 U.S. Dist. LEXIS at 56166; *Lewis*, 2007 U.S. Dist. LEXIS at 24976; *Theriault*, 353 F. Supp. 2d at 1; *Lennox Sch. Dist.*, 329 F. Supp. 2d at 1063; *Ings-Ray*, 2003 U.S. Dist. LEXIS at 7683; *C.R.K.*, 2002 U.S. Dist. LEXIS at 6326; *Clark*, 174 F. Supp. 2d at 1369; *Wilson*, 144 F. Supp. 2d at 690; *Manfredi*, 94 F. Supp. 2d at 447; *Vaird*, 2000 U.S. Dist. LEXIS at 6492.

61. See *Caesar Rodney High Sch.*, 2012 U.S. Dist. LEXIS 9572; *Marshall*, 2008 U.S. Dist. LEXIS 99663; *Theriault*, 353 F. Supp. 2d at 1; *Lennox Sch. Dist.*, 329 F. Supp. 2d at 1063; *Clark*, 174 F. Supp. 2d at 1369; *Vaird*, 2000 U.S. Dist. LEXIS at 6492.

62. See *Doe v. North Allegheny Sch. Dist.*, 2011 U.S. Dist. LEXIS 93551 (W.D. Pa. Aug. 22, 2011); *Snethen v. Bd. of Pub. Educ. for the City of Savannah*, 2008 U.S. Dist. LEXIS 22788 (S.D. Ga. Mar. 24, 2008); *Fortune v. City of Detroit Pub. Schs.*, 2004 Mich. App. LEXIS 2660 (Mich. Ct. App. Oct. 12, 2004).

system, which is not particularly protective of victims, where victims are not considered parties on par with the state and the defendant, and whose interests are therefore not at the center of a criminal proceeding. Moreover, the focus of this case law is forward-looking, scrutinizing whether the school's institutional responses avoided or led to further risk of or actual occurrence of harassment or violence against a survivor. Such responses often require actions generally not associated with the criminal justice system, such as moving an accused student out of housing or classes prior to an investigation or determination as to the "truth" of the victim's report.

However, these cases obscure the number of cases where the victim was not able to successfully show that the school had "actual knowledge" of the violence, due to three problems with the "actual knowledge" standard and how it has been applied by the courts as a whole. First, the actual knowledge prong requires that the *school* have actual knowledge of the harassment, raising the question of who represents the school. There is significant variation on this question. In some cases, especially ones where the harasser is a teacher or school official, if only another teacher or school official of equal rank has knowledge of the harassment, courts have found this knowledge to be insufficient to qualify as knowledge by the school.<sup>63</sup> Courts are more open to allowing teachers to count as the school in peer sexual harassment cases,<sup>64</sup> but this is not guaranteed,<sup>65</sup> and others who would seem to be in similar positions of authority as teachers, such as bus

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63. Megan Ryan ed., Commentary, *Comments from the Spring 2007 Harvard Journal of Law & Gender Conference Held at Harvard Law School*, 31 HARV. J.L. & GENDER 378, 387 (2008) (quoting Linda Wharton).

64. *See, e.g.*, *Montgomery v. Indep. Sch. Dist.* No. 709, 109 F. Supp. 2d 1081, 1099 (D. Minn. 2000); *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 908 (D. Minn. 1999); *Soriano ex rel. Garcia v. Bd. of Educ. of N.Y.C.*, No. 01 CV 491(JG), 2004 WL 2397610, at \*4 (E.D.N.Y. Oct. 27, 2004); *Ind. Area Sch. Dist.*, 397 F. Supp. 2d at 644.

65. *See M. v. Stamford Bd. of Educ.*, No. 3:05-vc-0177, 2008 U.S. Dist. LEXIS 51933, at \*25–26 (D. Conn. July 7, 2008) (holding that actual knowledge did not exist until assistant principal was informed, even though other school officials were previously aware of the incident), vacated in part by *Stamford*, , 2008 U.S. Dist. LEXIS 51933; *Snethen*, 2008 U.S. Dist. LEXIS 22788 (granting summary judgment when the school did not act with deliberate indifference to an attempted rape of one student by another and a teacher who did not necessarily qualify as an "appropriate person" for actual knowledge purposes had previously observed "horseplay" with sexual connotations between the assailant and another girl); *Peer ex rel. Jane Doe v. Porterfield*, No. 1:05-cv-769, 2007 U.S. Dist. LEXIS 1380, at \*28–30 (W.D. Mich. Jan. 8, 2007) (stating notice must be to an "official . . . capable of terminating or suspending the individual" as held to apply to a principal but not necessarily teachers (quoting *Nelson v. Indep. Sch. Dist.* No. 356, No. 00-2079, 2002 U.S. Dist. LEXIS 3093, at \*15 (D. Minn. Feb. 15, 2002))).

drivers,<sup>66</sup> coaches,<sup>67</sup> and other school professionals or “paraprofessionals”<sup>68</sup> have been judged to be “inappropriate persons.” This leads to confusing variation,<sup>69</sup> requiring survivors to know and parse through school hierarchies in specific and diverse contexts based on the identities of the perpetrators and the relationships between the person with knowledge and the harasser.

Second, variation has emerged as to what kind of knowledge constitutes actual knowledge. If a school is aware of a student’s harassment of other students besides the victim who is reporting in a given case, must the school have actual knowledge of the harassment experienced by that particular victim? Courts have resolved the issue in different ways.<sup>70</sup> In a review of the peer harassment cases where this question was posed, the decisions are fairly evenly split between courts that find that the school must have actual knowledge of the harassment experienced by the particular survivor bringing the case, those that state that the school’s knowledge of the peer harasser’s previous harassment of other victims is sufficient to meet the actual knowledge standard, and ambiguous decisions.<sup>71</sup>

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66. *See, e.g.,* Staehling v. Metro. Gov’t, No. 3:07-0797, 2008 U.S. Dist. LEXIS 91519, at \*30–31 (M.D. Tenn. Sept. 12, 2008).

67. *See, e.g.,* Halvorson v. Indep. Sch. Dist. No. I-007, No. CIV-07-1363-M, 2008 U.S. Dist. LEXIS 96445, at \*6 (W.D. Okla. Nov. 26, 2008) (explaining that the coaches “did not have authority to institute measures on the District’s behalf”). *But see* Roe *ex rel.* Callahan v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1033–34 (E.D. Cal. 2009) (finding that “case law does not expressly limit the employee who may trigger a school district’s liability under Title IX; it is an ‘open question.’ . . . [D]eciding who exercises substantial control for the purposes of Title IX liability is necessarily a fact-based inquiry. . . . On the present record and without evidence from the District, it cannot be established as a matter of law that Coach Scudder was not an ‘appropriate person’ for purposes of Title IX.”).

68. *See, e.g.,* Noble v. Branch Intermediate Sch. Dist., No. 4:01cv 58, 2002 U.S. Dist. LEXIS 19600, at \*44–48 (W.D. Mich. Oct. 9, 2002); Doe v. North Allegheny Sch. Dist., 2011 U.S. Dist. LEXIS 93551 (W.D. Pa. Aug. 22, 2011) (indicating that a Student Service Coordinator and social work intern were not “appropriate persons” for actual knowledge purposes).

69. Ryan, *supra* note 63, at 388.

70. *Id.* at 388–89.

71. Of eighteen cases where this question was dealt with directly or indirectly, six resulted in the court not requiring actual knowledge of harassment involving a specific victim. *See* Williams v. Bd. of Regents, 477 F.3d 1282, 1289 (11th Cir. 2007) (implying that knowledge of the perpetrator’s previous harassment was enough to put the school on notice); *Callahan*, 678 F. Supp. 2d at 1029-34 (noting the harassing behavior does not have to be plaintiff specific); Lopez v. Metro. Gov’t, 646 F. Supp. 2d 891, 915–16 (M.D. Tenn. 2009) (concluding that knowledge of the perpetrator’s sexual proclivities and previous misbehavior put the school on notice even though no prior incidents had occurred between the

perpetrator and victim); *Staebling*, 2008 U.S. Dist. LEXIS 91519, at \*28–31 (“The institution must have possessed enough knowledge of the harassment that it could reasonably have responded with remedial measures to address the kind of harassment upon which plaintiff’s legal claim is based.”); *J.K. v. Ariz. Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. LEXIS 83855, at \*45–46 (D. Ariz. Sept. 29, 2008) (“Title IX claims can be based on recipients knowledge of, and deliberate indifference to, a particular harasser’s conduct in general.”); *Michelle M. v. Dunsmuir Joint Union Sch. Dist.*, No. 2:04-cv-2411-MCE-PAN, 2006 U.S. Dist. LEXIS 77328, at \*16, \*20 (E.D. Cal. Oct. 12, 2006) (finding that although the defendants may not have had actual knowledge of specific incidents of peer sexual harassment, the defendant’s knowledge of the perpetrator’s prior disturbing behavior, coupled with the defendant’s failure to disseminate its policies on sexual harassment, could give rise to Title IX liability).

Eight cases resulted in the court finding that the actual knowledge prong had not been met because the school did not have knowledge of harassment directed at the victim bringing the case. *See North Allegheny Sch. Dist.*, 2011 U.S. Dist. LEXIS 93551 (granting school’s motion for summary judgment when a male student raped a female student with whom he had had previous consensual sexual encounters, when the school was aware of the alleged perpetrator’s previous sexual assaults but did not expel him from the school district, only expelled him after his rape of plaintiff); *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356 (6th Cir. Mich. 2012) (affirming the district court’s grant of summary judgment when a school revised the Individual Educational Plan of a special education student with known disciplinary problems inside and outside of school, to allow for a period of adult supervision after he shoved his girlfriend (plaintiff) into a locker, demanded she perform oral sex on him and made obscene gestures toward her at a school basketball game, only expelling him after he raped plaintiff approximately 8 weeks later). *Porterfield*, 2007 U.S. Dist. LEXIS 1380, at \*28–30 (noting that knowledge of student’s disciplinary problems did not amount to knowledge that he posed a sexual threat to other students); *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1348 (M.D. Ga. 2007):

While the precise boundaries of what kind of ‘actual knowledge’ a school must have to subject itself to Title IX liability remain undefined, it is generally accepted that the knowledge must encompass either actual notice of the precise instance of abuse that gave rise to the case at hand or actual knowledge of at least a significant risk of sexual abuse.

*Id.* *See also* *Fortune v. City of Detroit Pub. Schs.*, 2004 Mich. App. LEXIS 2660 (Mich. Ct. App. Oct. 12, 2004) (affirming summary judgment for school when two boys raped plaintiff in an empty classroom after an after-school activity and previous complaints about sexual harassment from another girl regarding one of the boys did not count as actual knowledge prior to plaintiff’s rape because that complaint had not indicated that the boy harassed other girls); *Soriano ex rel. Garcia v. Bd. of Educ. of N.Y.C.*, 2004 WL 2397610, at \*4 (finding that while a general lack of discipline in the school and a student’s reputation for inappropriate sexual conduct were not enough to put the school on actual notice, the plaintiff’s complaint to a teacher did put the school on actual notice); *Noble*, 2002 U.S. Dist. LEXIS 19600, at \*39-47 (holding that knowledge of the perpetrator’s past

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disciplinary problems was not enough to put the school on actual notice); *K.F. v. River Bend Cmty. Unit Sch. Dist. No. 2*, No. 01 C 50005, 2002 U.S. Dist. LEXIS 12468, at \*3–6 (N.D. Ill. July 8, 2002) (noting that perpetrator’s history of general disciplinary problems was not enough to put the school on actual notice).

Another twelve cases were ambiguous on this point or were decided on factual as opposed to legal considerations. *See Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1177 (10th Cir. 2007):

*Gebser* rejected a negligence standard for liability—namely, a standard that would have imposed liability on a school district for ‘failure to react to teacher-student harassment of which it . . . should have known’—but instead had ‘concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge.

*Id.* *See also Winzer v. Sch. Dist. for City of Pontiac*, 105 F. App’x. 679, 681 (6th Cir. 2004) (“The Supreme Court did not decide in *Davis* whether the ‘known acts of student-on-student sexual harassment’ must have been directed against the plaintiff herself. Neither did it decide whether such acts must have been committed by the plaintiff’s harasser, as opposed to some other student.”); *Ostrander v. Duggan*, 341 F.3d 745 (8th Cir. Mo. 2003) (no actual knowledge of the school prior to plaintiff’s rape, because “sexual abuse allegedly perpetrated by DTD fraternity members, other than Duggan, at locations other than the 507 premises, fails to satisfy the “known acts” requirement outlined in *Davis*”); *Murrell v. Denver Pub. Sch.*, 186 F.3d 1238, 1247 (10th Cir. 1999) (“[T]he first two prongs of the *Davis* analysis require that a school official who possessed the requisite control over the situation had actual knowledge of, and was deliberately indifferent to, the alleged harassment.”); *Schaefer v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052 (D.N.M. 2010) (dismissing Title IX claim for no actual knowledge where plaintiff was hit in the testicles once sufficiently hard to cause injuries by an unknown student who plaintiff claimed was a part of a gang of boys who had “racked” other boys in incidents about which the school was aware); *Morgan v. Bend-La Pine Sch. Dist.*, 2009 U.S. Dist. LEXIS 9443 (D. Or. Feb. 6, 2009) (granting summary judgment to school when plaintiff with a disability was involved in coercive “sexually charged incidents” but the school did not have actual knowledge because of plaintiff’s and other students’ concealment); *Renguette v. Bd. of Sch. Trs. ex rel. Brownsburg Cmty. Sch. Corp.*, 540 F. Supp. 2d 1036, 2008 U.S. Dist. LEXIS 30225 (S.D. Ind. 2008) (finding lack of actual knowledge because sexual activity between two students may have been voluntary/consensual); *Richard P. v. Sch. Dist.*, 2006 U.S. Dist. LEXIS 75068 (W.D. Pa. Sept. 30, 2006) (denying motion for a new trial when jury found lack of actual knowledge in case involving the sexual assault by two female students by several male students in a Laundromat); *Doe v. Ohio State Univ. Bd. of Regents*, No. 2:04-CV-0307, 2006 U.S. Dist. LEXIS 70444, at \*31–34 (S.D. Ohio Sept. 28, 2006):

The Supreme Court has declined to apply a constructive-knowledge standard, demanding actual knowledge of sexual harassment in Title IX cases of teacher-on-student harassment . . . . The Supreme Court has unequivocally imported the actual-knowledge standard into cases of

Finally, the actual knowledge standard, as Justice Stevens noted in his dissent in *Gebser*, encourages schools to avoid knowledge rather than set up procedures by which survivors can easily report.<sup>72</sup> This is in contrast to the constructive knowledge standard, which asks whether the defendant knew, or reasonably should have known, that a risk of harassment existed.<sup>73</sup> Such a standard creates incentives for schools to set up mechanisms likely to flush out and address harassment, since there is a substantial risk that a court will decide that the school “should have known” about the harassment anyway. In addition, the rule adopted by the Supreme Court in the sexual harassment in employment cases, *Faragher v. City of Boca Raton*<sup>74</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>75</sup> caused many employers to adopt sexual harassment policies and procedures.<sup>76</sup>

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student-on-student harassment. . . . The Sixth Circuit has followed the Supreme Court’s lead in requiring actual knowledge of student-on-student sexual harassment in Title IX cases.

*Id.* See also *Doe v. Town of Bourne*, 2004 U.S. Dist. LEXIS 10021 (D. Mass. May 28, 2004) (no actual knowledge of the sexual and physical assault when the victim complained that boys who had sexually and physically assaulted her were pushing her into lockers and the school did not respond to her complaint); *Crandell v. New York College of Osteopathic Med.*, 87 F. Supp. 2d 304, 2000 U.S. Dist. LEXIS 2836 (S.D.N.Y. 2000) (some of plaintiff’s claims regarding one instance of sexual harassment allowed to go forward while many others barred by lack of actual knowledge due to the victim’s failure to report them); *Vaird*, 2000 U.S. Dist. LEXIS 6492, at \*11–12 (E.D. Pa. May 12, 2000) (“[A]ctual notice requires more than a simple report of inappropriate conduct by a teacher.”).

The number of district courts that insist upon actual knowledge of harassment of a specific victim is doubly surprising because it suggests a certain acceptance of victim-blaming attitudes by some courts. A belief that the identity of the victim of harassing behavior is relevant to whether the school is obligated to respond to the harassment focuses the school or court on the victim’s and not the perpetrator’s behavior, suggesting that some victims must do something that invites the harassment, whereas other victims are “blameless.” Indeed, if a perpetrator is known to have harassed or assaulted multiple victims, this should suggest that the victim’s identity and behavior are *not* relevant, because the perpetrator himself does not find the identity of the victim relevant.

72. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 296 (1998) (Stevens, J., dissenting)

73. *Gebser*, 524 U.S. at 296 (Stevens, J., dissenting); REVISED GUIDANCE, *supra* note 32, at 13.

74. *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

75. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765–66 (1998).

76. See Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form over Substance in Sexual Harassment Law*, 26 HARV. WOMEN’S L.J. 3, 4 (2003) (“The centerpiece of the [*Faragher/Ellerth*] liability scheme is a rule of automatic liability for hostile environment harassment by supervisors, softened by an affirmative defense that excuses employers from liability or damages if they



Employers did so because under the *Faragher/Ellerth* standard, if they have such policies and procedures in place, but a plaintiff fails to use them, the employer has a defense against liability for the harassment.<sup>77</sup>

A decade plus of experience with the actual knowledge standard demonstrates that these are not the incentives created by the actual knowledge standard. In fact, as already noted, doing nothing at all is both most schools’ response of choice and the response that is most likely to qualify as a violation of a different prong of the same review standard. Unlike with the behavior encouraged by *Faragher/Ellerth* in the employment context, there has not been a rush to develop policies, procedures, and training on sexual harassment among schools as there has been among employers. In addition, we are now left with the unjust result that *children* and young people with fewer resources to deal with sexual harassment and violence are less protected at their schools—where their attendance for at least the early years is *compulsory*—than their *adult* parents are at their *non-compulsory* workplaces.

Thus, the actual knowledge standard does not encourage schools to address the victim-non-reporting problem and, if anything, gives schools incentives to suppress reporting, at least passively. Such passive suppression is easily done just by making no changes to the traditional criminal justice, policing approach to reports of sexual violence. As indicated by the statistics that began this article, fear of hostile treatment by police and other authority figures is the most common reason listed by student victims for not reporting.

Fortunately, OCR uses a constructive knowledge standard when it investigates schools for violations of Title IX in peer sexual harassment cases, in part because the OCR process is more injunctive than compensatory, so student victims complaining to OCR will not get monetary damages. OCR enforcement generally takes place as a result of a complaint being filed regarding a school’s response to a sexual harassment case, which causes OCR to undertake a fairly comprehensive investigation of that school’s response system.<sup>78</sup> This investigation often includes a close review of institutional policies and procedures, as well as the steps the school took to resolve a complaint<sup>79</sup> and files relating to past sexual harassment cases that required a school to respond in some way.<sup>80</sup> OCR also interviews those involved in the case, particularly relevant school

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take adequate preventative and corrective measures. . . . Employers have taken their [lawyers’] advice, by and large, adopting or updating procedures and training programs and implementing internal grievance procedures.”)

77. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 764.

78. See REVISED GUIDANCE, *supra* note 32, at 14.

79. See *id.*

80. See U.S. DEP’T OF EDUC., *How the Office of Civil Rights Handles Complaints*, <http://www.ed.gov/about/offices/list/ocr/complaints-how.html>.

personnel.<sup>81</sup> OCR cases are generally resolved through a “letter of finding” (“LOF”) addressed to the school and written by OCR, which is sometimes accompanied by a “commitment to resolve” signed by the school.<sup>82</sup>

As a result, OCR’s approach is both more comprehensive and more exacting than is possible in a private lawsuit, especially under the *Gebser/Davis* standard. Schools can be, and often are, required to change their entire response system to peer sexual violence and harassment, including but not limited to policies, procedures, and resource allocations. Thus, in addition to the list of institutional responses that have gotten schools in trouble in private lawsuits, each category of which includes investigations where schools have been found in violation of Title IX,<sup>83</sup>

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81. *See id.*

82. *See* EDUCATOR’S GUIDE TO CONTROLLING SEXUAL HARASSMENT, ¶322 (Travis Hicks, ed. 2008).

83. Examples where the victim reported the rape to a school official or some other authority figure, but the school did nothing or failed to prevent the offender or his friends from continually coming in contact with the victim, include: Letter from Debbie Osgood, Director, Chicago, Office for Civil Rights, U.S. Dep’t of Educ., to Dennis Carlson, Superintendent, Anoka-Hennepin Sch. Dist. (Mar. 15, 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05115901.html>; Letter from Zachary Pelchat, Supervisory Attorney, Office for Civil Rights, U.S. Dep’t of Educ., and Anurima Bhargava, Chief, Civil Rights Division, U.S. Dep’t of Just. to Richard L. Swanson, Superintendent, Tehachapi Unified School District (June 29, 2011), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/09111031.html>; Letter from Catherine D. Criswell, Director, Cleveland, Office for Civil Rights, U.S. Dep’t of Educ., to Dave L. Armstrong, Esq., Vice President for Enrollment and Legal Counsel, Notre Dame College (Sept. 24, 2010), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096001.html> [hereinafter Notre Dame C. Letter]; Letter from Charlene F. Furr, Operations Officer, Dall., Office for Civil Rights, U.S. Dep’t of Educ., to Jimmy D. Hattabaugh, Superintendent, Mansfield Sch. Dist. (Apr. 16, 2007) (on file with author); Letter from Cathy H. Lewis, Acting Dir., Policy & Enforcement Serv., Office for Civil Rights, U.S. Dep’t of Educ., to Thomas Crawford, Superintendent, Acad. Sch. Dist. (Apr. 16, 1993) (on file with author).

For examples where the school delayed responding, *see, e.g.*, Letter from Frankie Furr, Team Leader, Office for Civil Rights, U.S. Dep’t of Educ., to James E. Nelson, Superintendent, Richardson Indep. Sch. Dist. (Aug. 5, 2005) (on file with author) [hereinafter Richardson Indep. Sch. Dist. Letter]; Letter from Thomas J. Hibino, Reg’l Civil Rights Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Daniel Kehoe, Superintendent, Millis Pub. Sch. (May 19, 1994) (on file with author) [hereinafter Millis Pub. Sch. Letter]; Letter from Charles R. Love, Program Manager, Office for Civil Rights, U.S. Dep’t of Educ., to Glenn Roquemore, President, Irvine Valley College (Jan. 28, 2003) (on file with author). For more details on cases in which the school conducted a biased investigation, see Richardson Indep. Sch. Dist. Letter; Letter from John E. Palomino, Reg’l Civil Rights Dir., S.F., Office for Civil Rights, U.S. Dep’t of Educ., to Ruben Armiñana, President, Sonoma State Univ. (Apr. 29, 1994) (on file with author) [hereinafter

OCR has additionally found Title IX violations when a school’s policies and procedures did not follow OCR’s requirements, such as when schools create fact-finding procedures and hearings with significantly more procedural rights for the accused than the survivor;<sup>84</sup> adopt a standard of proof more exacting than “preponderance of the evidence,”<sup>85</sup> have policies or procedures that are contradictory, confusing and/or not coordinated,<sup>86</sup> do

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Sonoma State Univ. Letter]; Letter from John E. Palomino to Karl Pister (June 15, 1994), in University of California, Santa Cruz, OCR Case No. 09-93-2141 (on file with author) [hereinafter University of California, Santa Cruz Letter].

For examples of cases where school officials investigate and determine that the sexual violence did occur, but did not discipline or minimally disciplined the assailant and did not protect the survivor from any retaliation, see Millis Pub. Sch. Letter; Sonoma State Univ. Letter; Letter from Patricia Shelton, Branch Chief, and C. Mack Hall, Div. Dir., Office for Civil Rights, U.S. Dep’t of Educ., to James C. Enochs, Superintendent, Modesto City Schools (Dec. 10, 1993) (on file with author); Letter from John E. Palomino, Reg’l Civil Rights Dir., S.F., Office for Civil Rights, U.S. Dep’t of Educ., to Robin Wilson, President, Cal. State Univ., Chico (Oct. 23, 1991) (on file with author).

84. See, e.g., Letter from Debbie Osgood, Director, Chicago, Office for Civil Rights, U.S. Dep’t of Educ., to The Reverend John I. Jenkins, C.S.C., President, University of Notre Dame (June 30, 2011), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05072011.html> [hereinafter U. Notre Dame Letter]; Letter from Catherine D. Criswell, Director, Cleveland, Office for Civil Rights, U.S. Dep’t of Educ., to Gloria Hage, Esq., General Counsel, Eastern Michigan University (Nov. 22, 2010), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096002.html> [hereinafter E.M.U. Letter]; Notre Dame C. Letter, *supra* note TK; Letter from Myra Coleman, Team Leader, Philadelphia, Office for Civil Rights, U.S. Dep’t of Educ., to Valerie I. Harrison, Esq., University Counsel, Temple University (June 4, 2007) (on file with author) [hereinafter Temple U. Letter]; Letter from Gary D. Jackson, Reg’l Civil Rights Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Jane Jervis, President, The Evergreen State Coll. (Apr. 4, 1995) (on file with author) [hereinafter Evergreen State Coll. Letter].

85. See, e.g., U. Notre Dame Letter, *supra* note 80 (noting that although the university stated that it used a preponderance of the evidence standard, it did not notify students of this standard, and requiring this notification); Evergreen State Coll. Letter, *supra* note 80 (stating that the evidentiary standard applied to Title IX actions was that of a “preponderance of evidence”); Letter from Sheralyn Goldbecker, Team Leader, Office for Civil Rights, U.S. Dep’t of Educ., to John J. DeGioia, President, Georgetown Univ. (May 5, 2004) (on file with author) (requiring a preponderance of evidence standard upon investigation); Sonoma State Univ. Letter, *supra* note 79 (noting that a “much different and lower standard [of proof] is required for proving a case of sexual harassment, including assault, under Title IX” than for “a criminal charge alleging sexual assault”).

86. See, e.g., U. Notre Dame Letter, *supra* note 80; E.M.U. Letter, *supra* note 80; Temple U. Letter, *supra* note 80; Letter from Sandra W. Stephens, Team Leader, Dall., Office for Civil Rights, U.S. Dep’t of Educ., to David Schmidly, President, Oklahoma State Univ. (June 10, 2004) (on file with author); Letter from

not provide clear time frames for prompt resolutions of complaints,<sup>87</sup> or violate more “technical” Title IX requirements.<sup>88</sup> Thus, even more so than the “deliberate indifference” cases noted above, the responses required by OCR are decriminalized, with explicit rejection of the criminal “beyond a reasonable doubt” standard of proof and an elevation of the student survivor’s rights in hearings and other procedures above the status of victims in the criminal system.

Despite this good news, OCR’s enforcement, like enforcement of Title IX in the court context, has significant problems that encourage schools to avoid, passively or actively, knowledge of campus peer sexual violence generally and of specific cases particularly. First, very few students seem to be aware of OCR’s complaint process. A single page of information is posted on the OCR website,<sup>89</sup> but this is the only place that it seems to appear. Even OCR’s own guidance and an April 2011 Dear Colleague Letter regarding sexual violence never explain how one would go about initiating an investigation or where one might file a complaint,<sup>90</sup> even while referring to OCR investigations.<sup>91</sup> In addition, at no place on the OCR websites dealing with the complaint process is sexual harassment mentioned, so these pages are not terribly easy to find through simple

Howard Kallem, Chief Attorney, Office for Civil Rights, U.S. Dep’t of Educ., to Stephen W. Vescovo, Esq., Thomason, Hendrix, Harvey, Johnson & Mitchell (March 26, 2004) (on file with author) [hereinafter Christian Brothers Univ. Letter]; Sonoma State Univ. Letter, *supra* note 79.

87. See, e.g., U. Notre Dame Letter, *supra* note 80; E.M.U. Letter, *supra* note 80; Temple U. Letter, *supra* note 80; Christian Brothers Univ. Letter, *supra* note 82; University of California, Santa Cruz Letter, *supra* note 79; Sonoma State Univ. Letter, *supra* note 79.

88. See, e.g., Letter from Linda Howard-Kurent to Norman Cohen, Utah College of Massage Therapy (Aug. 17, 2001) (on file with author).

89. See U.S. DEP’T OF EDUC., *supra* note 76 (describing the criteria used by OCR to evaluate a complaint and the procedures for challenging determinations of non-compliance); U.S. DEP’T OF EDUC., *How to File a Discrimination Complaint with the Office for Civil Rights*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt> (describing the process to file a discrimination complaint with OCR).

90. The OCR website containing the April 2011 *Dear Colleague Letter* includes a “Know Your Rights” flyer that includes information about the OCR complaint process. U.S. DEP’T OF EDUC., *Know Your Rights*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/know.html>. It is unclear, however, what schools are supposed to do with this flyer, if anything. The *Dear Colleague Letter* does not require that schools post the flyer.

91. See REVISED GUIDANCE, *supra* note 32, at i, iii, 5–6, 8, 10, 11, 14–15, 20–22 (explaining the OCR complaint process); *Dear Colleague Letter*, U.S. DEP’T OF EDUC. OFFICE FOR CIV. RIGHTS (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> [hereinafter *Dear Colleague Letter*], at 9–12, 16.

internet searching. The CPI’s series on campus sexual violence confirms that “few students know they have the right to complain” and “the number of investigations into sexual assault-related cases is ‘shockingly low.’”<sup>92</sup> The lack of knowledge regarding the complaint process and the consequent low rate of complaints undercuts the effectiveness of OCR’s enforcement regime, including its constructive knowledge requirements.

Second and more critically, lack of publicity regarding OCR’s resolution of the complaints that it does receive diminishes the reach of those resolutions because schools that have not been investigated cannot learn from previous investigations and proactively fix any problems with their own response systems. The only way that anyone other than a complainant or the school being investigated can see the resolution of most cases is through filing a Freedom of Information Act (“FOIA”) request.<sup>93</sup> If schools or individuals wish to see various OCR LOFs but do not know which ones in particular, they must file a blanket FOIA request for all of the LOFs in a particular timeframe, against a particular school, or similar category. With the exception of a couple of recent cases,<sup>94</sup> the letters are not available in ED’s public FOIA reading room. Moreover, even though the only way a member of the public can read the LOFs is through filing a FOIA request, the request process is particularly lengthy for these documents. This means that the vast majority of school officials will not wait the months or expend the labor involved in filing and receiving results from a blanket FOIA request that might not even contain a case that is on point. Thus, while being investigated could lead schools to decriminalize their responses to sexual violence, the unlikelihood of students’ filing complaints with OCR, coupled with the lack of public information regarding the investigation results of the few complaints actually filed, undercut OCR’s intervention powers. In particular, although OCR’s more exacting “knew or should have known” standard has the potential to fix some of the problems with the “actual knowledge” standard required in private lawsuits, general ignorance about OCR’s complaint process fails to create incentives for schools to seek out knowledge of peer sexual violence—or at the very least not to avoid that knowledge.

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92. Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases: Feeble Watchdog Leaves Students at Risk, Critics Say*, CTR. FOR PUB. INTEGRITY (Feb. 25, 2010), [http://www.publicintegrity.org/investigations/campus\\_assault/articles/entry/1946/](http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1946/) [hereinafter *Lax Enforcement of Title IX*].

93. For more information about the FOIA process for LOFs, see Cantalupo, *Burying*, *supra* note 1, at 236-9.

94. See U.S. DEP’T OF EDUC., *Recent Resolutions*, ED.GOV, <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html>. These recent cases are a positive step demonstrating this administration’s recognition of and willingness to address the problem, but these efforts are only beginning to address the problem and past investigations prior to 2010 are not available in the reading room.

Therefore, both court and OCR's enforcement of Title IX provide mixed incentives to schools with regard to their institutional responses. On the back end, schools are encouraged to decriminalize their responses, but on the front end, Title IX's enforcement structure encourages schools to keep in place traditional law enforcement approaches to victim reporting.

#### B. The Clery Act

Like Title IX, the Clery Act deals with the rights of student survivors in campus disciplinary proceedings, primarily through a set of provisions referred to as the Campus Sexual Assault Victim's Bill of Rights ("CSAVBR").<sup>95</sup> Unlike Title IX, Clery also deals with the front end, reporting aspect of the campus sexual violence problem. However, because, as its full title suggests, the Clery Act conceives of campus peer sexual violence as merely one form of campus crime, its reporting procedures unsurprisingly tend to encourage "criminalization" of institutional responses. As such, it has been less effective than Title IX in encouraging schools to use decriminalized reporting procedures on the front end. It is also less effective than Title IX on the back end because there is no right to private enforcement under Clery, so victims can only get injunctive relief but no monetary compensation for Clery violations.<sup>96</sup>

Nevertheless, the enforcement of Clery, particularly with regard CSAVBR, has been more protective of surviving students' rights than the criminal justice system is, and violating the Clery Act can be still quite expensive for schools, since ED has the power to fine schools for violating Clery, whereas OCR has no fining capability. CSAVBR requires schools to publish policies that inform both on-campus and off-campus communities of the programs designed to prevent sexual violence provided by the school, as well as the procedures in place to respond to sexual violence once it occurs.<sup>97</sup> It further specifies that a school's educational programs should raise awareness of campus sexual violence.<sup>98</sup> Also, procedures adopted to respond to such violence must include: procedures and identifiable persons to whom to report;<sup>99</sup> the right of victims to notify law enforcement and to get assistance from school officials in doing so;<sup>100</sup> encouragement to victims and instructions as to how to preserve evidence of sexual violence;<sup>101</sup> notification to students regarding options for changing living and curricular arrangements and assistance in making those

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95. 20 USC § 1092 (f)(8) (2008).

96. 20 USC § 1092 (f)(8)(C) (2008).

97. 20 USC § 1092 (f)(8)(A) (2008).

98. 20 USC § 1092 (f)(8)(B)(i) (2008).

99. 20 USC § 1092 (f)(8)(B)(iii) (2008).

100. 20 USC § 1092 (f)(8)(B)(v) (2008).

101. 20 USC § 1092 (f)(8)(B)(iii) (2008).

changes;<sup>102</sup> and student disciplinary procedures that explicitly treat both accuser and accused equally in terms of their abilities “to have others present” at hearings and to know the outcome of any disciplinary proceeding.<sup>103</sup>

Probably the most visible case involving the Clery Act was the 2006 rape and murder of Laura Dickinson in her dormitory room at Eastern Michigan University (“EMU”) by a fellow student. The school initially told Dickinson’s family that her death involved “no foul play,” then informed the family over 2 months later of the arrest of the student since convicted of raping and murdering her.<sup>104</sup> As a result of a complaint filed against EMU for violations of the Clery Act,<sup>105</sup> the school eventually agreed to pay \$350,000 in fines for 13 separate violations of the Clery Act, the largest fine ever paid in a sexual violence case according to publicly available information, and settled with Dickinson’s family for \$2.5 million.<sup>106</sup> The case eventually led to the President, Vice President for Student Affairs and Director of Public Safety being fired,<sup>107</sup> and an estimated \$3.8 million in costs from the fines, the settlement with the Dickinson family, and “severance packages, legal fees and penalties.”<sup>108</sup>

Before EMU, the largest fine levied against a school was apparently against Salem International University for \$200,000.<sup>109</sup> In addition to not reporting five sex offenses, SIU had violated CSAVBR by not regularly providing counseling and other victim support services, “actively discourag[ing victims] from reporting crimes to law enforcement or

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102. 20 USC § 1092 (f)(8)(B)(vii) (2008).

103. 20 USC § 1092 (f)(8)(B)(iv) (2008).

104. See Joe Menard, *EMU Slaying Probe Reopens Wounds*, DETROIT NEWS (May 10, 2007), available at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20070510/METRO/705100402>; Candice Williams, *EMU Killer Denies Guilt, Gets Life*, DETROIT NEWS (May 8, 2008), available at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20080508/SCHOOLS/805080340/1026>.

105. See Joe Menard, *EMU Faces Federal Complaint*, DETROIT NEWS (Mar. 7, 2007), available at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20070307/SCHOOLS/703070426/1026>.

106. See Geoff Larcom, *Eastern Michigan University to Pay \$350,000 in Federal Fines Over Laura Dickinson Case*, ANN ARBOR NEWS (June 06, 2008), available at [http://blog.mlive.com/annarbornews/2008/06/eastern\\_michigan\\_university\\_to.html](http://blog.mlive.com/annarbornews/2008/06/eastern_michigan_university_to.html).

107. See Marisa Schultz, *EMU Murder Trial Begins Today*, DETROIT NEWS (Oct. 15, 2007), available at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20071015/SCHOOLS/710150361/1026/LOCAL>.

108. Marisa Schultz, *Controversy to Cost EMU \$1M*, DETROIT NEWS (July 19, 2007), available at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20070719/SCHOOLS/707190389/1003/metro>.

109. See Letter from John S. Loreng to Fred Zook (Dec. 17, 2001) at 7, <http://www.securityoncampus.org/pdf/SIUprdl.pdf> [hereinafter SIU Letter].

seeking relief through the campus judicial system,”<sup>110</sup> and responding to survivors’ reports with “threats, reprisals, or both.”<sup>111</sup> Furthermore, the school would not make accommodations for new living and academic arrangements for victims following an assault, and survivors were inadequately informed of their rights to pursue disciplinary action against the assailant.<sup>112</sup> Publicly available information indicates that the next highest fine was \$27,500 to Miami University of Ohio,<sup>113</sup> again for a combination of underreporting various crimes, including sex offenses, and “fail[ing] to initiate and enforce appropriate procedures for notifying both parties of the outcome of any institutional disciplinary proceeding brought alleging a sex offense.”<sup>114</sup> Lastly, in 2000, Mount St. Clare College in Clinton, Iowa, was the first school to be fined \$25,000, in part for two rapes that were reported to police but did not appear in the school’s reports since the perpetrators were never criminally charged.<sup>115</sup> As both the provisions of CSAVBR and these four cases demonstrate, like Title IX but unlike the criminal justice system, Clery gives sexual violence survivors’ procedural rights on par with accused students, and requires schools to provide services to victims that are not contemplated in a criminal case.

Unfortunately, and despite Clery’s attempts to the contrary, the reporting system created by the statute does not similarly encourage institutions to decriminalize their front end reporting-related responses to sexual violence. The primary purpose of the Clery Act was to increase transparency around campus crime so that prospective students and their parents could make more knowledgeable decisions about which schools to attend.<sup>116</sup> Therefore, the Clery Act’s focus is on establishing requirements for schools to report and publish certain categories of crime that occur on campus, including sex offenses. However, Clery’s reporting requirements do not adequately account for the differences between campus peer sexual violence and other kinds of criminal activity. For instance, Clery adopts definitions of criminal acts used in the Federal Bureau of Investigation’s *Uniform Crime Reporting Handbook* (“*UCR Handbook*”), which, up until very recently defined forcible sex offenses as “carnal knowledge of a

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110. *Id.* at 16.

111. *Id.*

112. *See id.* at 22.

113. *See* Letter from Fran Susman & Gerald Sikora to James Garland (Sept. 11, 1997), [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=180.&Itemid=75](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=180.&Itemid=75)

114. Letter from S. Daniel Carter to Douglas Parrott (Oct. 7, 2004), [http://www.securityoncampus.org/index.php?option=com\\_content&view=article&id=179.&Itemid=75](http://www.securityoncampus.org/index.php?option=com_content&view=article&id=179.&Itemid=75).

115. Donna Leinwand, *Campus Crime Underreported: Colleges Have Been Caught Misreporting Violence Statistics*, USA TODAY, Oct. 4, 2000, at 2A.

116. *See* H.R. REP. NO. H11499-01, at 1 (1990) (Conf. Rep.) (statement of Rep. Gooding).



female forcibly and against her will.”<sup>117</sup> It also considers a crime “reported”—and thus necessary for the institution to disclose—if it is brought to the attention of a “campus security authority” or the local police,<sup>118</sup> but excludes faculty, campus physicians, or counselors (mental health, professional and pastoral) from the definition of “campus security authority.”<sup>119</sup> Even more fundamentally, Clery’s approach draws from the stranger rape myth discussed above. Institutions are required to report crimes based on four factors: (1) where the crime occurred; (2) the type of crime; (3) to whom the crime was reported; and (4) when the crime was reported.<sup>120</sup> Thus, rather than requiring an institution to count criminal acts that take place between its students at any location, the Clery Act only counts criminal acts occurring on school property. In doing so, it assumes that an institution can protect students from sexual violence through its control of facilities and traditional policing and security methods, such as campus lighting (no dark alleys for those stranger rapists to hide) and blue light phones (to get police protection when fleeing the stranger rapist). In light of where, how, and at whose hands most campus sexual violence actually occurs, this assumption is likely to spur institutions to adopt ineffective traditional policing and security responses to the violence.

As a result, despite its greater focus than Title IX on the front end reporting of sexual violence, Clery does no better—likely worse—than Title IX in creating incentives for schools to develop decriminalized reporting procedures. While it does encourage decriminalized back end disciplinary procedures, its criminalized conception of reporting undercuts

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117. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTING HANDBOOK 19 (rev. 2004), *available at* [http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr\\_handbook.pdf](http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf). Note that the FBI has recently changed its definition to “[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.” See U.S. DEP’T OF JUSTICE, Press Release, *Attorney General Eric Holder Announces Revisions to the Uniform Crime Report’s Definition of Rape*, <http://www.fbi.gov/news/pressrel/press-releases/attorney-general-eric-holder-announces-revisions-to-the-uniform-crime-reports-definition-of-rape>.

118. OFFICE OF POSTSECONDARY EDUC., U.S. DEP’T OF EDUC., THE HANDBOOK FOR CAMPUS CRIME REPORTING 23 (2005), *available at* <http://www2.ed.gov/admins/lead/safety/handbook.pdf> [hereinafter CAMPUS CRIME REPORTING HANDBOOK]; OFFICE OF POSTSECONDARY EDUC., U.S. DEP’T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 73 (2011), *available at* <http://www2.ed.gov/admins/lead/safety/handbook-2.pdf> [hereinafter CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK]. See also 20 U.S.C. § 1092(f)(1)(F)(i).

119. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 114, at 51; CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 114, at 77–78.

120. CAMPUS CRIME REPORTING HANDBOOK, *supra* note 114, at 23; CAMPUS SAFETY AND SECURITY REPORTING HANDBOOK, *supra* note 114, at 11.

the message of CSAVBR and the results of the four investigations discussed above.

### C. Process Rights of Accused Students

The case law regarding the due process rights of students accused of conduct warranting suspension or expulsion from a public school further supports the idea that colleges and universities are not required to imitate the criminal justice system in structuring their student disciplinary processes. This case law, of course, is not applicable to the front end reporting structure because it only comes into play once a report has been made, and the institution's disciplinary procedures are operating. However, on the back end, the case law confirms that there are no legal requirements that institutions treat accused students like criminal defendants with the full panoply of due process rights to which criminal defendants are constitutionally entitled.

All accused students have some due process rights; the variation is in "what process is due."<sup>121</sup> Although the Supreme Court has never decided a case involving expulsion from a public institution, in *Goss v. Lopez*, the court considered a 10-day suspension, without a hearing, of a group of public high school students involved in a series of demonstrations and protests.<sup>122</sup> The Court decided that the students were entitled to due process consisting of "some kind of notice and [] some kind of hearing."<sup>123</sup> The *Lopez* Court also cited approvingly to *Dixon v. Alabama State Board of Education*, where the 5<sup>th</sup> Circuit Court of Appeals defined what was required for cases involving expulsion.<sup>124</sup> In *Dixon*, a group of students were expelled without a hearing from the Alabama State College for Negroes for unspecified misconduct after they had all participated in a sit-in at an all-white lunch counter and possibly had engaged in other civil rights protests and demonstrations.<sup>125</sup> *Dixon* set forth the requirements for due process before a state school can expel a student, including notice "of the specific charges and grounds which, if proven, would justify expulsion,"<sup>126</sup> "the names of the witnesses... and an oral or written report on the facts to which each witness testifies,"<sup>127</sup> and a hearing, "[t]he nature of [which] should vary depending upon the circumstances of the particular case."<sup>128</sup> The hearing must provide "an opportunity to hear both sides in

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121. *Morrissey v. Brewer*, 405 U.S. 951, 981 (1972).

122. *See Goss v. Lopez*, 419 U.S. 565, 570 (1975).

123. *Id.* at 579.

124. *Id.* at 576.

125. *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 152 (1961).

126. *Id.* at 158.

127. *Id.* at 159.

128. *Id.* at 158.

considerable detail”<sup>129</sup> and must give the accused student an opportunity to present “his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.”<sup>130</sup> These requirements fall short of “a full-dress judicial hearing, with the right to cross-examine witnesses,”<sup>131</sup> nor do they “require opportunit[ies] to secure counsel, to confront and cross-examine witnesses... or to call... witnesses to verify [the accused’s] version of the incident.”<sup>132</sup>

For private institutions, the requirements are even less onerous. While courts have reviewed private institutions for expelling or suspending students in an arbitrary and capricious manner,<sup>133</sup> most courts review private schools disciplinary actions under “the well settled rule that the relations between a student and a private university are a matter of contract.”<sup>134</sup> Therefore, private institutions are mainly bound by what they have promised students in the school’s own policies and procedures, and courts will review disciplinary actions according to the terms of the contract.<sup>135</sup>

In a representative selection of cases where students have challenged expulsions,<sup>136</sup> courts have steadfastly refused to intervene in school disciplinary decisions as long as they are follow the minimal requirements laid out by *Lopez*, *Dixon* and the school’s own policies and procedures. They have upheld expulsions for a wide range of student behaviors, from smoking,<sup>137</sup> drinking beer in the school parking lot<sup>138</sup> and engaging in consensual sexual activity on school grounds,<sup>139</sup> to participating in but withdrawing, prior to discovery, from a conspiracy to shoot several

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129. *Id.* at 159.

130. *Id.*

131. *Id.*

132. *Lopez*, 419 U.S. at 583.

133. *See* *Ahlum v. Administrators of Tulane Educ. Fund*, 617 So. 2d 96, 100 (La. Ct. App. 1993); *Coveney v. President & Trustees of Holy Cross College*, 445 N.E.2d 136, 137 (Mass. 1983); *Abbariao v. Hamline Univ. Sch. of L.*, 258 N.W.2d 108, 112 (Minn. 1977); *Rollins v. Cardinal Stritch Univ.*, 626 N.W.2d 464, 469 (Minn. Ct. App. 2001).

134. *Dixon*, 294 F.2d at 157.

135. *See* *Centre College v. Trzop*, 127 S.W.3d 562, 567 (Ky. 2004); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000); *Hernandez v. Don Bosco Prep. High*, 730 A.2d 365, 367 (N.J. 1999); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 243 (D. Vt. 1994).

136. The cases discussed here were drawn mainly from 3-9 EDUCATION LAW § 9.09, the section on student discipline law from an education law treatise. They are not intended to be a comprehensive review of cases involving expulsion, merely to give a sense of the range of student misconduct cases in which courts have upheld expulsions.

137. *See* *Flint v. St. Augustine High Sch.*, 323 So. 2d 229 (La. 1975).

138. *See* *Covington County v. G.W.*, 767 So. 2d 187 (Miss. 2000).

139. *See* *B.S. v. Bd. of Sch. Trs.*, 255 F. Supp. 2d 891 (N.D. Ind. 2003).

students and school officials,<sup>140</sup> and being found by two female students in a dormitory room with two other male students and the female students' roommate, who was inebriated, unconscious, and naked from the waist down.<sup>141</sup>

In the sexual violence context, research for two articles dealing with this subject has discovered only three cases where the court found a college or university to have violated an accused student's due process rights and in only one case did the court require the institution to pay any damages,<sup>142</sup> a small fraction of the amount for which the accused student asked, basically amounting to a tuition refund.<sup>143</sup> However, in the rest of the cases reviewed here, none has overturned a school's decision to sanction a student for peer sexual violence. In contrast, they have rejected challenges

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140. See *Remer v. Burlington Area Sch. Dist.*, 286 F.3d 1007 (7th Cir. Wis. 2002).

141. See *Coveney*, 445 N.E.2d 136. See also *A.B. v. Slippery Rock Area Sch. Dist.*, 906 A.2d 674 (Pa. Commw. Ct. 2006) (students leaving false bomb threat notes in a school bathroom); *Cloud v. Trustees of Boston University*, 720 F.2d 721 (1st Cir. Mass. 1983) ("peeping" under women's skirts at a university library); *Gaston v. Diocese of Allentown*, 712 A.2d 757 (Pa. Super. Ct. 1998) ("discipline problems" which plaintiffs alleged were a pretext for retaliation against the student's parents for objections they made to the school's curriculum); *Flaim v. Med. College of Ohio*, 418 F.3d 629 (6th Cir. Ohio 2005) (attempted possession of a controlled substance); *Hammock ex rel. Hammock v. Keys*, 93 F. Supp. 2d 1222 (S.D. Ala. 2000) (possession of marijuana); *Rogers v. Gooding Pub. Joint Sch. Dist. No. 231 (in Re Rogers)*, 135 Idaho 480 (Idaho 2001) (possession of a pellet gun); *Brown v. Plainfield Cmty. Consol. Dist. 202*, 500 F. Supp. 2d 996 (N.D. Ill. 2007) (brushing a teacher's buttocks with the back of a hand on two occasions); *Linwood v. Board of Education*, 463 F.2d 763 (7th Cir. Ill. 1972) (attacking and striking other students in the halls of the school); *Hernandez*, 730 A.2d 365 (engaging in a series of misbehavior including slashing a teacher's tires and selling illegal steroids); *S.K. v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 399 F. Supp. 2d 963 (D. Minn. 2005) (shooting a classmate in the back with a BB gun); *Trzop*, 127 S.W.3d 562 (possession of a gun in a college dormitory room).

142. See *Fellheimer*, 869 F. Supp. at 247. See also *Marshall v. Maguire*, 102 Misc. 2d 697 (N.Y. Sup. Ct. 1980); *Doe v. University of the South*, 2011 U.S. Dist. LEXIS 35166 (E.D. Tenn. 2011) (denying summary judgment to school district for possible failure to comply with own procedures in sexual assault case but refusing to offer an "opinion as to whether a sexual assault occurred, whether any such acts were consensual, or who, as between John Doe and the Complainant is credible.")

143. In September of 2011, John Doe was awarded \$26,500 of the \$5.5 million for which he had asked, essentially a refund of his tuition, when the jury found the university had not breached its contract with Doe but was fifty-three percent at fault (in comparison to Doe's forty-seven percent fault) in his negligence claim. Todd South, *Jury finds Sewanee and student at fault; awards student \$26,500*, TIMES FREE PRESS (Sept. 3, 2011), available at <http://timesfreepress.com/news/2011/sep/03/jury-finds-sewanee-and-student-fault-awards-50000/>.

to the admissibility of certain witnesses and evidence,<sup>144</sup> the right to know witnesses’ identities and to cross-examine them,<sup>145</sup> and the rights to an attorney,<sup>146</sup> discovery,<sup>147</sup> voir dire,<sup>148</sup> and appeal.<sup>149</sup> They have also allowed a victim to testify behind a screen,<sup>150</sup> and have consistently reiterated the distinction between disciplinary hearings and criminal proceedings.<sup>151</sup>

Moreover, these cases demonstrate that schools may even take actions prior to notice and a hearing without running afoul of due process requirements. Indeed, *Lopez* itself acknowledges that it might be necessary for a school to act quickly and prior to notice and a hearing under certain circumstances: “Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable.”<sup>152</sup> Courts have relied on this language to allow schools to take measures protecting victims and accusers, including allowing them to submit witness statements instead of appearing at the hearing,<sup>153</sup> protecting them from retaliation,<sup>154</sup> and, in cases of peer sexual violence, suspending or otherwise

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144. See *Schaer*, 735 N.E.2d at 380; *Cloud*, 720 F.2d at 724; *Brands v. Sheldon Community School*, 671 F. Supp. 627, 632 (N.D. Iowa 1987).

145. See *B.S.*, 255 F. Supp. 2d at 899; *Coplin v. Conejo Valley Unified Sch. Dist.*, 903 F. Supp. 1377, 1383 (C.D. Cal. 1995); *Gomes v. Univ. of Maine Sys.*, 365 F. Supp. 2d 6, 23 (D. Me. 2005).

146. See *Coveney*, 445 N.E.2d at 140; *Ahlun*, 617 So. 2d at 100.

147. See *Gomes*, 365 F. Supp. 2d at 19.

148. See *id.* at 32.

149. See *id.* at 33.

150. See *Cloud*, 720 F.2d at 724; *Gomes*, 365 F. Supp. 2d at 29.

151. See *Schaer*, 735 N.E.2d at 381 (“A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts”); *Granowitz v. Redlands Unified School Dist.*, 105 Cal. App. 4th 349, 355 (Cal. App. 4th Dist. 2003) (“Courts have consistently refused to impose stricter, adversarial, “trial-like procedures and proof” on public school suspension proceedings”); *Ray v. Wilmington College*, 106 Ohio App. 3d 707, 712 (Ohio Ct. App., Clinton County 1995) (“The issue here is not whether Wilmington could have provided Ray with a better hearing, nor whether the hearing satisfied the requirements of a formal trial.”); *Brands*, 671 F. Supp. at 632 (“The Due Process Clause does not require courtroom standards of evidence to be used in administrative hearings”); *Gomes*, 365 F. Supp. 2d at 17 (“The courts ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial”).

152. *Lopez*, 419 U.S. at 582–3.

153. See *Coplin*, 903 F. Supp. 1383; *B.S.*, 255 F. Supp. 2d at 899; *Gomes*, 365 F. Supp. 2d at 23.

154. See *B.S.*, 255 F. Supp. 2d at 901 (“FWCS has a strong interest in protecting students who report classmate misconduct. Those students may be

separating accused students prior to notice and a hearing.<sup>155</sup>

These cases clearly demonstrate that courts do not require schools to treat accused students like criminal defendants. Moreover, this makes total sense in light of the different powers and goals of student disciplinary proceedings. As these precedents implicitly acknowledge, the deprivations of property involved in a school expulsion are not comparable to sending someone to jail and potentially requiring registration as a sex offender. In fact, schools lack even much less coercive powers such as the subpoena. To the extent that high standards of proof, the treatment of the victim as a complaining witness as opposed to a party, and unequal rights to discovery and disclosures of evidence are all procedural protections provided in the criminal context because of the state's coercive powers, it is inappropriate to copy them wholesale in a context where those coercive powers are not present.

Instead, as "best practices" literature in the student discipline area already acknowledges,<sup>156</sup> the goals of a school in conducting student disciplinary proceedings are quite different. As one author explains, the central goal of student disciplinary systems is helping "to create the best environment in which students can live and learn... [a]t the cornerstone [of which] is the obligation of students to treat all other members of the academic community with dignity and respect—including other students, faculty members, neighbors, and employees."<sup>157</sup> He reminds school administrators and lawyers that this goal means that "*student victims are just as important as the student who allegedly misbehaved*" (emphasis in original),<sup>158</sup> a principle that "is critical" to resolving "[c]ases of student-on-

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understandably reluctant to come forward with information if they are faced with... the unsettling prospect of ostracism or even physical reprisals at the hands of their peers").

155. See *Brands*, 671 F. Supp. at 629 (suspending a student's eligibility in the state wrestling tournament prior to a hearing, after he and three other males "engaged in multiple acts of sexual intercourse with a sixteen-year-old female student"); *J.S. v. Isle of Wight County Sch. Bd.*, 362 F. Supp. 2d 675, 677–78 (E.D. Va. 2005) (student who sexually assaulted a younger, female student in the girls restroom suspended prior to notice and a hearing, transferred by the school to another school after an administrative hearing, and not allowed to return after the appeal hearing); *Jensen v. Reeves*, 45 F. Supp. 2d 1265, 1272 (D. Utah 1999) ("given the pattern of misbehavior and continual threat being posed by C.J. to other students, Principal Reeves may have been justified in immediately suspending C.J. without the requisite notice of the charges and opportunity to explain").

156. See generally EDWARD N. STONER II, REVIEWING YOUR STUDENT DISCIPLINE POLICY: A PROJECT WORTH THE INVESTMENT (2000), available at: <http://www.eric.ed.gov/PDFS/ED444074.pdf>.

157. *Id.* at 7.

158. *Id.*

student violence.”<sup>159</sup> In doing so, he points out that this principle of treating all students equally “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.”<sup>160</sup> Therefore, he advises that student disciplinary systems use the “‘more likely than not’ standard [of proof] used in civil situations” and avoid describing student disciplinary matters with language drawn from the criminal system.<sup>161</sup>

Thus, the need to decriminalize institutional responses to student misconduct, including peer sexual violence, is widely acknowledged, even when the focus is upon the rights of the student accused of misconduct. When combined with the requirements of Title IX and the Clery Act with regard to victims’ rights in disciplinary proceedings, the mandate, both legal and policy-based, that institutions decriminalize their responses to sexual violence is clear in terms of the institutions’ back end responses once a report is filed. Moreover, the best practices literature provides specific strategies and recommendations for institutions to use in the decriminalization process.<sup>162</sup> However, because the due process precedents and best practices literature regarding student disciplinary systems provide no additional insight into the front end victim-reporting problem, and Title IX and the Clery Act deal with that problem inadequately, we still need to generate some methods for decriminalizing the reporting process. The next and final section of this article turns to that task.

## II. RECOMMENDATIONS FOR DECRIMINALIZING REPORTING

Because of the Clery Act’s focus on reporting as well as the number of amendments that have been made to it since it was first passed, we should start on the decriminalization process by amending the Clery Act to enable two new approaches to the sexual violence and victim-non-reporting problems.<sup>163</sup> In fact, a recent set of amendments to Clery were proposed in the 112th Congress via the SaVE Act,<sup>164</sup> so additional changes to Clery are on the table, presenting a good moment to add these methods to the list of

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159. *Id.* at 7–8.

160. *Id.* at 7.

161. *Id.* at 10.

162. For more information about best practices and recommendations of additional ways to decriminalize disciplinary proceedings, see Cantalupo, *Campus Violence*, *supra* note 1, at 665–90.

163. Other recommendations regarding improving both Title IX and Clery’s address of the sexual violence and non-reporting problem can be found in Cantalupo, *Burying*, *supra* note 1, at 252–66, but the ones discussed here have the greatest potential to both decriminalize the reporting structure and deal effectively with the reporting-related disincentives discussed at length in that article.

164. S. 834, 112th Cong. (1st Sess. 2011); H.R. 2016, 112th Cong. (1st Sess. 2011); Lauren Siebin, *Education Dept. Issues New Guidance for Colleges’ Sexual-Assault Investigations*, CHRON. HIGHER EDUC. (D.C.), Apr. 15, 2011, at A20–21.

changes already being proposed. Alternatively, these approaches might be adopted through new regulations under either Clery or Title IX.

The first approach is to require schools to collect information about campus peer sexual violence (and any other violent criminal behavior with similar non-reporting problems) in a manner more likely to produce useful information that will both make it impossible for a campus to avoid (passively or actively) knowledge of peer sexual violence and provide the school with the information it needs to address the violence problem properly. More specifically, schools should be required to administer a standard survey developed by ED or a contractor working for ED every four years (or a similarly appropriate interval) via a method that would guarantee a high response rate (e.g., requiring a response to the survey in order to graduate or to register for classes). The survey would ask students questions designed to determine the incidence of sexual violence without depending on individual survivors to come forward to report, and schools would submit results of the survey to ED and publish it in the campus crime report. The ED could also do statistical comparisons of survey results from schools and, ideally, make those available to the public. Many schools already participate voluntarily in similar surveys, which often include such compilations, and are given to schools confidentially for their own use.<sup>165</sup> Schools generally use information from these surveys to inform themselves of what students are experiencing and to develop policies and programs for responding to those experiences.<sup>166</sup> As helpful as such surveys can be, even with a comparatively small group of schools participating,<sup>167</sup> imagine the wealth of information about students that

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165. Some schools conduct surveys on the incidence of sexual violence on their particular campus. For example, the American College Health Association offers the American College Health Assessment, which includes questions related to sexual violence. *About ACHA-NCHA*, AM. COLL. HEALTH ASS'N—NAT'L COLL. HEALTH ASSESSMENT, <http://www.acha-ncha.org/overview.html>. However, the school-specific information collected by the surveys is generally not made publicly available. Nevertheless, aggregate data made available to the public and school-specific survey results shared confidentially by officials at some schools confirm a consistent incidence rate at individual campuses, subsets of campuses, and nationwide. *Publications and Reports*, AM. COLL. HEALTH ASS'N—NAT'L COLL. HEALTH ASSESSMENT II, [http://www.acha-ncha.org/reports\\_ACHA-NCHAI.html](http://www.acha-ncha.org/reports_ACHA-NCHAI.html).

166. For instance, the American College Health Association's National College Health Assessment states as the survey's purpose: "[e]nabling both ACHA and institutions of higher education to adequately identify factors affecting academic performance, respond to questions and concerns about the health of the nation's students, develop a means to address these concerns, and ultimately improve the health and welfare of those students." *National College Health Assessment*, AM. COLL. HEALTH ASS'N—NAT'L COLL. HEALTH ASSESSMENT, <http://www.acha-ncha.org/>.

167. About 40–140 schools per semester participated in the National College Health Assessment in the two most recently surveyed full academic years (2008–



schools and the public could obtain from a survey in which all schools must participate.

Because such a survey would not depend on a traditional policing model, it would solve or bypass a number of difficulties that plague the current traditional system, including both the perception and the reality of police or school officials who are hostile or otherwise lack expertise in the dynamics of sexual violence. A survey would essentially remove the institution from its current “middle-man” position, where students report to the institution and then the institution reports to the public, and would enable students to report directly to the public what is happening among students on every campus across the country. School officials would receive campus-specific information that is easily comparable to national incidence rates.

In addition, because such a survey would be required of all schools, it would remove an ethical dilemma for schools that is created by the large victim non-reporting problem. That is, when a school creates better responses to victim reporting and survivors begin to report the violence as a result, a strange thing happens: the campus suddenly looks like it has a serious crime problem. In fact, what is known about the problem indicates that every campus currently has this serious crime problem at a similar rate, a rate that tracks the national incidence.<sup>168</sup> The non-reporting phenomenon and how it is created, however, means that the schools that ignore the problem have fewer reports and look more safe, whereas the schools that encourage victim reporting have more reports and look less safe. Appearances in this case are completely the opposite of reality, and the correct conclusion to draw from the number of reports of peer sexual violence on a campus is entirely counterintuitive. Therefore, institutions must decide whether to seek to end the violence by encouraging victim reporting and by otherwise openly acknowledging the problem, thereby risking developing a reputation as a dangerous campus, or to ignore the problem, thus discouraging victim reporting either passively or actively and

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2009 and 2009–2010), with a total of about 180–200 schools participating per academic year. Like proposed here, the National College Health Assessment does not appear to be administered every year by all participating schools. *Participation History*, AM. COLL. HEALTH ASS’N—NAT’L COLL. HEALTH ASSESSMENT, [http://www.acha-ncha.org/partic\\_history.html](http://www.acha-ncha.org/partic_history.html).

168. Some schools do conduct surveys like the American College Health Assessment on the incidence of sexual violence on their particular campus. Although the school-specific information collected by the surveys is generally not made publicly available from such surveys, aggregate data made available to the public, as well as school-specific survey results shared confidentially with this author by officials at some schools, confirm a consistent incidence rate at individual campuses, subsets of campuses, and nation-wide. *Publications and Reports*, AM. COLL. HEALTH ASS’N—NAT’L COLL. HEALTH ASSESSMENT II, [http://www.acha-ncha.org/reports\\_ACHA-NCHAI.html](http://www.acha-ncha.org/reports_ACHA-NCHAI.html).

appearing to be less dangerous. Moreover, if the campus next door or across town or one step below or above in the rankings chooses to ignore the problem, its choice could translate into a competitive disadvantage for the institution seeking to increase reporting. All schools conducting the same survey removes this competitive advantage and, with it, any incentives created by it to discourage victim reporting.<sup>169</sup>

The second method by which to decriminalize reporting, which ideally would be combined with the survey discussed above, is to require institutions to create certain programs related to peer sexual violence and then to funnel reporting through those programs. For instance, one of the most effective ways of addressing the myriad challenges related to campus peer sexual violence is to create a visible (yet confidential) and centralized victims' services office, a method which has received increasing recognition as a best practice for responding to campus peer sexual violence.<sup>170</sup>

A victims' services office can help with reporting by acting as a central location for both services and reports. Such offices are generally more trusted by survivors than traditional law enforcement or other school officials, in part because they can provide survivors with a "one-stop shop" for the various academic, medical, counseling and advocacy needs of victims. One can picture a campus student services system for sexual violence victims as a metaphorical wheel, with a victims' services office at the hub of the wheel and the various places where a student might initially report at the ends of the wheel spokes. These places could include the medical center, campus police, counseling services, residence life, individual faculty, the student conduct office, etc. This wheel-like structure allows the offices where a student initially reports immediately to refer the student to the victims' services office. That office could likewise refer students out to the different offices from which they can get needed services, thus alleviating a victim's need to go from office to office trying to figure out the system on her own.

The victims' services office can also provide a source of expertise in an area where schools need a lot more information and training, especially in light of the training requirements and education recommendations contained in the April 2011 Dear Colleague Letter, which will be

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169. For more information on this dilemma and other "information problems" affecting schools' responses to campus peer sexual violence, see Cantalupo, *Burying*, *supra* note 1, at 219-23.

170. See, e.g., HEATHER KARJANE ET AL., *CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND* 132 (2002) (noting a dedicated, on-campus victim services office as an "encouraging practice"); OVW FISCAL YEAR 2011 GRANTS (mandating that no less than twenty percent of the funds granted to a school to combat sexual assault, stalking and domestic and dating violence go towards a victim services program where no on-campus or off-campus program currently exists).

strengthened further by the Campus SaVE Act, should it be enacted into law.<sup>171</sup> Office staff would have the background and knowledge to implement such training and education programs and could provide deeper expertise in active cases. Faculty and staff could be minimally trained in how to handle reports, mainly by referring them to the victims’ services office as the campus expert, which usually is a relief to the majority of faculty and staff members who do not feel prepared to deal with such reports. Survivors would also be more likely to report to a confidential advocate and all-around resource, and such an office could provide raw numbers without breaching confidentiality. Centralizing reports with a victims’ services office is one of the most effective ways of both getting survivors to report and making sure an institution’s response is effective once a report occurs.<sup>172</sup>

In light of the benefits of such offices, the most effective way for the Clery Act to both capture reports and ensure that sexual violence survivors’ rights are protected (as required by the CSAVBR portion of the Clery Act) may very well be to mandate that every school create and professionally staff such an office. Such an approach would not only increase reporting, but would also provide an on-campus expert who would facilitate creation of the right policies and procedures, as well as preventive educational programming. A legal regime that truly wants to end the campus peer sexual violence problem could not do better than mandating such an office at every school.

Neither the survey nor victim services office necessarily need to replace the Clery Act’s current reporting structure, although it is worth considering whether the resources that schools and other entities put toward meeting the Clery Act’s current requirements would be more efficiently and effectively utilized to fund one of these methods. Alternatively, any amendments to the Clery Act could appropriate money for ED to design the survey and compile and analyze the data, giving schools the less resource intensive role of administering the survey and collecting the data, which might be made quite easy if, for instance, ED were to design a survey method that was electronic and automated. The design might also include questions, like the voluntary American College Health Association survey currently does, that deal with other important topics about which schools want to assess their students’ experiences. Moreover, with the majority of the expenses of designing and administering the survey removed from institution itself, schools could put the resources formerly used for campus crime reporting towards the victim services office.

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171. *Dear Colleague Letter*, *supra* note TK, at 4, 7, 12, 14–15; S. 834, 112th Cong. (1st Sess. 2011); H.R. 2016, 112th Cong. (1st Sess. 2011);

172. For more information regarding the role that victims’ services offices can play once a survivor comes forward, see Cantalupo, *Campus Violence*, *supra* note 1, at 681–2.

Adopting both of these methods is ultimately in the interests of schools, given the potentially very expensive liability that schools face under Title IX, in particular. The Title IX liability scheme gives schools a clear incentive to get their institutional responses to campus peer sexual violence right. Although schools could keep their current “criminalized” approaches in place and continue to avoid knowledge of the problem generally and individual cases specifically, they would do so at their own—and at significant—risk. In addition, proper institutional responses present the best hope for schools to address the problem and prevent it from happening in the first place, by breaking the cycle of non-reporting and violence, gathering enough campus-specific information about the problem to create other forms of prevention, and bringing in expert victims’ services professionals to inform and implement best prevention and response practices. Aside from wanting to do the right thing and prevent the violence from an altruistic standpoint, violence prevention and effective institutional responses also save schools from many of the difficulties and resource expenditures that specific cases can involve when schools are unprepared to deal with them. Finally, schools seeking to address the violence problem would not be faced with the competitive disadvantage dilemma created by the high rate of violence but low rate of victim reporting.

### III. CONCLUSION

If colleges and universities are ever going to end, or even significantly diminish, the distressingly high and persistent incidence of peer sexual violence on their campuses, they must decriminalize their institutional responses to the violence. While Title IX, the Clery Act and case law regarding the due process rights of students accused of misconduct warranting suspension or expulsion make it clear that schools should not be treating student disciplinary proceedings like criminal trials, they assume a traditional policing, criminal justice approach to victim-reporting. This assumption significantly diminishes the effectiveness of both these laws and an institution’s responses to sexual violence because they perpetuate a high victim non-reporting rate that is likely caused in large part by survivors’ documented fear and distrust of law enforcement’s and other school officials’ attitudes towards survivors. Therefore, institutions should be seeking not only to decriminalize their disciplinary procedures on the back end of a student’s progress through a school response system, but also to decriminalize their reporting mechanisms on the front end. Amending the Clery Act or passing new regulations under Title IX or Clery could provide two ways to decriminalize reporting: first by mandating that all institutions conduct a regular, national survey on sexual violence among their students and second by requiring institutions to create victims’ services offices which will centralize reporting and service provision as

well as serve as an expert for training and education purposes.

# HOW TRI-VALLEY UNIVERSITY FELL OFF THE DIPLOMA MILL: STUDENT IMMIGRATION AND FAÇADE EDUCATION

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INTRODUCTION

In 2008, Tri-Valley University (“TVU”) obtained Department of Homeland Security (“DHS”) approval to enroll foreign students, which led to the university’s first two active F-1 students in February 2009.<sup>1</sup> By October of 2009, Tri-Valley University enrolled eighty-seven active F-1 students, and by September 2010, 1,555 active F-1 students.<sup>2</sup> The growth in enrollment continued at an astounding pace until December 2010, at which time TVU had an estimated enrollment of 2,500 students.<sup>3</sup> Tuition was \$2,700 per semester, providing the school with an estimated revenue of \$4.2 million for the Fall 2010 semester.<sup>4</sup> Over a twenty-month period, TVU experienced a 77,650% increase in revenue from F-1 students.<sup>5</sup> On January 19, 2011, federal agents raided TVU and a multi-million dollar home in Pleasanton, California in connection with a federal customs and immigration criminal investigation.<sup>6</sup> Roughly three months later, Susan Xiao-Ping Su was indicted by a federal grand jury and charged with significant federal crimes, including conspiracy to commit visa fraud, visa fraud, and mail fraud.<sup>7</sup> The raid, civil forfeiture complaint, notice of intent, and indictment represented the first public steps in civil and criminal proceedings against TVU and Susan Su.

This article is a legal examination of current issues regarding international students studying at diploma mills, and for-profit institutions that take advantage of students in a variety of ways in the United States. The study contains four sections, beginning with a general overview of the regulatory framework governing for-profit institutions. This initial section

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1. United States v. Real Property Located at 405 Boulder Court, Suite 800, Pleasanton, California, (APN 946-4547-297), 3:11-cv-00258-EMC (N.D. Cal. 2011).

2. *Id.* at 13.

3. *Id.*

4. *Id.*

5. *Id.*

6. Susan C. Schena, *New Details Emerge in Pleasanton University Scandal*, LIVERMORE PATCH, Feb. 11, 2011, <http://livermore.patch.com/articles/new-details-emerge-in-pleasanton-university-scandal>.

7. United States v. Real Property Located at 405 Boulder Court, Suite 800, Pleasanton, California, (APN 946-4547-297), 3:11-cv-00258-EMC (N.D. Cal. 2011).

focuses on legal and regulatory efforts to combat fraud at for-profit colleges and universities and distinguishes between legitimate and illegitimate examples of other for-profit institutions. The second section provides an overview of the student immigration system in the United States, paying particular attention to SEVIS and a practice known as Curricular Practical Training (“CPT”). The third section includes a discussion of the case of TVU. In an effort to highlight current abuses in the student visa system, this section details pending allegations of visa fraud against TVU and its President, Susan Xiao-Ping Su. Additionally, we discuss some of the political fallout from TVU and other instances of student visa fraud. In section four, we explore the implications of the current student visa scheme as applied to for-profit colleges and universities. Finally, we conclude by offering three proposals to improve the current system of admitting foreign students to study at for-profit institutions.

To evaluate current issues regarding international students studying at for-profit colleges and universities, we utilized a research method known as a legal case study. A legal case study is a research design that operates under the assumption that the case is a useful example of some specific phenomenon. Dimensional-sampling is a method that uses a small number of cases that contain the variables of interest to the study.<sup>8</sup> Although difficult to generalize, case studies can advance knowledge of the legal process by providing an intensive and detailed investigation into the processes used to manage litigation.<sup>9</sup> This case study utilizes content analysis for the documents in the litigation (including the civil forfeiture complaint, notice of intent, and indictment). Case studies are often the only research design available for examining a phenomenon that occurs infrequently. Although the TVU case shares a number of similarities with other diploma mill-related cases, the drastic negative effects on TVU’s international students who were approved to study in the United States represents a unique dimension.

## I. REGULATION OF FOR-PROFIT INSTITUTIONS

The definition of for-profit higher education should be understood as a “complex and contentious subject.”<sup>10</sup> From a global perspective, there are a

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8. David O. Arnold, *Dimensional sampling: An Approach for Studying a Small Number of Cases*, 5 AM. SOCIOLOGIST 147 (1970).

9. Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1127–32 (2002).

10. KEVIN KINSER, *A Global Perspective on For-Profit Higher Education*, in FOR-PROFIT COLLEGES AND UNIVERSITIES: THEIR MARKETS, REGULATION,



variety of legal concerns associated with for-profit higher education. These concerns are amplified by the numerous categories that constitute for-profit higher education, including: traditional exchange programs and study abroad programs, international branch campuses, distance delivery of academic programs, and foreign investment in educational institutions. The varied formats of for-profit education (in addition to a profit-oriented motivation) makes quality assurance a significant challenge. There is no global framework for recognizing legitimate higher education institutions and there are numerous state-sponsored and non-government accreditation models.<sup>11</sup> The debate over the inclusion of education as a tradable service under the General Agreement on Trade in Services (“GATS”) highlights the contentious and challenging nature of the issues of accountability and profit-seeking education.<sup>12</sup>

Regulation of for-profit institutions has generally existed at the state level. Independent accrediting bodies did not emerge until the 1950s, and direct federal involvement did not occur in the United States until the 1970s.<sup>13</sup> Most states took a laissez-faire approach toward educational oversight during the first half of the twentieth century, which caused substantial difficulties during the influx of students studying under the GI bill, after World War II. To establish and standardize rules for the for-profit sector, the National Education Association (“NEA”) attempted to draft legislation that states could adopt, but no consensus was ever reached.<sup>14</sup> The federal Office of Education’s statutory power to list recognized accrediting agencies began in the Korean War G.I. Bill in 1952, which marked the beginning of the regional accrediting system currently in place.<sup>15</sup>

In 1972, a federal reauthorization of the Higher Education act required states to consider for-profit schools as an educational entity and to regulate

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PERFORMANCE, AND PLACE IN HIGHER EDUCATION 145, 147 (Guilbert C. Hentschke, Vincente M. Lechuga, & William G. Tierney eds., 2010).

11. *See generally* ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CROSS-BORDER TERTIARY EDUCATION: A WAY TOWARDS CAPACITY DEVELOPMENT (2007).

12. Christopher S. Collins, A general agreement on higher education: GATS, globalization, and imperialism, 2 RESEARCH IN COMPARATIVE & INT’L EDUC. 283, 283–96 (2007); Jason E. Lane, M. Christopher Brown & Matt Allen Pearcey, *Transnational campuses: Obstacles and opportunities for institutional research in the global education market*, in EXAMINING UNIQUE CAMPUS SETTINGS: INSIGHTS FOR RESEARCH AND ASSESSMENT 49, 49–62 (Jason E. Lane & M. Christopher Brown eds., 2004).

13. KEVIN KINSER, FROM MAIN STREET TO WALL STREET: THE TRANSFORMATION OF FOR-PROFIT HIGHER EDUCATION (2006).

14. *Id.*

15. *Id.* at 100.

illegitimate institutions.<sup>16</sup> To police behavior and prevent fraud, state commissions were established with representatives from the for-profit sector. When these state laws were originally implemented, they “generally covered only minimal standards for educational quality while maintaining strict rules over ethics, fiscal responsibility, and advertising.”<sup>17</sup> Prior to the 1972 reauthorization, participation of for-profit institutions of higher education in federal aid programs was relatively modest and placed with an equal status with not-for-profit private and public sector institutions.<sup>18</sup> Although regulatory in nature, this policy also gave for-profit institutions the legal and financial stature to gain momentum.<sup>19</sup>

Widespread accreditation of for-profit institutions and state and federal regulations have helped to create a more equal playing field on which profit-making institutions compete with other models of higher education. There is continued integration of the for-profit sector into the same regulatory framework that applies to traditional not-for-profit private and public higher education institutions.<sup>20</sup> However, at the state level, for-profit institutions are often considered a special case of postsecondary education and regulated separately from more traditional institutions. At the federal level, some regulations promulgated pursuant to the reauthorization of the Higher Education Act in 1992 specifically target for-profit institutions, but these regulations are increasingly applied to all institutions.<sup>21</sup> There are some institutions in the for-profit sector that exist outside of the regulatory structure that governs most legitimate postsecondary institutions.<sup>22</sup> Many of these institutions are fraudulent diploma mills, making consumer protection legislation an appropriate remedy.

Despite the progress of many for-profit institutions, fraudulent practices still persist throughout the industry. Diploma mills have captured the attention of the public through a steady stream of media exposure. Congress formally recognized the problem of diploma mills in 2002, when hearings on these institutions began in the U.S. Senate.<sup>23</sup> In a strategy designed to highlight the lack of educational standards at diploma mills, Senator Susan Collins of Maine paid a fee to obtain several degrees from a nonexistent Lexington University.<sup>24</sup> In addition, more than 1,000

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16. *Id.* at 21.

17. *Id.* at 113.

18. *Id.* at 21.

19. DAVID A. TRIVETT, PROPRIETARY SCHOOLS AND POSTSECONDARY EDUCATION 38 (1974).

20. See KINSER, *supra* note 13, at 22.

21. *Id.*

22. *Id.*

23. *Id.* at 20.

24. Letter from Robert J. Cramer, Managing Director of the Office of Special Investigations in the United States General Accounting Office to Senator Susan M.

individuals on the federal payroll, including twenty-eight senior employees, were listed with degrees from institutions identified as diploma mills.<sup>25</sup>

#### A. Federal Funding

The ability of for-profits to benefit from federal student aid is determined largely by regional accreditation status. Through regional accreditation, most for-profit institutions participate in Title IV federal student aid programs (e.g., Pell grants, SEOG grants, Stafford loans).<sup>26</sup> Students attending degree-granting, for-profit schools are more likely than students at traditional schools to apply for federal aid, and 72% of students at for-profits receive Pell grants and 91% receive Stafford loans.<sup>27</sup> As a result, a very large proportion of for-profit revenue is generated from students' federal grants and loans.

In 1992, while the number of for-profit institutions was on the rise, “a watershed reauthorization took place driven by widely reported instances of misuse of federal student aid funds and soaring default rates on federally guaranteed student loans.”<sup>28</sup> One result of this reauthorization was the 85-15 rule, which required a for-profit institution to obtain at least 15% of revenues from sources other than federal student aid programs.<sup>29</sup> The rule was designed to force a minimal level of non-subsidized support. In 1998, this rule was modified to a ratio of 90-10, allowing for-profit institutions to receive up to 90% of its revenue from federal student aid programs.<sup>30</sup> It is somewhat ironic for institutions that proclaim market sensibility and independence to have substantial reliance on federal aid money, leaving them exposed to a regulatory authority they had avoided for so many years.<sup>31</sup>

The federal student aid programs created by the Higher Education Act of 1965 (HEA) provided more than \$146 billion in 2009-2010 to higher

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Collins regarding the purchases of degrees from diploma mills (Nov. 21, 2002), available at <http://www.gao.gov/new.items/d03269r.pdf>.

25. KINSER, *supra* note 13, at 122.

26. *Id.* at 102-06.

27. SARAH KRICHOLS GOAN AND ALISA F. CUNNINGHAM, DEP'T OF EDUC., DIFFERENTIAL CHARACTERISTICS OF 2-YEAR POSTSECONDARY INSTITUTIONS (2007).

28. Mark L. Pelesh, *Markets, Regulation, and Performance in Higher Education*, in FOR-PROFIT COLLEGES AND UNIVERSITIES 91-108 (Guilbert C. Hentschke, Vincente M. Lechuga, & William G. Tierney eds., 2010).

29. The Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat 448 (subsequently amended and now at 20 U.S.C. § 1094(a)(24) (Supp. IV 2011)).

30. The Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (subsequently amended and now at 20 U.S.C. § 1094(a)(24) (Supp. IV 2011)).

31. KINSER, *supra* note 13, at 117.

education institutions.<sup>32</sup> This federal aid represents 75% of all student aid and 25% of all higher education expenditures.<sup>33</sup> 25% of all federal aid is directed to students at for-profit institutions, which enroll only 12% of all postsecondary students.<sup>34</sup> The regulatory environment emerging from federal funding shapes higher education in substantial ways.

#### B. Congressional Pressure on Regional Accreditation I

The federal government, individual states, and private, non-profit accrediting agencies represent the triad of higher education regulators. Each of these regulatory bodies has evolved through subsequent reauthorizations of the HEA. Although accrediting agencies are organized by peer review and voluntary association, they serve as federally recognized gatekeepers to the HEA funding programs.<sup>35</sup> Institutions criticize regional accreditors for wielding too much influence, and the government criticizes the same entities for lax oversight of the student aid system. Leading up to the 1992 reauthorization, accreditation agencies were criticized for inadequate standards and procedures, conflicts of interests, and an inability to serve as the gatekeeper for the Title IV programs that Congress and regulators expected.<sup>36</sup> Most of the criticism was related to the treatment of for-profit institutions. Consequently, Congress mandated changes to the HEA that would strengthen the triad regulatory system and prohibit “the eligibility and participation of the institutions that failed to meet tests for institutional integrity and quality.”<sup>37</sup> Accrediting agencies continue to evolve and strengthen the rigor of their standards to push institutions to better serve students. Because participation is “voluntary” (institutions can choose to forgo accreditation and federal funding), accrediting bodies work diligently to inform institutions that it is in their interest to be held to high standards.<sup>38</sup> Without regional accreditation, a federal system of accreditation would be imminent.

Several HEA measures were directed toward for-profit institutions. For example, proprietary institutions must now function for two years prior to gaining eligibility to participate in federal student aid programs.<sup>39</sup> A

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32. COLLEGE BOARD, TRENDS IN STUDENT AID 2010 (2010), *available at* [http://trends.collegeboard.org/downloads/student\\_aid/highlights.pdf](http://trends.collegeboard.org/downloads/student_aid/highlights.pdf).

33. *Id.*

34. *Id.*

35. See Clark C. Havighurst, *Foreword: The Place of Private Accreditation in the Regulatory State*, 57 LAW & CONTEMP. PROBS., no. 4, 1994, at 1.

36. See S. Rep. No. 102–58 (1991).

37. Pelesh, *supra* note 28, at 95.

38. See, e.g., MILTON GREENBERG, HIGHER EDUCATION, ACCREDITATION AND REGULATION 1 (2008).

39. 34 C.F.R. § 668.15(b)(7) (2011).

subcommittee found overwhelming evidence that the Guaranteed Student Loan Program (GSLP) as it relates to for-profit schools is

riddled with fraud, waste, and abuse, and is plagued by substantial mismanagement and incompetence. Despite the acknowledged contributions of the well-intended, competent, and honest individuals and institutions comprising the large majority of GSLP participants, unscrupulous, inept, and dishonest elements among them have flourished throughout the 1980s. The latter have done so by exploiting both the ready availability of billions of dollars of Guaranteed Student Loans and the weak and inattentive system responsible for them [e.g., accreditation] leaving hundreds of thousands of students with little or no training, no jobs, and significant debt that they cannot possibly repay. While those responsible have reaped huge profits, the American taxpayer has been left to pick up the tab for billions of dollars in attendant losses.<sup>40</sup>

This finding was tied to criticism of accreditation agencies' inattention to quality assurance. This inattention included: the branching of institutions without regulation, inappropriate course length (i.e., expanding the course hours but not the content to secure greater amount of federal aid dollars), and unethical practices in student recruitment and admission.<sup>41</sup> Overall, the subcommittee reported that the accreditation process had "failed to assure that proprietary schools provide the quality of education required for GSL participation" and that accrediting agencies, particularly in the for-profit sector, had not taken seriously their role as gatekeepers to federal dollars.<sup>42</sup>

### C. Gainful Employment and HEA

In addition to federal student aid, a student's ability to secure employment post-graduation is another component of the regulatory framework. A gainful employment rule was the subject of intense lobbying when it was released (in draft form) in the middle of 2010.<sup>43</sup> The Department of Education received around 90,000 comments on the draft and held more the 100 meetings about the rule.<sup>44</sup> In general, the rule was designed to protect taxpayers and students from programs that lack truth in advertising and in turn do harm to students who end up with debt and are unable to find a job. Although 12% of all students are educated at for-profit

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40. *Abuses in Federal Student Aid Programs: Hearing Before the Subcomm. On Investigations of the S. Comm. on Governmental Affairs*, 102nd Cong. (1991).

41. *Id.*

42. *Id.*

43. Kelly Field, *For-Profit Colleges Win Major Concessions in Final "Gainful Employment" Rule*, CHRON. HIGHER EDUC. (Wash., D.C.), June 2, 2011, <http://chronicle.com/article/for-profit-colleges-win-major/127744/>.

44. *Id.*

institutions, the institutions receive about 25% of all federal aid and account for almost 50% of students defaulting on loans.<sup>45</sup>

The original version of the gainful employment rule would have discontinued aid to hundreds of programs and limited enrollment growth at many others. The final version of the rule reflects a number of revisions. For example, the initial version contained guidelines that required a threshold of less than 20% of discretionary income or 8% of total income in a debt-to-earnings ratio.<sup>46</sup> If this ratio was not met, programs were required to have at least 45% of former students (whether or not they had graduated) paying principle on their loans.<sup>47</sup> If programs satisfied these requirements, students would be eligible for federal aid. Programs with ratios above 30% of discretionary income and 12% of total income and fewer than 35% of former students not paying principle would be ineligible for aid.<sup>48</sup> Programs that fell between the thresholds would have restrictions on enrollment growth.<sup>49</sup> In the final version of the rule, the restrictions for the in-between zone were eliminated. The final version also includes a timeline of four years to implement and the ability to fail the repayment rates three times before being penalized for not meeting the standard.<sup>50</sup> For-profit institutions were also able to secure the inclusion of interest-only loans into the repayment calculation and the choice of which data to include in calculating the debt-to-income ratios.<sup>51</sup> These regulations are effective as of July 1, 2012,<sup>52</sup> but the ultimate fate of the rule may be with Congress or the courts, as an intense battle continues.<sup>53</sup>

#### D. For-Profit Legitimacy

There are several legitimate examples of for-profit colleges and universities. For example, Strayer University is an established institution that has been educating students for over a hundred years.<sup>54</sup> It is accredited

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Federal Register, Program Integrity: Gainful Employment-Debt Measures, <http://www.federalregister.gov/articles/2011/06/13/2011-13905/program-integrity-gainful-employment-debt-measures> (last visited Apr. 30, 2012).

51. *Id.*

52. *Id.*

53. Indeed, as this Article was being edited, Judge Rudolph Contreras of the District Court for the District of Columbia struck down major portions of the gainful employment rule. *Ass'n of Private Colls. and Univs. v. Arne Duncan*, 1:11-CR-01314-RL (D.D.C. June 3, 2012).

54. Gilbert C. Hentschke, *For-Profit Sector Innovations in Business Models and Organizational Cultures*, in *REINVENTING HIGHER EDUCATION: THE PROMISE*

by the Middle States Commission on Higher Education and has several state licenses to operate in multiple locations.<sup>55</sup> The University of Phoenix is often upheld as an example of legitimate and productive for-profit postsecondary education. Hentschke highlighted several components of the University of Phoenix as exemplary, including their academic services for a wide array of student ability levels.<sup>56</sup> The University of Phoenix utilizes a client-focused approach that is designed to give students the best opportunity to succeed.<sup>57</sup> However, even Phoenix suffers from some negative media attention related to legal disputes. In one lawsuit, a jury found that the University of Phoenix fraudulently misled investors about its student recruitment policies and awarded a \$280 million verdict. The district court judge overturned the verdict, granting the for-profit institution's motion for judgment as matter of law based on evidentiary issues.<sup>58</sup> Other examples of legitimate for-profits include DeVry University, American Public University, and Kaplan.<sup>59</sup>

#### E. For-Profit Illegitimacy

On the other end of the for-profit spectrum are diploma mills—fraudulent institutions that exist on the sidelines of the legal and regulatory framework in the U.S. These institutions are not accredited and do not participate in federal aid programs. However, the Federal Trade Commission has partnered with the U.S. Department of Education in a campaign to inform consumers of the telltale signs of a diploma mill.<sup>60</sup> The shallow business PhonyDiploma.com, which is not an educational industry of any sort, represents the far end of illegitimacy. One very large and public scandal occurred in 2004, when the General Accounting Office (GAO) launched an investigation into federal employees who purchased fake degrees with federal dollars. A report concluded that these degrees were used to obtain higher levels of pay in a credential based salary system:

In summary, 3 of the 4 unaccredited schools responded to our requests for information and provided records that identified 463 students employed by the federal government.... Data provided by 8 agencies indicated that 28 senior-level employees have

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OF INNOVATION 159-96 (Ben Wildavsky, Andrew P. Kelly, and Kevin Cary eds., 2011).

55. *Id.*

56. *Id.*

57. *Id.*

58. Amanda Harmon Cooley & Aaron Cooley, *From Diploma Mills to For-Profit Colleges and Universities: Business Opportunities, Regulatory Challenges, and Consumer Responsibility in Higher Education*, 18 S. CAL. INTERDISC. L.J. 505, 519 (2009).

59. Hentshke, *supra* note 54, at 159–96.

60. KINSER, *supra* note 13, at 100–24.

degrees from diploma mills and other unaccredited schools....

This number is believed to be an understatement of the actual number of employees at these 8 agencies who have degrees from diploma mills and other unaccredited schools.<sup>61</sup>

The report also explained how widespread the scandal was, as it had reached senior executive levels at the Department of Homeland Security and the Department of Labor.<sup>62</sup>

Another controversy stems from a recent set of criminal and civil proceedings involving St. Regis University.<sup>63</sup> The leaders of St. Regis University unsuccessfully attempted to move their many businesses to Liberia, Russia, India, or Italy to prevent prosecution in the United States. After a Secret Service agent was able to spend \$1,277 for three undergraduate and advanced degrees in chemistry and environmental engineering based on his life experience, the federal government eventually shut down the fraudulent institution.<sup>64</sup> The owners, Dixie and Steven Randock, ultimately entered into individual plea agreements with the U.S. Attorney's Office, which included a guilty plea to conspiracy to commit mail and wire fraud. In July of 2008, both Randocks were sentenced to thirty-six months of imprisonment, followed by three years of supervised release.<sup>65</sup> With one minor variation, the United States Court of Appeals for the Ninth Circuit subsequently affirmed the Randocks' sentences.<sup>66</sup>

There are a variety of ways in which proprietary institutions can misrepresent the nature of what they have to offer: in *Phillips Colleges of Alabama, Inc. v. Lester*, the school misrepresented that it would provide a specified number of hours of practical training;<sup>67</sup> in *Motel Managers Training School, Inc. v. Merryfield*, the school implicitly misrepresented itself by failing to acknowledge its unlicensed status to its students;<sup>68</sup> and in *Malone v. Academy of Court Reporting*, the school misrepresented through mail, telephone, advertising presentations, and door-to-door canvassing that completion of the school's program would lead to an associate's degree and

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61. *Diploma Mills: Federal Employees Have Obtained Degrees from Diploma Mills and Other Unaccredited Schools, Some at Government Expense: Testimony Before the S. Comm. on Governmental Affairs*, 108th Cong. (2004) (statement of Robert J. Cramer, Managing Director, Office of Special Investigations, United States General Accounting Office).

62. *Id.*

63. Cooley, *supra* note 58, at 510–11.

64. *Id.*

65. *United States v. Randock*, 330 Fed. App'x 628 (9th Cir. 2009).

66. *Id.*

67. *Phillips Colleges of Alabama v. Lester*, 622 So.2d 308 (Ala. 1993).

68. *Motel Managers Training School, Inc. v. Merryfield*, 347 F.2d 27 (9th Cir. 1965).



that course credit would be transferable to a local university.<sup>69</sup> Finally, and perhaps most significantly, schools misrepresent students' prospects for employment upon graduation (e.g., in *Delta School of Commerce, Inc. v. Wood*, the court found that the school intentionally misrepresented itself when it told prospective students that they would receive a salary comparable to that of a nurse upon graduation from the school's program).<sup>70</sup>

## II. THE CURRENT STUDENT VISA SYSTEM

Although there is complexity around the regulatory framework of for-profit higher education, the landscape becomes much more complex as it relates to citizens from other countries who are students studying in the United States. Higher Education in the United States, Canada, and Australia attract many students from other countries and earn significant amounts of revenue for the institutions, as financial assistance is typically unavailable for these students. In the United States, there is a system to regulate how colleges and universities enroll international students.

The Student and Exchange Visitor Program ("SEVP") assists the Department of Homeland Security and the Department of State to monitor international students and the schools that enroll international students.<sup>71</sup> SEVP administers the F and M visa categories. SEVP uses the Student and Exchange Visitor Information System ("SEVIS"), a web-based solution, to track and monitor schools and programs, students, exchange visitors and their dependents while approved to participate in the U.S. education system.<sup>72</sup> SEVP collects, maintains and provides the information to allow only legitimate foreign students or exchange visitors to gain entry to the United States.<sup>73</sup> The result is an information system that provides information to the Department of State, U.S. Customs and Border Protection ("CBP"), U.S. Citizenship and Immigration Services ("USCIS"), and U. S. Immigration and Customs Enforcement ("ICE").<sup>74</sup>

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69. *Malone v. Academy of Court Reporting*, 64 Ohio App. 3d 588 (Ohio Ct. App., 1990); *See also* Matthew W. Finkin, *Private Accreditation in the Regulatory State*, 57 LAW & CONTEMP. PROBS. 89 (1994).

70. *Delta Sch. of Commerce, Inc. v. Wood*, 766 S.W.2d 424, 425 *opinion supplemented on denial of reh'g*, 769 S.W.2d 738 (1989).

71. U.S. Immigration and Customs Enforcement, Student and Exchange Visitor Program, *available at* <http://www.ice.gov/sevis/> (last visited May 13, 2012).

72. *Id.*

73. *Id.*

74. *Id.*

There are 10,000 approved schools and around one million students in the system.<sup>75</sup> The top schools enrolling students with an F-1 visa are the City University of New York, the University of Southern California, and Purdue University, and 36% of students in the system are enrolled in California, New York, Florida, Texas, or Pennsylvania.<sup>76</sup> China, South Korea, and India are the top three countries of origin for visiting students, and business is the most popular major.<sup>77</sup> To study in the United States, international students and the schools they attend must comply with a rigorous regulatory framework.

#### A. Student Responsibilities

The Immigration and Nationality Act identifies several categories of foreign nationals who may be admitted to the United States for non-immigrant purposes.<sup>78</sup> One such category, designated “F-1,” is comprised of “bona fide student[s]” who plan to study at an approved school.<sup>79</sup> Students entering the United States on an F-1 student visa are admitted for a temporary period known as “duration of status,” meaning “the time during which an F-1 student is pursuing a full course of study” at an approved school.<sup>80</sup> Once a student ceases to pursue a full course of study, the duration of status automatically ends and the temporary period for which the student was admitted to the United States expires.

A student must apply to an SEVP-approved school in the United States and upon acceptance, a school will provide the student with a document called a Form I-20.<sup>81</sup> A Form I-20 is a paper record of student information in the SEVIS database. Each school that admits a student sends a Form I-20, and students must select only one school.<sup>82</sup> Once the student has the Form I-20, the student must pay the SEVIS I-901 fee, which is approximately \$200.<sup>83</sup> Without this fee, students will not be eligible to apply for a visa. After paying the I-901 fee and receiving a receipt, a student can apply for a visa at any American embassy or consulate prior to

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75. U.S. Immigration and Customs Enforcement, SEVIS by the Numbers, available at <http://www.ice.gov/sevis/outreach.htm> (last visited May 13, 2012).

76. *Id.*

77. *Id.*

78. *See* 8 U.S.C. § 1101 (2006).

79. *Id.* at § 1101(a)(15)(F)(I); 8 C.F.R. § 214.1(a)(2) (2011).

80. 8 C.F.R. § 214.2(f)(5)(I).

81. *Id.* at § 214.2(f)(2); *see also* U.S. Immigration and Customs Enforcement, *Becoming a Nonimmigrant Student in the United States, May 2007*, available at [http://www.ice.gov/sevis/becoming\\_nonimmigrant\\_student\\_52007.htm](http://www.ice.gov/sevis/becoming_nonimmigrant_student_52007.htm).

82. 8 C.F.R. § 214.2(f)(1); *see also* *Becoming a Nonimmigrant Student in the United States*, *supra* note 80.

83. 8 C.F.R. § 214.13(a)(1).

departure from his home country.<sup>84</sup> Ultimately, failure to follow the guidelines could jeopardize the student's immigration status.

If a student fails to follow the guidelines, he may be refused entry into the United States. A passport, valid for at least six months beyond the date of the expected stay, and SEVIS Form I-20 must be presented upon entry.<sup>85</sup>

It is recommended that a student hand-carry the following documentation:

- Evidence of financial resources;
- Evidence of student status, such as recent tuition receipts and transcripts;
- Paper receipt for the SEVIS fee, Form I-797; and
- Name and contact information for "Designated School Official," including a 24-hour emergency contact number at the school.<sup>86</sup>

Students must also present the following documents: a passport, SEVIS Form (I-20), Arrival-Departure Record Form (I-94), and a Customs Declaration Form (CF-6059).<sup>87</sup> The students must also inform the customs officer of their student status. If the customs officer at the port of entry cannot initially verify the information or all of the required documentation is not presented, the student may be directed to an interview area known as "secondary inspection."<sup>88</sup> Secondary inspection allows inspectors to conduct additional research in order to verify information without causing delays for other arriving passengers. The inspector will first attempt to verify the status by using SEVIS.<sup>89</sup> In the event that the customs officer needs to verify information with a school or program, it is recommended that the student have the name and telephone number of the foreign student advisor at the school.

### B. University Responsibilities

An institution seeking initial or continued authorization for attendance by nonimmigrant students must file a petition for certification or recertification with SEVP, using the SEVIS.<sup>90</sup> The petition must identify (by name and address) each location of the school that is included in the request for certification or recertification, specifically including any physical location in which a nonimmigrant can attend classes through the school (i.e., campus, extension campuses, satellite campuses, etc.).<sup>91</sup> In

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84. *Id.* at § 214.13(d).

85. U.S. Immigration and Customs Enforcement, Fact Sheet: Arriving at a U.S. Port of Entry...What a Student Can Expect, October 1, 2004, *available at* [http://www.ice.gov/sevis/factsheet/100104ent\\_stdnt\\_fs.htm](http://www.ice.gov/sevis/factsheet/100104ent_stdnt_fs.htm).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. 8 C.F.R. § 214.3(a)(1).

91. *Id.* at § 214.3 (a)(1)(ii).

submitting the Form I-17, a school certifies that the designated school officials (DSOs) signing the form have read and understand DHS regulations relating to: nonimmigrant students, change of nonimmigrant classification for students, school certification and recertification, and withdrawal of school certification.<sup>92</sup> Both the school and DSO must also verify that they intend to comply with these regulations at all times; and that, to the best of its knowledge, the school is eligible for SEVP certification.<sup>93</sup> Willful misstatements may constitute perjury. The following types of schools may be approved for attendance:

- (A) a college or university (i.e., an institution of higher learning that awards recognized bachelor's, master's doctor's or professional degrees);
- (B) a community college or junior college that provides instruction in the liberal arts or in the professions and that awards recognized associate degrees;
- (C) a seminary;
- (D) a conservatory;
- (E) or an institution that provides language training, instruction in the liberal arts or fine arts, instruction in the professions, or instruction or training in more than one of these disciplines.<sup>94</sup>

To be eligible for certification, at the time of filing, the petitioning school must establish that it:

- (A) is a bona fide school;
- (B) is an established institution of learning or other recognized place of study;
- (C) possesses the necessary facilities, personnel, and finances to conduct instruction in recognized courses;
- (D) and is, in fact, engaged in instruction in those courses.<sup>95</sup>

For higher education institutions that are not accredited by a regional accrediting agency and that do not confer recognized degrees, the institutions must submit evidence that its credits are accepted unconditionally by at least three accredited or public institutions of higher learning.<sup>96</sup> The evidence can take the form of letters or articulation agreements, but there must be a total of three.<sup>97</sup> This information clarifies

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92. *Id.*

93. *Id.*

94. *Id.* at § 214.3(a)(2)(i).

95. *Id.* at § 214.3(a)(3).

96. *Id.* at § 214.3(c).

97. *Id.*

the evidentiary requirements in Title 8, Code of Federal regulations, Section 214.3(c) for adjudication of Form I-17.<sup>98</sup>

SEVP will notify the petitioner by updating SEVIS to reflect approval of the petition and by e-mail upon approval of a certification or recertification petition.<sup>99</sup> The certification or recertification is valid only for the type of program and non-immigrant classification specified in the certification or recertification approval notice. The certification must be recertified every two years and may be subject to out-of-cycle review at any time.<sup>100</sup>

There are also recordkeeping and reporting requirements. A SEVP-certified school must keep records containing certain specific information and documents relating to each F-1 student to whom it has issued a Form I-20 until the school notifies SEVP that the student is no longer pursuing a full course of study.<sup>101</sup> Student information not required for entry in SEVIS may be kept in the school's student system of records, but must be accessible to DSOs.<sup>102</sup> The school must keep a record of compliance with the reporting requirements for at least three years after the student is no longer pursuing a full course of study.<sup>103</sup>

### C. Curricular Practical Training (CPT)

Although students on an F-1 visa are not able to receive financial aid or work a regular job, a special provision allows students to work if it is essential to the academic experience. Curricular Practical Training ("CPT") is a type of employment authorization that allows an F-1 student to participate in employment off-campus.<sup>104</sup> Any required internship that is an integral part of the established curriculum for a program of study would qualify as CPT. According to the 8 C.F.R. § 214.2(f)(10)(i):

*Curricular Practical Training.* An F-1 student may be authorized by the DSO to participate in a curricular practical training program that is an integral part of an established curriculum. Curricular practical training is defined to be alternative work/study, internship, cooperative education, or any other type of required internship or practicum that is offered by sponsoring employers through cooperative agreements with the school. Students who have received one year or more of full time

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98. *Id.*

99. *Id.* at § 214.3(e)(2).

100. *Id.*

101. *Id.*

102. *Id.* at § 214.3(g)(1).

103. *Id.*

104. *Id.* at § 214.2(f)(10)(i); *see also* U.S. Immigration and Customs Enforcement, Practical Training, *available at* <http://www.ice.gov/sevis/practical-training/> (last visited May 13, 2012).

curricular practical training are ineligible for post-completion academic training. Exceptions to the one academic year requirement are provided for students enrolled in graduate studies that require immediate participation in curricular practical training. A request for authorization for curricular practical training must be made to the DSO. A student may begin curricular practical training only after receiving his or her Form I-20 with the DSO endorsement.

(A) *Non-SEVIS process. (no longer applies)*

(B) *SEVIS process.* To grant authorization for a student to engage in curricular practical training, a DSO at a SEVIS school will update the student's record in SEVIS as being authorized for curricular practical training that is directly related to the student's major area of study. The DSO will indicate whether the training is full-time or part-time, the employer and location, and the employment start and end date. The DSO will then print a copy of the employment page of the SEVIS Form I-20 indicating that curricular practical training has been approved. The DSO must sign, date, and return the SEVIS Form I-20 to the student prior to the student's commencement of employment.<sup>105</sup>

As institutions have wide margins for interpreting the CPT rule, this is an area that lacks clarity. For example, institutions can take a more conservative or liberal view of the rule in regulating how and when students can work. In most legitimate cases, student must have been lawfully enrolled on a full-time basis for one academic year before being eligible for CPT. It is available only while the student is in valid F-1 status and before the completion of his or her program. Students in English language programs are not eligible for CPT. If the student had a gap in study or a status violation, the one academic year waiting period may need to be recalculated once the student has again obtained valid F-1 status. Immigration regulations do not allow colleges or universities to approve CPT for employment that is: highly recommended, a great opportunity, or for financial purposes. Because CPT is subject to widely varying interpretations and potential abuse, institutions taking a conservative view will only authorize CPT for a specific job with a particular employer for a specific length of time. This typically involves the approval and participation of a faculty member, who agrees to monitor the student's progress. With a more liberal interpretation of the rule, institutions have a greater ability to attract international students.

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105. 8 C.F.R. § 214.2(f)(10)(i); U.S. Immigration and Customs Enforcement, Curricular Practical Training, *available at* <http://www.ice.gov/sevis/students/cpt.htm> (last visited May 13, 2012).

### III. THE CASE OF TRI-VALLEY UNIVERSITY

The case of Tri-Valley University (“TVU”) demonstrates the brokenness of the current student visa system and the abuses that occur when a proprietary institution with acute economic motives is left to police itself. On January 19, 2011, federal agents raided TVU and a multi-million dollar home in Pleasanton, California in connection with a federal customs and immigration criminal investigation.<sup>106</sup> That same day, the United States Attorney’s Office for the Northern District of California filed a civil forfeiture complaint alleging that TVU and its President Susan Xiao-Ping Su, engaged in an elaborate scheme to defraud students and the Department of Homeland Security.<sup>107</sup> Also on that day, United States Immigration and Customs Enforcement (“ICE”) delivered a Notice of Intent to Withdraw (“Notice of Intent”) to President Su and TVU, alleging multiple violations of federal regulations and terminating TVU’s active students nonimmigrant status.<sup>108</sup> Roughly three months later, Susan Xiao-Ping Su was indicted by a federal grand jury and charged with significant federal crimes, including conspiracy to commit visa and mail fraud.<sup>109</sup> The raid, civil forfeiture complaint, Notice of Intent, and indictment were the first public steps in civil and criminal proceedings against TVU and Susan Su. In the months that followed, the political impact of cases like TVU and other instances of student visa fraud was felt around the globe.

#### A. Background on Tri-Valley University

The story of TVU is one of rapid and expansive growth. TVU was, according to the institution’s website, a “Christian Higher Education Institution aiming to offer rigorous and excellent quality academic programs in the context of the Christian faith and world view.”<sup>110</sup> TVU offered students a host of degrees, ranging from bachelors to doctorates in engineering, law, business, and health sciences.<sup>111</sup> The President of TVU, Susan Xiao-Ping Su, is a “native of China, with a master’s degree in

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106. Susan C. Schena, *Homeland Security Raid of Ruby Hill House, Tri-Valley University Linked to Immigration, Customs Probe*, LIVERMORE PATCH, Jan. 19, 2011, <http://livermore.patch.com/articles/homeland-security-raids-ruby-hill-house>.

107. Complaint, *supra* note 1.

108. Notice of Intent to Withdraw, *available at* <http://www.globallawcenter.com> (last visited Aug. 18, 2011).

109. Complaint, *supra* note 1.

110. Susan C. Schena, *Federal Complaint Calls Private College in Pleasanton a Sham*, PLEASANTON PATCH, Jan. 20, 2011, <http://pleasanton.patch.com/articles/update-federal-complaint-calls-private-college-in-pleasanton-a-sham>.

111. *Id.*

engineering from the University of California, Davis and a Ph.D. in mechanical engineering from the University of California, Berkeley.”<sup>112</sup>

Following its modest beginnings in 2008, TVU obtained DHS approval to enroll foreign students in February 2009. Soon after receiving DHS approval to enroll foreign students, TVU enrolled 2 active F-1 students.<sup>113</sup> Eight months later, however, in October of 2009, TVU enrolled 87 active F-1 students.<sup>114</sup> Enrollment continued to grow at a rapid pace and by September 2010, TVU had an enrollment of 1,555 active F-1 students.<sup>115</sup> The growth in enrollment continued at an astounding pace until December 2010, at which time TVU had an estimated enrollment of 2,500 students.<sup>116</sup>

The rapid and exponential growth in enrollment at TVU may, in part, be attributed to TVU’s business model. ICE’s investigation revealed that TVU employed a “referral/profit-sharing scheme, which resembles a pyramid scheme.”<sup>117</sup> Students on F-1 visas at TVU, once enrolled, were given a striking incentive to recruit other foreign nationals. Under the business model, each F-1 student could collect up to 20% of the tuition of any new student that he or she referred in addition to collecting up to 5% of the tuition that any new student that his or her referred student refers.<sup>118</sup> The profit-sharing scheme employed at TVU produced a significant amount of revenue in a short time. Tuition at TVU was \$2,700 per semester, providing an estimated revenue of \$4.2 million for the Fall 2010 semester.<sup>119</sup>

#### B. The Raid

On January 19, 2011, federal agents raided TVU and a home in the gated Ruby Hill community in Pleasanton, California.<sup>120</sup> The raid on the Ruby Hill home commenced at about 6 a.m. and federal agents were still at TVU headquarters at 3 p.m. that same day.<sup>121</sup> According to a spokesperson for U.S. Immigration and Customs Enforcement, the raid was part of a federal criminal probe.<sup>122</sup> The properties subject to the raid included offices at TVU, one home on Victoria Ridge Court in Pleasanton and the home in

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112. Susan C. Schena, ‘Sham’ University Case One of Biggest, Official Says, PLEASANTON PATCH, May 3, 2011, <http://pleasanton.patch.com/articles/sham-university-case-one-of-biggest-official-says>.

113. Complaint, *supra* note 1, at 13.

114. *Id.*

115. *Id.*

116. Schena, *supra* note 111.

117. Complaint, *supra* note 1, at 11.

118. *Id.*

119. Susan C. Schena, *New Details Emerge in Pleasanton University Scandal*, LIVERMORE PATCH, Feb. 11, 2011, <http://livermore.patch.com/articles/new-details-emerge-in-pleasanton-university-scandal>.

120. Schena, *supra* note 105.

121. *Id.*

122. *Id.*



the gated Ruby Hill community of Pleasanton.<sup>123</sup> In addition to investigating those who operated TVU, agents also questioned available TVU students. After the raid, reports surfaced that Department of Homeland Security used radio-tracking devices to monitor roughly 1,500 Indian students who were detained and released following an investigation.<sup>124</sup>

### C. The Forfeiture Complaint

While the raid was underway, the United States Attorney for the Northern District of California filed a civil forfeiture complaint seeking the return of five parcels of real estate Susan Su had allegedly purchased with the proceeds in a scheme to defraud the Department of Homeland Security (“DHS”).<sup>125</sup> The forfeiture complaint The Government sought to seize \$3.2 million worth of property that the complaint alleges was paid for with illegal proceeds from TVU’s fraudulent scheme.<sup>126</sup> The forfeiture complaint further alleged that TVU has been a “sham university” since its inception and that Su and others used TVU to facilitate foreign nationals in illegally acquiring student immigration status that authorized them to remain in the United States.<sup>127</sup> As a result of this fraudulent scheme, in the brief time since 2009 when TVU obtained DHS approval, Su and TVU have “made millions of dollars in tuition fees for issuing these visa related documents which enable foreign nationals to obtain illegal student immigration status.”<sup>128</sup>

Significant factual detail about the alleged fraudulent scheme perpetrated by Su and TVU is contained in the forfeiture complaint. One of the more notable allegations of fraud pertained to TVU’s attempt to secure initial approval to admit foreign students on F-1 visas. For instance, because TVU is an unaccredited school, it must provide evidence to DHS that at least three accredited colleges or universities will accept transfer credits from TVU. The forfeiture complaint alleged that Su sent the

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123. Marnette Federis, *Update: Federal Complaint Calls Private College in Pleasanton a Sham*, PLEASANTON PATCH, Jan. 20, 2011, <http://pleasanton.patch.com/articles/update-federal-complaint-calls-private-college-in-pleasanton-a-sham>.

124. Karin Fischer, *U.S. Inquiry Into ‘Sham University’ Creates Friction With India*, CHRON. HIGHER EDUC., Feb. 2, 2011, <http://chronicle.com/article/US-Inquiry-Into-Sham/126198/>.

125. Complaint, *supra* note 1, at 2.

126. *Id.* at 14–18. The specific property identified includes: (1) A condominium valued at \$80,000; (2) two office suites worth a combined value of \$550,000; (3) a 2,600-square-foot residence purchased in 2010 for \$825,000; and (4) a \$1.8 million, 6,400-square-foot home.

127. Notice of Intent, *supra* note 108, at 2.

128. Complaint, *supra* note 1, at 2.

authorities three articulation agreements from accredited colleges, each of which stated that a particular school would accept academic credits earned at TVU. Reports indicate that Su claimed the agreements were with San Francisco State University, Central Florida University and University of East Western Medicine.<sup>129</sup> A subsequent ICE investigation revealed that at least two of those accredited colleges never agreed to accept TVU credits in the past and did not agree to accept TVU's credits in the future.<sup>130</sup> Without such approval from three accredited colleges or universities, DHS would not have approved TVU's I-17 application and TVU would not have been permitted to admit students on F-1 visas. Accordingly, the forfeiture complaint seeks return of the tuition proceeds of TVU's scheme to defraud.

The forfeiture complaint also revealed additional details about the ICE investigation into TVU's practices. For instance, in reviewing TVU's SEVIS records, it became apparent that TVU was grossly over capacity in the number of foreign students it was approved to educate. The DHS site visit as part of the approval process placed F-1 student capacity at 30 students.<sup>131</sup> Despite this limit on international student capacity, SEVIS records showed that TVU had 11 active F-1 students by May 2009, 75 by September 2009, 447 by January 2010, and 939 by May 2010.<sup>132</sup> In 2010, more than 95% of the students in active F-1 status were citizens of India.<sup>133</sup>

Finally, the forfeiture complaint contained allegations that Su impermissibly issued Forms I-20 to students that had been terminated in SEVIS.<sup>134</sup> As part of an undercover operation in June of 2010, ICE provided a witness with written information for two foreign nationals whose status had been terminated in SEVIS.<sup>135</sup> The witness subsequently told President Su that he had two friends who were seeking admission to TVU and had Forms I-20 reflecting their admission.<sup>136</sup> Su allegedly agreed and signed two Forms I-20 in the name of another DSO at TVU.<sup>137</sup> The following month, the witness met with Su again, and paid Su \$2,000 to activate the status of the two students for whom Su signed the Forms I-20.<sup>138</sup> TVU then subsequently activated the status of both students in

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129. Erica Perez, 'Sham University' Board Chair Faced Allegations Before, CAL. WATCH, Feb. 2, 2011, <http://californiawatch.org/dailyreport/sham-university-board-chair-faced-allegations-8437>.

130. *Id.*

131. Complaint, *supra* note 1, at 9.

132. *Id.* at 13.

133. *Id.* at 9.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Complaint, *supra* note 1, at 10.

SEVIS on July 27, 2010.<sup>139</sup> The information entered in SEVIS reflected that both students were enrolled in Ph.D. programs.<sup>140</sup>

#### D. SEVP and The Notice of Intent to Withdraw

The Notice of Intent to Withdraw is the culmination of an investigation by DHS into the educational practices of TVU.<sup>141</sup> In September of 2009, SEVP was made aware of a suspicion that TVU exclusively offered online courses, prompting further investigation into TVU and its educational practices. After an extensive investigation into the school in November of 2010, the Homeland Security Investigations (HSI) Office of the Special Agent in Charge, San Francisco, provided SEVP information regarding the school's alleged violations of SEVP regulations.<sup>142</sup> On January 19, 2011, U.S. Immigrations and Customs Enforcement delivered to TVU and President Su a "Student and Exchange Visitor Program Notice of Intent to Withdraw" alleging numerous violations of federal regulations.<sup>143</sup> TVU immediately lost its ability to enroll foreign students.<sup>144</sup>

The Notice of Intent raised eight issues regarding alleged violations of federal regulations. Based on these alleged violations, and pursuant to 8 C.F.R. § 214.4(a)(2) which authorizes SEVP to withdraw its certification of a school for the attendance of nonimmigrant students "if the school or school system is determined no longer be entitled to certification for any valid and substantive reason," TVU's Active student status was terminated. The eight issues can be summarized as follows: First, the school failed to maintain hundreds of student records by providing the same address at which none of the students live. Second, TVU failed to terminate students who had fallen out of Active status and notify SEVIS of changes in student records. Third, TVU authorized Curricular Practical Training ("CPT") for students outside of their major area of study, effectively issuing false certifications for work authorization. Fourth, TVU permitted students to serve as school instructors at non-educationally affiliated sites. Fifth, TVU failed to submit the school's Form I-17. Sixth, TVU did not submit statements of Designated School Officials ("DSOs"). Seventh, TVU impermissibly issued Forms I-20 to students not enrolled in full courses of study. Eighth, and finally, TVU failed to notify SEVIS of material changes to its curriculum, school location, degrees available, and research requirements. Although some of these violations might seem like minor compliance issues at first glance, a closer look at the details alleged in the Notice of Intent, if proven, reveal an outrageous picture of an entity that

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139. *Id.*

140. *Id.*

141. Notice of Intent, *supra* note 108, at 2.

142. *Id.*

143. *Id.* at 2–14.

144. Schena, *supra* note 119.

looks more like a fraudulent business and less like an institution of higher learning.

TVU allegedly failed to keep accurate student records in SEVIS. As stated above, each university that admits F-1 students is required to keep data on where F-1 students reside and report that data to SEVIS. In June of 2010, HSI agents gathered and examined TVU student data from SEVIS. At the time of the data examination, there were 968 TVU students listed as active in SEVIS. Remarkably, 553 of those students (57%) were listed in SEVIS as residing at 555 East El Camino Real,<sup>145</sup> Apartment 415, which HSI agents discovered is a single-unit, two-bedroom residence in Sunnyvale, California.<sup>146</sup> HSI agents interviewed the tenants of the apartment and confirmed that the four tenants residing in the apartment were not TVU students. A subsequent interview with a former TVU employee revealed that he was instructed by school officials to use the 555 East El Camino Real address when processing students in SEVIS in an attempt to conceal the fact that most of the students lived outside of California and did not attend their classes.<sup>147</sup>

TVU allegedly failed to terminate students who had fallen out of active status and notify SEVIS of such a termination.<sup>148</sup> The Notice of Intent identified two students listed as active students who made statements that they never physically attended classes at TVU, even though TVU required full time students to take three courses a semester and federal regulations provide that no more than one of those classes per semester could be conducted online.<sup>149</sup> Related to this violation, TVU also failed to notify SEVP of a change in the physical location of the school within 21 days of the move.<sup>150</sup>

Perhaps chief among the accusations against TVU is the third issue raised in the Notice of Intent: Designated School Officials (“DSOs”) approved students for Curricular Practical Training (“CPT”) that was not directly related to students’ major areas of study.<sup>151</sup> The Notice of Intent is rife with factual details of alleged abuses of what constitutes CPT. For instance, one student, working toward a master’s degree in Health/Health Care Administration/Management was authorized for full-time CPT with a computer science company.<sup>152</sup> Another student whose major area of study was computer science was authorized for CPT with a discount retail store

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145. Notice of Intent, *supra* note 108, at 1.

146. *Id.* at 2–14.

147. For a discussion on how such an abuse could occur under a seemingly comprehensive system of government regulation, *see supra* Section II and *infra* Section III.H.

148. Notice of Intent, *supra* note 108, at 2.

149. *Id.*

150. 8 C.F.R. § 214.3(h)(3) (2011).

151. *Id.* at § 214.2(f)(10); *see also* Notice of Intent, *supra* note 108, at 6.

152. Notice of Intent, *supra* note 108, at 6.

located in a mall in Alexandria, Virginia.<sup>153</sup> One student earning a Master's degree in Business Administration and Management was authorized for full-time CPT at "High Life," a tobacco shop in Houston, Texas.<sup>154</sup> In another instance, a student's CPT was approved by TVU's Department of Computer Science and Engineering, even though the student's major area of study was Business Administration, Management and Operations.<sup>155</sup> Another student whose major area of study was Health/Health Care Administration/Management was authorized for full-time CPT at a 7-Eleven in North Plainfield, New Jersey.<sup>156</sup> A student enrolled in a doctorate degree level program and majoring in Health/Health Care Administration/Management was authorized for full-time CPT with an IT consulting business in Iselin, New Jersey.<sup>157</sup> Finally, another student enrolled at the school as a doctoral candidate studying Health/Health Care Administration/Management was authorized for full-time CPT at Dillard's Inc., a retail store in Murray, Utah.<sup>158</sup> The Notice of Intent continued to allege that because TVU authorized students for practical training that was not directly related to the students' major area of study, the school was subject to withdrawal.

TVU also allegedly employed F-1 students as faculty members in violation of 8 CFR 214.2(f)(9)(i). One student admitted on an F-1 visa was authorized for full-time CPT training with a company in Michigan; the student was also listed on the school's website as the teacher for "EE350 Nanotechnology" and "ME311A Computer-Aided-Design with AutoCAD I." As such, the Notice of Intent concluded that "the teaching employment is not being performed on the school's premises or at an off-campus location which is educationally affiliated with the school in violation of 8 CFR 214.2(f)(9)(i)." Similarly, students participating in full-time CPT in Delaware, Iowa, Utah, Massachusetts, Michigan, and Illinois were also listed as instructors in the TVU catalog.<sup>159</sup> The Notice of Intent also alleged that the DSOs at TVU provided uncertified school employees with access to SEVIS and impermissibly delegated the issuance of Forms I-20 in violation of 8 CFR 214.3(l)(1).<sup>160</sup>

TVU similarly failed to provide SEVP paper copies of Form I-17 bearing the names, titles and signatures of TVU's DSOs as required by 214.3(l)(2).<sup>161</sup> More specifically, the Notice of Intent alleged that a former

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153. *Id.*

154. *Id.* at 6–7.

155. *Id.* at 7.

156. *Id.*

157. *Id.* at 7–8.

158. *Id.* at 8.

159. *Id.* at 9–10. Such a violation would also subject TVU to withdrawal. *See* 8 C.F.R. § 214.4(a)(2)(vi) (2011).

160. Notice of Intent, *supra* note 108, at 10.

161. *Id.* at 10–11.

employee not designated as a DSO stated that his responsibilities included processing applications for prospective students and creating Forms I-20 in SEVIS for these individuals.<sup>162</sup> The sixth issue raised in the Notice of Intent, closely related to the fifth issue, alleged that TVU failed to provide statements from any school official not designated as a DSO that they are familiar with and will abide by the regulations governing nonimmigrant students.<sup>163</sup>

The other major allegation in the Notice of Intent is articulated in the seventh issue, wherein the Government alleged that “SEVP believes a vast majority of nonimmigrant students enrolled at TVU are not enrolled for full courses of study.”<sup>164</sup> Several former students gave statements that they never physically attended classes at the school and that while the school offers online instruction, the students were not required to participate in the online instruction.<sup>165</sup> Of the 1,555 Active students, only 53 (3.4%) lived within commuting distance of TVU.<sup>166</sup> Several students made statements that the school issued a Form I-20 to a student who would not be enrolled in a full course of study in violation of 8 CFR 214.4(a)(2)(xi).<sup>167</sup> The significance of this alleged violation cannot be understated. If the allegations are later proven true, the very purpose for which TVU claimed these students were in the United States, namely education, was indeed false.

Finally, TVU also allegedly failed to notify SEVP of material changes to the school’s curriculum and the scope of the institution’s offerings.<sup>168</sup> As previously discussed, one such alleged violation was the failure to notify SEVP of a change in the physical address of the school.<sup>169</sup> Another significant alleged violation involved TVU’s issuance of Forms I-20 to nonimmigrant students to enroll in programs under TVU’s School of Medicine.<sup>170</sup> At the time of SEVP certification, the school’s catalog and the school’s Form I-17 did not indicate that programs were offered in the Health Sciences field.<sup>171</sup> Despite this inadequacy, 178 students were enrolled in master and doctoral level programs through the School of

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162. *Id.* at 11.

163. *Id.* at 11–12; *see also* 8 C.F.R. § 214(l)(3) (prohibiting an individual from processing applications for prospective students and creating Forms I-20 in SEVIS without training, knowledge of SEVIS regulations, or SEVP approval).

164. Notice of Intent, *supra* note 108, at 12–13.

165. *Id.* at 13.

166. *Id.*

167. *Id.*

168. *Id.* at 14.

169. *Id.* at 15. The school has 21 days from the date of the change to report the change as required by 8 C.F.R. § 214.3(h)(3) to update SEVIS accordingly. *See also* 8 C.F.R. § 214(g)(2)(i) (2011).

170. Notice of Intent, *supra* note 108, at 15.

171. *Id.*

Medicine at TVU.<sup>172</sup> Accordingly, because TVU failed to immediately notify SEVP of the addition of the programs, the school failed to notify SEVP of material changes under 8 CFR 214.3(f)(1) and 214.3(h)(3)(iii).<sup>173</sup> The school also made significant changes to its curriculum that permitted students to participate in substantial amounts of CPT, without notifying SEVP of material changes to its curriculum regarding its research requirements, degree completion requirements, and CPT program.<sup>174</sup> There are also additional allegations that numerous students participated in CPT for up to six trimesters.<sup>175</sup>

The Notice of Intent concluded by noting that pursuant to its power under 8 CFR 214.4(i)(4), SEVP was notifying TVU that, “[TVU’s] Active status nonimmigrant students have been terminated in SEVIS and [TVU’s] Initial status nonimmigrant students have been canceled in SEVIS.”<sup>176</sup> SEVP also terminated TVU’s PDSO and DSOs’ access to SEVIS.<sup>177</sup>

#### E. Su’s Response

President Su issued a written response to the Notice of Intent that generally denied the allegations of misconduct and pointing toward the success TVU experienced since its inception in 2008. Su’s response contained numerous spelling and grammatical mistakes, as is evidenced by her statement on the final page of the letter that, “TVU’s academic program, class content, degree curriculum are [sic] keep improving and updating almost in daily, weekly bases [sic] . . . .”<sup>178</sup> In response to the eight issues raised by SEVP, Su responded that “[s]ome are misunderstandings; some are our administrative system ignorance and part of the growing pain and have been working on to resolve.”<sup>179</sup> Su also pointed toward TVU’s rapid growth as the source of the alleged administrative errors.<sup>180</sup> In an apparent attempt to contest some of the allegations about noncompliance with several federal regulations regarding

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172. *Id.* at 16.

173. *Id.*

174. Notice of Intent, *supra* note 108, at 16–17.

175. Notice of Intent, *supra* note 108, at 16–18. “Permitting such curricular changes represents a material change in Tri-Valley University’s curriculum. To date, Tri-Valley University has not notified SEVP of these changes and is therefore in violation of 8 C.F.R. § 214.3(f)(1) and subject to withdrawal per 8 C.F.R. § 214.4(a)(2)(xix).” *Id.*

176. *Id.* at 19.

177. *Id.*

178 Letter from President Su responding to SEVP’s decision to withdraw TVU’s SEVIS approval, *available at* <http://www.globallawcenters.com/pdfs/34479.pdf> (last visited May 13, 2012).

179. *Id.*

180. *Id.*

class attendance and instructor eligibility, Su pointed toward the technology and method of instruction implemented by TVU.<sup>181</sup>

#### F. Criminal Indictment Against Susan Xiao-Ping Su

Over three months after the initial raid on TVU and related properties, criminal proceedings commenced against Susan Su. On April 28, 2011, a federal grand jury in Oakland, California indicted Susan Xiao-Ping Su in a 33-count indictment alleging, *inter alia*, conspiracy to commit visa fraud, visa fraud, wire fraud, money laundering, alien harboring, and making false statements.<sup>182</sup> Soon thereafter, on Monday May 2, 2011, Susan Xiao-Ping Su was arrested on federal charges of fraud, money laundering, and harboring undocumented immigrants.<sup>183</sup> Su made her initial appearance in a federal court in Oakland on May 2, 2011 and was released that same day on \$300,000 bond.<sup>184</sup> On November 18, 2011, Su entered a plea of not guilty.<sup>185</sup>

The gravamen of the indictment alleges that Susan Su engaged in a two-year scheme to defraud the Department of Homeland Security (DHS) by submitting fraudulent documents in support of TVU's application for approval to admit foreign students and, upon obtaining approval, fraudulently issued visa-related documents to student aliens in exchange for tuition and fees.<sup>186</sup> Susan Su purportedly carried out this scheme by creating multiple false representations to DHS through TVU's use of SEVIS.<sup>187</sup> Because of her false representations, Su was able to issue student visas without regard to students' academic qualifications or true intent to pursue a course of study at an American university. In exchange for these student visas, Su received substantial tuition and fees.<sup>188</sup> The indictment further alleged that as part of the F-1 visa scheme, Susan Su harbored multiple TVU student-employees to assist her in making the false representations to SEVIS.<sup>189</sup> Also contained in the indictment are allegations that Susan Su participated in multiple money laundering

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181. *Id.*

182. Press Release, Dep't of Justice, *Pleasanton University President Charged in 33-Count Indictment for Student Visa Fraud Scheme* (May 2, 2011), available at [http://www.justice.gov/usao/can/press/2011/2011\\_05\\_02\\_su.charged.press.html](http://www.justice.gov/usao/can/press/2011/2011_05_02_su.charged.press.html).

183. *President of Alleged Sham University to be Arraigned in Federal Court Today*, PLEASANTON PATCH, May 2, 2011, <http://pleasanton.patch.com/articles/president-of-alleged-sham-university-arrested>.

184. Schena, *supra* note 112.

185. *United States v. Su*, Docket No. 4:11-cr-00288 (N.D. Cal, filed Nov. 18, 2011).

186. Press Release, *supra* note 181, at 1.

187. *See Id.*

188. *Id.*

189. *Id.*



transactions totaling over \$3.2 million using the proceeds she derived from the visa fraud scheme.<sup>190</sup> If ultimately convicted, Su could face significant penalties, as Su is charged with federal criminal carrying penalties ranging from one to up to 20 years in prison.<sup>191</sup>

#### G. Other Instances of Visa Fraud

TVU is just one example in what seems to be a growing trend of sham colleges and universities exploiting international students and attempting to take advantage of America's student visa system. In July 2011, federal agents raided University of Northern Virginia (UNV).<sup>192</sup> The school was notified about a temporary blockage from accepting new international students and that it was in jeopardy of losing its ability to accept foreign students.<sup>193</sup> Indeed, even a brief review of news stories within the last ten years reveals various instances of student visa fraud, some committed by institutions, others committed by individuals. In 2004, a former employee of Morris Brown College in Atlanta was sentenced to 37 months in prison for his role in a scheme that resulted in the issuance of more than 50 visas, under the guise that these immigrants would attend college.<sup>194</sup> In 2011, the owner and operator of California Union University was sentenced to a year in prison after pleading guilty to visa fraud and money laundering.<sup>195</sup>

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190. *Id.*

191. Schena, *supra* note 112. The charges against Su include: Wire Fraud, in violation of 18 U.S.C. § 1343, carrying up to 20 years' imprisonment and a \$250,000 fine; Mail Fraud, in violation of 18 U.S.C. § 1341 carrying up to 20 years' imprisonment and a \$250,000 fine; Conspiracy to Commit Visa Fraud, in violation of 18 U.S.C. § 371 carrying up to 5 years' imprisonment and a \$250,000 fine; Visa Fraud, in violation of 18 U.S.C. § 1546(a), carrying up to 10 years' imprisonment and a \$250,000 fine; Use of False Document, in violation of 18 U.S.C. § 1001(a)(3), carrying up to 5 years' imprisonment and a \$250,000 fine; False Statements to a Government Agency, in violation of 18 U.S.C. § 1001(a)(2), carrying up to 5 years' imprisonment and a \$250,000 fine; Alien Harboring, in violation of 18 U.S.C. § 1324(a)(1)(A)(iii), § 1324 (A)(1)(A)(v)(II), and § 1324 (a)(1)(B)(i) carrying up to 10 years' imprisonment and a \$250,000 fine; Unauthorized Access of a Government Computer, in violation of 18 U.S.C. § 1030(a)(3), carrying up to 1 year imprisonment and a \$250,000 fine; and Money Laundering, in violation of 18 U.S.C. § 1957(a), carrying up to 10 years' imprisonment and a \$250,000 fine. Press Release, *supra* note 182.

192. Tom Bartlett, Karin Fischer, and Josh Keller, *Federal Agents Raid Virginia Institution that Draws Many Students from India*, CHRON. HIGHER EDUC., Jan 29, 2011, <http://chronicle.com/article/Agents-Raid-Virginia/128433/>.

193. *Id.*

194. *Morris Brown Employee Sentenced in Visa Scheme Involving Illegal Immigrants*, BLACK ISSUES IN HIGHER EDUC., Sept. 23, 2004, available at [http://findarticles.com/p/articles/mi\\_m0DXK/is\\_16\\_21/ai\\_n6355363/](http://findarticles.com/p/articles/mi_m0DXK/is_16_21/ai_n6355363/).

195. *Owner of Institution Called a Fake University is Sentenced for Visa Fraud*, CHRON. HIGHER EDUC., June 13, 2011, available at <http://chronicle.com/>

Student visa fraud also occurs in the testing phase, as F-1 students are required to pass certain tests prior to obtaining an F-1 visa.<sup>196</sup> Prior to the TVU case, one of the largest instances of institutional student visa fraud occurred at the Florida Language Institute.<sup>197</sup>

#### H. The Inadequacies of the SEVIS System

As noted above, SEVIS is the computerized system that collects and monitors information on the current status of non-immigrant students during their course of study in the United States. Despite its goal of restoring integrity to the immigration system and effectively managing status information on international students,<sup>198</sup> the failures of SEVIS also played a significant role in the injustices that occurred at TVU. Under the current system, each school plays a role in entering information into the SEVIS system and much of the regulation that takes place only occurs after fraudulent practices are reported to ICE or data collected in the system is analyzed and abuses are discovered. This back-end approach to regulation

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[blogs/ticker/owner-of-institution-called-a-fake-university-is-sentenced-for-visa-fraud/33879](http://blogs.ticker/owner-of-institution-called-a-fake-university-is-sentenced-for-visa-fraud/33879).

196. In 2010, Eamonn Daniel Higgins allegedly collected thousands of dollars from foreign nationals in exchange for taking exams on behalf of the foreign nationals at 10 southern California community colleges and universities. Higgins and his accomplices, over a seven year period, allegedly collected as much as \$1,500 per student per exam for passing grades on English proficiency exams, writing assessments, English and Math college placement tests, final exams and other college coursework the students needed to obtain their F-1 student visas or to stay current on their visas. In April of 2010, Higgins pleaded guilty to a charge of conspiracy to commit visa fraud. Later that year, in November 2010, Higgins was sentenced to five months in federal custody and five months of home confinement. *See, e.g.,* Anna Gorman and My-Thuan Tran, *Man Charged With Leading Student Visa Fraud Operation*, LOS ANGELES TIMES, Mar. 8, 2010, available at <http://articles.latimes.com/print/2010/mar/08/local/la-me-fake-student9-2010mar09>; *see also* Salvador Hernandez, *Man Sentenced in Student-Visas Scheme*, THE ORANGE COUNTY REG., Nov. 2, 2010, available at <http://www.ocregister.com/articles/higgins-273942-students-scheme.html#>.

197. *Florida Student Visa Fraud: Florida School Owner Gets Prison Time for Visa Fraud*, ASSOCIATED PRESS, Aug. 31, 2010, available at <http://www.wctv.tv/home/headlines/101866343.html>. Before the case of Tri-Valley University, one of the largest cases of student visa fraud in higher education involved The Florida Language Institute. In August 2010, the owner of Florida Language Institute, Lydia Menocal, was sentenced to 15 months in prison after he pleaded guilty to conspiring to make false statements on immigration documents. *Id.* Additionally, Menocal's sentence requires her to serve two years of supervised release and pay the United States \$600,000 in profits she made from the conspiracy. *Id.*

198. U.S. Immigration and Customs Enforcement, Fact Sheet: Maintaining Your Immigration Status While a Student or Exchange Visitor, available at <http://www.ice.gov/sevis/SEVISFactSheet.htm> (last visited May 13, 2012).

allows institutions like TVU to engage in fraudulent practices to flourish in the short-term, causing significant harm to international students. A system that recognizes, before students enter the United States, the limitations of a school's capacity to host international students will better serve international students and the United States system of higher education.

### I. The Political Impact of Student Visa Fraud

The global political impact of cases like TVU and the other instances of student visa fraud discussed in the preceding section cannot be understated. Soon after the raid, news accounts of Indian students being detained and outfitted with ankle-monitoring devices led to protests in the streets of India.<sup>199</sup> The Official Spokesperson for the Indian Ministry of External Affairs issued a press briefing on January 29, 2011, addressing "questions on the issue, including the tagging of some of the students."<sup>200</sup> The press briefings called on the United States to treat the former TVU students fairly—allowing those who wished to return to India to do so and those who wished to adjust their immigration status also be permitted to do so.<sup>201</sup> In an effort to clean up the political fallout of the TVU case and to discuss the fate of former students, Secretary of State Clinton met with Indian delegates, including External Affairs Minister S.M. Krishna in February 2011.<sup>202</sup> After the meeting, it was reported that Clinton gave Krishna her assurances that she would help the Indian students from TVU who had lost their visa status.<sup>203</sup>

Highlighting the pressing need to address the issue of sham institutions, four Senators wrote to the Director of United States Citizenship and Immigration Services ("USCIS") and the Assistant Secretary of Homeland Security.<sup>204</sup> The letter identified the problem as "the illegal use of student visas by foreign nationals to attend 'sham universities'" and pointed toward

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199. Schena, *supra* note 112.

200. Press Briefing, Indian Ministry of External Affairs (Jan. 29, 2011), available at <http://mea.gov.in/mystart.php?id=530317121>.

201. *Id.*

202. Schena, *supra* note 112.

203. *Hillary Clinton Assures Help to Duped Tri-Valley Students*, THE ECON. TIMES, Feb. 13, 2011 (Delhi), available at [http://articles.economictimes.indiatimes.com/2011-02-13/news/28540103\\_1\\_tri-valley-university-tvu-students-indian-students](http://articles.economictimes.indiatimes.com/2011-02-13/news/28540103_1_tri-valley-university-tvu-students-indian-students).

204. See Letter from Senators Dianne Feinstein, Claire McCaskill, Jon Tester, and Charles Schumer to Alejandro Mayorkas, Director of U.S. Citizenship and Immigration Services, and The Hon. John T. Morton, Assistant Sec. of Homeland Security (March 6, 2011), available at [http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord\\_id=90f4b32c-5056-8059-76e2-3ba1c01a09e8&Region\\_id=&Issue\\_id=](http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord_id=90f4b32c-5056-8059-76e2-3ba1c01a09e8&Region_id=&Issue_id=).

TVU as the latest example.<sup>205</sup> The letter identified three interests America has in operating a legitimate student visa program. First, framing the issue in economic terms, the Senators noted that the student visa program provides American colleges and universities with “much needed capital from international students paying full tuition.”<sup>206</sup> Second, a legitimate student visa program gives America the opportunity to “educate the world’s future leaders about American values such as freedom, democracy, and free-enterprise economy.”<sup>207</sup> Third, the Senators pointed out that the presence of fraud among some colleges and universities damages the credibility of legitimate colleges and universities admitting international students.<sup>208</sup> Taking a proactive approach to the problem, the Senators called on USCIS and Homeland Security to formulate high-risk factors for student visa fraud and conduct site visits to every Student Exchange Visitor Program (“SEVP”) in the nation.<sup>209</sup> Additionally, the letter called for harsher penalties for those operating for-profit sham universities.<sup>210</sup>

Senator Diane Feinstein and Senator Clair McCaskill also wrote a letter to Gene Dorado, Comptroller General of the United States, asking the Government Accountability Office (“GAO”) to undertake a review of the Student Exchange Visitor Program (“SEVP”).<sup>211</sup> The letter pointed out that there are over 10,000 schools currently approved to accept nonimmigrant students and exchange visitors to study at their institution and noted an increasing concern about the number of these schools that operate “not for educational purposes but instead solely to manipulate immigration law to admit foreign nationals into the country.”<sup>212</sup> The letter asked the GAO study to address whether ICE has appropriate procedures in place to detect fraud during the certification process and whether measures exist to detect fraud once approved schools begin accepting foreign students.<sup>213</sup> Finally, the letter asked what mechanisms are currently in place so that ICE can communicate with the Department of State and United States Citizenship and Immigration Services regarding the number of students a certified school can reasonably admit to ensure that only an appropriate number of visas are issued for each certified school.<sup>214</sup> The subject continues to garner

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205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. Letter from Senators Dianne Feinstein and Claire McCaskill to The Hon. Gene L. Dorado, Comptroller General of the U.S. (Mar. 4, 2011), *available at* [http://www.feinstein.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=1bf2e7fb-6bca-48c2-abee-beeb92719987](http://www.feinstein.senate.gov/public/index.cfm?a=Files.Serve&File_id=1bf2e7fb-6bca-48c2-abee-beeb92719987).

212. *Id.*

213. *Id.*

214. *Id.*

congressional attention, as Senator Charles Grassley of Iowa, recently called for reform of student visa regulations during a subcommittee hearing on immigration.<sup>215</sup>

The TVU case continues to appear in news outlets in India. On October 22, 2011 it was announced in that 435 students were approved to transfer to another institution and 145 had been denied.<sup>216</sup> At the same time, Secretary Clinton stated that they are expanding education about diploma mills to help protect students and families.<sup>217</sup> On November 8, 2011 it was reported that the remaining 1200 students would have to return to India.<sup>218</sup>

#### IV. IMPLICATIONS AND PROPOSALS

A careful review of the F-1 student visa system, especially in light of the TVU case, reveals three major problems with the current system. First, the ability of the United States to be a high-quality educational provider is damaged by low-quality and fraudulent institutions. Second, significant government resources are spent investigating and prosecuting fraudulent institutions, instead of preventing the fraud before it occurs. Third, international students are not protected from predatory and fraudulent institutions. Instead, these students are often treated more like criminals and less like victims. To strengthen America's standing in the international community, prevent fraud before it happens, and afford better protection to international students studying in the United States, reform is necessary. With these problems in mind, we offer three proposals for reform.

Simply, the presence of fraudulent institutions in the American system of higher education damages the legitimacy of the system as a whole. The financial impact of international students studying in the United States is estimated to be an \$18.8 billion dollar industry.<sup>219</sup> In addition to the positive financial impact international students have on the American economy, a system of higher education devoid of fraudulent institutions

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215. *U.S. Senator Calls for Tougher Student-Visa Regulations*, CHRON. HIGHER EDUC., July 29, 2011, available at [http://chronicle.com/blogs/ticker/u-s-senator-calls-for-tougher-visa-regulations/34946?sid=at&utm\\_source=at&utm\\_medium=en](http://chronicle.com/blogs/ticker/u-s-senator-calls-for-tougher-visa-regulations/34946?sid=at&utm_source=at&utm_medium=en).

216. *Tri-Valley Case: U.S. Approves Transfer of 435 Indian Students*, BUS. STANDARD (Delhi), Oct. 22, 2011, available at <http://www.businessstandard.com/commodities/news/tri-valley-case-us-approves-transfer435-indian-students/149535/on>.

217. *Id.*

218. *Doors Shut For Tri Valley Varsity Students, Likely To Return Home*, THE TIMES OF INDIA (Delhi), Nov. 8, 2011, available at [http://articles.timesofindia.indiatimes.com/2011-11-08/hyderabad/30372865\\_1\\_tri-valley-university-visa-fraud-admissions-in-other-universities](http://articles.timesofindia.indiatimes.com/2011-11-08/hyderabad/30372865_1_tri-valley-university-visa-fraud-admissions-in-other-universities).

219. *International Students Contribute \$18.8 Billion to U.S. Economy*, NAFSA, <http://www.nafsa.org/publicpolicy/default.aspx?id=23158> (last visited on May 11, 2012).

improves America's reputation in the global society. Moreover, the reliability of legitimate institutions increases when members of the international community are assured that fraudulent institutions are prosecuted and deterred.

When regulations are poorly drafted and certification mechanisms are inadequate, significant government resources must be spent to uncover and prosecute fraudulent practices. To be sure, enhancing the regulatory environment is difficult for a large and complicated system of proprietary education. Many institutions do not keep good records related to faculty qualifications or student learning, which makes transparency impossible. Since 2007, there have been several attempts at creating stronger regulations, primarily directed toward for-profit institutions.<sup>220</sup> Each time, however, these stronger regulations have been removed before the bills were signed into law.<sup>221</sup> In light of continued fraudulent activity related to diploma mills, legislation can enhance the distinguishing characteristics of legitimate and illegitimate for-profit institutions.

There are several ways that regulatory law can address the problems highlighted by the TVU case. For instance, some have suggested that state attorneys general can identify and address diploma mills by filing suits against vendors under deceptive trade practice laws, resulting in revocation of the fraudulent institution's tax-exempt status.<sup>222</sup> Accrediting agencies can also exclude institutions that engage in questionable practices.<sup>223</sup> Although accrediting and licensing agencies, states, and the federal government all play a role in regulating education, there are inadequacies that relegate some students to a disadvantaged position (e.g., poor or international). Indeed, it has been noted that:

The states' ability to address the problem through private or public law is severely hampered by the inadequacies of the legal doctrines under which such suits are brought, and nonfederal entities—state licensing agencies and accrediting agencies—are unable to effectively deal with the problem. Although the U.S. Department of Education has some weaknesses, it is best positioned to address the problem of proprietary schools' predatory practices if it can compensate for its weakness in detecting, deterring, and remedying fraudulent proprietary school misrepresentations.<sup>224</sup>

Students are often the victims of low quality education providers. In some cases, lawsuits have been filed against these illegitimate

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220. See Cooley, *supra* note 58, at 522.

221. *Id.* at 522–23.

222. See, e.g., *id.* at 524.

223. See *id.* at 516–24.

224. Patrick F. Linehan, *Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations*, 89 GEO. L.J. 753, 789 (2001).

institutions.<sup>225</sup> In other cases, as in the case with TVU, international students' rights are more limited and they often face the risk of deportation. Recognizing the unique harm caused to individuals and society by diploma mills, one author advocated that Congress should grant injured students a private right of action.<sup>226</sup> This sort of legal action would need to navigate around the evidentiary pitfalls of state law rights of action and instead give the DOE a right of action to sue proprietary school for frauds against students.<sup>227</sup> This would enhance the ability of private action to be an enforcement tool.<sup>228</sup> Lack of regulation becomes not only an issue of America's global positioning as a high quality provider of education, but also an issue of justice for the students. Given the number of legitimate and highly functioning institutions already in operation, there are two ways to enact tighter regulations without creating unnecessary burdens on the regulators or legitimate institutions: 1) Direct greater attention to for-profit institutions, and 2) Create tighter restrictions on approval to offer a degree, as there are few diploma mills with a long degree-granting history. Ultimately, a more effective framework would (A) regulate the certification of schools that enroll international students, (B) monitor the school's compliance with federal regulations, and (C) redefine the definition of curricular practical training. With these considerations in mind, we offer a three-prong approach to improving the current regulatory system.

#### A. Improve the Certification Process

Improving the initial certification process is an apparent first step in improving the SEVIS system. As noted in the review of literature on the student visa system, there are a variety of requirements (some of which are more stringent than others) necessary for higher education institutions to gain approval to admit students with an F-1 visa.<sup>229</sup> Institutions that lack regional accreditation and do not confer recognized degrees must submit evidence that course credits are accepted unconditionally by at least three accredited or public institutions of higher learning.<sup>230</sup> The evidence can take the form of letters or articulation agreements.<sup>231</sup> This information clarifies the evidentiary requirements in Title 8, Code of Federal regulations, Section 214.3(c) for adjudication of Form I-17.<sup>232</sup> This particular requirement is of interest in the TVU case because, according to

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225. Tamar Lewin, *For-Profit College Group Sued as U.S. Lays Out Wide Fraud*, N.Y. TIMES, Aug. 8, 2011, at A1.

226. Linehan, *supra* note 224, at 789.

227. *Id.* at 789–793.

228. *Id.*

229. *See generally* Part II, *supra*.

230. 8 C.F.R. § 214.3(c) (2011).

231. *Id.*

232. *Id.*

allegations in the forfeiture complaint, two of the three articulation agreements submitted to DHS were allegedly forged, although Su countered that ICE did not contact the right personnel at the institutions.<sup>233</sup>

The subsequent ICE investigation began due to the rapid increase of students at TVU (11 to 939 in one year, and half of whom were listed as residing in a single apartment).<sup>234</sup> The ICE investigation was extensive, as it included: witnesses with covert audio recording devices, sting operations to record President Su verifying visa status with airport officers over the phone, and in-depth evaluations of bank records.<sup>235</sup> In addition, ICE found that at least two of three articulation agreements included with TVU's I-17 petitions were false, and officials at those universities verified that they have not accepted any credits from TVU and have no agreement to do so in the future.<sup>236</sup> According to the Forfeiture, "Without such evidence from three accredited colleges or universities, DHS would not have approved TVU's I-17 application, and TVU would not have been authorized to issue the visa related documents to any enrolled foreign students."<sup>237</sup> Furthermore, the Forfeiture indicates that DHS relied on the evidence TVU submitted and was "unaware" that two of the agreements were false, which led to their approval.<sup>238</sup> Although ICE and DHS are two separate departments, it is clear that a simple verification of the articulation agreements could have prevented TVU from operating as a diploma mill. If TVU were prevented from engaging in fraudulent operations, illegal student visas would not have been issued, international students would not have been deported, and the extensive investigation by ICE would have been unnecessary.

There are two approaches to solving the problems associated with the articulation agreement rule. First, when reviewing I-17 forms from unaccredited institutions, DHS or SEVIS should verify that the schools purporting to accept transfer credits from the unaccredited institution did in fact agree to an articulation agreement. As approval forms can be easily fabricated and do not actually indicate rigor or legitimacy, verification seems to be an important component. International students also rely upon the SEVIS-approved list when choosing schools. As a result, SEVIS approval is in some way an indicator of quality to potential visiting students. In addition, this would not put any additional burden on institutions with a long history of high quality education. Allocating resources for verification of acceptance of credits or articulation would be miniscule compared to the resources required for an investigation. These

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233. Complaint, *supra* note 1, at 8.

234. *Id.* at 9.

235. *Id.* at 9–11.

236. *Id.* at 8.

237. *Id.*

238. *Id.*



concerns are also addressed in the next proposal about ongoing evaluation of institutions approved to admit students with F-1 visas.

A second, and perhaps more radical, approach would be to eliminate the articulation agreement rule altogether. The TVU case elicits a larger question about the appropriateness of even considering three letters as evidence of legitimacy. It seems that accrediting bodies (e.g. WASC, SACS) would be better equipped to evaluate a school's legitimacy than three schools strategically selected by the proprietary institution. Although accrediting bodies have their own set of challenges, they are better equipped to evaluate whether a particular institution meets a certain set of goals and standards. Continuing to permit certification through the "three articulation agreement" rule could at least hypothetically permit a diploma mill to find three institutions that perform little, if any, due diligence before agreeing to accept transfer credits. Indeed, schools that agree to accept transfer credits seem to have an institutional and financial incentive to do so, as partnership could eventually lead to an increase in transfer students. Accrediting bodies, on the other hand, are more detached and have little incentive to approve a school that does not meet educational benchmarks. Accordingly, a first step in improving the student and exchange visitor program is for the government to strictly monitor compliance with the articulation agreement rule or get rid of the articulation agreement rule altogether and turn over that aspect of the process to regional accrediting bodies.

#### B. Improve the Monitoring Process

Although an improved certification process would prevent some fraudulent practices, it is also clear that there must be improvements to the monitoring system once institutions are certified to host F-1 students. In general, for institutions that desire federal aid, regional accrediting agencies have the greatest amount of leverage in regulating higher education. These agencies operate in different regions of the country to continually evaluate institutions that are working to maintain or affirm their accredited status. Due to the ongoing nature of the evaluation process, an accredited institution that implements questionable or fraudulent practices can lose its accreditation through an ad-hoc visit.<sup>239</sup> An institution's status can also fail accreditation reaffirmation due to declining quality or stability. When institutions do not obtain federal aid, they can circumvent these processes. In sum, the creation of an agency-like entity to monitor unaccredited

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239. *Cf.* 8 C.F.R. § 214.3(h)(1)(ii) (2011). Currently, when SEVP will conduct a site visit for a school petitioning to receive F-1 students, "SEVP will contact the school to arrange the site visit. The school must comply with and complete the visit within 30 days after the date SEVP contacts the school to arrange the visit." *Id.*

institutions that enroll foreign students beyond the certification process would be beneficial.

Regulation, however, is often seen as a barrier to innovation.<sup>240</sup> Yet, there are several postsecondary sectors that operate under more rigorous standards that are still able to innovate. Community and technical colleges and other flexible and innovative institutions offer legitimate opportunities for learning. With this sector in place, it calls into question the need for small proprietary institutions that do not seek to deliver a level of quality that could be covered by regional accreditation. With this in mind, there may be good reason to increase capacity for ongoing monitoring of institutions that are able offer F-1 visa, but also to increase the rigor required to achieve the privilege of offering an education to visiting students.

Furthermore, compliance with SEVIS rules is often a lengthy, time-consuming and costly endeavor. SEVIS continues to frustrate college employees responsible for complying with the countless rules and regulations.<sup>241</sup> Near continuous change spates the system and challenges the staff required to make the system work. The expectations and requirements to remain in good SEVIS status can confuse students and administrators alike. SEVIS accomplished centralization of the control and monitoring of international students and scholars. However, many hold the opinion that security concerns have eroded the status and leadership of U.S. higher education.<sup>242</sup>

Improving the monitoring process should be accompanied by a set of standards that balance national security (the primary objective of SEVIS), the burden of compliance, and the overall health of the higher education system. Fraudulent practices thrive by attracting international students who are unaware of the legitimacy of an institution. Although the primary purpose of SEVIS is national security, SEVIS can also play an important role in fraud prevention. For instance, SEVIS could use the centralized data system to flag new and unaccredited institutions and to watch for large influxes of students or other types of conspicuous patterns. This adjustment

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240. See, e.g., REINVENTING HIGHER EDUCATION: THE PROMISE OF INNOVATION (Ben Wildavsky, Andrew P. Kelly, and Kevin Cary eds., 2011).

241. Janet V. Danley *SEVIS: The Impact of Homeland Security on American Colleges and Universities*, NEW DIRECTIONS FOR INSTITUTIONAL RESEARCH, 63 (2010); Kam C. Wong, *Implementing the USA PATRIOT Act: A Case Study of the Student and Exchange Visitor Information System (SEVIS)*, 2006 BYU EDUC. & L.J. 379, 382 (2006); Kristin Bagnato, *Obtaining Student Visas Remains an Endurance Test*, DIVERSE ISSUES IN HIGHER EDUC., <http://diverseeducation.com/article/4485/> (last visited May 13, 2012).

242. The problems and critiques of the SEVIS system and its impact on the ability to recruit the best scholars have been dealt with in other publications. See, e.g., MARK SIDEL, MORE SECURE, LESS FREE? ANTITERRORISM POLICY AND CIVIL LIBERTIES AFTER SEPTEMBER 11 (2004); see also Wong, *supra* note 241.

could be done at no additional regulatory expense on existing and legitimate institutions. Additional monitoring with existing data would only require steps by SEVP to implement thresholds and categories that would trigger investigation. These thresholds could be established with the input of various stakeholders, including university representatives who work with the system on a regular basis. If implemented effectively, such a system could do a great deal to prevent the kind of practices that allegedly occurred at Tri-Valley University. An entity that monitors compliance with federal regulations would ultimately be a benefit to students, the institutions hosting F-1 students, and the United States' standing as a leader in higher education.

### C. Refine the definition of what constitutes Curricular Practical Training

A third step in improving the current system is to redefine what qualifies as CPT and provide some uniformity to CPT across institutions. CPT has been identified as another area within the student visa system and higher education that creates opportunity for fraudulent use. Under the F-1 visa, students are prohibited from working, unless there is a curricular/educational component.<sup>243</sup> If this educational component cannot be verified, students are not supposed to be granted the opportunity to work. As presently stated, this rule leaves much room for interpretation. Legitimate colleges and universities typically interpret the ambiguous rule rather conservatively or self-regulate through extensive approval processes. With increased specificity and clarity, fraud and misunderstanding of the rule might be prevented. For example, CPT could be more stringently defined as a job or internship that is required for class credit or graduation.

As discussed in I.L.C., *supra*, CPT can currently be authorized when it is an "integral part of an established curriculum."<sup>244</sup> One potential revision to CPT would be further define "integral part of an established curriculum" through examples such as limiting CPT to classes where all students in the class are required to complete an internship. To be sure, this might be a harsh solution to combat the current abuses in the system. There is indeed a legitimate argument that the need for work experience can vary from student to student: an MBA student from Peru might benefit from an internship with an American start-up company, while an American MBA student in the same class is better served by a more traditional course of study. By limiting CPT to classes where all students are required to intern with a company, the ability to meet the unique educational needs of each student is hampered. Any detriment of such a proposal, however, is certainly outweighed by the benefit of establishing a uniform and

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243. 8 C.F.R. § 214.2(f)(10)(i) (2011).

244. *Id.*

legitimate CPT system. The purpose of such a revision would be to ensure that institutions implementing CPT knew what was required of them and to protect students with F-1 visas seeking to participate in a learning environment outside the traditional classroom setting. As with all attempts to make learning uniform, regulators must balance meeting the individual educational needs of students against maintaining academic standards that have some degree of uniformity across institutions. There is an especially strong need for uniform standards when instances of fraud have plagued systems with vague standards and weak enforcement mechanisms.

Although increased clarity might reduce the need for conservative interpretations of the CPT rules, greater specificity from the federal government is not typically welcomed.<sup>245</sup> This is the case with respect to the recent gainful employment law.<sup>246</sup> The law specifies that, in order to receive federal aid, most for-profit programs and certificate programs at nonprofit and public institutions must adequately prepare students for gainful employment in a recognized occupation.<sup>247</sup> To meet the gainful employment requirement, institutions must satisfy at least one of the following three metrics: (1) at least 35% of former students are repaying their loans (defined as reducing the loan balance by at least \$1); (2) the estimated annual loan payment of a typical graduate does not exceed 30% of his or her discretionary income; or (3) the estimated annual loan payment of a typical graduate does not exceed 12% of his or her total earnings.<sup>248</sup> Although the regulations apply to certain types of training programs at all institutions, for-profit programs most frequently have students with unaffordable debts and poor employment prospects.<sup>249</sup> Although this level of specificity can be difficult to track, it provides clarity for institutions. Additionally, loopholes that are difficult to regulate or enforce can be eliminated, making it more difficult for institutions to exploit students. Similar to the accreditation process, CPT could also integrate a peer-review component to ensure that applied definitions are consistent with the rule.

## V. CONCLUSION

This study highlighted the connections between regulatory inadequacies and the harm caused to stakeholders—primarily students. Results from the

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245. See Cooley, *supra* note 58, at 523.

246. See Press Release, *Obama Administration Announces New Steps to Protect Students from Ineffective Career College Programs* (June 2, 2011), available at <http://www.ed.gov/news/press-releases/gainful-employment-regulations>.

247. *Id.*

248. *Id.*

249. *Id.*

study indicate that the legal framework utilized to approve institutions to educate international students has several areas of weakness. This study also reiterated that, “for every harm that can be done by the use of or attempt to buy or sell a fraudulent degree, there are individuals who can prevent the realization of that harm.”<sup>250</sup> A more effective framework would improve regulation for the certification of schools that enroll international students, continually monitor institutional compliance with federal regulations, and redefine the definition of curricular practical training. Given that some for-profit institutions have trouble garnering 10% of their revenue from sources other than the federal government, international students become a primary target as a means to meet the threshold and maintain 90% funding from the government. Although non-profit institutions also seek out international students as a source of revenue, the issues around quality are more pronounced with for-profit institutions and diploma mills. The details around the rise and fall of TVU and, more recently, UNV continue to draw attention from other world governments and the United States Congress.

Although TVU and UNV represent extreme scenarios associated with for-profit education, accredited for-profit operations still receive a disproportionate amount of federal aid and have an overrepresentation of students who default on their loans. In spite of these realities, legal attempts to regulate disservice to students, no matter how egregious, are continuously met with resistance.<sup>251</sup> The proposals in this study are designed to better protect visiting students, decrease time and expenses related to investigation and prosecution, and perhaps create a better climate for increasing regulations on for-profits that are considered more legitimate, yet have poor results in learning and employment for their students.

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250. Cooley, *supra* note 58, at 527.

251. Kelly Field, *Judge Sides with For-Profit Colleges in Challenge to ‘State Authorization’ Rule*, CHRON. HIGHER EDUC. (Wash., D.C.), July 12, 2011, available at [http://chronicle.com/article/Judge-Sides-With-For-Profit/128206/?sid=at&utm\\_source=at&utm\\_medium=en](http://chronicle.com/article/Judge-Sides-With-For-Profit/128206/?sid=at&utm_source=at&utm_medium=en).

# THE ETHICAL AND EDUCATIONAL IMPERATIVE OF DUE PROCESS

GARY PAVELA\* AND GREGORY PAVELA \*\*

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*“For the legal order, after all, is an accommodation. It cannot sustain the continuous assault of moral imperatives, not even the moral imperative of ‘law and order’ . . . [The] highest morality almost always is the morality of process.”<sup>1</sup>*

## INTRODUCTION

In 2006, Wendy Murphy (Adjunct Professor of Law at the New England School of Law and a CBS News legal analyst) wrote a law review article titled *Using Title IX’s “Prompt and Equitable” Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to*

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1. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 120, 123 (1975).

*Redress Sexual Assault on Campus.*<sup>2</sup> Readers soon realized that Professor Murphy's reference to "fair proceedings" meant *fairness to the accuser*.<sup>3</sup> As far as the fairness to the accused was concerned, Professor Murphy had a simple legal prescription for private colleges and universities:

As the Supreme Judicial Court of Massachusetts held in *Schaer v. Brandeis University*,<sup>4</sup> accused students are not entitled to due process as a constitutional matter. Obviously, a [private] school is not the government and without state action, there can be no constitutional claim. Even if certain procedures are promised accused students as a matter of school policy of "contract," *there is no basis for a claim that such procedures must be followed* or the accused student may have the right of redress in civilian court. *The simple truth is, there is no right of redress for the accused student because schools are free to punish the student as they see fit without governmental regulations or interference.*<sup>5</sup>

Professor Murphy's due process observation (which we question below) was included in a critique of a 2002 Harvard University policy requiring "independent corroboration" as "a prerequisite to a full investigation and adjudication" of student sexual misconduct complaints.<sup>6</sup> Her views highlight one of the defining characteristics of the contemporary debates about the design of college and university sexual misconduct policies: procedural fairness—stripped of any ethical or educational purpose—is seen by "victim-centered" advocates as an impediment to providing a safe environment on college and university campuses.<sup>7</sup>

The thesis of this article is that due process—broadly defined as an inclusive mechanism for disciplined and impartial decision making—is essential to the educational aims of contemporary higher education and to fostering a sense of legitimacy in college and university policies. Even if due process were not required by law (as it typically is), colleges and universities would want to provide it as a matter of policy. An immediate risk is that persistent internal and external pressure on institutions to lower due process thresholds and to impose mandatory sanctions (initially in sexual violence cases, but possibly moving into other categories of student misconduct as well) will unnecessarily tip the balance of procedural due

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2. Wendy Murphy, *Using Title IX's "Prompt and Equitable" Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007 (2006).

3. *See generally id.*

4. 735 N.E.2d 373, 381 (Mass. 2000).

5. *Id.* at 1009–10 (emphasis added).

6. *Id.* at 1007.

7. *See, e.g., id.* at 1020 ("Simply put, any requirement of 'proof' beyond the word of the victim clearly will place women students at extra risk of sexual violence while potentially excluding from investigation and adjudicatory resolution the most serious of sexual assaults.").

process toward reassertion of greater paternalistic control by college and university administrators. Reassertion of such control—even when disguised by progressive-sounding euphemisms—is precisely the wrong direction for institutions to take as young adults seek to develop and demonstrate new leadership skills and as more older students (including returning veterans) arrive on campus expecting to be treated like adults. Furthermore, consistent with the aims of educational institutions to model ethical behavior expected of others, core due process procedures defined in campus publications should be honored in the same way other enterprises (commercial or otherwise) are expected to keep their stated commitments.

### I. STUDENT CONDUCT AND DUE PROCESS: A HISTORICAL PERSPECTIVE

Our views about the importance of defending core due process protections for students are influenced, in part, by historical accounts of efforts to regulate college and university student behavior going back as far as the middle ages. Those accounts do not reveal any “pre-due process” golden age of student rectitude. More evident is a pattern where rigid, “top-down” student conduct policies enforced with minimal due process created a poisonous “us versus them” (students versus faculty) atmosphere, usually corresponding with widespread incidents of student misconduct and violence. Ignorance of this pattern—and the value of engaging multiple internal constituencies in shaping college and university disciplinary procedures—can do incalculable harm to the future of American higher education.

#### A. Student Conduct and Due Process in European Institutions

One good starting point for a historical perspective on college and university student discipline is a 1495 code of conduct at the University of Paris<sup>8</sup> optimistically called “The Manual of the Perfect Student.” One scholar wrote that:

*The [M]anual of the [P]erfect [S]tudent* lists a great many things that students must *not* do. These include . . . swimming on Monday; . . . falling asleep during mass; . . . beating up children; . . . stirring up trouble; making stupid remarks; destroying trees;

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8. Students attending early European colleges and universities like Paris, Oxford, or Heidelberg were subject to greater regulation than southern institutions, like Bologna. *See generally* CHARLES HOMER HASKINS, *THE RISE OF UNIVERSITIES* 10 (1957) (observing that the great university at Bologna was “emphatically” a “student university, and Italian students are still quite apt to demand a voice in university affairs”). Haskins also wrote that the origins of colleges and universities in the north of Europe—Paris in particular—can be traced to “cathedral schools” run by the church and chartered by the crown. *Id.* at 14–15.



[and] pestering the hangman while he is trying to do his job . . .

Compilations of student conduct rules<sup>10</sup> were not accompanied by detailed due process guarantees<sup>11</sup> familiar to contemporary educators. Students typically lived in a less “legalistic” academic world where they were subject to close control by “masters” (lecturers) who “agreed to protect the student and to be responsible for his behavior.”<sup>12</sup> Evidence from a later era (eighteenth and nineteenth centuries) suggests that procedural informality existed even when students were subject to incarceration. Mark Twain provided an account of student life at the University of Heidelberg in his 1880 book *A Tramp Abroad*.<sup>13</sup> The “university prison” he described—also replicated at other German institutions<sup>14</sup>—had already been in existence for over 100 years:<sup>15</sup>

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9. HUNT JANIN, *THE UNIVERSITY IN MEDIEVAL LIFE: 1179–1499* 32 (2008).

10. The rules could be strict. “Undergraduates at the Sorbonne had to comply with strict regulations designed to preserve discipline and scholarly decorum.” *Id.* at 34. Student excursions off campus, however, seemed to provide greater freedom, since medieval students as “minor clerics” enjoyed certain exemptions from civil law. *See generally* Steven J. Overman, *Sporting and Recreational Activities of Students in Medieval Universities*, 1 *FACTA UNIVERSITATIS*, no. 6, 1999, at 25–33.

11. The absence of detailed “student rights” statements, of course, reflects levels of procedural due process in the surrounding society. *See generally* Kenneth Pennington, *Due Process, Community, and the Prince in the Evolution of the Ordo Iudiciarius*, 9 *REVISTA INTERNAZIONALE DI DIRITTO COMUNE* 9 (1998), available at [http://faculty.cua.edu/pennington/law58/procedure.htm#N\\_1\\_](http://faculty.cua.edu/pennington/law58/procedure.htm#N_1_). (observing “due process,” starting with a rudimentary right to be heard, was eventually grounded on the story of Adam and Eve: “[E]ven though God is omniscient, He too must summon defendants and hear their pleas.” This reasoning was not consistently applied, however. Pennington also observed that “Great Britain, a country that prides itself on its adherence to the principles of due process and in whose courts the community has never lost its place, did not establish the absolute right of defendants to defend themselves in court until the seventeenth and eighteenth centuries . . .” *Id.*

12. JANIN, *supra* note 9, at 35. *See also* LYNN THORNDIKE, *UNIVERSITY RECORDS AND LIFE IN THE MIDDLE AGES* (1975). “Due process” in this context depends upon the quality of relationships, not statements of student rights. There are appealing qualities to such arrangements, but the likely application to large numbers of students in contemporary higher education seems limited.

13. MARK TWAIN, *A TRAMP ABROAD VOL. I* (Samuel Clemens ed., Harper and Brothers 1921) (1880).

14. Carolyn J. Mooney, *How German Students Left Their Mark on a Campus Prison*, *CHRON. OF HIGHER EDUC.*, Mar. 1, 1996, at A55, available at <http://chronicle.com/article/How-German-Students-Left-Their/97185>.

15. Studentenkarzer (The Students’ Prison), HEIDELBERG MARKETING, [http://www.heidelberg-marketing.de/tourism/sights/historical\\_buildings/students\\_prison/index\\_eng.html](http://www.heidelberg-marketing.de/tourism/sights/historical_buildings/students_prison/index_eng.html) (last visited Apr. 28, 2012).

If the offense [by a student] is one over which the city has no jurisdiction, the authorities report the case officially to the University, and give themselves no further concern about it. The University court send[s] for the student, listen[s] to the evidence, and pronounce[s] judgment. The punishment usually inflicted is imprisonment in the University prison. *As I understand it, a student's case is often tried without his being present at all.* Then something like this happens: A constable in the service of the University visits the lodgings of the said student, knocks, is invited to come in, does so, and says politely—

“If you please, I am here to conduct you to prison” (emphasis added).<sup>16</sup>

The last student prison in Germany (at Gottingen) closed in 1933, “because the university had lost its authority to punish students for such offenses” and “*because students had come to view a stay in the campus slammer as a badge of honor*” (emphasis added).<sup>17</sup> The latter reason reflects an “us versus them” quality we will see again in American colleges and universities.

The widespread existence of student prisons at German institutions highlights the fact that significant portions of the student population there remained undeterred by strict rules and sanctions imposed with minimal due process.<sup>18</sup> This problem was not localized. Students at the University of Paris seemed as vexatious as their German counterparts<sup>19</sup> and “did not

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16. TWAIN, *supra* note 13, at 261.

17. Mooney, *supra* note 14.

18. Student misconduct even posed a threat to professors, as evidenced by “graded penalties” at Leipzig for any student “who picks up a missile to throw at a professor, him who throws and misses, and him who accomplishes his fell purpose to the master’s hurt.” HASKINS, *supra* note 8, at 61.

19. Consider this description by churchman Jacques de Vitry (d. 1240), who studied at the University of Paris:

Very few [University of Paris students] studied for their own edification, or that of others. They wrangled and disputed not merely about the various sects or about some discussions; but the differences between the countries also caused dissensions, hatreds and virulent animosities among them and they impudently uttered all kinds of affronts and insults against one another. They affirmed that the English were drunkards and had tails; the sons of France proud, effeminate and carefully adorned like women. They said that the Germans were furious and obscene at their feasts; the Normans, vain and boastful; the Poitevins, traitors and always adventurers. The Burgundians they considered vulgar and stupid. The Bretons were reputed to be fickle and changeable, and were often reproached for the death of Arthur. The Lombards were called avaricious, vicious and cowardly; the Romans, seditious, turbulent and slanderous; the Sicilians, tyrannical and cruel, the inhabitants of Brabant, men of blood, incendiaries, brigands and

have a good reputation with the townsfolk, who complained they were always brawling, whoring, dicing, swanking around in inappropriate clothing, singing and dancing, carrying weapons, and insulting not only respectable citizens but also the forces of law and order.”<sup>20</sup>

Likewise, in reference to students at Paris,<sup>21</sup> Homer Haskins wrote:

[I]f further evidence were needed to dispel the illusion that the medieval university was devoted to biblical study and religious nurture, the Paris preachers of the period would offer sufficient proof. Many [students] go about the streets armed, attacking the citizens, breaking into houses, and abusing women. They quarrel among themselves over dogs, women, or what-not, slashing off one another’s fingers with their swords, or, with only knives in their hands and nothing to protect their tonsured pates, rush into conflicts from which armed knights would hold back.<sup>22</sup>

Students in England appeared to be no better. Haskins wrote that “The coroners at Oxford recorded many a fateful issue of town and gown riots . . .”<sup>23</sup>

#### B. Student Conduct and Due Process in American Colleges and Universities

Higher education in the new world borrowed many attributes from the old, especially what historian Frederick Rudolph called “the collegiate way.”<sup>24</sup> This “collegiate way” paradigm was a residential institution model in an English tradition “permeated by paternalism.”<sup>25</sup>

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ravishers; the Flemish, fickle, prodigal, gluttonous, yielding as butter, and slothful. After such insults from words they often came to blows.

*Jacques de Vitry: Life of the Students at Paris*, MIDDLE AGES ONLINE READER, <http://jcsites.juniata.edu/faculty/tuten/vitry1.html> (last visited Apr. 28, 2012).

20. JANIN, *supra* note 9, at 32. See also THORNDIKE, *supra* note 12, at 78–79 (discussing a proclamation at Paris in 1269 against “some clerks and scholars” who “more and more often perpetuate unlawful and criminal acts . . . namely, that by day and night they atrociously wound or kill many persons, rape women, oppress virgins, break into inns, also repeatedly committing robberies and many other enormities hateful to God”).

21. Alcohol undoubtedly fueled much student misconduct at Paris. Hunt Janin reported that “[d]uring the Middle Ages there were about 4,000 taverns in Paris which sold some 700 barrels of wine every day. About sixty of those taverns were special favorites of the Paris students.” JANIN, *supra* note 9, at 37.

22. HASKINS, *supra* note 8, at 62.

23. HASKINS, *supra* note 8, at 61.

24. FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 86 (1962).

25. *Id.* at 87.

American students may have felt that Jeffersonian ideals clashed with paternalistic authoritarianism, but college and university officials held the view (expressed by one college president of the day) that “Republicanism is good: but the ‘rights of boys and girls’ are the offspring of Democracy gone mad.”<sup>26</sup>

Early American faculty members—like “masters” at many European institutions—typically assumed disciplinary control over students.<sup>27</sup> The extent of such control (or efforts at control) at the University of North Carolina in 1851 is reflected by the fact that “282 cases of delinquency came before the faculty from a student body of 230.”<sup>28</sup>

Harvard University in the 1840s seemed to enforce student disciplinary rules with almost as much zeal as North Carolina. Derek Bok (a former Harvard president) wrote about the history:

During chapel services, presidential addresses, and other ceremonial occasions, students were constantly urged to live god-fearing, upright lives. These exhortations were backed by detailed codes of conduct enforced by fines, demerits, and, if need be, expulsion. Not that the effort to mold conduct through discipline was notably successful. Annual reports of Harvard presidents in the 1840s are spiced with references to episodes such as a “college fence and a small building . . . were wantonly set on fire and the latter burnt down” or “a bomb-shell was placed, about midnight, in one of the rooms of University Hall, and exploded, doing great damage.” . . . To cope with these transgressions, the book of regulations at the end of the Civil War took a full forty pages of text.<sup>29</sup>

The violence Bok described (including arson and bombing) was not an isolated phenomenon. Incidents elsewhere included a “professor who was killed at the University of Virginia, the president of Oakland College in Mississippi who was stabbed to death by a student, [and] the president and

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26. *Id.* at 106 (citing remarks made on an unspecified date by President Thomas Cooper (d. 1839) at South Carolina College).

27. *Id.* at 106. Rudolf provides an amusing example of faculty perspectives on the responsibility to police students:

[T]he immigrant political economist Francis Lieber [teaching at South Carolina College] did not permit his distaste for [student] discipline to keep him from being conscientious; yet frustration was his lot. On one occasion, in pursuit of a student with a stolen turkey, he stumbled and fell on a pile of bricks, got up, rubbed his shins, and was heard to exclaim, “Mein Gott!! All dis for two thousand dollars.”

*Id.* at 106.

28. *Id.* at 106.

29. Derek Bok, *Ethics, the University, and Society*, HARVARD MAGAZINE, May–June 1988, at 39, 40.

professor who were stoned at the University of Georgia . . . .”<sup>30</sup> From a broader perspective, American colleges and universities in this era were encountering what historian Helen Lefkowitz Horowitz described as “a wave of violent collective uprisings in the late eighteenth and early nineteenth centuries against the combined authority of college professors and presidents.”<sup>31</sup> She wrote that:

Even we who lived through the 1960s find the violence directed against persons in the early 1800s hard to comprehend. At the University of North Carolina students horsewhipped the president, stoned two professors, and threatened the other members of the faculty with personal injury. Yale students in the 1820s bombed a residence hall. In a later Yale conflict, a student killed a tutor who tried to break up a melee.<sup>32</sup>

Princeton was a hotbed of insurrection at the time, producing six student rebellions between 1800 and 1830.<sup>33</sup> Lefkowitz Horowitz described two incidents—and the authoritarian college leadership that spawned them:

In 1800 students disturbed morning prayers by “scraping,” insulting the speaker by rubbing their boots against the rough floor. President Samuel Stanhope Smith called in three seniors and, when they admitted their wicked deed, dismissed them from the college. When their fellow students learned of this harsh penalty, they set off a riot. They shot pistols, crashed brickbats against walls and doors, and rolled barrels filled with stones along the hallways of Nassau Hall . . . . One of the expelled seniors did not leave the area and returned to the college two weeks later. He beat up the tutor whom he suspected of reporting on him. This set off a second riot that Smith quelled only by threatening to close the college.

Seven years later the suspension of three students again angered their classmates. This time undergraduate leaders acted responsibly and drew up a letter of remonstrance that questioned the justice of the dismissals . . . . President Smith found this conscious, collective act more threatening than spontaneous violence . . . . At evening prayers, he, his faculty, and a trustee

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30. RUDOLPH, *supra* note 24, at 97.

31. HELEN LEFKOWITZ HOROWITZ, *CAMPUS LIFE* 32 (1987).

32. *Id.* at 25.

33. *See* RUDOLPH, *supra* note 24. Rudolph wrote:

Ashbel Green [Princeton President from 1812–1822] remarked of one of Princeton's six [student] rebellions between 1800 and 1830 that “the true causes of all these enormities are to be found nowhere else but in the fixed, irreconcilable and deadly hostility . . . to the whole system established in this college . . . a system of diligent study, of guarded moral conduct and of reasonable attention to religious duty. . . .”

*Id.* at 98.

[demanded that the student signatories] disavow the letter . . . . Refusal meant suspension. A student leader led the way out of the room, followed by 125 Princetonians. Riot followed. Angry students seized Nassau Hall, smashed windows, and armed themselves with banisters against villagers who had assembled at the request of the president. The revolt ended when Smith closed the college for an early recess.<sup>34</sup>

Frederick Rudolph compiled a list of institutions with students “in rebellion” between 1800 and 1875: “Miami University, Amherst, Brown, University of South Carolina, Williams, Georgetown, University of North Carolina, Harvard, Yale, Dartmouth, Lafayette, Bowdoin, City College of New York, Dickinson, and DePauw.”<sup>35</sup> He concluded that the source of the rebellions was a clash of worldviews related to student discipline:

The system of discipline used in many colleges . . . thoroughly failed to achieve either its purpose or the larger purposes it intended to serve. For while discipline was an aspect of paternalism, the strict, authoritarian, patriarchal family was making no headway in American life, and for the colleges to insist upon it was for them to fight the course of history.<sup>36</sup>

### C. The UC-Berkeley Experience

Colleges and universities weathered the storms of student rebellion in the early nineteenth century and, for a time, adhered to the authoritarian model. Student resistance, however, resurfaced. The history of the University of California (hereinafter “Berkeley”) is instructive in this regard. Initial policies adopted by Berkeley (founded in 1869) provided for “the ready dismissal of any student who has not the habits or instincts of a gentleman or the tastes and ambition of a scholar.”<sup>37</sup> The rules allowed “prompt removal” of any student “who is known to be wasting his time . . . jeopardizing the good order of the University or the studious habits of his fellows, even though he has not been detected in and indeed may not have committed any single outrageous act.”<sup>38</sup> Sociologist C. Michael Otten, commenting on the Berkeley policies, wrote that:

The [accused] student need not be tried for a specific infraction of the rules; a bad reputation was ground enough for expulsion. . . . [I]n a community where everyone knows everyone else, the most severe punishment need not be mitigated by formal procedures. Discipline could be and was meted out on the basis

34. LEFKOWITZ HOROWITZ, *supra* note 31, at 24–25.

35. RUDOLPH, *supra* note 24, at 98.

36. *Id.* at 104.

37. C. MICHAEL OTTEN, UNIVERSITY AUTHORITY AND THE STUDENT 29 (1970).

38. *Id.*

of personal reputation and not according to objective standards, established precedent, or formalized procedures.<sup>39</sup>

Students may not have challenged Berkeley disciplinary policies directly, but—as enrollment expanded—the faculty grew weary of tensions that ensued. Otten tells the story of a 1904 UC riot that indicated “time was ripe for a new system of control:”<sup>40</sup>

[In] 1904, local newspapers were carrying front page banners telling of “RIOT AT THE UNIVERSITY,” “TWELVE RUSHERS TAKEN IN HAND BY STATE UNIVERSITY AND BOOKED FOR EXPULSION,” followed by another story of how “Professor Cory and his armed forces put handcuffs on as many as they could capture and held them until they could get their names.” The faculty also resorted to guns and searchlights .

<sup>41</sup>  
...

The story of student discipline at Berkeley followed its own path thereafter, but generally paralleled developments in the larger society. Student resistance and faculty exhaustion led to a new, less authoritarian model involving what Otten called “paternalistic self-government.”<sup>42</sup> The result was less manipulative than it sounds, since there appeared to be a time (1899-1919) when presidential leadership and student devotion to the quality and standing of the University created a climate of trust and cooperation. Students were given genuine disciplinary authority (a student judicial panel) and used it responsibly.<sup>43</sup> Their participation in “self-government,” Otten wrote, was “remarkably successful in quelling student ‘riots.’”<sup>44</sup>

Significantly, for our analysis, this era of trust and student self-governance at Berkeley did not last. Authoritarian control can reappear when students seem alienated or combative, aggressive media decry moral failings of the youth, and college and university administrators fear for the reputation of the institution. During the 1920s and beyond—at Berkeley

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39. *Id.* at 37.

40. *Id.* at 44.

41. *Id.* at 64.

42. *Id.* at 38.

43. Proceedings before this body were deliberately informal. It was described as a “household tribunal” rather than “judicial” board. OTTEN, *supra* note 37, at 65. While the procedures did not meet contemporary due process standards (e.g. no right of cross-examination) only one student in 15 years exercised a right of appeal to the Faculty and Academic Senate (where much more due process was provided). *Id.* at 66–70. In a time of shared values, strong community feeling, and significant student responsibility, trust in fellow students apparently trumped procedure. Whether this model could be re-created in a far larger and more diverse institution is questionable, especially during times of social and political polarization.

44. *Id.* at 38.

and elsewhere<sup>45</sup>—alienation after World War I, the social turmoil associated with Prohibition, political radicalization (and conservative reaction to it), and the growth of a bureaucratic management style all contributed to ideological conflict on campus. The result at Berkeley was a gradual return to authoritarianism, transformed into a new managerial style. Otten observed that “student government jurisdiction tended to contract as student [social and political] interests [off-campus] expanded.”<sup>46</sup> Disciplinary charges were managed and diverted by an “Office for the Dean of Students.”<sup>47</sup> Eventually, “all cases involving sentences of suspension or dismissal had to be referred to the chancellor, who also had the authority to establish procedures for the hearing.”<sup>48</sup> Administrators were reasserting control “with only the most cursory consultation with students.”<sup>49</sup>

The return of authoritarian control at Berkeley was incremental, but the end result became evident in the 1960s, when a new student culture of rebellion (with roots going back to the 1920s<sup>50</sup>) reasserted itself in Berkeley’s “Free Speech Movement” (FSM) in 1964. Serious disciplinary cases related to that movement resulted in appointment of a special judicial body: “The Ad Hoc Committee of the Academic Senate,” chaired by a prominent law professor. While holding student violators accountable, the Committee offered “serious criticism” of the disciplinary process:

On the other hand, the procedure by which the University acted to punish these wrongdoings is subject to serious criticism. The relevant factors are: first, the vagueness of many of the relevant regulations; second, the precipitate actions taken in suspending the students sometime between dinner time and the issuance of the press release at 11:45 PM; third, the disregard of the usual channel of hearings; fourth, the deliberate singling out of these students (almost as hostages) for punishment . . . ; and fifth, the

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45. RUDOLPH, *supra* note 24. Rudolph described student perspectives in the 1920 and 1930s:

Everywhere most students were in revolt over something or thought that they were: perhaps only compulsory chapel or compulsory military training. Disillusioned by the nature of the post-Versailles world, they registered their disgust in peace demonstrations and in solemn pledges never to go to war. They joined picket lines, they helped to organize labor unions. In the great urban centers a small number even signed up with the Communist party.

*Id.* at 467.

46. OTTEN, *supra* note 37, at 151.

47. *Id.* at 185.

48. *Id.* at 187.

49. *Id.* at 162.

50. *Id.* at 104.



choice of an extraordinary and novel penalty—"indefinite suspension" which is nowhere made explicit in the regulations.<sup>51</sup>

The Ad Hoc Committee criticism would resonate with most students. Over eighty percent of the student body at Berkeley "said they agreed with the goals of the FSM."<sup>52</sup> Those goals included "concerns about due process, as FSM leaders seemed to many students to have been unfairly singled out for punishment . . . ."<sup>53</sup>

"Core" FSM demands for due process were:

The rules . . . should be specific, clear, and well-publicized. Rule violators should be notified of the specific charges against them, and they should have a prompt hearing before an impartial body. At the hearing they should have the right to confront their accusers, and a written record should be kept of the proceedings. If the defendant wished, he could have professional counsel.<sup>54</sup>

FSM leaders at Berkeley understood that freedom of expression is meaningless without corresponding *procedural* protections. As Charles Alan Wright wrote in his classic law review article *The Constitution on Campus*,<sup>55</sup> freedom of expression can't be protected if "some administrator were permitted to make an *ex parte* and unreviewable determination that particular behavior was 'disruptive action' [not protected expression] and that a particular student had participated in it."<sup>56</sup>

The Free Speech Movement at Berkeley was one of the defining moments in the campus revolutions of the 1960s and 1970s. Following the pattern we previously described, it arose in a context of student rebellion against arbitrary authoritarian control by colleges and universities.<sup>57</sup> When

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51. *Id.* at 187.

52. *Id.* at 179.

53. ROBERT COHEN & REGINALD E. ZELNIK, THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S 7 (2002). *See also* ROBERT COHEN, FREEDOM'S ORATOR: MARIO SAVIO AND THE RADICAL LEGACY OF THE 1960S 235 (2009).

54. OTTEN, *supra* note 37 at 185–86.

55. Charles Alan Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027 (1969).

56. *Id.* at 1059.

57. *See* ROBERT COHEN, FREEDOM'S ORATOR: MARIO SAVIO AND THE RADICAL LEGACY OF THE 1960S 1 (2009). A critical moment occurred on October 1, 1964:

[P]olice drove a squad car to UC Berkeley's central thoroughfare, Sproul Plaza, to arrest civil rights organizer Jack Greenberg because he, like so many other free speech activists, was defying the ban by staffing a political advocacy table on the plaza. Before the police could complete the arrest . . . a crowd of students surrounded the car in a non-violent blockade that would last thirty-two hours. Shortly after the blockade began, Mario Savio, a leader of the civil rights group University Friends of SNCC (Student Non-Violent Coordinating Committee), removing his shoes so as not to damage the police car,

the “Cox Commission on the Disturbances at Columbia University” examined comparable unrest there, it likewise concluded that one of the internal causes of unrest that “especially impressed” Commission members was “an attitude of authoritarianism” among university officials.<sup>58</sup>

Over thirty years ago, in *Bradshaw v. Rawlings*,<sup>59</sup> The U.S. Court of Appeals for the Third Circuit suggested that the campus revolutions of the 1960s and 1970s—exemplified by the Berkeley Free Speech Movement—had permanently altered the relationship between students and institutions:

Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. By constitutional amendment, written and unwritten law, and through the evolution of new customs, rights formerly possessed by college administrations have been transferred to students.<sup>60</sup>

There is no guarantee the change will last. Our historical overview of efforts to regulate college and university student behavior shows longstanding cyclical tensions between students and administrators. Substantive and procedural protections that students gain in one generation may be lost in the next. Student memories in this regard are often fleeting, but college and university administrators' inclination to paternalism endures.

## II. *DIXON* AND *GOSS*: DUE PROCESS AS A THINKING STRATEGY

As suggested above, the Free Speech Movement at Berkeley was also a *due process* movement. Demands for greater procedural fairness were an

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climbed on top of it and into national headlines, using its roof as a podium to explain the protest and demand freedom of speech. From those first moments atop that car Savio emerged as the Berkeley rebellion's key spokesman, symbolizing all that was daring, militant, and new about the Free Speech Movement.

*Id.* Later, according to Cohen and Zelnik, “Savio's daring attempt to speak at an administration-run meeting in Berkeley's Greek Theatre days after the sit-in electrified thousands of students, who were shocked to see campus police drag him from the podium.” COHEN & ZELNIK, *supra* note 53, at 1.

58. CRISIS AT COLUMBIA: REPORT OF THE FACT-FINDING COMMISSION APPOINTED TO INVESTIGATE THE DISTURBANCES AT COLUMBIA UNIVERSITY IN APRIL AND MAY 1968, at 193 (1968).

59. *Bradshaw v. Rawlings*, 612 F.2d 135, 138 (3d Cir. 1979) (holding institution had no duty to prevent risk of harm to underage students consuming alcohol off-campus, even though the off-campus gathering was planned, in part, by a faculty member, flyers announcing the event were distributed on campus, and sophomore class funds were used to purchase beer).

60. *Id.* at 138–39.

indigenous response to local conditions, not a “legalistic” intrusion from without. Still, there’s no question formative case law was being decided around this time, most notably in *Dixon v. Alabama State Board of Education*,<sup>61</sup> and, somewhat later, in *Goss v. Lopez*.<sup>62</sup> Both *Dixon* and *Goss* set measured and moderate limits on unchecked disciplinary authority at public schools and colleges. By doing so, both decisions also made positive—perhaps not fully anticipated—contributions to student learning, individual and community decisionmaking, and the role of adult students as constituent participants in college governance.

*Dixon* and *Goss* have been discussed often and in detail elsewhere.<sup>63</sup> We previously wrote in *JCUL* that educators often failed to appreciate the “considerable leeway” those decisions gave them to fashion equitable and efficient disciplinary procedures.<sup>64</sup> In any event, the core due process standards in *Dixon* and *Goss* have become sufficiently settled to hold public college administrators personally liable for violating the due process rights of college students.<sup>65</sup>

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61. 294 F.2d 150 (5th Cir. 1961) (holding students are entitled to notice and some opportunity for a hearing prior to expulsion from a public college or university).

62. 419 U.S. 565 (1975) (finding public school students entitled to notice and an opportunity to be heard prior to suspension).

63. See, e.g., PETER LAKE, *BEYOND DISCIPLINE: MANAGING THE MODERN HIGHER EDUCATION ENVIRONMENT* 64 (2009); WILLIAM KAPLIN & BARBARA LEE, *THE LAW OF HIGHER EDUCATION* 485 (3d. ed. 1995).

64. Gary Pavela, *Limiting the Pursuit of Perfect Justice on Campus: A Proposed Code of Student Conduct*, 6 J.C. & U.L. 137, 139 (1979–1980).

65. See *Barnes v. Zaccari*, 757 F. Supp. 2d 1313 (N.D. Ga. 2010) (holding, in part, that former Valdosta State University President Ronald M. Zaccari was personally responsible under 42 U.S.C. § 1983 for violating the procedural due process rights of Hayden Barnes—a VSU student who was “administratively withdrawn” by Zaccari because Barnes was a perceived “danger to [himself] or others.”). The court went on to write:

The court is unpersuaded by Zaccari’s argument that he is entitled to qualified immunity because he ‘sought out legal advice’ . . . The law is clearly established in the Eleventh Circuit that ‘due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.’ *Dixon v. Alabama State Board of Education*, 294 F.2d at 151. Moreover, the court finds Zaccari’s assertion that he relied upon the [legal] advice . . . disingenuous. The undisputed facts show that Zaccari ignored the lawyers’ warnings that withdrawing Barnes would require due process in executing his administrative withdrawal of Barnes . . . Accordingly, the court denies Zaccari’s motion for summary judgment . . .

*Id.* at 1333. College administrators should be wary of sometimes attenuated academic discussion and guesswork about whether the Supreme Court might (or might not) explicitly adopt or reject the reasoning in *Dixon*. Academic speculation

Essentially, *Dixon* (recognized by the Supreme Court as a “landmark” decision that quickly influenced courts across the country<sup>66</sup>) defined higher education as a “vital” private interest that cannot be denied by the government without due process.<sup>67</sup> The court wrote that:

The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens . . .<sup>68</sup>

The court then provided the following due process guidance (in a context where plaintiffs had been expelled for participating in a civil rights lunch counter sit-in):

For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an

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can be engaging and occasionally instructive, but decision-makers have to be attentive to what the courts do in fact.

66. *Goss* 419 U.S. at 576 n. 8 (citing *Hagopian v. Knowlton*, 470 F.2d 201, 211 (2d Cir. 1972)) (“Since the landmark decision of [*Dixon*]... the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion.” The Court’s reference to the Second Circuit in *Hagopian* is instructive. Six years after *Dixon*—in a setting where courts are especially cautious in setting any procedural due process requirements—the U.S. Court of Appeals for the Second Circuit held that “due process only requires for the dismissal of a Cadet from the Merchant Marine Academy that he be given a fair hearing at which he is apprised of the charges against him and permitted a defense” [emphasis added]. *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir 1967). The same requirement was then imposed by the Second Circuit on the United States Military Academy in *Hagopian*.)

67. The court in *Dixon* cited the 1961 Supreme Court decision in *Cafeteria and Restaurant Workers Union v. McElroy et al.*, 367 U.S. 886, 894 (“One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law.”) (quoting *Homer v. Richmond* 292 F.2d 719, 722 (D.C. Cir. 1961)).

68. *Dixon v. Ala. St. Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961).

administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.<sup>69</sup>

The *Dixon* court elaborated upon the rationale for procedural fairness in student disciplinary cases:

The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case. Indeed, that result is well nigh inevitable when the Board hears only one side of the issue. In the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. Indeed, the example set by the Board in failing so to do, if not corrected by the courts, can well break the spirits of the expelled students and

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69. *Id.* at 158–59.

of others familiar with the injustice, and do inestimable harm to their education.<sup>70</sup>

At heart, the court in *Dixon* is describing an *educational* as well as a legal process. A disciplinary allegation against a student must be tested by unbiased examination of relevant evidence, including testimony from the accused. The “example set by the Board” in failing to follow such a process is demoralizing to students and would “do inestimable harm to their education.”<sup>71</sup> Implicit in this language is the insight that educators reviewing disciplinary charges are also teaching students the essential components of disciplined, empirical thinking. In few other contexts will accused students be paying as much attention. And, if fellow students are sitting on a hearing panel helping decide the case, they too will be engaged learners intensely focused on the importance of examining the evidence before resolving the issue. This experience—the application of “rudimentary elements” of due process—is not an alien, “legalistic” intrusion into academic life. It constitutes part of the core mission of colleges and universities to develop ways of thinking and qualities of character essential to the academic enterprise itself.

The U.S. Supreme Court decision in *Goss v. Lopez* addressed a school (not college student) case. But the Court's analysis is fully applicable to public higher education in light of its internal logic;<sup>72</sup> the “liberty” interests shared by students at public schools and colleges;<sup>73</sup> subsequent references

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70. *Id.* at 157.

71. *Id.*

72. *Goss*, 419 U.S. at 580, stating:

Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

*Id.* Public colleges, of course, impose discipline in precisely the same way, but the potential harm of an adverse disciplinary finding to the career prospects of an adult college student (whose misbehavior is less likely to be regarded as an adolescent indiscretion) is even greater.

73. The fact that public school students are *required* to attend school—while college students are not—does not render *Goss* inapplicable in the public college context. The Court in *Goss* also identified a “liberty” interest (and a resulting entitlement to due process) fully applicable to public college students as well. *Id.*

The Due Process Clause also forbids arbitrary deprivations of liberty. “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” the minimal requirements of the Clause must be satisfied. School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students’ standing with their fellow pupils and

by lower federal courts;<sup>74</sup> subsequent references from the Supreme Court itself,<sup>75</sup> and *even greater* Constitutional protections the Supreme Court has to given to adult college students attending public institutions of higher education.<sup>76</sup> We are in accord in this regard with Professor Peter Lake, who

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their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

*Id.* (citing *Wisconsin v. Constantineau*, 400 U. S. 433, 437 (1971)).

74. *See Gorman v. University of Rhode Island et al.*, 837 F.2d 7, 12 (1st Cir. 1988):

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. There is no doubt that due process is required when a decision of the state implicates an interest protected by the fourteenth amendment. It is also not questioned that a student's interest in pursuing an education is included within the Fourteenth Amendment's protection of liberty and property. *See Goss v. Lopez*, 419 U.S. 565, 574–75 (1975). Hence, a student facing expulsion or suspension from a public educational institution is entitled to the protections of due process. *See id.* 575–76 . . . ; *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961) (internal citations omitted).

75. *See Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 88–89 (1978):

In *Goss*, this Court felt that suspensions of students for disciplinary reasons have a sufficient resemblance to traditional judicial and administrative fact-finding to call for a “hearing” before the relevant school authority. While recognizing that school authorities must be afforded the necessary tools to maintain discipline, the Court concluded: “. . . [R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect.”

*Id.* Notwithstanding the opportunity provided in *Horowitz*, the Court declined to limit *Goss* to the school setting and cited language in the *Goss* decision (“Effective notice and informal hearing” can be “a meaningful hedge against erroneous action”) that applies with equal force in higher education. *Id.* at 89.

76. *Compare Bethel Sch. Dist. v. Fraser* 478 U.S. 675, 683 (1986) (“[A] highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse”) with *Papish*, 410 U.S. at 670 (“the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency’”).

has written that “[t]here is reason to believe that the Supreme Court will ultimately and explicitly extend *Goss*, in some form, to college students.”<sup>77</sup> The Supreme Court has, however, “carefully limited” *Goss* to student *disciplinary* decisions, not matters involving the “subjective and evaluative” assessment of academic performance.<sup>78</sup>

Like *Dixon*, the Supreme Court in *Goss* defined due process as a natural component of the educational process:

[I]t would be a strange disciplinary system in an educational

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The heightened constitutional protections the Court has given to college students was manifest in *Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 836 (1995):

In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school’s influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.

*Id.* It strains credulity to suggest the court would grant this stature to college students for First Amendment purposes, but give them less procedural due process than was accorded to school children in *Goss*.

77. LAKE, *supra* note 63, at 85. Professor Lake’s observation in this regard seems at odds with other portions of his text, but we think it is a concise and accurate statement of law.

78. *See Horowitz*, 435 U.S. at 89–90:

Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement. In *Goss*, the school’s decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances “provide a meaningful hedge against erroneous action. . . . The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.



institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done. “[F]airness can rarely be obtained by secret, one-sided determination of facts . . .” “Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.”<sup>79</sup>

The Court also identified due process as a *thinking* strategy:

Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process . . .

[R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced . . .

Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the fact-finding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.<sup>80</sup>

The above cited language from *Dixon* and *Goss* reflect the spirit of the scientific method. Both the methodology of science and the core components of due process encompass 1) a truth-seeking orientation; 2) a reasoned hypothesis (e.g. in the student disciplinary context, sufficient evidence to initiate a charge); 3) empirical investigation (an unbiased fact-finding process); and 4) candid assessment/reassessment of the outcome (e.g., informal or structured administrative review). The starting point for this kind of thinking and decisionmaking is summarized by Learned Hand's

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79. *Goss*, 419 U.S. at 580.

80. *Id.* at 580, 583–84.

famous observation that “the spirit of liberty is the spirit which is not too sure it is right.”<sup>81</sup> In a less frequently cited speech (receiving an honorary degree from Columbia University in 1939), Judge Hand applied the core idea behind “the spirit of liberty” to scholarship and teaching:

And where shall we find a better exemplar of those qualities of heart and mind on which in the end a democratic state must rest than in the scholar? I am not thinking of the patience and penetration with which he must be endowed, or of the equipment he must have; but of the consecration of his spirit to the pursuit of truth. No one can keep a mind always open to new evidence, always eager to change its conclusions, who has other allegiance or commitments. Upon the failure of this necessary detachment right judgment is most often wrecked; its achievement most strains our animal nature; it is the last habit to be acquired and the first to be lost . . . .

You may take Martin Luther or Erasmus as your model, but you cannot play two roles at once; you may not carry a sword beneath a scholar's gown, or lead flaming causes from a cloister. Luther cannot be domesticated in a university. You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voice of doubt. I am satisfied that a scholar who tries to combine these parts sells his birthright for a mess of pottage; that, when the final count is made, it will be found that the impairment of his powers far outweighs any possible contribution to the causes he has espoused. If he is fit to serve in his calling at all, it is only because he has learned not to serve in any other, for his singleness of mind quickly evaporates in the fires of passions, however holy.<sup>82</sup>

Learned Hand's “spirit of liberty” and “spirit to the pursuit of truth” are components of what Derek Bok has defined as the university's *ethical curriculum*: formal and informal instruction designed to help students acquire “a greater respect for facts and a greater ability to reason carefully about complicated problems.”<sup>83</sup> This is not to suggest reason can be divorced from empathy (empathy is essential to making good choices about the *aims* of reasoning), but ethical traditions worldwide stress the role of self-restraint and mental discipline in leading a worthy life.<sup>84</sup> College

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81. LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES* 190 (3d ed. 1960).

82. *Id.* at 136–38.

83. Bok, *supra* note 29, at 49.

84. For example, in the Buddhist tradition, mental discipline is viewed as a joyful experience: “The mind is fickle and flighty, it flies after fancies and whatever it likes; it is difficult indeed to restrain. But it is a great good to control

disciplinary systems are a resource for teaching precisely those qualities. Properly managed, an equitable disciplinary process models the thinking process itself—what John Dewey described as “a postponement of immediate action”, while the mind “affects internal control of impulse through a union of observation and memory.”<sup>85</sup> Most colleges' greatest educational deficiency in this regard may not be in providing an improper “amount” of due process, but in failing to be instructive about the *thinking enhancement* due process can provide.

The thinking enhancement associated with basic due process also needs to be understood as a form of “community cognition.” Separation of powers in governmental structures is designed, in part, to serve as a check on the self-righteous passions that can ignite any community (see our discussion of the Duke Lacrosse case, below). Due process serves a built-in repository of reasoned truth-seeking at precisely the time communities need it the most—when passions affirm truth is “obvious” and punishment needs to be “swift and severe.” At the social level this process is akin to cognitive therapy for individuals, described by psychologist Jonathan Haidt as “training clients to catch their thoughts, write them down, name the distortions, and find alternative and more accurate ways of thinking.”<sup>86</sup>

In the context of procedural fairness, the due process revolution of the 1960s and beyond reflected the natural evolution of a broader “thinking revolution”—evident in political theory (distrust of unchecked power), greater understanding of unconscious motivation, appreciation for the methodology of science, and—more recently—ongoing research into structural flaws of human cognition.<sup>87</sup> Finding the right procedural balance will always be a worthy endeavor, but rescinding the *idea* of due process (e.g. suggesting that due process at private colleges isn't necessary) requires rescinding one the most important self-corrective and truth-

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the mind; a mind self-controlled is a source of great joy.” BUDDHA’S TEACHINGS 8 (1973).

85. JOHN DEWEY, *EXPERIENCE AND EDUCATION* 64 (1938).

86. JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS* 38 (2006). Research on brain science and cognition is moving too quickly to be fully appreciated. An outline is emerging of multiple distortions in the human thinking process itself (recognizing the distortions is ground for modest optimism). This research validates the wisdom of Learned Hand’s observation that “the spirit of liberty is the spirit which is not too sure it is right.” HAND, *supra* note 81, at 190–9. See also Daniel Kahneman, *Don’t Blink! The Hazards of Confidence*, N.Y. TIMES MAG., Oct. 11, 2011, available at <http://www.nytimes.com/2011/10/23/magazine/dont-blink-the-hazards-of-confidence.html?pagewanted=all>.

It’s reasonable to suggest in this regard that the evolution of legal structures like “due process” mirrors the evolution of the brain itself (i.e. a more recently evolved “rational” component of the brain draws upon and mediates older limbic or “emotional” structures). *Id.*

87. See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011). See also Kahneman, *supra* note 86.

seeking mechanisms created within the modern university—and society as a whole.

### III. DUE PROCESS AND STUDENT ENGAGEMENT

The due process revolution in higher education was not limited to demands for greater procedural fairness. It was also contemporaneous with demands for greater student engagement in campus governance.<sup>88</sup> Greater student engagement, of course, was not a “legalistic” intrusion from the courts; *Dixon* and *Goss* mandated basic procedural due process, not student participation in defining and enforcing campus rules. But the fit between “due process” and student empowerment was intuitive and seamless. In 1967, several major national higher education organizations<sup>89</sup> devised and

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88. The intensity of feeling is seen by this concluding observation in the STUDENTS FOR A DEMOCRATIC SOCIETY, *Port Huron Statement* (1962) <http://www.h-net.org/~hst306/documents/huron.html>:

To turn these [proposals] into realities will involve national efforts at university reform by an alliance of students and faculty. They must wrest control of the educational process from the administrative bureaucracy. They must make fraternal and functional contact with allies in labor, civil rights, and other liberal forces outside the campus. They must import major public issues into the curriculum—research and teaching on problems of war and peace is an outstanding example. They must make debate and controversy, not dull pedantic cant, the common style for educational life. They must consciously build a base for their assault upon the loci of power.

*Id.* Students on some campuses now serve on institutional governing bodies. For a partial list (and an example of ongoing controversy) see also: Andrew Ramonas, *Other Schools Have Students on Boards of Trustees*, GEORGE WASHINGTON UNIV. HATCHET (Nov. 7, 2005), <http://www.gwhatchet.com/2005/11/07/other-schools-have-students-on-boards-of-trustees/>.

89. AM. ASSOC. OF UNIV. PROFESSORS, AAUP POLICY 273, 278 (10TH ed. 2006), <http://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm> (The AAUP website lists the following founding organizations “[T]he American Association of University Professors, the United States National Student Association (now the United States Student Association), the Association of American Colleges (now the Association of American Colleges and Universities), the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors formulated the joint statement. The document was endorsed by each of its five national sponsors, as well as by a number of other professional bodies. The governing bodies of the Association of American Colleges and the American Association of University Professors acted respectively in January and April 1990 to remove gender-specific references from the original text. Organizations approving the 1990–1993 interpretative notes were: American Association of Community Colleges, American Association of University Administrators, American Association of University Professors, American College Personnel Association, Association for Student Judicial Affairs, National Association for Women in Education, National Association of Student

promulgated the “Joint Statement on Rights and Freedoms of Students.”<sup>90</sup> Those “rights and freedoms” blended procedural due process protections (without reference to controlling court opinions) with a call for student participation in campus decisionmaking. No distinction was made in this regard between public and private universities. What follows are the Joint Statement “Hearing Committee Procedures” and language on “Student Participation in Institutional Government.”<sup>91</sup>

#### A. Hearing Committee Procedures

- a. The hearing committee should include faculty members or students, or, if regularly included or requested by the accused, both faculty and student members. No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding.
- b. The student should be informed, in writing, of the reasons for the proposed disciplinary action with sufficient particularity, and in sufficient time, to ensure opportunity to prepare for the hearing.
- c. The student appearing before the hearing committee should have the right to be assisted in his or her defense by an adviser of the student’s choice.
- d. The burden of proof should rest upon the officials bringing the charge.
- e. The student should be given an opportunity to testify, to present evidence and witnesses, and to hear and question adverse witnesses. In no case should the committee consider statements against the student unless he or she has been advised of their content and of the names of those who made them and has been given an opportunity to rebut unfavorable inferences that might otherwise be drawn.
- f. All matters upon which the decision may be based must be introduced into evidence at the proceeding before the hearing committee. The decision should be based solely upon such matters. Improperly acquired evidence should not be admitted.
- g. In the absence of a transcript, there should be both a digest and a verbatim record, such as a tape recording, of the hearing.
- h. The decision of the hearing committee should be final, subject only to the student’s right of appeal to the president or ultimately to the governing board of the institution.

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Personnel Administrators, National Orientation Directors Association, Southern Association for College Student Affairs, and United States Student Association. *Id.*

90. *Id.* at 273.

91. *Id.* at 275, 277–78.

### B. Student Participation in Institutional Government

“As constituents of the academic community, students should be free, individually and collectively, to express their views on issues of institutional policy and on matters of general interest to the student body. The student body should have clearly defined means to participate in the formulation and application of institutional policy affecting academic and student affairs. The role of student government and both its general and specific responsibilities should be made explicit, and the actions of student government within the areas of its jurisdiction should be reviewed only through orderly and prescribed procedures.”<sup>92</sup>

Ideas expressed in the *Joint Statement* have deep roots in American educational philosophy, especially the work of John Dewey and Horace Mann. Mann's memorable language about the aim of fostering student participation in school or college governance resonates with equal force today:

In order that men may be prepared for self-government, their apprenticeship must begin in childhood . . . He who has been a serf until the day before he is 21 years of age, cannot be an independent citizen the day after. . . As the fitting apprenticeship for despotism consists in being trained to despotism, so the fitting apprenticeship for self-government consists in being trained to self-government.<sup>93</sup>

Comparable views were expressed by former Harvard President Derek Bok in his 1988 essay “Ethics, the University, and Society.”<sup>94</sup> Bok wrote that “elements of a comprehensive program of moral education” in higher education should include “discussing codes of conduct with students and administering them fairly.”<sup>95</sup> He also observed that:

A final aim in maintaining discipline should be to involve students in the process of devising and administering rules. The more responsibility students can assume, the more likely they are to understand the reasons for regulations and to gain a stake in implementing them successfully . . . In addition to discussing rules, students can also assist in their administration. In fact, most institutions, including Harvard, involve students as members of judicial bodies in some types of offenses . . .<sup>96</sup>

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92. *Id.* at 275, 277.

93. Horace Mann, in PETER SMAGORINSKY & JOEL TAXEL, *THE DISCOURSE OF CHARACTER EDUCATION* 54 (2005).

94. Bok, *supra* note 29.

95. *Id.* at 49.

96. *Id.* at 49, 46. Bok expressed similar views in an interview with the *Christian Science Monitor*:

[Bok referred to] “qualities of character that go back to Puritan times . . .” Those qualities, he feels, are based on “some very basic principles

Nowhere in his analysis does Bok cite court cases as final authority. Procedural fairness and student engagement are independently derived from an *educational* perspective as core components of teaching and learning at public and private institutions of higher education. Similar analysis from other prominent educators has been applied to the school setting.<sup>97</sup>

The risks and benefits of involving students in “devising and administering rules” (and other forms of campus governance) are comparable to the risks and benefits of democracy itself. Some student proposals will seem trivial and unwise; others will inspire innovations that can revitalize the campus.<sup>98</sup> But the greatest benefit of student engagement

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that have been held to be important by almost every human society of which we have any knowledge. One [principle] obviously has to do with refraining from acts of unjustified violence or aggression toward others. Another has to do with keeping one’s word. Another has to do with telling the truth.” What can the university do to promulgate such principles? Among other things, it can encourage discussion of its own rules. On most campuses, Bok says, “There is an unwillingness to address squarely the central issue of why do we have this rule? What principle of ethical behavior is it built on? As a result the rule becomes an abstract, arbitrary, alien, thing,” he says. That’s better than having no rules at all. But it “falls very far short of how rules might be used as part of an educational process—so that students really learn something about the underlying principles of conduct.”

Rushworth M. Kidder, *Developing ‘Character’ Again at American Universities*, CHRISTIAN SCI. MONITOR, July 27, 1987, at 21.

97. See ERNEST L. BOYER, *THE BASIC SCHOOL: A COMMUNITY FOR LEARNING* 22, 25 (1995) (“A basic school is a just place . . . there is, in the school, a feeling of fair play . . . The Basic School, as a disciplined place, has a code of conduct which students themselves help define.”).

98. A relatively recent example is the movement to adopt “modified” honor codes nationwide. Student leadership has been essential to the effort. See Donald McCabe and Gary Pavela, *New Honor Codes for a New Generation*, INSIDE HIGHER EDUC., (Mar. 11, 2005), <http://www.insidehighered.com/views/2005/03/11/pavela1>:

An important element of Maryland’s success is the fact that faculty members and administrators were already accustomed to seeing students as participants in campus governance. A student sits on the statewide Board of Regents and students make up twenty percent of Maryland’s University Senate (a body that reviews and makes recommendations about core institutional policies). The impetus for this level of student participation was the campus revolutions of the sixties and seventies, which institutionalized student power and all but ended the concept of “in loco parentis” in American higher education. Ironically, those campus revolutions also laid the groundwork for the revitalization of an old academic tradition: student-administered honor codes.

is *the spirit* of engagement—protected and encouraged by the idea of student academic freedom.<sup>99</sup> The student rebellions at American colleges in the early nineteenth century seem as distant as the leadership style that inspired them. The (generally) less violent campus revolutions of the 1960s and 1970s fostered an era of student empowerment that may wax and wane in intensity, but has taken root at some of the nation's leading universities.<sup>100</sup> Contemporary college presidents—sometimes echoing language about student empowerment used by the Supreme Court in *Rosenberger v. Rectors of the University of Virginia*<sup>101</sup> can now be heard actively encouraging students to be partners in teaching, learning, and governing. At an April 20, 2005 Honors Convocation, University of Michigan President Mary Sue Coleman told the assembled students:

“I have a question I want our outstanding students to consider today—have we challenged you enough? More importantly, have you challenged this university enough? And are you ready to go out and challenge the world?”

This question is more important than ever before. Being able to challenge people, institutions, and policies in an informed manner is growing more complex every day.

What makes the environment of universities so intense is the unfettered intellectual exchange between faculty and students. Our students arrive here to learn from faculty—but quickly find out that we expect students to dispute existing theories and ideas. The unique nature of an academic community relies upon the expectation that everyone will be a contributor—that iconoclastic ideas are encouraged—that all knowledge is in a

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99. See Gary Pavela, *Academic Freedom for Students Has Ancient Roots*, CHRON. OF HIGHER ED., May 27, 2005, at B8.

100. This is not to say the authoritarian style has disappeared or isn't lying dormant. *Barnes v. Zaccari*, 757 F. Supp. 2d 1313 (N.D. Ga. 2010) (holding, in part, that former Valdosta State University president Ronald M. Zaccari was personally responsible under 42 U.S.C. § 1983 for violating the procedural due process rights of Hayden Barnes—a VSU student).

101. 515 U.S. 819, 836 (1995):

In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.



constant state of flux, contingent upon new data, new discoveries, new ideas.”<sup>102</sup>

A college campus where students are asked “*have you challenged this university enough?*” will not be grounded in authoritarian paternalism. Students will be engaged in campus governance, including decisionmaking roles in designing and administering disciplinary systems structured by basic due process. This overall approach—rooted in the campus revolutions of the 1960s and 1970s—is beneficial for students and colleges on many fronts. Colleges will avoid the student alienation associated with authoritarian management styles of the past; student voices will be heard on pressing local and national issues (including the need for stricter sexual assault policies on and off campus);<sup>103</sup> and the broad range of students will have better opportunities to develop the reasoning, thinking, creating, and leadership skills they need for the future.

#### IV. CHALLENGES TO THE DUE PROCESS REVOLUTION

Challenges to the due process revolution on college campuses have taken several prominent forms.<sup>104</sup> We address below what we think are the most important: 1) private colleges can and should dispense with due process standards applicable at public institutions; 2) college disciplinary codes should be reconfigured to provide only “minimal” due process; 3) violence, alcohol abuse, sexual harassment, and other forms of misconduct on campus have become so widespread that the due process “model” must be reexamined, both by colleges and universities and the courts.

##### A. Due process and the Public/Private Distinction

First, on the public/private college and university distinction (emphasized by professor Wendy Murphy, *supra*), there's no question federal courts refrain from requiring private institutions to adhere to standards for procedural due process mandated by the United States

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102. Mary Sue Coleman, Address at the University of Michigan Honors Convocation (Apr. 20, 2005), *available at* <http://www.umich.edu/pres/speech/archive/050420honors.php>.

103. DICKINSON COLLEGE, *Students Speak Out*, March 5, 2010, <http://www.dickinson.edu/news-and-events/features/2010-11/Students-Speak-Out/> (“A student protest at Dickinson, which began on Wednesday afternoon, focused on college policies related to sexual misconduct. While peaceful, the student sit-in [seeking stricter sexual assault policies and sanctions] blocked the halls of Old West, requiring administrative staff to move to other locations on campus.”).

104. Professor Murphy’s views seem supportive of all three positions identified in this paragraph; Peter Lake appears to endorse the latter two. Victims’ advocacy groups make a variety of analogous arguments, portraying colleges as dangerous places where crime is regularly and routinely hidden by college administrators.

Constitution.<sup>105</sup> Nonetheless, in spite of the latitude available to them, private colleges don't proudly proclaim the *absence* of due process, or adherence to a golden age when students could be summarily dismissed for offenses such as not being "a typical Syracuse girl."<sup>106</sup> Private colleges provide due process in student disciplinary cases because they have sound policy reasons for doing so, not because they mistakenly follow constitutional standards.

As evidenced by the 1967 "Joint Statement on Rights and Freedoms of Students" (*supra*), basic due process procedures typically followed at public institutions were also broadly endorsed by organizations representing both public and private colleges.<sup>107</sup> This pattern was also evident in a 1971 Carnegie Commission on Higher Education report titled "Dissent and Disruption."<sup>108</sup> Without distinguishing between public and private colleges, the report called for "more precise [disciplinary] rules than in the past, more formal procedures, and new mechanisms for clearly impartial judgments."<sup>109</sup> The Commission—which cautioned that "colleges cannot afford to get bogged down in frequent, complicated, and time-consuming judicial machinery"<sup>110</sup>—also stated:

The campus needs to provide evidence—to students, faculty members, administrators, and the general public—that justice will be done. This requires clear rules, expeditious and simple procedures that move quickly from informal to formal procedures, and the availability of independent and impartial tribunals.<sup>111</sup>

As an apparent model disciplinary procedure, the Commission report (in "Appendix N") cited a disciplinary code at the University of Oregon that included a specific list of prohibitions, a joint student-faculty student conduct committee, a student-faculty appeals board, provisions for written notice of charges and summoning of witnesses, representation by student defenders and a "clear and convincing" standard of proof.<sup>112</sup>

The Carnegie Commission listed many factors as grounds for heightened due process protection—including a recognition that colleges

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105. The public/private distinction is emphasized by professor and commentator Wendy J. Murphy. Wendy J. Murphy, *Using Title IX's "Prompt and Equitable" Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW ENG. L. REV. 1007 (2006).

106. *Anthony v. Syracuse Univ.*, 231 N.Y.S. 435, 489 (N.Y. App. Div. 1928).

107. AM. ASSOC. OF UNIV. PROFESSORS, *supra* note 89, at 273.

108. CARNEGIE COMM'N ON HIGHER EDUC., *DISSENT AND DISRUPTION* (1971).

109. *Id.* at 95.

110. *Id.* at 96.

111. *Id.* at 101.

112. *Id.* at 247.

are “now much more central to the lives of many more citizens”<sup>113</sup> and a need to promote “acceptance of [disciplinary] decisions[s] by the members of the campus.”<sup>114</sup> None of the factors identified by the Commission members (including Presidents at Notre Dame and Harvard universities) included *constitutional* mandates or any identifiable judicial mandate at all. Similar reasoning was followed in a 1970 American Council on Education report authored by a distinguished committee of educators, included Presidents or Chancellors at Michigan, Vanderbilt, and UCLA.<sup>115</sup> We highlight this point—and supporting evidence in reports or studies arising out of student unrest at Columbia University and UC-Berkeley in the 1960s—to challenge narratives that portray the college due process and student empowerment revolution as the single-minded result of judicial “engineering.” If “engineering” was involved, it came largely from *within* both public and private institutions of higher education as a self-correcting mechanism to reduce arbitrary decisionmaking and enhance student learning.

A noteworthy example of “self-correction” in procedural due process at a private institution of higher education can be seen in the contrast between Syracuse University (SU) procedures described in the 1928 *Anthony* decision<sup>116</sup> (the court upheld summary dismissal of third year student for not being “a typical Syracuse girl”) and the SU disciplinary process in 2012. The 2011-2012 SU Student Handbook states:

Students have the right to fundamental fairness before formal disciplinary sanctions are imposed by the University for violations of the Code of Student Conduct, as provided in the published procedures of the University Judicial System or other official University publications. Students have the right to written notice and the opportunity for a hearing before any change in status is incurred for disciplinary reasons . . .”<sup>117</sup>

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113. *Id.* at 94.

114. *Id.* at 93.

115. AMERICAN COUNCIL ON EDUCATION, *CAMPUS TENSIONS: ANALYSIS AND RECOMMENDATIONS* 39 (1970). The Committee stated:

Since increased [student] participation will contribute to effective institutional decision making and is also of educational benefit, students should serve in a variety of roles on committees that make decisions or recommendations . . . Effective student representation will not only improve the quality of decisions; it will also help insure their acceptance to the student body.

*Id.*

116. *Anthony v. Syracuse Univ.*, 231 N.Y.S. 435, 489 (N.Y. App. Div. 1928).

117. SYRACUSE UNIVERSITY, *2011–2012 Student Handbook* 3, 10 (2011), available at <http://www.syr.edu/currentstudents/studenthandbook/pdf/studenthandbook2011.pdf>. An interim suspension procedure is set forth on page ten and authorizes “a temporary suspension of certain rights or privileges while a judicial

The contemporary SU reference to “fundamental fairness” parallels language in the *Dixon* opinion requiring “at least the fundamental principles of fairness” prior to the imposition of serious disciplinary sanctions at public colleges.<sup>118</sup> SU policies do not identify any judicial compulsion to adopt such a standard. Instead, “fundamental fairness” is built into a disciplinary process designed to meet *SU's* objectives of better “educating and protecting members of the University community.”<sup>119</sup> Outside observers who would regard the SU disciplinary system as inappropriately mirroring more “legalistic” due process at public institutions<sup>120</sup> ignore the possibility that *the university itself* may find the system suitable and desirable. Private colleges and universities have significant intellectual resources and long traditions of self-governance. Facile presumptions that they have been led astray for over fifty years by misapplication of court decisions like *Dixon v. Alabama* need a stronger empirical foundation than critics have presented to date.

The adoption and preservation of “fundamental fairness” standards (or the equivalent) at public and private colleges and universities in the United States may be influenced, in part, by the significant voice students have gained in college governance. This phenomenon, largely an outgrowth of the campus revolutions of the 1960s and 1970s, is manifest at Syracuse University by the appointment of three students as non-voting “representatives” to the University Board of Trustees (the SU faculty is represented by one non-voting representative).<sup>121</sup> From a broader historical and geographical perspective, this kind of student participation in campus governance is not a radical innovation. It harkens back to the earliest European universities, as explained by the Supreme Court in *Rosenberger v. Rectors of the University of Virginia*:

In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous

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case is pending. An interim suspension . . . is based on the determination that the safety and well-being of the University community or specific persons are at risk.”

118. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961).

119. SYRACUSE UNIVERSITY, *supra* note 117, at 7.

120. Syracuse University, *2011–2012 Judicial Handbook* (2011), [http://judicial.syr.edu/\\_documents/judicial-handbook.pdf](http://judicial.syr.edu/_documents/judicial-handbook.pdf). Provisions in the SU code provide a detailed statement of student rights and responsibilities; written notice of charges; an opportunity for a peer review hearing in most serious cases; a right “to face the opposing party and to ask questions indirectly through the hearing board;” a right to be assisted “by a procedural advisor who is a full-time member of the Syracuse University community;” a right to be advised by an attorney when criminal charges are pending; and a right to appeal to a University Appeals Board. *Id.*

121. Provisions for student and faculty trustees are set forth in Syracuse University Bylaws, *available at*: <http://supolicies.syr.edu/ethics/bylaws.htm>.

assemblages or concourses for students to speak and to write and to learn . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment.<sup>122</sup>

Both public and private colleges and universities were incubators of the due process and student empowerment revolution of the 1960s and 1970s. Procedural protections and governance structures developed in that era retain strong internal constituencies, independent of judicial mandates. So, as cited in the introductory paragraph to this article, when Professor Murphy says private colleges and universities “*are free to punish the student as they see fit . . .*,” she seems to be living in an earlier era when a college or university president could instantly recognize the wisdom of her insights and issue a *pronunciamiento* making them so. But that approach is no longer available—and any person conversant with the idea that absolute power corrupts institutions should be wary of encouraging it.

We also think Professor Murphy is wrong when she writes that “[e]ven if certain procedures are promised accused students [at private colleges and universities] as a matter of school policy of 'contract,' there is no basis for a claim that such procedures must be followed or the accused student may have the right of redress in civilian court.”<sup>123</sup> Her statement in this regard (as cited in our introduction) is based on her interpretation of the holding in *Schaer v. Brandeis University*.<sup>124</sup> In *Schaer*, a sharply divided (3-2) Supreme Judicial Court of Massachusetts held that Brandeis—when interpreting and applying its published disciplinary regulations in a sexual assault case—met the “reasonable [procedural] expectations” of David Schaer, a student suspended for sexual misconduct. The court “assumed” a contractual relationship between the parties, but applied the contractual terms broadly and loosely in Brandeis' favor:

We adhere to the principle that courts are weary about interfering with academic and disciplinary decisions made by private colleges and universities . . . A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts. A college must have broad discretion in determining appropriate sanctions for violations of its policies.<sup>125</sup>

The “broad discretion” referenced in *Schaer* (associated with an archaic 1924 Maryland decision few colleges and universities would be proud to

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122. *Rosenberger v. Rectors of the Univ. of Va.*, 515 U.S. 819, 836 (1995).

123. Murphy, *supra* note 2, at 1010.

124. *Schaer v. Brandeis Univ.*, 735 N.E.2d 373 (Mass. 2000) (finding disciplinary proceedings at a private university did not violate “basic fairness” or otherwise constitute a breach of contract).

125. *Id.* at 482.

reference today)<sup>126</sup> was not absolute. The court held that “[t]he facts alleged do not show that Schaer was *denied basic fairness*”<sup>127</sup> and observed that “[w]hile a university should follow its own rules, Schaer’s allegations, even if true, *do not establish breaches of contract by Brandeis*.”<sup>128</sup> Recognizing a “basic fairness” standard in this context—and saying the Brandeis University met that standard—is not compatible with professor Murphy’s assertion that accused students at private colleges and universities have no “right of redress in civilian court.” Indeed, three years after *Schaer* was decided, a lower court in Massachusetts cited it as authority for issuing a preliminary injunction ordering the College of the Holy Cross to reinstate a suspended student pending trial on his breach of contract claim against the college.<sup>129</sup>

Clearly, the majority in *Schaer* was showing unusual deference to Brandeis. One dissenting justice (Justice Ireland)<sup>130</sup> wrote in this regard:

I write separately because I believe the court, while correctly assuming that a contract exists between Brandeis and its students regarding the university’s disciplinary procedures, fails to interpret the provisions of the disciplinary code in a commonsense way, or in a manner consistent with the standard rules of contract interpretation . . . .

In short, if the college or university puts forth rules of procedure to be followed in disciplinary hearings, it should be legally obligated to follow those rules. To do otherwise would allow Brandeis to make promises to its students that are nothing more

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126. *Woods v. Simpson*, 126 A. 882, 883 (Md. 1924) (upholding dismissal of public university student on grounds she was “apparently not in sympathy with the management of the institution”). The court wrote:

The maintenance of discipline, the upkeep of the necessary tone and standards of behavior in a body of students in a college, is, of course, a task committed to its faculty and officers, not to the courts. It is a task which demands special experience and is often one of much delicacy, especially in dealing with girl students[.]” *Id.*

127. *Schaer*, 735 N.E.2d at 380.

128. *Id.* at 381 (emphasis added).

129. *Ackermann v. President and Trs. of the Coll. of the Holy Cross*, 2003 WL 1962482 (Mass. Super. 2003). The court wrote:

Clearly, the College has countervailing risks of harm relating to its concerns for both the threat to its community that Ackermann’s presence on campus allegedly presents and the risk that the College’s independence in disciplinary matters will be undermined. But the College faces at least as great a risk of harm if it is perceived as ignoring the very rules of procedures it has established in disciplinary matters.

*Id.*

130. Justice Ireland was appointed Chief Justice in 2010.

than a “meaningless mouthing of words.” *Tedeschi v. Wagner College* . . . While the university's obligation to keep the members of its community safe from sexual assault and other crimes is of great importance, at the same time the university cannot tell its students that certain procedures will be followed and then fail to follow them. In a hearing on a serious disciplinary matter there is simply too much at stake for an individual student to countenance the university's failure to abide by the rules it has itself articulated.<sup>131</sup>

Justice Ireland was addressing Brandeis' legal obligations, but inherent in his criticism was the core, cross-cultural ethical principle of “promise keeping.” The importance of honoring this principle is also inchoate in other decisions involving colleges' and universities' obligation to follow their stated disciplinary procedures.<sup>132</sup> Philosopher Sissela Bok explored the origins of the “promise-keeping” imperative in her book *Common Values*:

From the Ten Commandments to Buddhist, Jain, Confucian, Hindu, and many other texts, violence and deceit are the most consistently rejected . . . To cement agreement about how and when these curbs apply, and to keep them from being ignored or violated at will, another negative injunction is needed—against breaches of valid promises [and] contracts . . . Together these injunctions, against violence, deceit, and betrayal, are familiar in every society and every legal system. They have been voiced in works as different as the Egyptian Book of the Dead, the Icelandic Edda, and the Bhagavad-Gita.<sup>133</sup>

Likewise, Derek Bok identified “promise keeping” as one of the core ethical teachings educators try to affirm:

[U]niversities should be among the first to reaffirm the importance of basic values, such as honesty, promise keeping, free expression, and non-violence, for these are not only

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131. *Schaer*, 735 N.E.2d at 381–82 (Ireland, J., dissenting) (citing *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302 (1980)).

132. The importance of honoring this principle is also inchoate in other decisions involving colleges' and universities' obligation to follow their stated disciplinary procedures. See *Ackermann*, 2003 WL 1962482, where the court stated:

Clearly, the College has countervailing risks of harm relating to its concerns for both the threat to its community that Ackermann's presence on campus allegedly presents and the risk that the College's independence in disciplinary matters will be undermined. But the College faces at least as great a risk of harm if it is perceived as ignoring the very rules of procedures it has established in disciplinary matters.

133. SISSELA BOK, *COMMON VALUES* 15 (1995).

principles of civilized society; they are values on which all learning and discovery ultimately depend.”<sup>134</sup>

It is untenable for colleges and universities to proclaim these ethical aims in theory while seeking “discretion” to wiggle out of them in practice. Significant procedural protections identified in college and university policies should be followed (unless waived by the parties) until properly changed in accordance with structures of the institution’s governance.

Not surprisingly, the outcome in *Schaer* does not reflect the law nationwide.<sup>135</sup> New York courts, for example, are also deferential to academic and disciplinary determinations at private institutions of higher education, but the tone of decisions there is reflected in a 1980 Court of Appeals decision (New York’s highest court) in *Tedeschi v. Wagner College*.<sup>136</sup>

Suspension or expulsion for causes unrelated to academic achievement . . . involve determinations quite closely akin to the day-to-day work of the judiciary. Recognizing the present day importance of higher education to many, if not most, employment opportunities, the courts have, therefore, looked more closely at the actions of educational institutions in such matters . . . .

Whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness in the somewhat one-sided relationship between the institution and the individual, we hold that when a university has adopted a rule or guideline

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134. Bok, *supra* note 29, at 50.

135. *See* *Fellheimer v. Middlebury Coll.*, 869 F.Supp. 238, 246 (D. Vt. 1994) (rendering misconduct hearing “fundamentally unfair” when college did not honor its published commitment to “state the nature of [student disciplinary] charges with sufficient particularity to permit the accused party to meet the charges.”). *See also* *Marita Hyman v. Cornell Univ.*, 82 A.D.3d 1309, 1310 (N.Y. App. Div. 2011). The court sided with the university under the facts of the case, but observed that:

It is well settled that in reviewing a university’s disciplinary determinations, “court[s] must determine whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings.” When a university has not substantially complied with its own guidelines or its determination is not rationally based upon the evidence, the determination will be annulled as arbitrary and capricious.

*Id.* (internal citations omitted). *See generally* Paul Smith, *Due Process, Fundamental Fairness, and Judicial Deference: The Illusory Difference Between State and Private Educational Institution Disciplinary Legal Requirements*, 9 U. N.H. L. REV. 443 (2011); Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings*, 42 B.C. L. REV. 653 (2001).

136. *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1304 (N.Y. 1980).



establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed.<sup>137</sup>

The New York court in *Tedeschi* split 4-3 for the student plaintiff. The Massachusetts court in *Schaer* split 3-2 in favor of the university. Those contested outcomes highlight the tension between judicial deference to college and university decisionmaking and the “promise-keeping” imperative. The best legal advice we have seen comes from professors William Kaplin and Barbara Lee: “The sharp differences of opinion in *Schaer* suggest that some courts will more closely scrutinize colleges’ compliance with their own disciplinary rules and regulations.”<sup>138</sup> In short (for reasons of sound policy as well as applicable law) private colleges and universities are not free to punish students “as they see fit.”

### B. Looking Beyond Minimal Due Process

The second due process challenge identified at the outset of this section (i.e., that college and university disciplinary codes should be reconfigured to provide only “minimal” due process) is associated with the work of Robert Bickel and Peter Lake. We think they—like professor Murphy—overlook the depth and value of the college and university due process revolution, especially the sense of *legitimacy* in campus regulations due process helps provide.

Professors Bickel and Lake assert their recommended “facilitator university” (an institution that would provide students with enhanced guidance, protection, and structure without “legalistic” discipline) would “respect . . . the voluntary association that is the core of the college community.”<sup>139</sup> Nonetheless, they seem to postulate a general “command” style of management—capable of ordering campus judicial systems to stop “fiddl[ing] with due process that exceeds constitutional/contractual minimums . . .”<sup>140</sup>

In our view, “fiddling” (e.g., negotiating with campus constituencies, including students) in the design of disciplinary procedures is precisely what colleges and universities should do if they wish to have the greatest educational impact.<sup>141</sup> As Derek Bok has suggested, the involvement of

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137. *Id.* at 1306.

138. WILLIAM KAPLIN & BARBARA LEE, *THE LAW OF HIGHER EDUCATION* 473 (2007).

139. ROBERT BICKEL & PETER LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 210 (1999). *See also* LAKE, *supra* note 63, at 10–25.

140. BICKEL & LAKE, *supra* note 139, at 143.

141. Peter Lake, in his book *Beyond Discipline*, refers approvingly to “educational discourse.” LAKE, *supra* note 63, at 256. This discourse, he says, “is rich with concepts like weighing, balancing, measuring, standards, values,

students in designing and participating in rule enforcement makes it “more likely they will understand the reasons for regulations and . . . gain a stake in implementing them successfully.”<sup>142</sup> If anything has been learned from the student rebellions of the 1800s and the campus unrest of the 1960s and 1970s, it is that the failure to involve students in campus governance promotes a climate in which violence, disruption, and general defiance of campus rules<sup>143</sup> is more likely to occur.

Both at public and private institutions, greater student participation in campus governance will likely result in implementation of due process procedures that go beyond minimal standards set by the courts.<sup>144</sup> No one

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principles, goals, and the like.” *Id.* We think debating and defining college and university disciplinary procedures entails the use and development of this kind of discourse.

142. Bok, *supra* note 27, at 46.

143. For example, the Princeton University Honor Code appears to have arisen out of student and faculty dissatisfaction with a climate of widespread cheating in the late 1800s. The Honor System website at Princeton contains this overview:

Examinations at the College of New Jersey (as Princeton University was then known) in the late 19th-century were rife with cheating; students saw cheating as a way to outwit the faculty, while professors went to great lengths to uncover undergraduate cheating. Booth Tarkington '1893, as quoted in W. Joseph Dehner, Jr.'s 1970 paper, described this rivalry as a “continuous sly warfare between the professor and the student.” Crib sheets were common, as was sharing answers during examinations. Students who refused to collaborate were ridiculed. Reporting fellow students to the faculty was seen as dishonorable and out of the question for most students. Professors, on the other hand, would spend exams stalking the recitation rooms watching for any inconsistencies, and sometimes hired extra sets of eyes for the purpose of catching cheaters.

PRINCETON UNIV., FREQUENTLY ASKED QUESTIONS: HONOR SYSTEM, [http://www.princeton.edu/mudd/news/faq/topics/honor\\_code.shtml](http://www.princeton.edu/mudd/news/faq/topics/honor_code.shtml) (last visited Jan. 15, 2012). It's reasonable to hypothesize that the “continuous sly warfare between the professor and the student” at Princeton during this period was a reflection of the earlier student rebellions against Princeton's authoritarian model (described earlier in this article). When overt challenges to faculty dominance failed, the students resorted to the academic equivalent of asymmetrical warfare.

144. I (Gary Pavela) know this likelihood due to personal experience implementing (and sometimes failing at implementing) revised due process procedures at the University of Maryland. Consider, for example, the following editorial published several years ago in the University of Maryland *Diamondback*:

As citizens of the United States we have certain rights. But how many students are aware that when they step onto campus, they lose some of those rights? . . . One major difference in rights is the conflict between the Fifth Amendment to the Constitution against self-incrimination, and the [University of Maryland] Declaration of Student Rights . . . which

should be surprised that students—like faculty members<sup>145</sup>—expect significant due process when serious penalties can be imposed. Alliances often form between students and teachers that make it harder to backtrack on due process protections, once given.<sup>146</sup> We do not regard this dynamic as undesirable. Substantial changes in student behavior must be internalized and habituated. As recognized decades ago by the Carnegie Commission on Higher Education,<sup>147</sup> students who are alienated from campus governance are likely to be a hostile and uncooperative audience. The “costs” of more-than-minimal due process may be repaid many times over by broad-based acceptance of the legitimacy of campus rules.

The perceived legitimacy of campus disciplinary policies will depend, in part, upon the proper “fit” of those rules with distinct campus cultures (e.g., behavioral standards and enforcement mechanisms at Liberty University will probably have variations not followed at UC-Berkeley). One lesson we draw from this truism is that college and university disciplinary rules and due process procedures should not be exclusively defined from without. Courts will set minimal constitutional and contractual standards, but the legitimacy of college and university policies must be determined, in large measure, by local constituencies identifying, discussing, and balancing competing perspectives. Some colleges and universities will favor less procedural due process, some more. The cultural “flavor” of each institution, however, should not be circumvented

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states: “In all disciplinary hearings . . . no student shall be compelled to testify against himself or herself, although a negative inference may be drawn from any person’s failure to respond to relevant questions in a judicial proceeding.” Though we are students, we are United States citizens first, and our rights should not be altered or reduced when we step onto campus. . . The answer is not to hole up in some ranch in Montana, but rather work through the system to get it changed. Fight the power.

*NO RIGHTS*, UNIV. OF MD. DIAMONDBACK, Oct. 1, 1997, at 4. Campus newspapers often form a powerful alliance with elected student leaders on these topics.

145. See 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings, American Ass’n of Univ. Professors (1958), available at <http://www.aaup.org/AAUP/pubsres/policydocs/contents/statementon+procedurals tandardsinfaculty+dismissal+proceedings.htm> (recommended standards call for notice and a hearing in contested cases, assistance by counsel, and the right to summon and question witnesses).

146. For example, the AAUP favors a high (“clear and convincing”) standard of proof—also favored by accused students in disciplinary cases—in order to preserve a comparable standard in the resolution of sexual harassment allegations against faculty members. Letter from Gregory F. Scholtz to Russlyn Ali, U.S. Dept. of Educ. (June 27, 2011), available at <http://www.nacua.org/documents/AAUPLetterToOCRReSexualViolenceEvidence.pdf>.

147. CARNEGIE COMM’N ON HIGHER EDUC., *supra* note 108, at 93.

by one-size-fits-all prescriptions of consultants, commentators, government regulators, or authors of law review articles.

Peter Lake offered a revealing insight on college and university student conduct systems in his book *Beyond Discipline*. He first observed that “[r]emarkably, I found that about half the students I handled in the discipline system I administered became better students or professionals because of their encounter with that system in some way.”<sup>148</sup> He then wrote:

Such things are hard to measure, but my sense is that most discipline officers concur that a substantial number of students who process through discipline systems actually are made better off by their encounter with that system in some way.<sup>149</sup>

Professor Lake’s word “remarkably” is apt, since most of his book is devoted to arguing that college and university disciplinary systems typically follow what he regards as a “legalistic process . . . hard to reconcile with the developmental goals of higher education.”<sup>150</sup>

The conceptual tension in Professor Lake’s analysis may be influenced, in part, by the fact that many college and university disciplinary systems are not so “legalistic” as he assumes. For nearly fifty years, courts and commentators have cautioned against turning student conduct proceedings into miniature criminal trials.<sup>151</sup> What many educators seek is the kind of balanced approach summarized in a 1970 American Association of State Colleges and Universities “White Paper” on “Due Process in the Student-Institutional Relationship”:

The lesson should be clear . . . that the institution’s disciplinary system must be simple enough to deal with small infractions and minor penalties without undue processes or delay, and, at the same time, complex enough to handle contested or serious cases with appropriate speed, detachment, objectivity, and regard for the rights of the accused.<sup>152</sup>

For example, from first publication in 1979–1980,<sup>153</sup> our *Model Code of Student Conduct*<sup>154</sup> has contained a “disciplinary conference” procedure for

148. LAKE, *supra* note 63, at 253

149. *Id.*

150. LAKE, *supra* note 63, at 17.

151. *See supra* part II and accompanying text. *See also* CARNEGIE COMM’N ON HIGHER EDUC., *supra* note 108, at 96 (“[colleges and universities] cannot afford to get bogged down in frequent, complicated, and time-consuming judicial machinery”); Gary Pavela, *Limiting the Pursuit of Perfect Justice on Campus*, 6 J.C. & U.L. 137 (1980).

152. THOMAS C. FISCHER, DUE PROCESS IN THE STUDENT-INSTITUTIONAL RELATIONSHIP 2 (1970).

153. Pavela, *supra* note 64.

resolving cases in which accused students are subject to penalties less than suspension or expulsion—the large majority of cases on most campuses. Disciplinary conferences normally consist of a non-adversarial meeting between an accused student and a decision maker. The person filing a complaint is not required to participate, unless cross-examination is necessary to resolve a dispositive factual issue. Documentary evidence and written statements are relied upon, so long as the accused student is given access to them in advance, and allowed to respond to them at the conference. Accused students are allowed to call relevant witnesses, in the discretion of the decision maker. There is no right of appeal.

Disciplinary conference procedures are grounded in the 1975 U.S. Supreme Court decision in *Goss v. Lopez*. The Court held in that case that a student subject to a brief suspension—or other comparatively minor penalty—is entitled to “oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story” in a “discussion” with a “disciplinarian.”<sup>155</sup> Colleges and universities now using disciplinary conference procedures include the University of Maryland, American University, George Washington University, North Carolina State University, Pennsylvania State University, Illinois State University, Rutgers University, and Occidental College, among others.<sup>156</sup>

Our experience has been that students and their families readily accept fair-minded, informal disciplinary procedures grounded in “respectful two-way listening.”<sup>157</sup> Legitimacy is not lost when “conversational” due process is associated with less severe sanctions. However, when the stakes are high—i.e., suspension, expulsion, or permanent disciplinary records—greater procedural protection is usually expected.<sup>158</sup> In this context,

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154. An updated, online version of this Model Code is available at <https://docs.google.com/Doc?docid=0Aaj24xYwfevnZGZkcHZ6cDlfODk0Y2JtdHR0aHE>.

155. *Goss v. Lopez*, 419 U.S. 565, 581–82 (1975).

156. Gary Pavela, *The Value of Investigatory Procedures*, 365 ASCA LAW & POLICY REPORT (May 6, 2010), available at <https://docs.google.com/Doc?docid=0Aaj24xYwfevnZGZkcHZ6cDlfNjI0cWRtdjUyZjI>.

157. The term “respectful listening” is derived from research done by the United States Secret Service on preventing lethal school violence. U.S. SECRET SERV. & U.S. DEPT. OF EDUC., THREAT ASSESSMENT IN SCHOOLS: A GUIDE TO MANAGING THREATENING SITUATIONS AND TO CREATING SAFE SCHOOL CLIMATES 69 (2002), available at [http://www.secretservice.gov/ntac/ssi\\_guide.pdf](http://www.secretservice.gov/ntac/ssi_guide.pdf).

158. The importance of providing more substantial due process in serious or “difficult” cases was stated in *Goss v. Lopez*. The Court wrote:

[R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit

colleges and universities that provide more due process than the law requires may be making rational judgments about what is needed to maintain confidence in their disciplinary procedures. Charles Alan Wright made the same point in 1969, at the start of the due process revolution: “[v]oluntary acceptance of wise rules,” he wrote, “going in many instances beyond the minimal requirements of the Constitution, is a constructive act, ‘calculated to ensure the confidence of all concerned with student discipline.’”<sup>159</sup>

#### i. Due Process and Social Science Research

A growing body of social science research supports Wright's view. This research usually focuses on people's *perceptions* of justice—what will lead them to describe their experiences as fair?<sup>160</sup> Intuitively, having an outcome in one's favor will make it more likely that someone will describe their experience as fair. Indeed, prior to 1975, most research focused on the relationship between perceptions of fairness and outcomes.<sup>161</sup> But later research, spurred by the work of psychologist John Thibaut and legal scholar Laurens Walker,<sup>162</sup> has repeatedly and robustly demonstrated that perceptions of procedural fairness contribute significantly to the overall perception of fairness, independent of the outcome.<sup>163</sup>

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cross-examination, and allow the student to present his own witnesses.

In more difficult cases, he may permit counsel.”

*Goss*, 419 U.S. at 581–82. We suggested above that differing cultural environments at different colleges and universities will be manifested in diverse disciplinary rules and procedures. In the realm of procedural fairness however, the differences seem less pronounced. *See, e.g.*, Liberty Univ. Office of Student Conduct, *Student Appeals Court Handbook* (2010), available at <http://www.liberty.edu/media/1216/SAC%20Handbook%202010-2011.pdf>.

159. Wright, *supra* note 55, at 1087 (citing Gen. Order on Judicial Standards of Procedure and Substance in Review of Student Discipline at Tax Supported Insts. of Higher Educ., 45 F.R.D. 133, 148 (W.D. Mo., 1968)).

160. Russell Cropanzano & Jerald Greenberg, *Progress in Organizational Justice: Tunneling Through the Maze*, in 12 INT'L REV. OF INDUST. AND ORG. PSYCHOL. 317–72 (Cary L. Cooper & Ivan T. Robertson eds., 1997).

161. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

162. JOHN W. THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

163. *See* Robert J. Maccoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. LAW SOC. SCI. 171 (2005). Indeed, the fair process effect has been so well documented that some scholars have expressed concerns about the possibility of manipulation; (i.e., a fair procedure will be used to mask unfair results), hence the “double-edged” sword. We are aware of this critique, and hope that others who value due process do so with the goal of improving both procedural and substantive outcomes.

In short, organizations and institutions believed to follow fair procedures enjoy greater levels of legitimacy.<sup>164</sup> Perceived institutional legitimacy is important because it is a key precondition for the effectiveness of governance.<sup>165</sup> It follows that colleges, universities, and other institutions not perceived as practicing fair procedures will have difficulty encouraging compliance with policies, thereby stymieing efforts to achieve organizational goals. Results from laboratory studies suggest a link between judgments of procedural justice and rule compliance. When individuals perceive procedural injustices they are less likely to comply and develop innovative methods of avoiding detection.<sup>166</sup> Strict enforcement accompanied by minimal due process may thus *encourage* student deviance rather than deter it.

Perception of procedural fairness is also associated with greater general satisfaction with the legal experience regardless of outcome, and may “cushion the dissatisfaction that might result from unfavorable outcomes . . . .”<sup>167</sup> Satisfaction with the overall process is an important consideration when making future decisions to report a crime, an especially important issue for sexual misconduct given that reporting the harassment is the least common response, while ignoring or avoiding the behavior the most common.<sup>168</sup>

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164. See Barry M. Goldman & Edward McCaffrey, *Why Fair Treatment Matters*, 10 SYNTHESIS: LAW & POL’Y IN HIGHER EDUC. 738, 739. The authors wrote:

Although the effects of organizational justice (and injustice) have been well-established, with over 200 studies to date documenting these effects, there is less agreement among scholars as to *why* it matters. The primary explanations are that justice matters for both *instrumental* and *non-instrumental* reasons. The instrumental reasons are, perhaps, easier for people to understand: fair procedures make it more likely that individuals will achieve desired results. For example, an individual is more likely to feel that she or he will be successful with the decision process if the decision makers are unbiased . . . . The non-instrumental reasons, while less tangible to many, are proving to be very powerful and may be traceable to the need for self-esteem . . . . For example, a recent study indicates that most (65%) of individuals filing discrimination claims with EEOC identified feeling disrespected as a catalyst for their claim.

*Id.*

165. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (explains study revealing that people follow the law if they believe it is legitimate, not out of fear of punishment).

166. See Nehemia Friedland et al., *Some Determinants of the Violation of Rules*, 3 J. OF APPLIED SOC. PSYCHOLOGY 103–18 (1973).

167. LIND & TYLER, *supra* note 161, at 72.

168. See Caroline C. Cochran et al., *Predictors of Responses to Unwanted Sexual Attention*, 21 PSYCHOL. OF WOMEN Q. 207–26 (1997).

Core definitions of procedural fairness seem to be broadly shared.<sup>169</sup> One of the earliest and most consistent findings is that perceptions of procedural fairness are influenced by the opportunity to tell one's story, known as process control.<sup>170</sup> But process control is just one dimension of procedural justice; later researchers explored other determinants. A 2002 meta-analytic review of 183 empirical studies found that even after controlling for the outcome (distributive justice), a set of fair-process criteria known as *Leventhal criteria* were significantly related with perceptions of fairness.<sup>171</sup> Although acknowledging that different rules will be given different emphasis depending on the situations, Leventhal (1980) identified the following rules to be met in order for a process to be perceived as fair: (1) rules should be consistently applied; (2) individuals involved in the decisionmaking process should be perceived as bias free; (3) information must be gathered and processed as accurately as possible; (4) there must be an opportunity to modify or reverse decisions made throughout the process; (5) the decisionmaking process must reflect the interests of all groups and subgroups affected by the decisionmaking process; and (6) the procedures must conform to an individual's basic moral and ethical values.<sup>172</sup>

## ii. Lessons from the Duke Lacrosse Case

Broadly-shared conceptions of procedural fairness do not insulate communities or societies from losses of collective or individual judgment when passions inflame the group or an influential subgroup. One noteworthy example in the recent history of American higher education is

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169. Philosopher Sissela Bok wrote in her book *Common Values*:

Whether in council scenes in Homer's *Iliad*, where leaders met to settle conflicts and to decide between war and peace, or in debates in contemporary parliamentary bodies and international organizations, certain rudiments of procedure are necessary for decision making: recognizing different points of view, hearing and weighing arguments, and striving for a modicum of impartiality. While these rudiments hardly guarantee the fairness or wisdom of the outcome, they provide "the core of a thin notion of minimum procedural justice."

Bok, *supra* note 133, at 53 (citing STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 90 (1989)).

170. See THIBAUT & WALKER, *supra* note 162; LIND & TYLER, *supra* note 161.

171. Jason Colquitt et al., *Justice at the Millennium: A Meta-Analytic Review of 25 Years of Organizational Justice Research*, 86 J. OF APPLIED PSYCHOL. 425, 438 (2001).

172. Gerald S. Leventhal, *What Should Be Done With Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27-55 (Gergen et al. eds., 1980).



the Duke University lacrosse case. The details of this story have been told and retold in multiple sources,<sup>173</sup> but a concise insight was offered by CBS news correspondent Ed Bradley: the “biggest surprise for us [in preparing a related 60 Minutes story] was the presumption of guilt.”<sup>174</sup> This presumption was openly expressed or implied by significant numbers of faculty members, including a published statement by what came to be known as “The group of 88.”<sup>175</sup> The statement was described by authors Stuart Taylor and KC Johnson:

The Group of 88 . . . committed themselves to 'turning up the volume . . .' [Their] statement concluded, 'To the students speaking individually and to the protestors making collective noise, *thank you for not waiting* and for making yourselves heard.' By this point, of course, the protesters had plastered the campus with wanted posters showing the lacrosse players' photos; chanted . . . 'Time to confess'; and waved a banner proclaiming, CASTRATE.<sup>176</sup> (emphasis added).

Given the context, the Group of 88 reference to “not waiting” was antithetical to basic conceptions of fundamental fairness. Duke University chemistry professor Steve Baldwin aptly summarized the climate in his subsequent observation: “I have never heard presumably intelligent, careful, balanced people being so completely over the top.”<sup>177</sup>

If, as we suggest above, fundamental standards of procedural fairness “seem to be broadly shared,” it could be expected during the lacrosse team crisis that some Duke constituencies would have emphasized a presumption of innocence and the need for unbiased assessment of facts. That is precisely what occurred, both in the context of courageous leadership by faculty members with legal training and experience (most notably, a former chair of the American Bar Association’s Section of Individual Rights and Responsibilities)<sup>178</sup> and a cross-section of student

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173. The most comprehensive compilation can be found in *Until Proven Innocent*, a book by Stuart Taylor (a former *New York Times* reporter and a senior fellow at the Brookings Institution) and K.C. Johnson (a professor of history at Brooklyn College and CUNY). STUART TAYLOR & K.C. JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE* (2007).

174. *Id.* at 117.

175. *Id.* at 145.

176. *Id.*

177. *Id.* at 135.

178. Duke law professor James E. Coleman, Jr. chaired an investigating committee that challenged many “negative stereotypes” about the lacrosse team. See TAYLOR & JOHNSON, *supra* note 173, at, p. 207–11 (describing the Coleman Committee’s approach to the investigation).

constituencies, especially the student newspaper. Johnson and Taylor wrote:

One of the few oases of common sense in [a] wretched media landscape was Duke's own student newspaper, *The Chronicle*. Setting a tone for coverage that would consistently outclass almost all in the national media, *The Chronicle* published an April 3 editorial noting that student protesters and professors who demonized the lacrosse players were "guaranteed front page coverage in the nation's biggest newspapers [and their] fringe views are slated for prime time." But it stressed that far more students reserved judgment while awaiting the evidence. "You'd hardly believe that," the editorial said, "if you've read any major newspaper or turned on your television in the past few days."<sup>179</sup>

The Duke lacrosse story highlights the passions that can be aroused when allegations of wrongdoing involve issues of social class, race, athletics, or sex. These are not infrequent topics at American colleges and universities; they will inevitably arise again. Colleges and universities are free to follow a "minimal due process" model, but that model may not serve them well if they are thrust into the social and legal maelstrom of a polarized student conduct case. Furthermore, for purposes of our analysis, internal dynamics of the Duke lacrosse case suggest that important student voices will be attuned to the need for procedural fairness. If those voices are disregarded, the perceived legitimacy of college and university rules will be in jeopardy.

### C. Due Process and Campus Safety

The third due process challenge identified above (i.e., violence, alcohol abuse, sexual harassment, and other forms of misconduct on campus have become so widespread that the due process "model" must be reexamined, both by institutions of higher learning and the courts) takes varied forms. Some critics assert college and university student disciplinary proceedings constitute "a kind of parallel judicial universe"<sup>180</sup> where "offenses as serious as . . . rape" can be "disposed of discreetly" rather than referred to the criminal justice system.<sup>181</sup> Implicit in this critique—which is typically uninformed by any knowledge of federal laws *requiring* colleges and universities to resolve sexual misconduct charges independently of

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179. TAYLOR & JOHNSON, *supra* note 173, at 125.

180. Ironically, reporters writing these kinds of stories seem oblivious of the fact that the newspapers employing them also have "parallel judicial universes" resolving comparable claims of sexual harassment in the workplace.

181. Nina Bernstein, *College Campuses Hold Court in Shadows of Mixed Loyalties*, N. Y. TIMES, May 5, 1996, at 1.

criminal courts<sup>182</sup>—is an assumption colleges and universities cannot or should not resolve such cases at all.<sup>183</sup> Another perspective, better informed about the legal obligations colleges and universities have to enforce rules that may overlap with criminal laws, seems to suggest that crime and misconduct on campus are somehow associated with too much due process for the accused. Professor Lake makes this point in *Beyond Discipline*:

Fairness and a sound, safe, academic environment sometimes appear inversely related . . .

This Book addresses a paradox of modern higher education: extremely well-run and complex systems ensuring fairness coexist in higher education environments filled with persistent negative outcomes, like cheating, drinking, and violence. How is it possible that higher education has achieved such success in process and fairness dimensions and simultaneously failed to conquer the intransigent educational environmental problems of the day?<sup>184</sup>

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182. An April 4, 2011, United State Department of Education Office of Civil Rights “Dear Colleague” letter on sexual violence states:

[A] school should not delay conducting its own investigation or taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime. Any agreement or Memorandum of Understanding (MOU) with a local police department must allow the school to meet its Title IX obligation to resolve complaints promptly and equitably. Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence, once notified that the police department has completed its gathering of evidence (not the ultimate outcome of the investigation or the filing of any charges), the school must promptly resume and complete its fact-finding for the Title IX investigation.

Letter from Russlyn Ali to Colleague, U.S. Dept. of Educ. (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

183. Nina Bernstein notes, for example, that college and university disciplinary proceedings may interfere with criminal prosecutions:

[P]rosecutors and police officers cite campus proceedings that have damaged or destroyed viable cases. At Salem State College, a recent student rape trial ran for 11 hours, until 1 A.M., with no rules of evidence, and produced a tape recording that the local prosecutor had to study word by word because the criminal case could be dismissed if she withheld anything exculpatory from the grand jury. It declined to indict.”

Bernstein, *supra* note 181, at 16. Ms. Bernstein, however, doesn’t inform her readers why the grand jury “declined to indict.”

184. LAKE, *supra* note 63, at 8–9.

Terms used by Professor Lake (“education environments *filled with* persistent negative outcomes”) echo language used by a variety of national advocacy groups portraying college and university campuses as dangerous places run by administrators trying to hide a rising tide of campus crime.<sup>185</sup> The website for the Network of Victim Assistance proclaims that “[i]ncidents of drug and alcohol abuse, sexual assault and hate crimes *are common* on today's college campuses.”<sup>186</sup> This is so, in part, because “*many* victims are discouraged by college authorities from reporting crimes to local law enforcement agencies and encouraged instead to file complaints only with the campus justice systems. This practice protects the reputation of the school, but may increase the impact and consequences of the crime on the victim . . . .”<sup>187</sup> (*italics added*).

Terms like “filled with,” “common,” and “many” are conveniently ambiguous. They set the stage for a range of earnest and urgent prescriptions, generally lacking historical insight or comparative analysis of behavior patterns in the larger society. When the suggestion is made in this context that “complex [college and university conduct] systems ensuring fairness” have “failed to conquer” student misconduct,<sup>188</sup> readers are not invited to consider whether:

- 1) the same argument should not be made about the criminal justice system in general (e.g., the Bill of Rights has likewise “failed to conquer” crime);
- 2) young adults attending institutions of higher learning are generally safer than young adults *not* attending institutions of higher learning;
- 3) certain kinds of college or university student misconduct (especially cheating and binge drinking) are associated with cross-generational behavioral problems not confined to college and university campuses;
- 4) some of the most serious forms of reported misconduct by college and university students occur off-campus, beyond the reach of college and university officials;
- 5) a majority of victims (especially in sexual misconduct cases) decline to report allegations for reasons unrelated to the design of campus disciplinary systems, and

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185. *Id.* (emphasis added).

186. *Campus Crime*, NETWORK OF VICTIM ASSISTANCE (NOVA), <http://www.novabucks.org/campuscrime.html> (last visited Apr. 26, 2012) (emphasis added).

187. *Id.*

188. See LAKE, *supra* note 63.

6) the frequency of college and university student misconduct *might be worse* without the levels of procedural fairness provided.<sup>189</sup>

First, from a broader perspective, there is ample evidence colleges and universities are comparatively safe places for young adults. In 2011, the American College Health Association (ACHA) conducted a large study involving 157 colleges and universities, enrolling 1.36 million students ages eighteen to twenty-four.<sup>190</sup> The researchers found that college and university campuses:

[P]rovide much safer and more protective environments than previously recognized. When compared to the mortality of eighteen- to twenty-four-year-olds in the general population, college student death rates are significantly lower for such causes as suicide, alcohol-related deaths and homicide.<sup>191</sup>

Specific findings included data showing that the suicide rate for traditionally-aged college and university students was forty-seven percent lower than “the same-aged general population”; alcohol related deaths sixty to seventy-six percent lower; and homicide ninety-seven percent lower.<sup>192</sup>

Although the ACHA researchers found that alcohol-related mortality among traditionally-aged college and university students “was substantially lower than predicted,”<sup>193</sup> student binge drinking remains one of the greatest challenges faced by college and university administrators. The 2010 National Survey on Drug Use and Health found that:

Young adults aged 18 to 22 enrolled full time in college were more likely than their peers not enrolled full time (i.e., part-time college students and persons not currently enrolled in college) to use alcohol in the past month, binge drink, and drink heavily. Among full-time college students in 2010, 63.3 percent were current drinkers, 42.2 percent were binge drinkers, and 15.6

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189. This possibility does not seem remote in light of the reported history of student violence in eras when due process was minimal, at best.

190. James C. Turner & Adrienne Keller, PRESENTATION AT AMERICAN PUBLIC HEALTH ASSOCIATION ANNUAL MEETING AND EXPOSITION: LEADING CAUSES OF MORTALITY AMONG AMERICAN COLLEGE STUDENTS AT FOUR-YEAR INSTITUTIONS 3, (Nov. 4, 2011), *available at* <http://apha.confex.com/apha/139am/webprogram/Paper241696.html>.

191. *More U.S. College Students Die from Suicide than Alcohol-Related Causes, U.Va. Researchers Find*, UVA TODAY, Nov. 4, 2011, <http://www.virginia.edu/uvatoday/newsRelease.php?id=16568>.

192. Turner & Keller, *supra* note 190, at 19.

193. PRESENTATION SUMMARY: LEADING CAUSES OF MORTALITY AMONG AMERICAN COLLEGE STUDENTS AT FOUR-YEAR INSTITUTIONS, Am. Pub. Health Ass’n (Nov. 2, 2011, 12:50 PM), <http://apha.confex.com/apha/139am/webprogram/Paper241696.html>.

percent were heavy drinkers. Among those not enrolled full time in college, these rates were 52.4, 35.6, and 11.9 percent, respectively.<sup>194</sup>

The high level of college and university student binge drinking has stabilized or slightly declined.<sup>195</sup> College and university campuses (especially those in the Northeast where “Greek systems dominate . . . [and] athletic teams are prominent”<sup>196</sup>) are hotspots for this behavior. At the same time, however, the larger society is recognizing that binge drinking is a national, cross-generational problem. A January 11, 2012, *New York Times* article reports that:

Excessive drinking isn’t just for college kids anymore. New research shows that four times a month, one in six Americans goes on a drinking binge, knocking back an average of eight alcoholic beverages within a few hours.

The findings, based on a survey of 457,677 Americans around the country, show that while binge drinking remains common among the young, it’s also an issue for people well past their 20s. Over all, about 36 percent of binge drinking occurs among people 35 and older, and older people tend to binge-drink more frequently than the young.<sup>197</sup>

No issue this complex and entrenched is going to be solved by the simplistic reduction of college and university due process procedures to “minimums” required by the courts. Other environmental and social-norming approaches are given much more attention by researchers who have studied the problem in depth.<sup>198</sup> Again, a particular danger in this

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194. SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 20 (2011), [www.samhsa.gov/data/NSDUH/2k10NSDUH/2k10Results.htm](http://www.samhsa.gov/data/NSDUH/2k10NSDUH/2k10Results.htm).

195. The 2010 National Survey on Drug Use and Health reports that:

Among young adults aged 18 to 22, the rate of binge drinking appears to be declining somewhat. In 2002, the binge drinking rate within this age group was 41.0 percent compared with the current 38.4 percent. Among full-time college students, the rate went from 44.4 to 42.2 percent, but the change was not significant. Among part-time college students and others not in college, the rate decreased from 38.9 to 35.6 percent during the same time period.

*Id.*

196. NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, WHAT PARENTS NEED TO KNOW ABOUT COLLEGE DRINKING 4 (2002). <http://www.collegedrinkprevention.gov/NIAAACollegeMaterials/parentBrochure.aspx>

197. Tara Parker-Pope, *America's Drinking Binge*, N.Y. TIMES BLOG (Jan. 11, 2012, 3:40 PM), <http://well.blogs.nytimes.com/2012/01/11/americas-drinking-binge/>.

198. *See generally* NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, HOW TO REDUCE HIGH-RISK COLLEGE DRINKING: USE PROVEN STRATEGIES, FILL

context is generating campus-wide controversies about procedural fairness that detract from interventions requiring suasion, education, and peer engagement. The 2004 National Academy of Sciences report to Congress entitled “Reducing Underage Drinking: A College Responsibility” offered guidance in this regard:

Law is a blunt instrument. It is not self-executing, and it requires the affirmative support of a substantial proportion of the population and of those who are expected to enforce it. These characteristics of a law are particularly important for instrumental prohibitions, such as the ban against underage drinking, because the level of compliance will depend heavily on the willingness of a large number of individuals to adhere to the law simply because they accept its moral authority to command their obedience. That is, a legal norm of this kind, which affects so many people in so many everyday social and economic contexts, cannot be successfully implemented based on deterrence (the threat of punishment) alone. It must rely heavily on the “declarative” or “expressive” function of the law: by forbidding the conduct, it aims to shape people’s beliefs and attitudes about what is acceptable social behavior and thereby to draw on their disposition to obey.<sup>199</sup>

We believe the expressive function of the law encompasses *how the law is administered*. In the college and university context, if students do not respect the fairness of the process, they will not accept the legitimacy of the rule.

Academic dishonesty is another area of particular concern for college and university administrators. Don L. McCabe at Rutgers University, one of the leading researchers in the field, has documented “an ever-increasing rise in the incidence of academic dishonesty among students—cheating on tests and exams, on written assignments, and on class projects.”<sup>200</sup> McCabe attributes the increase, in part, to pervasive attitudes among many high school students who “view high school as simply an annoying obstacle on the way to college, a place where they learn little of value, where teachers are unreasonable or unfair, and where, since ‘everyone else’

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RESEARCH GAPS (2002) (discussing the importance of science-based research and effective strategies to control excessive drinking on college and university campuses), *available at* [http://www.collegedrinkingprevention.gov/media/FINAL\\_Panel2.pdf](http://www.collegedrinkingprevention.gov/media/FINAL_Panel2.pdf).

199. COMM. ON DEVELOPING A STRATEGY TO REDUCE & PREVENT UNDERAGE DRINKING, NAT’L ACAD. OF SCI., *REDUCING UNDERAGE DRINKING: A COLLECTIVE RESPONSIBILITY* 28 (Richard J. Bonnie & Mary Ellen O’Connell eds., 2004) *available at* [http://www.nap.edu/openbook.php?record\\_id=10729&=page=28](http://www.nap.edu/openbook.php?record_id=10729&=page=28).

200. Donald L. McCabe & Gary Pavela, *New Honor Codes for a New Generation*, *INSIDE HIGHER EDUC.* (Mar. 11, 2005, 4:00 AM), <http://www.insidehighered.com/views/2005/03/11/pavela1>.

is cheating, they have no choice but to do the same to remain competitive.”<sup>201</sup> Many high school students, McCabe believes, “take these habits with them to college.”<sup>202</sup>

Colleges and universities have responded to the increase in academic dishonesty with research-based programming showing positive results.<sup>203</sup> McCabe described that programming in 2006, saying:

[W]e propose that administrators work with faculty and students to develop broader programmatic efforts based upon notions of ethical community building . . .

Developing an ethical community happens outside the classroom as much as inside it, and thus involves creating a “hidden curriculum” in which students are actively engaged in developing moral reasoning skills through regular facilitated discussion of real-life ethical dilemmas that face them in the context of their educational program (e.g., Trevino & McCabe, 1994). In addition, students can be involved in the development and enforcement of a code of conduct. Unlike the deterrence approach that focuses exclusively on catching and punishing cheaters, the ethical community building approach emphasizes a more positive message about creating a culture in which all members benefit from living in a culture of integrity.

Student involvement is central to the ethical community-building approach (McCabe & Pavela, 2000): 'Such an approach not only communicates to students that [their] institution is committed to academic integrity, it also encourages students to take responsibility for their own behavior.' With proper guidance, students can play a vital role in designing and enforcing academic integrity standards in their program.<sup>204</sup>

As in the case of binge drinking, effective responses to academic dishonesty require a broad base of community support. The continued success of honor codes in influencing student behavior highlights again the

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201. *Id.*

202. *Id.*

203. See Donald L. McCabe, Linda Klebe Treviño & Kenneth D. Butterfield, *Honor Codes and Other Contextual Influences on Academic Integrity: A Replication and Extension to Modified Honor Code Settings*, 43 RES. IN HIGHER EDUC. 357, 357 (2002) (“[Study] [r]esults suggests that modified honor codes are associated with lower levels of student dishonesty and that the McCabe and Treviño model appears to be reasonably robust.”).

204. Donald L. McCabe, Linda Klebe Treviño & Kenneth D. Butterfield, *Academic Dishonesty in Graduate Business Programs: Prevalence, Causes, and Proposed Action*, 5 Academy of Management Learning & Educ. 294, 302 (2006) (citations omitted).



pivotal role of a sense of *legitimacy* (active student participation and engagement) in designing and enforcing college and university rules. That sense of legitimacy will be lost if students come to believe the rules are not fairly enforced.

Finally, the issue of sexual harassment on college and university campuses—including sexual violence—has subjected college and university due process procedures to heightened scrutiny, including direct federal intervention to mandate a “preponderance of the evidence” standard of proof (lower than the “clear and convincing standard” used at some colleges and universities).<sup>205</sup> This is an area fraught with controversy and competing statistics, but there is evidence at the national level that continued efforts to challenge sexual harassment are producing results. A 2011 *Washington Post/ABC* poll reported that:

Seventeen years ago, nearly four in 10 women ages 18 to 49 said they had been sexually harassed at some point. Now, one in four say so. Similarly, 25 percent of college-educated women in the new survey report experiencing harassment, compared with 42 percent in 1994.<sup>206</sup>

We have examined competing views about the extent of sexual violence on college and university campuses. National commentary was galvanized by the work of Professor Mary Koss at the University of Arizona, who found (over 25 years ago) that “one of four college women will be the victim of rape or attempted rape.”<sup>207</sup> Her data and interpretation have been vigorously challenged,<sup>208</sup> but are generally supported by recent (and we think carefully researched) data accompanying the April 4, 2011 Office of Civil Rights “Dear Colleague” Letter (OCR DCL) on sexual violence.<sup>209</sup> The authors of the 2007 Campus Sexual Assault (CSA) Study cited in the DCL<sup>210</sup> found that “about 1 in 5 women are victims of completed or attempted sexual assault while in college.”<sup>211</sup>

The CSA Study cited in the OCR DCL is worthy of careful study.<sup>212</sup> It was derived from a web-based survey administered in the winter of 2006 at

205. Ali, *supra* note 182, at 11.

206. Scott Clement, *Workplace Harassment Drawing Wide Concern*, Wash. Post, Nov. 16, 2011, at A6.

207. Mary P. Koss, *Defending Date Rape*, 7 J. INTERPERS. VIOLENCE 122–26 (1992) (explaining and responding to criticism of her work).

208. See, e.g., Heather MacDonald, *The Campus Rape Myth*, 18 CITY J. 22 (2008) (discussing flaws in Koss’ study).

209. Ali, *supra* note 182, at 2 (citing CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT xiii (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>).

210. KREBS ET AL., *supra* note 209.

211. Ali, *supra* note 182, at 2 (citing KREBS ET AL., *supra* note 209, at xiii).

212. The data and commentary contain a wealth of insight and should be read in their entirety.

two large public universities; 5,446 undergraduate women and 1,375 undergraduate men participated.<sup>213</sup> The following findings are especially noteworthy for our topic:

- Data on female victims: “Data indicate that 13.7% of undergraduate women had been victims of at least one completed sexual assault since entering college: 4.7% were victims of physically forced sexual assault; 7.8% of women were sexually assaulted when they were incapacitated after voluntarily consuming drugs and/or alcohol (i.e., they were victims of alcohol and/or other drug- [AOD] enabled sexual assault); 0.6% were sexually assaulted when they were incapacitated after having been given a drug without their knowledge (i.e., they were certain they had been victims of drug-facilitated sexual assault [DFSA]).”<sup>214</sup>
- Data on male victims: “Although the prevalence of sexual assault is considerably lower among the male sample than the female sample, there are some estimates worth noting. Approximately 6.1% (n = 84) of males reported experiencing attempted or completed sexual assault since entering college. Half of them (n = 50, 3.7%) experienced a *completed* sexual assault. Among victims of completed sexual assault since entering college, incapacitated sexual assault was much more prevalent (n = 45, 3.4%) than physically forced sexual assault (n = 12, 0.7%). Only 0.7% of the male sample reported experiencing physically forced sexual assault (n = 12).”<sup>215</sup>
- College and university women at greater risk [background/previous research]: “Although methodological variation renders comparisons difficult to make, some previous studies suggest that university women are at greater risk than women of a comparable age in the general population. This pattern is likely due to the close daily interaction between men and women in a range of social situations experienced in university settings, as well as frequent exposure to alcohol and other drugs.”<sup>216</sup>

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213. KREBS ET AL., *supra* note 209, at x.

214. *Id.* at vii.

215. *Id.* at 5-5 (emphasis in original) (citations omitted).

216. *Id.* at 1-1 (citations omitted).

- Data on sexual assault before and after entering college: “Nineteen percent of the women reported experiencing completed or attempted sexual assault since entering college, a slightly larger percentage than those experiencing such incidents before entering college.”<sup>217</sup>
- Greater risk for freshmen and sophomores: “Years in college was positively associated with experiencing physically forced sexual assault since entering college. This finding is not surprising given that the more years a woman has been in college, the more exposure she has had to potentially being assaulted since entering college. However, upon examining *when* sexual assault is most likely to occur (by restricting the analyses to sexual assaults occurring within the past 12 months, or since entering college for freshmen), the risk was greater for freshmen and sophomores than for juniors and seniors . . . .”<sup>218</sup>
- Fraternity membership and incapacitated sexual assault: “Over a quarter of incapacitated sexual assault victims reported that the assailant was a fraternity member at the time of the incident; this proportion is significantly higher than that reported by victims of physically forced sexual assault (28% vs. 14%, respectively). Not surprisingly, the vast majority of incapacitated sexual assault victims (89%) reported drinking alcohol, and being drunk (82%), prior to their victimization. This is much higher than the proportion of physically forced victims who reported drinking (33%) and being drunk (13%) prior to their assault.”<sup>219</sup>
- Sexual assault and parties: “A surprisingly large number of respondents reported that they were at a party when the incident happened, with a significantly larger proportion of incapacitated sexual assault victims reporting this setting (58% compared with 28%).”<sup>220</sup>
- Most incidents occur off-campus: “The majority of sexual assault victims of both types reported that the incident had happened off campus (61% of incapacitated sexual assault victims and 63% of physically forced sexual assault victims).”<sup>221</sup>

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217. *Id.* at xiii (citations omitted).

218. *Id.* at xiv (emphasis in original).

219. *Id.* at xvi.

220. *Id.*

221. *Id.* at xvi–xvii.

- Few victims seek assistance: “A very small percentage of victims reported that they contacted a victim’s, crisis, or health care center after the incident. This type of disclosure was more prevalent among physically forced sexual assault victims (16%) than incapacitated sexual assault victims (8%).”<sup>222</sup>
- Few victims report sexual assault: “A similarly small proportion of victims of both types of sexual assault stated that they reported the incident to a law enforcement agency, with incapacitated sexual assault victims once again being less likely to report the incident (2% vs. 13%).”<sup>223</sup>
- Reasons for not reporting: “Of the victims who did not report the incident to law enforcement, the most commonly reported reasons for non-reporting were that they did not think it was serious enough to report (endorsed by 56% of physically forced sexual assault victims and 67% of incapacitated sexual assault victims), that it was unclear that a crime was committed or that harm was intended (endorsed by just over 35% of both types of victims), and that they did not want anyone to know about the incident (endorsed by 42% of physically forced sexual assault victims and 29% of incapacitated sexual assault victims).”<sup>224</sup>
- Sorority membership as a risk factor [background/previous research]: “Sorority membership itself has been identified as a risk factor for sexual assault, including being a victim of alcohol or drug coercion.”<sup>225</sup>
- Greek organizations and alcohol consumption [background/previous research]: “Not surprisingly, previous research has documented that students who are members of Greek organizations drink more frequently and heavily than nonmembers, and it is questionable whether Greek affiliation is associated with sexual assault once alcohol consumption is controlled for analytically.”<sup>226</sup>
- Sexual assault and fraternity men [background/previous research]: “[F]raternity men have been identified as being more

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222. *Id.* at xvii.

223. *Id.*

224. *Id.*

225. *Id.* at 2–7 (citations omitted).

226. *Id.* at 2–8 (citations omitted).

likely to perpetrate sexual assault or sexual aggression than nonfraternity men.”<sup>227</sup>

- Sexual assault and aggressive sports [background/previous research]: “[A] recent study found that college men who had participated in aggressive sports (including football, basketball, wrestling, and soccer) in high school used more sexual coercion (along with physical and psychological aggression) in their college dating relationships than men who had not. This group also scored higher on attitudinal measures thought to be associated with sexual coercion, such as sexism, acceptance of violence, hostility toward women, and rape myth acceptance.”<sup>228</sup>

- Sexual victimization before college [background/previous research]: “[E]ven though some women experience their first sexual assault after entering college, many women who experience sexual assault during college had been sexually victimized before coming to college. Since women who have experienced sexual assault before entering college have a much greater chance of experiencing sexual assault during college, it is important that sexual assault programming reflects this reality.”<sup>229</sup>

- Few college and university programs address the relationship between substance use and sexual assault [background/previous research]: “[D]espite the link between substance use and sexual assault, it appears that few sexual assault prevention and/or risk reduction programs address the relationship between substance use and sexual assault. In a review of 15 university-based prevention interventions conducted between 1994 and 1999, only three included references to alcohol use.”<sup>230</sup>

The CSA study provides convincing support for calls to expand institutional efforts to reduce sexual violence on college and university campuses. As the authors state, colleges and universities are places where there is “close daily interaction between men and women in a range of social situations,” often accompanied by “frequent exposure to alcohol and other drugs.”<sup>231</sup> Stepping back from impassioned criticism or defense of college and university administrators trying to manage this exceptional

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227. *Id.* at 2–11 (citations omitted).

228. *Id.* (citations omitted).

229. *Id.* at 6–4.

230. *Id.* (citation omitted).

231. *Id.* at 1–1 (citation omitted).

environment, commentators might focus more attention on the fact that alcohol abuse and sexual violence are probably exacerbated on college and university campuses, but are also reflective of significant, cross-generational social problems in other settings. Single-minded focus on college and university student misconduct—a favorite topic in national media—can be a convenient distraction from important contributory shortcomings elsewhere, including disengaged parenting. Caricatures of college and university campuses as uniquely dangerous places also pose the risk of forcing institutions to adopt largely politicized solutions (e.g., a lower standard of proof in disciplinary cases) when far deeper issues are involved (e.g., the “most common reason” college and university students decline to report sexual violence is a belief the offense was not “serious enough” to report).<sup>232</sup> Politicized solutions, in turn, politicize college and university sexual assault policies, undermine their legitimacy, and discredit educational interventions.

The CSA data also highlight the difficult task colleges and universities have undertaken in resolving contested sexual violence cases. The close connection between substance abuse and sexual assault hinders communication when incidents occur; it also clouds memories when investigations are undertaken thereafter. The large number of cases occurring off-campus (sometimes in places where colleges and universities have no authority or control) may also inhibit access to evidence and witnesses. These and other obstacles—including reluctance on the part of young adults<sup>233</sup> to discuss sexual desires or limits openly and directly—help explain why unbiased disciplinary proceedings (while unquestionably necessary) will be a consistent source of disappointment to individuals who rely primarily on the threat of punishment to address student sexual misconduct.

Most educators understand that sexual misconduct must be challenged in multiple ways, including education, peer group suasion, and more candid communication among and between men and women. Peggy Reeves Sanday, professor of anthropology at the University of Pennsylvania and author of *Fraternity Gang Rape: Sex, Brotherhood and Privilege on Campus*<sup>234</sup> has recognized that colleges and universities “have to be prepared to expel perpetrators after due process.”<sup>235</sup> The core of her research-based message, however, is the need to challenge male bonding that “involves defining women as ‘the other’.”<sup>236</sup>

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232. *Id.* at xvii.

233. We hypothesize this reluctance is not limited to young adults.

234. PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD AND PRIVILEGE ON CAMPUS* (2d ed. 2007) [hereinafter Sanday I]. See also Peggy Reeves Sanday, *The Culture of Rape*, 4 *SYNTHESIS: LAW & POL’Y IN HIGHER EDUC.* 281, 281–83, 295–96 [hereinafter Sanday II].

235. *Id.* at 295–96.

236. *Id.* at 282.

[M]ale bonding depends on being loyal to the male group and separating from women. It involves defining woman as the “other.”

Guys need to talk with their female peers on campus, and not just talk to each other. If there were open discussion between males and females about these issues on campuses across the country, then we would have far fewer problems. . . . Men and women have to understand each other's points of view. There are women—and men—who enjoy sex every day or three or four times a week. There are men and women who don't enjoy that kind of sexuality. We have to understand that polarization forces men into a kind of “hypersexuality.” . . . It's shameful to force men into a kind of hypersexuality they may not feel. The same with women. . . . The sexual variation among males and females is great.<sup>237</sup>

Sanday's challenge to sexual stereotyping and her emphasis on candid communication require active student participation. Student participation, in turn, depends upon a sense of trust in the legitimacy of campus rules and rule enforcement. Accordingly, it is not surprising that Sanday's call for strict enforcement of sexual misconduct policies would be associated with a concurrent emphasis upon due process. Students accused of sexual misconduct, she stated, “must receive a proper hearing and due process. Justice means that both sides must be heard.”<sup>238</sup> This is not a conception of due process from a “legalistic” frame of reference; it derives instead from the social science perspective that due process—properly balanced and applied—is essential to fostering broad-based community support for other kinds of sustained social and educational interventions.

## V. CONCLUSION

Our title refers to the *ethical* and *educational* imperative of due process. Ethics (broadly conceptualized as examining, defining, and developing components of good character and behavior) encompasses an understanding that institutions, like individuals, benefit from the kind of self-insight and self-restraint expressed by Learned Hand: “*The spirit of liberty is the spirit which is not too sure that it is right.*”<sup>239</sup> This spirit, which is also a core component of the methodology of science, promotes both basic due process and participatory decisionmaking—especially student engagement in campus governance. Greater student engagement, in turn, is likely to foster more than “basic” due process, since students (generally) favor greater procedural protections when serious penalties may

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237. *Id.* at 282–83.

238. *Id.* at 283.

239. Learned Hand, *The Spirits of Liberty*, Address at New York City's Central Park (May 21, 1944), in *LIFE*, July 3, 1944, at 20 (emphasis added).

be imposed. This is how a democratic process works. It is not always an elegant mechanism, but it tends to foster a sense that the rules and policies being enforced are worthy of being obeyed. Our overview of the history of efforts to regulate college and university student behavior was designed to demonstrate this point; for all the turmoil involved, the campus revolutions of the 1960s and 1970s had the virtue of promoting a sense of moral legitimacy in rules adopted through a participatory, less authoritarian model. This history may reflect an aspect of what Alexander M. Bickel (cited in our preface) had in mind when he wrote: “For the legal order, after all, is an accommodation. It cannot sustain the continuous assault of moral imperatives, not even the moral imperative of ‘law and order’ . . . The highest morality almost always is the morality of process.”<sup>240</sup>

Furthermore, as our overview of several key due process holdings indicates, due process is a form of *institutional* self-restraint. Grounded in traits like humility and reciprocity, it also promotes the educational aim of disciplined thinking (“hear the case before you decide it”). Disciplined thinking for worthy ends—properly described as a “ladder of reason”<sup>241</sup>—is a magnificent human creation. Colleges and universities contributed to its birth and must be ever watchful for its future.

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240. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 120, 123 (1975).

241. GEORGE T. LEMMON, *THE ETERNAL BUILDING: OR, THE MAKING OF MANHOOD* 233 (1899) (“[W]ithout space or seeming necessity for argument. . . . we put foot on the ladder of reason and start in our climb for the realm of moral law.”)





# THE COMMERCIAL SPEECH DOCTRINE BARELY SURVIVES *SORRELL*

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## INTRODUCTION

In First Amendment jurisprudence, strict scrutiny is the toughest meter courts use to evaluate laws that burden one of our most prized rights—the freedom of speech. Wary that governments might discriminate against unpopular ideas by censoring speech, courts rarely allow laws to stand that make distinctions based on viewpoint or content.

Commercial speech is different. Since 1980, when the United States Supreme Court handed down *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>1</sup> courts have used a form of intermediate scrutiny when evaluating the First Amendment implications of commercial speech restrictions. Whereas strict scrutiny, which is applied

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1. 447 U.S. 557 (1980).

to restrictions on fully-protected speech, requires the government to show that its law is narrowly tailored to promote a compelling state interest, and that there is no other less restrictive means for achieving its goal, *Central Hudson* dials back the government's burden in justifying commercial speech restrictions. The four-part *Central Hudson* test allows some deference to state actors when they regulate commercial speech, which historically has been viewed as less valuable than other protected speech.

The *Central Hudson* test has had its critics on the Court ever since its inception.<sup>2</sup> One reason for the test's unpopularity is that its vague contours allow for inconsistent decisions. A recent circuit split over the constitutionality of state regulations on alcohol advertisements in college and university newspapers is illustrative. *Pitt News v. Pappert* and *Educational Media Co. at Virginia Tech v. Swecker* provided the Third and Fourth Circuits, respectively, with nearly identical challenged laws accompanied by nearly identical facts.<sup>3</sup> Both courts employed *Central Hudson*; the Third Circuit struck down the Pennsylvania law and the Fourth Circuit let the Virginia law stand.<sup>4</sup>

Another reason for the test's unpopularity, some argue, is that it does not give enough protection to commercial speech that is informative and not misleading or impermissibly aggressive.<sup>5</sup> While a lower level of scrutiny should always attach to commercial speech regulations that seek to protect consumers from deceptive advertising, critics say, a standard First Amendment analysis is appropriate when a law restricts commercial speech for any other reason.<sup>6</sup> A standard First Amendment analysis consists of strict scrutiny for content-based restrictions and intermediate scrutiny for content-neutral restrictions. A law that restricts alcohol advertisements in order to lower consumption, then, would not automatically be afforded the more lenient *Central Hudson* intermediate scrutiny; rather, like

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2. See, e.g., *Greater New Orleans Broad. Assn., Inc. v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in judgment); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501, 510–14 (1996) (joint opinion of Stevens, Kennedy, and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment).

3. Compare *Educ. Media Co. at Virginia Tech, Inc. v. Swecker*, 602 F.3d 583 (4th Cir. 2010), with *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).

4. *Id.*

5. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571–72 (2001) (Kennedy, J., concurring) (expressing concern that the test gives insufficient protection to truthful, non misleading commercial speech).

6. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (Stevens, J., concurring) (stating that “less than strict review” is appropriate when a state regulates to protect consumers, but that “rigorous review” is appropriate when the state prohibits truthful commercial information for reasons unrelated to the presentation of a fair bargaining process).

noncommercial speech restrictions, it would face strict scrutiny if it were content-based and intermediate scrutiny if it were content-neutral.

In June 2011, the Supreme Court came down with a decision that has the potential to change dramatically the course of the commercial speech doctrine.<sup>7</sup> In *Sorrell v. IMS Health, Inc.*, the Court reviewed a Vermont law that regulated the sale of prescription-prescriber data to pharmaceutical marketers. Read conservatively, *Sorrell* at least clarifies one factor of the *Central Hudson* test by holding that a state's method of achieving its stated goal cannot include intentionally keeping its citizens in the dark.<sup>8</sup> That is, a law that seeks to influence people's behavior by keeping truthful commercial information from them cannot withstand even the lower level of scrutiny applied under *Central Hudson*.

In vague but potentially hugely significant language, the *Sorrell* Court also discussed instances where commercial speech might warrant strict scrutiny. While the Court acknowledged with approval that content-based distinctions in commercial speech restrictions are permissible so long as the government satisfies the *Central Hudson* test, it qualified this application of *Central Hudson* scrutiny in two important ways. First, the Court made clear that the longstanding rule that viewpoint discrimination is presumptively fatal to a speech restriction applies with equal force to commercial speech restrictions.<sup>9</sup> Second, the Court suggested that the only government interest sufficiently weighty to warrant deference (in the form of the more lenient level of scrutiny) is consumer protection.<sup>10</sup> In other words, it might be the case post-*Sorrell* that *Central Hudson* scrutiny applies only to laws motivated by consumer protection, and all other commercial speech laws receive the same scrutiny as do restrictions of fully-protected speech.

This Note seeks to explain the significance of *Sorrell* and evaluate its effect on the future of the commercial speech doctrine. Part I explores the winding and shaky history of commercial speech law in First Amendment jurisprudence, culminating in an evaluative test that has proven difficult to apply. Problems with the test have produced inconsistent holdings not only across the district and circuit courts, but also within the Supreme Court's own case law. The first Part of this Note examines those inconsistencies and highlights one facet of the test with which courts have had particular trouble. Part II describes the circuit split resulting from *Pitt News* and *Swecker* in order to illustrate the areas of *Central Hudson* that are sufficiently vague and unworkable to permit inconsistent holdings. Part III introduces and explains *Sorrell*, making careful note of the take-away lessons relevant to the commercial speech doctrine. Part IV applies the

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7. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2670 (2011).

8. *Id.* at 2670.

9. *Id.* at 2664.

10. *Id.* at 2672.

lessons from *Sorrell* to the alcohol advertisement bans in order to see the new rules in practice. Finally, this note concludes in Part V by taking stock of the newest developments in the commercial speech doctrine and highlighting the ends left loose by *Sorrell*.

#### I. HISTORY AND DEVELOPMENT OF THE COMMERCIAL SPEECH DOCTRINE

The treatment of commercial speech<sup>11</sup> in First Amendment jurisprudence has been described pejoratively as consisting merely of “ad hoc subject-specific examples of what is permissible and what is not.”<sup>12</sup> Though its exact place under the umbrella of constitutional protection is still unsure, commercial speech has at least escaped its original position alongside incitement, threats, and other forms of speech that are wholly unprotected by the First Amendment. In 1942, the Supreme Court upheld a New York ban on the dissemination of “advertising matter,”<sup>13</sup> thereby beginning a 33-year period in which commercial speech remained completely outside the purview of any First Amendment protection. During that time, some lower courts queried whether commercial speech is always without the kind of value that would merit constitutional recognition.<sup>14</sup> Then, in a 1975 7-2 opinion, the Supreme Court announced that an advertisement providing information for women seeking abortion services did more than simply propose a commercial transaction, and

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11. Though the Court has not given a precise definition of “commercial speech,” its decision in *Bolger v. Youngs Drug Products Corp.* describes at least three characteristics generally common to the category: (1) it advertises something, (2) it refers to a specific product, and (3) the speaker has a profit motive. 463 U.S. 60, 67 (1983). For a discussion of speech outside advertising that could be considered “commercial speech,” see generally Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983).

12. Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631 (1990).

13. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). The regulation in question, Section 318 of the Sanitary Code, reads:

“Handbills, cards and circulars—No person shall throw, cast or distribute, or cause to permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein. . . . This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter.”

*Id.* at 53 n.1 (citing CITY ADMIN. CODE & CHARTER §§ 16–18(5)).

14. See, e.g., *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974).

therefore merited some defense under the First Amendment.<sup>15</sup> The *Bigelow* Court declined to opine on the constitutionality of *all* commercial speech, but it noted approvingly that the advertisement was not deceptive or fraudulent, did not relate to illegal activity, and did not invade the privacy or infringe the rights of other citizens.<sup>16</sup>

The next year, writing for the first time in approving language about the value of commercial advertising generally, the Court drew on language from previous noncommercial speech cases and held that “speech does not lose its First Amendment protection because money is spent to project it.”<sup>17</sup> Advertising may seem tasteless and excessive at times, the Court wrote in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, but it is “nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”<sup>18</sup> While paving the way for constitutional protection of advertising, the Court did not, in that case, provide limits or interpretive guidelines; the Court simply noted that “whatever may be the proper bounds” of permissible commercial advertising regulations, they were in that case “plainly exceeded.”<sup>19</sup>

For a short time following *Virginia Pharmacy*, commercial speech enjoyed considerable protection.<sup>20</sup> Then, in 1978, the Court began to set some limits on commercial speech protection by relegating evaluation of commercial speech restrictions to a level somewhere below “strict scrutiny” but above a “rational basis” test. Upholding an attorney’s

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15. *Bigelow v. Virginia*, 421 U.S. 809 (1975) (internal citations omitted).

16. *Id.* at 828.

17. *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). In stating this proposition, the Court cited, *inter alia*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (preceding the commercial speech doctrine but prophesying its coming by holding that an “editorial” advertisement, which sought support on behalf of a movement that was of public interest and concern, was not without First Amendment protection simply because it was paid for).

18. *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

19. *Id.* at 771.

20. This protection was based mostly on the *Virginia Pharmacy* Court’s assertion that a state cannot seek to manipulate behavior by keeping the public in the dark about truthful information. *Id.* at 773. See also *Linmark Assocs., Inc. v. Twp of Willingboro*, 431 U.S. 85, 97 (1977) (holding that a township’s goal of preventing the flight of white residents was “laudable,” but its ordinance prohibiting “For Sale” and “Sold” signs impermissibly restricted the free flow of commercial information).

censure for improper advertising to potential clients, the Court in *Ohralik v. Ohio State Bar Association* stated that “commercial speech [has] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.”<sup>21</sup> Two years later in *Central Hudson*, the Court promulgated its “supposedly precise”<sup>22</sup> balancing test that remains a benchmark for evaluation of commercial speech regulations today.<sup>23</sup>

The Court in *Central Hudson* struck down a state regulation that, in order to conserve fuel, banned promotional advertising by electrical utilities. The Court started by affirming that commercial speech warrants some First Amendment protection, but that the Constitution “accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”<sup>24</sup> Accordingly, the government’s burden in defending a law that restricts commercial speech is lower than its burden in cases of protected speech. A law that restricts commercial speech stands if four conditions are met:

1. The commercial speech “must concern lawful activity and not be misleading” to be entitled to any first amendment protection (if it is false, it can be regulated or banned and the rest of the test is not applicable);
2. The government’s interest in regulating the commercial speech must be “substantial;”
3. The regulation must “directly advance[] the governmental interest asserted;” and
4. The regulation must not be “more extensive than is necessary to serve that interest.”<sup>25</sup>

The New York regulation failed on the fourth prong of the test. The state did not meet its burden of demonstrating that the “interest in conservation cannot be protected adequately by more limited regulation of . . . commercial expression.”<sup>26</sup> The burden of proof is on the government to justify its restriction of commercial speech.<sup>27</sup>

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21. 436 U.S. 447, 456 (1978).

22. Mark A. Conrad, *Board of Trustees of the State University of New York v. Fox - the Dawn of A New Age of Commercial Speech Regulation of Tobacco and Alcohol*, 9 CARDOZO ARTS & ENT. L.J. 61, 72 (1990).

23. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

24. *Id.* at 563.

25. Conrad, *supra* note 22, at 72 (citing *Cent. Hudson*, 447 U.S. at 563–66). The Court considers this test a form of “intermediate scrutiny.” See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).

26. *Cent. Hudson*, 447 U.S. at 570.

27. The Court reaffirmed this allocation of burden of proof in subsequent cases. See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

From the outset, the test had its critics within the Court.<sup>28</sup> Perhaps the most vocal was Justice Rehnquist, who believed the majority had given commercial speech *too much* constitutional protection. His lone dissent “encapsulated the main problem with the four-part *Central Hudson* test by stating that it ‘elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech.’”<sup>29</sup> Rehnquist chastised the majority for “unlock[ing] a Pandora’s Box” by—as he saw it—inappropriately elevating advertising to the level of political speech.<sup>30</sup> Value judgments about his criticism aside, Rehnquist was at least right about the Pandora’s Box.

Inconsistency has marred commercial speech jurisprudence following *Central Hudson*.<sup>31</sup> Over the course of time and across various jurisdictions, courts have had different views about what the latter three *Central Hudson* prongs actually require.<sup>32</sup> For example, courts struggled over whether the

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28. See *id.* at 573 (Blackmun, J., concurring) (calling the test “inadequate”).

29. Conrad, *supra* note 22, at 73 (citing *Cent. Hudson*, 447 U.S. at 591 (Rehnquist, J., dissenting)).

30. *Cent. Hudson*, 447 U.S. at 598 (Rehnquist, J., dissenting).

31. See, e.g., Kozinski and Banner, *supra* note 12, at 630–31 (citing cases); R. George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 DENV. U. L. REV. 137, 162–66 (1994) (citing cases).

32. The first prong of the test, requiring that speech is true and about legal activity before it warrants any protection, receives little attention in case law. One reason for this could be, as Professor Erwin Chemerinsky posits, that the law on this point is clearly established. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.7.5, at 1095 (3d ed. 2006). Though the Supreme Court has not decided a case concerning false and deceptive ads, Chemerinsky writes, courts accept that they are outside constitutional protection. *Id.* This point might not be quite so clear-cut. Although the *Central Hudson* majority said advertisements that are misleading or about illegal activity are excluded from First Amendment protection, other opinions suggest this speech may sometimes warrant intermediate scrutiny. For example, Justice Blackmun in his *Central Hudson* dissent suggested that intermediate scrutiny is appropriate for regulations of misleading and coercive commercial speech. See *Cent. Hudson*, 447 U.S. at 573 (Blackmun, J., dissenting) (“I agree with the Court that . . . intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech”). Justice Stevens echoed this view in *44 Liquormart, Inc. v. Rhode Island*, where he wrote that something less than strict scrutiny, but presumably more than non-protection, is appropriate for misleading commercial speech. 517 U.S. 484, 501 (1996) (“When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review”). See *infra* text accompanying notes 124–31 for more discussion on this point.



test's fourth prong, which requires that the law be no more extensive than necessary, calls for the government to show that its law is the least restrictive way to achieve its goal.<sup>33</sup> The answer to that problem was only very recently settled; *Central Hudson* scrutiny seems only to require a narrow tailoring.<sup>34</sup> Another problematic nuance of *Central Hudson* review is whether the test allows states to advance their goals by limiting truthful information available to the public. A detailed look at the case law on this issue is helpful not only to determine how courts should treat restrictions that operate by withholding information, but also to appreciate the dramatic differences in how much (or little) value various courts and judges ascribe to commercial speech.

#### A. Can The State Regulate By Keeping Citizens In The Dark?

In one of its seminal commercial speech cases, *Virginia Pharmacy Board*, the Court ruled that commercial speech regulations are not acceptable if they operate by keeping truthful, noncoercive information from people for what the government perceives to be the people's own good.<sup>35</sup> In response to "whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its

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33. See *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476–77 (1989).

34. The Court in *Board of Trustees of the State University of New York* held that the fourth prong does not require that the government use least restrictive means, but rather "a means narrowly tailored to achieve the desired objective." *Id.* at 480. However, the Court later found in *Rubin v. Coors Brewing Co.* that a commercial speech regulation failed on the fourth prong because there existed regulation alternatives that "could advance the Government's asserted interest in a manner less intrusive to the respondent's First Amendment rights." 514 U.S. 476, 491 (1995). Just a few years later, though, the Court returned to its interpretation of the fourth prong that calls for a narrow tailoring, not the least restrictive means. In *Greater New Orleans Broadcasting Ass'n v. United States*, the Court expressly affirmed *Fox* in explaining that "[t]he Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest." 527 U.S. 173, 188 (1999). Similarly, in *Lorillard Tobacco v. Reilly*, the Court stated that "'the least restrictive means' is not the standard; instead, the case law requires a reasonable fit between the legislature's ends and the means chosen to accomplish those ends." 533 U.S. 525, 556 (2001) (internal citations omitted).

35. *Va. State Bd. of Pharmacy v. Va. Consumer Council*, 425 U.S. 748 (1976). The Court held that Virginia could not pursue its goal of encouraging people to consult only "professional" pharmacists by "keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.* at 770.

recipients,” the Court wrote, “we conclude that the answer to this [question] is in the negative.”<sup>36</sup>

Until the birth of the *Central Hudson* test, this was generally the rule. In *Linmark Associates, Inc. v. Township of Willingboro*, for example, the Court confronted a city ordinance that prohibited “For Sale” signs to prevent “the flight of white home-owners from a racially integrated community.”<sup>37</sup> An abundance of “For Sale” signs, the city worried, would cause panic selling.<sup>38</sup> Though the Court found the city’s goal “vital,” it nonetheless struck down the ordinance saying that the “First Amendment disable[s] the State from achieving its goal by restricting the free flow of truthful information.”<sup>39</sup>

Then, in *Central Hudson*, the rule from *Virginia Pharmacy* and *Linmark* fell out of focus. The Court in that case evaluated New York’s ban on utility companies’ promoting the use of electricity.<sup>40</sup> The purpose of the state’s ban was to reduce energy consumption; the Court found the interest legitimate. The ban failed the test’s fourth prong, because it was more extensive than necessary, but on the third prong the Court found a “direct link” between advertising and energy consumption. Justice Blackmun explained in his dissent that by calling the relationship between lessened demand and restricted information a “direct link,” the Court seemingly approved of this method as a possible avenue for the state to achieve its goals.<sup>41</sup> By not striking down the law because it operated by keeping people in the dark, the majority “[left] open the possibility that the State may suppress advertising of electricity in order to lessen demand for electricity.”<sup>42</sup> For Blackmun, suppression of truthful information simply because the government fears its persuasiveness is not permissible.<sup>43</sup>

Following *Central Hudson*, the Court evaluated several laws that operated by keeping people in the dark, but its analyses were not always consistent and tended not to locate the issue in any of test’s four prongs. In *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*<sup>44</sup> and *United States v. Edge Broadcasting Co.*,<sup>45</sup> the Court confronted laws restricting advertising of casinos and lotteries in a jurisdiction where both were legal. Though the laws were premised on the assumption that people are better off with less information, the Court upheld both. Even in *Rubin*

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36. *Id.* at 773.

37. 431 U.S. 85, 86 (1977).

38. *Id.*

39. *Id.* at 94, 95.

40. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 558 (1980).

41. *Id.* at 573.

42. *Id.* at 573.

43. *Id.* at 573–74.

44. 478 U.S. 328 (1986).

45. 509 U.S. 418 (1993).

*v. Coors Brewing Co.*, where the Court struck down a federal law prohibiting brewers from stating alcohol content on beer labels, it did not do so because the law operated by keeping people in the dark.<sup>46</sup> Instead, the Court believed that the “puzzling” regulatory scheme would likely fail to achieve the government’s goal of eliminating strength wars (competition on the basis of alcohol content) between brewers.<sup>47</sup> In other words, the Court did not hold, as it had in *Linmark*, that the state cannot “achiev[e] its goal by restricting the free flow of truthful information.”<sup>48</sup>

Yet in other cases and some separate opinions, the idea survived. The Court in *Bolger v. Youngs Drug Products Corp.*, examining a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives, held that “the restriction of ‘the free flow of truthful information’ constitutes a ‘basic’ constitutional defect regardless of the strength of the government’s interest.”<sup>49</sup> The Court quoted *Linmark* in striking down the law. Similarly, Justice Brennan wrote in his *Posadas* dissent that he saw “no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity.”<sup>50</sup>

The Court had its opportunity to clear up the confusion in *44 Liquormart, Inc. v. Rhode Island*, but the case did not have a majority opinion and is therefore difficult to apply.<sup>51</sup> Holding a Rhode Island statute’s blanket ban on liquor price advertising unconstitutional, Justice Stevens pronounced for the plurality that “a State’s paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it.”<sup>52</sup> In a portion of the opinion joined by just two other justices, Stevens wrote that “[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.”<sup>53</sup> Stevens went on to review the statute with “special care”<sup>54</sup> under *Central Hudson* and found that it failed the test’s third and fourth prongs.<sup>55</sup>

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46. 514 U.S. 476 (1995).

47. *Id.* at 489.

48. *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 95 (1977).

49. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983) (quoting *Linmark*, 431 U.S. at 95–96).

50. *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 350 (1986) (Brennan, J., dissenting).

51. 517 U.S. 484, 516 (1996).

52. *Id.* at 497.

53. *Id.* at 503.

54. *Id.* at 501. Stevens’s “special care” version of *Central Hudson*, from how he described it, seems on par with strict scrutiny: “[W]e must review the price

Justice Thomas went even further in his *44 Liquormart* concurrence. “In cases such as this,” Thomas wrote, “in which the government’s asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in [*Central Hudson*] should not be applied, in my view. Rather, such an ‘interest’ is *per se* illegitimate and can no more justify regulation of ‘commercial’ speech than it can justify regulation of ‘noncommercial’ speech.”<sup>56</sup> Thomas did not join the portion of the opinion in which Stevens made the similar pronouncement about paternalistic government assumptions, as Thomas was unwilling to sign onto a *Central Hudson* analysis of the regulation.<sup>57</sup> Both opinions, though, look unfavorably on governments restricting speech in order to manipulate behavior.

Justice Thomas remained vocal in later opinions about the appropriate application of strict scrutiny to regulations that operate by keeping people in the dark. In his *Lorillard* concurrence, he stressed that “when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”<sup>58</sup> In the Court’s most recent commercial speech decision, *Sorrell*, Thomas joined the majority in a decision that more clearly places off-limits a government’s attempt to regulate by keeping people in the dark.<sup>59</sup>

Before delving into the details of *Sorrell*, though, a case study of a circuit split over a particular commercial speech issue decided under *Central Hudson* is presented below. The divergent analyses help to illustrate the test’s troublesome ambiguities.

## II. INCONSISTENT RESULTS UNDER *CENTRAL HUDSON*: CASE STUDY OF A CIRCUIT SPLIT OVER COMMERCIAL SPEECH

In two recent federal cases involving state regulation of alcohol advertisements in college newspapers, the Third and Fourth Circuits came

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advertising ban with ‘special care,’ . . . mindful that speech prohibitions of this type rarely survive constitutional review.” *Id.* at 504 (internal citation omitted).

55. *Id.* at 506–07

56. *Id.* at 518 (Thomas, J., concurring).

57. *Id.* at 523. Specifically, Thomas believed that when a state’s interest “is to be achieved through keeping would-be recipients of the speech in the dark,” the advancement-of-state-interest prong of *Central Hudson* makes little sense. “Faulting the State for failing to show that its price advertising ban decreases alcohol consumption ‘significantly,’ . . . seems to imply that if the State had been *more successful* at keeping consumers ignorant and thereby decreasing their consumption, then the restriction might have been upheld.” *Id.*

58. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring).

59. *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653 (2011).

down differently on the question of constitutionality under *Central Hudson*. In both cases, the state regulations at issue targeted truthful, nonmisleading advertisements concerning lawful activity, in satisfaction of the first *Central Hudson* prong.<sup>60</sup> Both courts also recognized a substantial government interest in preventing underage and abusive drinking among college students, satisfying the second *Central Hudson* prong.<sup>61</sup> The fork in the road came when each court asked whether the government had presented enough evidence to show that the state regulation would materially and directly advance its interest without burdening too much protected speech—the third and fourth prongs of the test.

Practically, these prongs give courts license to determine how much deference they are willing to grant the legislature. In the Third Circuit case, *Pitt News v. Pappert*, then-Judge Samuel Alito wrote for a unanimous three-judge panel that refused to take the government at its word when it claimed that the advertisement ban would have an appreciable effect on college drinking problems. In 2010, six years after *Pitt News*, the Fourth Circuit in *Educational Media Co. v. Swecker* upheld a similar ban based on little more than the government’s assertion that the law was “common sense.”<sup>62</sup>

#### A. *Pitt News v. Pappert*

The path to victory for the student-run newspaper at the University of Pittsburgh, *The Pitt News*, was arduous. The paper filed suit in 1999 against the state’s attorney general, seeking an injunction forbidding the enforcement of a Pennsylvania law that banned advertisers from paying for the dissemination of “alcoholic beverage advertising” by media affiliated with a university, college, or other “educational institution.”<sup>63</sup> The District Court refused to grant the injunction, saying that the paper lacked

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60. The regulations concerned lawful activity, even though some potential viewers of the advertisements would be below the legal drinking age. *Educ. Media Co. v. Swecker*, 602 F.3d 583, 589 (4th Cir. 2010) (alteration in original) (The Virginia regulation “does not restrict commercial speech *solely* distributed to underage students; rather, it applies to commercial speech that, though *primarily* intended for underage students, also reaches of-age readers. Therefore, the commercial speech regulated by [the Virginia regulation] concerns lawful activity”); *Pitt News v. Pappert*, 379 F.3d 96, 106 (3d Cir. 2004) (“[T]he law applies to ads that concern lawful activity (the lawful sale of alcoholic beverages) . . .”).

61. *Swecker*, 602 F.3d at 590; *Pitt News*, 379 F.3d at 106.

62. *Swecker*, 602 F.3d at 589–90.

63. *Pitt News*, 379 F.3d at 103–04.

standing.<sup>64</sup> On appeal, a Third Circuit panel affirmed—based not on lack of standing, but on the unlikelihood that *Pitt News* would succeed on the merits of its claim. On rehearing on remand, the District Court granted summary judgment for the state.<sup>65</sup> The paper appealed the grant of summary judgment; the case went to another Third Circuit panel.<sup>66</sup> In 2004, the paper finally received a favorable decision.

The second Third Circuit panel, having first decided that the ban “clearly restricts speech,”<sup>67</sup> moved on to apply the four-part *Central Hudson* test.<sup>68</sup> The law applied to ads that concern lawful activity, the court said, and the asserted government interests—preventing underage drinking and alcohol abuse—are, “at minimum, ‘substantial.’”<sup>69</sup> The law “founders, however, on the third and fourth prongs of the *Central Hudson* test.”<sup>70</sup>

On the third prong of the test, under which the government must show that the regulation will alleviate the identified harm to a material degree, the Third Circuit held that Pennsylvania improperly relied on “nothing more than ‘speculation’ and ‘conjecture.’”<sup>71</sup> The court said:

We do not dispute the proposition that alcoholic beverage advertising in general tends to encourage consumption, and if [the regulation] had the effect of greatly reducing the quantity of alcoholic beverage ads viewed by underage and abusive drinkers on the Pitt campus, we would hold that the third prong of the *Central Hudson* test was met. But [the regulation] applies only

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 106 (alteration in original) (“The very purpose of [the regulation] is to discourage a form of speech (alcoholic beverage ads) that the Commonwealth regards as harmful. If government were free to suppress disfavored speech by preventing potential speakers from being paid, there would not be much left of the First Amendment. Imposing a financial burden on a speaker based on the content of the speaker’s expression is a content-based restriction of expression and must be analyzed as such.”). The state attempted to argue that the law was enforceable only against the advertiser and not the publications and applied only when the media received payment for an advertisement. But *The Pitt News* felt its immediate effects when one advertiser cancelled its advertising contract with the paper based on threats from the Pennsylvania State Police. See Bruce E. H. Johnson, *Alito as Judge: Paid Speech is Also Free Speech*, THE FIRST AMENDMENT CENTER, (Nov. 7, 2005), <http://www.firstamendmentcenter.org/alito-as-judge-paid-speech-is-also-free-speech>.

68. The court said the regulation must, at a minimum, satisfy *Central Hudson* scrutiny; it then went on to explain that strict scrutiny was applicable for an independent reason. That portion of the opinion is discussed in Part IV, *infra*.

69. *Pitt News*, 379 F.3d at 106. (internal citation omitted).

70. *Id.* at 107.

71. *Id.* at 108.

to advertising in a very narrow sector of the media (i.e., media associated with educational institutions), and the Commonwealth has not pointed to any evidence that eliminating ads in this narrow sector will do any good.<sup>72</sup>

Even if students on the Pitt campus do not see alcoholic beverage ads in their student newspaper, the court continued, they will still be exposed to a “torrent of beer ads on television and the radio, and they will still see alcoholic beverage ads in other publications, including the other free weekly Pittsburgh papers that are displayed on campus together with *The Pitt News*.”<sup>73</sup> What’s more, “[c]ommon sense suggests that would-be drinkers will have no difficulty finding establishments [where alcohol can be purchased] despite [the regulation].”<sup>74</sup> The court’s invocation of strong language here—reference to common sense—is notable. The Fourth Circuit six years later would invoke common sense too, holding that it is “common sense” that a similar regulation would in fact be successful in curbing student drinking.<sup>75</sup>

On the fourth prong, the court held that the regulation was not adequately tailored to achieve Pennsylvania’s asserted objectives. The regulation “is both severely over- and under-inclusive,” the court stated.<sup>76</sup> Because more than sixty-seven percent of Pitt students and more than seventy-five percent of the total university population were over the legal drinking age, the regulation prevented the communication to adults of truthful information about products that adults could lawfully purchase.<sup>77</sup> In other words, the regulation was over-inclusive because it burdened a substantial amount of protected speech. The regulation was under-inclusive in that it did not make use of other, better methods for achieving the state’s goal, the court said. Pennsylvania could “combat underage and abusive drinking by other means that are far more direct and that do not affect the First Amendment. The most direct way to combat underage and abusive drinking by college students is the enforcement of the alcoholic beverage control laws on college campuses.”<sup>78</sup>

Having found that the Pennsylvania regulation failed the third and fourth prongs of *Central Hudson*, the court enjoined enforcement of the regulation.<sup>79</sup>

#### B. *Educational Media Co. at Virginia Tech, Inc. v. Swecker*

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72. *Id.* at 107 (alteration in original).

73. *Id.*

74. *Id.* at 107.

75. *See Educ. Media Co. at Virginia Tech, Inc. v. Swecker*, 602 F.3d 583, 590 (4th Cir. 2010).

76. *Pitt News*, 379 F.3d at 108.

77. *Id.*

78. *Id.*

79. *Id.* at 113.

In June of 2006, the American Civil Liberties Union of Virginia filed a lawsuit on behalf of two student newspapers, Virginia Tech University's *Collegiate Times* and the University of Virginia's *Cavalier Daily*, challenging a Virginia ban similar to the one that the Third Circuit struck down two years earlier in *Pitt News*.<sup>80</sup> The regulation prohibited college publications in Virginia from printing advertisements for beer, wine, or mixed beverages unless the ads were “in reference to a dining establishment.”<sup>81</sup> The alcohol advertisements for dining establishments could use five approved words and phrases—including “A.B.C. [alcohol beverage control] on-premises,” “beer,” “wine,” “mixed beverages,” or “cocktails”—but could not refer to brand or price.<sup>82</sup> A federal magistrate judge found the ban unconstitutional, citing *Pitt News*; an appeal to the Fourth Circuit followed.<sup>83</sup>

The Fourth Circuit three-judge panel, like the panel in *Pitt News*, applied the *Central Hudson* test to determine whether Virginia's ban impermissibly burdened the newspapers' First Amendment rights. And, like the court in *Pitt News*, the Fourth Circuit court moved easily past the first two prongs.<sup>84</sup> On the third prong—which asks whether the advertising ban “directly and materially” advances the government's substantial interest—the Fourth Circuit began, like the Third, by saying that “the correlation between advertising and demand alone is insufficient to justify

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80. Michael Beder, *Federal Court Strikes Down Ban on Alcohol Ads in Va. Campus Papers*, STUDENT PRESS LAW CENTER (April 1, 2008), <http://www.splc.org/news/newsflash.asp?id=1730>.

81. 3 VA. ADMIN. CODE § 5-20-40 (2011). The statute defined college student publications as those prepared, edited, or published primarily by its students; sanctioned as a curricular or extracurricular activity; and distributed primarily to persons under 21 years of age. *Id.* Both parties agreed that a majority of the readership of the college newspapers is over the age of 21. Nonetheless, the district court determined that both college newspapers were “college student publications” as defined by the regulation. On appeal, the Fourth Circuit held that the average readership age could preclude the college newspapers from qualifying as “college student publications,” and thus from regulation under the law. However, in a pre-enforcement challenge, the papers needed only to demonstrate a credible threat of prosecution under the regulation; that credible threat came when “an Alcoholic Beverage Control Compliance Officer specifically advised *The Collegiate Times* that they *would* violate [the regulation] if they published a specific alcohol advertisement.” *Educ. Media Co. v. Swecker*, 602 F.3d 583, 596 n.1 (4th Cir. 2010) (alteration in original).

82. § 5-20-40.

83. Two regulations were found unconstitutional at the district court level, but only the regulation that applied specifically to college publications was at issue on appeal. *Swecker*, 602 F.3d at 586. For the procedural history in prose, see Beder, *supra* note 79.

84. *Swecker*, 602 F.3d at 588–89.



advertising bans in every situation.”<sup>85</sup> Again like the Third Circuit, the court next appealed to intuition—but in contrary fashion. According to the Fourth Circuit:

“[A]lcohol vendors *want* to advertise in college student publications. It is counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students.”<sup>86</sup>

The Fourth Circuit’s intuition, it seems, is in conflict with the Third’s.<sup>87</sup> For the Third Circuit, common sense dictated that college students would find drinking establishments despite the ban on alcohol ads in one news medium to which they had access. The Fourth Circuit did not seem to think “common sense” required it to consider the myriad other ways college students are informed of alcohol availability near campus. Further, on this prong of the test, the Fourth Circuit shifted the burden of persuasion onto the newspapers in a way that the Third Circuit had not.<sup>88</sup> In formulating the *Central Hudson* test, and in later commercial speech cases, the Court has explained that the burden is properly on the government to

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85. *Id.* at 590.

86. *Id.*

87. Judge Moon, in his dissent, recognized the problem with taking the state at its word. He likened the facts in *Swecker* to those in *Pitt News* and stated that Virginia, like Pennsylvania, relied on nothing more than speculation to satisfy the third *Central Hudson* prong. Moon noted that the state’s expert had even admitted that “[t]here is . . . very little empirical evidence that alcohol advertising has any effect on actual alcohol consumption . . . . [And] that a ban on advertising in one medium generally results in greater advertising saturation in other media or forms of marketing.” *Swecker*, 602 F.3d at 593 n. 5 (alteration in original). Even if the state’s ban would reduce demand generally, there was no showing that the ban would specifically promote the state’s asserted interest: “The Board’s justification for the regulation is not to reduce general ‘demand by college students,’ a significant number of whom are of legal age to imbibe, but to reduce ‘*underage* and *abusive* drinking among college students.’” *Id.* at 596 (internal citation omitted).

88. Compare *Swecker*, 602 F.3d at 590 (“The college newspapers fail to provide evidence to *specifically* contradict this link or to recognize the distinction between ads in mass media and those in targeted local media.”), with *Pitt News v. Pappert*, 379 F.3d 96, 107–08 (3d Cir. 2004) (“Common sense suggests that would-be drinkers will have no difficulty finding those establishments [where alcohol can be purchased] despite [the regulation], and the Commonwealth has not pointed to any contrary evidence. In contending that underage and abusive drinking will fall if alcoholic beverage ads are eliminated from just those media affiliated with educational institutions, the Commonwealth relies on nothing more than ‘speculation’ and ‘conjecture.’”).

prove that its restriction directly advances its interests.<sup>89</sup> Instead of following this guideline in the third prong analysis, the court accepted on intuition that the law would materially advance the state's interest, and then asked the newspaper to rebut.<sup>90</sup>

The Fourth Circuit's reasoning also diverged from the Third Circuit's on the final *Central Hudson* prong—asking whether the regulation is narrowly tailored to fit the government's asserted interest. Unlike the court in *Pitt News*, the *Swecker* court did not address the under-inclusivity of the regulation based on the numerous other publications that could deliver to the student body information about alcohol specials and prices. In fact, the court commented on this point approvingly: “[T]he restriction only applies to ‘college student publications’—campus publications targeted at students under twenty-one. It does not, on its face, affect all possible student publications on campus. Therefore, [the regulation] is sufficiently narrow.”<sup>91</sup> The Fourth Circuit's other justifications for finding the Virginia law narrowly tailored were based on facts that differed from those in *Pitt News*.<sup>92</sup>

Having decided the last two *Central Hudson* prongs in Virginia's favor, the Fourth Circuit reversed the district court's granting of an injunction, allowing Virginia to enforce its regulation of alcohol advertisements in college newspapers.<sup>93</sup>

### III. *SORRELL V. IMS HEALTH, INC.*

*Sorrell v. IMS Health, Inc.*, decided in June 2011, can be read not only to resolve the circuit split described above, but also to elevate the value of commercial speech to a new level nearly on par with fully-protected speech.

The Vermont law at issue in *Sorrell* regulated pharmaceutical marketing by forbidding entities that gather information about prescription-prescriber habits (like pharmacies) from selling that information, absent physician

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89. *See, e.g.*, *Cent. Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 570 (1980) and *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

90. *Swecker*, 602 F.3d at 590.

91. *Id.* at 591.

92. The Fourth Circuit said the ban did not completely prevent restaurants from communicating their prices because it allowed some alcohol advertisements. On this point in *Pitt News*, the Pennsylvania regulation was over-inclusive, as it was a complete ban. The Fourth Circuit also said, approvingly, that Virginia implemented non-speech related mechanisms to serve its interest—education and enforcement programs. On this point in *Pitt News*, the Third Circuit said the Pennsylvania regulation was under-inclusive specifically because it was *not* complemented by other drinking-law enforcement mechanisms. *Compare Swecker*, 602 F.3d at 590–91, *with Pitt News*, 379 F.3d at 108.

93. *Swecker*, 602 F.3d at 591.

consent, to companies that would use it commercially (like data miners and detailers).<sup>94</sup> The statute also forbade the commercial entities, should they gain access to prescriber data, from using it for marketing without consent.<sup>95</sup> At the same time, exceptions in the statute allowed for the information's dissemination for other purposes, such as research and educational communication.<sup>96</sup> Pharmaceutical companies use the data Vermont had in mind under this law to make sales pitches to physicians for their branded product. Vermont's stated reasons for banning this practice were to protect the public health of Vermonters, preserve physician privacy, and lower healthcare costs.<sup>97</sup>

To label *Sorrell* a case about commercial speech, without qualification, does not tell the whole story. The Court first considered whether data (specifically, prescription-prescriber identifying information contained in databases) even counts as speech for the purposes of First Amendment review.<sup>98</sup> Vermont argued on several alternative theories that prescriber-identifying data is not speech: The law regulates commerce, the sale of data and use for detailing, that has merely an incidental burden on speech;<sup>99</sup> the law does not regulate speech, but simply access to information;<sup>100</sup> or the law regulates conduct, and it should not matter for the purpose of constitutional review whether the object of that conduct is data or "beef jerky."<sup>101</sup>

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94. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2660–61 (2011). (Pharmacies receive "prescriber-identifying information" when processing prescriptions. Pharmacies sell the information to "data miners," who produce reports on prescriber behavior and sell those reports to pharmaceutical manufacturers. Pharmaceutical manufacturers promote their drugs to doctors through a process called "detailing," which involves using data from the reports to refine marketing tactics and increase sales to doctors.).

95. *Id.*

96. *Id.*

97. *Id.* (Breyer, J., dissenting) (citing VT. STAT. ANN., tit. 18, § 4631(a) (2009)).

98. *Id.* at 2664.

99. *Id.* at 2664–65. This is also the main position of the case's dissenters. Justice Breyer described this as a regulatory case "where the government seeks typical regulatory ends (lower drug prices, more balanced sales messages) through the use of ordinary regulatory means (limiting the commercial use of data gathered pursuant to a regulatory mandate). The speech-related consequences here are indirect, incidental, and entirely commercial." *Id.* at 2685 (Breyer, J., dissenting).

100. *Id.* at 2665.

101. *Id.* at 2666 (citing *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 52–53 (1st Cir. 2008) *abrogated by Sorrell*, 131 S. Ct. 2653).

The *Sorrell* Court implied that database information probably does count as speech,<sup>102</sup> but ultimately said it did not matter whether or not it found the data at issue to be speech for First Amendment review.<sup>103</sup> Even if the data itself is not speech, the Court said, Vermont's law nonetheless warranted strict scrutiny because it burdened something that was undoubtedly "speech"—the pharmaceutical detailers' pitches—in a content-discriminatory way.<sup>104</sup> In other words, even if the prescriber-identifying data is just a commodity, the law was speaker-based because it dictated that some speakers (researchers, for example) could have access to the speech-enhancing commodity and others (marketers) could not. Laws that make distinctions based on identity of the speaker warrant strict scrutiny, the Court said.<sup>105</sup>

Although the Court was content to strike down the law under strict scrutiny for that reason, it nonetheless went on to entertain Vermont's argument for application of *Central Hudson* scrutiny and strike down the law under that test, too. "In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory," the Court said, but "[t]he State argues that a different analysis applies here because, assuming [the law] burdens speech at all, it at most burdens only commercial speech."<sup>106</sup> If the law burdened commercial speech, the Court explained, it could survive only if it satisfied the familiar *Central Hudson* test.<sup>107</sup>

In its discussion of why Vermont's law failed even the more lenient *Central Hudson* level of scrutiny, the Court made a few important statements (and implications) about the commercial speech doctrine

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102. *Sorrell*, 131 S. Ct. at 2667 ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment.").

103. *Id.* ("[T]his case can be resolved even assuming, as the State argues, that prescriber-identifying information is a mere commodity.").

104. *Id.* It is important to note here that the Court's discussion of heightened scrutiny in the first half of the opinion applies only to its consideration of the law as it affects noncommercial speech. In other words, the Court's analysis starts anew in Part B of the opinion with the *commercial speech* doctrine, and the opinion's earlier statements about content-based distinctions triggering heightened scrutiny in *noncommercial speech* cases do not apply.

105. *Id.* See also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994) (explaining that strict scrutiny applies to regulations reflecting an "aversion" to messages from "disfavored speakers") and *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 583–83 (1983) (applying strict scrutiny to a speaker-based financial burden).

106. *Sorrell*, 131 S. Ct. at 2667.

107. *Id.* at 2667–68 ("To sustain the targeted, content-based burden [the law] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.").

generally. The opinion's first important take-away about the commercial speech doctrine is that states cannot regulate by keeping citizens in the dark. On the third prong of its *Central Hudson* analysis, which asks whether the law directly advances the state's interest, the Court relied on an idea first laid out in *Virginia Pharmacy*: "The choice 'between the dangers of suppressing information, and the dangers of its misuse if it is freely available' is one that 'the First Amendment makes for us.'"<sup>108</sup> The Court explained that while Vermont's stated policy goals may have been proper, the law did not advance them in a permissible way and therefore failed on the third prong of *Central Hudson*.<sup>109</sup> "[T]he fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech."<sup>110</sup> For example, "the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, non-misleading advertisements that contain impressive endorsements or catchy jingles."<sup>111</sup> The commercial speech doctrine as it stands following *Sorrell*, then, prohibits a state from regulating the free flow of truthful information based on its belief that the public is better off without that information. Any law premised on that paternalistic assumption fails the means-ends inquiry and is therefore invalid.<sup>112</sup>

The opinion's next important take-away regards the appropriate level of scrutiny in commercial speech cases, but requires some reading between the lines because the Court threw in the imprecise term "heightened scrutiny" instead of the more familiar language of strict and intermediate scrutiny. The take-away is that content-based distinctions in commercial speech regulations, unlike in regulations of fully-protected speech, do not automatically trigger strict scrutiny. Content-based commercial speech laws must pass muster under *Central Hudson*, not strict scrutiny.<sup>113</sup> At an early point in the opinion, the Court said that the "First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys,'" and that

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108. *Id.* at 2671 (quoting *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)).

109. *Id.* at 2670.

110. *Id.* at 2670–71 (internal citation omitted).

111. *Id.* at 2671.

112. Of course, a law premised on keeping people in the dark would also fail strict scrutiny's ends-means inquiry, which is at least as stringent as *Central Hudson*'s intermediate scrutiny.

113. *Sorrell*, 131 S. Ct. at 2667–68 ("Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment. To sustain the targeted, content-based burden [the law] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.") (internal citation omitted).

“[c]ommercial speech is no exception.”<sup>114</sup> At first blush this language could suggest that content-based distinctions in commercial speech laws trigger the *same kind* of heightened scrutiny that content-based distinctions in noncommercial speech laws trigger (which, of course, is strict scrutiny). Justice Breyer in dissent similarly interpreted the majority’s language about “heightened scrutiny” to mean that content-based distinctions in commercial speech laws require something more stringent than *Central Hudson* scrutiny, if not quite strict scrutiny.<sup>115</sup> However, once the Court reached the point in its opinion where it considered the law as a burden on commercial speech, the “heightened scrutiny” the Court used to evaluate the law was nothing more than the *Central Hudson* test.<sup>116</sup>

Finally, the opinion’s third important take-away is that while content-based but viewpoint-neutral restrictions<sup>117</sup> on commercial speech are permissible if the state satisfies *Central Hudson*, content-based restrictions that lack a neutral justification are not.<sup>118</sup> Put another way, viewpoint discrimination (a particularly egregious kind of content-based discrimination<sup>119</sup>) will trigger the highest scrutiny even in commercial speech cases. For example, a state could permissibly regulate commercial speech in one industry and not another based on the neutral justification that a greater risk of fraud existed in the former but not the latter.<sup>120</sup>

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114. *Sorrell*, 131 S. Ct. at 2664 (internal citations omitted).

115. *Id.* at 2677 (Breyer, J., dissenting) (“The Court (suggesting a standard yet stricter than *Central Hudson*) says that we must give *content-based* restrictions that burden speech ‘heightened’ scrutiny.”).

116. *Id.* at 2667–68 (“[T]he State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.”).

117. Content-neutrality and viewpoint-neutrality are not one in the same. Professor Volokh provides a simple way to understand the difference: “Remember that a law *may be content-based even if it’s viewpoint-neutral*. A ban on profanity, for instance, is viewpoint-neutral, but content-based. Speech restrictions fall into three categories: (1) content-neutral (and therefore viewpoint-neutral), (2) content-based but viewpoint-neutral, and (3) viewpoint-based (and therefore content-based).” Eugene Volokh, *Content Discrimination and the First Amendment (Including the “Secondary Effects” Doctrine)*, THE VOLOKH CONSPIRACY (June 21, 2010), <http://volokh.com/2010/06/21/content-discrimination-and-the-first-amendment-including-the-secondary-effects-doctrine/>.

118. *Sorrell*, 131 S. Ct. at 2672.

119. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

120. *Sorrell*, 131 S. Ct. at 2672.

However, a state cannot, as Vermont did, regulate commercial speech in a content-based way because of “a difference of opinion.”<sup>121</sup>

Read carefully, this portion of the opinion about viewpoint neutrality might also suggest that the only neutral state justification sufficiently important to warrant deferential *Central Hudson* scrutiny is consumer protection.<sup>122</sup> The Court held that “Vermont has not shown that its law has a neutral justification” because “[t]he State nowhere contends that detailing is false or misleading within the meaning of this Court's First Amendment precedents[. . .] or does the State argue that the provision challenged here will prevent false or misleading speech.”<sup>123</sup> If *Sorrell* does stand for the proposition that only consumer protection interests warrant deferential *Central Hudson* scrutiny, it would not be the first time the idea was championed in commercial speech jurisprudence; but it would mark the idea's birth into a majority opinion.

Justice Stevens wrote in his 44 *Liquormart* plurality opinion that *Central Hudson* intermediate scrutiny is applicable only when a state's law targets commercial speech based on its tendency to mislead or cause other consumer harms.<sup>124</sup> “When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information,” Stevens wrote, “the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore

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121. *Id.*

122. *See id.* (“Indeed the government's legitimate interest in protecting consumers from commercial harms explains why commercial speech can be subject to greater governmental regulation than noncommercial speech.”) (internal citations omitted). Of course, the *Sorrell* Court did apply *Central Hudson* scrutiny to Vermont's commercial speech restriction, which the Court said was not based on neutral consumer protection interests. However, the Court had already completed its strict scrutiny analysis, and explicitly stated that it entertained the *Central Hudson* analysis only at Vermont's urging to show that the regulation also failed more deferential scrutiny. Going forward in future cases, a court's decision not to employ *Central Hudson* when it finds that a commercial speech restriction is based on something other than consumer protection would not necessarily be inconsistent with *Sorrell*.

123. *Id.* (internal citation omitted).

124. 44 *Liquormart, Inc. v. R.I.*, 517 U.S. 484, 501 (1996) (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491–92 (1995) (Stevens, J., concurring)). This view is in tension with *Central Hudson*'s holding that speech concerning unlawful activity, or speech that is misleading, is completely outside the protection of the First Amendment. The first prong of the *Central Hudson* test requires that speech is not misleading and does not refer to illegal activity in order for the court to confer any protection, including intermediate scrutiny. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (“For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading”).

justifies less than strict review.”<sup>125</sup> However, when a state restricts commercial speech for reasons “unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.”<sup>126</sup> That is, the same First Amendment analysis typically applied to a regulation of protected speech is also applicable to a commercial speech regulation unless the regulation targets false, misleading, or aggressive commercial speech. Only in those latter cases is *Central Hudson* intermediate scrutiny applicable.<sup>127</sup>

Justice Stevens was not the first to propose that *Central Hudson* applies only to laws aimed at consumer protection. Defense of this view goes all the way back to *Central Hudson* itself, in which Justice Blackmun wrote in his concurrence: “Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques.”<sup>128</sup> And other Justices have recently expressed sympathy to Stevens’s view; for example, Justice Kennedy wrote in his *Lorillard Tobacco* concurrence that he had “continuing concerns that the [*Central Hudson*] test gives insufficient protection to truthful, non-misleading commercial speech.”<sup>129</sup>

Of course, this view proffered by Stevens, Blackmun, and others does not imply that all commercial speech regulations unrelated to consumer protection warrant strict scrutiny. Instead, those regulations unrelated to consumer protection simply face the same First Amendment analysis as do other forms of protected speech. That is, if the regulation is content-neutral, it receives intermediate scrutiny.<sup>130</sup> If the regulation is content-

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125. *44 Liquormart*, 517 U.S. at 501 (citing *Rubin*, 514 U.S. at 491–92 (Stevens, J., concurring)).

126. *Id.*

127. For another example of Stevens’s argument, see *Rubin*, 514 U.S. at 491–92 (1995) (Stevens, J., concurring) (“In my opinion the ‘commercial speech doctrine’ is unsuited to this case, because the Federal Alcohol Administration Act (FAAA) neither prevents misleading speech nor protects consumers from the dangers of incomplete information. A truthful statement about the alcohol content of malt beverages would receive full First Amendment protection in any other context; without some justification tailored to the special character of commercial speech, the Government should not be able to suppress the same truthful speech merely because it happens to appear on the label of a product for sale.”).

128. *Cent. Hudson*, 447 U.S. at 574 (1980) (Blackmun, J., concurring).

129. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571–72 (2001) (Kennedy, J., concurring).

130. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (“[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.”) (internal citation omitted).



based, it receives strict scrutiny.<sup>131</sup> Practically, the result of this framework puts commercial speech on par with noncommercial speech, except when the commercial speech is targeted because it is false, misleading, or proposes an illegal transaction, in which case *Central Hudson* applies.

In sum, the lessons learned from *Sorrell* are: a state cannot legislate the withholding of truthful commercial information from its citizens for what it perceives to be their own good;<sup>132</sup> content-based, viewpoint-neutral distinctions in commercial speech regulations, unlike in regulations of fully-protected speech, do not automatically trigger strict scrutiny;<sup>133</sup> but content-based, viewpoint-discriminatory distinctions in commercial speech regulations do trigger strict scrutiny.<sup>134</sup> Finally, though not stated explicitly in the opinion, *Sorrell* might mark a turn in the jurisprudence of commercial speech such that *Central Hudson* intermediate scrutiny will be applied only in cases where the state's interest is consumer protection (and all other commercial speech restrictions would be treated as if they restricted fully-protected speech).<sup>135</sup>

#### IV. THE TAKE-AWAYS FROM *SORRELL* IN APPLICATION

To see these lessons from *Sorrell* in action, this Note returns now to the circuit split over alcohol advertising bans in state college and university newspapers. If *Pitt News* and *Swecker* had been decided after *Sorrell*, the analyses contained therein would be very different. The most straightforward differences in how those cases would be decided center on the states' attempts to withhold truthful commercial information, and on the laws' viewpoint discrimination. But further, if we assume that *Sorrell* adopts Stevens' point that *Central Hudson* applies only to consumer-protection-motivated commercial speech laws, analysis of the alcohol ad bans would proceed under strict scrutiny. The ways that *Sorrell* would change the alcohol ad ban case analyses are explored below.<sup>136</sup>

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131. *Id.* (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”)

132. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011).

133. *See id.* at 2667–68.

134. *See id.* at 2672.

135. *See id.*

136. This Note does not address whether the state can regulate alcohol advertising in college and university papers by virtue of its capacity as educator. That is, newspapers at state colleges and universities might enjoy lesser First Amendment protection than their professional newspaper counterparts because of their situation in an educational environment, and therefore the state might be able to regulate alcohol ads in those papers even if it would not be able to regulate the same ads in professional papers. That topic is outside the scope of this Note, which does not seek to address the intersection of government-as-sovereign and government-as-educator for the purposes of the alcohol advertisement statutes. It

### A. Prohibition on Paternalism

Both the *Pitt News* court and the *Swecker* court assumed that the First Amendment allows a state, in an effort to curb excessive drinking, to restrict truthful advertising available to consumers. The states, in both cases, explicitly asserted that they sought to decrease demand for alcohol by limiting the information newspaper readers received about alcohol sold in the area.<sup>137</sup> The Third and Fourth Circuits came down differently on whether a restriction of this sort would be successful, but neither court found the means constitutionally impermissible.<sup>138</sup>

The *Sorrell* decision, which came down a year after *Swecker*, establishes that Pennsylvania's and Virginia's method of trying to control behavior by cabining available information is impermissible. The *Sorrell* Court discussed this principle in its analysis of the third prong of *Central Hudson*, explaining that the "direct advancement" requirement of the third prong is not met when the state restricts information because it fears how people will use it.<sup>139</sup> In *Sorrell*, Vermont argued that the force and persuasiveness of the commercial speech at issue in that case justified the state's attempt to

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is important to note, though, that some courts have acknowledged the full spectrum of First Amendment rights for college newspapers. *See, e.g.,* *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) ("Censorship of constitutionally protected expression cannot be imposed [at a college or university] by suspending the editors [of student newspapers], suppressing circulation, requiring imprimatur of controversial articles, excising repugnant material, withdrawing financial support, or asserting any other form of censorship oversight based on the institution's power of the purse.")

137. *Pitt News v. Pappert*, 379 F.3d 96, 107 (3d Cir. 2004) (The state suggested that "the elimination of alcoholic beverage ads from *The Pitt News* and other publications connected with the University will slacken the demand for alcohol by Pitt students."); *Educ. Media Co. v. Swecker*, 602 F.3d 583, 589–90 (4th Cir. 2010) ("The Board asserts that history, consensus, and common sense support the link between advertising bans in college newspapers and a decrease in demand for alcohol among college students. The Board cites judicial decisions recognizing this general link and argues that, here, this link is extraordinarily strong because college newspapers, a targeted form of media bearing the name of the college, attract more attention among college students than other forms of mass media.").

138. The Fourth Circuit in *Swecker* clearly understood the state's method (keeping consumers in the dark) to be valid, as the court upheld the law. Recall, also, that the Third Circuit said it would condone this method if it had a chance at success: "We do not dispute the proposition that alcoholic beverage advertising in general tends to encourage consumption, and if [the regulation] had the effect of greatly reducing the quantity of alcoholic beverage ads viewed by underage and abusive drinkers on the Pitt campus, we would hold that the third prong of the *Central Hudson* test was met." *Pitt News*, 379 F.3d at 107 (internal citation omitted).

139. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011).

stifle it.<sup>140</sup> “This reasoning is incompatible with the First Amendment,” the Court held, and “[the] State *may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements* that contain impressive endorsements or catchy jingles.”<sup>141</sup>

Under the *Sorrell* rule prohibiting paternalistic prohibitions on the dissemination of truthful commercial information, the laws at issue in *Pitt News* and *Swecker* fail.

### B. Viewpoint Discrimination Triggers Strict Scrutiny

The *Sorrell* opinion suggests that content-based, viewpoint-discriminatory restrictions on commercial speech at least warrant strict scrutiny, and maybe are even *per se* unconstitutional.<sup>142</sup> That is, if the state banned all advertisements about a certain issue (content-based, viewpoint-neutral), the regular commercial speech test would attach; but if the state banned just one side of the issue (content-based, viewpoint-discriminatory), strict scrutiny would attach. Applied to state bans on alcohol advertisements, this rule means that a court would review with strict scrutiny a state law that prohibited ads promoting drinking but allowed ads promoting temperance.

Under this rule, the Pennsylvania and Virginia regulations at issue in *Pitt News* and *Swecker* both warrant strict scrutiny. They target commercial promotions of alcohol but leave unregulated similar content that is either editorial (noncommercial) or that is commercial but accords with the state’s preferred message.<sup>143</sup> In other words, the regulations disfavor a particular content (commercial advertising) and viewpoint (promotion of alcohol).

### C. No Consumer Protection Interest, No *Central Hudson* Deference

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140. *Id.* at 2671.

141. *Id.* (emphasis added).

142. *Id.* at 2672. The Court, describing viewpoint-discriminatory laws as especially suspicious, has implied that such laws are never permissible. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”). Even if not *per se* unconstitutional, viewpoint-discriminatory laws at least warrant strict scrutiny. *See, e.g., Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980) (Explaining that the First Amendment is hostile both to prohibitions of public discussion of an entire topics (content-discrimination) and to restrictions on particular viewpoints (viewpoint-discrimination)).

143. For example, the regulation permits advertisements providing notice that the “alcohol beverage control” is on-premise. *See* 3 VA. ADMIN. CODE § 5-20-40(A)(3) (2011).

The final take-away from *Sorrell* discussed above is that the *Central Hudson* lower level of scrutiny attaches only if the government's interest is consumer protection. The Court did not state this rule outright, but it justified application of deferential *Central Hudson* scrutiny because of the "government's legitimate interest in protecting consumers from commercial harms."<sup>144</sup> If *Sorrell* does stand for the proposition that only consumer protection interests warrant deferential *Central Hudson* scrutiny, then all commercial speech regulations unrelated to consumer protection face the same First Amendment analysis as fully-protected speech. That is, content-neutral laws get intermediate scrutiny<sup>145</sup> and content-based laws get strict scrutiny.<sup>146</sup>

The Pennsylvania and Virginia laws banning most alcohol advertisements in college and university newspapers were not premised on consumer protection interests. The states' interest was to reduce underage and abusive drinking among college students.<sup>147</sup> In other words, the states did not regulate alcohol advertisements because they were false or misleading to consumers, but rather because the state believed that a prevalence of advertisements in college newspapers contributed to a high incidence of underage and abusive drinking.

Applying Justice Stevens' view, given at least some backing in *Sorrell*, that commercial speech restrictions unrelated to consumer protection ought to receive the same analysis as fully-protected speech, a court would treat the alcohol ad laws like restrictions on fully-protected speech and examine them for discrimination based on speaker, content, or message that would trigger strict scrutiny. As already discussed in the preceding section, Pennsylvania's and Virginia's laws were viewpoint-based and therefore warrant strict scrutiny. But they warrant strict scrutiny for other reasons, too: the laws discriminate based on speaker and content.

When a law burdens protected speech and discriminates based on the identity of the speaker, strict scrutiny attaches.<sup>148</sup> Because the Pennsylvania and Virginia laws single out specific speakers for regulation—college newspapers, as opposed to all newspapers and other advertising venues<sup>149</sup>—a court should apply strict scrutiny in reviewing the

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144. *Sorrell*, 131 S. Ct. at 2672 .

145. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

146. *Id.*

147. *Educ. Media Co. v. Swecker*, 602 F.3d 583, 590 (4th Cir. 2010); *Pitt News v. Pappert*, 379 F.3d 96, 106 (3d Cir. 2004).

148. *See, e.g., Turner Broad.*, 512 U.S. at 658 (1994) (explaining that strict scrutiny applies to regulations reflecting an "aversion" to messages from "disfavored speakers") and *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 583–84 (1983) (applying strict scrutiny to a speaker-based financial burden).

149. The Pennsylvania law applied only to advertisers running ads in media affiliated with educational institutions. It was undoubtedly even narrower in

laws. In fact, then-Judge Alito posited this line of reasoning in *Pitt News*, arguing that a financial burden on one particular segment of the media triggers a higher burden of persuasion for the government.<sup>150</sup> A law that “single[s] out the press” or “a small group of speakers” can survive only if “[it] is necessary to achieve what the Court has described as an overriding government interest and an interest of compelling importance.”<sup>151</sup> In other words, the regulation must pass muster under strict scrutiny.

The other reason for strict scrutiny, in addition to viewpoint discrimination and content discrimination based on speaker identity, is the laws’ content discrimination based on whether speech is commercial or noncommercial. In other words, the Pennsylvania and Virginia regulations at issue in *Pitt News* and *Swecker* restricted commercial promotions of alcohol but left unregulated promotion of alcohol in noncommercial forums (like editorials or news sections).

In the early development of the commercial speech doctrine, courts generally did not consider a regulation’s distinction between commercial and noncommercial speech to be a “content-based” distinction warranting strict scrutiny,<sup>152</sup> but that appears to have changed. For example, in *City of Cincinnati v. Discovery Network, Inc.*, the Court said that commercial speech cannot be treated differently from noncommercial speech if both implicate the same government interest.<sup>153</sup> That kind of differential

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practice, then-Judge Alito wrote in *Pitt News*, considering alcohol advertisers are exceedingly more likely to run ads in papers at universities than in papers affiliated with elementary and secondary schools. *Pitt News*, 379 F.3d at 111. The Virginia law applied only to college and university media, and was arguably more egregious than Pennsylvania’s because Virginia’s ban applied directly to the student publishers while Pennsylvania’s law applied to advertisers directly and student publishers only indirectly. See Brief for Student Press Law Center and College Newspaper Business and Advertising Managers as Amici Curiae Supporting Plaintiffs-Appellees, *Swecker*, 602 F.3d 583 (4th Cir. 2010) (No. 08-1798).

150. *Pitt News*, 379 F.3d at 109. Judge Alito first applied *Central Hudson* scrutiny, saying the statute must “[a]t a minimum” satisfy that test. *Id.* at 106. After completing that analysis (holding that the statute failed *Central Hudson* scrutiny), Judge Alito began a new analysis under the “additional, independent” reason that the statute violated the First Amendment: “[I]t unjustifiably impose[d] a financial burden on a particular segment of the media, i.e., media associated with universities and colleges.” *Id.* at 109.

151. *Id.* (internal citation omitted).

152. In *Metromedia, Inc. v. San Diego*, for example, a plurality of the Supreme Court asserted that “our recent commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech.” 453 U.S. 490, 513 (1981). The plurality also said, as an obiter dictum, that “an ordinance totally banning commercial billboards but allowing noncommercial billboards would be constitutional.” *Id.* at 536 (Brennan, J., with whom Blackmun, J. joined, concurring in the judgment).

153. 507 U.S. 410, 410 (1993).

treatment “seriously underestimates the value of commercial speech.”<sup>154</sup> At least where commercial and noncommercial speech implicate the same government interest, then, the government cannot regulate only the former on the ground that it is supposedly less valuable.<sup>155</sup>

Applying that logic to the alcohol advertising bans, strict scrutiny is triggered by the governments’ differential treatment of commercial speech (advertisements) and noncommercial speech (editorials, for example) that implicated its interest in curbing underage and abusive drinking. Of course, editorials and news stories that focus on alcohol frequently tend to decry the ills of excessive consumption—and so would not implicate the government’s interest in the same way as do advertisements promoting alcohol. But not always. Take, for example, the drink-specials report that *Pitt News* defiantly ran in its news section after U.S. District Court Judge William Standish upheld the Pennsylvania ban on alcohol advertising in student newspapers. Dubbed the “booze beat” by the Associated Press, the list of “Today’s Drink Specials” featured more than a “dozen places with specials including half-price margaritas, vodka shots for \$1.50 and one called ‘Kick the Keg.’”<sup>156</sup> It is hard to imagine editorial content that would more implicate the government’s interest in curbing excessive student drinking than students themselves encouragingly reporting to other students where they can get dollar-fifty vodka shots. Yet the first of the Third Circuit panels to hear the case reasoned with approval that under the Pennsylvania law the newspaper was free to run its booze beat.<sup>157</sup> Accordingly, two different kinds of speech that each implicated the government’s interest—alcohol advertisements and a “booze beat”—were treated differently based only on the fact that one is commercial and the other is not. That differential treatment, according to *Discovery Network*,

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154. *Id.* at 410–11.

155. *Id.* The *Sorrell* opinion lends further support to this rule. The *Sorrell* majority cited *Discovery Network* approvingly, *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011), and said that Vermont’s law would have fared better had it restricted the use of prescriber data broadly, instead of just restricting commercial use. *Id.* at 2672 (“If Vermont’s statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances then the State might have a stronger position.”).

156. *College Paper Skirts Alcohol-Ad Ban By Reporting Drink Specials*, THE ASSOCIATED PRESS, Feb. 21, 2003, available at <http://www.firstamendmentcenter.org/college-paper-skirts-alcohol-ad-ban-by-reporting-drink-specials>.

157. *Pitt News v. Fisher*, 215 F.3d 354, 366 (3d Cir. 2000) (“*The Pitt News* could, for instance, contact area bars, find out what their nightly drink specials are, and publish a weekly listing of goings-on about town—so long as *The Pitt News* did not receive any consideration for doing so. There is thus no direct limitation on the freedom of *The Pitt News* to publish alcohol-related information.”).

is an “impermissible means of responding to [the government’s] interests.”<sup>158</sup>

#### V. CONCLUSION AND LOOSE ENDS

The status of commercial speech in First Amendment jurisprudence has been significantly elevated since the mid-twentieth century. Slowly but surely, the Court has shown an increasing willingness to recognize the value of commercial speech and provide it with some constitutional protection. That seems especially true following *Sorrell*, as described above. Taking a step back now to evaluate the commercial speech doctrine as it stands today, there are areas of maturation and clarity, but there are also loose ends that need tidying.

This is what we do know about the commercial speech doctrine following the Court’s recent decision: First, the First Amendment forbids the government from keeping truthful commercial information from people for what it perceives to be their own good. This principle faded in and out of vogue in decisions dating back to *Virginia Pharmacy*, but the Court in *Sorrell* provided it a majority backing. *Sorrell* located the principle in the third prong of the *Central Hudson* test, which asks whether the state’s means directly advance its interest. The means-ends relationship, the Court said, cannot include keeping truthful information from people in order to manipulate their behavior. Of course, if this kind of means-ends relationship fails *Central Hudson* intermediate scrutiny, it is similarly fatal under a strict scrutiny analysis. We also know, following *Sorrell*, that content-based commercial speech restrictions do not automatically trigger strict scrutiny, unless they are also viewpoint-based. When a state regulates commercial speech because it disagrees with the advertiser’s message, strict scrutiny attaches.

Still unclear, however, is what a court ought to do with commercial speech restrictions based on consumer protection interests such as truthful advertising. Following *Sorrell*, there are several different ways courts could interpret the commercial speech doctrine on this issue. Justice Stevens’ approach is one possibility; he, and possibly the *Sorrell* majority, would apply *Central Hudson* scrutiny only to laws premised on consumer protection and treat all other commercial speech restrictions as if they applied to fully-protected speech. Alternatively, a court could simply apply *Central Hudson* scrutiny to all commercial speech restrictions (except those that are viewpoint-discriminatory, because we know from *Sorrell* that those warrant strict scrutiny). Still another way to interpret the doctrine would be to treat laws regulating false, misleading, or impermissibly aggressive commercial speech—in other words, laws based on consumer protection—as wholly outside any First Amendment scrutiny and to apply *Central*

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158. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 411 (1993).

*Hudson* scrutiny to all other commercial speech restrictions (except viewpoint-discriminatory laws).

The early iteration of the commercial speech doctrine did not protect false, misleading, and impermissibly aggressive speech. The *Virginia Pharmacy* Court held that “[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing effectively with this problem.”<sup>159</sup> The *Central Hudson* Court reinforced the principle that misleading advertisements (and also those promoting illegal activity) are not protected by any level of scrutiny under the First Amendment: “[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.”<sup>160</sup>

Other and more recent case law, however, leaves open the possibility that even deceptive and aggressive commercial speech warrants at least intermediate scrutiny. For example, Justice Blackmun’s dissent in *Central Hudson* characterizes the majority’s holding as having attached intermediate scrutiny to laws regulating misleading and coercive commercial speech.<sup>161</sup> Writing for a plurality in *44 Liquormart*, Justice Stevens similarly implied that even regulations of deceptive and coercive commercial speech warrant some level of scrutiny, as opposed to no protection whatsoever. Justice Stevens explained that commercial speech is protected under the First Amendment because of its informational value to consumers, and when a state regulates commercial speech to “protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”<sup>162</sup> Notably, Justice Stevens did not write that regulations of deceptive or aggressive commercial speech warrant no constitutional protection. Instead, Justice Stevens suggested that a well-conceived test for permissible commercial speech appropriately accommodates the governmental interest in regulating false or misleading speech, but that

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159. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (internal citation omitted).

160. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563–64 (1980) (internal citation omitted).

161. *Id.* at 573 (Blackmun, J., concurring) (“I agree with the Court that . . . intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech”).

162. *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 501 (1996).



accommodation takes the form of a lower level of scrutiny, not a complete lack of protection.

Taking instruction from the trajectory of the commercial speech doctrine, which has continued to elevate the value and protection of commercial speech, we can conclude that a majority of the Court would afford intermediate (*Central Hudson*) scrutiny to laws based on consumer protection, as opposed to no protection at all. Then, again based on the increasing value placed on commercial speech in recent decades, it is also likely going forward that the Court will find ways to apply strict scrutiny, not *Central Hudson* scrutiny, to commercial speech restrictions not based on consumer protection. Although *Sorrell* points in this direction, commercial speech cases in the near future could cement this development in the doctrine. *Sorrell* has potential to mark a change in the tide, after which *Central Hudson* scrutiny is reserved only for consumer protection laws and commercial speech generally takes its place alongside other fully-protected speech.



# GUNS ON CAMPUS: CONTINUING CONTROVERSY

MICHAEL ROGERS \*

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\* Michael J. Rogers is a second year law student at Notre Dame Law School, Class of 2013. First, I would like to thank my family for their love and support in my ventures, and my loving fiancée who has supported and stood by me through our law school adventure. Next, I would like to thank Professor John Robinson for his tireless work and edits on my note. Also, thank you to Professor Rick Garnett for contributing to my constitutional basis and giving me strong advice in my note. Thank you to the entire staff of the Journal of College and University Law for your teamwork and help. Finally, I would like to thank the University of Notre Dame for giving me the opportunity to learn the law in an atmosphere that inspires me to work toward greatness every day.

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## INTRODUCTION

After the numerous tragic rampages that have occurred on college and university campuses, some observers have suggested that the tragedies could have been avoided or stopped if even one student had been armed and able to defend himself or herself with a firearm.<sup>1</sup> Others have suggested that if firearms are allowed on college and university campuses, even if such rampages could be prevented, the rate of homicides and violence will rise due to students routinely carrying firearms.<sup>2</sup> States have historically restricted the exercise of individual gun rights in varying forms. These restrictions have, often times, taken the form of banning firearms on college and university campuses.<sup>3</sup> Across America, state legislators have

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1. See, e.g., Joyce Lee Malcolm, *McDonald v. City Of Chicago: The Second Amendment Made Clearer, the Fourteenth Amendment Made Murky*, in *McDonald v. Chicago: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 458 (2011).

2. *Id.* at 457.

3. General firearm regulations take a standard form across the country of prohibiting unlicensed individuals from carrying firearms on college and university campuses. There has been constant debate and a strong movement to allow concealed weapon permit holders to carry on campuses. The states that do allow firearms on campuses adhere to this model. See UTAH CODE ANN. § 76-10.505.5 (West 2011):

(2) A person may not possess any dangerous weapon, firearm, or sawed-off shotgun, as those terms are defined in Section 76-10-501, at a place that the person knows, or has reasonable cause to believe, is on or about school premises as defined in this section.

(3) (a) Possession of a dangerous weapon on or about school premises is a class B misdemeanor. (b) Possession of a firearm or sawed-off shotgun on or about school premises is a class A misdemeanor.

(4) This section does not apply if: (a) the person is authorized to possess a firearm as provided under Section 53-5-704, 53-5-705, 76-10-511, or 76-10-523 [concealed weapon permit laws] or as otherwise authorized by law.

Utah was the first state to allow firearms to be carried on college and university campuses. Its legislation, like other states that allow firearms on campuses, makes it illegal to carry a firearm on campus unless the carrier also possesses a concealed weapon permit. Concealed weapon permits allow individuals to carry firearms in areas where it would otherwise be illegal to do so. For the purposes of this note, it will be assumed that prohibitions against carrying firearms without a concealed weapon permit are valid, and total firearm bans indicate regulatory schemes that do not allow individuals to carry firearms on

annually introduced bills pertaining to the “guns on campus” issue, and 2011 was no exception. In fourteen states, legislators introduced bills to allow licensed individuals to carry concealed weapons on campus.<sup>4</sup> Additionally, in two states, legislators introduced bills to explicitly forbid individuals from carrying concealed weapons on campus.<sup>5</sup> All sixteen bills failed.<sup>6</sup> This note will analyze and discuss various cases and legislation pertaining to the individual right to possess firearms for self-defense and personal security in the college and university campus setting. After considering the current Second Amendment jurisprudence, this Note will discuss potential standards of review applicable to firearm regulations on public, but not private, college and university campuses.<sup>7</sup>

### I. STATUS AFTER *HELLER*

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college and university campuses, with or without a concealed weapon permit. Arguments for allowing firearms on campuses will be referring to allowing concealed weapon permit holders to carry firearms on college and university campuses. Arguments against allowing firearms on campuses will be referring to prohibitions against concealed weapon permit holders carrying firearms on campuses, in addition to the prohibition against individuals who do not hold a concealed weapon permit. See Appendix A, *infra*, for a brief summary on the current state laws pertaining to firearms on college and university campuses.

4. National Conference of State Legislatures, *Guns on Campus: Overview* (Nov. 13, 2011), <http://www.ncsl.org/issues-research/educ/guns-on-campus-overview.aspx> (twenty-two states explicitly regulate concealed weapons on campus. Those states include: Arkansas, California, Florida, Georgia, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming. Additionally, twenty-five states have delegated the decision of whether or not to regulate concealed weapons on campus to the college or university itself. Those states include: Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Montana, New Hampshire, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, and West Virginia). Concealed weapon permits allow citizens to more widely carry firearms throughout society after receiving the permit from the state entity charged with regulating concealed weapons. So, many laws target concealed weapons because other legislation governs the general possession of firearms. Oregon was assumed to have delegated the authority to decide regulation of concealed weapons to colleges and universities themselves, but the Oregon Court of Appeals ruled otherwise. See *infra* section VI.

5. *Id.*

6. *Id.*

7. Public universities are considered a state actor and are subject to the same restraints under the Constitution as the state. Private universities are generally not considered state actors, but instead private institutions, and are not subject to the same restraints as the state. Therefore the constitutional analysis in this Note may not be applicable to private colleges and universities.

In the light of recent and dramatic changes in individual gun rights jurisprudence, states and state institutions face potential challenges to firearm regulations that restrict firearm possession on post-secondary campuses. Before 2008, it was uncertain if the Second Amendment guaranteed United States citizens individual rights to possess firearms or if that right was reserved only to a state-regulated militia.<sup>8</sup> The United States Supreme Court answered the question in *District of Columbia v. Heller*.<sup>9</sup> In a 5-4 decision, the Court held that the Second Amendment included an individual right of law-abiding citizens to possess firearms, especially in defense of one's self, homestead, and family.<sup>10</sup> In that case, Dick Heller, a special police officer, brought suit under the Second Amendment to enjoin the District of Columbia from enforcing firearm regulations that effectively banned handguns within the District.<sup>11</sup> The District Court for the District of Columbia dismissed Heller's suit. The decision was then appealed to the Court of Appeals for the District of Columbia, which reversed the District Court ruling.<sup>12</sup> Following the reversal, the United States Supreme Court granted certiorari.<sup>13</sup> The Supreme Court's decision specifically ruled that the District of Columbia's law effectively banning the ownership of handguns was unconstitutional under the Second Amendment.<sup>14</sup>

Justice Scalia, speaking for the majority in *Heller*, supported the decision with history. He cited Article VII of the English Bill of Rights, which guaranteed Protestants the right to "have Arms for their defense."<sup>15</sup> He also utilized William Blackstone, who maintained that Englishmen had "natural right[s] of resistance and self-preservation . . . [and] of having and using arms for self-preservation and defense."<sup>16</sup> Next, Justice Scalia analyzed the setting within the states before and after ratification of the Second Amendment to support the Court's decision. The Court found that several states, before and after ratification, "unequivocally protected an individual citizen's right to self-defense [and this was] strong evidence that that is how the founding generation conceived the right."<sup>17</sup> Despite

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8. See U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

9. 554 U.S. 570, 635-36 (2008).

10. *Id.* at 575.

11. *Id.* at 570

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 593 (citing Bill of Rights, 1689. 1 W. & M., c. 2, §7 (Eng.)).

16. *Id.* at 664 (quoting 1 William Blackstone, Commentaries 140).

17. Derek P. Langhauser, *Gun Regulation of Campus: Understanding Heller and Preparing for Subsequent Litigation and Legislation*, 36 J.C. & U.L. 63, 79 (2009).

vigorous dissent and seemingly contradictory precedent,<sup>18</sup> the Court secured the right to keep and bear arms as an individual right of the people. Although the Second Amendment may be read to guarantee only a collective right to possess firearms for the purpose of maintaining a state militia, the Court found that the individual right to keep and bear arms was a central component of the Amendment.<sup>19</sup>

In its decision, the Court was careful to add that the right to bear arms was not an absolute right. “It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,” Justice Scalia wrote.<sup>20</sup> He expounded further on the narrow application of the Court’s ruling, stating “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings...”<sup>21</sup>

This explicit narrowing of the opinion left open the possibility of future regulation, and the preservation of some current regulations concerning firearm possession, despite the people’s individual right that the Court had just recognized. Although the Court answered a large question regarding the application of the Second Amendment, there were still many questions lingering.

*Heller* did not address several key issues for colleges and universities. First, the facts of *Heller* did not raise the incorporation question. Consequently, that question went unaddressed in *Heller*.<sup>22</sup> Second, but still related to incorporation, the facts of *Heller* did not raise the question of what restrictions would be valid when public colleges and universities were left, by states, to determine their own position on allowing or banning

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18. See *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Miller*, 307 U.S. 174 (1939) (holding that the Second Amendment *did not* limit the federal government from regulating firearms that did not relate to state militias).

19. *Heller*, 554 U.S. at 635.

20. *Id.* at 626.

21. *Id.*

22. See Langhauser, *supra* note 17 (explaining that under the ruling in *Heller*, the individual right to possess firearms was applicable only to the federal government, not the states). While this left state law intact, it also raised concerns of future validity of such state laws. There were several cases in federal court that would raise the incorporation issue, and it was the next logical progression of this individual right in the Bill of Rights. If and when will the Second Amendment be incorporated to the states? What restrictions and limitations on an individual’s right to keep and bear arms under existing state law would endure if incorporation occurred?

weapons on campus.<sup>23</sup> Third, given the facts of *Heller*, the Court did not have an opportunity to define the term “schools” in its dicta when limiting the scope of the opinion.<sup>24</sup>

## II. INCORPORATION OF THE SECOND AMENDMENT: *MCDONALD V. CITY OF CHICAGO*

The Supreme Court, in *McDonald v. City of Chicago*,<sup>25</sup> concluded that the Fourteenth Amendment incorporates against the states the Second Amendment right to keep and bear arms.<sup>26</sup> The Second Amendment is now binding on the states as a fundamental individual right of the people. Until 2010, the Second Amendment to the United States Constitution applied only to federal legislation and the federal government’s actions.<sup>27</sup> This section will outline the reasoning and justifications the Court utilized in incorporating the Second Amendment. Understanding the Supreme Court’s analysis is essential to analyzing and evaluating future laws and firearm regulations.

In June of 2008, Otis McDonald and other Chicago residents who wanted to possess a firearm in their home for self-defense filed suit in federal court against the city of Chicago. They sought a declaration that two handgun bans violated the Second and Fourteenth Amendment.<sup>28</sup> The District Court for the Northern District of Illinois dismissed the case, and the Court of Appeals for the Seventh Circuit affirmed the trial court’s dismissal.<sup>29</sup> McDonald then filed a petition for certiorari with the United States Supreme Court, and the Court granted review.<sup>30</sup> After ruling that the

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23. *Id.* (explaining the issues of pre-emption of state laws over college and university procedure and position, and impliedly anticipating potential complications if the Second Amendment then preempted state law).

24. *Id.* The standard interpretation of “schools” is believed to be K-12, not necessarily including post-secondary institutions like colleges and universities. By leaving the term undefined, the Court was not clear at what level such valid exceptions existed. Such consideration is particularly relevant because the ages of most college and university patrons are of majority, but that of K-12 are not.

25. 130 S. Ct. 3020 (2010) (Plurality opinion written by Justice Alito, joined by the Chief Justice and Justices Scalia and Kennedy). Justices Scalia and Thomas each wrote separate concurrences. Justice Stevens wrote a dissent, while Justice Breyer, joined by Justices Ginsburg and Sotomayer, filed a separate dissent.

26. *Id.* at 3050. The Court held that the Second Amendment, as recognized in *Heller*, is incorporated under the Fourteenth Amendment as an individual right to possess firearms for the purpose of self-defense. *Id.*

27. *Id.* at 3022.

28. *Id.* at 3027.

29. *Id.*

30. *Id.* at 3028.



Second Amendment was incorporated against the states,<sup>31</sup> the Court reversed the decision of the Court of Appeals and remanded the case for further proceedings.<sup>32</sup>

McDonald argued that the individual right to keep and bear arms was incorporated into the Fourteenth Amendment on two potential grounds:<sup>33</sup> first, the Privileges and Immunities Clause of the Fourteenth Amendment,<sup>34</sup> and second, the Due Process Clause of the Fourteenth Amendment. Chicago and Oak Park (two separate municipalities) argued that the rights protected by the Bill of Rights can be incorporated into the Fourteenth Amendment only “if that right is an indispensable attribute of *any* ‘civilized’ legal system.”<sup>35</sup> The plurality rejected the municipalities’ argument as well as McDonald’s first argument (which required overruling the *Slaughter-House Cases*), but it accepted McDonald’s second argument and incorporated the Second Amendment into the Due Process Clause of the Fourteenth Amendment.

The plurality began by noting that the Bill of Rights originally applied only to the federal government.<sup>36</sup> The plurality then quickly dismissed the Privileges and Immunities Clause argument, along with any formerly binding precedent.<sup>37</sup> It saw no need to reconsider the holding in the *Slaughter-House Cases* because incorporation jurisprudence had evolved under Due Process Clause analysis.<sup>38</sup> Also, the Court rejected *Cruikshank*,

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31. *McDonald* was a plurality decision. Justice Alito wrote for the plurality, which included the Chief Justice, Justice Kennedy, and Justice Scalia. While Justice Thomas agreed with the plurality that the Second Amendment is a fundamental right, he argued that it should be incorporated through the Privileges and Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause. Justice Stevens dissented, and Justice Breyer dissented separately with Justices Ginsburg and Sotomayer joining Justice Breyer.

32. *McDonald*, 130 S. Ct. at 3020.

33. *Id.* at 3028.

34. *Id.* By depending on the Privileges and Immunities Clause, this argument necessarily asked the Court to reject the narrow interpretation of the clause set forth in the decision of the *Slaughter-House Cases*.

35. *Id.*

36. *Id.* at 3020 (citing *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243 (1833)).

37. *See* *United States v. Cruikshank*, 92 U.S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Miller*, 307 U.S. 174 (1939). These cases were used to establish that the Second Amendment did *not* limit the federal government from regulating firearms that did not relate to state militias. These cases had been used as authority to reject incorporation of the Second Amendment in the past.

38. *McDonald*, 130 S. Ct. at 3030-31. The author would like to thank Professor Richard Garnett for pointing out that, although the Court has maintained the precedent of the *Slaughter-House Cases*, it has seemingly followed the

*Presser*, and *Miller* as controlling precedent because those cases were decided before selective incorporation under the Due Process Clause was established.<sup>39</sup>

Despite the plurality's rejection of the Privileges and Immunities strategy, Justice Thomas argued that the Court should utilize the Privileges and Immunities Clause to incorporate the Second Amendment.<sup>40</sup> Justice Thomas concurred with the plurality that the Second Amendment guarantees a fundamental right,<sup>41</sup> but disagreed with using the Due Process Clause of the Fourteenth Amendment for incorporation.<sup>42</sup> Justice Thomas urged the Court to overturn past incorporation precedent on this particular issue.<sup>43</sup> He argued that the real work in incorporating fundamental rights is done by the Privileges and Immunities Clause, not the procedural concerns of the Due Process Clause. The plurality did not agree with Justice Thomas and did not overturn its incorporation precedents nor return to the privilege and immunity analysis.<sup>44</sup>

The plurality, instead, turned to the Fourteenth Amendment's Due Process Clause to incorporate the Second Amendment. The plurality proceeded to determine if the Second Amendment satisfied the requirement of selective incorporation under that clause. The determination is based on "whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice."<sup>45</sup> If the Second Amendment guarantees a fundamental right, then it would be applied to the federal and state governments with equal force.<sup>46</sup> The Court determined that the Second Amendment does guarantee a fundamental right.

The Chicago and Oak Park statutes at issue in the case were very similar to the statute at issue in *Heller*. Both essentially banned handgun

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purposes behind the Privileges and Immunities Clause—as outlined in the *Slaughter-House* dissent—through its Substantive Due Process jurisprudence.

39. *Id.* at 3031. These cases were used to reject incorporation of the Second Amendment in the past.

40. *Id.* at 3058–59 (Thomas, J., concurring); *Incorporation of the Right to Keep and Bear Arms*, 124 HARV. L. REV. 229, 232 (2010) (hereinafter *Incorporation*).

41. *Incorporation*, *supra* note 40, at 232.

42. *Id.*

43. *Id.*

44. Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 292.

45. *McDonald*, 130 S. Ct. at 3034. This standard was related to the fundamental principles of our government as well as the history of the American legal tradition, as embodied in the Court's citation of *Snyder v. Massachusetts*, 291 U.S. 97, 105 ("rights that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'").

46. *Id.* at 3035.

ownership within their respective jurisdictions.<sup>47</sup> On this point, the plurality began with a selective recitation of the reasoning utilized in *Heller*. The plurality reiterated that “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is ‘the central component’ of the Second Amendment right.”<sup>48</sup> The plurality added that it is clear that “this right is ‘deeply rooted in this Nation’s history and tradition.’”<sup>49</sup> After again establishing that the right to keep and bear arms is a fundamental individual right of the people, the plurality transitioned into its analysis of the incorporation doctrine under the Fourteenth Amendment.

In its Fourteenth Amendment analysis, the plurality again returned to history to present evidence for the claim that the Congress that sent the Fourteenth Amendment to the states for ratification intended the Second Amendment to bind the states. Prior to the ratification of the Fourteenth Amendment, but after the Civil War, many freed blacks returned to the South and found that the state legislatures had restricted their rights to own firearms.<sup>50</sup> Once disarmed, they faced violence and murder from armed gangs of former rebel soldiers.<sup>51</sup> The plurality found that the legislative response to such violence was strong, probative evidence that the Fourteenth Amendment was meant to make the Second Amendment binding upon the states. In this regard, the plurality said:

The most explicit evidence of Congress’ aim appears in §14 of the Freedman’s Bureau Act of 1866, which provided that “the right . . . to have full and equal benefit to all laws and proceedings concerning personal liberty, personal security, and

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47. Complaint at 7, *McDonald v. Chicago*, WL 2571757 (N.D. Ill 2008) (08cv03645). (Chicago Municipal Code § 8-20-050 provides: “No registration certificate shall be issued for any of the following types of firearms: ...(c) handguns ...”); Brief for City of Chicago et al. as Amici Curiae Supporting Respondents at 1-2, *McDonald v. Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521) (“The Oak Park ordinance prohibits the possession of handguns in the community. Oak Park, Ill., Mun. Code § 27-1-1. Police officers, members of the Armed Forces and National Guard, private security guards and federally licensed firearms collectors are exempt from the ban. *Id.* So also are gun clubs and theatre organizations. *Id.* Rifles and shotguns may be kept and carried on one’s own land or place of business. *Id.* Violations are punishable by a fine of not more than \$1,000 for a first offense and \$2,000 for any subsequent offense, but not imprisonment. *Id.* at § 27-4-1(A). Oak Park does not require registration or licensure of any weapon and does not prohibit possession and use of tasers”).

48. *McDonald*, 130 S. Ct. at 3036 (citing *District of Columbia v. Heller*, 554 U.S. at 598–99) (internal citations omitted)).

49. *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

50. *McDonald*, 130 S. Ct. at 3039.

51. *Id.*

the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens . . . ”<sup>52</sup>

The plurality found that this was an explicit guarantee of the individual right to keep and bear arms. Additionally, the plurality considered the Civil Rights Act of 1866.<sup>53</sup> This Act, the plurality pointed out, used nearly the same language as the Freedman’s Bureau Act when explaining that the Act guaranteed the “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.”<sup>54</sup> The plurality reasoned that with the use of this identical language, and with the Freedman’s Bureau Act identifying the right to keep and bear arms as a fundamental individual right, it was only logical that the Civil Rights Act would also include the right to bear arms as an individual right.<sup>55</sup>

When that legislation was not as effective as hoped for, the Fourteenth Amendment was added to the Constitution. The Fourteenth Amendment’s Section 1 reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>56</sup>

The plurality added that the Fourteenth Amendment was generally understood to provide constitutional protection for the rights included in the Civil Rights Act of 1866.<sup>57</sup> Through analyzing the text and legislative background of the Act, the plurality concluded that it was meant to guarantee the individual right to keep and bear arms for at least self-defense and defending family and homesteads.<sup>58</sup>

The plurality continued by establishing that the Second Amendment would be incorporated fully and would bind the states in the same manner with which it binds the federal government.<sup>59</sup> Although binding on the states, like other incorporated constitutional rights, Second Amendment rights are not limitless. The plurality echoed dicta from *Heller* that certain

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52. *Id.* at 3040 (citing 14 Stat. 176-177) (emphasis added).

53. 14 Stat. 27.

54. *McDonald*, 130 S. Ct. at 3040 (citing The Civil Rights Act of 1866, 42 U.S.C. § 1982).

55. *McDonald*, 130 S. Ct. at 3040.

56. U.S. CONST. amend. XIV §1.

57. *McDonald*, 130 S. Ct. at 3041.

58. *Id.*

59. *Id.* at 3049.

*reasonable* firearm regulations would continue to be acceptable after incorporation.<sup>60</sup> The plurality assured that “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” could continue to be enforced.<sup>61</sup>

After the *Heller* and *McDonald* decisions, there remains no doubt about the state of the Second Amendment. The Second Amendment guarantees the individual right to keep and bear arms for legal purposes, and it applies to the states as it does to the federal government. These decisions do, however, leave some questions unanswered. Although the Court said that governments could still place *reasonable* restrictions and limitations on the right to keep and bear arms, the *McDonald* case did not provide an opportunity for the Court to discuss what constitutes a reasonable restriction. Justice Breyer, in his dissent in *McDonald*, raised issues about the Court’s making such determinations. He said that many factors must be considered to determine reasonableness. What types of firearms (for self-defense) are constitutionally protected? How far does the protection extend outside the home (if at all)? What types of restrictions will apply and what procedural concerns are raised?<sup>62</sup> *McDonald* left these questions unanswered.

Further, the *McDonald* plurality rejected the notion that the judiciary should weigh the conflicting interests and decide, on a case-by-case basis, whether Second Amendment rights should prevail over firearm regulations. Justice Alito, citing the *Heller* majority, stated: “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”<sup>63</sup> This leaves the states and courts with a doctrine that acknowledges the possibility of reasonable restrictions on individual gun rights, but that has yet to provide a basis from which to determine reasonableness. Thus, the states may pass laws and courts may

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60. *Id.* at 3046.

61. *Id.* at 3047 (citing *Heller*, 554 U.S. at 525–28).

62. *Id.* at 3127 (Breyer, J., dissenting). Justice Breyer argued that there were several practical frailties in the plurality opinion. He argued that there is no consensus that the right to keep and bear arms is fundamental in nature and thus guaranteed by the Fourteenth Amendment’s due process clause, that such a right does nothing to protect minorities or promote equality under the Fourteenth Amendment, that incorporation significantly inhibits state power, and that incorporation will force judges to answer empirical questions regarding matters on which they are not experts. The latter two arguments may indicate some difficulties in applying this case’s holding. There are many state regulations in place, and many state legislatures may resist changing their regulations because they believe them to be reasonable. Thus, despite Justice Alito’s assurances otherwise in the plurality opinion, the determination of what constitutes a reasonable regulation will likely fall to judges reviewing regulations in individual cases.

63. *Id.* at 3050 (citing *Heller*, 554 U.S. at 634).

decide cases in an effort to determine what constitutes a reasonable firearm regulation in the light of an incorporated Second Amendment. If the lower courts are in conflict over the reasonableness of a particular regulation, the Supreme Court may address the issue when such an issue is before it.

### III. ISSUES RISING FOR COLLEGES AND UNIVERSITIES FROM THE INCORPORATION OF THE SECOND AMENDMENT

Many issues arise for colleges and universities in the wake of Second Amendment incorporation.<sup>64</sup> The largest issue, as discussed above, is the definition of reasonableness in the context of firearm regulation on campuses. This is particularly true for colleges and universities that institute their own gun policies. The Court mentioned that firearm bans in sensitive areas, such as schools, may generally be reasonable, but the Court did not define “schools.”<sup>65</sup> With no clarification if “schools” includes colleges and universities, it is unclear if college and university campuses are “sensitive” enough to validate a firearms ban. Although colleges and universities broadly qualify as a school—an institution of teaching and learning—they can readily be distinguished from K–12 institutions. Most students in colleges and universities are at or above the age of majority. This is critical in terms of gun ownership and possession. Guns, generally, cannot be purchased by individuals under the age of eighteen,<sup>66</sup> and, in most states, handguns cannot be purchased until the purchaser reaches twenty-one years of age.<sup>67</sup> Thus firearm bans at schools below the college and university level might do little or nothing that interferes with students’ Second Amendment rights. Bans at the college and university level,

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64. The issues identified are analyzed as applying only to public colleges and universities. The state university systems across the United States are considered state actors and therefore are subject to the incorporation of the Second Amendment. Private institutions are not be subject to the demands of the Second Amendment and are seemingly able to continue whatever gun regulations they currently have in place, pending any state or federal legislation to the contrary. Private institutions, like other private actors, generally cannot violate another individual’s Second Amendment rights. Such violations require government action.

65. Although defining “schools” in either *Heller* or *McDonald* would have been dictum, such a definition would have provided guidance and insight to the states and lower courts. As a side mention in both cases, the Court identified that firearm regulations in sensitive areas, like schools, would still likely be acceptable. The Court’s mentioning of schools without providing further explanation leaves numerous possible readings of their sensitive area example.

66. LEGAL COMMUNITY AGAINST VIOLENCE, REGULATING GUNS IN AMERICA: AN EVALUATION AND COMPARATIVE ANALYSIS OF FEDERAL, STATE, AND SELECTED LOCAL GUN LAWS, at 81–87 (2008), available at <http://smartgunlaws.org/wp-content/uploads/2008/01/RegGuns.entire.report.pdf>.

67. *Id.*

however, would interfere much more with the Second Amendment rights of students who would otherwise be able to lawfully possess firearms.

Additionally, some colleges and universities do not have the clearly defined perimeters that high schools, middle schools, and elementary schools usually have. Some colleges and universities span across cityscapes and mix with metropolitan areas. The physical layout of some colleges and universities can easily create confusion for individuals trying to determine if they are on campus or off campus at any given point. For example, public roads often run through college campuses. Could a public road be considered a sensitive school area subject to a reasonable regulation, or would the street merely be part of the public landscape where the same regulation would be unreasonable?

The plurality in *McDonald* focused primarily on individual rights to possess firearms for self-defense in the home.<sup>68</sup> This creates another potential issue for colleges and universities. In many instances, students' day-to-day home<sup>69</sup> is an on-campus dormitory.<sup>70</sup> Usually, dorms are apartment-like housing with shared common spaces and bathrooms. Students generally make up the vast majority of residents in the dorms. Does a dorm room constitute a "home" as the Court described it in *McDonald* or is it part of the "school" and a sensitive area? Dorms possess critical characteristics of both. The fundamental purpose of the right to keep and bear arms, as the Court saw it, was to protect one's self, home, and family.<sup>71</sup> Defense of self and home can certainly be at issue for a student in a dorm, particularly considering that many students, as a practical matter, have no other choice of housing while in school but the dorms.<sup>72</sup> On the other hand, dorms can easily be considered a sensitive

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68. *McDonald*, 130 S. Ct. at 3020.

69. "Home" can have many different definitions. For instance, it can mean temporary or relatively permanent residence. For this argument, we will assume that the relatively permanent day-to-day residence of students living on campus is their dorm.

70. The dorm issue also depends on the definition of "school." The broader the scope of "school," the more likely dorms would be considered part of the definition. But it would not be out of line to define "school" as the institution's classroom buildings, offices, and departments created for the direct purpose of education. This would further raise issues of public events, common areas, and extra-curricular activities. It is equally as reasonable to set the definition to include any property the college or university owns and operates related to the purpose of education. Also, with a broader and more inclusive definition of school, there will likely be higher scrutiny over firearm regulation. A broader definition would make firearm regulation more restrictive because it reaches more areas and individuals.

71. *McDonald*, 130 S. Ct. at 3041.

72. Many colleges and universities around the country are mandating that first year students live on campus. *See, generally*, Gregory Poole, *Mandatory On-Campus Freshmen Housing a Mistake*, THE CRIMSON WHITE, Jan. 19, 2011,

area. Students are gathered in relatively tight quarters for the purpose of receiving a higher education. The presence of firearms in such a setting, arguably, could be disruptive and dangerous. Both arguments carry weight and truth.

Some state legislatures create the laws pertaining to firearm regulations on public campuses, while others leave gun-policy making up to the college or university itself.<sup>73</sup> When colleges and universities create their own gun-regulation policies, they may face additional issues and costs in the post-*McDonald* era. The college or university that makes its own policy may face costly litigation over such regulations. Although the potential for litigation may create an incentive for policy makers to ensure that regulations are as reasonable as possible, this incentive may be for naught since there is little by way of a starting point to determine the reasonableness of any given firearm regulation. Colleges and universities do have several factors cutting in favor of finding their firearm regulations reasonable. First, the Court in *McDonald* did generally recognize “schools” (however eventually defined), along with government buildings, as sensitive areas that warrant regulation generally.<sup>74</sup> This may create a presumption that firearm regulations on college and university campuses are valid. Second, many states currently have firearm regulations concerning college and university campuses.<sup>75</sup> Such state regulations not only allow firearm regulations on campuses,<sup>76</sup> but may influence courts as to what types of regulations are reasonable.

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<http://cw.ua.edu/2011/01/19/mandatory-on-campus-freshmen-housing-a-mistake/>; Amy Winberry, *Policy Will Require Freshmen to Live on Campus*, THE REFLECTOR, Jan. 19, 2007, <http://www.reflector-online.com/news/policy-will-require-freshment-to-live-on-campus>; Carmen Splane, *SDSU Mandates Dorm Life for Freshmen*, NBC SAN DIEGO, Feb. 10, 2011, <http://www.nbcsandiego.com/news/politics/SDSU-Mandates-Dorm-Life-for-Freshmen-103437864.html>; Arizona State University, *University Housing*, <http://www.asu.edu/housing/> (last visited Apr. 30, 2012); Wichita State University, *Freshmen Live on Campus*, June 28, 2011, <http://webs.wichita.edu/?u=Housing&p=/Freshman/> (last visited Apr. 30, 2012). This creates issues for both the sensitive area arguments and unreasonable regulations arguments as they pertain to dorms. Mandating all first- year students be in the dorms, arguably, makes the area more sensitive. Conversely, such a mandate, coupled with a firearm ban in the dorms, would require gun owning and possessing students to sacrifice some of their Second Amendment rights during their first year of post-secondary studies. This issue may call for special analysis from the courts.

73. See *supra* note 4.

74. *McDonald*, 130 S. Ct. at 3050.

75. See *supra* note 4.

76. See Appendix A, *infra*.



#### IV. CURRENT STATE LAWS AND PROPOSITIONS REGARDING GUNS ON CAMPUSES

As discussed above, legislators from several states have proposed legislation that would allow guns on college and university campuses.<sup>77</sup> Several other states have legislation that bans weapons on campuses.<sup>78</sup> Analysis of state legislation on this issue can provide insight into some of the potential issues that have not been addressed yet by the courts. In this instance, state firearm regulations might be informative tools for the courts in determining what constitutes a reasonable firearm regulation on public campuses.

##### A. Florida State Law

Florida has addressed the firearms-on-campus issue in two ways. First, Florida explicitly prohibits possession of firearms on college and university campuses.<sup>79</sup> Florida's statute clearly defines the term "schools" to include colleges and universities throughout the state.<sup>80</sup> Further, it is significant that Florida includes private and public colleges and universities within its definition. The statute also makes some exceptions according to which individuals may possess firearms within a school area. Generally, the statute does not allow firearms within 1000 feet of a school or school event. The statute excepts individuals who live within 1000 feet of a school and those who visit such residences.<sup>81</sup> Also, the statute excepts possession of firearms in vehicles. Part 2(a)(3) of the statute reads: "[however, a person

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77. *Id.*

78. *Id.*

79. FL. STAT. ANN. § 790.115 (West 2011). The law reads:

(2)(a) A person shall not possess any firearm, electric weapon or device, destructive device, or other weapon as defined in § 790.001(13), including a razor blade or box cutter, except as authorized in support of school-sanctioned activities, at a school-sponsored event or on the property of any school, school bus, or school bus stop; however, a person may carry a firearm:

1. In a case to a firearms program, class or function which has been approved in advance by the principal or chief administrative officer of the school as a program or class to which firearms could be carried;
2. In a case to a career center having a firearms training range; or
3. In a vehicle pursuant to § 790.25(5); except that school districts may adopt written and published policies that waive the exception in this subparagraph for purposes of student and campus parking privileges.

For the purposes of this section, "school" means any preschool, elementary school, middle school, junior high school, secondary school, career center, or postsecondary school, whether public or nonpublic).

80. *Id.*

81. *Id.* at § 790.25(5).

may possess a firearm:] In a vehicle pursuant to § 790.25(5)<sup>82</sup>; except that school districts may adopt written and published policies that waive the exception in this subparagraph for purposes of student and campus parking privileges.”<sup>83</sup> The vehicle exception seemingly allows individuals picking people up or temporarily being on campus to legally possess a firearm in their vehicle.

Exceptions to firearm bans on campuses are significant because they permit two opposing conclusions. First, if there are valid exceptions, then, as a logical matter, an *absolute* ban does not exist. Such a concession creates opportunities for additional arguments in favor of gun possession on campuses. Reasoning and justification for one exception may easily apply to another proposed exception. Additionally, as time passes with the exceptions in place, and no negative consequences ensue, then justifications for gun regulations on campuses based on danger and violence may weaken. Second, exceptions to outright gun bans allow for individuals to exercise their Second Amendment rights when there is not a significant countervailing interest. This limits the restriction on the right. The less the gun regulation interferes with fundamental individual rights under the Second Amendment, the more likely a court is to accept the regulation as valid.

The second way Florida has addressed firearms on college and university campuses is through its concealed weapon legislation. The relevant statute provides that possession of a concealed weapon permit will not allow its possessor to carry weapons onto campuses.<sup>84</sup> Florida makes

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82. *Id.* The law goes on to state, in relevant part:

Possession in private conveyance: Notwithstanding subsection (2), it is lawful and is not a violation of §790.01 for a person 18 years of age or older to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use. Nothing herein contained prohibits the carrying of a legal firearm other than a handgun anywhere in a private conveyance when such firearm is being carried for a lawful use. Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person. This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense as provided in §776.012.

This would allow individuals to keep their firearm in their vehicle while travelling throughout the otherwise restricted school zones. It is important to note that although an exception, this is quite limited in application. Individuals cannot have the firearm on their person, and it must not be immediately accessible.

83. *Id.* at § 790.115.

84. FL. STAT. ANN. § 790.06 (West 2011). Concealed weapon permits allow individuals to carry firearms in such a manner that individuals around them are not aware that the individual is carrying the firearm. They also operate as a tool to

an exception for students to carry weapons, *other than firearms*, openly or concealed, for self defense. In part 12(a)(13) of Section 790.06, Florida prohibits carrying a concealed weapon or firearm in “[a]ny college or university facility unless the licensee is a registered student, employee, or faculty member of such college or university and the weapon is a stun gun or nonlethal electric weapon or device designed solely for defensive purposes and the weapon does not fire a dart or projectile.”<sup>85</sup> Florida recognizes students’ and faculty’s rights to defend themselves, but still maintains a regulation on firearms. While firearms are not the only feasible form of self-defense, the Supreme Court has recognized Second Amendment rights are fundamental, specifically with respect to self-defense.<sup>86</sup> It may not be enough that Florida has allowed for another form of self-defense on campus. Also, Florida’s recognition of the right to self-defense may weaken its argument against allowing individuals to carry firearms on college and university campuses.

#### B. North Carolina Law

In 2011, North Carolina amended its statute to create an absolute ban of any kind of firearm on any educational property or at any school-sponsored extracurricular activity.<sup>87</sup> The concealed weapon law expands this ban by explicitly stating that a concealed weapon permit does not allow the permit holder to carry a firearm in the areas in which firearms are banned by Section 14-269.2, including educational property.<sup>88</sup> Educational property is defined by the statute to include any property owned or operated by any school.<sup>89</sup> School is then defined to include “[a] public or private school, community college, college, or university.”<sup>90</sup> Although North Carolina,

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allow certain individuals to carry firearms in places where firearm possession is otherwise prohibited. Many concealed weapon permit statutes specify areas, like college and university property, where the permit will not allow individuals to avoid regulations restricting firearm possession.

85. *Id.*

86. *McDonald*, 130 S. Ct. at 3036.

87. N.C. GEN. STAT. ANN. § 14-269.2 (West 2011), which reads:

It shall be a Class I felony for any person knowingly to possess or carry, whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property or to a curricular or extracurricular activity sponsored by a school. Unless the conduct is covered under some other provision of law providing greater punishment, any person who willfully discharges a firearm of any kind on educational property is guilty of a Class F felony. However, this subsection does not apply to a BB gun, stun gun, air rifle, or air pistol.

88. N.C. GEN. STAT. ANN. § 14-415.11 (West 2011) (law originally passed in 1995, but most recently amended in 2011).

89. N.C. GEN. STAT. ANN. § 14-269.2 (West 2011).

90. *Id.*

through various statutes, recognizes an individual right to use a firearm for self defense,<sup>91</sup> that right is completely denied in colleges and universities. North Carolina's statutes are good examples of general gun regulations that completely ban firearms on campuses.

Due to its strong gun bans, North Carolina has seen proposed legislation to soften the ban. The proposed legislation, had it passed, would have allowed for concealed weapon permit holders to keep their firearm in their vehicle while on educational property.<sup>92</sup> As the law stands, it reduces the penalty for firearm possession on campus from a felony to a misdemeanor for any non-student carrying a firearm on campus or for any individual, student or non-student, to have a firearm in his or her vehicle on educational property.<sup>93</sup>

The North Carolina statutes, and any statutes that are similar to them, may face the biggest Second Amendment challenges. The broad definitions of "school" and "educational property" used in these statutes make the gun regulation more far-reaching and affect more individuals than narrower alternatives would. An absolute ban is an absolute prohibition on fundamental Second Amendment rights. Such a prohibition raises the question: Does North Carolina have a strong enough interest to justify such a burden on a constitutional right? Such a sweeping ban with far reaching effects is probably not justified.

### C. Wisconsin Concealed Weapon Law

Wisconsin's statute controlling the possession of weapons on various types of property, passed in 2011, is unique among state gun regimes. The statute creates a presumption that individuals may carry their firearms, unless otherwise restricted by property owners.<sup>94</sup> The statute creates an affirmative duty for any individual business or institution to post an

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91. *See* N.C. GEN. STAT. ANN. §§ 14-51.2–51.3 (West 2011).

92. N.C. House Bill No. 650 (West 2011).

93. N.C. GEN. STAT. ANN. § 14-269.2 (West 2011).

94. *See* WISC. STAT. ANN. § 943.13(1m)(c)(5) (West 2011), which reads:

Whoever does any of the following is subject to a Class B forfeiture:  
 Enters or remains in any privately or publicly owned building on the grounds of a university or college, if the university or college has notified the actor not to enter or remain in the building while carrying a firearm or with that type of firearm. This subdivision does not apply to a person who leases residential or business premises in the building or, if the firearm is in a vehicle driven or parked in the parking facility, to any part of the building used as a parking facility.

The presumption that individuals can carry firearms is created by the statute through the clauses that show that the individual violates the statute only if he or she continues to carry a firearm onto property on which the owner (private, business, government, or institutional) has authority to prohibit firearms, has prohibited them, and has given proper notice of that prohibition.

approved sign at all building entrances, stating that firearms are prohibited, if they wish to prevent anyone from carrying a firearm in the building.<sup>95</sup> Colleges and universities, public or private, throughout Wisconsin can post such signs at the entrances of campus buildings to prevent weapons from being carried into the buildings, but the legislation still permits individuals to carry weapons outside the buildings on campus grounds.<sup>96</sup> The statute specifically states that sections of the law allowing individual property owners to prohibit firearms throughout their property (including property outside of buildings) do not apply to colleges and universities or institutional property.<sup>97</sup> The statute also explicitly identified several sensitive areas that would not be affected by the new legislation. Colleges and universities were not identified as sensitive areas.<sup>98</sup> Additionally, the statute establishes the individual right to keep a firearm in one's vehicle, and forbids colleges and universities from interfering with that right.<sup>99</sup>

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95. *Id.* at § 943.13(2)(bm)(2)(am), which reads:

For the purposes of sub. (1m)(c)2., 4., and 5., an owner or occupant of a part of a nonresidential building, the state or a local governmental unit, or a university or a college has notified an individual not to enter or remain in a part of the building while carrying a firearm or with a particular type of firearm if the owner, occupant, state, local governmental unit, university, or college has posted a sign that is located in a prominent place near all of the entrances to the part of the building to which the restriction applies and any individual entering the building can be reasonably expected to see the sign.

96. Allie Grasgreen, *Guns Come to Campus*, INSIDE HIGHER ED., Oct. 3, 2011, [http://www.insidehighered.com/news/2011/10/03/concealed\\_carry\\_in\\_oregon\\_wisconsin\\_and\\_mississippi\\_means\\_changes\\_for\\_college\\_and\\_university\\_campuses#ixzzLiQCjzgAZ](http://www.insidehighered.com/news/2011/10/03/concealed_carry_in_oregon_wisconsin_and_mississippi_means_changes_for_college_and_university_campuses#ixzzLiQCjzgAZ).

97. WISC. STAT. ANN. § 943.13(1m)(c)(2) (West 2011), which reads:

[Whoever does any of the following is subject to a Class B forfeiture:] While carrying a firearm, enters or remains in any part of a nonresidential building, grounds of a nonresidential building, or land that the actor does not own or occupy after the owner of the building, grounds, or land, if that part of the building, grounds, or land has not been leased to another person, or the occupant of that part of the building, grounds, or land has notified the actor not to enter or remain in that part of the building, grounds, or land while carrying a firearm or with that type of firearm. This subdivision does not apply to a part of a building, grounds, or land occupied by the state or by a local governmental unit, to a privately or publicly owned building on the grounds of a university or college, or to the grounds of or land owned or occupied by a university or college, or, if the firearm is in a vehicle driven or parked in the parking facility, to any part of a building, grounds, or land used as a parking facility.

98. Grasgreen, *supra* note 95.

99. WISC. STAT. ANN. § 943.13(1m)(c)(5) (West 2011).

Wisconsin's right-to-carry presumption exemplifies a split among the states. There are indications that firearm regulations on campuses may be presumed valid in the face of Second Amendment challenges.<sup>100</sup> Within the classroom, this may be true. Classrooms are for learning and fostering open debates among adherents of opposing ideas. Although arguments for the necessity of self-defense even in the classroom still exist,<sup>101</sup> colleges and universities as learning institutions may have significant enough interests in safety in the educational setting to limit the exercise of Second Amendment rights within the classroom. Outside of the classroom, on the other hand, colleges and universities may not have as strong of an argument for regulation. Students and individuals may be more likely to experience threats outside the classroom and may need to defend themselves on campus grounds outside of the classroom. The general public, including its threatening members, can pass through campus grounds. Such potential threats demand that individuals be able to exercise their fundamental rights under the Second Amendment. Additionally, the Wisconsin statute distinguishes colleges and universities from the broad definition of "schools" generally.<sup>102</sup> Thus, the statute supports a definitional difference between elementary/secondary schools and colleges and universities, especially with respect to gun regulation.

#### V. COLORADO AND OREGON COURT CASES

Although limited in number, there are state court cases pertaining to firearm regulations on college and university campuses. These cases demonstrate how the regulations are reviewed, and they identify some issues that arise when they are challenged. Despite the fact that, outside of the state that decided the case, the decisions will only be persuasive authority, understanding the analyses and issues can provide perspective on how courts may address challenges to guns-on-campus regulation in other states.

##### A. *Oregon Firearms Educational Foundation v. Board of Higher Education*

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100. Brannon P. Denning & Glenn H. Reynolds, *Five Takes on McDonald v. Chicago*, 26 J.L. & POL. 273, 295 (2011).

101. See Malcolm, *supra* note 1 at 459. Malcolm presents the argument that society is safer with a legally armed citizenry to defend themselves. This argument can easily be extended to the proposition that a college or university classroom would be safer if students were able to defend themselves through being armed. The counter argument could also be extended that a classroom full of armed people in more likely to erupt in lethal violence than is a classroom in which no one is armed.

102. WISC. STAT. ANN. § 943.13(1m)(c)(2) (West 2011).

After the U.S. Supreme Court decided *Heller* and *McDonald*, the Oregon Court of Appeals considered the rights of gun owners to carry firearms on state college and university campuses, but the case was decided based on the applicable state law and not on constitutional grounds.<sup>103</sup> Although not decided on the Second Amendment issues that face colleges and universities, it is still informative as to the type of analysis that may appear in future decisions. Additionally, it further identifies some obstacles that colleges and universities may face when trying to implement their own gun regulation policies independent of the state's regulation efforts.

In 2010, the Oregon Firearms Educational Foundation filed suit against the Oregon Board of Higher Education, seeking to invalidate an administrative rule that sanctioned persons for possessing firearms on state college and university property.<sup>104</sup> Under Oregon law, the Foundation brought its challenge to the administrative rule directly to the court of appeals.<sup>105</sup> The Foundation argued both that the rule sanctioning individuals who carry or possess firearms on campus was preempted by existing state law and that the law violated the Second Amendment.<sup>106</sup> The Oregon Court of Appeals found that the administrative rule was preempted by state law, so the court did not address the Second Amendment issue.<sup>107</sup> Additionally, the Oregon Board of Higher Education did not appeal the case, so no court ever analyzed the Second Amendment issue. Despite this, judicial analysis of the case still provides valuable analysis relating to the state statutes.

First, the Oregon Court of Appeals rejected an argument that Oregon's concealed weapon law explicitly allowed permit holders to carry firearms on college and university campuses.<sup>108</sup> The court said that even if a legislature allows individuals to carry weapons, colleges and universities are not necessarily prevented from restricting the carrying of weapons on their property. This suggests that, outside of additional legislation, colleges and universities in states with statutory and decisional regimes similar to Oregon's may have the power to create gun regulations on campus.

Second, the court decided the case on the basis of an Oregon law that granted sole power to regulate firearms to the Legislative Assembly.<sup>109</sup>

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103. Oregon Firearms Educ. Found. v. Bd. of Higher Educ., 264 P.3d 160, 162 (Or. Ct. App. 2011).

104. *Id.*

105. OR. REV. STAT. ANN. § 183.400 (West 2011).

106. *Oregon Firearms Educ. Found.*, 264 P.3d at 161.

107. *Id.*

108. *Id.* at 162.

109. *Id.* at 162-63. *See also* OR. REV. STAT. ANN. § 166.170 (West 2011), which reads:

(1) Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer,

With sole power to regulate firearms left to the legislature, the Oregon Board of Higher Education could not legitimately make any valid regulation regarding firearms, the court said. Although this does not speak directly to the individual right to carry on campuses, it does present another issue for colleges and universities. Approximately half the states in the U.S. leave many regulatory decisions to their state colleges and universities.<sup>110</sup> State and higher education regulatory agencies are now required to navigate not only Second Amendment rights, but state laws as well when creating gun regulations. It may seem that the colleges and universities can create any firearm regulation they like, but they may still run into serious obstacles as more gun regulation challenges are filed and courts have to interpret more statutory schemes. A violation of either state law or the Second Amendment will invalidate the regulation in question. In this case, even if the regulation had satisfied all state laws, it still may have been found invalid under the Second Amendment.

*B. Students for Concealed Carry on Campus v. Regents of the University of Colorado*

This case originated in a suit brought by Students for Concealed Carry on Campus challenging the University of Colorado's firearm regulations.<sup>111</sup> The student group claimed that the regulations violated the Colorado Concealed Carry Act (CCA)<sup>112</sup> and the right to bear arms in self-defense under the state constitution.<sup>113</sup> The state trial court dismissed the student

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ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly.

(2) Except as expressly authorized by state statute, no county, city or other municipality corporation or district may enact civil or criminal ordinances, including but not limited to zoning ordinances, to regulate, restrict or prohibit the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition. Ordinances that are contrary to this subsection are void.

110. See *supra* note 4. Oregon was one of the states characterized as deferring such regulation decisions to the colleges and universities. *But see Oregon Firearms Educ. Found.*, 264 P.3d 160 (ruled against the university having such power to create gun regulations).

111. *Students for Concealed Carry on Campus v. Regents of the Univ. of Colorado*, WL 1492308 (Colo. App. 2010).

112. COLO. STAT. ANN. §§ 18-12-201 – 18-12-216 (West 2012)

113. COLO. CONST. art. II, § 13, which states:

“The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto



group's claims against the university, and the student group appealed to the Colorado Court of Appeals.<sup>114</sup> The Court of Appeals reversed the trial court and found that the student group had legitimate claims under the Colorado Concealed Carry Act, as well as the Colorado Constitution. The Colorado Supreme Court granted *certiorari*.<sup>115</sup> On March 5, 2012, the Colorado Supreme Court affirmed the decision of the Court of Appeals on statutory grounds under the Concealed Carry Act and remanded the case.<sup>116</sup> Because the Colorado Supreme Court held that the students stated a claim on statutory grounds, it did not consider the constitutional claim. The Court of Appeals analysis under the state constitution was not overturned and still warrants consideration.

Although the Colorado Court of Appeal's decision was made before *McDonald* was decided, the Colorado Court of Appeals provides insightful analysis on the standard of review applicable to firearm regulations. Again, this is distinguished from potential Second Amendment claims, but review of the state constitutional right could provide insight into how gun regulations may be analyzed under the Second Amendment right.

The Colorado Court of Appeals decided that the plaintiffs stated a claim under the state's Concealed Carry Act and, more importantly to this analysis, had a claim against the Regents under the state constitution article II, section 13, which guarantees the right to bear arms in self-defense.<sup>117</sup> The firearm regulation at the University of Colorado was a complete ban.<sup>118</sup> The complaint alleged that it was "an *unreasonable* regulation of the right to keep and bear arms."<sup>119</sup> The Colorado Court of Appeals outlined the standards of review for regulations affecting individual rights claims.

The Colorado Court of Appeals identified rational basis, strict scrutiny, and reasonable exercise of state police power as potential standards of

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legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."

114. *Id.*

115. *Regents of Univ. of Colorado v. Students for Concealed Carry on Campus*, WL 4159242 (Colo. 2010).

116. *Regents of Univ. of Colorado v. Students for Concealed Carry on Campus*, 271 P.3d 496 (Colo. 2012).

117. *Students for Concealed Carry on Campus v. Regents of the Univ. of Colo.*, WL 1492308 at \*1.

118. *Id.*

119. *Id.* at \*11 (emphasis added). The wording of the complaint makes it particularly relevant to Second Amendment analysis. The U.S. Supreme Court, through Justice Alito, made assurances in *McDonald* that "reasonable regulations" would be tolerated within the Second Amendment. State court decisions regarding what constitutes a reasonable and unreasonable firearm regulation should be informative to the courts hearing future cases of this sort.

review for the firearm regulation.<sup>120</sup> This may be similar to the review options other courts will utilize when analyzing state firearm regulations (including regulations generated by public colleges and universities, because they are state actors). First, the court rejected rational basis as the proper standard of review.<sup>121</sup> This is the most deferential standard identified by the court. The Colorado Court of Appeals explained that when utilizing rational basis review “the court determines whether the government’s chosen means were rationally related to furthering a legitimate governmental purpose.”<sup>122</sup> Further, this standard does not require that the regulation be the most strongly related option, nor the least restrictive, only that there is a rational argument that the regulation is related to a legitimate governmental purpose. Under this standard of review, the existence of alternative regulation options that are friendlier to would be gun-carriers have no effect on the legitimacy of the regulation.<sup>123</sup> Rational basis carries a presumption of validity and is most appropriately used where a fundamental right is not involved.<sup>124</sup>

The Colorado Court of Appeals identified strict scrutiny as the proper standard of review where a fundamental right is implicated in the regulation. Under this standard, such regulations “will be sustained only if they are narrowly tailored to serve a compelling state interest.”<sup>125</sup> The court added further that the government must show “[the regulation] is narrowly drawn to achieve that interest in the least restrictive manner possible.”<sup>126</sup> However, the court did not follow strict scrutiny because Colorado had not defined the right to bear arms as fundamental.<sup>127</sup>

The Colorado Court of Appeals, citing state precedent, decided that state firearm regulations should be reviewed under the same standard for analyzing the reasonable exercise of state police power. The court said that a regulation falls under this standard “if it is reasonably related to a legitimate governmental interest such as the public health, safety, or welfare.”<sup>128</sup> This standard does not create a validity presumption as with

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120. *Id.*

121. *Id.* at 8–9, 11.

122. *Id.* at 9 (citing *Western & S. Life Ins. Co. v. State Bd. Of Equalization*, 451 U.S. 648, 668, 671-72 (1981)).

123. *Id.*

124. *Id.* at 8.

125. *Id.* at 9.

126. *Id.* (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000)).

127. This may suggest that other courts reviewing Second Amendment claims may be more likely to utilize strict scrutiny review because the Court has defined the Second Amendment as a fundamental individual right of the people.

128. *Students for Concealed Carry on Campus*, WL 1492308 at \*10 (quoting *Robertson v. City & County of Denver*, 874 P.2d 325 (Colo. 1994)).

rational basis review.<sup>129</sup> This standard weighs the significance of the state interest against the regulation's infringement on the right.<sup>130</sup> If the regulation reasonably relates to a legitimate state interest and does not excessively impinge upon the right in question, then it is valid. The Colorado Court of Appeals concluded that the students stated the kind of claim that, under the Colorado constitution, requires the reviewing court to determine if the rule in question infringed excessively upon the students' firearms rights.

This case may suggest how other courts will address Second Amendment constitutional issues. According to the Colorado court, regulations affecting a fundamental right require strict scrutiny review. Thus, under the Second Amendment, now incorporated, Colorado may have to reanalyze firearm regulations with respect to the fundamental status of Second Amendment rights.

#### VI. FEDERAL CASES CONCERNING THE RIGHT TO KEEP AND BEAR ARMS

Several circuits of the U.S. Court of Appeals have handed down rulings pertaining to the appropriate standard of review of firearm regulations since the Second Amendment was made applicable to the states in *Heller*, with conflicting outcomes. There are three prevailing standards of review in the lower courts reviewing gun regulation: strict scrutiny, intermediate scrutiny, and substantial burden.<sup>131</sup> The Supreme Court has not set an explicit standard of review for Second Amendment cases, but, in *Heller*, it did explicitly rule out rational basis review.<sup>132</sup> To determine the proper review for Second Amendment claims, some courts have considered the standard of review for alleged First Amendment violations and analogized those cases to the Second Amendment case before them.<sup>133</sup>

First Amendment free-speech regulations are reviewed under varying standards depending on the character and degree of the challenged law's burden on the right.<sup>134</sup> The more burdensome the regulation is on protected speech, the more demanding the standard of review, and the greater the burden is on the government to establish that the regulation is narrowly

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129. *Id.*

130. *Id.*

131. *See generally*, United States v. Skoien, 614 F.3d 638 (2010); United States v. Engstrum, 609 F. Supp. 2d 1227 (2009); Nordyke v. King, 644 F.3d 776 (2011).

132. *Heller*, 554 U.S. 570 (2008).

133. *See generally*, Nordyke v. King, 644 F.3d 776 (2011) (only regulations that substantially burden the right to keep and to bear arms should receive heightened scrutiny under the Second Amendment).

134. *See, e.g.*, United States v. Skoien, 587 F.3d 803, 813 (2009), *vacated* United States v. Skoien, 614 F.3d 638 (2010).

tailored and related to a compelling state interest.<sup>135</sup> Regulations imposing only slight burdens on speech are reviewed more leniently.<sup>136</sup> Some scholars have argued for this reasoning to be applied to Second Amendment analysis.<sup>137</sup> Regulations like the D.C. handgun ban from *Heller*, which severely interfere with Second Amendment rights, must be reviewed with strict scrutiny. Some courts have reasoned that if the regulation does not interfere with Second Amendment rights at their core, then such heightened scrutiny is unwarranted, and that intermediate scrutiny would be appropriate.<sup>138</sup>

Another established First Amendment review policy could be adapted to apply to Second Amendment review. Under First Amendment jurisprudence, laws and regulations that are premised on the content of speech require a higher standard of review (strict scrutiny) than regulations that are content-neutral.<sup>139</sup> This differentiating standard can be applied to firearm regulations that go to the core of Second Amendment rights versus regulations that do not. The core of Second Amendment rights is still a debatable issue, but minimally the core should consist of the right to self-defense in one's home identified by the Supreme Court in *Heller* and *McDonald*. Thus, minimally, regulations that restrict core rights of self-defense in the home would require strict scrutiny review, but regulations that do not may get intermediate scrutiny.

Federal appellate courts have disagreed on the proper standard of review for Second Amendment cases. Reasoning in the cases has centered on key issues from *Heller* and *McDonald*. In *Heller*, the Supreme Court said that the individual right to keep and bear arms is recognized and guaranteed in the Second Amendment. The Supreme Court also acknowledged, in dicta, that, like other rights, the Second Amendment right is not absolute. The Supreme Court gave two key examples of this distinction in the case. The first example explained that at its core the Second Amendment guarantees an individual right to possess a firearm for self defense in the home.<sup>140</sup> It is vital to understand this example for what it really is. This is an example of illustration not limitation. The Supreme Court's base holding in *Heller* is that the Second Amendment recognizes and guarantees the individual right to keep and bear arms for legal purposes—one of which is self-defense in the home. "Legal purposes" is not limited to just self- and home-defense though; that was just the legal purpose within the facts of the case before the Supreme Court. Many courts have mistakenly taken this example as a

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135. WISC. STAT. ANN. § 943.13(1m)(c)(5) (West 2011).

136. Malcom, *supra* note 101.

137. *Id.* at 455.

138. *Id.*; see also *Nordyke*, 644 F.3d at 776.

139. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 933 (3d ed. 2006).

140. *Heller*, 554 U.S. at 570.

limit on the holding and based their review of later regulations on this interpretation.<sup>141</sup>

The second key example given by the Supreme Court pertained to forms of firearm regulations that may not violate the Second Amendment. Some of those potentially valid firearm regulations are restrictions on felons' Second Amendment rights and regulations keeping firearms out of sensitive areas (like government buildings and schools).<sup>142</sup> Some courts have said that, in identifying unproblematic regulations of these sorts, the Court was setting up categorical exceptions to the Second Amendment.<sup>143</sup> Other courts find it as an indication that intermediate scrutiny is the proper standard of review.<sup>144</sup> Although both interpretations have some merit, the Supreme Court merely acknowledged that, like other rights, Second Amendment rights are not absolute. Some regulations, with the valid setting and scope, will, therefore, be valid.

#### A. *United States v. Skoien*

This case originated in Madison, Wisconsin, when Steven Skoien was charged with owning and possessing a handgun in his home in violation of 18 U.S.C.A. § 922(g)(9).<sup>145</sup> Skoien was indicted for possessing a firearm

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141. See generally *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2009); *United States v. Anderson*, 599 F.3d 348 (5th Cir. 2009); *United States v. Shultz*, 2009 U.S. Dist. LEXIS 234 (N.D. Ind. 2009); *Nordyke v. King*, 644 F.3d 776 (2011).

142. *Heller*, 554 U.S. at 625.

143. See, e.g., *Skoien*, 614 F.3d at 640. The *en banc* 7th Circuit vacated the panel decision and recognized a categorical exception to Second Amendment rights for convicted criminals. *Id.* at 45. The 7th Circuit linked its decision to Supreme Court's dicta in *Heller* referring to potentially valid firearm regulations pertaining to convicted criminals. *Id.* at 639–40; *Heller*, 554 U.S. at 625–26. This exception, although implemented in many state and federal laws, is not as clear cut as the 7th Circuit made it seem. As discussed earlier, the exceptions laid out by the Supreme Court were not clear categories, but more likely examples of potentially valid legislation subjects. A valid subject in and of itself does not make any or all regulations within that subject automatically valid as the 7th Circuit made it in this case. See also *United States v. Anderson*, 599 F.3d 348, 352 (5th Cir. 2009); *United States v. Shultz*, 2009 U.S. Dist. LEXIS 234 at \*3 (N.D. Ind. 2009).

144. *Nordyke*, 644 F.3d 776.

145. *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (*en banc*), *cert. denied*, 131 S. Ct. 1674 (2011); see also 18 U.S.C. § 922(g)(9) (2006), which provides, in relevant part:

It shall be unlawful for any person—(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

after being previously convicted for misdemeanor domestic violence. Skoien moved to dismiss the charges on Second Amendment grounds, but the U.S. District Court for the Western District of Wisconsin denied the motion.<sup>146</sup> Skoien pled guilty to the charge and then appealed the denial of his motion.<sup>147</sup>

Although this case analyzed Second Amendment rights under federal law, the same standards would also be used to analyze state laws after *McDonald* incorporated the Second Amendment. The *Skoien* appeal was heard by the Seventh Circuit,<sup>148</sup> and then was reheard by the Seventh Circuit *en banc*. The *en banc* opinion vacated the earlier decision,<sup>149</sup> and then affirmed the trial court's ruling on different grounds.<sup>150</sup>

Although no longer valid precedent, the panel opinion provides a helpful analytical template for analyzing firearm regulation cases and is worth reviewing. The panel decision established intermediate scrutiny as the proper standard of review for Section 922(g)(9) cases. The panel reasoned that rational basis review was plainly rejected in *Heller*, and that strict scrutiny was inappropriate because strict scrutiny "is obviously incompatible with *Heller's* dicta about 'presumptively lawful' firearms laws."<sup>151</sup> Although this latter point is debatable, the panel maintained that "[l]aws that restrict the right to bear arms are subject to meaningful review, but unless they severely burden the core Second Amendment right of armed defense, strict scrutiny is unwarranted."<sup>152</sup>

Further, the panel decision is informative in two areas. First, the opinion leaves open strict scrutiny review for certain firearm regulations. The panel recognized that, minimally, the Supreme Court established that firearm regulations limiting self-defense in the home are subject to strict scrutiny.<sup>153</sup> Since strict scrutiny was utilized to review one application of firearm regulation to Second Amendment rights, other aspects of Second Amendment rights could also be so fundamental as to require strict scrutiny review of regulations restricting them. The Supreme Court identified the right to possess firearms for legal purposes to be both fundamental and antecedent to the adoption of the Second Amendment.<sup>154</sup> With such a

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146. *United States v. Skoien*, 587 F.3d 803, 805 (7th Cir. 2009) *reh'g en banc granted, opinion vacated*, 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010) and *on reh'g en banc*, 614 F.3d 638 (7th Cir. 2010).

147. *Id.*

148. *Id.* at 803.

149. *United States v. Skoien*, 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010) (granting rehearing *en banc*, vacating opinion).

150. *Skoien*, 614 F. 3d at 638.

151. *Id.* at 811 (emphasis in original).

152. *Id.* at 812.

153. The review used in *Heller* was strict scrutiny. *See Heller*, 554 U.S. at 570.

154. *Id.* at 591–92.

classification, the Second Amendment's core scope should expand past self-defense in the home.

Second, the panel decision explains the application of intermediate scrutiny to reviewing regulations regarding firearms. Intermediate scrutiny is different from rational basis review.<sup>155</sup> It is much more demanding of the regulations to which it is applied. Intermediate scrutiny carries no presumption of constitutionality.<sup>156</sup> Under intermediate scrutiny, "[t]he government 'bears the burden of justifying its restrictions, [and] it must affirmatively establish the reasonable fit' that the test requires."<sup>157</sup> A "reasonable fit" is required between a compelling governmental interest and the regulatory means chosen to serve that end.<sup>158</sup> More specifically, this standard or review requires that the government regulation's scope (i.e., its interference with Second Amendment rights) be properly proportioned to the compelling interest.<sup>159</sup> Although not as demanding as strict scrutiny, intermediate scrutiny does require a meaningful review of the regulation to ensure it does not excessively suppress the right it affects. In addition, the panel opinion acknowledged that intermediate scrutiny is valid only for regulations that do not severely burden core Second Amendment rights.<sup>160</sup>

The Seventh Circuit *en banc* vacated the panel's decision in favor of a more categorical exception, relating back to the Supreme Court's dicta in *Heller* and *McDonald* regarding potentially valid firearm regulations that restrict convicts' firearm rights.<sup>161</sup> The *en banc* Seventh Circuit panel reasoned that by mentioning such an exception in the *Heller* and *McDonald* opinions, the Supreme Court created clear categories of existing regulations that were *per se* valid. The *en banc* panel further reasoned that the Supreme Court meant to recognize the continuing validity of such categorical exceptions after the Court incorporated the Second Amendment.<sup>162</sup>

#### B. *United States v. Engstrum*

Not all federal courts have agreed that intermediate scrutiny is the proper standard of review for Second Amendment regulations. In *United States v. Engstrum*,<sup>163</sup> Rick Engstrum was indicted under 18 U.S.C. §

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155. *Skoien*, 587 F.3d, at 814.

156. *Skoien*, 587 F.3d, at 814.

157. *Id.* (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

158. *Id.*

159. *Id.*

160. *Id.* at 814.

161. *Skoien*, 614 F.3d 638.

162. *Id.*

163. 609 F. Supp.2d 1227 (D. Utah 2009).

922(g)(9) for possession of a firearm following a domestic violence conviction.<sup>164</sup> In response to Engstrum’s motion to dismiss the indictment against him, the United States District Court for the District of Utah maintained that strict scrutiny is the proper standard, but that 18 U.S.C. §922(g)(9) is a valid regulation under such review.<sup>165</sup>

The District Court found strict scrutiny to be the proper standard based on two rationales. First, “the *Heller* Court described the right to keep and bear arms as a fundamental right that the Second Amendment was intended to protect.”<sup>166</sup> Second, “the *Heller* Court categorized Second Amendment rights with other fundamental rights which are analyzed under strict scrutiny.”<sup>167</sup> Further, the District Court explained that strict scrutiny required that firearm regulations be narrowly tailored to serve a compelling government interest.<sup>168</sup> This requires the government to show that the regulation goal serves a legitimate government interest, and to show that the regulation is the narrowest means available to achieve that end. According to the Utah District Court, Section 922(g)(9) was focused on a compelling government interest—to prevent domestic violence and injury to potential victims—and not allowing individuals convicted of domestic violence to possess firearms was part of the narrowest approach to achieving that interest.<sup>169</sup>

### C. *Nordyke v. King* (“*Nordyke V*”)

The Ninth Circuit has introduced yet another standard of review for Second Amendment regulation.<sup>170</sup> In *Nordyke V*, a Ninth Circuit panel declared that a “substantial burden” review was proper in the case before it. The case was originally brought prior to the U.S. Supreme Court’s decision in either *Heller* or *McDonald*. Russell Allen Nordyke, a gun show promoter, originally brought suit in the U.S. District Court for the Northern District of California in 1999 challenging a county ordinance prohibiting the possession of firearms on county property in California.<sup>171</sup> Initially, Nordyke claimed that the ordinance violated his First Amendment rights

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164. *Id.* at 1228.

165. *Id.* at 1229.

166. *Engstrum*, 609 F. Supp. 2d 1227, 1231.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Nordyke v. King*, 644 F. 3d 776, 780 (9th Cir. 2011), *reh’g granted en banc* 664 F. 3d 774 (9th Cir. 2011). The *en banc* panel ruled that the panel decision shall not represent any precedent and should not be cited by any court in the Ninth Circuit. Although the holding may ultimately be overturned, the panel decision does present another viewpoint and possible interpretation and review. As such, it is worth discussing.

171. *Nordyke*, 644 F. 3d at 780.



and was preempted by state law. Nordyke sought a preliminary injunction to prevent enforcement of the ordinance, but the District Court denied it. Then he filed an interlocutory appeal to the Ninth Circuit. The Ninth Circuit certified to the California Supreme Court the question whether the ordinance was preempted by state law, and the California Supreme Court replied that state law did not preempt the ordinance.<sup>172</sup> The Court of Appeals then rejected the argument that the ordinance burdened the expressive nature of gun possession and added that a Second Amendment challenge would be precluded by Ninth Circuit precedent.<sup>173</sup> The case was then remanded to allow Nordyke to amend his pleading. Nordyke amended his pleading, but his Second Amendment claim was not allowed by the District Court, and the District Court granted summary judgment on his other claims.<sup>174</sup>

Nordyke then appealed the summary judgment and denial of his Second Amendment claim. Before the Ninth Circuit ruled on the appeal, the Supreme Court decided *Heller*. After further briefing to consider the ramification of *Heller*, the Ninth Circuit panel held: “(1) the individual right to keep and to bear arms recognized in *Heller* is incorporated against state and local governments through the Due Process Clause of the Fourteenth Amendment; but (2) the Ordinance constituted a permissible regulation of firearms under the Second Amendment.”<sup>175</sup> In that decision, the panel did not adopt a standard of review for firearm regulations. That case was then reheard *en banc*, but before the *en banc* court could render a decision the Supreme Court decided *McDonald*. The case was then remanded to a Ninth Circuit panel to decide the case in light of the *McDonald* decision.<sup>176</sup> The Ninth Circuit panel then adopted the substantial burden standard of review for firearm regulations, and concluded that, under the facts of this case, a higher standard of review was not necessary for the Second Amendment claim.<sup>177</sup> The Ninth Circuit then decided to vacate the panel decision and rehear the case again *en banc*.

Despite being vacated, the Ninth Circuit panel decision still provides good insight into the arguments and rationale for a different standard of review. The substantial burden standard is seemingly more deferential than intermediate scrutiny. A substantial burden review requires that only firearm regulations that “substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment.”<sup>178</sup> As a preliminary consideration, the court should determine if the regulation

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172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 782.

176. *Nordyke*, 644 F. 3d at 776.

177. *Id.*

178. *Id.* at 786.

itself creates a substantial burden on the right it regulates. This includes considerations of the scope and effect of the regulation. The court should ask whether the regulation allows sufficient alternative means to exercise the right.<sup>179</sup> If the regulation does not excessively inhibit the ability to exercise the right, then it does not invite heightened scrutiny. For example, in this case, the Ninth Circuit panel decided that a state regulation banning gun possession on county property did not create a substantial burden on gun show operators trying to sell firearms at the county fair. The panel reasoned that since the gun show operators could sell their firearms through other means and at other locations, the restriction did not excessively interfere with their Second Amendment rights.<sup>180</sup> The Ninth Circuit *en banc* panel has not delivered its decision in this case as of publication of this note.

## VII. LIKELY REVIEW OF STATE LAWS AND COLLEGE AND UNIVERSITY RESTRICTIONS

There are varying opinions as to the proper standard of review of alleged Second Amendment violations, but most courts agree that different standards are required for different regulations. State laws have changed since the rulings in *Heller* and *McDonald*. More states are allowing more widespread firearm possession, and more challenges to gun regulation are being filed.<sup>181</sup> These factors may influence future judicial decisions on college and university firearm regulations. One point is clear, the Supreme Court ruled out rational basis review in *Heller*.<sup>182</sup> In the same case, the Supreme Court also mentioned in dicta that there would be certain, reasonable, valid regulations.

Although the Supreme Court recognized that there would be some valid regulations, the case before it did not present an opportunity for the Court to discuss what regulations would be valid and why. Today, throughout the states, there are many firearm regulations that affect colleges and universities directly and indirectly.<sup>183</sup> The spectrum runs from absolute firearm bans<sup>184</sup> on college and university campuses, to regulations that

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179. *Id.*

180. *Id.*

181. WISC. STAT. ANN. § 943.13(2)(bm)(2)(am) (West 2011) (Wisconsin allows individuals to possess firearms in common grounds outside of buildings and allows individuals to keep firearms in their vehicles); FL. STAT. ANN. § 790.06 (West 2011) (under the concealed weapon permit statute, Florida allows individuals to possess firearms except in fifteen stated locations and individuals can keep their firearms in their vehicles). *See also* Malcolm, *supra* note 1, at 457.

182. *See Heller*, 554 U.S. at 634–35.

183. States have taken different approaches to firearm regulations. *See supra* note 1.

184. *See supra* Part IV.

allow firearms only in certain areas,<sup>185</sup> to regulations that allow firearms to be carried on campuses.<sup>186</sup> Obviously, absolute firearm bans on campuses interfere with individual Second Amendment rights the most. Although, under absolute bans, individuals can carry firearms off campus grounds, many students and faculty spend a majority of their time in any given day on campus. Thus, their Second Amendment rights are severely restricted by absolute bans. Absolute firearm bans impose the greatest restrictions on the greatest number of people. They may reach everyone affiliated with the college or university, as well as other members of the surrounding community. Other regulations do not have so broad an effect. Regulations of that sort do interfere with individual firearm rights, but limited interference, depending on the reason for the interference, may survive proper scrutiny.

#### A. Strict Scrutiny

The Supreme Court, in *Heller* and *McDonald*, established that the right to possess firearms for legal purposes under the Second Amendment was a fundamental individual right of the people.<sup>187</sup> Further, the Court said the Second Amendment merely codified a recognized pre-existing right.<sup>188</sup> When a right is considered fundamental, as this right is, courts generally review regulations and restrictions to the right under heightened scrutiny.<sup>189</sup> Strict scrutiny is the highest level of scrutiny, requiring the government to show that the regulation is related to a compelling government interest and is the least restrictive means to accomplish that interest.<sup>190</sup>

The government faces an uphill battle if firearm regulations are reviewed under strict scrutiny, but some regulations should be reviewed under it. Many colleges and universities (whether through college or university regulations or state regulations) have absolute bans of firearms on campus.<sup>191</sup> No firearms are allowed on campus at any time.<sup>192</sup> These

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185. *Id.*

186. See WISC. STAT. ANN. § 943.13(2) (West 2011); FL. STAT. ANN. § 790.06 (West 2011); N.C. GEN. STAT. ANN. § 14-269.2 (West 2011). See *supra* Part IV (the assumption that the right to carry firearms on college and university campuses is or can be reasonably limited to concealed weapon permit holders).

187. *McDonald*, 130 S. Ct. 3020, 3041 (2010).

188. See *Skoien*, 587 F.3d at 813.

189. See, e.g., *Engstrum*, 609 F. Supp. 2d at 1228.

190. *Id.* at 1231.

191. See, e.g., FL. STAT. ANN. § 790.115 (West 2011); N.C. GEN. STAT. ANN. § 14-269.2 (West 2011).

192. A typical exception to this absolute ban would be for police forces or specific individuals with special permission to carry firearms on campus. Generally, such exceptions are only for security forces. Other exceptions might exist for drill demonstrations by student organization. Firearms used for drill

types of regulations should face strict scrutiny for several reasons. First, an absolute ban of firearms on college and university campuses severely interferes with fundamental firearm rights for students, faculty, and staff. The interference is still broader considering that a vast majority of the individuals on college and university campuses have reached the age of majority, many students live on campus, and campus parameters are not clear to the general public. Such far reaching restrictions require the most demanding sort of judicial scrutiny.<sup>193</sup>

The absolute ban of firearm possession in college and university dormitories warrants further analysis. Although different from other home dwellings, dormitories are the day-to-day residences for many students in many colleges and universities. Some students are required to live in the dorms for at least their first year of college.<sup>194</sup> In *Heller*, the Supreme Court established that the Second Amendment includes a fundamental right to possess firearms for legal purposes. Chief among legal purposes to possess firearms is self-defense in the home.<sup>195</sup> The D.C. ban on handguns was a per se invalid regulation of firearms and required high scrutiny because it severely interfered with this fundamental legal purpose.<sup>196</sup> The same argument can be made for gun bans in dormitories. Students who live on campus, especially those required to live on campus, maintain the right to possess firearms for self-defense in their home. An absolute weapon ban prohibits students from exercising that right, and should be reviewed with the highest of scrutiny.

#### B. Intermediate Scrutiny

Absolute firearm bans should face strict scrutiny, but not all regulations reach the level of complete prohibition. Lesser regulations may not require such a critical review. Intermediate scrutiny, similar to strict scrutiny, does not presume that the regulation is valid. The government still carries the burden to show that there is an important interest and the regulation reasonably fits as a means to accomplish that interest.<sup>197</sup> A reasonably fitting regulation does not have to be the most narrowly tailored means to accomplish the government's end, but the government must show that the regulation does not excessively restrict the right it implicates.<sup>198</sup> There must be proportionality between the means used to achieve the compelling

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demonstrations are usually permanently incapacitated, meaning they have been rendered incapable of discharging ammunition.

193. See *Skoien*, 587 F.3d at 813.

194. *Supra* note 68.

195. *Id.*

196. See *Heller*, 554 U.S. 570.

197. See *Craig v. Boren*, 429 U.S. 180, 197 (1976); *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Skoien*, 587 F.3d at 813.

198. *Skoien*, 587 F. 3d at 813.

interest and the restriction on the protected right. Here, validity of the regulation depends on the important interest, on the level of interference with the right, and on how reasonably the regulation satisfies the interest.

Analyzing the application of intermediate scrutiny with respect to current state statutes may further clarify. The Florida and Wisconsin state laws discussed earlier do not rise to the level of complete firearm bans.<sup>199</sup> Although Florida's statute is more strict, it allows for another means of personal self-defense on campus and provides an exception for firearms stored in vehicles.<sup>200</sup> This allowance might be enough to move review of the statute from strict to intermediate scrutiny. Wisconsin's statute looks less like a complete ban because it mandates that individuals can keep firearms in their vehicles and can carry firearms on the common grounds (outside of buildings) of college and university campuses.<sup>201</sup>

Florida's statute effectively removes firearms from colleges and university campuses, with minimal exception for firearms kept in vehicles (further restricted to individuals not affiliated with the college or university if the college or university exercises its right under the statute to ban its students, teachers, and faculty from storing firearms in their vehicles on campus), but attempts to mitigate the effects of the regulation by allowing students to carry non-lethal weapons.<sup>202</sup> The statute is in place to ensure safety for students and create a comfortable and peaceful educational setting. These are important interests. Safety is always a concern. Creating a sound educational setting where students can share and learn openly is also a compelling interest for colleges and universities (and thus the state).<sup>203</sup> In light of these interests, the fundamental rights of the Second Amendment are restricted.

Students, especially those living off-campus, may not be severely inhibited by a regulation similar to Florida's.<sup>204</sup> It is not unusual for firearms to be restricted in sensitive areas (as held by the Supreme

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199. See *supra* Part IV. North Carolina's statutes were also discussed, but they constitute an absolute ban of firearms on campus and would be analyzed under strict scrutiny.

200. See *supra* notes 82, 84 and accompanying text.

201. See *supra* notes 95–96, 99 and accompanying text.

202. See *supra* note 74.

203. See Joan H. Miller, Comment, *The Second Amendment Goes to College*, 35 SEATTLE U. L. REV. 235, 249-53(2011).

204. It may be a very separate issue for students who cannot possess or keep their firearms anywhere other than their residency. Banning possession for these students might directly interfere with the Supreme Court's view of the fundamental legal purpose of possessing a firearm—self-defense in the home—and would be likely struck down in court. To avoid these issues, the following paragraph analyzes Florida's ban only as applied to individuals who come and go on or through campuses.

Court).<sup>205</sup> The Florida regulation would seemingly achieve the ends of campus safety<sup>206</sup> and elimination of disruptions to sound educational settings. The regulation, due to its explicit exceptions, may be a reasonable fit. Although the regulation appears to be a firearm ban, it is still only a restriction on firearms rights. Certain exceptions exist. Homes which are within the school zone but not affiliated with the college or university are exempt from the firearm restrictions in the regulation.<sup>207</sup> Additionally, any person visiting such a home is also exempt.<sup>208</sup> Also, the law allows for individuals to keep firearms in their vehicles, while either passing through or parking in school areas.<sup>209</sup> This alleviates much of the concern for restrictions on the general public. The final exception allows students and staff to carry non-lethal weapons, as alternatives to firearms, for self-defense.<sup>210</sup> It is unclear whether such an exception would mitigate the restrictive effects of firearm regulations. Although the regulation does provide for another form of self-defense, a court may find it an unsuitable alternative to fundamental Second Amendment rights. A court may also find it unconstitutional for the state, through regulations, to decide for the people how to exercise their right to keep firearms for self-defense.

Wisconsin has legislated in a different direction. The Wisconsin regulations start with the presumption that concealed weapon permit holders can legally carry their firearms on campus.<sup>211</sup> The statute outlines where and how individual institutions, including colleges and universities, can limit the right to carry firearms into buildings. But the statutes maintain the individual's right to keep firearms locked in his or her vehicle and to carry firearms throughout the institution's grounds outside of buildings.<sup>212</sup> The statutes are concerned with the same compelling interests as are the Florida statutes, but address those concerns in a less restrictive way. It might, therefore, survive intermediate scrutiny. The Wisconsin statute recognizes and respects fundamental Second Amendment rights. Additionally, the regulation does not unduly interfere with the rights of the general public, who may innocently wander onto the outskirts of college and university campuses. Even in buildings, the law creates a presumption of legal firearm possession until the college or university puts a conspicuous sign at the entrance informing individuals that firearms are prohibited inside the building.<sup>213</sup>

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205. *Heller*, 554 U.S. 570, 625–29 (2008).

206. *See* Malcolm, *supra* note 1, at 458.

207. *See supra* note 79.

208. *Id.*

209. *Id.*

210. *Id.*

211. *See* WISC. STAT. ANN. § 943.13(2)(bm)(2)(am) (West 2011).

212. *Id.*

213. *Id.*

Such minor interference with firearm possession, only triggered when it would directly undermine the important interests of safety and comfortable learning in the educational setting, may survive intermediate scrutiny. Of all the regulations discussed, the Wisconsin statute seems to achieve the goals of the important state interests with the least restriction on Second Amendment rights. It may fall within what the Supreme Court acknowledges as a reasonable regulation on firearm possession in sensitive areas.

### VIII. CONCLUSION

There is no judicial ruling directly addressing what constitutes a reasonable regulation of firearm possession on college and university campuses. But there are indications of how such a decision would be made. State statutes show a high likelihood that colleges and universities would be included under the definition of “schools.” A majority of states use such a definition.<sup>214</sup> That does not mean that college and university regulations would not be analyzed differently from K-12 schools, but it is likely that colleges and universities will be considered more sensitive than other public venues. Although college and university campuses may be considered more sensitive than those other venues, firearm regulations pertaining to colleges and universities should still, at the very least, be reasonable. The Second Amendment codifies *fundamental* individual rights. In turn, those rights require the same sort of respect as other fundamental rights. Thus, outright firearm bans on college and university campuses, due to their distant reach, absolute nature, and scope of effect, warrant the highest level of scrutiny. Other regulations, less restrictive in reach and absoluteness, may warrant only intermediate scrutiny with a lower burden on the government to establish their constitutionality.

Dorm rooms, especially those which are inhabited through college and university mandate, may be the largest issue in the future. When the Supreme Court held that firearm possession for legal purposes is a fundamental right of the people, it specifically spoke to self-defense in the home.<sup>215</sup> Dorms are, at times, the only home that a student has in the state where he or she attends college. They may have no other option for residency, and they may have no other option for a location in which to keep their firearms for self-defense. They face many of the same potential threats as apartment-dwellers generally. Although still owned and operated by the college or university, the dorm is a hybrid—both home and school. According to case law and current Second Amendment jurisprudence, when firearm regulations directly restrict the fundamental right of self-defense in the home, the firearm regulation should fail.

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214. See, e.g., N.C. GEN. STAT. ANN. § 14-269.2 (West 2011); FL. STAT. ANN. § 790.115 (West 2011).

215. See *Heller*, 554 U.S. 570.

Many states are changing their stance on firearm possession on campuses, and the courts may follow suit. Colleges and universities that regulate possession of concealed weapons on campus face challenges from state law preemption,<sup>216</sup> state constitutions,<sup>217</sup> and the incorporated status of the Second Amendment. Regulations should specifically target the important government interests, but still allow citizens generally to exercise their individual right to possess firearms for legal purposes. Overbearing firearm regulations and restrictions will likely fail, even under intermediate scrutiny. Colleges and universities have to be aware of such scrutiny, and recognize the scope and effect of firearm regulations on campuses.

#### APPENDIX A: MORE STATE STATUTORY SCHEMES

##### More State Statutory Schemes that Completely Ban Firearms on Campuses

###### • Arkansas:

ARK. CODE ANN. § 5-73-119 (West 2012):

(c)(1) No person in this state shall possess a handgun upon the property of any private institution of higher education or a publicly supported institution of higher education in this state on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to employ the handgun as a weapon against a person.

ARK. CODE ANN. § 5-73-306 (West):

No license to carry a concealed handgun issued pursuant to this subchapter authorizes any person to carry a concealed handgun into:

(14) Any school, college, community college, or university campus building or event, unless for the purpose of participating in an authorized firearms-related activity

###### • Massachusetts:

MASS. GEN. LAWS ANN. ch. 269, § 10 (West)

Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device; punishment

(j) Whoever, not being a law enforcement officer, and notwithstanding any license obtained by him under the

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216. See *Oregon Firearms Educ. Found. v. Bd. of Higher Educ.*, 264 P.3d 160 (Or. Ct. App. 2011).

217. See *Students for Concealed Carry on Campus v. Regents of the Univ. of Colo.*, WL 1492308 (Colo. App. 2010).



provisions of chapter one hundred and forty, carries on his person a firearm as hereinafter defined, loaded or unloaded or other dangerous weapon in any building or on the grounds of any elementary or secondary school, college or university without the written authorization of the board or officer in charge of such elementary or secondary school, college or university shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. For the purpose of this paragraph, "firearm" shall mean any pistol, revolver, rifle or smoothbore arm from which a shot, bullet or pellet can be discharged by whatever means.

• **New Jersey:**

N.J. STAT. ANN. § 2C:39-5 (West)

Unlawful possession of weapons

e. Firearms or other weapons in educational institutions.

(1) Any person who knowingly has in his possession any firearm in or upon any part of the buildings or grounds of any school, college, university or other educational institution, without the written authorization of the governing officer of the institution, is guilty of a crime of the third degree, irrespective of whether he possesses a valid permit to carry the firearm or a valid firearms purchaser identification card.

• **New Mexico:**

N.M. STAT. ANN. § 30-7-2.4 (West 2012):

A. Unlawful carrying of a firearm on university premises consists of carrying a firearm on university premises except by:

- (1) a peace officer;
- (2) university security personnel;
- (3) a student, instructor or other university-authorized personnel who are engaged in army, navy, marine corps or air force reserve officer training corps programs or a state-authorized hunter safety training program;
- (4) a person conducting or participating in a university-approved program, class or other activity involving the carrying of a firearm; or
- (5) a person older than nineteen years of age on university premises in a private automobile or other private means of conveyance, for lawful protection of the person's or another's person or property.

B. A university shall conspicuously post notices on university premises that state that it is unlawful to carry a firearm on university premises.

C. As used in this section:

(1) “university” means a baccalaureate degree-granting post-secondary educational institution, a community college, a branch community college, a technical-vocational institute and an area vocational school; and

(2) “university premises” means:

(a) the buildings and grounds of a university, including playing fields and parking areas of a university, in or on which university or university-related activities are conducted; or

(b) any other public buildings or grounds, including playing fields and parking areas that are not university property, in or on which university-related and sanctioned activities are performed.

D. Whoever commits unlawful carrying of a firearm on university premises is guilty of a petty misdemeanor.

N.M. STAT. ANN. § 29-19-8 (West 2012):

B. Nothing in the Concealed Handgun Carry Act shall be construed as allowing a licensee in possession of a valid concealed handgun license to carry a concealed handgun on school premises, as provided in Section 30-7-2.1 NMSA 1978.

• **Oklahoma:**

OKLA. STAT. ANN. tit. 21, § 1277 (West)

Unlawful carry in certain places

D. No person in possession of a valid concealed handgun license issued pursuant to the provisions of the Oklahoma Self-Defense Act shall be authorized to carry the handgun into or upon any college, university, or technology center school property, except as provided in this subsection. For purposes of this subsection, the following property shall not be construed as prohibited for persons having a valid concealed handgun license:

1. Any property set aside for the use or parking of any vehicle, whether attended or unattended, provided the handgun is carried or stored as required by law and the handgun is not removed from the vehicle without the prior consent of the college or university president or technology center school administrator while the vehicle is on any college, university, or technology center school property;

2. Any property authorized for possession or use of handguns by college, university, or technology center school policy; and

3. Any property authorized by the written consent of the college or university president or technology center school administrator, provided the written consent is carried with the handgun and the valid concealed handgun license while on college, university, or technology center school property

### **State Statutory Schemes that are Similar to the Florida Statute**

- **Georgia:**

GA. CODE ANN. § 16-11-127.1 (West)

Weapons on school safety zones, school buildings or grounds or at school functions

(a) As used in this Code section, the term:

(1) "School safety zone" means in or on any real property owned by or leased to any public or private elementary school, secondary school, or school board and used for elementary or secondary education and in or on the campus of any public or private technical school, vocational school, college, university, or institution of postsecondary education.

(b)(1) Except as otherwise provided in subsection (c) of this Code section, it shall be unlawful for any person to carry to or to possess or have under such person's control while within a school safety zone or at a school building, school function, or school property or on a bus or other transportation furnished by the school any weapon or explosive compound . . . :

(c) The provisions of this Code section shall not apply to:

(7) A person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Code Section 43-38-10, when such person carries or picks up a student at a school building, school function, or school property or on a bus or other transportation furnished by the school or a person who is licensed in accordance with Code Section 16-11-129 or issued a permit pursuant to Code Section 43-38-10 when he or she has any weapon legally kept within a vehicle when such vehicle is parked at such school property or is in transit through a designated school zone;

(8) A weapon possessed by a license holder which is under the possessor's control in a motor vehicle or which is in a locked compartment of a motor vehicle or one which is in a locked container in or a locked firearms rack which is on a motor vehicle which is being used by an adult over 21 years of age to bring to or pick up a student at a school building, school function, or school property or on a bus or other transportation furnished by the school, or when such vehicle is used to transport someone to an activity being conducted on school property which has been authorized by a duly authorized official of the school; provided, however, that this exception shall not apply to a student attending such school

• **Tennessee:**

TENN. CODE ANN. § 39-17-1309 (West 2012)

Carrying or possession of weapons; school buildings and grounds

(b)(1) It is an offense for any person to possess or carry, whether openly or concealed, with the intent to go armed, any firearm, explosive, explosive weapon, bowie knife, hawk bill knife, ice pick, dagger, slingshot, leaded cane, switchblade knife, blackjack, knuckles or any other weapon of like kind, not used solely for instructional or school-sanctioned ceremonial purposes, in any public or private school building or bus, on any public or private school campus, grounds, recreation area, athletic field or any other property owned, used or operated by any board of education, school, college or university board of trustees, regents or directors for the administration of any public or private educational institution.

(c)(1) It is an offense for any person to possess or carry, whether openly or concealed, any firearm, not used solely for instructional or school-sanctioned ceremonial purposes, in any public or private school building or bus, on any public or private school campus, grounds, recreation area, athletic field or any other property owned, used or operated by any board of education, school, college or university board of trustees, regents or directors for the administration of any public or private educational institution. It is not an offense under this subsection (c) for a nonstudent adult to possess a firearm, if the firearm is contained within a private vehicle operated by the adult and is not handled by the adult, or by any other person acting with the expressed or implied consent of the adult, while the vehicle is on school property.

**State Statutory Schemes that Allow Weapon Possession on Campuses**

• **Mississippi:**

MISS. CODE ANN. § 97-37-7(2) (West 2012)

Permits for certain employees; fees; fingerprint checks; renewal; reciprocal agreements for out-of-state law enforcement officers

A person licensed under Section 45-9-101 to carry a concealed pistol, who has voluntarily completed an instructional course in the safe handling and use of firearms offered by an instructor certified by a nationally recognized organization that customarily

offers firearms training, or by any other organization approved by the Department of Public Safety, shall also be authorized to carry weapons in courthouses except in courtrooms during a judicial proceeding, and any location listed in subsection (13) of Section 45-9-101, except any place of nuisance as defined in Section 95-3-1, any police, sheriff or highway patrol station or any detention facility, prison or jail. The department shall promulgate rules and regulations allowing concealed pistol permit holders to obtain an endorsement on their permit indicating that they have completed the aforementioned course and have the authority to carry in these locations. This section shall in no way interfere with the right of a trial judge to restrict the carrying of firearms in the courtroom.

MISS. CODE. ANN. § 45-9-101(13) (West 2012):

. . . any junior college, community college, college or university facility unless for the purpose of participating in any authorized firearms-related activity . . .

• **Louisiana:**

14 LA. REV. STAT. ANN. § 95.2 (West 2012)

Carrying a firearm or dangerous weapon by a student or nonstudent on school property, at school-sponsored functions or firearm-free zone

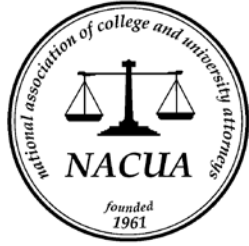
A. Carrying a firearm, or dangerous weapon as defined in R.S. 14:2, by a student or nonstudent on school property, at a school sponsored function, or in a firearm-free zone is unlawful and shall be defined as possession of any firearm or dangerous weapon, on one's person, at any time while on a school campus, on school transportation, or at any school sponsored function in a specific designated area including but not limited to athletic competitions, dances, parties, or any extracurricular activities, or within one thousand feet of any school campus.

C. The provisions of this Section shall not apply to:

- (1) A federal, state, or local law enforcement officer in the performance of his official duties.
- (2) A school official or employee acting during the normal course of his employment or a student acting under the direction of such school official or employee.
- (3) Any person having the written permission of the principal.
- (4) The possession of a firearm occurring within one thousand feet of school property and entirely on private property, or entirely within a private residence, or in accordance with a concealed handgun permit issued pursuant to R.S. 40:1379.1 or R.S. 40:1379.3.

- (5) Any constitutionally protected activity which cannot be regulated by the state, such as a firearm contained entirely within a motor vehicle.
- (6) Any student carrying a firearm to or from a class, in which he is duly enrolled, that requires the use of the firearm in the class.
- (7) A student enrolled or participating in an activity requiring the use of a firearm including but not limited to any ROTC function under the authorization of a university.
- (8) A student who possesses a firearm in his dormitory room or while going to or from his vehicle or any other person with permission of the administration.





# NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS

The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 3,000 attorneys who represent more than 1,400 campuses and 660 institutions.

The Association's purpose is to improve the quality of legal assistance to colleges and universities by educating attorneys and administrators on legal issues in higher education. NACUA accomplishes this goal through its publications, conferences, and workshops. NACUA also operates a clearinghouse for references through which attorneys share knowledge and work products on current legal problems. With its headquarters in Washington, D.C., NACUA monitors governmental developments having significant legal implications for its member institutions, coordinates the exchange of information concerning all aspects of law affecting higher education, and cooperates with other higher education associations to provide general legal information and assistance.

Accredited institutions of higher education in the United States and Canada are the primary constituents of NACUA. Each member institution may be represented by several attorneys, any of whom may attend NACUA meetings, perform work on committees, and serve on the Board of Directors.

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# UNIVERSITY OF NOTRE DAME

## The Law School

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Notre Dame Law School, the oldest Roman Catholic law school in the United States, was founded in 1869 as the nation's third law school. The Notre Dame program educates men and women to become lawyers of extraordinary professional competence who possess a passion for justice, an ability to respond to human need, and a compassion for their clients and colleagues. Notre Dame Law School equips its students to practice law in every state and in several foreign nations. The school raises and explores the moral and religious questions presented by the law. The learning program is geared to skill and service. Thus, the school is committed to small classes, especially in the second and third years, and emphasizes student participation.

In order to further its goal of creating lawyers who are both competent and compassionate, Notre Dame Law School is relatively small. The Admissions Committee makes its decisions based on a concept of the "whole person." The Law School offers several joint degree programs, including M.B.A./J.D. and M.Div./J.D. Notre Dame Law School is the only law school in the United States that offers study abroad for credit on both a summer and year-round basis. Instruction is given in Notre Dame's own London Law Centre under both American and English professors. The Center for Civil and Human Rights, which is located on the home campus, adds an international dimension to the educational program that is offered there. Notre Dame Law School serves as the headquarters for the *Journal of College and University Law*.

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