
THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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 **NACUA**

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When Donald Trump, a reality television personality with anti-immigrant views, was elected President of the United States in November 2016, thousands of students, faculty and staff at many colleges and universities around the country asked their institutions to affirmatively declare themselves sanctuaries for undocumented students. Young people justifiably feel and felt threatened by President Trump’s campaign and post-election rhetoric, including derogatory statements about Mexicans, Haitians, and Africans, promises to ramp up immigration enforcement, and the plan to build a wall and require Mexico to pay for it. Leaders at a number of higher education institutions immediately voiced support for undocumented students and embraced the “sanctuary” label.

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Key Legal Considerations Relating to “Sanctuary Campus” Policies and Practices

Aleksandar Dukic
Stephanie Gold
Gregory Lisa

An estimated 200,000 to 225,000 United States college students are undocumented immigrants. Concerns about President Donald J. Trump’s campaign promises to make deportation of millions of illegal immigrants a top priority sparked widespread campus protests shortly after his election. Protestors demanded a variety of actions. Many called for their campus to become a “sanctuary” that would protect undocumented students from deportation as much as legally possible.

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Forty Years of Public Records Litigation Involving the University of Wisconsin: An Empirical Study

David Pritchard
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Truth-seeking is so fundamental a value in American culture that the law provides a wide variety of mechanisms to promote the quest for knowledge. Many of the freedoms explicitly guaranteed by the First Amendment were designed to protect individuals' rights to search for truths of various kinds. Additional rights associated with truth-seeking such as freedom of association, academic freedom, and the right to know have developed in the broad shadow of the First Amendment. Indeed, constitutional law in the United States has been called "the law of penumbras and emanations." Beyond the constitutional realm, Congress and state legislatures have recognized the importance of truth-seeking in education by establishing a diverse network of public colleges and universities as well as by enacting statutes that grant rights of access to information controlled by governmental bodies. Although access-to-information laws are important means by which the press and public can scrutinize the performance of government institutions, higher education's culture of autonomy does not easily accommodate demands for transparency and public accountability. One scholar noted:

Universities have a special need to preserve academic freedom and independence in academic decision-making. ... Thus, a conflict exists between the laudable goal of open government and the special needs of universities to operate relatively free from public pressure.

After the Dear Colleague Letter: Developing Enhanced Due Process Protections for Title IX Sexual Assault Cases at Public Institutions

Jim Newberry

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Since the formation of the American Republic, Americans have maintained a fundamental mistrust of government power. In the Title IX realm, the Obama Administration exacerbated those concerns. In its efforts to enforce Title IX and to reduce sexual misconduct on campuses, the Obama Administration issued a "Dear Colleague Letter" in April 2011 and a follow up Question and Answer document in April 2014, both of which set out OCR's view of the obligations of institutions receiving federal financial assistance under Title IX and its implementing regulations. This 2011 Dear Colleague Letter "explains the requirements of Title IX pertaining to sexual-harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence."

STUDENT NOTE

Faculty Title VII and Equal Pay Act Cases in the Twenty-First Century

Nora Devlin

The ever-evolving nature of case law means that even as scholars have been examining the issue of gender pay disparity in academia since at least 1977, there is always more to be written. Employees alleging gender-based pay discrimination may pursue two causes of action for filing claims under federal law: under the Equal Pay Act of 1963 (EPA) and under Title VII of the Civil Rights Act of 1964 (Title VII). This paper discusses these two causes of action, their treatment in the courts in cases with college faculty plaintiffs, and what issues these cases raise for faculty and universities. Finally, the paper examines how the case law might be used to shape policies that better protect both faculty and universities.

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UNIVERSITIES AS “SANCTUARIES”

PROFESSOR MARYAM AHRANJANI¹

“The arc of the moral universe is long, but it
bends toward justice.”

Rev. Dr. Martin Luther King, Jr.

Abstract

When Donald Trump, a businessman and reality television personality with anti-immigrant views, was elected President of the United States in November 2016, thousands of students, faculty and staff at many colleges and universities around the country implored their institutions to affirmatively declare themselves sanctuaries for undocumented students. Enjoying support both from the estimated 200,000 undocumented university students and other stakeholders, the movement gained quite a bit of momentum, but many contentious battles also have occurred. According to the author’s empirical analysis, only twenty of the more than 5,000 institutions of higher education in the United States have adopted the sanctuary campus designation.

This piece explores the legal and policy implications of the “sanctuary campus” designation and the balance between the goal of the designation and the effects. In concluding that the sanctuary movement should focus on promoting policies and programs, this article argues: 1) there is a lack of clarity about the term “sanctuary,” 2) to the extent that there is agreement about the term, universities already are de facto and de jure sanctuaries and efforts to affirmatively adopt the designation may undermine the presumption, and 3) there are some persuasive political and other reasons to focus on targeted assistance rather than a name that may not mean much.

¹ Assistant Professor, University of New Mexico (UNM) School of Law. I extend heartfelt gratitude to: fellow members of the UNM Undocu Task Force; my supportive deans, Alfred Mathewson and Sergio Pareja; Rayman Solomon and the editors and board of the Journal of College and University Law; Michael Olivas, Susan Brooks, Jenny Moore, Nathalie Martin, Mary Pareja, Jen Laws, Gabe Pacyniak, and Cliff Villa for their collegiality, mentorship and feedback; Ernesto Longa and research assistant Kristen Edwards; Lumen Mulligan and the University of Kansas School of Law faculty for their thoughtful comments and suggestions during a faculty exchange presentation in April, 2018; and my Iranian American parents and Peruvian American husband, all of whom made tremendous personal sacrifices in pursuit of higher education in the U.S.

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I. Introduction

When Donald Trump, a reality television personality with anti-immigrant views, was elected President of the United States in November 2016, thousands of students, faculty and staff at many colleges and universities around the country asked their institutions to affirmatively declare themselves sanctuaries for undocumented students.² Young people justifiably feel and felt threatened by President Trump's campaign and post-election rhetoric, including derogatory statements about Mexicans,³ Haitians, and Africans,⁴ promises to ramp up immigration enforcement, and the plan to build a wall and require Mexico to pay for it.⁵ Leaders at a number of higher education institutions immediately voiced support for undocumented students and embraced the "sanctuary" label.⁶

The movement gained quite a bit of support and momentum,⁷ but many contentious battles have also occurred.⁸ The threshold challenge is that there are different definitions of the term "sanctuary campus," and it is not clear that all campuses are on the same page in terms of how far they will go to defend the designation.⁹ There are approximately 5,300 institutions of higher education in the United States,¹⁰ and only a tiny fraction of those have adopted the term.¹¹ Since a relatively small number of campuses have adopted the term,¹² the question of how to best address undocumented students on university campuses remains a live and ongoing issue.

2 *The University as a Sanctuary*, University of Southern California Pullias Center for Higher Education (Jan. 2017), https://pullias.usc.edu/wp-content/uploads/2017/01/The_University_as_a_Sanctuary_Final.pdf.

3 Katie Reilly, *Here Are All the Times Donald Trump Insulted Mexico*, Time (Aug. 31, 2016), <http://time.com/4473972/donald-trump-mexico-meeting-insult/>.

4 Julie Hirschfeld Davis, *Trump Alarms Lawmakers With Disparaging Words for Haiti and Africa*, N.Y. Times (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html>.

5 Donald Trump: *Mexico Will Pay for Wall, '100%*, BBC.com (Sept. 1, 2016), <http://www.bbc.com/news/election-us-2016-37241284>.

6 Yara Simón, *28 Universities That Vow to Offer Sanctuary to Their Undocumented Students*, Remezcla (Nov. 22, 2016, 11:13 AM), <http://remezcla.com/lists/culture/sanctuary-campus-daca/>.

7 American Association of University Professors, *Sanctuary Campus Movement* (Aug. 11, 2017), <https://www.aaup.org/issues/sanctuary-campus-movement>.

8 Lana Shadwick, *Battle Over 'Sanctuary Campuses,' In-State Tuition to Dreamers Heats Up*, Breitbart (Jan. 22, 2017), <http://www.breitbart.com/texas/2017/01/22/battle-to-defund-sanctuary-campuses-and-deny-instate-tuition-to-dreamers-heats-up/>.

9 Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions than Answers*, Atlantic (Nov. 22, 2016), <https://www.theatlantic.com/education/archive/2016/11/the-push-for-sanctuary-campuses-raises-more-questions-than-answers/508274/>.

10 Jeffrey J. Selingo, *How Many Colleges and Universities do We Really Need?*, Wash. Post (Jul. 20, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/07/20/how-many-colleges-and-universities-do-we-really-need/?utm_term=.02e258f3f1f2.

11 César Cuauhtémoc García Hernández, *Sanctuary Campuses Map*, crImmigration.com, <http://crimmigration.com/2017/02/07/sanctuary-campuses-map/>.

12 See *infra* Section III.A. for a description of the author's database of sanctuary campuses.

Immediately prior to the current president's election, I became faculty advisor to the newly formed Immigration Law Student Association, and a few months later became a member of our university's Undocu Task Force.¹³ The Undocu Task Force's charge is to better coordinate resources for our undocumented and "DACAmended"¹⁴ students across units on campus, identify gaps in services and attempt to fill those gaps. New Mexico provides relatively strong supports for undocumented students both by law and by practice,¹⁵ but our largest state institutions have declined to go so far as to call ourselves "sanctuaries."¹⁶ Despite the high population of immigrants and Latinos, the same is true of our neighboring (border) states of Arizona and Texas.¹⁷ The goals of the sanctuary campus movement at my and other institutions are to protect undocumented, immigrant and international students so they can learn and promote solidarity.¹⁸

This piece explores some of the legal and policy implications of the "sanctuary campus" designation and aims to affirm the role of universities as safe places to pursue knowledge and skills for all students. It does not seek to provide exhaustive technical legal advice to counsel at and for universities. Rather it seeks to encourage university thought leaders, including counsel, to think more broadly about the institutions they serve and how to pursue the broad aims of their institutions rather than get tied up in the politics surrounding the "sanctuary" term.

In particular, this piece makes the following arguments: 1) there is a lack of clarity about the term "sanctuary," 2) to the extent that there is agreement about

13 University of New Mexico, *Undocumented UNM*, <http://undocumented.unm.edu/>.

14 A commonly used term for students who have authorization to remain and work in the U.S. pursuant to the Deferred Action for Childhood Arrivals Program.

15 Maryam Ahranjani, *What Does Immigration Status Have to Do with Law School Diversity*, CLEO Edge 50 (Winter/Spring 2018), [http://mydigitalpublication.com/publication/?i=459668&pre=1#{"issue_id":459668,"page":50}](http://mydigitalpublication.com/publication/?i=459668&pre=1#{) (describing the ways in which diverse students are supported in New Mexico). See also uLEAD network: New Mexico Policy (Jan. 9, 2018), <https://uleadnet.org/map/new-mexico-policy> for an explanation of SB 582, New Mexico's law passed in 2005 that makes all qualified residents of New Mexico eligible for in-state tuition and state-funded financial aid, regardless of immigration status, and prohibits post-secondary institutions from denying admission based on immigration status.

16 Russell Contreras and Sophia Tareen, *Universities Exploring 'Sanctuary' Status for Immigrants*, Associated Press (Dec. 3, 2016), <https://apnews.com/d792a64476f248f9a1552e780d8f8b8e/universities-exploring-sanctuary-status-immigrants>.

17 Yoohyun Jung, *Arizona's Public Universities Will Not Consider Becoming 'Sanctuaries'*, Ariz. Daily Star (Feb. 11, 2017), http://tucson.com/news/local/education/arizona-s-public-universities-will-not-consider-becoming-sanctuaries/article_8432d51c-ffda-55fb-87bb-e6a8cca301d2.html; Julián Aguilar, *Ahead of Thursday Hearing, Texas Senate Adds Muscle to Anti-Sanctuary City Bill*, Tex. Trib. (Feb. 1, 2017, 11 AM), <https://www.texastribune.org/2017/02/01/texas-senate-adds-muscle-anti-sanctuary-city-legis/>.

18 Dulce Morales, *A Movement for Sanctuary Campuses Takes Shape*, Institute for Policy Studies (Mar. 15, 2017), <http://www.ips-dc.org/a-movement-for-sanctuary-campuses-takes-shape/>. Note that the terms "immigrant," "undocumented" "non-citizens" and "DACAmended" have distinct legal definitions but are sometimes used interchangeably in this piece because sometimes the relevant legal distinction is between citizens and non-citizens. Further, sometimes the general public conflates the terms. Finally, and perhaps most importantly, the sanctuary campus movement's concerns about inclusion and solidarity extend to all students, regardless of immigration status.

the term, universities already are sanctuaries and efforts to affirmatively adopt the designation may undermine the reality, and 3) there are sometimes legitimate, persuasive political and policy reasons to pursue sanctuary policies but not the designation. Since anti-immigrant sentiment has always and will likely always exist, this piece argues that while the effort spent on the sanctuary campus movement has been useful in many ways, it is the policies created by the movement that matter most. The author concludes with policy recommendations that further the goals of inclusion and solidarity that drive the sanctuary campus movement.

II. Background

The term “sanctuary campus” first arose in response to President Trump’s anti-immigrant campaign rhetoric, including his mantra, “Make America Great Again.”¹⁹ During the campaign season, he promised to force Mexico to build a contiguous border with Mexico, referred to Mexicans as “rapists,” and allowed neo-Nazis to support him.²⁰ Because of the campaign rhetoric, there was widespread concern about rescission of DACA,²¹ the Obama-era executive order protecting individuals who were brought to the U.S. as children and who meet certain criteria. After the January 2017 executive orders on enhancements of border security²² and foreign terrorist entry (also known as the “Muslim ban”),²³ campuses across the country began to prepare for aggressive enforcement of immigration law on college and university campuses. The term “sanctuary campus” arose as a way to demonstrate support for all immigrant students. The concern about rescission of DACA became a reality on September 5, 2017.²⁴

Borrowed from earlier immigrants-rights movements, the term “sanctuary campus” evolves from the idea of churches²⁵ and cities as sanctuaries from federal law enforcement of immigration law.²⁶ The idea of state agents – cities, towns and

19 Pamela Engel, *How Trump Came up with his slogan ‘Make America Great Again,’* Bus. Insider (Jan. 18, 2017), <http://www.businessinsider.com/trump-make-america-great-again-slogan-history-2017-1>.

20 John Bowden, *Neo-Nazis Celebrate Trump ‘s---hole’ comment: He’s ‘on the same page as us,’* Hill (Jan. 12, 2018, 4:53 PM), <http://thehill.com/blogs/blog-briefing-room/news/368807-neo-nazis-celebrate-trump-shithole-comment-hes-on-the-same-page>; Melissa Ryan, *How the President and Neo-Nazis Work Hand in Hand*, Progressive (Jan. 31, 2018), <http://progressive.org/magazine/trump-s-army-how-the-president-and-neo-nazis-work-hand-in-ha/>.

21 Julianne Hing, *Fear and Fight in the Final Days of DACA*, Nation (Jan. 25, 2017), <https://www.thenation.com/article/fear-and-fight-in-the-final-days-of-deferred-action/>.

22 Exec. Order No. 13769, 82 Fed. Reg. 8977 - 8982 (Jan. 25, 2017); White House, *Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States* (rev. Mar. 6, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/>.

23 *Id.*

24 U.S. Dept. of Homeland Security, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sept. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>.

25 Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 Cap. U. L. Rev. 583, 597-608 (2014).

26 Michael J. Davidson, *Sanctuary: A Modern Legal Anachronism*, 42 Cap. U. L. Rev. 583, 609-616 (2014). Rose Cuisson Villazor, *What is a Sanctuary?*, 61 SMU L. Rev. 133, 154-156 (2008).

other localities – declaring themselves as sanctuaries arose in the 1980s from the church sanctuary movements to protest federal immigration policies that denied asylum to refugees from Guatemala and El Salvador.²⁷ San Francisco passed a law in 1989 prohibiting local police from holding undocumented immigrants in custody if they do not face charges or don't have a record of violent felonies.²⁸

As of the 2016 election, approximately 300 cities and counties across the country have various iterations of sanctuary city policies despite the threat of losing federal assistance.²⁹ A number of cities have sued the U.S. Department of Justice for its efforts to punish them by withholding funds.³⁰ The Seventh Circuit Court of Appeals recently sided with Chicago by finding that the Justice Department may not withhold public safety grants from cities that limit cooperation with the current administration's immigration policy.³¹ Litigation in other jurisdictions is pending.³²

The relevance of the sanctuary cities movement to the topic of this piece is that this movement, while controversial, has arguably grown and seems to have influenced the birth of the sanctuary campus movement. For example, as public support for immigrants swells in his state and others, Governor Jerry Brown of California signed legislation in January 2018 declaring the entire state a sanctuary for undocumented immigrants, a move that Administration officials have condemned.³³

Writing in the context of the sanctuary cities movement of 2007-2008 immediately preceding President Obama's election, Professor Rose Cuison Villazor made some interesting points regarding sanctuaries in the city context that are worth applying to higher education.³⁴ First, she points out, for better or for worse, that for some the term "sanctuary" is politically charged and evokes somewhat negative connotations, including condoning evasion of immigration laws and enforcement.³⁵ Use of a term that adds fuel to the fire of anti-immigrant sentiment seems counter-productive. Second, suggests that perhaps the more

27 Rose Cuison Villazor, *What is a Sanctuary?*, 61 SMU L. Rev. 133, 134-136 (2008).

28 <http://sfgov.org/oceia/sanctuary-city-ordinance-0> (last visited January 30, 2018); Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions than Answers*, Atlantic (Nov. 22, 2016), <https://www.theatlantic.com/education/archive/2016/11/the-push-for-sanctuary-campuses-raises-more-questions-than-answers/508274/>.

29 Richard Gonzales, *Mayor Rahm Emanuel: 'Chicago Always Will Be a Sanctuary City'*, npr (Nov. 14, 2016 at 7:57 PM EST), <https://www.npr.org/sections/thetwo-way/2016/11/14/502066703/mayor-rahm-emanuel-chicago-always-will-be-a-sanctuary-city>.

30 Dan Levine, *Appeals Court Rules against U.S. on Funds for Sanctuary Cities*, Reuters (April 19, 2018), <https://www.reuters.com/article/us-usa-immigration-ruling/appeals-court-rules-against-u-s-on-funds-for-sanctuary-cities-idUSKBN1HQ2WG>.

31 *Id.*

32 *Id.*

33 Jonathan Blitzer, *In Calling for Politicians' Arrest, An Ice Official Embraces His New Extremist Image*, New Yorker (Jan. 4, 2018), <https://www.newyorker.com/news/news-desk/in-calling-for-politicians-arrest-an-ice-official-embraces-his-new-extremist-image>.

34 Rose Cuison Villazor, *What is a Sanctuary?*, 61 SMU L. Rev. 133, 154-156 (2008).

35 *See id.*

important question than what is a sanctuary is why sanctuary, which, applied to our higher education space, shifts the focus to dealing with the lack of meaningful support felt by undocumented students.³⁶ Finally, she highlights the importance of distinguishing between the use of the term in the public versus private context since the law is usually different in the two.³⁷

However, there is an important distinction between sanctuary cities and sanctuary universities. Sanctuary cities have police forces that could theoretically face off with immigration officers, or affirmatively refuse to enforce federal law, but institutions of higher education simply do not have that manpower, which leaves them more vulnerable to federal enforcement officers than cities.³⁸ However, it would be extremely difficult, logistically, fiscally and politically, for federal immigration officers to pursue the tens, if not hundreds of thousands of cases, of undocumented students on campus, not to mention the terrible optics for the administration that would result from enforcement efforts on campuses.

The third predecessor to the sanctuary campus movement is the precedent set by the Supreme Court in 1982 in *Plyler v. Doe*.³⁹ In *Plyler*, the Court held that states, should they choose to offer public education, may not deny students that basic privilege on the basis of immigration status. The Court differentiated between adults who made the decision to enter or stay in the United States without legal authorization and children who were brought to the country by an adult.⁴⁰ Writing for the majority, Justice Brennan points out that “by denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute even in the smallest way to the progress of our Nation.”⁴¹ Over 90% of students in the K-12 context attend public schools, and hundreds of thousands of them are undocumented, so the implications of the decision are far-reaching.⁴²

Despite this longstanding precedent guaranteeing access to public education for undocumented students, K-12 students—both undocumented and those with legal authorization—face hardships and discrimination on the basis of immigration

36 *See id.*

37 *See id.*

38 Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions than Answers*, Atlantic (Nov. 22, 2016) (explaining concerns by some college presidents).

39 457 U.S. 202 (1982).

40 *Id.* (explaining that “legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice”).

41 *Id.* at 209.

42 Jack Jennings, *Proportion of U.S. Students in Private Schools is 10 Percent and Declining*, Huffington Post (Dec. 6, 2017), https://www.huffingtonpost.com/jack-jennings/proportion-of-us-students_b_2950948.html; The Education Trust-West, *Undocumented Students in California: What You Should Know* (Apr. 2017), https://29v0kg31gs803wndhe1sj1hd-wpengine.netdna-ssl.com/wp-content/uploads/sites/3/2015/11/ETW_CA-Undocumented-Students-What-You-Need-to-Know-FINAL-April-2017.pdf (explaining that 250,000 undocumented young people ages 3-17 are enrolled in California schools).

status.⁴³ Each fall when school begins, there are reports of students being denied access to public schools when they are unable to produce a social security number or other proof of residency.⁴⁴ Notwithstanding clear legal precedent in favor of undocumented K-12 students, some districts recently have chosen to adopt the “sanctuary” designation to show solidarity and support because the right to attend is just one barrier.⁴⁵

Given resistance to or at least ignorance of longstanding Supreme Court precedent, it should come as no surprise, then, that there is resistance to the idea of undocumented students being protected in the higher education realm. However, arguably, the same logic applied in *Plyler* applies in the higher education context. That is, failing to provide education to undocumented students will only make their lives harder and will mean they have less opportunity to contribute to society. This idea of equal opportunity motivates the sanctuary movement.

III. Analysis

Understanding the history of the movement leads to the question of whether the designation is necessary to achieve the goals of the movement. This section argues there is no need to affirmatively designate universities as sanctuaries because 1) there is a lack of clarity about the term, 2) even applying the most sweeping definition of the term, unlike cities, universities already are de facto and de jure sanctuaries, and 3) there are sometimes legitimate, persuasive political and policy reasons to pursue policies and programs that underlie the sanctuary campus designation without adopting the title.

A. *The Term “Sanctuary” Lacks Universal Meaning*

What does “sanctuary” mean? The answer depends on the respondent and her pre-existing experience with the term. Scholars have documented the sanctuary church and city movements quite effectively, so this piece focuses on the prior movements only to the extent necessary to distinguish the sanctuary campus movement.⁴⁶ This section explains how the use of a term that may have different meanings within those prior movements leads to a lack of clarity in the higher education context.

43 Eric T. Schneiderman, *Immigrant Children Have a Right to a Good Education*, Educ. Week (Mar. 11, 2016), <https://www.edweek.org/ew/articles/2016/03/16/immigrant-children-have-a-right-to-a.html> (explaining investigations into dozens of school districts across New York who denied immigrant children access to public schools).

44 *See id.*

45 District of Columbia Public Schools, *Keeping DC Schools Safe for All Families and Students* (Mar. 10, 2017), <https://dcps.dc.gov/release/dcps/keeping-dc-schools-safe-all-families-and-students-0>; Ray Sanchez, *US Public Schools Take Steps to Protect Undocumented Students*, cnn (Feb. 24, 2017, 4:45 PM), <https://www.cnn.com/2017/02/23/us/public-schools-immigration-crackdown/index.html>.

46 Laura Jarrett & Tal Kopan, *Federal Judge Again Blocks Trump from Punishing Sanctuary Cities*, cnn (Sept. 15, 2017), <https://www.cnn.com/2017/09/15/politics/chicago-lawsuit-trump-sanctuary-cities-jag-funds/index.html>.

In an attempt to understand the actual scope of the movement, I decided to create a comprehensive database. My assiduous research assistant began with Xavier Maciel and Aparna Parikh's interactive map of universities and colleges that declared themselves to be sanctuary campuses, were petitioned to become sanctuary campuses, or denied requests to become sanctuary campuses.⁴⁷ That map became the basis of a more current, detailed and extensive database including the names of 204 schools, a link to and summary of each school's most recent policy statements, description of whether schools offered in-state tuition to undocumented students, and whether the schools were in red or blue states.⁴⁸

Our research concludes that only twenty schools have made an official declaration as a sanctuary campus.⁴⁹ The majority (17) are located in Democratic states and a slim majority (11) are public.⁵⁰ Many otherwise reiterated a commitment to serving undocumented students by publicly offering statements of support (and even "unequivocal support"), declaring themselves "safe campuses," and issuing statements of solidarity.⁵¹ However, even if schools were not willing to adopt the sanctuary term, most of the 204 were willing to affirm general support and/or implement at least some of the policies requested in the sanctuary petitions, such as not using campus police to inquire about immigration status or enforce immigration laws.⁵² It was difficult to ascertain whether pledged support and resources are new or preexisting.

Nine of the twenty sanctuary schools are private and eleven are public.⁵³ Almost all of the private schools are small and well-endowed.⁵⁴ Of the eleven public schools, ten are in California or Oregon, states that wholeheartedly embrace immigrant and undocumented students, as demonstrated through strong legislation and/or sympathetic political environments.⁵⁵

One of the first universities to adopt the identity is Wesleyan University (population 3,200), which publicly declared that it would not willingly assist with government efforts to deport students, faculty and staff who are undocumented.⁵⁶ Wesleyan's embrace reflects the finding that nearly 90% of private schools to adopt

47 César Cuauhtémoc García Hernández, *supra* note 11.

48 Database on file with author.

49 Database on file with author.

50 Database on file with author.

51 Database on file with author.

52 Database on file with author.

53 Database on file with author.

54 One school is large (25,000) and one school's endowment is under \$10 million. Database on file with author.

55 American Association of University Professors, *Sanctuary Campus Movement* (Aug. 11, 2017), <https://www.aaup.org/issues/sanctuary-campus-movement>; Gutmann Declares 'Sanctuary,' Pa. Gazette, Jan/Feb 2017, at 16.

56 Emily Deruy, *The Push for Sanctuary Campuses Prompts More Questions than Answers*, Atlantic (Nov. 22, 2016), <https://www.theatlantic.com/education/archive/2016/11/the-push-for-sanctuary-campuses-raises-more-questions-than-answers/508274/>.

the designation are small (under 5,000) and with endowments ranging between \$137 million and \$12 billion dollars.⁵⁷ Small and well-endowed means the decision to declare sanctuary is low-risk. For well-endowed, small private schools with tiny undocumented populations, adopting the designation does not carry the same risks as it does for public entities dependent on state funds appropriated by often hostile state legislatures.

With a population of 25,000, the University of Pennsylvania is the largest of the private schools to adopt sanctuary campus.⁵⁸ President Amy Gutmann came out early in the movement to demonstrate unflagging support for undocumented students when she sent an email to the campus community with the following message: “Penn is and has always been a “sanctuary” – a safe place for our students to live and to learn. We assure you that we will continue in all of our efforts to protect and support our community including our undocumented students.”⁵⁹ The UPenn reflects the finding that supportive declarations may simply be reiterations of existing university and city / state policies.⁶⁰

It has been more difficult for state higher education institutions, particularly those in states without pre-existing laws protecting undocumented students like California⁶¹ and Oregon⁶² and less-wealthy private colleges to declare themselves as sanctuaries.⁶³ In the absence of a federal DREAM Act to protect undocumented students’ access to higher education,⁶⁴ over the 17 years since the first attempt at passage of a federal statute, 21 states (over 40%) have moved to offer in-state tuition to students who are undocumented.⁶⁵ These so-called “baby DREAM Acts” typically allow in-state tuition for students who achieved a high school diploma or GED from an in-state high school and who pledge to apply for legal status as soon as eligible.⁶⁶ The number of states providing protections has steadily increased,

57 Database on file with author.

58 Database on file with author.

59 Cassie Owens, *Amy Gutmann: Penn is a Sanctuary Campus and We’ll Protect Undocumented Students*, Billy Penn (Nov. 30, 2016, 2:30 PM), <https://billypenn.com/2016/11/30/amy-gutmann-penn-is-a-sanctuary-campus-and-well-protect-undocumented-students/>.

60 *Id.* See also database on file with author.

61 University of California, *Undocumented Student Resources: California State Legislation*, <http://undoc.universityofcalifornia.edu/legislation-basics.html>.

62 Oregon State University, *DACA and Undocumented Student FAQs*, <http://leadership.oregonstate.edu/executive/deferred-action-childhood-arrivals-daca-and-undocumented-student-faqs>.

63 Jeff Charis-Carlson, *Most Iowa Campuses Stop Short of Declaring ‘Sanctuary’ Status*, Iowa City Press-Citizen (Jan. 30, 2017, 2:58 PM), <http://www.press-citizen.com/story/news/education/college/2016/12/09/some-iowa-campuses-stop-short-declaring-sanctuary-status/95134322/>.

64 Yamiche Alcindor and Sheryl Gay Stolberg, *After 16 Futile Years, Congress Will Try Again to Legalize ‘Dreamers,’* N.Y. Times (Sept. 15, 2017), <https://www.nytimes.com/2017/09/05/us/politics/dream-act-daca-trump-congress-dreamers.html>.

65 Diana Ali, *In-State Tuition for Undocumented Students: 2017 State-Level Analysis*, NASPA.org (July 21, 2017), <https://www.naspa.org/rpi/posts/in-state-tuition-for-undocumented-students-2017-state-level-analysis>.

66 Nat’l Conf. of State Legislatures, *Tuition Benefits for Immigrants*, (Jul. 15, 2015), <http://www.ncsl.org/research/immigration/tuition-benefits-for-immigrants.aspx>.

reflecting the idea that universities have both remained consistent and adapted to fit the needs of society.⁶⁷

It is worth noting that while some argue that the vast majority of Americans are in support of undocumented students,⁶⁸ which means, in theory, that state legislatures would be in support of the sanctuary designation, in fact, a number of state institutions have indicated hesitation at best and strong resistance at worst.⁶⁹ After students in Arkansas, Georgia and Texas called for their campuses to declare themselves as sanctuaries, Republican legislators threatened to cut off funding.⁷⁰ Even institutions in states that provide in-state tuition and other protections for undocumented students have indicated concerns about overtly adopting “sanctuary” status.⁷¹

So, what exactly does a declaration of “sanctuary” actually mean? The term can signify many things, from affirmatively providing legal help for undocumented students to financial assistance to simply not allowing Immigration and Customs Enforcement agents on campus without a warrant.⁷² Proposed policies include a range of actions, including:

- Not allowing Immigration and Customs Enforcement Officers (ICE) and Customs and Border Patrol (CBP) officers onto campus without a warrant,
- The refusal of campus police to enforce immigration law,
- Not sharing student immigration status with ICE/CBP,⁷³
- Refusing to use E-Verify,
- Not gathering information on immigration or citizenship status,
- Providing tuition support, including in-state tuition rates at public universities to students with DACA status,

67 David Watson, *What is a University For?*, Guardian (Jan. 14, 2002, 8:34 AM), <https://www.theguardian.com/education/2002/jan/15/highereducation.news>.

68 Adriana Gomez Licon and Emily Swanson, *Majority of Americans Support Dreamers Staying in the US, poll says*, Christian Sci. Monitor (Oct. 11, 2017), <https://www.csmonitor.com/USA/Politics/2017/1011/Majority-of-Americans-support-Dreamers-staying-in-the-US-poll-says>.

69 *Controversy over ‘sanctuary campuses is misleading, legal analysts say*, PBS NewsHour (Dec. 17, 2016, 2:22 PM), <https://www.pbs.org/newshour/nation/sanctuary-campus-controversial>.

70 *Id.*

71 Justin Cox, *New Mexico State University’s President Says Campus Will Not Become a Sanctuary Campus*, krqe (Dec. 3, 2016), <http://krqe.com/2016/12/03/new-mexico-state-universitys-president-says-campus-will-not-become-sanctuary-campus/>.

72 Ashley Cleek, *Weighing the Risks of a ‘Sanctuary’ Campus*, Pub. Radio Int’l (Feb. 16, 2017, 5:00 PM EST), <https://www.pri.org/stories/2017-02-16/weighing-risks-sanctuary-campus>.

73 Except that with regard to students on F, J and M visas, in accepting SEVIS certification, the institution has agreed to share with DHS certain information and also to ICE/SEVP campus visits with regard to students comprised within the SEVIS system. 8 C.F.R. § 214.3(g), <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-17197/0-0-0-20666.html>.

- Publicly supporting the DACA program,
- Providing distance-learning options for deported students to complete their degrees,
- Enforcing policies with all college or university staff and all contractors and subcontractors and their employees working on property owned or controlled by the college or university, and/or
- Providing confidential legal support to students with immigration law questions and issues.⁷⁴

An institution that adopts all these elements may be at risk of local and national political pressure, as well as challenges by its state legislature, the Departments of Justice, Homeland Security, Education, and the National Institutes of Health (which provide funding to institutions that follow applicable federal laws), and others.⁷⁵ On the least inclusive end, an institution that adopts the term but merely says it will not allow ICE officials onto campus without a valid judicial warrant really is not saying much not already required by law. All institutions should require valid judicial warrants from law enforcement officers for any students before complying with law enforcement requests or risk facing legal by students.⁷⁶ For example, a student whose class schedule is released to an Immigration and Customs Enforcement official and whose person and backpack is subsequently searched and items therein seized may be able to raise FERPA and Fourth Amendment claims if the official did not have a valid judicial warrant.⁷⁷

Critics have argued that the lack of shared meaning is a threshold problem with sanctuary designation.⁷⁸ Others have said that there is a baseline understanding that the term sends a message of solidarity and inclusion.⁷⁹ While the author echoes the first concern, regardless of one's response to the lack of semantic clarity, this paper argues that universities already are sanctuaries and that the goals of

74 Immigration Response Initiative at Harvard Law School and Cosecha Movement, *Sanctuary Campus Frequently Asked Questions* 32, <https://today.law.harvard.edu/wp-content/uploads/2017/02/Sanctuary-Campus-Toolkit.pdf> (providing a wealth of data and resources related to support for undocumented students).

75 *Supra* note 72.

76 Charis-Carlson, *supra* note 63, noting exception regarding students covered by the SEVIS system.

77 See U.S. Department of Education, <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>; U.S. Const. amend. IV. The Family Educational Rights and Privacy Act (FERPA) protects the privacy of student education records. Generally, if a student is over 18, an institution must seek the student's permission prior to releasing an education record such as a class schedule. Further, the fourth amendment prohibits warrantless searches and seizures unless a specific exception applies.

78 Michael Olivas, *Sanctuary Campuses Won't Provide Real Sanctuary for Immigrant Students*, Inside Higher Educ. (Nov. 29, 2016, 3:00 AM), <https://www.insidehighered.com/views/2016/11/29/sanctuary-campuses-wont-provide-real-sanctuary-immigrant-students-essay>.

79 American Council on Education, *Immigration Post-Election Q & A: DACA Students, "Sanctuary Campuses," and Institutional or Community Assistance* (Dec. 2, 2016), www.acenet.edu. See also, UNMSanctuary Campus, <http://www.unmsanctuarycampus.org/> (stating that the faculty working group "stands in solidarity with undocumented students and community members by pushing to make UNM a Sanctuary Campus").

sanctuary movement in some contexts may be better served by focusing on actual programs and services for students.⁸⁰

The brief background section introduced the history of, reasons for, and goals of the sanctuary campus movement in higher education. While the fuzziness of the term is a threshold problem, this section continues by proposing that 1) as a matter of law, policy, and public opinion, universities already are sanctuaries, and 2) for *some* institutions,⁸¹ the goals may be achieved without the designation and, relatedly, that the designation means nothing if policies and programs to support the goals are not in place.

The overarching tension in the debate over sanctuary designation is how to provide a safe, supportive environment for *all* students, especially immigrant students, while complying with the law. Legal concerns include, *inter alia*, compliance with due process, equal protection, first amendment, HIPAA, and FERPA rights on the one hand and threats to loss of funding and/or political ostracism for perceived non-compliance with federal immigration law.⁸² The next section more directly addresses legal issues related to the designation and concludes that the on the whole, individual rights of undocumented students outweigh concerns about non-compliance.

B. Universities Already Are Sanctuaries

In addition to concerns over the actual meaning, if any, of the sanctuary designation,⁸³ there are other reasons the designation may undermine the goals of the movement. This section explains how, because of their historic role, treatment in fact and by law, universities already are sanctuaries. Therefore, all students – regardless of citizenship—do and should enjoy protection.

1. The Role of the University in American Society

Since its inception in medieval Europe, the modern university system has been dedicated to discourse and learning free from restraints present in other societal contexts.⁸⁴ The word “university” derives from the Latin *universitas magistrorum et scholarium*, which roughly translates to “community of teachers and scholars.”⁸⁵

80 Charis-Carlson, *supra* note 63 (quoting University of Iowa President Bruce Harreld as saying “What I’m really worried about is if we put a label across it that doesn’t mean anything, we actually as an institution...might actually start relaxing the things we’re doing to really help individually.”).

81 *See id.*

82 Immigration and Naturalization Act Sec. 274. [8 U.S.C. § 1324] (Harboring Certain Alien and General Compliance).

83 Hannah Natanson, *Faust Says Harvard Will Not be a ‘Sanctuary’ Campus*, Harvard Crimson (Dec. 7, 2016), <https://www.thecrimson.com/article/2016/12/7/faust-sanctuary-campus-policy/> (describing the Harvard University’s decision to deny the label because “it had no legal significance [and] could actually further endanger undocumented students.”).

84 Christopher Z. Mooney, *The Vital Role of Scholarship in Public Discourse*, Chron. Higher Ed. (Dec. 3, 2017), <https://www.chronicle.com/article/The-Vital-Role-of-Scholarship/241956> (describing the critical role of American academics producing independent scholarship, particularly in an era of “fake news”).

85 A History of the University in Europe: Vol. 1 8 (Walter Rüegg, ed., 1992).

Although it has evolved and will continue to evolve, the idea of community is perhaps the single defining characteristic of universities since their inception nine hundred years ago.

In the American context, universities have enjoyed a special status for over three centuries. They have educated clergy and private citizens, served as tools to learn about and address societal needs and problems, provided opportunities to promote upward social mobility, and have served as havens for all manner of debate regarding societal issues.⁸⁶

For as long as universities have existed, however, they have been criticized.⁸⁷ Some of the critiques include that universities are elitist, graduation rates are low, they are expensive, they are too market-driven, they are not market-driven enough, quality controls vary greatly, faculty selection and review processes are flawed, they perpetuate social status, they are unable to keep up with rapidly changing technology.⁸⁸

Notwithstanding their shortcomings, they occupy a unique and protected place in American society that are unmatched by any other societal institution and largely unmatched by any other nation.⁸⁹ They have advanced social reform, promoted science and technology, and inculcated valuable skills for citizenship and leadership.⁹⁰ Because of that unique space, universities already offer protections and stand as “sanctuaries” to protect the “marketplace of ideas.”⁹¹ Understanding this history helps frame the redundancy of calling universities “sanctuaries.”

2. *Universities as De Facto Sanctuaries*

In terms of universities as de facto sanctuaries or places of refuge, picture in your mind any university or college with which you are familiar. Consider its physical characteristics, including its location, appearance, and subtly or actually somewhat inaccessible by outsiders. More than likely, the institution is physically quite beautiful, well-kept, and safe. American higher education institutions are systems whose “structure, formal rules, and powerful traditions have evolved over three centuries”⁹² but who share an “ambience of intimacy and leisured

86 Michael Roth, *What Is a University For?* Wall Street J. (Mar. 4, 2016 at 5:21 PM EST), <https://www.wsj.com/articles/what-is-a-university-for-1457130080>.

87 Christopher J. Lucas, *American Higher Education* xi-xxi (1994).

88 Arthur M. Cohen, *The Shaping of American Higher Education* 1 (1998).

89 Roger L. Geiger, *The History of American Higher Education* x (2015) (explaining that the four unique aspects of American higher education include: 1) all members of society, not just the elite, are welcome 2) applied and practical studies are available both to undergraduates and graduate students, 3) public and private institutions provide market-based, mass higher education that responds to student demands, and 4) high-quality teaching and scholarship has led to a “world-leading status for American science.”

90 *Id.*

91 Clay Calvert, *Where the Right Went Wrong in Southworth: Underestimating the Power of the Marketplace*, 53 Me. L. Rev. 53 (2001). *But see* James F. Shekleton, *Strangers at the Gate: Academic Autonomy, Civil Rights, Civil Liberties, and Unfinished Tasks* 26 J.C. & U.L. 875 (2010) (explaining how in recent decades, there has been an increase in regulations affecting university campuses).

92 Geiger, *supra* note 89, at 539.

contemplation.”⁹³ When crimes happen on campuses, people seem shocked and outraged, as if they are immune from social realities.⁹⁴ In terms of public perceptions of universities, scholars point out that college attendance has both an “economic and iconic status” in our society.⁹⁵

3. *Universities as De Jure Sanctuaries*

With regard to the preexisting status of universities as de jure sanctuaries, from the founding of the University of Paris in the 12th century, the institution has been recognized by church and political leaders as one requiring and deserving special legal protection.⁹⁶ Henry Dunster, Harvard’s first president, solidified the governance of the college, the first established in the United States, by obtaining charter of incorporation from the General Court.⁹⁷ Over time, higher education institutions have become regulated by a web of public and private control.⁹⁸

Notwithstanding the fact that recent social movements have brought increased regulation to universities,⁹⁹ the law treats university students with special care.¹⁰⁰ From campus safety and security reporting¹⁰¹ to sex discrimination¹⁰² to free speech¹⁰³ to disability rights¹⁰⁴ to equal protection and diversity¹⁰⁵ to student health privacy and records protection,¹⁰⁶ courts and legislatures have considered

93 Lucas, *supra* note 87, at 289.

94 Aimee Lee Ball, *Staying Safe on Campus*, NY Times (July 20, 2012), <https://www.nytimes.com/2012/07/20/education/edlife/students-fear-venturing-out-alone-at-night-on-campus.html>.

95 Geiger, *supra* note 89, at ix.

96 Geiger, *supra* note 89, at xiv (describing how medieval universities were “given separate legal incorporation by Popes or monarchs and accorded the right to confer degrees”).

97 Geiger, *supra* note 89, at 4.

98 Cohen, *supra* note 88, at 39.

99 James F. Shekleton, *Strangers at the Gate: Academic Autonomy, Civil Rights, Civil Liberties, and Unfinished Tasks* 26 J.C. & U.L. 875 (2010).

100 Leonard M. Niehoff, *Introduction: Civil Rights in the Academy*, 75 Mich. B.J. 1145 (1996).

101 U.S. Dept. of Education, *The Handbook for Campus Safety and Security Reporting: 2016 Edition*, <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

102 U.S. Dept. of Education, *Know Your Rights: Title IX Prohibits Sexual Harassment and Sexual Violence Where You Go to School*, <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf>; Know Your Title IX, *College Resources* (<https://www.knowyourix.org/college-resources/>) (explaining that even under the current administration, Title IX protects all higher education students, including international and undocumented students).

103 Board of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000). *Rosenberger v. Rector and Visitors of Univ. of Va.* 515 U.S. 819 (1995).

104 U.S. Department of Education, *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities*, <https://www2.ed.gov/about/offices/list/ocr/transition.html>.

105 *Fisher v. Univ. of Tex. at Austin*, 579 U.S. __ (2016) (finding that the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause).

106 Association of State and Territorial Health Officials, *Comparison of FERPA and HIPAA Privacy Rule for Accessing Student Health Data* (Aug. 11, 2017), <http://www.astho.org/programs/preparedness/public-health-emergency-law/public-health-and-schools-toolkit/comparison-of-ferpa-and-hipaa-privacy-rule/> (explaining HIPAA and FERPA protections for university students).

and established special protections for students in higher education. In addition to the special legal protections enjoyed by universities as business entities, the individual rights recognized by courts and legislatures support the argument that universities are de jure sanctuaries. Further, noncitizens—including, arguably, those on campuses—enjoy many of the same protections as citizens.

Scholars have pointed out that noncitizens are in fact entitled to a number of constitutional protections.¹⁰⁷ Many U.S. Supreme Court opinions from the 1970s reinforce this idea.¹⁰⁸ David Cole¹⁰⁹ points out that since the U.S. Constitution only expressly limits to citizens the right to vote and to run for federal elective office, one may deduce that “equality between non-nationals and citizens would appear to be the constitutional rule.”¹¹⁰ Despite public misunderstanding, “the Constitution extends fundamental protections of due process, political freedoms, and equal protection to all persons subject to our laws, without regard to citizenship.”¹¹¹

While the Constitution is silent as to additional limitations for non-citizens, Professor Cole concedes that the U.S. Supreme Court has made distinctions. However, he points out that where the Court subjects non-citizens to obligations, it also generally has entitled them to protections.¹¹² He further recognizes that under international human rights law, non-citizens of a country are entitled to the same protections as citizens since, as recognized by the Court, obligations imply protections.¹¹³

Admittedly, there are arguments in favor of treating non-citizens differently from citizens. Professor Cole articulates a number of them.¹¹⁴ Non-citizens have taken no oath of loyalty (although most U.S. born people haven’t either), they have no constitutional right to reside in the U.S., treating non-citizens and citizens equally may devalue the very notion of citizenship, and the whole purpose of immigration law is to set conditions for foreign nationals to reside in the U.S.¹¹⁵

107 Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 U. Conn. L. Rev. 879 (2015); David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. Jefferson L. Rev. 367 (2003).

108 E.g., *Alameida-Sanchez v. United States*, 413 U.S. 266 (1973) (holding that noncitizens are entitled to the same rights that attach to the criminal process as citizens); *Graham v. Richardson* 403 U.S. 365 (1971) (invalidating state statutes that denied welfare benefits to resident aliens or to aliens who did not live in the U.S. for a specified number of years); *In re Griffiths*, 413 U.S. 717 (1973) (finding that a state’s exclusion of an resident alien applicant for bar admission violated the fourteenth amendment’s equal protection clause).

109 After having been a professor of constitutional law and criminal justice at Georgetown University Law Center for nearly thirty years, Professor Cole currently serves as national legal director of the ACLU. <https://www.aclu.org/bio/david-cole>.

110 David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. Jefferson L. Rev. 367, 368 (2003).

111 *Id.* at 381.

112 *Id.* at 372.

113 *Id.* at 368.

114 *Id.*

115 David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T.

However, in response to these concerns, he points out that most citizens acquire that status merely by accident of birth, most do not affirmatively chose to live in the U.S., and the plenary power of Congress over “a uniform rule of naturalization” has been narrowed by the Supreme Court in recent years.¹¹⁶

Striking a middle ground, he asserts that at the very least, non-citizens are entitled to substantially the same constitutional rights protections as citizens, but these rights are not absolute. His net analysis is that the areas of “defensible differentiation” between non-citizens and citizens include admission, expulsion, voting and running for federal elective office,¹¹⁷ but these are much narrower than the rights of presumptive equal treatment, including due process, First Amendment freedoms of expression, association and religion, privacy, and the rights of the criminally accused.¹¹⁸

Assuming that university students enjoy special protections and that non-citizens enjoy most of the same rights as citizens, it follows that non-citizen students (including undocumented students) enjoy, without the “sanctuary” designation, protections promoted by the sanctuary campus movement. This conclusion supports the idea that while a university’s decision to call itself a “sanctuary” may, assuming it supports the claim with corresponding programs and policies, be valuable, it is not essential to the argument that undocumented students deserve equal access to and protection while on higher education campuses.

C. Universities Should Pursue Programs and Policies that Promote the Solidarity and Inclusion Goals of the Sanctuary Movement Even If They Don’t Adopt the “Sanctuary” Title

As Professor Cole points out, there are a number of public misperceptions about the rights of non-citizens, and those misperceptions contribute to the perhaps-small-but-vocal anti-sanctuary campus voices. Some institutions may hesitate to poke the bear of federal immigration enforcement and risk charges of violations of general compliance and harboring in violation of INA provisions. There may be concern that sanctuary campuses violate valid state and federal laws exercising police power to provide for health, safety, and welfare of all U.S. residents¹¹⁹ However, states may respond that federalism and commandeering principles preclude the police power argument since state laws providing support for undocumented students are not in direct conflict with federal law.¹²⁰

Jefferson L. Rev. 367, 384 (2003).

116 *Id.* at 385-387.

117 In fact, DACA recipients are not eligible for unemployment benefits, health insurance, and social security. Also, there are a number of licensing requirements that serve as obstacles for non-citizens. Justin Chan, *America’s Undocumented College Students Face Roadblocks to Employment After Graduation*, Forbes.com (May 15, 2007, 6:04 PM), <https://www.forbes.com/sites/justinchan/2017/05/15/what-job-prospects-do-undocumented-students-have/#63ddf2fa5131>.

118 Cole, *supra* note 115, at 388.

119 Douglas R. Sahmel, *How Maryland’s Sanctuary Policies Isolate Federal Law and the Constitution While Undermining Criminal Justice*, 36 U. Balt. L.F. 149 (2006).

120 See University of New Mexico Student Financial Aid Office, <http://financialaid.unm.edu/>

Professor Huyen Pham has proposed a compromise to address federalism concerns: case-by-case review under intermediate scrutiny.¹²¹ Under intermediate scrutiny, a university must show that it has an important government interest in protecting undocumented students and its policies (including a “sanctuary” designation) are substantially related to that interest. Neither the government interest nor the substantial relationship analysis seem like a slam dunk.

According to the Pew Research Center, between 200,000-225,000 postsecondary students in the U.S. are undocumented.¹²² It would be nearly impossible for federal immigration enforcement officials and immigration judges to deal with all of those cases, let alone state and local police.¹²³ In fact, political concern about the consequences of failing to turning over information about undocumented students to federal immigration officials is in direct conflict with student privacy rights under FERPA.¹²⁴

With regard to lawmakers’ and university officials stated concerns about being accused of violating federal law, it is unlikely that the designation would lead to any federal action to remove funds. In the Title IX context, for example, in the forty-six years since its enactment, not once has funding been pulled from an institution that violates it.¹²⁵ If, in fact, the Department of Education and/or Department of Justice finds that a “sanctuary” university is violating federal law, the more likely outcome is negotiation to resolve the alleged violation. Further, courts generally have been supportive of sanctuary cities,¹²⁶ which means that efforts to de-fund universities—which evoke more sympathy—for non-compliance with federal law are also unlikely to succeed.

Regardless of whether universities adopt the “sanctuary” designation, the goals of the movement may be achieved by focusing on progressive programs and policies. As a baseline, university officials should conduct regular campus climate evaluations. These evaluations should inform what programs and policies

apply/situations.html (last visited June 27, 2018) (explaining that New Mexico state law provides multiple of protection for undocumented students: non-discrimination in admissions, in-state tuition, and financial aid). See also University of California, *Undocumented Student Resources*, <http://undoc.universityofcalifornia.edu/> (last visited June 27, 2018).

121 Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. Cin. L. Rev. 1373 (2006).

122 Kaitlin Mulhere, *Undocumented and Stressed*, Inside Higher Educ. (Jan. 26, 2015) <https://www.insidehighered.com/news/2015/01/26/study-finds-undocumented-colleges-students-face-unique-challenges> (explaining estimates about the population of undocumented students in the United States).

123 Jennifer M. Hansen, *Sanctuary's Demise: The Unintended Effects of State and Local Enforcement of Immigration Law*, 10 SCHOLAR 289, 292, 318-327 (2008).

124 Deruy, *supra* note 9; Cosecha, *supra* note 74, at 12.

125 Tyler Kingkade, *Why It's Unlikely North Carolina Schools Would Lose Funding Over HB 2*, Huffington Post (Feb. 2, 2017, 4:06 PM), https://www.huffingtonpost.com/entry/north-carolina-federal-funding_us_57320239e4b096e9f092b9c6.

126 Ilya Somin, *Federal Court Rules that Trump's Executive Order Targeting Sanctuary Cities is Unconstitutional* Wash. Post (Nov. 21, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/21/federal-court-rules-that-trumps-executive-order-targeting-sanctuary-cities-is-unconstitutional/?utm_term=.bae2db281a10.

are necessary to promote inclusion and solidarity with all the students served by an institution of higher education.¹²⁷

Current best practices include individualized attention and emotional support for students who are undocumented or who are affected by the current administration's immigration policies, academic support, financial support, and legal support.¹²⁸ Institutional actors and units must recognize that stress related to immigration status will negatively affect a student's ability to learn, and their stress is related to their own legal status, how to pay for school, and concern for family members.¹²⁹ Even in states that provide in-state tuition, undocumented students often have no reliable way to pay in-state tuition and living expenses, so even the idea of in-state tuition for undocumented students is misleading.¹³⁰

That said, the University of California system has paved a path toward success in higher education that seems unparalleled.¹³¹ Depending on the institution, state and resources, programs and policies may be designed in a way that is consistent with the particularized needs of students on campus, always keeping in mind that the university's role and duty is to educate all of its students, and the UC system provides an excellent example.

IV. Conclusion

Consider Magdalena's situation.¹³² She has survived a brutal attempted sexual assault on campus by someone she knew well, and even though she is physically okay, she has not been able to focus on her upcoming final exam. She reaches out to her mentor, a professor with whom she feels comfortable, to see whether the professor thinks it is reasonable to request an extension for her exam. The professor immediately reports the incident to the university's Title IX office, as required by law. When the Title IX coordinator reaches out to Magdalena to investigate further and determine whether to open a case against the accused assailant, Magdalena is petrified that her status as an undocumented student will be revealed to law enforcement. Thankfully, she discovers that although the Title IX liaison is required to make an inquiry, she is not required to respond. But the several days of waiting

127 University of California, *Undocumented Student Resources*, <http://undoc.universityofcalifornia.edu/> (last visited June 27, 2018) (including a detailed, and constantly changing, list of programs and policies).

128 Robert T. Teranishi, Carola Suárez-Orozco, and Marcelo Suárez-Orozco, *In the Shadows of the Ivory Tower* 20-22, UndocuScholars.org, <https://static1.squarespace.com/static/5aa69fbe8f51307aa7d7cdcb/t/5aa6c5718165f57981de21d6/1520878966718/undocuscholarsreport2015.pdf> (last visited June 27, 2018).

129 Mulhere, *supra* note 122 (explaining that 25.8% of male and 36.7% of female undocumented undergrads meet the clinical definition for generalized anxiety disorder compared to 4% and 9% of the general population).

130 Meredith Hoffman, *The Crippling Cost of College for America's Undocumented Students*, Vice (Apr. 3, 2016, 10:00 PM) https://www.vice.com/en_us/article/7bdnvy/the-crippling-cost-of-college-for-americas-undocumented-students.

131 University of California, *Undocumented Student Resources*, <http://undoc.universityofcalifornia.edu/> (last visited June 27, 2018).

132 The name and other identifying facts have been changed but are based on an actual case with which the author is familiar.

on pins and needles to figure out her obligations has re-victimized Magdalena, who is just trying to focus on her studies and make a better life for herself and her family.

This is one example of the hurdles faced by undocumented students. What would help Magdalena the most? Would it be her university deciding to call itself a “sanctuary?” Would it be her university creating a policy of anonymity, which is what some institutions have done, that somehow allows the university to meet its reporting obligations but protects vulnerable students from law enforcement?

The vast majority of institutions of higher education in the United States have not adopted the “sanctuary campus” designation.¹³³ In fact, only twenty institutions have embraced it,¹³⁴ but much time and energy is spent in its pursuit. An institution’s decision to call itself a sanctuary undeniably sends a strong moral and rhetorical message, but because of the lack of clarity and political disagreement about immigration policies, the term also invites backlash. Notwithstanding the relatively limited scope of likely repercussions for universities, there can be no doubt that there has been a rise in the alt-right voice on campuses across the country, impacting campus political climates for the undocumented and all members of campus communities.¹³⁵ To the extent that there is agreement that universities train the next generation of leaders and workers in our society, climate and culture of campus environments matter as much as curriculum.¹³⁶ For university officials to feel that raising the “sanctuary” flag would make themselves and the undocumented students they seek to protect the targets of political backlash and hate crimes,¹³⁷ there is still a way forward.

This piece should not be understood to condone capitulation to anti-immigrant sentiment. On the contrary, universities already enjoy a special historical and legal status as sanctuaries. Therefore, political, legal and financial battles may be avoided and the movement goals may be best achieved by simply affirming the pre-existing role. Affirming the role may involve some public declaration of support¹³⁸ but certainly *should* involve taking meaningful steps to create and support strong programs and policies to support undocumented and immigrant students in the face of racist, nationalist, divisive actions.¹³⁹

133 Selingo, *supra* note 10. César Cuauhtémoc García Hernández, *supra* note 11.

134 According to database on file with author.

135 Nadia Dreid and Shannon Najmabadi, *Here’s a Rundown of the Latest Campus-Climate Incidents Since Trump’s Election*, Chron. Higher Educ. (Dec. 13, 2016), <https://www.chronicle.com/blogs/ticker/heres-a-rundown-of-the-latest-campus-climate-incidents-since-trumps-election/115553>.

136 Bryan R. Warnick, *Understanding Student Rights in Schools: Speech, Religion, and Privacy in Educational Settings* 166 (2013).

137 Colleen Flaherty, *AAUP Condemns Hate Crimes, Endorses Campus Sanctuary Movement*, Inside Higher Educ. (Nov. 23, 2016), <https://www.insidehighered.com/quicktakes/2016/11/23/aaup-condemns-hate-crimes-endorses-campus-sanctuary-movement>.

138 According to the database gathered by the author, a number of institutions already have reiterated a commitment to serving undocumented students by publicly offering statements of support (and even “unequivocal support”), declaring themselves “safe campuses,” and issuing statements of solidarity

139 Patricia McGuire, *From Anger to Action for Dreamers*, Inside Higher Educ. (Sept. 8, 2017) <https://www.insidehighered.com/views/2017/09/08/how-colleges-should-respond-daca-rescission-essay>.

Beside the compelling moral argument that a person brought to the U.S. as a child cannot be sent “back” to a country they may not know, the Supreme Court has already condemned the denial of K-12 public education on the basis of immigration status. Recognizing moral obligation, legal rights of noncitizens, and economic benefits,¹⁴⁰ many states have gone further and provided protections so that these students may pursue higher education. For example, there are approximately 9,000 public school teachers in the United States who are “DACAmended,” and many of them teach in underserved urban and rural schools with a teacher shortage.¹⁴¹ There are a number of other compelling arguments in favor of welcoming undocumented students to U.S. universities.¹⁴² By focusing on policies and programs that *actually* support undocumented students, higher education will meet institutional and movement goals.

140 Teranishi, *supra* note 128 (providing data that indicates that undocumented students are net contributors to the economy).

141 Claudio Sanchez, *Nearly 9,000 DACA Teachers Face an Uncertain Future*, NPR (Jan. 29, 2018), <https://www.npr.org/sections/ed/2018/01/29/579682676/nearly-9-000-daca-teachers-face-an-uncertain-future>.

142 Sonali Kohli, *Why U.S. Colleges Should Welcome Undocumented Immigrants*, Atlantic (Jan. 31, 2015), <https://www.theatlantic.com/education/archive/2015/01/why-us-colleges-should-welcome-undocumented-immigrants/385049/>

KEY LEGAL CONSIDERATIONS RELATING TO “SANCTUARY CAMPUS” POLICIES AND PRACTICES

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Abstract

Following President Trump’s election and his administration’s subsequent announcement it intends to end the Deferred Action for Childhood Arrivals (DACA) program, college campus communities are focused on what steps they can legally take to protect and support their undocumented students. A number of campuses have self-identified as “sanctuary campuses.” But the policies and practices implemented at such campuses vary and the legal questions about what campuses can do to protect their students do not turn on the label. This article explores the various meanings attached to “sanctuary campus” and the legal import of that label. We then analyze the legal issues that restrict the actions campuses can take to support and protect undocumented students. These include: (1) campus administrators’ legal obligations to provide information and documents to Immigration and Customs Enforcement (ICE) agents and officers; (2) the extent to which campuses can block ICE or other federal law enforcement from campus or specific parts of campus; and (3) the risk that actions taken by campuses in support of undocumented immigrants could violate the federal law prohibiting “harboring” unauthorized aliens or assisting others that do so.

I. Introduction

An estimated 200,000 to 225,000 United States college students are undocumented immigrants.¹ Concerns about President Donald J. Trump’s campaign promises to make deportation of millions of illegal immigrants a top priority sparked widespread campus protests shortly after his election.² Protestors demanded a variety of actions. Many called for their campus to become a “sanctuary” that would protect undocumented students from deportation as much as legally possible.

Many undocumented students received temporary protection from deportation under the Deferred Action for Childhood Arrivals (DACA) Executive Order issued

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1 Kaitlin Mulhere, *Undocumented and Stressed*, Inside Higher Ed. (Jan. 26, 2015), <https://www.insidehighered.com/news/2015/01/26/study-finds-undocumented-colleges-students-face-unique-challenges>.

2 See e.g., Catherine E. Shoichet & Azadeh Ansari, *‘Sanctuary Campus’ Protests Target Trump Immigration Policies*, CNN (Nov. 16, 2016), <http://www.cnn.com/2016/11/16/politics/sanctuary-campus-protests/index.html>.

by President Obama in 2012.³ DACA enabled certain undocumented immigrants who came to the United States as children to apply for deferred immigration enforcement—the use of prosecutorial discretion to defer actions to remove them—for a period of two years, subject to renewal. Although DACA never conferred lawful immigration status on those who applied, it allowed them to remain in the U.S., to obtain temporary work permits, and protected them from deportation while covered by the policy.⁴ On September 5, 2017, the Trump Administration announced that it would rescind the DACA program and no new requests would be accepted. The Trump Administration also initially announced that no DACA renewals would be processed after March 5, 2018, absent Congressional action. However, two courts have since issued injunctions requiring that DACA renewals continue as litigation challenging the Trump administration’s rescission of DACA proceeds through the courts.⁵ As a result, it is unclear how long students who have been protected from deportation and granted temporary work authorization by DACA will continue to enjoy those benefits. Moreover, thousands of undocumented students who were never protected by DACA⁶ may believe they are more at risk of deportation under Trump administration policies.

Since President Trump’s election, and with renewed vigor following the Trump administration’s announcement that it intended to end the DACA program, campus communities are focused on what steps they can legally take to protect and support their undocumented students. Practices and policies in place at some self-identified “sanctuary campuses” may be tested. But what does it mean to be a sanctuary campus? There is no single answer to this question. The more than 100 “campus sanctuary” petitions submitted to schools across the country in the fall of 2016 called for a variety of actions.⁷ And, campuses responded in different ways. At least eleven *institutions have declared themselves sanctuary campuses*.⁸ But

3 Mulhere, *supra* note 1.

4 In contrast, non-citizens that meet the requirements for Legal Permanent Residency can reside and work indefinitely in the United States and recipients of temporary visas enjoy lawful status in the United States for the period of their visa.

5 The Department of Homeland Security’s Citizens and Immigration Services division has indicated that it is not accepting DACA applications from individuals who have never before been granted deferred action under DACA but that in accordance with federal court orders issued on January 9, 2018 and February 13, 2018, it is continuing to accept requests to renew a grant of deferred action under DACA on the same terms in place before DACA was rescinded on September 5, 2017. See Dep’t of Homeland Sec., *Deferred Action for Childhood Arrivals: Response to January 2018 Preliminary Injunction*, <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction>.

6 Mulhere, *supra* note 1. One study found that close to 44% of undocumented students had not received DACA protections.

7 Carla Javier & Jorge Rivas, *Students from 100 universities are fighting for ‘sanctuary campuses’ to defy Trump’s deportation plans*, Splinter News (Nov. 21 2016), <https://splinternews.com/students-from-100-universities-are-fighting-for-sanctua-1793863883>.

8 These include Portland State University, Reed College, Wesleyan University, Pitzer College, SantaFe Community College, University of Pennsylvania, Oregon State University, Connecticut College, Drake University, Swarthmore College, and Scripps College. See Chris Lydgate, *Kroger Declares Reed a Sanctuary College*, Reed Magazine (Nov. 18, 2016), http://www.reed.edu/reed_magazine/sallyportal/posts/2016/sanctuary-college.html; Michael S. Roth, *Wesleyan University a Sanctuary*

even among that group, the policy commitments made by campus officials are not uniform. Moreover, the policies and practices at many campuses that have declined to declare themselves a sanctuary do not differ significantly from those that have identified themselves as a sanctuary campus.

The legal ramifications of sanctuary campus status are of course largely dictated not by the label but by campus policies and practices. Below, we explore the various meanings attached to “sanctuary campus” and the legal import of that label. We then analyze the legal issues that restrict the actions campuses can take to support and protect undocumented students. These include: (1) campus administrators’ legal obligations to provide information and documents to Immigration and Customs Enforcement (ICE) agents and officers; (2) the extent to which campuses can block ICE or other federal law enforcement from campus or specific parts of campus; and (3) the risk that actions taken by campuses in support of undocumented immigrants could violate the federal law prohibiting “harboring” unauthorized aliens or assisting others that do so.

II. What is a Sanctuary Campus?

Each letter issued by a university official declaring a campus a sanctuary has its own characteristics.⁹ A November 30, 2016 letter signed by the University of Pennsylvania’s President, Provost and Executive Vice President declared that “Penn is and has always been a ‘sanctuary’—a safe place for our students to live and to learn.”¹⁰ It also made several commitments that mirrored those made by other schools—some that self-identify as a sanctuary and some that do not. These

Campus, Roth on Wesleyan (Nov. 20, 2016), <http://roth.blogs.wesleyan.edu/2016/11/20/wesleyan-university-a-sanctuary-campus/>; Wim Wiewel, President, Portland State Univ., *Portland State is a Sanctuary University*, <https://www.pdx.edu/insidepsu/portland-state-is-a-sanctuary-university> (last visited Nov. 19, 2017); Melvin L. Oliver, President, Pitzer Coll., *President Oliver and the Board of Trustees Declare Pitzer a Sanctuary College* (Nov. 30, 2016), <https://www.pitzer.edu/president/president-oliver-and-board-of-trustees-declare-pitzer-a-sanctuary-college/>; Robert Nott, SFCC *Declared a ‘Sanctuary Campus’ for Immigrants*, *New Mexican*, (Nov. 30, 2016) http://www.santafenewmexican.com/news/education/sfcc-declared-a-sanctuary-campus-for-immigrants/article_cb2a01c6-52d4-55d7-b888-f6d4a16b0ecc.html; Amy Gutmann, President, Vince Price, Provost, & Craig R. Carnaroli, Exec. Vice President, Univ. of Pa., *A Message to the Penn Community Concerning Our DACA and Undocumented Community Members*, *Penn News* (Nov. 30, 2016), <https://news.upenn.edu/message-penn-community-concerning-our-daca-and-undocumented-community-members>; Edward J. Ray, President, Or. State Univ., *Oregon State is a Sanctuary University* (Nov. 21, 2016), <http://life@osu.edu/dept/ncs/lifeatosu/2016/oregon-state-is-a-sanctuary-university/>; Letter from Katherine Bergeron, President, Conn. College, to Members of the Conn. Coll. Cmty. (Dec. 1, 2016), <https://www.conncoll.edu/media/new-media/president-bergeron/letters/Dec-1-16.pdf>; Marty Martin, President, Drake Univ., *President Martin’s Message on the Recent Executive Order Restricting Immigration and Travel*, *Drake News* (Jan. 31 2017), <http://news.drake.edu/2017/01/31/president-martins-message-on-the-recent-executive-order-restricting-immigration-and-travel/>; Letter from Thomas E. Spock, Chair of Bd. Managers & Valerie Smith, President of Swarthmore Coll., *Swarthmore Board Pledges Sanctuary for Undocumented Students, All Community Members* (Dec. 2, 2016), <http://www.swarthmore.edu/news-events/swarthmore-board-pledges-sanctuary-undocumented-students-all-community-members>; Lara Tiedens, President of Scripps Coll., *Office of the President: Message in Response to Petition* (Dec. 11, 2016), <http://inside.scrippscollege.edu/news/office-of-the-president-message-in-response-to-petition>.

9 See *supra* note 8 (collecting letters).

10 See Amy Gutmann et al. *supra* note 8.

commitments include: (1) not to share any information about any undocumented student with ICE or the Customs and Border Protection (CBP)/ U.S. Citizenship and Immigration Services (USCIS) unless presented with valid legal process; (2) not to allow officers of these agencies on its campus unless required to do so by warrant; (3) to prevent campus police from complying with ICE detainer requests¹¹ for nonviolent crimes;¹² and (4) to ensure continued financial aid to undocumented and DACA students to enable these students to complete their studies.¹³

Other institutions, including Drake University, have made more general statements identifying their campus as a sanctuary:

We are and will be “a place of refuge or safety”—our chosen definition of “sanctuary”—for all of our students, faculty, and staff. We will do all that we can, within the framework of the law, to defend our students’ and employees’ rights. We will protect private information. We will provide programming and education regarding immigrants’ rights. We will continue to advocate for our government’s policies to align with our nation’s best aspirations for equity, opportunity, and inclusion.¹⁴

Many other institutions have declined to self-identify as a sanctuary campus. The President of Brown University explained that she had concluded that private colleges cannot actually offer “legal sanctuary from members of law enforcement or Immigration and Customs Enforcement” and thus she had determined it would “irresponsible” to lead students to believe otherwise.¹⁵ Pennsylvania State University similarly issued a message to the community that noted that sanctuary campus “is an ambiguous term that is subject to multiple interpretations and has no legal validity. If used, it could imply that our university has the authority to exempt our campus from federal immigration laws, when in fact no university has that authority.”¹⁶

A. Sanctuary from immigration enforcement in churches and schools is custom not law.

Campuses that fear that they will mislead students if they label themselves a sanctuary are not alone. Despite a long history of churches acting as sanctuaries, Roman Catholic Cardinal, Donald Wuerl, leader of the Washington Archdiocese,

11 An ICE detainer request is issued by an authorized immigration officer to any other Federal, State, or local law enforcement agency advising the recipient that DHS seeks custody of an alien presently in custody of that agency and asks that they hold the alien for 48 hours (excluding Saturdays, Sundays and holidays) beyond when he or she would otherwise be released in order to allow DHS to assume custody. *See* 8 C.F.R. 287.7.

12 The University of Pennsylvania letter referenced a City of Philadelphia practice that blocks City and campus police from complying with such orders. *See supra* note 8.

13 *See id.*

14 *See* Marty Martin, *supra* note 8.

15 Jon Street, ‘No basis in law’: Two Ivy League School Presidents Take a Stand Against ‘Sanctuary Campuses’, *Blaze* (Dec. 6, 2016), <http://www.theblaze.com/news/2016/12/06/no-basis-in-law-two-ivy-league-school-presidents-take-a-stand-against-sanctuary-campuses/>.

16 *See A Message to the Community*, PennState News (Dec. 23, 2016), <http://news.psu.edu/story/448939/2016/12/23/message-university-community>.

recently warned that although the church opposes deportation of people already living in the United States, it may not be able to provide any true protection for undocumented aliens. He explained:

“When we use the word sanctuary, we have to be very careful that we’re not holding out false hope. We wouldn’t want to say, ‘Stay here, we’ll protect you,’” he said, explaining that he’s not sure churches can legally guarantee protection to people who might move into a church building, or that federal agents would necessarily respect the boundaries of a church as a place that they cannot enter. “With separation of church and state, the church really does not have the right to say, ‘You come in this building and the law doesn’t apply to you.’ But we do want to say we’ll be a voice for you.”¹⁷

Churches have historically served as a sanctuary for individuals who fear deportation only because immigration officials have refrained from raiding churches to avoid the bad optics of such raids. The federal government has in some instances prosecuted church leaders for harboring illegal aliens even when the clergy were motivated by humanitarian goals like protecting political refugees.¹⁸

Although churches cannot provide full legal protection from deportation, such situations have not dissuaded many from declaring themselves sanctuaries. One report indicates that the church sanctuary movement has grown to include some 800 congregations, many of which recognize that they are engaged in a form of civil disobedience.¹⁹ Moreover, even though immigration officials do have legal authority to raid both churches and schools they have not traditionally done so. Thus far, the Trump administration has not signaled any intent to depart from this tradition.

The practice of avoiding immigration raids at churches and schools is documented in an October 24, 2011 memorandum authored by then Director of ICE, John Morton, regarding “Enforcement Actions at or Focused on Sensitive Locations.”²⁰ According to ICE’s website, ICE “previously issued and implemented a policy” that remains in effect.²¹ The Morton memorandum defines sensitive locations to include places of worship and schools—including post-secondary colleges

17 Julie Zauzmer, *Cardinal Wuerl Voices Catholic Support for Immigrants But Urges Caution About Sanctuary Church*, Wash. Post (Mar. 2, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/03/02/cardinal-wuerl-voices-catholic-support-for-immigrants-but-urges-caution-about-sanctuary-churches/?utm_term=.9295d8ed3f56.

18 See e.g. *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989); see also *Tucson Ecumenical Council v. Ezell*, 704 F. Supp. 980 (D. Ariz. 1989) (church vehicle was subject to forfeiture where a minister used the vehicle to knowingly transport undocumented aliens).

19 Sarah Pulliam Bailey, *This Undocumented Immigrant Just Announced That She is Seeking Sanctuary at a Church. Now She Waits*. (Feb. 15, 2017), WASH. POST, https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/15/this-undocumented-immigrant-just-announced-shes-seeking-sanctuary-at-a-church-now-she-waits/?utm_term=.51deca94a49b.

20 Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, on Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

21 U.S. Immigration and Customs Enforcement, FAQ on Sensitive Locations and Courthouse Arrests, <https://www.ice.gov/ero/enforcement/sensitive-loc> (last visited June 22, 2018).

and universities. It does not, however, prohibit ICE enforcement actions at these locations. Instead, as a general rule, it requires that “planned enforcement action at or focused on a sensitive location” have the prior approval of the Assistant Director of Operations, Homeland Security Investigations; the Executive Associate Director of Homeland Security; the Assistant Director for Field Operations, Enforcement and Removal Operations (ERO); or the Executive Associate Director of ERO. Even this requirement for approval by senior officials is not mandatory in all circumstances, though. Under the following exigent circumstances, enforcement activities may proceed without such approval:

- the enforcement action involves a national security or terrorism matter;
- there is an imminent risk of death, violence, or physical harm to any person or property;
- the enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
- there is an imminent risk of destruction of evidence material to an ongoing criminal case.²²

The memorandum also explicitly explains that it provides guidance for ICE officers in exercising their discretionary law enforcement functions and does not affect their statutory authority. It further states that “[n]othing in this memorandum is intended to and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.”²³

On February 8, 2017, ICE agents arrested several Latino men outside a homeless shelter housed in a church in Alexandria, Virginia.²⁴ The move prompted several elected officials to raise concerns about the church being targeted by ICE.²⁵ However, an ICE spokeswoman emphasized that the arrests took place across the street from the church, not on church property, and explained that the agency’s “sensitive location” policy was followed.²⁶ She further explained that “DHS is committed to ensuring that people seeking to participate in activities or utilize services provided at any sensitive location are free to do so without fear or hesitation.”²⁷

22 See John Morton, *supra* note 201.

23 *Id.*

24 Julie Carey, *ICE Agents Arrest Men Leaving Fairfax County Church Shelter*, NBC Wash. (Feb. 15, 2017), <http://www.nbcwashington.com/news/local/ICE-Agents-Arrest-Men-Leaving-Alexandria-Church-Shelter-413889013.html>.

25 Tess Owen, *Cold as Ice: Immigration Agents Arrested Men as They Left a Church Hypothermia Shelter in Virginia*, Vice News (Feb 16, 2017), <https://news.vice.com/story/ice-agents-arrest-men-leaving-hypothermia-shelter-in-virginia>.

26 See Julie Carey, *supra* note 24.

27 See Tess Owen, *supra* note 25.

B. Guidance relating to ICE's exercise of prosecutorial discretion is subject to change.

Although to date ICE has not departed from the “sensitive location” policy documented in the 2011 memorandum, it could choose to do so at any time. The Trump Administration has taken other steps to depart from Obama-era enforcement practices. Specifically, the new administration has articulated immigration enforcement priorities in a manner that sweeps a wider group of undocumented aliens into priority groups for removal. It has also reaffirmed its intention to proceed with removal proceedings against all foreign nationals who are in the country in violation of law—even those not identified as a priority. Most recently the Trump Administration adopted a “zero tolerance policy” of criminally prosecuting every adult arrested for entering the U.S. illegally.²⁸

On February 20, 2017, then Secretary of Homeland Security, John F. Kelly, issued a Memorandum titled “Enforcement of the Immigration Laws to Serve the National Interest” (Immigration Enforcement Memo).²⁹ This memorandum provides guidance for Department of Homeland Security (DHS) officers when implementing President Trump’s January 25, 2017 Executive Order (EO) titled “Enhancing Public Safety in the Interior of the United States.”³⁰

The Immigration Enforcement Memo rescinded guidance issued during the Obama Administration that clearly expressed that removal of certain aliens who were not criminals was not an enforcement priority. In contrast, the Immigration Enforcement Memo identifies priorities that sweep more widely and makes clear that aliens not specifically identified as a priority are not *deprioritized* for removal.³¹ In other words, while the Immigration Enforcement Memo instructed the DHS to focus its limited enforcement resources on certain categories of aliens, it also directed that DHS will not decline to bring enforcement action against those who are not so described.

In a statement following the announcement of the administration’s intent to phase out DACA, President Trump stated that he had “advised the Department of Homeland Security that DACA recipients are not enforcement priorities unless they are criminals, are involved in criminal activity, or are members of a gang.”³² Nonetheless, the shift in priorities announced in the Immigration Enforcement Memo suggests undocumented students, including DACA recipients, may be at increased risk of removal.

28 Associated Press, *Sessions: Zero-tolerance” policy may cause families to be split at border*, CBS News (May 8, 2018), <https://www.cbsnews.com/news/sessions-zero-tolerance-policy-may-cause-families-to-be-split-at-border/>.

29 Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., on Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

30 *Enhancing Public Safety in the Interior of the United States*, Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017).

31 See John Kelly, *supra* note 29.

32 David Nakamura, *Trump Administration Announces End of Immigration Protection Program for ‘Dreamers,’* Wash. Post (Sept. 5, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/09/05/trump-administration-announces-end-of-immigration-protection-program-for-dreamers/?utm_term=.151da24046af.

C. Proposed legislation targets “sanctuary campuses”

At least two campus administrators have cited concerns about losing funding when declining to identify as a sanctuary campus. New Mexico State University President Garrey Carruthers said the University would “not declare itself a sanctuary,” and specifically would not ban ICE officials from campus because doing so could jeopardize federal funding and the institution’s ability to issue visas to international students and visiting scholars.³³ Similarly, Emory University President Claire Sterk has observed that “[d]eclaring ourselves a sanctuary campus, which has potent symbolism, could have the collateral effect of reducing funding for teaching, education and research, directly harming our students, patients and the beneficiaries of our research.”³⁴

Such concerns reflect a fear that sanctuary campuses will be punished by new legislation or executive branch actions that restrict funding to such campuses. Indeed, President Trump’s repeated efforts to restrict federal funding for sanctuary cities suggest campuses have reason to be cautious. University counsel and administrators should track proposed legislation that targets sanctuary campuses as well as developments related to sanctuary cities as the latter may result in precedents that could affect colleges and universities.

On March 13, 2018, the Fifth Circuit largely upheld a Texas law first enacted in May 2017 that prohibits local and campus police forces from adopting policies that would prevent officers from asking about arrestees’ immigration status or thwarting communication with immigration officials and requires campus police comply with ICE detainer requests.³⁵ Pennsylvania legislator Jerry Knowles (R-Berks/Carbon/Schuylkill) has also introduced a bill targeting sanctuary campuses. His bill would make colleges and universities ineligible for state aid if their governing body adopts a rule, order or policy that would (1) prohibit the enforcement of a federal law or the laws of Pennsylvania pertaining to an immigrant or immigration; (2) refuse federal authorities access to a campus; (3) direct employees not to communicate, coordinate or cooperate with federal authorities regarding an individual’s immigration status; or (4) apply an adverse employment action against an employee of an institution of higher education for communicating, coordinating or cooperating with federal authorities regarding an immigration issue.³⁶

33 Dr. Garrey Carruthers, Chancellor, N.M. State Univ., *New Mexico State University President Comments on Effort to Create A Sanctuary Campus* (Dec. 2, 2016), <http://krwg.org/post/new-mexico-state-university-president-comments-efforts-create-sanctuary-campus>.

34 Melissa Cruz, ‘Sanctuary Campuses’ Defy Trump—Though at Risk, *RealClear Politics* (Feb 18, 2017), http://www.realclearpolitics.com/articles/2017/02/18/sanctuary_campuses_defy_trump_though_at_a_risk_133117.html (referencing proposed state legislation in Georgia that would affect state funding for public and private colleges in the state).

35 *City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 173 (5th Cir. 2018) (affirming the district court’s injunction against enforcement of Section 752.053(a)(1) only as it prohibits elected officials from “endors[ing] a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws.”).

36 H.B. 14, 2017-2018 Leg., Reg. Sess. (Pa. 2017).

At the federal level, in January 2017, Representative Duncan Hunter (R-CA) introduced the “No Funding for Sanctuary Campuses Act” (H. R. 483), which would amend Title IV of the Higher Education Act of 1965 to make sanctuary campuses ineligible for Title IV funding (which includes most federal student financial aid programs such as the Pell Grant, Direct Loan, Perkins Loans and the Federal Work Study programs). The bill has been referred to the House Committee on Education and the Workforce and defines “sanctuary campus” as a campus that has in effect an “ordinance, policy, or practice” that prohibits or restricts the institution or its employees from:

- (i) sending, receiving, maintaining, or exchanging with any Federal, State, or local government entity information regarding the citizenship or immigration status (lawful or unlawful) of any individual;
- (ii) complying with a request lawfully made by the Secretary of Homeland Security ... to comply with a detainer for, or notify about the release of, an individual; or
- (iii) otherwise complying with section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1373).³⁷

The bill further indicates that sanctuary campuses include any institution that (1) “brings in, or harbors, an alien in violation of section 274 (a)(1)(A) of the Immigration and Nationality Act;” (2) makes aliens without lawful immigration status eligible for in-state tuition to the same extent as a citizen or national of the United States is eligible for such benefits; or (3) prevents the Department of Homeland Security from recruiting students on an equal basis with other employers.³⁸

The prospects for enactment of these bills are unclear. But, the types of conduct they target may help institutions understand what policies and practices may draw scrutiny from state and federal agencies. In addition to tracking the progression of these and similar pieces of proposed legislation, educational institutions may also benefit from tracking the legal battle related to the Trump Administration’s efforts to withhold federal funding from sanctuary cities. The way in which the administration attempts to define “sanctuary jurisdictions” and the outcome of its efforts to withhold federal funding from such jurisdictions could ultimately affect campuses.

D. Trump Administration aims to withhold funding from “sanctuary cities”

On January 25, 2017, President Trump issued an Executive Order (EO) titled “Enhancing Public Safety in the Interior of the United States”. Among other things, the EO declared that cities that do not comply with federal immigration enforcement agents “are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.”³⁹

37 No Funding for Sanctuary Campuses Act, H.R. 483, 115th Cong. (2017).

38 *Id.* The bill also includes an exception carving out campus policies that might otherwise cause the campus to be labeled a sanctuary campus if the policies apply only when a student comes forward as a victim or witness to a criminal offense. *See Id.* § 493E(a)(2).

39 Exec. Order No. 13,768, *supra* note 30, at § 9.

The EO does not define sanctuary jurisdictions beyond identifying them as those that willfully refuse to comply with 8 U.S.C. § 1373 (Section 1373).⁴⁰ Section 1373(a) provides that a state or local government entity or official “may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” This restriction is consistent with previously issued U.S. Department of Justice (DOJ) guidance to grant recipients, including certain self-described sanctuary cities, which reminded recipients that they must comply with Section 1373 as a condition of receipt of federal funds under specific grant programs.⁴¹

Multiple cities challenged the EO on constitutional grounds⁴² and on April 25, 2017, a federal district court in California entered a nationwide preliminary injunction blocking enforcement of the section of the EO that declared jurisdictions that refused to comply with Section 1373 ineligible for federal grants.⁴³ That court explained that:

The Constitution vests the spending powers in Congress, not the President, so the Order cannot constitutionally place new conditions on federal funds. Further, the Tenth Amendment requires that conditions on federal funds be unambiguous and timely made; that they bear some relation to the funds at issue; and that the total financial incentive not be coercive. Federal funding that bears no meaningful relationship to immigration enforcement cannot be threatened merely because a jurisdiction chooses an immigration enforcement strategy of which the President disapproves.⁴⁴

The Trump Administration’s efforts to directly condition specific grants on a jurisdiction’s cooperation with its immigration enforcement efforts has also been blocked by several courts. In July 2017, DOJ announced that the Edward Byrne Memorial Justice Assistance Grants (Byrne JAG grants) would only be available to jurisdictions that (1) complied with any DHS request for at least 48 hours’ notice of the date and time of release of any unauthorized person, (2) allowed unrestricted access to their prisons for the conduct of interviews of detainees, and (3) certified compliance with Section 1373. The Federal Circuit Court of Appeals for the Seventh

40 *Id.*

41 See Memorandum from Karol V. Mason, Asst. Att’y Gen., Office of Justice Programs, U.S. Dep’t of Justice, to Michael Horowitz, Inspector Gen., U.S. Dep’t of Justice, on Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (July 7, 2016), http://culberson.house.gov/uploadedfiles/2016-7-7_section_1373_-_doj_letter_to_culberson.pdf; Memorandum from Michael E. Horowitz, Inspector Gen., U.S. Dep’t of Justice, to Karol V. Mason, Asst. Att’y Gen., Office of Justice Programs, U.S. Dep’t of Justice, on Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (May 31, 2016), <https://www.oig.justice.gov/reports/2016/1607.pdf>.

42 See e.g. Brian Amaral, *2 Mass. Sanctuary Cities Sue Trump Over Funding Cut Threat*, Law360 (Feb. 9, 2017), <https://www.law360.com/articles/890080/2-mass-sanctuary-cities-sue-trump-over-funding-cut-threat>.

43 *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 508 (N.D. Cal. 2017), *reconsideration denied*, No. 17-CV-00485-WHO, 2017 WL 3086064 (N.D. Cal. July 20, 2017), appeal docketed, Nos. 17-16886 and 17-16887 (9th Cir. Sept. 18, 2017).

44 *Id.*

Circuit recently held that the Attorney General lacked the authority to impose these conditions and upheld a nationwide injunction blocking DOJ from conditioning the Byrne JAG grants on local compliance with federal immigration authorities.⁴⁵

Perhaps of even greater consequence, one federal district court addressing the constitutionality of the same conditions on the Byrne JAG grants recently held not only that the conditions were unconstitutional but that Section 1373 itself was unconstitutional.⁴⁶ Relying on a recent U.S. Supreme Court decision, *Murphy v. NCAA*, which legalized sports gambling at the state level, the court explained that “[b]ecause Section 1373 directly tells states and state actors that they must refrain from enacting certain state laws, it is unconstitutional under the Tenth Amendment.”⁴⁷

The legal battles related to the executive branch’s ability to place conditions of federal grant programs will no doubt continue, and future court decisions may have implications for colleges and universities. This will certainly be the case where campus police officers operate within a sanctuary jurisdiction that may have policies, laws or ordinances preventing or limiting cooperation between campus police and federal immigration enforcement officials.⁴⁸

III. Existing law should guide campus decision-making

Although much is unclear about what a sanctuary campus is and how future legislative and executive branch actions will affect such campuses—however they may be defined—a number of legal authorities that are currently in place should guide institutions’ policies and practices.

A. *Sharing documents and information with immigration officials*

Although student campus sanctuary petitions varied, many sought a commitment from institutions not to share in the first instance or to withhold upon inquiry information about students’ immigration status from ICE and CBP agents. Below we examine the extent to which an institution may keep confidential, or decline, to share immigration status and other student information with ICE and CBP agents upon request.

1. *Absent a warrant or subpoena, no specific legal requirement compels institutions to provide records to immigration officials that identify undocumented students.*

With a few exceptions, including students participating in a Student and Exchange Visitor Program (SEVP) (discussed below), federal law does not clearly

45 See *City of Chicago v. Sessions*, 888 F.3d 272, 287 (7th Cir. 2018).

46 *City of Philadelphia v. Sessions*, No. CV 17-3894, 2018 WL 2725503 (E.D. Pa. June 6, 2018).

47 *Id.* at *33.

48 Oregon State University has recognized this dynamic and explained to its community that “Oregon is already a sanctuary state. Oregon law provides that no state law enforcement agency (such as the Oregon State Police) that serves the OSU Corvallis campus—can use state resources ‘for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the U.S. in violation of federal immigration laws.’” See Edward J. Ray, *supra* note 8.

require that institutions turn student information over to ICE of CBP agents absent a warrant or subpoena. Section 1373 prevents state and local entities from prohibiting or restricting a government entity or official from providing information to ICE. However, as noted above, one federal district court recently held that this statute is unconstitutional. Moreover, courts have not addressed whether, and under what set of facts, public or private higher education institutions are “state or local entities” within the meaning of the statute.

Even if the cooperation obligation in Section 1373 is constitutional and applies to some higher education institutions, that obligation does not appear to override the privacy protections provided by the Family Educational Rights and Privacy Act (FERPA).⁴⁹ FERPA generally forbids schools to disclose educational records or personally identifiable information derived from such records to a third party unless the eligible student (or if under 18 years old his or her parent) has provided written consent.⁵⁰ Student consent is not required when an institution is complying with a judicial order or lawfully-issued subpoena.⁵¹ However, schools complying with a lawfully-issued subpoena or court order must make a “reasonable effort to notify” the student before compliance with the subpoena.⁵² Therefore, even if Section 1373 were to be interpreted to apply to universities and colleges, those that have practices and policies that protect the confidentiality of citizenship or immigration status of their students by requiring a court order or lawfully-issued subpoena before disclosing school records or personally identifiable student information to immigration officials could now reasonably argue under these developing sanctuary city cases that they do not violate the statute. And schools that allow exceptions to their confidentiality policies where an undocumented student is suspected by the campus police of committing a crime based on their own investigation or based upon a valid judicial warrant are less likely to be challenged by other law enforcement agencies beyond ICE.

Of course, institutions that fail to comply with a court order or subpoena could be held in contempt of court. But, it is unclear whether an ICE administratively issued subpoena, without more, is a “lawfully- issued subpoena” that triggers the general FERPA exception to consent in the first place. ICE issues administrative subpoenas for books and records through its own internal processes and those

49 In 1999, the Department of Justice Office of Legal Counsel (OLC) examined the relationship between Section 1373 and a federal statute barring disclosure of census-related information. The OLC concluded that Section 1373 did not act to repeal the census privacy law. *See Relationship Between Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and Statutory Requirement for Confidentiality of Census Information*, 23 Op. O.L.C. Supp. 5 (1999), [http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/](http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/10/1999-05-18-census-confidentiality.pdf)

1999-05-18-census-confidentiality.pdf. The same analysis by extension suggests that Section 1373 did not repeal FERPA and other privacy protections in federal law. See Elizabeth M. McCormick, *Federal Anti-Sanctuary Law: A Failed Approach to Immigration Enforcement And A Poor Substitute For Real Reform*, 20 Lewis & Clark L. Rev. 165, 205 (2016).

50 20 U.S.C. § 1232g (2012); 34 C.F.R. § 99.30(a) (2015). FERPA applies to all schools, public and private, that receive funds under an applicable program of the U.S. Department of Education. *Id.*

51 *See* 34 C.F.R. § 99.31(a)(9).

52 *See id.* § 99.31(a)(9)(ii).

administrative subpoenas are not issued by a court.⁵³ When an employer refuses to comply with an administrative subpoena, ICE agents can only enforce it after securing a judicial order from a federal judge.

At other times, ICE may secure court-issued subpoenas from the outset. Whether the FERPA provision that allows institutions to release personally identifiable information without student consent in response to a “lawfully-issued subpoena” extends to administrative ICE subpoenas that have not been reviewed by a court has not been addressed in federal guidance or court decisions.⁵⁴

In addition, FERPA notably excludes certain information from the definition of “educational records,” including “records maintained by a law enforcement unit of the educational agency ... that were created by that law enforcement unit for the purpose of law enforcement.”⁵⁵ A school is therefore allowed to disclose such records without student consent or legal process. Similarly, FERPA permits public disclosure of “directory information” without the student’s consent. However, each school must inform students what information is considered “directory information” and provide students an opportunity to withhold consent for disclosure of “directory information.” If this is done properly, an institution is permitted to disclose “directory information” without student consent, a court order, or lawfully-issued subpoena.

With respect to both exceptions to the consent requirement, FERPA *permits but does not mandate* disclosure of the information without student consent. Thus, a campus policy to require a warrant or court order before sharing information that falls into these FERPA exceptions would not run afoul of FERPA. However, where campus officials are state government employees, enacting such a policy may present risks under Section 1373 if the information protected is arguably “citizenship or immigration status” of the student. For instance, if ICE requested the residence address of an enrolled student, and that student had not objected to the institution sharing his or her directory information, even though address is not citizenship or immigration status information, ICE may, as it has in the *City of Philadelphia* litigation, take the position that an institutional policy that prevents employees from sharing this address information in the absence of a lawfully-issued subpoena is counter to the obligation under Section 1373 not to prohibit such information sharing.

2. Document retention programs

Institutions should maintain a document retention program that provides for periodic archiving or destruction of documents pursuant to a regular document maintenance schedule. Such programs must comply with other applicable regulatory requirements for maintenance of student records, records pertaining to visas, and any other applicable document retention rules. Any policy that singles out certain

53 See 8 U.S.C. §1225(d)(4),

54 According to an IRS memorandum, the Department of Education considers an administrative subpoena issued by the IRS “lawfully-issued” for purposes of FERPA. Internal Revenue Serv., Office of Chief Counsel, Memorandum No. 200302046 (Oct. 31, 2002), <https://www.irs.gov/pub/irs-wd/0302046.pdf>.

55 20 U.S.C. § 1232g(a)(4)(B)(ii).

types of documents for destruction because of their potentially incriminating nature would not likely be construed by government authorities (or courts) as part of a regular document retention program. In fact, such a program might suggest concealment, or an attempt to avoid, frustrate, or otherwise impede an immigration investigation.⁵⁶

Moreover, the government may view document destruction policies that amount to an attempt to conceal aliens or impede an immigration investigation as inconsistent with provisions of the Immigration and Nationality Act (INA) that prohibit the aiding or abetting of another person who is harboring or encouraging an undocumented alien to remain in the United States.⁵⁷ Or depending upon the circumstances, a document destruction policy that selectively destroys documents identifying students with non-legal immigration status could be construed as evidence that the institution intended to conceal or otherwise harbor undocumented students. In addition, selective destruction of documents that identify undocumented students carries some risk implicating Section 1373. Section 1373 provides not only that persons or agencies may not restrict or prevent the sharing of citizenship or immigration status information with immigration authorities but also may not adopt policies that (for information it otherwise collects or is required to collect) restrict a federal, state, or local government entity from maintaining “information regarding the immigration status, lawful or unlawful, of any individual” in any way.⁵⁸

The Student and Exchange Visitor Information System provides ICE access to certain student records without a subpoena and provides a mechanism for DHS to deter certain campus policies and practices.

While in many circumstances, institutions can demand a subpoena before turning student information over to ICE, an institution’s ICE-authorized acceptance of international students in the F, M, and J nonimmigrant categories and concomitant enrollment in the Student and Exchange Visitor Information System (SEVIS) provides the government an administrative tool to come onto campus and obtain student information contained in SEVIS without formal process. In addition, ICE’s broad authority to certify (or to decline to certify) an institution’s participation in the Student and Exchange Visitor Program (SEVP) could be used to encourage

56 Various criminal obstruction of justice statutes – for instance, 18 U.S.C. §§ 1503, 1505, 1510, and 1512 – can be and have been used to punish individuals and entities who have destroyed or concealed information relating to pending or potential investigations. See *United States v. McKnight*, 799 F.2d 443 (8th Cir. 1986) (destruction of bank documents subject to grand jury subpoena); *United States v. Sutton*, 732 F.2d 1483 (10th Cir. 1984) (Section 1505 conviction stemming from obstruction of Department of Energy audit by document destruction); *United States v. Jahedi*, 681 F. Supp. 2d 430 (S.D.N.Y. 2009) (document destruction in violation of Sections 1503 and 1512(c)(1)); *United States v. Perraud*, 672 F. Supp. 2d 1328 (S.D. Fla. 2009) (destruction of documents related to pending SEC investigation); *United States v. Lundwall*, 1 F. Supp. 2d 249 (S.D.N.Y. 1998) (withholding and destroying documents sought in civil discovery); *United States v. Fineman*, 434 F. Supp. 197 (E.D. Pa. 1977) (defendant aware of grand jury investigation, and caused document to be destroyed knowing that it might be sought by grand jury), *aff’d*, 571 F.2d 572 (3d Cir. 1977).

57 See 8 U.S.C. § 1324(a)(1)(A)(v).

58 See *id.* § 1373(b).

institutions to cooperate with immigration enforcement efforts in other ways. SEVP certification is required for an institution to enroll nonimmigrant foreign students.

All schools in the United States that enroll F-1, and/or M-1 nonimmigrant students must be certified by SEVP. Schools petition for certification by submitting a Form I-17, "Petition for Approval of School for Attendance by Nonimmigrant Student," in the SEVIS portal. Within ICE, SEVP approves or denies these requests for certification. Once certified, the school has access to SEVIS and may issue Form I-20, "Certificate of Eligibility for Nonimmigrant Student Status," which prospective nonimmigrant students need to secure visas.⁵⁹ To maintain certification, the school must comply with SEVP regulations and policies, as well as record keeping and reporting requirements.⁶⁰

The SEVIS system tracks the records of these nonimmigrant and visiting students and their continued participation in their educational programs. Further, SEVP-certified institutions are subject to on-site review related to SEVP participating students at any time, without a warrant or subpoena. These institutions are also required to maintain and produce information and documents related to F-1 or M-1 students to DHS at any time upon request.⁶¹ Although DHS agents need not provide a subpoena for such requests, the institution may request that notice be given in writing. An institution has three days to respond to such a written request (or ten days if the information request is about a class of students).⁶² However, if a student is in custody, the institution must respond "orally on the same day the request for information is made . . . and DHS will provide a written notification that the request was made after the fact, if the school so desires."⁶³ In addition, DHS regulations require that F-1 and M-1 students waive their privacy rights under FERPA and prevent educational institutions from invoking FERPA protections in order to avoid disclosing student information that it is otherwise required to provide to DHS.⁶⁴

In addition to providing ICE access to student records for SEVP-participating students without need of a warrant or subpoena, the broad authority ICE has to deny SEVP certification to an institution could be used to encourage institutions to cooperate with immigration enforcement efforts in other ways. SEVP-related regulations list a number of reasons for denial of SEVP certification, but the list is non-exhaustive. The regulations authorize DHS/ICE to withdraw or deny SEVP

59 Information about students holding J-1 visas is also in SEVIS. Sponsoring organizations must issue a form DS 2019 in order for visiting students to secure their J-1 visas. These visas are authorized by the US Department of State, which follows a process analogous to the process for issuing a Form I-20 for F and M visas.

60 See generally 8 C.F.R. § 214.3.

61 The Note to 8 C.F.R. § 214.3(g)(1) provides that DHS officers "may request any or all of the data in [8 C.F.R. § 214.3(g)(1)(i)-(x)] on any individual student or class of students upon notice."

62 See *id.*

63 *Id.*

64 See 8 C.F.R. § 214(1)(h).

certification for “any valid and substantive reason.”⁶⁵ Whether ICE could use such a general provision as authority to enforce immigration policy, including a policy against sanctuary campuses, is an open question.

4. Implications for cooperation agreements with law enforcement

Campus policies relating to sharing information with immigration law enforcement agencies must be formulated with other legal obligations in mind. In many instances, the laws that establish campus police departments outline the obligations of such forces to cooperate with local police departments. Similarly, some campus police departments have entered contractual agreements with local municipal police departments that must be considered.

A campus police department may have cooperation obligations under the law that established its authority. Practices adopted in response to a call for a sanctuary campus could be inconsistent with those obligations. Similarly, many universities have entered into memoranda of understanding with state or local police departments that detail commitments to work together, and the implementation of sanctuary campus policies might frustrate the purpose of such agreements or the ability of such organizations to work cooperatively. The extent to which such tension arises may depend in part on local law enforcement policies and practices relating to federal immigration law enforcement. Even absent any conflicting legal obligations, institution administrators may want to consider how adopting “sanctuary” policies or practices for undocumented students who are victims of or witnesses to crimes or more generally for any ICE-related inquiry that is not accompanied by a judicial warrant might affect the university’s ability to cooperate with state and local police on a range of matters.

B. Permitting ICE officials on campus

Many sanctuary campus petitions called on institutions to prevent ICE officers from entering campus without a warrant. Below we analyze (1) the extent to which campuses can require a warrant before ICE (or other law enforcement) agents enter campus and (2) the risk that such a policy could be found to violate Section 1373’s information-sharing requirement or the provisions of the INA that make it illegal to harbor an alien.

Immigration officers have authority “to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.”⁶⁶ But this statute does not describe any particular place or manner for the exercise of ICE authority. ICE interrogation can include a brief detention, not amounting to arrest, as outlined in 8 C.F.R. § 287.8(b). For making arrests without a warrant, any immigration officer has the power “to arrest any alien in the United States, if he has reason to believe that the alien ... arrested is in the United States in violation of any ... law or regulation and is likely to escape before a warrant can be obtained

65 *See id.* § 214.4(a)(2).

66 8 U.S.C. § 1357(a)(1).

for his arrest.”⁶⁷ Courts have interpreted “reason to believe” to mean probable cause in this context, which exists when “the facts and circumstances within the arresting officers’ knowledge” are sufficient in themselves to warrant a prudent person’s “belief that an offense has been or is being committed.”⁶⁸

Immigration officers are not permitted to exercise these powers in a manner that violates the Fourth Amendment, which prohibits “unreasonable searches and seizures.”⁶⁹ Courts have analyzed Fourth Amendment challenges brought by non-citizens.⁷⁰ The U.S. Supreme Court, however, has not directly held that Fourth Amendment protections extend to undocumented aliens residing in the U.S.⁷¹ Even if undocumented aliens do enjoy such protections, those facing removal may be without a meaningful remedy for unconstitutional searches and seizures. The exclusionary rule, which routinely prevents use of evidence secured through an unconstitutional search or seizure in a criminal trial, does not apply equally in an immigration removal proceeding. In *INS v. Lopez-Mendoza*, the U.S. Supreme Court held that the exclusionary rule did not generally apply to removal proceedings but noted that its decision “[did] not deal ... with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”⁷² Thus, while non-citizens may theoretically be protected from unreasonable searches and seizures, it is possible that evidence obtained through an unconstitutional search may still be relied on in a removal proceeding.

Perhaps more importantly to universities and colleges, the Fourth Amendment does not necessarily require that ICE officers secure a warrant before setting foot on campus. Students’ Fourth Amendment protections would require a warrant only for searches and seizures conducted in places in which an individual has a reasonable expectation of privacy.⁷³ Because many parts of a university campus are open to the public and accessible by roads and walkways, students may have difficulty establishing that they have an expectation of privacy in the entire campus. Campuses may therefore be unable to legally (or practically) require a warrant for ICE agents to access the public spaces on campus. In contrast, students likely do have an expectation of privacy in restricted buildings, dormitories, or other living spaces so campuses may be able to legally require a warrant before ICE agents enter those spaces.

The school’s own property interests in controlling access to its facilities—particularly to places on campus that are regularly open to the public—may also

67 *Id.* § 1357(a)(2).

68 *See, e.g., United States v. Olivares*, 496 F.2d 657, 660 (5th Cir. 1974) (internal quotation marks omitted).

69 U.S. Const. amend. IV.

70 *See, e.g., INS v. Delgado*, 466 U.S. 210, 213 n.1, 218 (1984); *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983); *Ill. Migrant Council v. Pilliod*, 531 F. Supp. 1011, 1022-23 (N.D. Ill. 1982).

71 *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (explaining that this issue was not squarely before the court in the current case or in *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984).

72 *Id.*

73 *See Katz v. United States*, 389 U.S. 347 (1967).

be limited. DHS regulations confer enforcement powers on immigration officials. Among other things, those regulations provide that immigration officers can perform site inspections without a warrant. Site inspections are “enforcement activities undertaken to locate and identify aliens illegally in the United States, or aliens engaged in unauthorized employment, at locations where there is a reasonable suspicion, based on articulable facts, that such aliens are present.”⁷⁴ The regulations also describe the warrant requirement for non-public areas of a business or residence:

An immigration officer may not enter into the non-public areas of a business, a residence including the curtilage of such residence, or a farm or other outdoor agricultural operation, except as provided in section 287(a)(3) of the Act [relating to searches of vehicles “a reasonable distance” from the external boundary of the United States and vessels within U.S. territorial waters], for the purpose of questioning the occupants or employees concerning their right to be or remain in the United States unless the officer has either a warrant or the consent of the owner or other person in control of the site to be inspected. When consent to enter is given, the immigration officer must note on the officer’s report that consent was given and, if possible, by whom consent was given. If the immigration officer is denied access to conduct a site inspection, a warrant may be obtained.⁷⁵

This provision recognizes that some areas of a business are non-public and therefore would require a warrant or consent to access. However, it also posits that immigration officers can access other areas of a business that are clearly public without a warrant.

Accordingly, ICE officials can likely access, without a warrant, areas of a campus that are open and plainly accessible. Colleges and universities might ask immigration officials to check in with campus security before entering such areas of campus, but such advance notice would be a courtesy and not a legal requirement. Any such requirement, of course, would need a provision for exigencies such as “hot pursuit” of dangerous suspects who may cause harm to students or campus employees, or if law enforcement action were delayed in order to comply with a campus demand for advanced notice, an institution could face scrutiny and potentially third-party liability for any harms that result due to the delay. In May 2016, for instance, the family of a woman murdered by an unauthorized alien in San Francisco filed a wrongful death suit against the city and its sheriff, alleging that a sanctuary city policy facilitated the murder.⁷⁶

74 See 8 C.F.R. § 287.8(f)(1).

75 See *id.* § 287.8(f)(2).

76 See Richard Gonzales, *Family of Kate Steinle Files Wrongful Death Lawsuit*, NPR (May 27, 2016), <http://www.npr.org/sections/thetwo-way/2016/05/27/479784842/family-of-kate-steinle-file-wrongful-death-lawsuit>. There is some risk that if an institution’s policy limits law enforcement’s capacity to respond to exigent circumstances, the institution could face a third-party liability claim from an injured party. Students have asserted that campuses have a duty to protect students from crimes committed by a third party under a number of legal theories, including the institution’s status as a landowner, the special relationship theory, and duties owed by campus police who undertake to protect students. See Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319 (2008).

A policy with a good-faith insistence upon legal process before entering areas of campus in which students have a reasonable expectation of privacy and in which the school has a valid interest in the orderly conduct of its business of providing an appropriate learning environment is likely defensible under the harboring provision of the INA (discussed at length below).

Even when campus officials have a good-faith basis to insist on a warrant (or a subpoena for records), they should do so in a manner that does not actively frustrate law enforcement efforts. For instance, if, while awaiting service of a warrant, a campus official was to hide the undocumented persons or destroy records, a court or law enforcement authority could take the position that an institution has run afoul of the harboring provision discussed below. Moreover, such steps might also trigger separate obstruction of justice charges if the student was a criminal suspect or enhancements under the U.S. Sentencing Guidelines for harboring, as they would be willfully impeding the investigation of ICE officials.⁷⁷

Although campus officials may not legally obstruct an immigration investigation, campus officials (including campus police) do not have a broad affirmative duty to report violations of immigration laws.⁷⁸ Provisions of the INA allow state and local law enforcement to enter into agreements with federal authorities to enforce the immigration laws, but the INA provides that “[n]othing in this subsection shall be construed to require any State or political subdivision of a State” to enter into such arrangements.⁷⁹ Thus, institutions do not generally have an affirmative obligation to notify immigration officials about student-related matters or to assist such officials beyond the normal legal requirements to comply with legal process or other lawful requests.⁸⁰

Although the INA does not require immigration enforcement cooperation agreements, as noted above, ICE’s broad authority to deny SEVP certification to an institution could be used to encourage cooperation. In addition, specific institutions may have cooperation and reporting obligations that require campus police to take certain actions under the state or local laws that establish the authority of those police departments. Campuses should take care to ensure that no campus

77 See U.S. Sentencing Guidelines Manual § 3C1.1 (U.S. Sentencing Comm’n 2015). See also *United States v. Manzano-Huerta*, 809 F.3d 440 (8th Cir. 2016) (affirming the conviction of a defendant prosecuted for violating the harboring statute with an obstruction enhancement because he provided materially false information to law enforcement about the employment status of an unauthorized employee).

78 There is no general affirmative duty for citizens to report violations of the immigration laws. See *United States v. Driscoll*, 449 F.2d 894, 896 (2d Cir. 1971) (defendant aware of alien smuggling had no duty to alert authorities); see also *Doe v. City of New York*, 860 N.Y.S.2d 841, 844 (N.Y. Sup. Ct. 2008) (holding that although the Metropolitan Transit Authority was a government entity subject to the requirements of Section 1373, Section 1373 did not impose an affirmative duty to report information to federal immigration authorities), *aff’d*, 890 N.Y.S.2d 548 (N.Y. App. Div. 2009).

79 8 U.S.C. § 1357(g)(9).

80 Of course, although an individual is not required to affirmatively assist authorities, various federal statutes prohibit obstruction of civil, administrative, and criminal investigations and proceedings. See *supra* note 56.

sanctuary policies or practices undermine their ability to meet these obligations. Similarly, many universities have entered into memoranda of understanding with state or local police departments that detail commitments to work together. Administrators should therefore carefully consider whether any policies they adopt undermine the campus police department's ability to cooperate with local police in the ways required by law or by any existing agreement with state or local police.

C. Institutions cannot "harbor" illegal aliens.

Another consideration that must guide campuses' policy development is whether any rules or practices designed to support and protect students without legal immigration status could be construed to violate the harboring provision of the INA. Practices relating to campus housing, financial aid, and document destruction could come under such scrutiny.

The harboring provisions of the INA impose criminal penalties and fines on persons who do any of the following with an unauthorized alien: (i) bring into the United States, (ii) transport within the United States, (iii) conceal, harbor, or shield from detection in any place, or (iv) encourage or induce to come to, enter, or reside in the United States.⁸¹ For subparts (ii), (iii), and (iv), the defendant need not know that the alien is unauthorized; "reckless disregard" of this fact is sufficient. The statute also penalizes attempts to commit those acts, as well as conspiring or aiding and abetting such acts.

Courts have interpreted the harboring prohibition broadly, generally considering "shielding," "harboring," and "concealing" to encompass "conduct tending substantially to facilitate an alien's 'remaining in the United States illegally.'"⁸² This broad interpretation of key terms of the harboring provision could be applied to conclude that activities that do not involve active or affirmative concealment of unauthorized aliens is still harboring. For example, when in the 1980s, students proposed that the University of California system offer unauthorized refugees "sanctuary" in private student housing, federal immigration officials indicated that facilitators of such a program could face prosecution.⁸³ However, some recent court decisions have begun to limit the meaning of "harboring" under the statute by requiring that the defendant do more than simply provide shelter or transportation to an undocumented alien. These cases suggest that "harboring" means keeping an alien in any place, moving an alien, or providing physical protection with the intent to conceal from government authorities.

81 8 U.S.C. § 1324(a). A "person" under the statute can be either "an individual or an organization." *See id.* § 1101(b)(3).

82 *United States v. Lopez*, 521 F.2d 437, 441 (2d Cir. 1975). *See also* 3C Am. Jur. 2d *Aliens and Citizens* § 2588 (citing *Lopez*, 521 F.2d 437 and *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977)). *But see United States v. Ye*, 588 F.3d 411, 414 (7th Cir. 2009) (rejecting the requirement that actions substantially facilitate an alien's remaining in the U.S. and holding instead that "concealing, harboring, or shielding from detection an alien is unlawful conduct, regardless of how effective a defendant's efforts to help the alien might tend to be").

83 *See* Bill Billiter, *'Sanctuary' for Central Americans Becomes a UC Cause*, LA Times (Feb. 1, 1985), http://articles.latimes.com/1985-02-01/local/me-5929_1_sanctuary-movement.

This narrowed definition was recently referenced in *United States v. McClellan*.⁸⁴ There, a restaurant owner was convicted under the harboring provision for employing and providing housing for unauthorized aliens. The *McClellan* court affirmed that the defendant had violated the harboring statute because the defendant had not *simply provided housing*, but rather had “deliberately safeguard[ed] members of a specified group from the authorities.”⁸⁵ The court explained, “[A] defendant is guilty of harboring for purposes of § 1324 by ‘providing . . . a known illegal alien a secure haven, a refuge, a place to stay in which the authorities are unlikely to be seeking him.’”⁸⁶

In sum, federal case law is unclear with regard to what level of intent is required for harboring. Some courts have required that the defendant act with clandestine intent to hide the alien,⁸⁷ while others have required that the defendant’s actions “substantially facilitate” the alien’s unlawful stay,⁸⁸ and still others have held that “simple sheltering” is sufficient to trigger statutory liability.⁸⁹

Separate from establishing liability for concealing, harboring, or sheltering an alien, Section 1324 also targets those who “encourage or induce” an unauthorized person to come to, enter, or reside in the United States.⁹⁰ Federal courts have explained that a defendant “encourages” an unauthorized alien to “reside” in the United States when the defendant takes some action “to facilitate the alien’s ability to live in this country indefinitely.”⁹¹ Defendants have been convicted under this provision for doing as little as occasionally employing an alien housekeeper while offering advice on how to avoid deportation.⁹² More typically, cases involve employers providing additional aid to unauthorized employees if such aid encourages them to stay.⁹³

84 794 F.3d 743 (7th Cir. 2015).

85 *Id.* at 751 (internal quotation marks omitted).

86 *Id.* at 749-50 (quoting *United States v. Costello*, 666 F.3d 1040, 1050 (7th Cir. 2012)); *see also United States v. Vargas-Cordon*, 733 F.3d 366, 381 (2d Cir. 2013) (explaining that harboring requires that the defendant intended to facilitate an illegal alien’s remaining in the United States and to prevent the alien’s detection by immigration authorities).

87 *See e.g., id.*

88 *See Lopez*, 521 F.2d 437; *Cantu*, 557 F.2d 1173.

89 *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (“harbor” means “to afford shelter to”).

90 8 U.S.C. § 1324(a)(1)(A)(iv).

91 *United States v. Thum*, 749 F.3d 1143, 1148 (9th Cir. 2014).

92 *United States v. Henderson*, 857 F. Supp. 2d 191, 209 (D. Mass. 2012) (quoting *DelRio-Mocci v. Connolly Pros. Inc.*, 672 F.3d 241, 248 (3d Cir. 2012)) (explaining that encouragement entails “affirmative assistance that makes an alien lacking lawful immigration status more likely to enter or remain in the United States than she otherwise might have been”).

93 *See, e.g., Edwards v. Prime, Inc.*, 602 F.3d 1276, 1295 (11th Cir. 2010) (finding that defendants had “encouraged or induced” illegal aliens to reside in the United States by knowingly supplying them with jobs and social security numbers to facilitate their employment, because the “Court [gives] a broad interpretation to the phrase ‘encouraging or inducing’ in this context, construing it to include the act of ‘helping’ aliens come to, enter, or remain in the United States”).

Although the outside parameters of liability under the harboring statute is unclear, there is some danger that institutional efforts to assist undocumented students, perhaps by knowingly providing institutional financial aid, could trigger such liability. Such actions could be interpreted as encouraging or inducing an illegal alien to reside in the United States. Specifically, knowingly funding an undocumented alien student's education in the United States could be challenged as "encouraging" him/her to reside in the United States in violation of immigration laws.

Although this risk does exist, with rare exception, harboring enforcement actions have historically targeted defendants who reaped some financial gain from harboring (like retaining a cheap source of labor).⁹⁴ As noted above, a harboring enforcement action against a university was threatened in at least one instance.⁹⁵ But, there is no clear legal precedent establishing that providing financial aid, counseling services, dormitory housing, or other student services violates (or does not violate) the harboring provisions of the INA.

The federal circuit courts have taken a varied approach to the interpretation of the harboring provision and therefore this area of the law is particularly unsettled. If an institution were liable under the harboring provision, penalties can be severe and include both prison time and fines. Each violation—which means "for each alien in respect to whom such a violation occurs"—can carry a prison sentence of up to five years. If the harboring is done for a commercial purpose, the potential sentence doubles to ten years. Fines of up to \$500,000 per violation can also be imposed. Additionally, the statute authorizes seizures and forfeitures, providing, "[a]ny conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a [harboring] violation . . . , the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture."⁹⁶

The harboring provision of the INA references "any person," and thus individual employees acting at the direction of an institution could also be prosecuted. Although we are not aware of prior cases involving criminal or civil liability of university employees under the harboring provision of the INA, church employees have faced penalties for their roles in sanctuary practices.⁹⁷ Fines for individuals are limited to \$250,000 per violation.⁹⁸

94 Most cases deal with employers providing additional aid to unauthorized employees that encourages them to stay. *See, e.g., Edwards*, 602 F. 3d 1276. The Harboring Provision allows for a greater penalty for those convicted of harboring for some commercial gain, but defendants motivated by humanitarian goals are liable under the statute as well. *See Aguilar*, 883 F. 2d 662.

95 *See Billiter, supra* note 83.

96 8 U.S.C. § 1324(a) and (b)(1).

97 *See e.g. Aguilar*, 883 F.2d 662 (affirming the conviction and sentence of probation for Arizona church officials who led a well-publicized sanctuary program).

98 *See* 18 U.S.C. § 3571; *United States v. Yu Tian Li*, 615 F.3d 752, 757 (7th Cir. 2010).

IV. Conclusion

American immigration policy has been on a roller coaster ride since the September 11, 2001 terrorist attacks. The election of President Trump signaled that his anti-immigrant campaign rhetoric would soon be followed by executive policies aimed to increase enforcement of existing immigration laws.

Students, faculty, and other campus constituencies across the country have responded by urging that their campuses be declared “sanctuaries,” where administrators would take all legal measures to protect students from deportation and removal proceedings. But there is no consensus about the meaning of sanctuary campus, even among those campuses who have declared themselves as such. And, even though the specific commitments made by campuses in response to student petitions were often modest, adopting the term “sanctuary” may have dramatic symbolic and political consequences. For some, the term suggests support and compassion for students. But to critics, it signals a willingness to defy the law to shelter unauthorized immigrants.

College administrators must thus navigate territory where both the meaning of sanctuary is vague and the policies of the executive branch with regard to immigration enforcement and relative to funding for sanctuary jurisdictions is still developing. With so much uncertainty, it is essential that institutions understand the current law, and monitor a number of key developments on the horizon. As discussed above, the idea that churches and schools can provide legal sanctuary from deportation and removal proceedings is based on tradition and optics, not an actual non-discretionary legal restriction on the authority of ICE officials. Moreover, several legislative proposals are pending that, if enacted, would restrict funding to sanctuary campuses; but these proposals themselves might be subject to legal or constitutional challenge. Institutions would be wise to track not only these proposals but also the legal battles surrounding the Trump Administration’s attempts to withdraw federal funding from state and local jurisdictions that have adopted sanctuary policies.

Specific policies and practices that campuses may adopt or have recently adopted must also be examined in relation to the harboring provisions of the INA and in relation to Section 1373, which prevents state and local entities from adopting policies that prevent government entities or employees from providing citizenship or immigration status information to immigration authorities. Of course, when student information is shared, such disclosures must not violate FERPA. Non-collection of immigration status information, except where collection is required by law, may be a strategy that enables the institution to avoid ICE distractions. Any approach must also include tracking future court decisions that address the constitutionality of Section 1373.

In addition, campuses should consider whether their actions could be construed to frustrate or impede an immigration investigation or otherwise violate criminal obstruction of justice laws. Moreover, institutions need to be aware that participation in the SEVP program provides DHS broad authority to review certain student records and that ICE has broad authority to withdraw SEVP certification. Finally, sanctuary policies and practices need to be examined for consistency with laws

that grant authority to campus police forces and any agreements with local and federal law enforcement agencies.

With regard to ICE's agents access to campus, agents can likely legally exercise their authority on public parts of campus without a warrant. Institutions may insist on a warrant for entry into private dormitories and other areas where students have an expectation of privacy. In so doing, they must also ensure that they do not run afoul of law enforcement cooperation agreements, and that they avoid any activities that could be deemed to be willfully obstructing an investigation.

Finally, institutions should carefully monitor legal decisions construing the harboring provisions of the INA . There is little precedent that addresses when a college may be guilty of harboring an illegal alien. The interpretation of the harboring provisions is largely unsettled and thus it would be prudent to remain attentive to future interpretations of "harboring" by governmental officials, law enforcement and the courts.

FORTY YEARS OF PUBLIC RECORDS LITIGATION INVOLVING THE UNIVERSITY OF WISCONSIN: AN EMPIRICAL STUDY

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Abstract

The research reported in this Article represents a pioneering attempt to study public records lawsuits involving a public university system over an extended period. An analysis of all public records lawsuits involving the University of Wisconsin System over a four-decade period suggests that much of the received wisdom about public records disputes involving higher education is incorrect. Most public records litigation is not about administrative searches or issues that implicate traditional notions of academic freedom. Rather, most lawsuits in Wisconsin sought information about alleged misconduct or suspected ethical lapses by university employees. News organizations initiated the majority of the lawsuits, always prevailing. Advocacy groups were also very successful in litigation. In contrast, students or employees who sued to obtain information for purely personal reasons rarely gained access to the information they sought. The results show the usefulness of public records laws as a means of public accountability. In addition, the Article demonstrates the merits of a research strategy that focuses on data from trial-court cases that are not available via Lexis, Westlaw, or other online services.

Truth-seeking is so fundamental a value in American culture that the law provides a wide variety of mechanisms to promote the quest for knowledge. Many of the freedoms explicitly guaranteed by the First Amendment were designed to protect individuals' rights to search for truths of various kinds.¹ Additional rights associated with truth-seeking such as freedom of association,² academic

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1 William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008); Brian C. Murchison, *Speech and the Truth-Seeking Value*, 39 COLUM. J.L. & ARTS 55 (2015).

2 Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964); Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741 (2008).

freedom,³ and the right to know⁴ have developed in the broad shadow of the First Amendment. Indeed, constitutional law in the United States has been called “the law of penumbras and emanations.”⁵ Beyond the constitutional realm, Congress and state legislatures have recognized the importance of truth-seeking in education by establishing a diverse network of public colleges and universities⁶ as well as by enacting statutes that grant rights of access to information controlled by governmental bodies.⁷ Although access-to-information laws are important means by which the press and public can scrutinize the performance of government institutions,⁸ higher education’s culture of autonomy does not easily accommodate demands for transparency and public accountability.⁹ One scholar noted:

Universities have a special need to preserve academic freedom and independence in academic decision-making. ... Thus, a conflict exists

3 RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955); James R. Ferguson, *Scientific Inquiry and the First Amendment*, 64 *CORNELL L. REV.* 639 (1979); R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 *NEB. L. REV.* (2011); ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* (2012); STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* (2014).

4 Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 *WASH. U. L. Q.* 1 (1976); David M. O’Brien, *The First Amendment and the Public’s Right to Know*, 7 *HASTINGS CONST. L.Q.* 579 (1979); Fred H. Cate, D. Annette Fields & James K. McBain, *The Right to Privacy and the Public’s Right to Know: The Central Purpose of the Freedom of Information Act*, 46 *ADMIN. L. REV.* 41 (1994); Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 *DUKE J. CONST. L. & PUB. POL’Y* 113 (2008).

5 Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 *HARV. L. REV.* 1639, 1656 (1993).

6 On the development of the American system of colleges and universities, see CHRISTOPHER J. LUCAS, *AMERICAN HIGHER EDUCATION: A HISTORY* (1994); ARTHUR M. COHEN & CARRIE B. KISKER, *THE SHAPING OF AMERICAN HIGHER EDUCATION: EMERGENCE AND GROWTH OF THE CONTEMPORARY SYSTEM* (2ND ED. 2010).

7 Most public colleges and universities are creations of state governments; as such, they are subject to the public records laws of their states. See WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (5th ed. 2013), § 13.5. The federal Freedom of Information Act, 5 U.S.C. § 552, which applies to the relatively few federally created universities such as the U.S. Military Academy at West Point, does not apply to state colleges and universities. See David Pritchard & Craig Sanders, *The Freedom of Information Act and Accountability in University Research*, 66 *JOURNALISM Q.* 402 (1989); Lauren Kurtz, *The Application of Open Records Laws to Publicly Funded Science*, 31 *NATURAL RESOURCES & ENVIRONMENT* (Spring 2017), available at https://www.americanbar.org/publications/natural_resources_environment/2016-17/spring/the_application_open_records_laws_publicly_funded_science.html (last visited, Feb. 20, 2018). For convenient access to the public records laws of the 50 states, see the FOIAdvocates website, <http://www.foiadvocates.com/records.html> (last visited Feb. 20, 2018).

8 Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 *AM. B. FOUND. RES. J.* 521 (1977); Anthony Lewis, *The Right to Scrutinize Government: Toward a First Amendment Theory of Accountability*, 34 *U. MIAMI L. REV.* 793 (1980).

9 F. King Alexander, *The Changing Face of Accountability: Monitoring and Assessing Institutional Performance in Higher Education*, 71 *J. HIGHER ED.* 411 (2000); David D. Dill, *The Regulation of Public Research Universities: Changes in Academic Competition and Implications for University Autonomy and Accountability*, 14 *HIGHER ED. POL’Y* 21 (2001); *ACHIEVING ACCOUNTABILITY IN HIGHER EDUCATION: BALANCING PUBLIC, ACADEMIC, AND MARKET DEMANDS* (Joseph C. Burke ed. 2005); J. Douglas Toma, *Expanding Peripheral Activities, Increasing Accountability Demands and Reconsidering Governance in US Higher Education*, 26 *HIGHER ED. RES. & DEVELOPMENT* 57 (2007).

between the laudable goal of open government and the special needs of universities to operate relatively free from public pressure.¹⁰

The culture of autonomy in higher education is so powerful, in fact, that it is not uncommon for public universities to resist requests from citizens, news organizations, or others for access to information. In such situations, requesters have the option of asking a court to order that the records in question be released.¹¹

Little is known, however, about what happens in such lawsuits. The information that scholars, lawyers, and higher-education administrators receive about public records litigation involving universities is fragmented and incomplete, largely because it is based on the small number of cases that are covered by the news media and/or decided by appellate courts. Even the relatively sparse scholarly literature on access-to-information laws and higher education is “largely anecdotal or hortatory,” two professors concluded after reviewing existing research.¹² The focus on the unrepresentative disputes that receive media coverage or reach appellate courts has fostered a widespread belief among scholars and higher-education administrators that public records litigation involving colleges and universities tends to be concentrated in two areas of special sensitivity—employment searches for high-level administrators¹³ and academic freedom.¹⁴

10 Frank A. Vickory, *The Impact of Open-Meetings Legislation on Academic Freedom and the Business of Higher Education*, 24 AM. BUS. L.J. 427, 428 (1986). See also James C. Hearn, Michael K. McLendon & Leigh Z. Gilchrist, GOVERNING IN THE SUNSHINE: OPEN MEETINGS, OPEN RECORDS, AND EFFECTIVE GOVERNANCE IN PUBLIC HIGHER EDUCATION (2004), at 2 (“sunshine laws pose for institutions and society a difficult tension among three desirable objectives: maintaining individual privacy rights, ensuring public accountability (i.e., the public’s right to know), and providing institutions the autonomy they need for effective functioning.”), citing HARLAN CLEVELAND, THE COST AND BENEFITS OF OPENNESS: SUNSHINE LAWS AND HIGHER EDUCATION (1985).

11 Daxton R. “Chip” Stewart, *Let the Sunshine In, or Else: An Examination of the “Teeth” of State and Federal Open Meetings and Open Records Laws*, 15 COMM. L. & POL’Y 265 (2010).

12 Michael K. McLendon & James C. Hearn, *Mandated Openness in Public Higher Education: A Field Study of State Sunshine Laws and Institutional Governance*, 77 J. HIGHER EDUC. 645, 647 (2006).

13 Judith Block McLaughlin, *From Secrecy to Sunshine: An Overview of Presidential Search Practice*, 22 RES. HIGHER ED. 195 (1985); Judith Block McLaughlin & David Riesman, *The Shady Side of Sunshine: The Press and Presidential Searches*, 87 TEACHERS C. REC. 471 (1986); Robert Birnbaum, *Presidential Searches and the Discovery of Organizational Goals*, 59 J. HIGHER ED. 489 (1988); Charles N. Davis, *Scaling the Ivory Tower: State Public Records Laws and University Presidential Searches*, 21 J.C. & U.L. 353 (1994); Eric M. Eisenberg, Alexandra Murphy & Linda Andrews, *Openness and Decision Making in the Search for a University Provost*, 65 COMM. MONOGRAPHS 1 (1998); Nick Estes, *State University Presidential Searches: Law and Practice*, 26 J.C. & U.L. 485 (1999-2000); Michael J. Sherman, *How Free Is Free Enough: Public University Presidential Searches, University Autonomy, and State Open Meeting Acts*, 26 J.C. & U.L. 665 (1999-2000); Alexandra Tilsley, *Too Much Sunshine Can Complicate Presidential Searches*, CHRONICLE OF HIGHER EDUC., Aug. 8, 2010; Syni Dunn, *More Public Colleges Opt for Closed Searches*, CHRONICLE OF HIGHER EDUC., June 7, 2013.

14 Nader Mousavi & Matthew J. Kleiman, *When the Public Does Not Have a Right to Know: How the California Public Records Act is Deterring Bioscience Research and Development*, 2005 DUKE L. & TECH. REV. 23; BRUCE E. JOHANSEN, SILENCED!: ACADEMIC FREEDOM, SCIENTIFIC INQUIRY, AND THE FIRST AMENDMENT UNDER SIEGE IN AMERICA (2007); Robert R. Kuehn & Peter A. Joy, “Kneecapping” Academic Freedom, ACADEME, Nov.-Dec. 2010, at 8; Michael Halpern, *The Costs of a Climate of Fear*, ACADEME, Nov.-Dec. 2010, at 16; Jennifer Dearborn, *Ready, Aim, Fire: Employing Open Records Acts as Another Weapon Against Public Law School Clinics*, 39 RUTGERS L. REC. 16 (2011); Rachel Levinson-Waldman, *Academic Freedom and the Public’s Right to Know: How to Counter the Chilling Effect of FOIA Requests on Scholarship*,

The research presented in this Article, which is based on an analysis of all public records lawsuits involving the University of Wisconsin System from 1978 through 2017, suggests that much of the received wisdom is incorrect. With respect to administrative searches, we found no public records lawsuits seeking the identities of applicants for university positions after the early 1990s. Meanwhile, only a small number of cases—all involving the UW system’s flagship Madison campus—have featured academic freedom arguments for keeping records confidential.

In short, most public records litigation is not about administrative searches or issues that implicate traditional notions of academic freedom. Rather, most lawsuits involving the University of Wisconsin System during the four decades covered by our study sought information about alleged misconduct or suspected ethical lapses by university employees. News organizations initiated most of those lawsuits, although advocacy groups occasionally sought records that the university wished to keep secret. News organizations and advocacy groups that filed public records lawsuits against the university always obtained the records they sought, though sometimes with sensitive peripheral information redacted. In some cases, students or employees who wanted information for purely personal reasons filed lawsuits seeking access to university records. Such litigation tended to be unsuccessful.

Part I of this Article explains the research design of the study. Part II provides background about the University of Wisconsin System and its challenges with freedom of inquiry. Part III traces the history of the Wisconsin Public Records Law, with examples of how media organizations have used it to generate news stories about UW System entities. Part IV provides an overview of the outcomes in public records lawsuits involving the university. Part V tells the story of how the university solved what it considered to be the problem of public records lawsuits about administrative searches. Part VI shows the evolution of the university’s academic freedom arguments for withholding information. Part VII documents the university’s aggressive use of the Family Educational Rights and Privacy Act (FERPA)¹⁵ as an argument for withholding information. Part VIII discusses the implications of the study’s findings.

I. Research Design

A distinctive aspect of the research reported in this Article is its focus on what we believe is a complete set of public records lawsuits filed against any component of the UW System in the 40-year period from 1978 through 2017. We took pains to be comprehensive so that our analysis would avoid the risk of bias that can result from studying only the lawsuits that attract the attention of the news media and/or appellate courts.

Am. Const. Soc., Issue Brief, Sep. 8, 2011, available at http://www.acslaw.org/sites/default/files/Levinson_-_ACS_FOIA_First_Amdmt_Issue_Brief.pdf (last visited Feb. 20, 2018); Michael Halpern, *Freedom to Bully: How Laws Intended to Free Information Are Used to Harass Researchers*, Union of Concerned Scientists report, available at <http://www.ucsusa.org/center-science-and-democracy/protecting-scientists-harassment/freedom-bully-how-laws#.WX-YS4TyuUk> (last visited Feb. 20, 2018).

15 20 U.S.C. § 1232g, 34 C.F.R., Part 99.

The choice of cases in any empirical study of legal phenomena is crucially important. Because cases that reach appellate courts are systematically different from those which are resolved at the trial-court level, research focusing only on appellate cases does not accurately describe the full range of ordinary litigation. As one researcher wrote, “When studies use as data only those cases that result in a published judicial opinion, they are vulnerable to a publication bias that can lead to erroneous conclusions.”¹⁶ Cases that draw the attention of the news media are similarly unrepresentative.¹⁷

A significant challenge to our research was the fact that no one in Wisconsin maintains a list of public records lawsuits. Through a combination of personal knowledge,¹⁸ Internet searches of news coverage, searches of Wisconsin’s online database of circuit court cases,¹⁹ and consultations with lawyers who have defended UW System entities when they are sued²⁰ we identified 34 public records lawsuits that were filed before the end of 2017. We did not find any public records cases filed against a component of the University of Wisconsin before 1978. Most of the 34 cases in our study were resolved at the trial court level. Ten of them (29%) reached appellate courts, with one proceeding all the way to the Wisconsin Supreme Court.²¹ Once we had a list of cases, we traveled to courthouses throughout Wisconsin to review thousands of documents in trial court files. The files, which are not available on the Internet, revealed the kinds of information requesters sought, arguments made in favor of and against releasing the information, and the outcomes of the cases. We also examined news coverage about the disputes.

16 Ahmed E. Taha, *Data and Selection Bias: A Case Study*, 75 UMKC L. REV. 171, 171 (2006). See also Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 125 (2002) (“Judicial decisions represent only the very tip of the mass of grievances.”); Kay L. Levine, *The Law is Not the Case: Incorporating Empirical Methods into the Culture of Case Analysis*, 17 U. FLA. J.L. & PUB. POL’Y 283, 285 (2006) (“We should be aware that constructing legal arguments in the context of one case, or teaching students how to do so, is distinct from making claims about what the law in a particular area really is, in all of its many forms and messy realities.”); David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U.L. REV. 681, 683 (2007) (“For many observers of the American legal system, law is what judges write in appellate opinions. These observers are mistaken. But the gravitational pull of an appellate-centered view of the legal world is strong. Opinions from such tribunals continue to dominate the training of new lawyers and are widely disseminated by the mainstream media.”); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1920 (2008).

17 KAREN S. JOHNSON-CARTEE, NEWS NARRATIVES AND NEWS FRAMING: CONSTRUCTING POLITICAL REALITY (2005); PAMELA J. SHOEMAKER & STEPHEN D. REESE, MEDIATING THE MESSAGE IN THE 21ST CENTURY: A MEDIA SOCIOLOGY PERSPECTIVE (2014).

18 As journalists, both authors of this Article were involved in litigation seeking access to documents in the custody of UW System campuses. See *Capital Times v. Bock*, No. 164-312, 9 Med. L. Rptr. 1837 (Dane County Cir. Ct. 1983); *UWM Post v. Union Policy Board*, No. 2009-CV-17771 (Milwaukee County Cir. Ct.).

19 The database is accessible at <https://wcca.wicourts.gov> (last visited Feb. 20, 2018).

20 The authors acknowledge helpful information provided by Mary E. Burke, former Assistant Attorney General, Wisconsin Department of Justice; Tomas Stafford, UW System General Counsel; and John C. Dowling, former Senior University Legal Counsel, UW-Madison.

21 Two of the cases that reached the Court of Appeals had not been decided as of November 20, 2017. See *Scott v. Board of Regents*, 2015AP1244 (pending); *Hagen v. Board of Regents*, 2017AP2058 (pending).

If a strength of our research is its analysis of a complete set of trial court cases over a period of several decades, a possible limitation is that the study analyzes litigation in only one state. The focus on a single state raises the question of whether knowledge about public records lawsuits involving higher education in Wisconsin may be useful for understanding patterns of similar litigation in other states. Because there is no comprehensive collection of information about how trial courts in other states have resolved public records cases, there is no empirical answer to such a question. That said, a key issue in assessing the generalizability of studies of legal behavior in single jurisdictions is to show that the location where the research was conducted “is not so atypical as to be unique.”²² In other words, the argument for the usefulness of our findings in states other than Wisconsin depends in an important sense on the extent to which Wisconsin’s public records statute and Wisconsin’s characteristics are similar to those of other states.

Wisconsin’s public records statute is a fairly typical state public records law.²³ It is in the middle of the pack in terms of the level of access it enables, procedures for gaining access to records, and penalties for government officials who illegally withhold records.²⁴ More generally, Wisconsin appears to be a very typical state. A 2006 analysis of U.S. Census data went so far as to declare Wisconsin to be the most representative of the American states. The analysis compared state-by-state averages on twelve variables, including neighborhood characteristics, race and ethnicity, and income and education.²⁵ An analysis of the Census Bureau’s *2015 American Community Survey* came to a similar conclusion: Wisconsin is one of the “most normal” states.²⁶

II. The University of Wisconsin

Wisconsin’s original Constitution, ratified by popular vote on March 13, 1848, contained the seeds of the modern University of Wisconsin System. The Constitution stated: “Provision shall be made by law for the establishment of a state university, at or near the seat of government, and for connecting with the same, from time to time, such colleges in different parts of the state, as the interests of education may require.”²⁷ After the Constitution was ratified, the state moved

22 MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* xxxii (1979) See also Roger Gomm, Martyn Hammersley & and Peter Foster, *Case Study and Generalization in CASE STUDY METHOD: KEY ISSUES, KEY TEXTS* 98-115 (2000).

23 Caitlin Ginley, *Grading the nation: How accountable is your state?* Center for Public Integrity, Nov. 10, 2015, <https://www.publicintegrity.org/2012/03/19/8423/grading-nation-how-accountable-your-state> (last visited Feb. 20, 2018).

24 Bill F. Chamberlin, Crisitina Popescu, Michael F. Weigold & Nissa Laughner, *Searching for Patterns in the Laws Governing Access to Records and Meetings in the Fifty States by Using Multiple Research Tools*, 18 U. FLA. J. L. & PUB. POL’Y 415 (2007); Stewart, *supra* note 11.

25 Mark Preston, *The Most ‘Representative’ State: Wisconsin*, CNN POLITICS, July 27, 2006, available at <http://www.cnn.com/2006/POLITICS/07/27/mg.thu/> (last visited Feb. 20, 2018).

26 Andy Kiersz, *Ranked: All 50 states and DC, from least to most average*, BUSINESS INSIDER, Oct. 12, 2016, available at <http://www.businessinsider.com/average-state-ranking-2016-10/#51-district-of-columbia-1> (last visited Feb. 20, 2018).

27 Wis. Const. Art. X, § 6 (1848).

quickly to create the university. On July 26, 1848, Governor Nelson Dewey signed into law a bill incorporating the University of Wisconsin. The first class met in February 1849.²⁸

Wisconsin's founding fathers believed that a public education system including a university had two principal functions: "To prepare young people for the duties and obligations of citizenship, and to train them to perform the practical tasks of life."²⁹ Academic freedom was not contemplated in any serious fashion until 1894, when a prominent faculty member was accused of being a dangerous radical who should be censured, if not fired.³⁰ In response, the UW Board of Regents adopted a ringing defense of academic freedom. The Regents' statement contained the famous "sifting and winnowing" statement that epitomizes the university's commitment to the search for truth:

Whatever may be the limitations which trammel inquiry elsewhere, we believe that the great state University of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone the truth can be found.³¹

In 1915 the words of the statement were cast in bronze on a tablet and bolted to the east wall of Bascom Hall on the campus in Madison, where they remain more than a century later.³²

Over the years the university grew to the point that in 1970 it consisted of the main campus in Madison plus four-year campuses in Milwaukee (added in 1956), Green Bay (1968), and a site called Parkside between the cities of Racine and Kenosha (1968); freshman-sophomore campuses in ten communities around the state; and the statewide University of Wisconsin Extension. In the early 1970s the State Legislature merged the University of Wisconsin with the Wisconsin State University System,³³ which had been composed of nine four-year campuses and four freshman-sophomore campuses. At the end of 2017 the UW System consisted of 13 four-year campuses, 13 two-year campuses, and Extension offices in each

28 MERLE EUGENE CURTI & VERNON ROSCO CARSTENSEN, *THE UNIVERSITY OF WISCONSIN: A HISTORY*, vol. 1 (1949).

29 *Id.*, at 46.

30 Theodore Herfurth, *Sifting and Winnowing: A Chapter in the History of Academic Freedom at the University of Wisconsin*, in *ACADEMIC FREEDOM ON TRIAL: 100 YEARS OF SIFTING AND WINNOWING AT THE UNIVERSITY OF WISCONSIN-MADISON* 59 (W. Lee Hansen ed., 1998). For additional background on the development of academic freedom at the University of Wisconsin, see Theron F. Schlabach, *An Aristocrat on Trial: The Case of Richard T. Ely*, 47 *WIS. MAGAZINE HIST.* 146 (1963-64); MERLE CURTI & VERNON CARSTENSEN, *THE UNIVERSITY OF WISCONSIN: A HISTORY, 1848-1925* (2 vols.) (1974); ALLAN G. BOGUE & ROBERT TAYLOR, *THE UNIVERSITY OF WISCONSIN: ONE HUNDRED AND TWENTY-FIVE YEARS* (1975); *PROUD TRADITIONS AND FUTURE CHALLENGES: THE UNIVERSITY OF WISCONSIN-MADISON CELEBRATES 150 YEARS* (David Ward & Noel Radomski eds., 1999).

31 University of Wisconsin Board of Regents, Report of Investigation into Charges Against Professor Richard T. Ely, September 18, 1894.

32 Replicas of the "sifting and winnowing" tablet are also displayed at several of the 25 University of Wisconsin campuses outside of Madison.

33 Chapter 335, 1973 Wis. Sess. Laws.

of Wisconsin's 72 counties.³⁴ It was by far the largest agency in Wisconsin state government, with roughly 175,000 students and 39,000 faculty and staff.³⁵

As the university evolved from a single campus in Madison to a sprawling statewide system, its commitment to unfettered "sifting and winnowing" was occasionally called into question. Attempts by university administrators to constrain controversial speech by faculty and students generated considerable opposition and negative publicity, including a successful federal court challenge to a speech code the Board of Regents had adopted.³⁶ Meanwhile, the university's reluctance to be transparent led to frequent criticism. In the late 1970s, for example, a journalist noted that UW-Madison's "predilection for secrecy" was undermining the State Legislature's trust in the university.³⁷ The university's lack of transparency in the early 1990s led another journalist to decry "another of a series of disgraceful attempts (by the university) to torpedo Wisconsin's public records law."³⁸ In 1996 a scholar noted, "The University of Wisconsin System has often reacted zealously to deny access when requests for information about system personnel are made."³⁹ Legislators also have expressed unhappiness with the university's frequent resistance to disclosure. In 2005, a member of the Wisconsin Assembly made a sweeping request for records about the university's finances because "university officials have never wanted to come clean about pretty much anything—they think they know better than legislators and taxpayers."⁴⁰ The university's reputation for transparency was no better in 2009, when editorials in Wisconsin's largest newspaper blasted UW-Milwaukee and the UW-Madison medical school for refusing to release public documents without a court order.⁴¹ In 2016 the university was criticized for deleting video of UW System chancellors describing how state budget cuts had harmed their campuses⁴² and for refusing to release

34 In November 2017 the UW System Board of Regents approved merging the 13 two-year campuses with four-year campuses in their regions. In addition, divisions of the statewide UW Extension were to be placed under the administrative control of UW-Madison or UW System. Implementation of the mergers was to be effective as of July 1, 2018. UW System Board of Regents, *Approval of Restructuring of UW Colleges and UW-Extension*, Res. 7 (Nov. 9, 2017).

35 WHAT IS THE UW SYSTEM? Available at <https://www.wisconsin.edu/about-the-uw-system/> (last visited Feb. 20, 2018).

36 *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991). See also Donald A. Downs & Anat Hakim, *The University of Wisconsin, Free Speech, and the First Amendment*, WISCONSIN INTEREST, Fall 2000, 27-34; DONALD ALEXANDER DOWNS, RESTORING FREE SPEECH AND LIBERTY ON CAMPUS (2005).

37 David Pritchard, *Sifting and Winnowing*, MADISON CAP. TIMES, May 15, 1979, at 3.

38 John Patrick Hunter, *Open record shenanigans are a disgrace*, MADISON CAP. TIMES, Feb. 4, 1992, at 6A.

39 GARY COLL, MASS COMMUNICATION LAW IN WISCONSIN 83 (1996).

40 State Rep. Steve Nass, quoted in Karen Rivedal, *UW busy digging up data*, WIS. ST. J., July 16, 2005, at B1.

41 Editorial, *Compliance "run wild": Officials at the University of Wisconsin-Milwaukee need to understand that the public has a right to see records of public meetings*, MILWAUKEE J. SENTINEL, Nov. 14, 2009; Editorial, *Cough up the records: A newspaper should not have to resort to a lawsuit to force the release of records that are obviously public*, Milwaukee J. Sentinel, Dec. 26, 2009.

42 Nico Savidge, *UW System official deleted video of scrapped budget cut presentations*, WIS. ST. J., Apr. 19, 2016.

a final version of the UW System budget for 2016-17.⁴³ Such incidents led to an editorial in a Madison newspaper titled, “UW System secrecy only breeds suspicion.”⁴⁴

III. Wisconsin’s Public Records Law

In 1849, a year after statehood, the Wisconsin Legislature adopted a set of statutes for the new state. Although several scholars have implied that the Legislature adopted a general public records law that year,⁴⁵ the 1849 statutes did not contain a generalized right of access to government documents. Rather, various laws required some state officials (e.g., the secretary of state⁴⁶ and the commissioners of the school and university lands⁴⁷) and many county officials (e.g., county boards of supervisors,⁴⁸ probate judges,⁴⁹ sheriffs, clerks of circuit court, registers of deeds, county treasurers, and clerks of the board of supervisors⁵⁰) to preserve their records and have them open to public inspection. County officers were required to keep their offices open during business hours and permit public inspection of “all books and papers required to be kept.”⁵¹

In the early days of statehood, public officials sometimes chafed at legally required transparency. Wisconsin courts, however, insisted that both the letter and the spirit of the access-to-information provisions of the statutes be honored. In 1856, for example, after Jefferson County balked at paying for firewood and candles to keep the clerk of circuit court’s office heated and lit so that citizens could transact business during the dark days of Wisconsin’s long winters, the state Supreme Court made a strong statement in favor of effective access to government: “To require these officers to keep their office open during business hours and yet provide no means of warming or lighting them, would be simply absurd.”⁵² In 1887, the Court again stressed the importance of meaningful access to public records, this time in a case involving a county register of deeds who wanted to condition access to land records on his evaluation of a citizen’s motive for wishing to examine and copy the records. The Court’s view was unequivocal. Because the

43 Pat Schneider, *UW regents relied on private phone, face-to-face conferences for budget briefing*, MADISON CAP. TIMES, June 10, 2016; Karen Herzog, *Finalized budget for UW withheld*, MILWAUKEE J. SENTINEL, JUNE 11, 2016, AT 1A.

44 Editorial, *UW System secrecy only breeds suspicion*, WIS. ST. J., July 13, 2016.

45 See, e.g., John A. Kidwell, *Open Records Laws and Copyright*, 1989 WIS. L. REV. 1021, 1027; Michael D. Akers, Gregory J. Naples & Luke J. Chiarelli, *Federal and State Open Records Laws: Their Effects on the Internal Auditors of Colleges and Universities*, 3 MARQ. SPORTS L.J. 161, 172 (1993); Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The “Uses and Effects” Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL OF RTS. J. 1, 2 n.3 (2003).

46 WIS. REV. STAT. Ch. 9, § 11 (1849).

47 WIS. REV. STAT. Ch. 24, § 103 (1849).

48 WIS. REV. STAT. Ch. 10, § 37 (1849).

49 WIS. REV. STAT. Ch. 10, § 74 (1849).

50 WIS. REV. STAT. Ch. 10, § 137 (1849).

51 *Id.*

52 *County of Jefferson v. Besley*, 5 Wis. 134, 136 (Wis. Sup. Ct., 1856).

statute granted rights of access to land records to “any person,” the motive of a person seeking access was irrelevant, the Court ruled.⁵³

In 1917, the Legislature passed the state’s first unified public records law, enacting a two-paragraph statute that not only required state and local government officials to retain records but also gave the public a seemingly unconditional right to inspect, and copy, governmental records “except as expressly provided otherwise.”⁵⁴ Wisconsin courts interpreted the statute’s language quite literally in the years after the law’s implementation, with the Wisconsin Supreme Court going so far as to hold that the law required disclosure of individuals’ state income tax returns.⁵⁵ In 1947, however, the state Supreme Court pulled back from its literal interpretation of the law. The court noted that the 1917 statute had been enacted by the adoption of a “revisor’s bill” that was merely intended to compile existing law into a single statute.⁵⁶ Although the court acknowledged that the words of the disclosure provision of the 1917 law were clear, it nonetheless decided that the statute did not extend the common law right to examine government records. The result was a significant constriction of the public’s right of access to government records in Wisconsin.

By the mid-1960s the membership of the Court had changed; none of the justices who narrowed access rights in 1947 remained. Without explicitly overruling the 1947 decision, the Court established a new common-law rule: Custodians of government documents in Wisconsin would henceforth be required to balance the public interest in disclosure with the harm that might result from disclosure.⁵⁷ But the balancing was not to be neutral. Using a variant of the preferred position balancing theory often used in freedom-of-expression cases,⁵⁸ the Court stated that the interest in disclosure was to be given a preferred position in the balancing process:

In reaching a determination so based upon a balancing of the interests involved, the trial judge must ever bear in mind that public policy favors the right of inspection of public records and documents, and, it is only in the exceptional case that inspection should be denied.⁵⁹

53 *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N.W. 30 (1887). The text of the current public records law grants rights of access to “any requestor” WIS. STAT. § 19.35(1), leading to the reasonable inference that the motive of the party requesting records is not relevant to a decision about whether the records must be released. In a 2016 ruling, however, the Wisconsin Supreme Court considered the “partisan purpose” of a requestor (the Democratic Party of Wisconsin) when it overturned a Court of Appeals decision that would have required release of records in the custody of a Republican elected official. *Democratic Party of Wisconsin v. Department of Justice*, 2016 WI 100, 372 Wis. 2d 460, 888 N.W.2d 584.

54 WIS. STAT. § 18.01 (1917), later renumbered as WIS. STAT. § 19.21 (1979-80).

55 *Juneau v. Wisconsin Tax Commission et al.*, 184 Wis. 485, 199 N.W. 63 (1924).

56 *International Union, United Auto., Aircraft and Agr. Implement Workers v. Gooding*, 251 Wis. 362, 29 N.W.2d 730 (1947).

57 *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 137 N.W.2d 470 (1965).

58 CLAY CALVERT, DAN V. KOZLOWSKI & DERIGAN SILVER, *MASS MEDIA LAW* 52-53 (20th ed. 2018).

59 *Id.*, at 683, 475.

The presumption-of-openness principle led to a renewed era of generous access to public records, with the Court ruling that the following kinds of documents must be disclosed: a city attorney’s report of investigation into alleged police misconduct,⁶⁰ accident reports in the custody of police,⁶¹ the names of doctors who performed abortions at a county-operated hospital,⁶² and police blotter information, including not only who was arrested but what they were arrested for.⁶³ When the Legislature adopted a new public records statute to go into effect on January 1, 1983,⁶⁴ it enshrined the presumption-of-openness principle in the law’s declaration of policy.⁶⁵

Despite the Legislature’s declaration of policy in favor of openness, effective rights of access to public records may have narrowed since the enactment of the new law in 1983. A review of activity in the first decade after implementation of the new law found that “records custodians have seemed reluctant to disclose records, courts have increasingly upheld denials of access, and the legislature has appeared more willing to create new exceptions to disclosure.”⁶⁶ One of the most significant exceptions to disclosure came in 2003, when the Legislature gave certain categories of public employees the right to seek a court order blocking public access to records mentioning them, if disclosure would harm an employee’s privacy or reputational interests.⁶⁷ All in all, Wisconsin’s public records law has become more complex over time.⁶⁸

Media organizations make frequent use of Wisconsin’s public records law for the purpose of obtaining newsworthy information about university affairs. Although the university sometimes resists disclosure to the point that news organizations seek a court order requiring the university to disclose records, the university often releases information without requesters having to go to court. Voluntary disclosure has resulted in dozens of news stories about various components of the UW System in recent years, including revelation of the following matters:

60 *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 137 N.W.2d 470 (1965), *modified & reh’g denied*, 28 Wis.2d 672, 139 N.W.2d 241 (1966).

61 *Beckon v. Emery*, 36 Wis.2d 510, 153 N.W.2d 501(1967).

62 *State ex rel. Dalton v. Mundy*, 80 Wis.2d 190, 257 N.W.2d 877 (1977).

63 *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 279 N.W.2d 179 (1979).

64 WIS. STAT. §§ 19.31-19.39 (2013-14).

65 WIS. STAT. § 19.31 (“The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied”). For legislative history and a critique of the 1983 statute, see Linda de la Mora, *The Wisconsin Public Records Law*, 67 MARQ. L. REV. 65 (1983).

66 Sverre David Roang, *Toward a More Open and Accountable Government: A Call for Optimal Disclosure Under the Wisconsin Open Records Law*, 1994 WIS. L. REV. 719, 720.

67 WIS. STAT. § 19.356(2)(a). See also Matthew V. Munro, *Access Denied: How Woznicki v. Erickson Reversed the Statutory Presumption of Openness in the Wisconsin Open Records Law*, 2002 WIS. L. REV. 1197.

68 For detailed overviews of the law, see MELANIE R. SWANK, *THE WISCONSIN PUBLIC RECORDS AND OPEN MEETINGS HANDBOOK* (5th ed. 2012); and Wis. Dep’t of Justice, *Wisconsin Public Records Law Compliance Guide* (2015), <https://www.doj.state.wi.us/sites/default/files/dls/2015-PRL-Guide.pdf> (last visited Feb. 20, 2018).

- Disciplinary actions taken by UW-Milwaukee against a senior professor who sexually harassed a graduate student.⁶⁹
- Violations of National Collegiate Athletic Association rules by UW-Madison athletes who accepted more than \$23,000 in unadvertised discounts at a shoe store.⁷⁰
- Disciplinary actions taken against a UW-Oshkosh professor who engaged in improper political activity in his classroom.⁷¹
- A fox-guarding-the-henhouse situation in which a UW-Madison medical school official who had received more than \$25 million in royalties from a company was made responsible for monitoring the potential conflict of interest of a faculty member who received hundreds of thousands of dollars in consulting fees from the same company.⁷²
- The reasons for the abrupt retirement of a dean at UW-Sheboygan and the closing of an on-campus program that had served high-school students of color for more than 20 years.⁷³
- The discipline UW-Madison meted out to 20 university doctors who provided sick notes to public employees who missed work in early 2011 to protest budget proposals by Wisconsin's newly elected governor.⁷⁴
- The basis for the previously unexplained firing of the men's soccer coach at UW-Milwaukee.⁷⁵
- Details of negotiations between UW System administrators and the Wisconsin Governor as the university sought to minimize the effect of harsh budget cuts.⁷⁶
- The reasons for the suspension of the UW-Stevens Point men's basketball coach.⁷⁷

69 Margaret Talbot, *A Most Dangerous Method*, LINGUA FRANCA, January/February 1994; Kiss, *banter with student gets professor disciplined*, MILWAUKEE J., Feb. 25, 1994. The professor in question wrote a book about the controversy: JANE GALLOP, *FEMINIST ACCUSED OF SEXUAL HARASSMENT* (1997).

70 Andy Hall, *Shoe Box reports released by UW*, WIS. ST. J., Jan. 19, 2001, at A1; Don Walker & Jeff Potrykus, *Badgers can't shoo scandal away*, MILWAUKEE J. SENTINEL, Jan. 20, 2001, at 1C.

71 Adam Rodewald, *UW-Oshkosh releases disciplinary record of professor who encouraged students to sign Sen. Randy Hopper recall petition*, OSHKOSH NORTHWESTERN, May 6, 2011.

72 John Fauber, *Millions paid to UW chairman*, MILWAUKEE J. SENTINEL, Dec. 27, 2011, at 1A.

73 Eric Litke, *University of Wisconsin-Sheboygan Upward Bound program dropped following federal probe*, SHEBOYGAN PRESS, Jan. 19, 2012, at A1; Eric Litke & Janet Ortegon, *University of Wisconsin-Sheboygan dean was polarizing figure*, SHEBOYGAN PRESS, Jan. 20, 2012, at A1.

74 Jason Stein & Patrick Marley, *20 doctors disciplined for sick notes; Physicians received fines, warnings, records show*, MILWAUKEE J. SENTINEL, Apr. 6, 2012, at 1A.

75 Don Walker, *Coach had used offensive language; Letter discusses Whalley's dismissal*, MILWAUKEE J. SENTINEL, Apr. 28, 2012, at 10C.

76 Karen Herzog, *Nervous UW System tried to strike deal*, MILWAUKEE J. SENTINEL, Feb. 3, 2015, at 3A.

77 Scott A. Williams, *Point's coach suspended for season*, MILWAUKEE J. SENTINEL, JAN. 6, 2017, AT 4B.

- Results of an investigation into allegations that the UW-Madison men’s basketball coach used university resources to pay expenses associated with his participation in a lengthy, extramarital affair.⁷⁸
- An examination of the UW-Oshkosh Foundation’s curious decision to purchase the home of Chancellor Richard Wells for roughly \$120,000 more than its market value.⁷⁹
- An overview of twenty sexual-harassment cases filed against UW-Madison in the previous decade.⁸⁰

IV. Overview of Outcomes

Our research found 34 cases in which a public records lawsuit was filed against a component of the University of Wisconsin. Half of the lawsuits (17) involved UW-Madison. Other campuses had far fewer public records lawsuits to deal with: UW-Milwaukee (4), UW-Stevens Point (3), UW-Superior (2), and one each for UW-Oshkosh, UW-Parkside, UW-Platteville, UW-River Falls, UW-Whitewater, and UW-Fox Valley. Two lawsuits sought records from multiple campuses.

Roughly half of the cases (18, or 53%) originated with requests from news organizations. In six cases in which news organizations sought reports of investigations into alleged misconduct by university employees, the university was willing to release the records but the employees went to court to block release of the documents.⁸¹ Given that the Court of Appeals had previously ruled that the public had a right of access to reports of completed investigations into alleged misconduct,⁸² it was no surprise that all of the efforts to block release of similar reports to the media failed.⁸³ Accordingly, every case involving the news media resulted in release of virtually all of the records sought.

Six lawsuits were filed by advocacy organizations, including groups critical of affirmative action,⁸⁴ skeptical of the quality of teacher training in university

78 Kevin Draper, *Wisconsin Investigated Bo Ryan After Extramarital Affair, Denies It Caused His Resignation*, DEADSPIN, March 5, 2016, available at <http://deadspin.com/wisconsin-investigated-bo-ryan-after-extramarital-affai-1762792798> (last visited Feb. 20, 2018).

79 Karen Herzog, *Oshkosh chancellor got sweet deal for home*, MILWAUKEE J. SENTINEL, Apr. 2, 2017, at 1A.

80 Karen Herzog, *UW assault cases cost \$591,050 to settle*, MILWAUKEE J. SENTINEL, Apr. 11, 2018, at 1A.

81 *Marder v. Board of Regents*, 226 Wis. 2d 563, 596 N.W.2d 502 (Ct. App. 1999); *Doe v. University of Wisconsin-Milwaukee*, No. 2002-CV-6343 (Milwaukee County Cir. Ct., 2002); *Jones v. Board of Regents*, No. 2005-CV-3755 (Dane County Cir. Ct., 2005); *Bell v. Board of Regents*, No. 2007-CV-1453 (Dane County Cir. Ct., 2007); *Buckley v. Board of Regents*, No. 2011-CV-542 (Portage County Cir. Ct., 2012); *Hagen v. Board of Regents*, No. 2017-CV-389 (Winnebago County Cir. Ct., 2017).

82 *Wisconsin State Journal v. University of Wisconsin-Platteville*, 160 Wis.2d 31, 465 N.W.2d 266 (1990).

83 In one case, the employee who was the subject of a journalist’s records request appealed the judge’s order that the records be released. As of Feb. 20, 2018, the Court of Appeals had not ruled on the appeal. See *Hagen v. Board of Regents*, 2017AP2058 (pending).

84 *Osborn v. Board of Regents*, 254 Wis.2d 266, 647 N.W.2d 158 (Wis. Sup. Ct. 2002). Osborn, a UW-Madison mathematics professor, was president of the Wisconsin Association of Scholars.

education programs,⁸⁵ opposed to abortions at the UW medical school,⁸⁶ concerned about possible animal abuse in research,⁸⁷ and angry that a professor allegedly offered extra credit to students who collected signatures to put an anti-smoking referendum on a municipal ballot.⁸⁸ Five of these lawsuits resulted in release of the records the organization sought, either by court order or via a settlement that gave the organization essentially everything it wanted. The plaintiffs who filed the lawsuit involving the anti-smoking referendum did not pursue their records request after the referendum failed.

In all, 24 of the 34 lawsuits (71%) had a public purpose either because they were intended to help produce news stories or because they were related to public policy advocacy. Other than the case that plaintiffs dropped after the side they favored prevailed in the Stevens Point anti-smoking referendum, requesters with a public purpose always succeeded in gaining access to the records they sought. In contrast, university students and employees who filed public records lawsuits seeking information for purely personal reasons (e.g., to find out why complaints had been filed against them,⁸⁹ to gain personally identifiable information from surveys in which participants had been promised confidentiality,⁹⁰ to learn results of other students' exams⁹¹) never got the information they wanted.

V. Employment Searches for Administrators

As noted near the beginning of this Article, one of the greatest concerns universities express about the scrutiny that public records and open meetings laws enable is that searches for top administrators could be compromised. Such laws “reframe the search process as a kind of public performance,”⁹² with the resulting fear that fewer quality applicants would be willing to apply for high-level positions.⁹³ An analysis of the search for a new president of the University of Florida in 1983 was scathing about the effect of the state of Florida’s legal requirement that all aspects of the search be public:

85 *National Council on Teacher Quality v. Legal Records Custodians*, No. 2012-CV-63 (Jefferson County Cir. Ct., 2012).

86 *Zignego v. Golden*, No. 2010-CV-5700 (Dane County Cir. Ct., 2010). Zignego was associated with Pro-Life Wisconsin.

87 *Rhodes v. Board of Regents*, No. 2010-CV-1811 (Dane County Cir. Ct., 2010); *Animal Legal Defense Fund v. Board of Regents*, 2017 Wisc. App. LEXIS 823 (Wis. Ct. App., 2017). Rhodes was an employee of People for the Ethical Treatment of Animals.

88 *Hansen v. Bunnell*, No. 2005-CV-98 (Portage County Cir. Ct., 2005). Craig and Susie Hansen, owners of a bar, were associated with a group that opposed the anti-smoking proposal.

89 *Stone v. Board of Regents*, 2007 WI App 223, 305 Wis.2d 679, 741 N.W.2d 774 (Ct. App. 2007); *Scott v. Board of Regents*, No. 2013-CV-11294 (Milwaukee County Cir. Ct., 2015).

90 *Balke v. UW-Madison*, No. 2007-CV-2273 (Dane County Cir. Ct., 2008); *Peterson v. Greenfield*, No. 2009-CV-357 (Kenosha County Cir. Ct., 2009).

91 *Kang v. Board of Regents*, 2007 WI App 1, 298 Wis. 2d 246, 726 N.W.2d 356 (Ct. App. 2006).

92 Eisenberg, Murphy & Andrews, *Openness and Decision Making in the Search for a University Provost*, *supra* note 13 at 18.

93 Hearn, McLendon & Gilchrist, *supra* note 10.

By forcing the search committee to conduct business in public, open-meeting and open-record laws lead to evasions and game-playing. Unable to talk candidly in public, search committee members avoid controversy altogether or they talk privately, outside of committee sessions, despite the fact that such conversations are “illegal.” Hence, the public is not better informed about the real issues and no more confident about the fairness of decisions than had the entire process been conducted in camera.⁹⁴

A few years after that search for a University of Florida president, UW-Madison fired its athletic director and football coach. As the university began taking applications for a new athletic director and football coach, the *Milwaukee Journal* sought access to the names of applicants for the two positions, both of which have a higher profile among Wisconsin residents than do the president of the UW System or the chancellors of individual campuses. The university denied the newspaper’s request for the names of applicants; the newspaper filed a mandamus action seeking public release of the names of the applicants.⁹⁵ The trial court ordered that the records be released. The university appealed, but to no avail. The Court of Appeals also ruled that the names must be disclosed.⁹⁶ The managing editor of the *Milwaukee Journal* praised the Court of Appeals decision, saying that the public had a right to know details about searches for administrative employees:

Our view of the law all along has been that the citizens of Wisconsin ought to know about the competition for these state jobs, whether it’s for football coach at UW-Madison or chancellor of UW-Milwaukee. If we don’t know what the field of applicants looks like, how would we ever know if the right choices were made?⁹⁷

The Court of Appeals issued its decision in late June 1991 as a similar case was heating up. In September 1990 several news organizations, including the *Milwaukee Journal*, had gone to court to gain access to the names of applicants for 13 vacant administrative positions throughout the UW System, including campus chancellors at UW-Milwaukee, UW-Oshkosh, and UW-La Crosse.⁹⁸ In April 1991, UW System President Kenneth Shaw announced his resignation; in mid-June the news organizations amended their complaint to include a request for the names of

94 McLaughlin & Riesman, *The Shady Side of Sunshine*, *supra* note 13 at 491.

95 *Milwaukee Journal v. Board of Regents*, 163 Wis.2d 933, 472 N.W.2d 607 (Wis. Ct. App. 1991).

96 *Id.*

97 Steve Schultze, *Ruling rejects UW policy on applicants*, *MILWAUKEE J.*, June 27, 1991, at 13.

98 *Milwaukee Journal et al. v. Board of Regents*, No. 1990-CV-3524 (Dane County Cir. Ct., 1990). In addition to seeking the names of the applicants for the three vacant chancellor positions, the news organizations requested the names of the applicants for ten additional positions. At UW-Madison, information was sought about applicants for the positions of dean of the School of Law, dean of the School of Business, dean of the School of Education, associate director for women’s athletics, associate director for academic and student support, administrative officer in the Department of Athletics, and assistant director of external relations. At UW-Eau Claire, information was sought about applicants for the positions of vice chancellor and of assistant chancellor for information and technology management. At UW System, information was sought about applicants for the position of assistant vice president for university relations.

the applicants to replace him.⁹⁹ A few days later, the Court of Appeals ruled that the names of the applicants for the positions of UW-Madison football coach and athletic director had to be disclosed, leaving no doubt that the names of applicants for other administrative positions would have to be made public as well.

In late October 1991, the newspapers and the university agreed to a settlement that made public the names, addresses, and occupations of all applicants and nominees for the administrative positions in which the news organizations had expressed interest, as well as any similar positions in the future.¹⁰⁰ In return, the newspapers agreed not to request other information about job applicants—presumably including reference letters, search committee communications, and the like—for the next three years and two months (until January 1, 1995).¹⁰¹ Because of the settlement, the names of all applicants for all administrative jobs in the UW System became public record, including the names of more than 140 people who applied or were nominated to replace outgoing UW System President Shaw. The chancellor of the flagship campus in Madison said that the university was “deeply embarrassing” itself by obeying the requirement to release the names of applicants.¹⁰² However, the only way to change the requirement was to change the law, as the Court of Appeals had suggested in June 1991:

Whether, as the university maintains, the names of applicants for university positions ... should be shielded from public view is a question of broad public policy properly directed to the legislature. If the university desires a blanket rule mandating secrecy for the names of job applicants at any level, it should press its case in the legislature, rather than asking the courts to rule contrary to the expressed public policy of the state by creating an exception to the open records law.¹⁰³

The settlement between the group of newspapers and the university over access to the identities of the applicants for the 13 administrative positions noted that any change in “the parties’ obligations under Wisconsin’s public records laws” would take precedence over the settlement agreement.¹⁰⁴ Accordingly, the university set to work lobbying the Legislature for a change in the law. The university’s initial efforts were partly successful. In June 1992 the Legislature modified the law so that the names, occupations, and addresses of all applicants who were not “final candidates” could be kept confidential if the applicants so wished.¹⁰⁵ The names of up to five finalists for each position would have to be released within two days of a request.

99 *Id.*, Amended Complaint, June 19, 1991.

100 *Id.*, Stipulation and Order, Oct. 28, 1991.

101 *Id.*, Stipulation and Order, at 5.

102 Associated Press, *Shalala: Disclosure law embarrassing*, Wis. St. J., Apr. 15, 1992, at 3B.

103 *Milwaukee Journal v. Board of Regents*, *supra* note 95 at 611 (emphasis in original).

104 *Id.*, Stipulation and Order, at 6.

105 Wis. STAT. § 19.36(7) (2001-02).

For the next two decades, the university continued to lobby the Legislature to allow greater secrecy in administrative searches. In 2015, the efforts bore fruit when the Legislature, despite opposition from major Wisconsin newspapers,¹⁰⁶ exempted the university from the general requirement that state agencies must release the names of finalists for administrative positions. The change allowed the UW System to release only the names of candidates who have been “certified for appointment”¹⁰⁷ for the positions of UW system president, vice presidents and senior vice president, as well as the chancellors and vice chancellors of each campus in the UW system. The names of applicants for all other university positions, including high-profile positions such as UW-Madison football coach, no longer need to be disclosed at all.¹⁰⁸

The university’s efforts in the Legislature to reduce its disclosure obligations mirrored examples elsewhere. In at least three other states—Michigan, Texas, and New Mexico—legislatures have amended the law to exempt disclosure of the names of candidates for public university presidents. University officials in those states lobbied to rewrite the laws after the news media successfully sued for access to such information.¹⁰⁹

VII. Academic Freedom

The concept of academic freedom was developed to protect faculty members’ rights to challenge conventional wisdom and to address controversial or unpopular subjects in their teaching and research.¹¹⁰ The modern university’s conception of academic freedom includes a desire for autonomy from external constituencies. Because people and organizations that request documents related to teaching or research often do so for the purpose of shedding light on what they believe to be unwise or inappropriate activities,¹¹¹ universities often perceive such requests as adversarial.

106 E.g., Editorial, *Don’t hide finalists for top UW jobs*, WIS. ST. J., June 5, 2015; Ernst-Ulrich Franzen, *One step back, one step forward on open government*, MILWAUKEE J. SENTINEL, June 7, 2015; Editorial, *Remove plan to conceal finalists for UW jobs*, GREEN BAY PRESS-GAZETTE, June 8, 2015; Editorial, *Disclosure change should be reversed*, KENOSHA NEWS, July 5, 2015.

107 WIS. STAT. § 19.36(7)(a)1 (2013-14).

108 WIS. STAT. § 19.36(7) (2013-14). See also Trisha LeBoeuf, *University of Wisconsin System now has fewer disclosure requirements for applicants to top leadership positions*, SPLC NEWS, July 17, 2015, available at <http://www.splc.org/article/2015/07/university-of-wisconsin-system-now-has-fewer-disclosure-requirements-for-top-leadership-positions> (last visited Feb. 20, 2018).

109 Hearn, McLendon & Gilchrist, *supra* note 10, at 8 (“In all three states, legislatures rewrote the statutes in response to court decisions requiring universities to disclose the names of candidates. Estes notes a distinctive pattern to these reform episodes: a public university’s presidential search attracts litigation from the media in pursuit of greater disclosure of candidate identities, the media win their lawsuits, then the university appeals to the legislature, pointing out that it cannot attract good presidential candidates under the rules demanded by the press and the courts.”).

110 HOFSTADTER & METZGER, *supra* note 3; William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (Summer 1990).

111 See, e.g., examples cited *supra* at notes 69-80. See also Jonathan Peters & Charles N. Davis, *When Open Government and Academic Freedom Collide*, 12 FIRST AMEND. L. REV. 295 (2013); William K. Briggs, *Open-Records Requests for Professors’ Email Exchanges: A Threat to Constitutional Academic Freedom?* 39 J.C. & U.L. 601 (2013).

Academic freedom was explicitly mentioned in only two public records lawsuits (both involving UW-Madison), but academic freedom in one form or another underlay the university's position in other public records disputes that were resolved without a lawsuit being filed. In addition, the university has used the concept of academic freedom in its efforts to persuade the Legislature (unsuccessfully, as of the end of 2017) to exempt unpublished research material from the public records law.

In 1978, a Madison newspaper made a public records request for reports by UW-Madison faculty members that documented "the nature and scope of any gainful outside activities of an extensive, recurring, or continuing nature."¹¹² The UW-Madison Faculty Rules and Regulations required faculty members to file the reports, which were, according to the newspaper, "maintained primarily for the purposes of disclosing and preventing conflicts of interest which might arise with respect to outside activities of faculty members."¹¹³ The university denied the request, and the newspaper filed a lawsuit asking a judge to order the university to release the records.¹¹⁴

In a speech to the UW-Madison Faculty Senate, the campus chancellor said that if the records were released to the newspaper the result would have "the same chilling impact on academic freedom that demands from the right had on university faculties 25 years ago during the heyday of McCarthyism."¹¹⁵ In its answer to the lawsuit, the university claimed that disclosure "would violate the faculty members' constitutionally protected right to academic freedom."¹¹⁶ The university asserted that faculty members' disclosure of gainful outside activities "is for the use of the University administration, including department chairmen (*sic*), alone."¹¹⁷ The university added that the "unmistakable effect" of disclosure to the media would be a "substantial chilling effect" on activities that served the public interest in a variety of ways.¹¹⁸

The judge, however, refused to dismiss the lawsuit, saying that he was "unable to see how public inspection of reports of gainful significant outside activities impinges on any constitutionally secured rights."¹¹⁹ The university used a variety of procedural mechanisms to delay an ultimate decision, but in April 1983 the

112 *Capital Times v. Bock*, *supra* note 18, Petition for Writ of Mandamus, at 3.

113 *Id.*, at 4.

114 The attorney general's office normally represents the university in litigation, but Attorney General Bronson La Follette refused to do so, saying that he believed that the law required the reports to be made public. The university hired private counsel to deal with the lawsuit. *La Follette won't defend 11 UW deans*, MADISON CAP. TIMES, Aug. 8, 1978, at 1.

115 David Pritchard, *Shain: C-T suit threatens academic freedom*, MADISON CAP. TIMES, Sept. 12, 1978, at 1.

116 *Capital Times v. Bock*, *supra* note 18, Brief of Respondents in Support of Motion to Quash Alternative Writ of Mandamus, at 7-12.

117 *Id.*, at 10.

118 *Id.*, at 11-12.

119 *Id.*, Decision on Motion to Quash, at 2.

court issued its final ruling, rejecting the university's academic freedom argument and its assertion of a chilling effect. The court noted that less than 3 percent of UW-Madison faculty members had filed reports of outside activities during the years covered by the newspaper's request, a level of compliance with the reporting requirement that the judge characterized as "unrealistically low."¹²⁰ Deferring to the statute's command to prevent disclosure only in the exceptional case, the court stated that disclosure was in the public interest:

The University is dependent upon the trust of the public for its well-being. Nondisclosure raises unfounded suspicions of illegitimate activities. The disclosure of the documents would erase any doubts which might taint the faculty's well-deserved reputation for excellence in, and dedication to, performance. There is a public interest in assuming that the faculty is free from overly burdensome nonscholastic endeavors. The public has a right to know if enough time is being allocated to the faculty's primary educational function.¹²¹

When the reports were released, they contained no bombshells about faculty conflicts of interest.¹²² However, the fact that 97 percent of faculty members had not filed reports led to a new UW System Code of Ethics requiring every faculty member to file an annual report of outside interests that must be made available to the public upon request.¹²³ Despite the Code of Ethics, conflicts of interest persisted. Beginning in 2009, for example, the *Milwaukee Journal Sentinel* revealed a variety of ethically dubious links between drug companies and UW-Madison medical researchers.¹²⁴ The newspaper learned of the relationships in large part because of public records requests.

In 2011, another public records request raised questions of academic freedom. Amid turmoil in Madison over sweeping changes to public employee law proposed by a newly elected Republican governor, a representative of the Wisconsin Republican Party made a public records request for emails sent or received by UW-Madison professor William Cronon, who had written a blog post about the controversial changes in state law.¹²⁵ The dispute never went to court, but it attracted national media attention, including pieces on the front page, the editorial page, and the op-ed page of *The New York Times*.¹²⁶

120 *Id.*, Memorandum Decision, at 11.

121 *Id.*, at 12.

122 Rob Fixmer, *UW makes prof reports public*, MADISON CAP. TIMES, Apr. 29, 1983, at 1.

123 WIS. ADMIN. CODE UWS § 8.025 (Outside activities and interests; reports) (1986). The annotations to the rule specifically state that it incorporates and codifies the result of litigation in *Capital Times v. Bock*.

124 See, e.g., John Fauber, *UW doctors speak for drug companies*, MILWAUKEE J. SENTINEL, Jan. 12, 2009; John Fauber & Susanne Rust, *UW course for doctors pushed risky therapy*, MILWAUKEE J. SENTINEL, Jan. 25, 2009; John Fauber, *UW tied to male hormone marketing*, MILWAUKEE J. SENTINEL, Aug. 8, 2009; John Fauber, *Physicians' disclosures to UW, journals inconsistent*, MILWAUKEE J. SENTINEL, Nov. 7, 2009; John Fauber, *UW a force in pain drug growth*, MILWAUKEE J. SENTINEL, Apr. 2, 2011; John Fauber, *Millions paid to UW chairman*, MILWAUKEE J. SENTINEL, Dec. 27, 2011.

125 William Cronon, *Who's Really Behind Recent Republican Legislation in Wisconsin and Elsewhere?*, SCHOLAR AS CITIZEN, MAR. 15, 2011, available at <http://scholarcitizen.williamcronon.net/2011/03/24/open-records-attack-on-academic-freedom/> (last visited Feb. 20, 2018).

126 A.G. Sulzberger and Emma G. Fitzsimmons, *Wisconsin Professor's E-Mails Are Target of G.O.P.*

The university released some of the professor's emails, while refusing to release others for various unremarkable reasons (e.g., confidentiality required for personnel decisions).¹²⁷ The university's response argued the confidentiality is a fundamental component of academic freedom:

Faculty members like Professor Cronon often use e-mail to develop and share their thoughts with one another. The confidentiality of such discussions is vital to scholarship and to the mission of this university. Faculty members must be afforded privacy in these exchanges in order to pursue knowledge and develop lines of argument without fear of reprisal for controversial findings and without the premature disclosure of those ideas. The consequence for our state of making such communications public will be the loss of the most talented and creative faculty who will choose to leave for universities that can guarantee them the privacy and confidentiality that is necessary in academia. For these reasons, we have concluded that the public interest in intellectual communications among scholars as reflected in Professor Cronon's e-mails is outweighed by other public interests favoring protection of such communications.¹²⁸

The requester did not file a lawsuit challenging the university's decision to withhold some records on the grounds of academic freedom, so it is unclear whether a court would have rejected the academic freedom argument, as happened in the earlier case involving faculty members' reports of gainful outside activities.

In recent years UW-Madison has attempted to expand, and in a sense redefine, the concept of academic freedom to incorporate the right to keep unpublished research materials confidential for commercial reasons. This expanded definition of academic freedom was evident in 2009, when the university responded to a request for records documenting experiments on animals in UW-Madison labs. The request was made by People for the Ethical Treatment of Animals (PETA), which sought access to a variety of documents, including photographs and videos of cats and monkeys that had been used in experiments. The university's rejection of the request claimed that academic freedom included the right of a faculty member to control unpublished material for purposes of possible patent applications. An administrator of the UW-Madison Research Animal Resources Center wrote to PETA:

Regarding the third item in your request, "All photographic and videographic records," please be advised that any such records constitute unpublished proprietary research data. ... (U)nder the balancing test inherent in the public records law, we have made the specific determination that the public interest in maintaining academic freedom of researchers to determine how and/or when their research data is published and enabling

Records Request, N.Y. TIMES, Mar. 26, 2011, at A1; Editorial, *A Shabby Crusade in Wisconsin*, N.Y. TIMES, Mar. 26, 2011; Paul Krugman, *American Thought Police*, N.Y. TIMES, Mar. 28, 2011.

127 Letter from John C. Dowling, Senior University Legal Counsel, to Stephan Thompson, Deputy Executive Director, Republican Party of Wisconsin (Apr. 1, 2011) (copy on file with authors).

128 *Id.*

patenting of researchers' inventions outweighs the public interest in accessing unpublished data.¹²⁹

The university took the same stance in 2010 when it rejected a request for the raw data that had been used to support the conclusions of two articles co-authored by a faculty member in the UW-Madison Department of Zoology. In denying the request, UW-Madison's senior legal counsel wrote that the public interest in disclosing the raw data was outweighed by other factors, including academic freedom:

There is a strong interest in the concepts and traditions of academic freedom at institutions of higher education. That is, faculty and staff members must enjoy the academic freedom to decide how and when the fruits of their scholarly labors will be disseminated to the public. Allowing public access to scientific data under these circumstances would have a devastatingly negative effect on the continuing research and the careers of the scientists employed in this state's institutions of public higher education.¹³⁰

The senior legal counsel's statement defined academic freedom not as the right to pursue unpopular or controversial topics, but rather as the right of faculty members to control whether and when "the fruits of their scholarly labors will be disseminated to the public." The requester in the case, a postdoctoral researcher who accused the zoology professor of basing publications on unreliable data,¹³¹ persisted with a plea for assistance to the attorney general. The response from the attorney general's office cast a clear light on the university's expanded definition of academic freedom:

Raw data generated by academic researchers is widely understood in the scientific community to be the intellectual property of those researchers, to be shared and disclosed as they see fit ... If that fundamental academic tradition were to be undermined, incentives for innovative scholars and scientists to devote their lives to original research would disappear. Ground-breaking discoveries in medicine, technology, and other fields would cease.¹³²

The letter from the attorney general's office went on to mention "the highly competitive nature of bioscience research" and "the economic importance of original scientific research to UW." In other words, though the university evoked academic freedom in its opposition to disclosing information about the animal

129 Letter from Richard R. Lane, Associate Director, Research Animal Resources Center, to Chelsea Rhodes, Laboratory Investigations Department, People for the Ethical Treatment of Animals (Feb. 24, 2009) (on file with authors). The rationale for non-disclosure was repeated verbatim in additional letters from Lane to Rhodes over the ensuing several months. See Letters from Lane to Rhodes, July 15, 2009, and Sept. 24, 2009 (on file with the authors).

130 Letter from John C. Dowling, Senior University Legal Counsel, to Aaron Taylor, requester (Oct. 8, 2010) (on file with authors).

131 Eugenie Samuel Reich, *Whistle-blower claims his accusations cost him his job*, 474 NATURE 140 (2011).

132 Letter from Mary E. Burke, Assistant Attorney General, to Aaron Taylor, requester (Nov. 23, 2010) (on file with authors).

experiments, it did not hide the fact that commercial interests were fundamental to its stance.

Although reasonable people may differ over whether the concept of academic freedom should be construed so broadly as to cover the commercial interests of the university and its researchers, there is no doubt that protecting intellectual property—especially information about potentially patentable inventions—is central to the technology transfer that enables university discoveries to be converted into practical applications in medicine, agricultural, and other fields.¹³³ Patents allow the university to license companies to manufacture products based on university inventions. The more successful the products in the marketplace, the greater the royalties paid to the university.

The University of Wisconsin has a long history of patenting research. In the early 1920s a professor at the Madison campus demonstrated that irradiation with ultraviolet light increased the amount of vitamin D in food.¹³⁴ Rats with rickets that were fed irradiated food were cured. In 1924, the professor patented a process that enabled human food (most memorably milk) to be enriched with vitamin D. Twenty years later rickets had been virtually eliminated in the United States, and the university had a steady stream of royalties that could be used to fund research.¹³⁵ More recently, UW-Madison's research foundation sued Apple, Inc., for infringing on a patent a group of computer science researchers obtained for microprocessors that Apple used in some of its iPhone and iPad lines. In 2017, the court ordered Apple to pay the university foundation more than \$506 million.¹³⁶

Another concern about the disclosure of research information is possible harassment of people working in areas such as animal research and climate science that are the object of public controversy.¹³⁷ Accordingly, when People for the Ethical Treatment of Animals (PETA) and the university agreed on a settlement that gave PETA the photographs that were at the heart of a public records request, the animal-rights organization agreed not to name any university students or employees identified in the materials released by the university.¹³⁸ After reviewing the material the university disclosed, PETA filed complaints with federal agencies charging that UW-Madison researchers had violated multiple provisions of the

133 See, e.g., DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* (2003); David Roessner, Jennifer Bond, Sumiye Okubo & Mark Planting, *The Economic Impact of Licensed Commercialized Inventions Originating in University Research*, 42 RES. POL'Y 23 (2013).

134 Harry Steenbock & Archie Black. *Fat-soluble vitamins XVII. The induction of growth-promoting and calcifying properties in a ration by exposure to ultra-violet light*. 61 J. BIOLOGICAL CHEMISTRY 405 (1924).

135 Rima D. Apple, *Patenting University Research: Harry Steenbock and the Wisconsin Alumni Research Foundation*, 80 ISIS 374 (1989).

136 *Wisconsin Alumni Research Foundation v. APPLE INC.*, No. 14-cv-062-wmc (W.D. Wis. July 10, 2017). See also Karen Herzog, *Judge says Apple owes UW-Madison foundation \$506 million in patent infringement case*, MILWAUKEE J. SENTINEL, July 27, 2017. Apple filed notice that it planned to appeal the trial court decision.

137 Stephan Lewandowsky & Dorothy Bishop, *Comment: Don't let transparency damage science*, 529 NATURE 459 (2016); Christopher Wlach, *Animal Rights Extremism as Justification for Restricting Access to Government Records*, 67 SYRACUSE L. REV. 191 (2017).

138 *Rhodes v. Board of Regents*, *supra* note 87, Settlement Agreement, May 25, 2012.

federal Animal Welfare Act.¹³⁹ The university was fined for violations related to the care of research animals, in part because of the information PETA obtained via its public records lawsuit.¹⁴⁰ Less than a year after the fines received media attention, the embattled laboratory closed.¹⁴¹

In 2013, the UW System asked the Legislature to exempt research information from disclosure until it was publicly disseminated or patented.¹⁴² Not only did UW-Madison claim to be spending more than \$100,000 annually dealing with public records requests from animal rights groups, but it asserted that public disclosure of research contracts, protocols, and investigational brochures would put its medical researchers at a competitive disadvantage.¹⁴³ The university's effort failed amid considerable negative press attention.¹⁴⁴ Two years later a similar provision found its way into the governor's budget bill for the 2015-17 biennium.¹⁴⁵ Once again, negative press reaction helped scuttle the proposal.¹⁴⁶

VII. FERPA

In January 2009, the UW-Milwaukee student newspaper made a written request for a variety of records relating to public meetings of the university's Union Policy Board, a body composed of six students and three university employees. The newspaper asked for copies of meeting agendas, copies of meeting minutes, and audio recordings of public meetings of the Board during the previous five months.¹⁴⁷ The university's records custodian blacked out the names of all students and two employees before she released the agendas and minutes. She also removed the voices of students and the two employees from the audio recording. The rationale for the wholesale redactions? The records custodian claimed that the names and voices of the students were personally identifiable "educational records" within

139 Dan Simmons, *PETA complaint alleges mistreatment of cats in UW research*, WIS. ST. J., Sept. 12, 2012. See also Patrick Cole, *Decapitated Cat, Maimed Goat Trigger Scrutiny of Research Labs*, BUSINESS WEEK, Feb. 7, 2013.

140 Lydia Mulvany, *UW-Madison fined \$35,000 over care of research animals*, MILWAUKEE J. SENTINEL, Mar. 17, 2014.

141 Pat Schneider, *UW-Madison has ended controversial cat experiments targeted by PETA*, MADISON CAP. TIMES, Jan. 23, 2015.

142 Jason Stein, *UW-Madison seeks limits on open records regarding research*, MILWAUKEE J. SENTINEL, May 24, 2013.

143 Mike Ivey, *Animal rights group cries foul over UW request to block public records access*, MADISON CAP. TIMES, May 26, 2013.

144 See, e.g., Allen Ruff, *Don't exempt UW-Madison from state open records law*, MILWAUKEE J. SENTINEL, July 1, 2013; Dan Simmons, *Public records exemption for UW dies under fierce opposition*, WIS. ST. J., Feb. 11, 2014.

145 SB-21 (2015), at 181-182. See also Dana Ferguson, *Walker proposal could shield UW research from view*, MINNEAPOLIS STAR TRIBUNE, Feb. 5, 2015.

146 See, e.g., Ernst-Ulrich Franzen, *Don't cover up UW research*, MILWAUKEE J. SENTINEL, Feb. 9, 2015, at 9A; BILL LUEDERS, *DON'T LET UW HIDE ITS RECORDS*, MILWAUKEE J. SENTINEL, Feb. 23, 2015, at 9A.

147 Letter from Jonathan Anderson, Editor in Chief, *UWM Post*, to Amy Watson, Public Records Custodian, University of Wisconsin-Milwaukee (Jan. 8, 2009) (on file with authors).

the meaning of the Family Educational Rights and Privacy Act (FERPA) of 1974.¹⁴⁸ The names and voices of two of the three employees were redacted because leaving employee voices on the audio recording “would make the identities of the student members easier to trace.”¹⁴⁹ An internal appeal of the records custodian’s decision elicited a response from a UW-Milwaukee lawyer who acknowledged that meetings of the Union Policy Board were open to the public, and thus to student reporters. Nonetheless, the lawyer asserted that FERPA prevented the university from releasing any information about what student members of the Board did at the meeting, or even whether they attended the meeting. In other words, everything about the meetings of the Board was public until the meetings ended, at which point university officials draped the cloak of confidentiality over any information that might reveal which student members of the Board attended the meeting and what they did while they were there.

This absurd result led to a public records lawsuit against the university¹⁵⁰ as well as a considerable amount of negative publicity.¹⁵¹ The Wisconsin Department of Justice advised the university to turn over the records with no redactions, so the university did—but the disclosure came more than a year after the student newspaper requested the records. The university paid \$11,764 to cover the newspaper’s attorney fees and costs.¹⁵²

Despite the bad publicity and the expense associated with the lawsuit by the student newspaper, UW-Milwaukee’s aggressive use of FERPA to limit disclosure continued. In 2013 a former member of UW-Milwaukee’s student government sued the university to learn how he became the subject of a misconduct investigation. Among the records he sought were emails about him written by the “investigating officer,” an employee in the Dean of Students office who was also a graduate student. In addition to emails written by the employee (whose name he knew), the student sought the employee’s position description. Because the employee was a student, UW-Milwaukee claimed that everything about the employee’s job-related acts was exempt from disclosure because of FERPA.¹⁵³ The trial judge agreed with the university’s argument.¹⁵⁴

Many similar examples of what may seem to be over-compliance with FERPA have been documented in the United States.¹⁵⁵ One author asserted that colleges

148 Family Educational Rights and Privacy Act (FERPA) of 1974, 20 U.S.C. § 1232(g).

149 Letter, Amy Watson, Public Records Custodian, University of Wisconsin-Milwaukee, to Jonathan Anderson, Editor in Chief, *UWM Post* (Mar. 22, 2009), at 2 (on file with the authors).

150 *UWM Post v. Union Policy Board*, *supra* note 18.

151 See, e.g., Editorial, *Compliance “run wild,” supra* note 39.

152 *UWM Post v. Union Policy Board*, *supra* note 18, Stipulation; Bruce Vielmetti, *UWM student paper wins public records, legal fees*, MILWAUKEE J. SENTINEL, Feb. 16, 2010, at 3B.

153 Bruce Vielmetti, *Student activist sues UWM for public records*, MILWAUKEE J. SENTINEL, Dec. 11, 2013.

154 *Scott v. Board of Regents*, *supra* note 89, Decision and Order. As of Feb. 20, 2018, the case was awaiting a decision from the Wisconsin Court of Appeals.

155 See, e.g., Matthew R. Salzwedel & Jon Ericson, *Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics*, 2003 WIS. L. REV. 1053; Mary

and universities were using FERPA not to protect student well-being, but rather to “prevent further bad press.”¹⁵⁶ Former U.S. Sen. James L. Buckley, one of the authors of FERPA, told an interviewer in 2011 that institutions of higher education were making “extreme misinterpretations” of law by using it to justify withholding non-academic information.¹⁵⁷

Be that as it may, colleges or universities that receive federal funds (e.g., in the form of research grants or student financial aid) have a strong incentive to over-comply with FERPA. Educational institutions that have “a policy or practice” of releasing education records or personally identifiable information contained in education records could lose their eligibility for federal funding.¹⁵⁸ Although the federal government has never withheld federal funding from a college or university for non-compliance with FERPA,¹⁵⁹ the theoretical possibility that it could happen makes lawyers very cautious. The caution was evident in a letter from a UW-Madison lawyer to the lawyer for a student who was requesting documents to determine why other students were admitted to a doctoral program but he was not. The university lawyer wrote: “Please understand that when dealing with FERPA, I believe in being safe, rather than sorry as the university’s federal funding could be on the line with any violation.”¹⁶⁰

The executive director of the Student Press Law Center said that UW-Milwaukee had been on the Center’s radar because of its extreme interpretations of FERPA: “They’re over-complying to an extent that Congress could never have possibly intended.”¹⁶¹ While lamenting what he considered to be the university’s overuse of FERPA, he nonetheless understood how the possibility of losing federal funding could make university lawyers exceedingly cautious. “There doesn’t seem to be any nefarious motive,” he said, “just a bureaucratic mentality run wild.”¹⁶²

VIII. Discussion

The research reported in this Article represents a pioneering attempt to survey the landscape of public records lawsuits involving a public university system

Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide Their Scandals*, 33 *CARDOZO L. REV.* 1555 (2012); Ron Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy To Suppress Open Records Requests*, 101 *GEO. L. J.* 493 (2013).

156 Penrose, *supra* note 155, at 1561.

157 George Schroeder, *It’s clear the ‘O’ stands for opaque*, *EUGENE (OREGON) REG.-GUARD*, Feb. 18, 2011, at C1.

158 20 U.S.C. § 1232g(b)(1).

159 Mathilda McGee-Tubb, *Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Law Must Yield to FERPA*, 53 *B.C.L. REV.* 1045 (2012); Frank LoMonte, Executive Director, Student Press Law Center, *Education privacy law used as excuse to conceal records*, Apr. 11, 2017, available at <http://www.opengovva.org/blog/education-privacy-law-used-excuse-used-conceal-records> (last visited Feb. 20, 2018).

160 Letter from John C. Dowling, Senior University Legal Counsel, UW-Madison, to Lawrence Bensky, Attorney for Seon Kyu Kang (Feb. 11, 2003) (on file with authors).

161 Editorial, *Compliance “run wild,” supra* note 41.

162 *Id.*

over an extended period. The results demonstrate the merits of a research strategy that strives to analyze a comprehensive set of trial-court cases. The method of traveling to courthouses to review files that are not available via Lexis, Westlaw, or other online services reaped considerable dividends. The labor-intensive method enabled a much-needed corrective to the scholarly consensus that most public records lawsuits against universities focus on administrative searches or raise issues of academic freedom.¹⁶³ In reality, most lawsuits sought information about suspected misconduct or ethical lapses by university employees.

The results also showed how the news media and, to a lesser extent, policy-oriented activist groups have used the public records law with considerable success to obtain information that is newsworthy and/or relevant to public policy. The university's transparency in these cases is sometimes voluntary, sometimes compelled. When the university resisted such requests and the requestor sued to gain access to the information it sought, the university always lost.

The research in trial-court files also found that the university was using a phrase "academic freedom" in a new way, one that goes beyond the traditional conception of "continual and fearless sifting and winnowing by which alone the truth can be found."¹⁶⁴ The modern university argues that it must withhold research information to enhance its chances of monetizing discoveries and innovations via patents and other means.¹⁶⁵ Financial considerations are also the principal rationale for the university's aggressive use of FERPA as a justification for withholding records that mention students. Failure to comply with FERPA could jeopardize eligibility for federal funds.¹⁶⁶ Although no campus has ever been declared ineligible for federal funding because of FERPA violations, the financial stakes are far from trivial.

While the university uses a broad federal statute (FERPA) as the basis for its argument that information about students must not be released, no federal statute authorizes broad confidentiality about research information. After Wisconsin courts showed little sympathy to the university's anti-disclosure positions with respect to research information, the university lobbied the Legislature to pass a state statute that would create a zone of confidentiality for research information. The university had reason to be hopeful; after all, the Legislature had granted it broad confidentiality rights with respect to administrative searches.¹⁶⁷ In addition, information about researchers' unpatented inventions is akin to trade secrets, which are exempt from disclosure in Wisconsin and most other states.¹⁶⁸ As of the

163 See notes 13-14 *supra* and associated text. For another study based on paper documents from trial-court case files that raised questions about an existing scholarly consensus, see David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 COMM. LAW & POL'Y 303 (2009).

164 University of Wisconsin Board of Regents, *supra* note 31.

165 See notes 129-141 *supra* and associated text.

166 UW System campuses received roughly \$911 million in federal awards in 2013-14. University of Wisconsin System, *UW System Federal Funding*, May 26, 2015, available at https://www.wisconsin.edu/government-relations/uw_system_federalpriorities/ (last visited Feb. 20, 2018).

167 See notes 100-108 *supra* and associated text.

168 WIS. STAT. § 19.36(5).

end of 2017, however, the Legislature had taken no action to limit public access to research information.

Our research demonstrated the dominance of news organizations as requestors of public records from the university. When the university withheld records, news organizations often filed lawsuits asking a court to order the university to release records. News organizations initiated more than half of the lawsuits we identified, never losing a case. Journalists are frequent users of the public records law for a number of reasons. They tend to have experience and expertise in using the public records law to obtain documents.¹⁶⁹ In addition, journalists have access to resources that can help them assess the likelihood of winning a public records lawsuit.¹⁷⁰ Finally, embedded within journalistic culture is an ethic that champions government transparency as a tool of public accountability.¹⁷¹

While major Wisconsin news organizations consistently oppose the university's proposals for greater restrictions on access to information, the news media are getting weaker. The precarious economic position of legacy news organizations makes them less likely to go to court to assert access-to-information claims.¹⁷² University administrators may not always welcome public records requests from journalists, but there is no doubt that such requests often lead to newsworthy stories that serve the public interest.¹⁷³ As the strength of the institutional press fades, so too does its role as a non-partisan agent of accountability. Because accountability is a cornerstone of democracy, the issue has implications far beyond public universities. As law professor RonNell Andersen Jones noted:

The loss of newspapers as legal instigators and enforcers, coupled with the existence of barriers that appear to limit the ability of replacement entities in the new media ecology from taking up those roles, should give cause for concern that American democracy will suffer as legislation and litigation in the interest of open government wane.¹⁷⁴

169 See, e.g., Craig Sanders, *Newspapers' Use of Lawyers in the Editorial Process*, in *HOLDING THE MEDIA ACCOUNTABLE: CITIZENS, ETHICS, AND THE LAW* 138 (David Pritchard ed. 2000).

170 Many news industry associations provide legal assistance with public records and open meetings cases. The Wisconsin Newspaper Association, for example, operates a legal hotline that enables reporters to speak with a lawyer about such matters at no charge. See generally, Craig Sanders, *Helping the Press Define Its Rights and Responsibilities*, in *HOLDING THE MEDIA ACCOUNTABLE: CITIZENS, ETHICS, AND THE LAW* 154 (David Pritchard ed. 2000).

171 Society of Professional Journalists, *SPJ Code of Ethics* ("Recognize a special obligation to serve as watchdogs over public affairs and government. Seek to ensure that the public's business is conducted in the open, and that public records are open to all."), available at <http://www.spj.org/ethicscode.asp> (last visited Feb. 20, 2018).

172 Knight Foundation, *News organizations' ability to champion First Amendment rights is slipping, survey of leading editors finds* (April 21, 2016), available at <http://www.knightfoundation.org/press-room/press-release/news-organizations-ability-champion-first-amendmen/> (last visited Feb. 20, 2018).

173 See notes 69-80 *supra* and associated text.

174 RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 *WASH. & LEE L. REV.* 557, 627 (2011). See also RonNell Andersen Jones & Sonja R. West, *The First Amendment Is Not Enough*, *N.Y. TIMES*, Jan. 25, 2017, at A25.

Our research found that partisan, activist organizations began appearing as plaintiffs in public records actions against the university in recent years, regularly winning cases.¹⁷⁵ Like journalists, activists seek to hold the university accountable, but partisan accountability may be fundamentally different from non-partisan accountability in ways that scholars have yet to examine.

Wisconsin courts have unambiguously indicated that if the university would like changes in the state's public records policies, it should seek them from the Legislature. Given that the 2017-18 Wisconsin Legislature was more conservative than at any time since the mid-1950s,¹⁷⁶ the university could hope to find a receptive audience for its proposals.¹⁷⁷ The practical realities and competitive nature of certain kinds of research make it prudent to consider whether there are specific types of research-related records that could be protected by a narrowly drawn exemption without compromising Wisconsin's historically strong public interest in transparency and accountability.

Although Wisconsin is a typical state, and although Wisconsin's public records law is well within the mainstream of state public records laws,¹⁷⁸ access-to-information issues have arisen in other states that have not yet found their way into Wisconsin courtrooms. One such issue is whether university foundations are subject to state public records laws; different states have resolved the issue in different ways.¹⁷⁹ Another issue on which states differ is whether the police forces of private universities are subject to state public records laws. In 2015, the Ohio Supreme Court, in a case involving Otterbein University, ruled that police at such institutions were subject to the state's public records law.¹⁸⁰ The next year, in a case involving the University of Notre Dame, the Indiana Supreme Court ruled that the state's public records law did not apply to police at private universities.¹⁸¹ Such

175 See notes 83-88 *supra* and associated text.

176 Jason Stein & Patrick Marley, *Wisconsin's Capitol shifts further to right*, MILWAUKEE J. SENTINEL, Nov. 9, 2016.

177 Research about differences among American states has shown that the more conservative a state's political culture, the more its laws tend to restrict freedom of information in terms of public records and other issues. See David Pritchard & Neil Nemeth, *Predicting the Content of State Public Records Laws*, 10 NEWSPAPER RES. J. 45 (1989). See also Casey Carmody & David Pritchard, *Policy Liberalism, Public Opinion and Strength of Journalist's Privilege in the American States*, 49 FIRST AMEND. STUD. 31 (2015).

178 See notes 23-26, *supra*, and accompanying text.

179 Alexa Capeloto, *Private Status, Public Ties: University Foundations and Freedom of Information Laws*, 33 QUINNIPIAC L. REV. 339 (2014); Jonathan W. Peters & Jackie Spinner, *How university foundations try to avoid public scrutiny – and what reporters can do*, COL. JOURNALISM REV., July 16, 2015, available at https://www.cjr.org/united_states_project/how_university_foundations_try_to_avoid_public_scrutiny_and_what_reporters_can_do.php (last visited Feb. 20, 2018).

180 *State ex rel. Schiffbauer v. Banaszak*, 2015 Ohio 1854, 142 Ohio St. 3d 535, 33 N.E.3d 52 (2015).

181 *ESPN, Inc. v. University of Notre Dame*, 62 N.E.3d 1192 (Ind. 2016). See also Cheva Gourarie & Jonathan Peters, *Why private college police forces are a new front in the fight over public records*, COL. JOURNALISM REV., Feb. 29, 2016, available at https://www.cjr.org/united_states_project/private_police_records.php (last visited Feb. 20, 2018).

differences are to be expected in a federal system such as the United States where states have considerable latitude to do as they please with respect to many matters, including public records laws.¹⁸²

182 It is apt to recall Justice Brandeis' famous statement about the states' abilities to be laboratories of democracy: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

AFTER THE DEAR COLLEAGUE LETTER: DEVELOPING ENHANCED DUE PROCESS PROTECTIONS FOR TITLE IX SEXUAL ASSAULT CASES AT PUBLIC INSTITUTIONS

JIM NEWBERRY*

Abstract

Since the formation of the American Republic, Americans have maintained a fundamental mistrust of government power. In the Title IX realm, the Obama Administration exacerbated those concerns. In its efforts to enforce Title IX and to reduce sexual misconduct on campuses, the Obama Administration issued a “Dear Colleague Letter” in April 2011 and a follow up Question and Answer document in April 2014, both of which set out OCR’s view of the obligations of institutions receiving federal financial assistance under Title IX and its implementing regulations. This 2011 Dear Colleague Letter “explains the requirements of Title IX pertaining to sexual-harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.” Although the 2011 Dear Colleague Letter and the 2014 Q & A result in an increased focus on the problems of sexual assault on campus, some scholars have suggested these documents undermine due process. On September 22, 2017, the Secretary of Education released new guidance that revoked both the 2011 Dear Colleague Letter and the 2014 Q & A document. Instead, OCR re-established its 2001 Revised Sexual Harassment Guidance as the guiding light for future assessments of institutional compliance. Further, the Secretary announced her plans to initiate a “rulemaking process that responds to public comment.” The proposed rulemaking process will undoubtedly address multiple stakeholder concerns with the approach to sexual misconduct, but one anticipates that due process concerns for public institutions will be near the top of the list of concerns addressed in rulemaking effort. The purpose of this Essay is to set out a vision for what due process in the Title IX sexual assault context should look like. In accomplishing this purpose, the author —drawing on existing case law, policy arguments, and his own experience as a higher education lawyer—proposes a set of due process protections which will equitably balance the interests of (a) Complaining Witness seeking redress for multiple forms of sexual misconduct, (b) Respondents seeking protection against lifelong stigmas arising from unfair campus proceedings, and (c) institutions of higher education seeking to eliminate all forms of educational program discrimination based on sex. This Essay has four parts. Part I examines why Title IX Sexual Assault proceedings require enhanced due process measures. Part II explains why providing enhanced due process to the Respondent does not undermine the institution’s obligations to the Complaining Witness. Part III describes the author’s vision of what enhanced due process provisions should entail. Finally, Part IV offers some suggestions for private institutions.

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INTRODUCTION

Since the formation of the American Republic, Americans have maintained a fundamental mistrust of government power.¹ In the Title IX realm, the Obama Administration exacerbated those concerns.² In its efforts to enforce Title IX and to reduce sexual misconduct on campuses,³ the Obama Administration issued a “Dear Colleague Letter” in April 2011⁴ and a follow up Question and Answer document in April 2014,⁵ both of which set out OCR’s view of the obligations of institutions receiving federal financial assistance under Title IX and its implementing regulations. This 2011 Dear Colleague Letter “explains the requirements of Title IX pertaining to sexual-harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence.”⁶

As Fifth Circuit Judge Edith Jones observed, this 2011 Dear Colleague Letter, “was not adopted according to notice-and-comment rulemaking procedures; its extremely broad definition of ‘sexual harassment’ has no counterpart in federal civil rights case law; and the procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt.”⁷ Specifically, the Dear Colleague Letter and the 2014 OCR Q & A document: (1) suggest institutions handle sexual assault cases with a single person serving as detective, prosecutor, judge, and jury;⁸ (2) maintain hearings are not required;⁹ (3) imply “the school should not start the proceedings with a presumption of innocence, or even a stance of neutrality ... [but with an assumption] any complaint is valid and the accused is guilty as charged;”¹⁰

1 See, e.g. Mark David Hall, *ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC* 12-40 (2013); Marci Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 293, 295 (Michael W. McConnell, Robert F. Corchran, Jr., & Angela C. Carmella, eds. 2001); Ian Spier, *The Calvinist Roots of American Social Order: Calvin, Witherspoon, and Madison*, *PUBLIC DISCOURSE* (April 13, 2017) (available at <http://www.thepublicdiscourse.com/2017/04/19116/>).

2 See K.C. Johnson & Stuart Taylor, Jr., *THE CAMPUS RAPE FRENZY* 9-10 (2017).

3 Any university that receives federal funds for any purpose is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2012), and its implementing regulations, 34 C.F.R. § 106 (2015), which prohibit discrimination on the basis of sex in educational programs or activities operated by recipients of federal financial assistance.

4 See Office for Civil Rights (“OCR”), April 4, 2011 “Dear Colleague” letter, available online at: <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter the “2011 Dear Colleague Letter.”]

5 On April 24, 2014, additional guidance was issued by the OCR entitled “Questions and Answers on Title IX.” Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 24, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

6 *Id.*

7 *Plummer v. Univ. of Houston*, 860 F.3d 767, 779-80 (5th Cir. 2017) (Jones, J., dissenting)

8 See White House Task Force to Protect Students from Sexual Assault, *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault* 14 (Apr. 2014).

9 OCR Questions and Answers, *supra* note 5, at 25.

10 David E. Bernstein, *LAWLESS: THE OBAMA ADMINISTRATION’S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* 126 (2015).

(4) forbid the consideration of the complainant’s sexual history with anyone other than the accused student;¹¹ (5) discourage cross-examination;¹² (6) allow an appeal of not guilty verdicts;¹³ and (7) mandate a preponderance of the evidence—rather than clear and convincing evidence or beyond a reasonable doubt—as the standard for determining guilt.¹⁴ Although the 2011 Dear Colleague Letter and the 2014 Q & A result in an increased focus on the problems of sexual assault on campus,¹⁵ some scholars have suggested these documents undermine due process.¹⁶

On September 22, 2017, the Secretary of Education released new guidance that revoked both the 2011 Dear Colleague Letter and the 2014 Q & A document.¹⁷ Instead, OCR established *Revised Sexual Harassment Guidance* as the guiding light for future assessments of institutional compliance.¹⁸ Further, the Secretary announced her plans to initiate a “rulemaking process that responds to public comment.”¹⁹ The proposed rulemaking process will undoubtedly address multiple stakeholder concerns with the approach to sexual misconduct, but one anticipates that due process concerns for public institutions will be near the top of the list of concerns addressed in rulemaking effort.²⁰ The purpose of this Essay is to set out a vision for what due process in the Title IX sexual assault context should look like.²¹

11 OCR Questions and Answers, *supra* note five, at 31.

12 *See Id.* at 30-31.

13 Dear Colleague Letter, *supra* note 4, at 12.

14 *Id.* at 11.

15 When these tragic events occur, the institution has a constitutional and legal obligation to support the Complaining Witness. *See* discussion at p. 11.

16 Bernstein, *supra* note 10, at 124.

17 Betsy DeVos, *Secretary’s Prepared Remarks on Title IX Enforcement*, Antonin Scalia Law School, George Mason University (September 7, 2017).

18 Office for Civil Rights, Dear Colleague Letter dated September 22, 2017, p. 2, *available at* <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>. The 2017 Dear Colleague Letter was released simultaneously with *Q&A on Campus Sexual Misconduct*, *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>

19 DeVos, *supra* note 17.

20 For the most part, this Essay addresses only public institutions. Because private institutions are not constitutional actors, the Due Process Clause does not apply to the actions of the institutions or their employees. Although he acknowledges that private institutions are not constitutional actors under current Supreme Court jurisprudence, Professor Rubinfeld suggests that, in the context of Title IX sexual assault hearings, the courts should consider private institutions to be state actors. *See* Jed Rubinfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 Tex. L. Rev. 15 (2017). As he explained, “[u]nder the Dear Colleague letter, Title IX remained of course an equality statute, but OCR was pursuing Title IX’s equality objectives by compelling schools to do law enforcement on the federal government’s behalf.” *Id.* at 46. Regardless of the merits of Professor Rubinfeld’s argument, private institutions should seriously consider adopting this framework and contractually agreeing to follow this framework. If a student is expelled by a private institution for sexual assault and subsequently sues, the courts may well expect a process that resembles what public institutions are providing. Moreover, as noted in Section IV below, federal regulations impose an obligation on all institutions receiving federal financial aid to adopt “prompt and equitable” grievance procedures.

21 Although the author generally focuses on the due process obligations of public institutions, private institutions, which adopt similar protections as a part of their sexual misconduct policies,

In accomplishing this purpose, the author—drawing on existing case law, policy arguments, and his own experience as a higher education lawyer—proposes a set of due process protections which will equitably balance the interests of (a) Complaining Witness²² seeking redress for multiple forms of sexual misconduct, (b) Respondents seeking protection against lifelong stigmas arising from unfair campus proceedings, and (c) institutions of higher education seeking to eliminate all forms of educational program discrimination based on sex.

This Essay has four parts. Part I examines why Title IX Sexual Assault proceedings require enhanced due process measures. Part II explains why providing enhanced due process to the Respondent does not undermine the institution's obligations to the Complaining Witness. Part III describes the Author's vision of what enhanced due process provisions should entail. Finally, Part IV offers some suggestions for private institutions.

I. Enhanced Due Process Measures Are Required In Title IX Sexual Assault Proceedings

Unlike the legal traditions of other cultures, the Anglo-American-Australasian legal tradition has required procedural due process before governmental actor deprives an individual of life, liberty, or property.²³ "Due process is the foundation of any system of justice that seeks a fair outcome. Due process either protects everyone or it protects no one."²⁴ Due process prevents arbitrary governmental action,²⁵ but it is ultimately a search for truth—did the individual actually do the action for which he is accused?²⁶ All doubts are resolved in favor of the

must carefully adhere to any self-imposed procedural obligations. The failure to do so would enable a dissatisfied party to assert a claim against the institution based on a breach of contract theory.

22 For simplicity's sake, this Essay uses the term "Complaining Witness" to designate the person who believes that he/she was harmed by a violation of an institution's sexual misconduct policy. While some quoted materials may refer to such individuals as "victims" or "survivors," the author considers "Complaining Witness" to be more neutral and balanced. Similarly, the term "Respondent" will be used by the author to designate the person who the Complaining Witness believes violated the institution's sexual misconduct policy, even though some quoted materials may refer to such individuals as the "alleged perpetrator" or "accused."

23 Compare Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 GEO. WASH. J. INT'L L. & ECON. 1, 6 (1997) (describing the lack of due process in the Ukraine), and Haibo He, *The Dawn of the Due Process Principle in China*, 22 COLUM. J. ASIAN L. 57, 93 (2008) (stating that China does not have a tradition of due process), with Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1211–12 (2005) (describing the distinctive Anglo-American tradition of due process), and Belinda Wells & Michael Burnett, *When Cultures Collide: An Australian Citizen's Power to Demand the Death Penalty Under Islamic Law*, 22 SYDNEY L. REV. 5, 19 (2000) (describing the application of due process in South Australia and its roots in English history).

24 DeVos, *supra* note 17.

25 *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

26 See David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 473 (1992) ("[T]he search for truth is the reason the Constitution protects the right to confrontation, the right to compulsory process and the right to put on a defense.").

individual.²⁷ The focus is on preventing false convictions.²⁸ As Blackstone noted, it is better for ten guilty men to go free than to imprison an innocent man.²⁹

Due process clearly applies when a public university seeks to expel a student for disciplinary reasons,³⁰ but the judiciary has allowed universities to apply a less rigorous standard than that imposed in the context of a criminal proceeding.³¹ Despite the life-altering consequences of an expulsion,³² a state university need not transplant “wholesale . . . the rules of procedure, trial and review which have evolved from the history and experience of courts.”³³ Because student disciplinary hearings “are not criminal trials, and therefore need not take on many of those formalities,”³⁴ “neither rules of evidence nor rules of civil or criminal procedure need be applied.”³⁵ Indeed, as long as the student has notice of the charges, an explanation of the evidence against him, opportunity to present his side of the story, and the evidence is sufficient, there is no constitutional violation.³⁶ Notice requires nothing more “than a statement of the charge against them.”³⁷ As to the hearing, “[c]ross-examination, the right to counsel, the right to transcript, and an

27 Henry L. Chambers, Jr., *Reasonable Certainty and Reasonable Doubt*, 81 MARQ. L. REV. 655, 658–59 (1998).

28 See Elizabeth Kaufer Busch, *Sexual Assault: What’s Title IX Got To Do With It?*, ___ PERSPECTIVES IN POLITICAL SCIENCE ___, ___ (2017) (Discussing differences between Due Process approach and the Inquisitorial System).

29 See 2 WILLIAM BLACKSTONE, COMMENTARIES *358 (“[B]etter that ten guilty persons escape, than that one innocent suffer.”).

30 *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 222-23 (1985). The requirement to provide due process dates from the landmark decision in *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158–59 (5th Cir. 1961).

31 *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). See also *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633–37 (6th Cir. 2005) (collecting cases and analyzing the amount of process due in student disciplinary cases).

32 Robert B. Groholski, Comment, *The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process Law*, 19 N. ILL. U. L. REV. 739, 754–55 (1999); James M. Picozzi, Note, *University Disciplinary Process: What’s Fair, What’s Due, and What You Don’t Get*, 96 YALE L.J. 2132, 2138 (1987); Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 683 (2001). Indeed, in some states, if the student was expelled for sexual assault, that fact is noted on the student transcript. VA. CODE ANN. § 23-9.2:18. Given the potential liability for admitting a known sex offender, it will be difficult for students to transfer to other institutions. See Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players Is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 617, 634–35 (2003) (explaining the liability that universities are exposed to because of student sexual harassment and suggesting that this may make them more cautious regarding which students they accept). In the Southeastern Conference, an athlete who is disciplined for sexual assault is ineligible to play at any other conference school. SOUTHEASTERN CONFERENCE RULES 4.1.19.

33 *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

34 *Flaim*, 418 F.3d at 635.

35 *Id.*; see also *Nash v. Auburn Univ.*, 812 F.2d 655, 665 (11th Cir. 1987) (holding that a student disciplinary hearing is not required to follow the formal rules of evidence); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 73 (4th Cir. 1983) (same).

36 *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

37 *Nash v. Auburn University*, 812 F.2d 655, 663 (11th Cir. 1987).

appellate procedure have not been constitutional essentials, but where institutions have voluntarily provided them, courts have often cited them as enhancers of the hearing's fairness."³⁸ While Respondents have a right to consult legal counsel,³⁹ there is no right to active participation by attorneys.⁴⁰ In short, due process requires "only that [students] be afforded a meaningful hearing,⁴¹ and that the decision be supported by substantial evidence.⁴² As long as a public university meets the constitutional standards, it need not follow its own internal procedures and rules in order to satisfy its constitutional obligations.⁴³

II. Providing Enhanced Due Process Does Not Undermine the Institution's Obligations to the Complaining Witness

With the diminution of due process protections, the possibility of erroneous outcomes—false convictions—increases. Yet, this increased possibility of error has no corresponding benefit. "The notion that a school must diminish due process rights to better serve the 'victim' only creates more victims."⁴⁴

Public institutions frequently have ignored their obligations to support the Complaining Witness.⁴⁵ Following the decline of the in loco parentis doctrine, many

38 William A. Kaplin & Barbara A. Lee, *THE LAW OF HIGHER EDUCATION* § 10.3.2.3 (5th ed. 2013.).

39 *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (noting that "at most the student has a right to get the advice of a lawyer"); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (noting that a student is not forbidden from obtaining legal counsel before or after the disciplinary hearing); see *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 464 (S.D.N.Y. 2015) (reaffirming *Osteen*); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 582 (E.D. Va. 1996) (noting that procedures that afforded the student the opportunity to consult with an attorney outside of the disciplinary hearings were adequate).

40 *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005) ("Ordinarily, colleges and universities need not allow active representation by legal counsel or some other sort of campus advocate."); see also *Osteen*, 13 F.3d at 225 (noting that during a disciplinary hearing, "the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel, as by examining and cross-examining witnesses and addressing the tribunal"); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 74 (4th Cir. 1983) (holding a student received due process even though a practicing attorney did not conduct his defense because two student-lawyers consulted extensively with the student's attorney throughout the proceedings).

41 *Tigrett v. Rector & Visitors of the Univ. of Virginia*, 290 F.3d 620, 630 (4th Cir. 2002)

42 *Nash*, 812 F.2d at 667-68

43 *Riccio v. County of Fairfax*, 907 F.2d 1459, 1469 (4th Cir. 1990) (noting that violations of federal due process are to be measured by federal standards, not by a state's standard); *Bills v. Henderson*, 631 F.2d 1287, 1298 (6th Cir. 1980) ("[P]rocedural rules created by state administrative bodies cannot, of themselves, serve as a basis for a separate protected liberty interest."); *Bates v. Sponberg*, 547 F.2d 325, 329-30 (6th Cir. 1976) ("It is not every disregard of its regulations by a public agency that gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional processes of state institutions."); *Winnick v. Manning*, 460 F.2d 545, 550 (2^d Cir. 1972) (holding that a university's violation of its own procedures did not amount to a violation of federal due process).

44 DeVos, *supra* note 17.

45 See Janet Napolitano, "Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault, 33 *YALE L. & POL'Y REV.* 387, 387 (2014) (stating that increased awareness of sexual assault on campuses highlights the need for public institutions to significantly improve their

universities have tolerated a student-life culture that enabled heavy drinking and casual sex.⁴⁶ Such an environment does not prevent or justify sexual assault and, indeed, indirectly encourages it.⁴⁷ When students have come forward with allegations of sexual assault, campus officials often failed to: (1) provide adequate psychological counseling; (2) grant accommodations, such as changes in class schedule or housing; or (3) prevent retaliation by the alleged perpetrator's supporters.⁴⁸ If a Complaining Witness wished to pursue justice against a Respondent, the university often simply referred them to the criminal justice system, where police and prosecutors would not pursue ambiguous cases.⁴⁹ If the school initiated student disciplinary proceedings, it was often a horrific experience for the complainant.⁵⁰ Sadly, at some institutions, the Respondent's status as an athlete or the child of a wealthy donor apparently influenced the decision to pursue discipline or the sanction involved.⁵¹

When a student makes an allegation of sexual assault, a public institution has a constitutional, legal, and moral obligation to support the Complaining Witness.⁵² Reporting is going to be painful for the Complaining Witness, but a university can minimize the pain to the fullest extent possible. Specifically, a public institution must make timely and age-appropriate resources available to the Complaining Witness—whether it is relocation of residence, schedule adjustments, medical assistance, or psychological counseling.⁵³ Of course, the institution must ensure the Respondent or the Respondent's friends and allies do not retaliate against the Complaining Witness.⁵⁴

procedures for responding to this problem); 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, 214–17 (2011) (reviewing instances in which schools have failed to appropriately respond to allegations of sexual assault).

46 See Oren R. Griffin, *A View of Campus Safety Law in Higher Education and the Merits of Enterprise Risk Management*, 61 *Wayne L. Rev.* 379, 383 (2016) (noting how students are generally treated as adult consumers and are “free to engage in various activities at their own discretion”).

47 CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 2-5-2-8 (2007)*, <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (noting that substance abuse and prior consensual sexual activity are major risk factors for sexual assault).

48 See Cantalupo, *Burying*, *supra* note 45, at 214–16 (describing instances in which university officials failed to provide appropriate support, protection, or accommodations for sexual assault Complaining Witness, or failed to act at all).

49 See Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 *J.C. & U.L.* 481, 487–488 n.28 (2012) (noting that many institutions’ sexual assault reporting guidelines emphasize contacting police).

50 Cantalupo, *Burying*, *supra* note 45, at 214–16.

51 Bernstein, *supra* note 10, at 123.

52 As part of its constitutional obligations under the Equal Protection Clause, a public institution should encourage Complaining Witness to report the acts against them to the police and should support the student after the report. However, the OCR guidance takes a different view. Bernstein, *supra* note 10, at 124–25.

53 2001 Guidance at (VII)(A).

54 *Id.*

The institution has these obligations regardless of any uncertainties or ambiguities about the case. A student, who sincerely believes she is a victim of sexual assault, is going to manifest the trauma of a rape complainant even though the Respondent may claim innocence or the evidence is at best inconclusive.⁵⁵

These obligations are in addition to—not in place of—the obligations to the individual accused of the sexual assault. Fulfilling the institutional obligations to the Complaining Witness will not harm the Respondent. Diminishing the due process protections for the Respondent will not help the Complaining Witness. In fact, the 2017 guidance reflects that OCR expects institutions to provide both the Complaining Witness and the Respondent with interim measures without regard to “fixed rules or operating assumptions that favor one party over another.”⁵⁶

III. What Enhanced Due Process Measures Entail

A. *The 2017 OCR Perspective*

In the 2017 guidance, OCR set forth a number of procedural steps which institutions must now take in order discharge their Title IX obligations. During its investigation, those steps include:

- The use of a trained investigator to:
 - Analyze and document the available evidence;
 - Objectively evaluate the credibility of the parties and witnesses;
 - Synthesize all of the evidence – both inculpatory and exculpatory; and
 - Assess the unique and complex circumstances of each case.⁵⁷
- Notice to the Respondent that includes:
 - The allegations constituting a potential violation of the school’s sexual misconduct policy;
 - Sufficient details to prepare a response, including:
 - The identities of the parties involved,
 - The specific section of the code of conduct violated,
 - The specific conduct allegedly constituting the violation, and
 - The date and time of the alleged incident; and

55 While the 2011 DCL and the 2014 Q & A impose this obligation, the 2017 Q & A document requires no specific interim measures, only that an institution should assess the need for interim measures necessary to avoid depriving any student of his/her education. 2017 Q&A, *supra* note 18, at 3.

56 *Id.*

57 *Id.*, p. 4.

- Sufficient time to prepare a response before an initial interview;
- A written report summarizing the relevant exculpatory and inculpatory evidence; and
- Timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.⁵⁸

In addition, OCR identified additional procedural safeguards that would apply in any adjudication of the parties' interests, including:

- The preparation of findings of fact and conclusions as to whether the facts support a finding of responsibility on each of the alleged violations;
- Equal access for both parties to any information to be used during any informal or formal disciplinary meetings and hearings, including the investigation report;
- An opportunity to respond to the report in writing prior to a decision;
- Equal processes for both parties during the pendency of the adjudication procedure;
- Equal access to advisors in the resolution of any claim based on sexual assault, domestic violence, dating violence, or stalking; and
- Adjudicators without conflicts of interests.⁵⁹

Finally, OCR has noted that institutions are not obligated to provide both parties with a right of appeal, but to the extent that both parties are given the ability to appeal, the appeal procedures must be equally available to both parties.⁶⁰

Although the 2017 Q & A does much to restore balance to Title IX proceedings, the notice and comment process contemplated by OCR will provide a variety of stakeholders with the opportunity to address the question of what due process protections should be injected into sexual misconduct proceedings on campus. Based on the author's experiences with multiple matters arising on multiple campuses, the author believes the following protections are ones that protect the parties' interests and are ones that are within the realm of that which can be reasonably expected of institutions whose primary responsibility is educating students rather than adjudicating quasi-criminal complaints of violence and less serious complaints of other forms of discriminatory conduct.

B. The Author's Perspectives

Considerable confusion has existed for years about the roles of the Complaining Witness, the Respondent, and the institution in sexual misconduct hearings. The author believes the criminal judicial system provides a useful analogy. The

58 *Id.*

59 *Id.*, p. 5.

60 *Id.*, p. 7.

author believes the Complaining Witness in a Title IX proceeding is analogous to a criminal complainant, the Respondent is analogous to a criminal defendant, and the institution is analogous to the State. Just as the State prosecutes, plea bargains, and enforces the outcome of a criminal case, so too should the institution prosecute, informally resolve, enforce the outcome of a campus sexual misconduct proceeding. Ultimately, it is the institution that must ensure that its educational programs are being offered without discrimination based on sex, not the complainant. Thus, just as the State decides whether to prosecute (or not prosecute) or plea bargain a criminal matter based on the State's assessment of public safety concerns, the institution should determine whether to prosecute (or not prosecute) or informally resolve a Title IX complaint based on the institution's assessment of how it can best fulfill its Title IX obligations.

Undoubtedly, a state's attorney wisely considers a criminal victim's desires in making a decision about how best to proceed with a criminal case. Similarly, any institution would be wise to consider a Title IX Complaining Witness's desires in making decisions about how best to proceed with a Title IX case. However, in both the criminal setting and the Title IX setting, the Complaining Witness's interests are secondary to the interests of the State and the institution. The institution, not the Complaining Witness, is ultimately responsible for ensuring that it discharges its Title IX obligations by taking "immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again."⁶¹

The criminal process analogy impacts the concept of the campus grievance process. Criminal prosecutors are expected to seek the truth of what occurred and outcomes consistent with the law, not to ignore exculpatory evidence just because the criminal victim feels aggrieved. Similarly, institutions should seek the truth of what occurred and outcomes consistent with their sexual misconduct policy so as to discharge the institution's Title IX obligations. Hopefully, the result of the Title IX proceedings will satisfy the Complaining Witness, but that will not always be the case, nor should Complaining Witness satisfaction be the goal of the institution's efforts.

Thus, if the goals of the campus sexual misconduct proceedings are finding the truth and achieving outcomes consistent with the law, one must assess what procedural safeguards have been shown in other types of proceedings to promote the truth and outcomes consistent with applicable law, even if some modification of those safeguards is necessary in light of a hearing likely to be conducted by individuals with limited experience and training in conducting adversarial proceedings.

The author believes the following safeguards have consistently proven useful in promoting the truth and outcomes consistent with the law.

61 2001 Guidance at (VII).

1. *Strict Separation of Roles*

To achieve the truth, institutions must strictly separate the investigative, prosecutorial, adjudicative, and appellate functions. America's criminal justice system acknowledges the possibility that individuals may abuse their power; so, it disperses authority among multiple individuals and contains structural safeguards to prevent abuse of power.⁶² A prosecutor must obtain a grand jury indictment or preliminary hearing finding of probable cause.⁶³ A single juror can prevent a finding of guilt.⁶⁴ A guilty verdict, but not an acquittal, is subject to appellate review.⁶⁵ The authority to imprison an individual is never concentrated in an individual.⁶⁶ While neither our constitutional system nor our criminal justice system operates perfectly, avoiding concentrations of power and authority makes it more likely that society, rather than a faction,⁶⁷ will prevail and only the guilty will go to jail.

The same principles must apply when a public university confronts an allegation that could result in expulsion. The individuals who investigate the allegation must not be involved in the decision to prosecute, the determination of guilt, or the appellate review. The individuals who determine whether to initiate disciplinary proceedings must not be involved in the investigation or the adjudication of guilt.⁶⁸ The individuals who determine whether the student is, in fact, guilty must not be involved with the investigative phase, the decision to charge, or the appellate review. The appellate panel must have not be involved in the investigation, prosecution, or hearing. To that end, the author proposes that Title IX Coordinators serve in a role analogous to that of a prosecutor. Title IX Coordinators should oversee the institutional complaint process, but they should delegate the investigation of the complaint to trained investigators.

2. *An Objective Investigation with the Opportunity to Respond*

Initially, there should be an investigation—conducted by internal staff or outside investigators—that should involve interviewing the Complaining Witness, the Respondent, and any relevant witnesses as well as all available evidence.⁶⁹ The

62 See, e.g., Bertrall L. Ross II, *Reconciling the Booker Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L., POL'Y & ETHICS J. 725, 758 (2006) (describing the separate roles given to the judge and the jury); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 656 (1976) (discussing different procedural safeguards in our criminal justice system).

63 *Thirty-Ninth Annual Review of Criminal Procedure: 2010*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 223, 239, 247 (2010).

64 *Burch v. Louisiana*, 441 U.S. 130, 134 (1979) (holding that there is a constitutional right to a unanimous jury if the jury only has six members).

65 U.S. CONST. amend. V, § 1.

66 See Ross, *supra* note 62, at 758–59 (noting that the judge and jury have different functions so that one entity does not have all the power).

67 THE FEDERALIST NO. 10 (James Madison).

68 Moreover, the Respondent should have the right to offer a rebuttal to the investigative report.

69 See Andrew T. Miltenberg & Philip A. Byler, *Representing An Accused in College Sexual Misconduct Disciplinary Proceedings*, 43 LITIGATION 1, 5–6 (Fall 2016).

investigator's conclusions should be reduced to writing. Once the final investigative report is completed, both the Complaining Witness and the Respondent should have an opportunity to rebut and supplement the Report.

3. *Independent Determination of Probable Cause for Hearing*

Not all criminal complaints are supported by sufficient evidence to warrant a trial. In some instances, there is only evidence to support a lesser charge while in other instances, the evidence supports no charge against the accused. In all such situations, it is a matter for the prosecutor to determine, hopefully with the goal of achieving equal justice under the law, whether to proceed. Even when the prosecutor wishes to proceed, the prosecutor must still persuade a grand jury to indict or a preliminary hearing judge that a crime has been committed.⁷⁰ A similar process should be employed in the Title IX context.

Specifically, the author believes that some university official or officials, who are independent of the Title IX Coordinator, should determine if there is probable cause to believe the allegations against the Respondent could be found to be true by a reasonable trier of fact—either a hearing officer or a hearing panel. In making this determination, the official or officials would rely on the investigator's report and any rebuttal/supplemental material supplied by the Complaining Witness and the Respondent. If the official or officials determine there is probable cause, then matter should proceed to hearing. If there is no probable cause, the complaint should be dismissed.

4. *A Hearing with Adequate Procedural Safeguards*

a. Clear Notice of the Specific Allegations

Fundamental fairness requires that any individual accused of a violation be notified of the specific charge against the individual at the earliest possible stage of the proceeding. In the interest of obtaining the unfettered perspective of the Respondent, investigators may well want to inquire of a Respondent about the case without specifying the reason for the inquiry. While such an approach may well provide helpful information, the broader goal of providing an "equitable" hearing under Title IX leads to the conclusion that "gotcha" investigative tactics have no place in sexual misconduct proceedings.

The OCR suggests a similar, but slightly different, conclusion. It states:

Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview.⁷¹

70 Review, *supra* note 63, at 29, 247.

71 2017 Q & A, *supra* note 18, at 4.

The “once it decides to open an investigation” language is somewhat perplexing and ripe for mischief. If a complaint is filed, is there ever a situation when an institution might conclude not to conduct at least some form of a limited investigation? So, the notice protections should be triggered with the filing of a complaint by either a complaining party or by the institution on its own volition. When the complaint is initiated, the notice protections should automatically follow rather than being triggered by some ambiguous notion of when an institution comes to a conclusion that the matter is worthy of serious attention.

Finally, the author agrees with the OCR’s recent conclusion that the notice should include “the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident.”⁷²

b. Access to All Inculpatory and Exculpatory Evidence

To ensure the correct result, the Respondent must have access to all inculpatory and exculpatory evidence.⁷³ There should be no surprises at the hearing.⁷⁴ OCR adopted this approach in its most recent guidance.⁷⁵

c. Access to an Advisor

Since the 2013 adoption of the Violence Against Women Act amendments to the Clery Act, institutions must provide all parties to a campus sexual misconduct proceeding with “the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor or their choice.”⁷⁶ Notably, there is no requirement that any advisors be permitted only a requirement that the parties have the same opportunities to have others present. The author believes the involvement of advisors, and specifically attorney advisors, is essential to the preservation of the parties’ due process rights. Well-informed counsel can help to inform the tribunal of due process concerns along the way so the tribunal can

72 *Id.*

73 See Lisa M. Kurcias, Note, *Prosecutor’s Duty to Disclose Exculpatory Evidence*, 69 *FORDHAM L. REV.* 1205, 1210–11 (2000) (stating that criminal procedural rules require the government to produce all material and exculpatory evidence upon request). Schools should apply the same rules to disciplinary proceedings.

74 While this proposition may seem obvious, it presents special problems in the context of the Complaining Witness’s previous sexual history. “Over the last few decades, almost all American courts have limited the extent to which accused rapists can bring in the sexual past of an alleged victim. This ensures that rape trials are not in effect also putting the victim on trial.” Bernstein, *supra* note 10, at 125. Public universities must follow the same approach as the federal rules of evidence *FED. R. EVID.* 412 or applicable state law, See Pamela J. Fisher, *State v. Alvey: Iowa’s Victimization of Defendants Through the Overextension of Iowa’s Rape Shield Law*, 76 *IOWA L. REV.* 835, 835 n.1 (collecting rape shield laws from most states).

75 2017 Q & A, *supra* note 18, at 4.

76 20 U.S.C. §1092(f)(8)(B)(iv)(II) and 34 C.F.R. §668.46(k)(2)(iii). “Advisor” is defined by 34 C.F.R. §668.46(k)(3)(ii) as “any individual who provides the accuser or accused support, guidance, or advice.”

address those concerns during the grievance process rather than in a federal lawsuit. This Essay addresses the scope of the advisor’s involvement in more detail below. Thus, the author believes that Respondents must have access to an advisor of their choosing, and the advisor must be able to participate in at least some limited fashion.⁷⁷ The regulations ultimately adopted by OCR should eliminate any question as to whether the Respondent can have an advisor present.

d. The Right to Cross-Examine Witnesses

Effective cross-examination is critical to the goal of getting to the truth of what occurred. Since “[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested,”⁷⁸ there must be some form of cross-examination.⁷⁹ Some advocates for complainants have voiced legitimate concerns that cross-examination can be a means for the Respondent to re-victimize the complainant. Institutions can ameliorate that concern by utilizing one or more techniques designed to eliminate or at least substantially reduce the invective that may often otherwise accompany questions posed by one party to the other. However, these arrangements should be limited to the cross-examination of the parties. Institutions should regular cross-examination of all non-parties.

e. The Institution Has the Burden of Proof

In the hearing, the burden of proving the case should be on the institution. Again, using the criminal justice system as a model, engaged criminal victims can be helpful to the prosecution, but in the end, the criminal victim has no responsibility to generate the evidence necessary to convict the defendant. The state must bear that burden.

⁷⁷ While a public university is not required to provide an attorney for a student accused of sexual assault, *Lassiter v. Dep’t of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 25 (1981), the institution cannot prohibit the student from seeking legal counsel; *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (noting that “at most the student has a right to get the advice of a lawyer”); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (noting that a student is not forbidden from obtaining legal counsel before or after the disciplinary hearing); see *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 464 (S.D.N.Y. 2015) (reaffirming *Osteen*); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 582 (E.D. Va. 1996) (noting that procedures that afforded the student the opportunity to consult with an attorney outside of the disciplinary hearings were adequate). Nor can the university prohibit an attorney from being present at the hearing and offering advice as a *passive* participant. *C.f. Osteen*, 13 F.3d at 225 (holding that when the student may also face criminal charges, “it is at least arguable that the due process clause entitles him to consult a lawyer, who might for example advise him to plead the Fifth Amendment”); *Gabrilowitz v. Newman*, 582 F.2d 100, 107 (1st Cir. 1978) (holding that when criminal charges are also pending, a student must be allowed to have an attorney present during the disciplinary hearings to provide advice, but the attorney does not have to actively participate in the student’s defense).

⁷⁸ *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

⁷⁹ Although trial attorneys strive to perfect the technique of leading questions, the veracity and accuracy of a witness’s testimony can be questioned and refuted without leading questions. Instead, cross-examination can take place through the hearing officer or by requiring advocates to ask more open-ended questions.

The institution should carry the same responsibility in a Title IX proceeding. Since Respondents have a presumption of innocence, the institution has the burden of proving guilt.⁸⁰ While complaining witnesses can do much to assist the institution in the presentation of the case on campus, it is the institution's obligation to present witnesses, documents, and other forms of evidence at the hearing. The issue then becomes what level of proof is required for a finding of responsibility.

f. Clear and Convincing Evidence by Unanimous Verdict

The standard of proof must be high enough to avoid wrongful convictions. In the criminal justice system, a conviction for sexual assault requires the prosecution to prove every element of the offense beyond a reasonable doubt (99% certainty).⁸¹ However, if a student disciplinary system uses a lesser standard, such as clear and convincing evidence (75%), or, as the OCR 2011 Dear Colleague Letter mandated, a mere preponderance of the evidence (50.01%),⁸² then the likelihood that an innocent person will be found guilty increases dramatically.⁸³ Although use of a preponderance of the evidence is constitutionally acceptable,⁸⁴ institutions—as a matter of policy—should diminish the chances of false convictions by utilizing a clear and convincing evidence standard or a beyond a reasonable doubt standard.⁸⁵

To be sure, the lower preponderance of the evidence standard is the norm in most civil litigation,⁸⁶ but a Title IX sexual assault proceeding is akin to a criminal prosecution.⁸⁷ As Professor Rubinfeld argues, both the quasi-criminal nature of the

80 See Barton L. Ingraham, *The Right to Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. CRIM. L. & CRIMINOLOGY 559, 562–63 (1996) (noting that although the prosecution in a criminal case has the burden to prove all the elements of the crime charged, the defendant in a criminal case has no burden of proof). Although some insist Complaining Witness have “procedural equality,” Nancy Chi Cantalupo, *Address: The Civil Rights Approach to Campus Sexual Violence*, 28 REGENT U. L. REV. 185, 193 (2016), the governmental actor cannot transfer its responsibilities to a private individual. The matter is not *Victim/Survivor v. Alleged Perpetrator*; the matter is *Public University v. Alleged Perpetrator*. It is the public university that has the constitutional and legal obligation to remedy known incidents of sex discrimination, including sexual assault. It is the alleged perpetrator who violated the university's rules.

81 *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (stating that the Constitution requires application of the reasonable doubt standard for all criminal convictions).

82 Dear Colleague Letter, *supra* note 4, at 11.

83 See John Villasenor, *Probabilistic Framework for Modeling False Title IX “Convictions” Under the Preponderance of the Evidence Standard*, 15 LAW, PROBABILITY, & RISK 223 (2016).

84 See William E. Thro, *No Clash of Constitutional Values: Respecting Freedom & Equality in Public University Sexual Assault Cases*, 28 REGENT UNIVERSITY LAW REVIEW 197, 209 (2016).

85 Although no court has held that using preponderance of the evidence violates due process, the original public meaning of the due process clause may well require a higher standard when the consequences are life altering. The modern procedural due process jurisprudence, with its emphasis on “practical factors” represents a significant departure from original public meaning. See Gary Lawson, *Due Process Clause* in HERITAGE GUIDE TO THE CONSTITUTION 16494(2nd Edition, David F. Forte & Matthew Spalding, eds. 2014) (Kindle Edition).

86 See Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 145 (2013).

87 *Doe v. University of Kentucky*, 860 F.3d 365, 369-370 (6th Cir. 2017).

proceedings and the fact some States require a higher standard of proof to declare someone a sex offender suggest institutions should use a higher standard of proof.⁸⁸

3. *Broad Appeal Rights for the Respondent*

If the Respondent is found “not guilty,” then the matter should end.⁸⁹ The Anglo-American legal tradition, drawing upon ideas expressed in Greek, Roman, and Canon law, has long recognized the principle that no person should be subjected to “double jeopardy.”⁹⁰ To allow the Complaining Witness or the University to appeal a not guilty verdict and, thus, potentially subject the Respondent to a second trial violates both the letter and the spirit of this universal maxim.

Alternatively, if the Respondent is found “guilty,” then the respondent should have the right to appeal on any legal or factual ground.⁹¹ This does not mean that the appellate proceeding is a *de novo* trial. Rather, it simply means that the appellate tribunal—like any appellate court—should review factual findings for clear error and legal conclusions on a *de novo* basis.

IV. A Suggested Course for Private Institutions

As previously noted, due process obligations do not apply to private institutions.⁹² However, Title IX does not give private institutions a free pass to adopt whatever rules they wish to adopt. In fact, regulations adopted soon after the enactment of Title IX require that all institutions receiving federal financial aid adopt “prompt and equitable” grievance procedures to address student or employee claims arising under Title IX.⁹³ Although the courts have not addressed the meaning of “prompt and equitable” grievance procedures under Title IX, one expects that federal courts will ultimately conclude that there is little difference between the “prompt and equitable” procedures required by regulation and the “due process” required by the Constitution.

Consequently, private institutions will be well-advised to monitor the evolution of judicial decisions pertaining to the due process obligations of public institutions. Those decisions may ultimately prove to be harbingers of private institution obligations yet to be imposed pursuant to regulations promulgated pursuant to Title IX.

88 Rubinfeld, *supra* note 20, at 60-61.

89 The Dear Colleague Letter required that Complaining Witness be able to appeal a not guilty verdict. See Dear Colleague Letter, *supra* note 4, at 12.

90 G. Robert Blakey, *Double Jeopardy* in in HERITAGE GUIDE TO THE CONSTITUTION 16259(2nd Edition, David F. Forte & Matthew Spalding, eds. 2014) (Kindle Edition).

91 Many institutions limit appeals to specific grounds, such as the discovery of new information. See Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie SukGersen, FAIRNESS FOR ALL STUDENTS UNDER TITLE IX 2 (2017).

92 See note 20, *supra*.

93 34 C.F.R. §106.8

In the meantime, trustees, presidents, and other policymakers at private institutions should consider whether, irrespective of due process obligations, their Title IX grievance procedures are equitable to all concerned. In light of existing regulations, it is their current duty to provide no less.

CONCLUSION

Sexual assault is a major problem on public university campuses. When any member of the campus community alleges sexual assault by another member of the campus community, the institution owes an obligation to both the Complaining Witness and the Respondent. As to the Complaining Witness, the institution must provide support and must respond to the allegations in a manner that is not deliberately indifferent.⁹⁴ With respect to the Respondent, the public institution must provide due process.

Because of the potentially life-changing consequences of being declared responsible for sexual assault, due process concerns are enhanced. To address these concerns, institutions should strictly separate roles, allow rebuttal/supplementation to the investigative report, have an independent determination of whether to proceed, conduct a hearing that is designed to find the truth, and provide for meaningful appeals.

94 *Davis v. Monroe County*, 526 U.S. 629, 644 (1999).

FACULTY TITLE VII AND EQUAL PAY ACT CASES IN THE TWENTY-FIRST CENTURY

NORA DEVLIN

Abstract

The ever-evolving nature of case law means that even as scholars have been examining the issue of gender pay disparity in academia since at least 1977, there is always more to be written. Employees alleging gender-based pay discrimination may pursue two causes of action for filing claims under federal law: under the Equal Pay Act of 1963 (EPA) and under Title VII of the Civil Rights Act of 1964 (Title VII). This paper discusses these two causes of action, their treatment in the courts in cases with college faculty plaintiffs, and what issues these cases raise for faculty and universities. Finally, the paper examines how the case law might be used to shape policies that better protect both faculty and universities.

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Introduction

The ever-evolving nature of case law means that even as scholars have been examining the issue of gender pay disparity in academia since at least 1977,¹ there is always more to be written. Employees alleging gender-based pay discrimination may pursue two causes of action for filing claims under federal law: under the Equal Pay Act of 1963² (EPA) and under Title VII of the Civil Rights Act of 1964 (Title VII).³ This paper discusses these two causes of action, their treatment in the courts in cases with college faculty plaintiffs, and what issues these cases raise for faculty and universities. Finally, the paper examines how the case law might be used to shape policies that better protect both faculty and universities.

I. Causes of Action for Gender Pay Disparity for Faculty

When employees encounter gender-based pay discrimination, there are currently two causes of action offered to them by the federal government: the EPA, and Title VII. This paper examines those cases that have been adjudicated since the year 2000. In 2007, the Supreme Court decided *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*,⁴ which severely limited employees' access to relief. The Supreme Court's decision in *Ledbetter* forced plaintiffs to file suit against their employers within a specified window after the first violation of the law only.⁵ For two years, *Ledbetter* made it nearly impossible for plaintiffs to file their lawsuits in a timely manner, as often they waited to file suit until they had exhausted every possible internal remedy or had waited to see if the situation would be worked out on its own. Congress passed the Lilly Ledbetter Fair Pay Act of 2009⁶ (FPA) to clarify the intent of the law. With the passing of the FPA, violations are now viewed as discrete acts with each paycheck issued, making Title VII and Equal Pay Act filings timely as long as at least one paycheck was paid during the statute of limitations.

Since this legislation was not enacted until 2009,⁷ some of the cases examined in this paper took place before this important decision. While only a few cases brought by professors were affected by the change in law from 2007–2009, this is nonetheless an important distinction to make.

1 Ester Greenfield, *From Equal to Equivalent Pay: Salary Discrimination in Academia*, 6 J. LAW & EDUC. 41 (1977).

2 EQUAL PAY ACT OF 1963, 29 USC (1963).

3 CIVIL RIGHTS ACT OF 1964, 42 USC 2000-e2 (1964). While relief for gender pay discrimination may also be available under state law, this paper will focus on the federal causes of action available to all faculty.

4 *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 US 618 (2006).

5 For claims about unequal pay for equal work, a plaintiff would have to file within 180-300 days (depending on the statute) of the employee being made aware of this pay disparity, or of the first paycheck that violated the law.

6 LILLY LEDBETTER FAIR PAY ACT OF 2009, 123 STAT. 5 (2009).

7 Although it was retroactive to the date of the *Ledbetter* decision. See *id.* §6 (2009)

The next two subsections describe what Title VII and EPA claims consist of, the burdens for the plaintiff and the defense, and the standards used by the courts to evaluate these claims. Subsection C gives a short comparison of the two causes of action and discuss how they are distinct.

A. Title VII Claims

Title VII claims broadly consist of claims against discriminatory employment actions or practices. Title VII offers a remedy for discrimination on the basis of sex/gender, race, color, religion, or national origin.⁸ In this paper we are looking at claims of discrimination based on sex/gender, although sometimes plaintiffs sue for discrimination on the basis of multiple factors (e.g., gender and religion, or gender and national origin).

In Title VII wage discrimination claims, a plaintiff may establish discrimination through either direct evidence or circumstantial evidence. Rarely do universities or their administrators record declarations (audio, visual, or written) that female professors shall be paid less than comparable males out of prejudice, so most Title VII claims utilize circumstantial evidence.⁹ Title VII disparate treatment¹⁰ cases use the *McDonnell Douglas* burden-shifting evidentiary framework.¹¹ As the court explained in *Scroggins v. Troy University*, “A *prima facie* case of disparate treatment in wages claim is established if the plaintiff demonstrates (1) she belongs to a protected class, (2) she received lower wages than similarly situated comparators outside of the class, and (3) she was qualified to do the job.”¹² Once the burden to put forth a *prima facie* case is met by the plaintiff, the burden shifts to the defense to show they did not discriminate. After the employer produces evidence of a “legitimate non-discriminatory reason” for the salary differential, the plaintiff must show that the employer’s reason is a pretext for discrimination.¹³

B. Equal Pay Act Claims

Equal Pay Act claims, like Title VII wage discrimination claims, first require the plaintiff to make out a *prima facie* case. Unlike Title VII, EPA claims require an appropriate comparator of another gender to show that the compensation varied by gender despite “equal work on jobs the performance of which requires equal

8 Title VII of the CIVIL RIGHTS ACT OF 1964, *supra* note 3 at §2000e-2(a).

9 That said, direct evidence of (intentional) discrimination is a viable method for meeting the burden. See Melissa Hart, *Missing the Forest for the Trees: Gender Pay Discrimination in Academia*, 91 DENVER U. L. REV. 873, 886 (2014).

10 This article does not discuss any disparate impact cases, thus discussion of the establishment of disparate impact claims is beyond the scope of this article. The question of whether some of the cases discussed (e.g., *Reiff v. University of Wisconsin-System*, *infra* note 17.) may have been stronger if they had been argued as disparate impact rather than disparate treatment cases is not addressed in this article but is a question worthy of consideration.

11 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See for example, *Finch v. Xavier University*, 689 F. Supp. 2d 955 (2010).

12 *Scroggins v. Troy University*, Civil Act. No. 2:13CV63-CSC (WO) 1, 22 (2014).

13 *Texas Dept. of Community Affairs v. Burdine*, 450 US 248, 255 (1980).

skill, effort, and responsibility, and which are performed under similar working conditions.”¹⁴ Statistical evidence can also be used to bolster the claim, though it is not required. Once the plaintiff establishes a *prima facie* case the burden shifts to the employer to prove that the differential is justified under one of the four statutory defenses.¹⁵ There are four defenses applicable in EPA wage discrimination cases; “an employer may lawfully differentiate between a male and female employee engaging in equal work if the pay differential is the result of (1) a seniority system, (2) a merit system, (3) a system that ‘measures earnings by quantity or quality of production,’ or (4) ‘any factor other than sex.’”¹⁶ The most common defense is the fourth affirmative defense—any factor other than sex.¹⁷ Finally, if the defense provides a legitimate non-discriminatory explanation for the wage differential, the burden is shifted once more to the plaintiff to provide evidence that the defense’s explanation is in fact a pretext.

C. Commonalities and Contrasts in EPA and Title VII Claims

While the two causes of action are similar, they differ in substantive ways. Title VII is written to include many kinds of discriminatory employment actions (not just compensatory) and across multiple arenas (not just gender), thus it is a more broadly written statute. As already stated, Title VII offers two options by which the plaintiff can establish her *prima facie* case, whereas EPA claims must be established using comparators.¹⁸ Similarly, under Title VII a plaintiff is entitled to compensatory and punitive damages,¹⁹ but EPA plaintiffs are only entitled to compensatory damages. Finally, under the EPA there is a high standard for what constitutes an appropriate comparator—especially for professional job classes because the jobs must be virtually identical based on §206(d)(1) as quoted in I.B. above—whereas there is no statutory requirement for a comparator under Title VII, thus it is more lenient.²⁰ Nevertheless, the difference in standards for comparators is slight enough that in the cases discussed here wherein the plaintiff filed wage

14 EQUAL PAY ACT OF 1963, *supra* note 2, at §206(d)(1).

15 SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE *infra* note 17 at 772.

16 EQUAL PAY ACT OF 1963, *supra* note 2 at §206(d)(1) as quoted in Andrew Brenton, *Overcoming the Equal Pay Act and Title VII: Why Federal Sex-Based Employment Discrimination Laws Should Be Replaced with a System for Accrediting Employers for Their Antidiscriminatory Employment Practices Comment*, 26 WIS. J. LAW GEND. SOC. 349 (2011).

17 See for instance, *Allender v. University of Portland*, 689 F. Supp. 2d 1279 (D.Or. 2010); FINCH V. XAVIER UNIVERSITY, *supra* note 11; *Sauceda v. University of Texas at Brownsville*, 958 F. Supp. 2d 761 (S.D. Tex. 2013); *Reiff v. Board of Regents of the University of Wisconsin-System*, No. 13-cv-192-jdp, 2014 WL 4546041 (W.D. Wisc. 2014); *Arthur v. College of St. Benedict*, 174 F. Supp. 2d 968 (D. Minn. 2001); *Kovacevich v. Kent State University*, 224 F 3d 806 (6th Cir. 2000).

18 Sandra J. Perry, *Equal Pay Act cases in higher education*, 12 J. INDIVID. EMPLOY. RIGHTS 21, 22 (2005).

19 42 U.S.C. §1981a

20 EQUAL PAY ACT OF 1963, *supra* note 2, at §206(d)(1). For a comparison of the two, see also Deborah Thompson Eisenberg, *Shattering the Equal Pay Act’s Glass Ceiling*, 63 SMU REV 17 (2010); See appendix B, comparison chart in G. Siniscalco et al., American Bar Association, *Developments in Equal Pay Law: The Lilly Ledbetter Act and Beyond*, (2010), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/2010_eeo_007.authcheckdam.pdf (last visited Nov 26, 2017).

discrimination claims under both Title VII and the EPA, there were no instances of a difference in the judge's application of the legal standard between the two claims.²¹

II. Summary of Cases

In the late 1990s into the year 2000, two public universities attempted to use a sovereign immunity defense against EPA and/or Title VII claims. In both *Varner v. Illinois State University*²² and *Anderson v. State University of New York*²³ the defendants claimed that congress did not have constitutional authority to require state universities to adhere to the EPA or Title VII. The sovereign immunity defense was rejected by the courts, and the cases set the precedent that public universities are in fact answerable in court for their sex-based wage discrimination.²⁴ A search of the Westlaw, Hein Online, and Google Scholar databases found close to 20 cases of professors suing their university employers under Title VII and/or the EPA for wage discrimination since 2000. This section provides brief summaries for a sampling of these cases by circuit.

A. Sixth Circuit

In *Elberger v. University of Tennessee Health Science Center*, plaintiff Andrea Elberger brought a class-action suit against the University of Tennessee Health Science Center (UTHSC) under the EPA.²⁵ Elberger was hired as an assistant professor in anatomy and neurobiology in 1985. She was promoted to associate professor in 1986, and to full professor in 1993. In 1990, she first discovered that she was in the bottom 25 percent of salaries of associate professors in her department. For over 20 years she discussed the issue of sex-based pay disparity with her department chair, dean of the college of medicine, and the executive vice chancellor. Despite the raises Elberger received over this period, in 2012 she discovered that she was the lowest paid full-professor in the department. While investigating gender pay disparities as chair of a Dean's subcommittee on the status of women, she found data that showed that the pay inequities in other departments in the college of medicine were nothing short of egregious; "in 2012, the mean pay disparities among female and male professors in the following departments were: 1) in Pathology, \$127,637.90; 2) in Anatomy and Neurobiology, \$50,515.00; 3) in Physiology; \$44,357.40; 4) in Pharmacology, \$37,930.40 and 5) in Microbiology, Immunology & Biochemistry,

21 There were instances of Title VII discrimination claims not based on wages (e.g., for failure to promote decisions) that were combined with EPA claims, see *Cullen v. Indiana University Bd. of Trustees*, *infra* note 57.

22 *Varner v. Illinois State University*, 226 F. 3d 927 (7th Cir. 2000).

23 *Anderson v. State University of New York*, 107 F. Supp. 2d 158 (N.D.N.Y. 2000).

24 For further information and an explanation of the courts' reasoning, see Thane Somerville, *The Equal Pay Act as Appropriate Legislation under Section 5 of the Fourteenth Amendment: Can State Employers be Sued Notes and Comments*, 76 WASH. LAW REV. 279–312 (2001).

25 *Elberger v. Univ. of Tennessee Health Sci. Ctr. Coll. of Med.*, 2013 WL 12049105, at 1 (W.D. Tenn. 2013). Note: neither the ampersand nor the capitalization in this quote represent the style of this journal, copyeditor, or author. Rather than stating [sic] after every error, we hope you will accept this general apology for the errors in the cited sentence. I speculate the judge cited from a university document listing the departments as above.

\$26,632.30.”²⁶ Elberger alleged that the failure to address the systemic issue of pay inequity that she repeatedly brought to the administration’s attention meant that all women professors within the college of medicine should be entitled to relief. The court found that the suit ought to be limited only to the five departments with disparities over \$25,000 as shown conclusively by the statistical data provided (reproduced above).²⁷ Furthermore, despite the twenty-year history of discrimination experienced by the plaintiff, the statute of limitations restricts the suit to discriminatory pay within the last three years, so only female faculty in the five departments who were employed at UTHSC within the last three years would be recognized as “similarly situated.”²⁸

*Finch v. Xavier University.*²⁹ In this case, summary judgment was denied for Xavier University for both procedural and factual reasons. The plaintiffs (Finch and Michels) alleged that in violation of Title VII and the EPA, they had been paid \$34,000 and \$38,000 less, respectively, than their primary comparator, the chair of their department.³⁰ The chair position could not be used as an appropriate defense since Finch had served as chair and only received an additional stipend of less than \$3,000, and could show evidence of this tradition.³¹ The defense’s argument in this regard was not against the comparator, but rather served as their affirmative defense. The affirmative defense that the comparator held his degrees longer than the plaintiffs, that he was recruited from another university, that he had more experience than the plaintiffs, and that as chair he had more responsibilities than the plaintiffs, all relied completely upon unsworn statements from other faculty members, so it was not considered during the motion for summary judgment. It is unclear why the university would rely on these statements as their defense. Furthermore, in addressing whether there were factual disputes, the court recognized the need for the affirmative defense not to be simply a pretext for discrimination. The court concluded:

Plaintiffs have adduced evidence that traditionally Defendant paid no more than a \$3,000 bonus or stipend to the Department chair to perform those extra duties. Accepting that fact as true for purposes of summary judgment, Defendant paid [comparator] DeSilva a \$31,000 to \$35,000 premium solely for his education and experience. A reasonable juror could question whether DeSilva’s educational and professional background was that much more valuable than Plaintiffs’ background to justify that substantial differential in pay.³²

26 *Id.* at 2.

27 *Id.* at 5.

28 *Id.* at 5.

29 FINCH V. XAVIER UNIVERSITY, *supra* note 11.

30 *Id.* at 968.

31 *Id.* at 968.

32 *Id.* at 968.

The court posits that a reasonable juror might compare the CVs of the plaintiffs and the comparator and wonder if the pay disparity may in fact be pretextual. This reasoning by a judge stands out among other court cases examined for this article, because it considers the plaintiff's and comparator's qualifications at face value and weighs them against the evidence of the plaintiff's experience and education. The judge's reasoning is also interesting in that by suggesting that a jury is able to make such determinations, this decision falls out of line with the tradition of academic deference.³³ The fact that the defense in *Finch*³⁴ did not argue that DeSilva was an inappropriate comparator was important to the court's decision to deny the motion for summary judgment; perhaps if the defense did have evidence beyond unsworn affidavits, it could have been used to throw out the comparison with DeSilva.

In *Kovacevich v. Kent State University*³⁵ the Sixth Circuit Court of Appeals established one important precedent and re-affirmed an already established precedent regarding summary judgment. In this case, the school of education at KSU was awarding merit increases (as a sum, rather than percentage) according to a facially-neutral system. A committee of peers would rank faculty applications in their department according to their teaching and scholarship. The peer rankings were then sent to the departmental chairperson who (without knowing who was who) would assign dollar amounts to the applicants. The dean would then be given the list and dollar amounts, and would have full discretion to adjust the recommended amounts or award additional pay to the applicants. While it appeared to be a neutral system, in fact, the system was disproportionately favoring male faculty. In the plaintiff's case, the dean repeatedly reduced her award to the minimum possible amount, and at least once denied her any merit pay, against her chairperson's recommendation. A jury found that the defense's claims of neutrality were not sufficient to withstand the plaintiff's evidence that the system was simply pretextual (it was highly subjective and in the hands of one dean), and thus the precedent that facially neutral systems can in fact be discriminatory was set. In addition, *Kovacevich* affirmed the "Suggs-Wilson-Fields line of cases"³⁶ which establishes that once a case proceeds to trial on the merits, a revisiting of the case should only address a review of the "ultimate question of discrimination" and not the elements of a prima facie case.³⁷

B. Seventh Circuit

In *Reiff v. Board of Regents of the University of Wisconsin System*, the district court for the Western District of Wisconsin examined the issue of what can be considered a discriminatory compensation decision that would entitle a plaintiff to back pay until that date (even if it falls outside of the statute of limitations

33 WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 145 (Fifth ed. 2013).

34 *FINCH v. XAVIER UNIVERSITY*, *supra* note 11.

35 *KOVACEVICH v. KENT STATE UNIVERSITY*, *supra* note 17.

36 *Id.* at 822.

37 *Id.* at 821.

period).³⁸ The court looked to other circuits' interpretations of the Fair Pay Act, as well as Ginsburg's dissent in *Ledbetter* for guidance; the court ruled that "failure to promote" decisions (in this case, a denial of tenure) do not count as compensation decisions under the EPA or Title VII statutes. In *Reiff*, the plaintiff had experienced serious discrimination prior to her promotion to assistant professor and again while fighting for promotion to associate professor during the 1990's.³⁹ As full professor and the most senior faculty member in her department, she found that she had been paid less than male counterparts and brought suit. The salary data considered within the statute of limitations spanned from 2007–2013, and in only two of those years did salaries remain unchanged. What makes *Reiff* interesting is the kinds of salary adjustments used by the University of Wisconsin (UW). In this case, UW gave College and University Professional Association [CUPA] raises to bring salaries up to 87 percent of the average salary for a professor of that rank in one's discipline.⁴⁰ When the University of Wisconsin system implemented the CUPA raises, they did so according to the professors' PhD specializations rather than the department in which they were employed, which meant that Reiff did not receive a CUPA raise when her comparator did because her PhD was in English literature while her comparator held a PhD in foreign languages. Furthermore, due to bureaucratic inconsistency, the adjustments to the plaintiff's comparator's salaries were unclearly labeled and perpetuated the plaintiff's belief that her salary was unfairly low. In fact, the only truly illegal action that occurred in this case, according to the court, happened well before the statute of limitations, when she was an untenured lecturer and then assistant professor. Despite not actually experiencing wage discrimination as a full professor, she was under the impression that she had been subject to discriminatory pay decisions because of the university's inconsistent accounting practices and seemingly arbitrary implementation of CUPA raises. Reiff was not in the same position to stand up for herself when she was a lecturer or assistant professor as she was once she became full professor; when she had the job security of tenure, she was not as vulnerable to retaliation by her department or institution. Thus, believing she had been discriminated against once again, she brought suit, but ultimately lost.

Packer v. Trustees of Indiana University is an interesting case in which technical issues with evidence played a central role.⁴¹ In this strange case, the plaintiff provided a great deal of evidence to support her Title VII and EPA claims, but the plaintiff's counsel failed to properly cite the evidence in the response to the defense's motion for summary judgment.⁴² In addition, the plaintiff failed to even

38 REIFF V. BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN-SYSTEM, *supra* note 17 at 5.

39 *Id.* at 1. Plaintiff was told that she could only be employed as a lecturer (from 1990-1994), despite her qualifications for an assistant or associate professor position, because she was a married woman. Essentially, she experienced four consecutive years of failure to promote decisions based on sex discrimination. She was then denied tenure after three years as an assistant professor, but received the promotion the following year in 1998.

40 *Id.* at 2. for explanation, at 10 for discussion.

41 *Packer v. Trustees of Indiana Univ. Sch. of Med.*, 800 F 3d 843 (7th Cir. 2015).

42 Sadly, this was not the only case in which the plaintiff's counsel failed to do their jobs; it was a common occurrence among the cases included here.

address the argument of her *prima facie* case. The appellate court reviewing the summary judgment decision of the district court noted, “in short, Packer not only neglected to address the *prima facie* aspect of her case, but sketched out only a skeletal argument on the matter of pretext. Such cursory treatment amounts to a waiver of the claim.”⁴³ The defense was granted summary judgment; on appeal the plaintiff’s new counsel provided appropriate citations, but the original ruling was upheld. Despite the procedural issue, factual aspects of Packer’s claims are also interesting. Packer claimed that her department chair repeatedly sabotaged her work “by assigning her a series of increasingly insufficient and inappropriate lab spaces and interfering with her efforts to obtain grant money.”⁴⁴ Similarly, in response to the University’s assertions that Packer was underperforming in her research and publications, Packer argued “that there were other male faculty members in the department whose research performance also fell short of expectations but who suffered no adverse consequences.”⁴⁵ It is worth noting that upon appeal Seventh Circuit, Judge Ilana Rovner, affirmed the trial court, but demonstrated a degree of compassion for the plaintiff and her experience with prior (incompetent) counsel that permeated the opinion and made it stand out among other cases.⁴⁶

C. First Circuit

Another unusual case is that of *Lakshman v. University of Maine System*.⁴⁷ In this case, the plaintiff was a male senior scientist at the University of Maine where he claimed to have been frozen into “a low paying, non-faculty position, and out of a faculty appointment.”⁴⁸ Lakshman’s claims of gender discrimination were based upon specific conversations he had with women faculty who discouraged him from applying for tenure track positions in his department because they were slated for women. He failed to meet his *prima facie* burden on the Title VII unequal pay claim, however, because he had no evidence of discriminatory animus. Much of the evidence of discriminatory animus that Lakshman produced failed to fall within the statute of limitations period and therefore was not considered. In *Elberger*, the statute of limitations simply restricted who was eligible for relief and for what time period, whereas in *Lakshman* the statute of limitations barred the plaintiff from producing evidence of discriminatory animus.

43 *Id.* at 852.

44 *Id.* at 846.

45 *Id.* at 846.

46 One idea for an interesting study would be a critical discourse analysis of the opinions of female and male judges for the same courts in EPA or Title VII gendered compensation cases. The language and reasoning used by female judges in these cases stood out to me and could merit further investigation. It would also be interesting to do a meta-analysis of how often female judges in these cases reference other female judges (for instance, do they do so more than male judges reference female judges?).

47 *Lakshman v. University of Maine System*, 328 F. Supp. 2d 92 (D. Me. 2004).

48 *Id.* at 97.

D. Third Circuit

Another unusual case that deals with the statute of limitations, is *Summy-Long v. Pennsylvania State University*.⁴⁹ In this case, the Third Circuit Court of Appeals affirmed the District Court's summary judgment award in favor of Penn State based on, among (many) other reasons,⁵⁰ the plaintiff's failure to provide any numeric or statistical evidence of gender pay disparities from any of the time periods within the statute of limitations (in this case 2003 and onward).⁵¹ While few cases can compare to *Summy-Long* in the time from filing to final disposition, plaintiffs in other cases successfully made claims about wage discrimination spanning multiple decades even if they were not attempting, like *Summy-Long*, to get salary data for as far back as the 1970s.⁵² What really makes this case stand out is the dedication of the plaintiff to refuse to settle for over a decade.

E. Second Circuit

As in *Elberger* and *Summy-Long*, in the Second Circuit case of *Lavin-McEleney v. Marist College*, the plaintiff relied on statistical analysis to make her claim.⁵³ In this case, the plaintiff, a professor of criminal justice, identified an appropriate male comparator using statistical analysis of faculty salaries across the whole college. A regression analysis controlled for five independent variables (rank, years of service, division, tenure status, and degrees earned), and by looking at the plaintiff's peers in each category identified only one appropriate male comparator who fell into the same category as the plaintiff across all five independent variables.⁵⁴ As it happened, the comparator identified by the plaintiff was a psychology professor, but the judge ruled that the statistical expert was able to provide sufficient evidence to convince a reasonable juror that the comparator was appropriate. Furthermore, because the plaintiff provided both statistical evidence of pay inequity using all faculty salaries in addition to identifying an appropriate male comparator, the court felt it was unnecessary to rule on whether just one of the two methods for meeting the burden was sufficient.⁵⁵ A jury found for the plaintiff on the EPA claim, but determined the college's violations were not willful and thus did not find Marist liable for the Title VII claims. The second circuit affirmed the lower court's ruling in its entirety.

49 *Summy-Long v. Pennsylvania State University*, 2017 U.S. App. LEXIS 22134 (3d Cir. Nov. 6, 2017).

50 The plaintiff changed counsel numerous times and requested multiple deadline extensions which delayed the case for over a decade. There were four motions for summary judgement granted, at least in part, by the district court in favor of the university (one prior to *Ledbetter*, three after) the last of which fully dismissed the claim. See *Summy-Long v. Pennsylvania State University*, 226 F. Supp. 3d 371 (M.D. Pa. Dec. 27, 2016); *Summy-Long v. Pennsylvania State University*, 811616 WL 1 (M.D. Pa. Mar. 26, 2009); *Summy-Long v. Pennsylvania State University*, 1253472 WL 1 (M.D. Pa. Mar. 24, 2010); *Summy-Long v. Pennsylvania State University*, 4514312 WL 1 (M.D. Pa. Nov. 2, 2010).

51 *Summy-Long v. Pennsylvania State University*, *supra* note 49 at 2.

52 See *Id.* at 3. Appropriately, the court ruled her request was untimely.

53 *Lavin-McEleney v. Marist College*, 239 F 3d 476 (2nd Cir. 2001).

54 *Id.* at 478.

55 *Id.* at 482.

F. Eleventh Circuit

In the case of *Scroggins v. Troy University*⁵⁶ the plaintiff failed to establish appropriate comparators for either Title VII or EPA claims,⁵⁷ but because of the clearly discriminatory acts of the associate dean while aware that the plaintiff was filing claims under EPA and Title VII, the plaintiff's claims of retaliation were not dismissed. Scroggins was unable to establish wage discrimination mainly because her education was not equivalent to the education of the other faculty of her rank. The plaintiff held a JD, MS in human resources, BA, and professional human resources certification, while her comparator had earned a PhD in economics. Furthermore, she did not have the same experience as a practicing attorney (both comparators with Juris Doctorates were practicing attorneys for over a decade prior to hire at Troy).⁵⁸

G. Fourth Circuit

Another recent case regarding appropriate comparators is *Spencer v. Virginia State University*.⁵⁹ This case went before the same judge in 2016 (dismissed without prejudice) and again in 2017 (summary judgment for the university denied), with very few changes in the facts presented. The differences between the first opinion and the second are instructive. In the first opinion, the plaintiff identified six male comparators, all of whom were outside of her department,⁶⁰ but failed to demonstrate that they were appropriate comparators under either the EPA or Title VII. In the second case, the plaintiff—only claiming an EPA violation and dropping the Title VII claim⁶¹—presented only two of the previously named six comparators, but was able to show that they had substantially equal jobs using the university's "standard Employee Work Profile (EWP), which establishes a common core of responsibilities for all faculty members."⁶² Furthermore, by focusing on only the two comparators who were clearly underqualified for the post of associate professor, and who were given starting salaries higher than any female faculty member at the entire university, Spencer was able to argue a much more compelling case.⁶³ While in the first opinion, the judge found that the plaintiff failed to show that her comparators were appropriate because she did not

56 SCROGGINS V. TROY UNIVERSITY, *supra* note 12.

57 Another example of failure to establish comparators under Title VII and EPA is *Cullen v. Indiana University Bd. of Trustees*, 338 F.3d 693 (7th Cir. 2003). It is only notable in so far as it takes "similarity in name only" to a literal level: the plaintiff, Dr. Cullen, compared herself to a Dr. Quillen with the same title despite entirely different job duties.

58 SCROGGINS V. TROY UNIVERSITY, *supra* note 12.

59 *Spencer v. Virginia State University*, 224 F.Supp.3d 449 (E.D. Va. 2016); *Spencer v. Virginia State University*, 2017 WL 1289843 1 (E.D. Va. 2017). In 2018, a third decision was issued in this case by the same judge wherein summary judgment was granted to the defendants (*infra* note 95). Further discussion of this matter appears in section III.A.1 of this article.

60 SPENCER V. VIRGINIA STATE UNIVERSITY (2016), *id.* at 453–454.

61 It is not clear why she dropped the Title VII claim. No reason was provided.

62 SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59 at 2.

63 *Id.* at 3.

establish that they performed “substantially equal work,”⁶⁴ in the second case the court determined:

When viewing Plaintiff’s [First Amended Complaint (FAC)] in a light most favorable to her, the Court similarly cannot find on the limited record before it that teaching undergraduate courses with a large number of students requires different skills, efforts, and responsibilities than teaching primarily graduate and doctorate-level courses with fewer students. Plaintiff has affirmatively pleaded that “the task of teaching students in various disciplines requires equivalent skill and responsibility” (FAC ¶ 32) and has provided sufficient facts to infer that Shackelford and Dial are proper comparators under the EPA.⁶⁵

This decision could set an important precedent that universities whose faculty handbooks utilize a EWP may find it difficult to claim in court that comparators outside the plaintiff’s department are inappropriate.⁶⁶

The most interesting aspect of this case was how the court changed its ruling regarding the retaliation claim under the EPA between the first and second opinions. In both cases, the court cites dicta⁶⁷ from *Burlington Northern & Santa Fe Ry. Co. v. White*⁶⁸ to distinguish the retaliatory actions taken from “‘petty slights or minor annoyances that often take place at work and that all employees experience.’” *Burlington Northern*, 548 U.S. at 68.⁶⁹ In the 2017 case, the plaintiff was able to demonstrate how the inappropriate actions of the provost, which were entirely written off by the court in the first case as petty slights, had consisted of abuse of power and were indicative of retaliatory animus.⁷⁰ The adverse employment actions, in addition to denying plaintiff’s request for a wage adjustment, included:

(1) intentionally delaying in signing paperwork on two occasions, which prevented Plaintiff from being paid in a timely manner; (2) refusing to assist Plaintiff while she faced a formal discrimination complaint that Defendants encouraged a student to file; (3) making veiled threats to Plaintiff referencing an antagonistic view taken by the VSU Administration against her; (4) refusing to address Plaintiff’s concerns regarding a troubled student who was stalking her; and (5) removing Plaintiff from her role of giving the Freshman Orientation speech without explanation.⁷¹

64 SPENCER V. VIRGINIA STATE UNIVERSITY (2016), *supra* note 59 at 457.

65 SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59 at 7.

66 This could be especially problematic for universities if well argued in conjunction with the market-forces defense precedent set in *SILER-KHODR V. UNIVERSITY OF TEXAS HEALTH SCIENCE CENTER* (*infra* note 80) and adopted in *SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE* (*supra* note 17).

67 While the court cites the below case, it does not cite the specific quote as dicta as might be expected.

68 *Burlington N. & Sfr Co. v. White*, 548 US 53 (2006).

69 SPENCER V. VIRGINIA STATE UNIVERSITY (2016), *supra* note 59 at 461, SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59 at 9.

70 SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59 at 9.

71 *Id.* at 9., citations omitted.

This change in the court's judgment on the same actions by the provost was compelled by the plaintiff's newly detailed explanation of how the actions taken by the provost impacted her and her ability to perform at work. As will be discussed in later sections, the plaintiff's claims of retaliation may have seemed crystal clear to someone familiar with the principles of academic freedom and the power differential inherent in the relationship between an associate professor and her provost. This case demonstrates that a district court judge ought not be expected to glean such an understanding from a factual description of events that did not adequately describe the effects on the plaintiff.

H. Ninth Circuit

In another case of disputed comparators, *Allender v. University of Portland*,⁷² the plaintiff alleged that three other associate professors in the economics department, and one full professor, were appropriate comparators. The university contended that the full professor did not perform a substantially equal job to that of an associate professor (the court agreed), and argued that the male associate professors were not similarly situated "because they have greater seniority or service to the university."⁷³ The court concluded that this argument was more appropriately considered as an affirmative defense, so Allender was able to establish her prima facie case under the EPA. The university's affirmative defense (any factor other than sex), was that seniority as well as Allender's performance issues constituted factors other than sex that determined the pay differential between her and her comparators.⁷⁴ In shifting the burden back to the plaintiff, the plaintiff showed that performance issues on their own were insufficient to explain differences in salaries since the salary differential decisions preceded any disciplinary actions.⁷⁵ Similarly, the defendants failed to provide evidence that seniority is used by the university to set wages, and therefore this aspect of their defense failed as well. Finally, because one of the comparators served as dean of the business school, the university averred that his higher salary could be attributed to this service. The university relied on *Hein v. Oregon College of Education*⁷⁶ to argue that the salary differentials based on the unequal starting salaries of Allender and her comparator (Seal) were not violations of the EPA because the original disparity was non-discriminatory. The court demonstrated that this argument presupposed that salary increases were equal for all faculty members, as in *Hein*, when in this case, "The University, however, does not provide raises across the board, but rather assigns raises based on teaching, scholarship and service. Thus the facts here do not resemble the facts in *Hein*, because here, a professor who starts at a lower salary may reduce the wage gap if she outperforms her male colleagues, whereas in *Hein*, the court found that salary increases perpetuated the wage

72 *ALLENDER V. UNIVERSITY OF PORTLAND*, *supra* note 17.

73 *Id.* at 1285.

74 *Id.* at 1286.

75 *Id.* at 1287.

76 *Hein v. Oregon College of Educ.*, 718 F 2d 910 (9th Cir. 1983).

gap.”⁷⁷ In this case, Allender’s clearly superior publication record (20 refereed articles compared to Seal’s four)⁷⁸ was enough to raise the question of whether “Seal’s larger salary is reasonably attributable to his former service as dean”⁷⁹ thus, the court denied the university’s motion for summary judgment.

1. Fifth Circuit

Another instance of a court finding that the university’s affirmative defense failed to be compelling was in *Siler-Khodr v. University of Texas Health Science Center San Antonio*.⁸⁰ *Siler-Khodr* is a notable precedent for two reasons. First, this was one of the cases originally argued in the late 1990s wherein the university defendant tried to claim sovereign immunity in response to an EPA claim. Second, both affirmative defenses offered by the university—that the plaintiff’s grant-obtaining abilities were lesser than her comparator’s, and that market forces dictated her comparator’s higher salary—were deemed insufficient. This case is also notable because the appeal was brought after a jury ruled in favor of the plaintiff, awarding her significant back pay and damages (in excess of \$100,000 in 2001).

The court’s response to the market forces defense in *Siler-Khodr* is worthy of further discussion because of the way it shapes the outcome of *Sauceda v. University of Texas at Brownsville*.⁸¹ *Sauceda* is intriguing in both its interpretation of *Siler-Khodr* and further elaboration on the reasoning behind the issues with an affirmative defense based on “market forces.” In an eloquent and philosophical opinion, District Court Judge Hilda Tagle takes extra care to explain the reasoning for the Fifth Circuit’s history of rejecting a market-forces defense. In *Sauceda*, the University argued that the two comparators the plaintiff identified had to be paid higher salaries to attract them to the university, whereas the plaintiff who was already employed by the university did not need to be attracted with higher wages. The district court writes, “to say that an otherwise unjustified pay differential between women and men performing equal work is based on a factor other than sex because it reflects market forces which value the equal work of one sex over the other perpetuates the market’s sex-based subjective assumptions and stereotyped misconceptions Congress passed the Equal Pay Act to eradicate.”⁸² The court elaborates on this interpretation of the EPA throughout the discussion of the affirmative defense offered by the university.

The affirmative defense, based on any factor other than sex, consisted of three arguments. First, the university argued that to obtain a professional accreditation

77 ALLENDER V. UNIVERSITY OF PORTLAND, *supra* note 17 at 1288.

78 Of course, there could be nuance here; perhaps Allender published in bottom rung journals and Seal’s four publications were all in the top journals in his field. Still, four compared to 20 is worth questioning.

79 *Id.* at 1288.

80 *Siler-Khodr v. University of Texas Health Science*, 261 F 3d 542 (5th Cir. 2001).

81 SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE, *supra* note 17.

82 *Id.* at 776.

for the business school they needed to offer higher salaries to attract “academically qualified” (AQ) professors.⁸³ The court, citing *Siler-Khodr* stated that there was evidence that the two comparators were not awarded salaries in accordance with this argument, and therefore, when viewed in the light most favorable to the plaintiff, created a fact issue.⁸⁴ Second, the university asserted “that the salary differential was based on market forces of supply and demand for newly hired accounting faculty, i.e., salary compression or inversion”⁸⁵ and thus assumed this was a non-discriminatory factor other than sex which dictated how salaries were determined. The university asked the court:

to adopt the reasoning of courts outside the Fifth Circuit to conclude that “[a]n employer may take market forces into account when determining the salary of an employee, provided there is no evidence suggesting that the employer took advantage of any kind of market forces that would permit different pay for a male and female for the same position.” *Schultz v. Dep’t of Workforce Dev.*, 752 F.Supp.2d 1015, 1028 (W.D.Wisc.2010) (citations). However, adoption of this proposition would shift the burden of production on this affirmative defense from the defendant to the plaintiff.

In explaining that the burden of production must remain with the defense, the court refers to precedent in the Fifth Circuit. Absent sufficient evidence that market forces do not arise from “outmoded assumptions or stereotypes,” the court states plainly that, “the unseen hand of the market does not enjoy a presumption that it is free from the discriminatory assumptions and stereotypes in the labor market Congress passed the Equal Pay Act to eradicate.”⁸⁶ At first blush, it may seem that this is an unfair or impossible burden to place on the defense—how could one prove that something does not exist? But, as the *Sauceda* court stated, production and persuasion are the burden of the defense. Furthermore, the argument that the labor market—which resulted in such widespread discriminatory pay inequity that legislation like the EPA was required to provide a legal remedy for women—ought not be assumed to be free of prejudice is highly compelling. That said, this precedent, if adopted by other circuits, could be cause for great concern for defendants, especially if applied in a case like *Spencer* where an EWP is used and/or plaintiffs argue for comparators outside of their discipline. Such reasoning could call into question the market value assigned to various fields, which is inextricably tied to the gendered realities of those fields. For instance, a philosopher employed in a philosophy department compared to a philosopher employed in a gender studies department could have a much higher salary and more prestige even when all else is equal; it would be extremely difficult, if not impossible, for a defendant to show that the labor market dictating these salaries is not sexist.

83 *Id.* at 777–778.

84 *Id.* at 778.

85 *Id.* at 778.

86 *Id.* at 780.

While this is not an exhaustive summary of the faculty gender-pay equity cases in the last 17 years,⁸⁷ it represents a wide range of issues, with an emphasis on the more recent themes in pay equity cases. Most of these cases, if not granted summary judgment, were settled prior to (or even during) a jury trial by returning to mediation.⁸⁸

III. Discussion of Current Case law

The current case law for faculty pay equity cases will be examined in the subsections that follow. This section discusses how current case law affects faculty plaintiffs, and then analyzes what the case law means for university defendants.

A. How Current Case law affects Faculty

This subsection examines what the current case law for faculty EPA and Title VII wage discrimination means for faculty plaintiffs and their representatives (e.g., labor unions or employees' counsel). The four themes discussed are, 1) the job of professor, 2) intersectionality, 3) retaliation claims, and 4) time and statutes of limitations.

1. The job of professor

While the job of a professor is often specifically defined in a faculty handbook, many differentiations are made based on one's rank, field, department, or specialization. Nevertheless, there are more commonalities than differences among the job expectations of faculty of the same rank at the same institution; tenure-track faculty are typically evaluated on their teaching, research, and service. Faculty bringing EPA or Title VII wage discrimination cases are better positioned to win their suit if the court views the professoriate as a whole rather than delineating with a great deal of specificity who is an appropriate comparator. In fact, a holistic definition of tenure-track faculty may even prevent wage discrimination in the first place.

For instance, in *Reiff*,⁸⁹ the CUPA market adjustments that professors received were in accordance with the average pay of a professor in the field in which they received their doctorate rather than with the department in which they were currently employed. This arbitrary differentiation served to undermine any efforts toward equality of pay within a department of both foreign-literature, and English-literature, scholars.

⁸⁷ See also *ARTHUR v. COLLEGE OF ST. BENEDICT*, *supra* note 17; *CULLEN v. INDIANA UNIVERSITY Bd. OF TRUSTEES*, *supra* note 57.

⁸⁸ In one recent case, the settlement was reached prior to the motion for summary judgment but it still resulted in ABA sanctions for the law school: see Stephanie Francis Ward, *Texas Southern's law school receives ABA public censure after sex discrimination allegations*, *ABA JOURNAL*, July 20, 2017, http://www.abajournal.com/news/article/texas_southerns_law_school_receives_aba_public_censure_involving_equal_oppo/ (last visited Dec 3, 2017).

⁸⁹ *REIFF v. BOARD OF REGENTS OF UNIV. WISC. Sys.* *supra* note 17.

Sometimes the court is willing to accept a statistician's argument that an appropriate comparator exists outside of the department because there is not a single appropriate comparator within the department, as in the case of *Lavin-McEleney*.⁹⁰ On the other hand, in *Elberger*⁹¹ the court determined that "similarly situated" faculty must be employed within the statute of limitations period in the specific five departments where enormous pay disparities were shown using statistical analysis.

Interestingly *Spencer*⁹², which was dismissed and then litigated a year later in a win for the plaintiff, is the most promising case for defining the job of professor; the faculty handbook's Employee Work Profile (EWP) established a common core of responsibilities for all faculty members and made comparisons across fields especially easy; however, it was not until the second decision that the plaintiff used the appropriate language (common core) to persuade the judge that the EWP should be used to determine comparators. Using the EWP, Spencer could show that her comparators performed the same job duties (as listed in the EWP) but out-earned all the female faculty at this rank (and above) while not actually having the appropriate qualifications for the rank. Nevertheless, since the first draft of this article was written this case came before the same judge a third time and the defendants' motion for summary judgment was granted.⁹³ The plaintiff failed on a procedural level and apparently did not present her argument with the appropriate language, again. The court was inclined to side with the university in light of the plaintiff's failure to mention the EWP.⁹⁴

On the other hand, Eisenberg states that claims by those in professional and managerial roles are more likely to fail under the EPA until we can establish a "comparable work" standard that will be more accommodating than the current statutory requirements of *equal* skill, effort and responsibility.⁹⁵ In academia, faculty evaluations are delineated by rank, but all evaluations consider teaching, research, and service. The degree to which each of these areas is valued depends on the institution.⁹⁶ The comparability of faculty positions even across disciplines,

90 LAVIN MCELENEY V. MARIST COLLEGE, *supra* note 53.

91 ELBERGER V. UNIV. OF TENNESSEE HEALTH SCI. CTR. COLL. OF MED., *supra* note 25.

92 SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59. In the second decision the language used by the plaintiff mirrored that of the statute to establish the common core of responsibilities of faculty.

93 Spencer v. Virginia State University, 2018 WL 627558 1 (2018).

94 It is possible the university no longer used the EWP, and in the year between the 2017 and 2018 decision many other facts could have changed (for instance, the former administrators may have been paid less than a former female administrator which would have superficially weakened Spencer's case). Nevertheless, this case would still have been strong using the Fifth Circuit precedent that market forces that put males disproportionately in administrative roles leads to disproportionate numbers of males making high salaries among the faculty when they opt to teach; if the commonly accepted "female" career trajectory to professorship is statistically more direct (tenure track only, no administrative experience) and therefore lower paying, then the market forces that push women into such trajectories are sexist.

95 Eisenberg, *supra* note 20 at 46.

96 Linda A. Renzulli et al., *Pathways to Gender Inequality in Faculty Pay: The Impact of Institution, Academic Division, and Rank*, 34 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 58-72 (2013).

for instance through a union that represents all faculty to the administration, is not theoretically inconceivable; however, per Fowles and Cohen, that “many state executives, legislatures, and now court systems seem to be pursuing an aggressive agenda designed to curb unionization among public employees, especially among those employed in public education”⁹⁷ is cause for concern when it comes to gender equity in pay, since arguments for “market forces” are now consistently trumping the egalitarian logic of unions. Perhaps more hopefully, Melissa Hart argues that conversations about who is comparable to whom miss the mark altogether; “[such a conversation] directs attention to the individual faculty members and away from the structures of the workplace and its system of evaluation.”⁹⁸ For Hart, the first step in remedying wage discrimination is to question how systems and structures promote inequality.

2. Intersectionality

This section briefly discusses the need for an intersectional⁹⁹ approach to discrimination claims brought by professors. The cases described in earlier sections have been primarily brought by white women faculty.¹⁰⁰ Therefore, a concern for faculty of color might be that the case law has grown around the cases that have been brought, and if few cases are brought by women of color (possibly due to their increased vulnerability by being a member of multiple protected classes), then it is a reasonable concern that the law has not yet evolved to accommodate people in a variety of vulnerable positions.¹⁰¹ For instance, we know that black women professors have multiple demands on their time for aspects of work that are much more time consuming than what is expected for white faculty.¹⁰² In the current case law, a university might be able to argue that a black female professor is not comparable to male faculty because of the differences in how their time is spent (e.g., she has more service obligations which are valued less in the evaluation process). The argument that a black woman’s work is *equal* (per the EPA) to the work of a white man in academia would be hard to prove based solely on how their time is allocated, but these facts may support a Title VII discrimination claim.¹⁰³ While

97 Jacob Fowles and Joshua Cowen, *In the Union Now: Understanding Public Sector Union Membership*, 47 ADM. SOC. 574–595, 1 15 (2015).

98 Hart, *supra* note 9 at 884.

99 An intersectional approach has been described and developed by Crenshaw, see Kimberle Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, U CHI LEG. F 139 (1989).

100 One exception is SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE, *supra* note 17.

101 Further discussion of this concept can be found in Chapter 7 in VANESSA E. MUNRO, *THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY* (2016).

102 Brenda Lloyd-Jones, *African-American Women in the Professoriate: Addressing Social Exclusion and Scholarly Marginalization through Mentoring*, 22 MENTORING & TUTORING: PARTNERSHIP IN LEARNING 269–283, 274 (2014).

103 Despite the fact that disproportionately foisting service and teaching responsibilities on women of color is sex and race-based discrimination and could constitute a violation of Title VII, it is such a widespread phenomenon and usually happens because of a *lack* of a policy rather than a disparate impact of an existent policy, so it may be very difficult to argue in court. Similarly, as Crenshaw’s theory explains, discrimination claims brought by black women take place at the

such disparate allocations of time could conceivably be treated as pretextual, and perhaps the court's argument in *Sauceda*¹⁰⁴ could be used to demonstrate the sexist and racist assumptions in devaluing teaching and service (on which women and people of color, especially women of color, spend more time than their white male counterparts) over research, it could largely depend on the circuit whether such an argument could actually persuade a court. Similarly, blatant racism may not be recognized as evidence of retaliatory animus when evaluating gender-based wage discrimination claims as in *Lakshman*.¹⁰⁵

3. Retaliation claims

Retaliation against an employee who has filed an EPA or Title VII complaint is explicitly prohibited in the statutes. The EPA states it is unlawful for any person "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."¹⁰⁶ When it comes to retaliation claims, the courts have been somewhat inconsistent. There are a couple of clear examples from the cases discussed above. First, retaliation claims can be straightforward and undeniable, as in the case of *Scroggins*¹⁰⁷ the dean did not renew the contract of the plaintiff (an adverse employment action) after the dean was aware of the filings for the EPA claim. Scroggins's claims of retaliation for both the EPA and Title VII survived the university's motion for summary judgment, but her wage discrimination claims did not. In *Finch*¹⁰⁸ the plaintiffs were fired after their filings, and the retaliation claim was clear cut. Yet, there are also examples of retaliation claims that do not persuade the courts even when they may have had legal justification. One example is the *Spencer*¹⁰⁹ case(s) discussed in detail above, where the provost's treatment of the plaintiff was blatantly retaliatory, but in the first opinion the plaintiff did not provide sufficient detail to persuade the judge that the behavior of the provost constituted adverse employment actions.

Finally, in *Lakshman*¹¹⁰ Lakshman's job changed such that he had to report to two supervisors within two weeks of filing his Title VII claim, so there was a prima facie

intersection of race and gender and courts have effectively marginalized black women's experiences by refusing to acknowledge that the intersection in which they exist is in fact a place at all according to the law. Kimberle Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, 1989 U. Chi. Legal F. 139 (1989).

104 SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE, *supra* note 17.

105 LAKSHMAN V. UNIVERSITY OF MAINE, *supra* note 47 at 112.

106 EQUAL PAY ACT OF 1963, *supra* note 2 at §215(a)(3); See also Title VII's prohibition at 42 U.S.C. § 2000e-3(a).

107 SCROGGINS V. TROY UNIVERSITY, *supra* note 12 at 17.

108 FINCH V. XAVIER UNIVERSITY, *supra* note 11.

109 SPENCER V. VIRGINIA STATE UNIVERSITY (2016), *supra* note 59, SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59. In SPENCER V. VIRGINIA STATE UNIVERSITY (2018), *supra* note 94, the plaintiff's evidence was once again insufficient to persuade the judge that the provost had retaliated against her.

110 LAKSHMAN V. UNIVERSITY OF MAINE SYSTEM, *supra* note 47.

case of an adverse employment action. There was also evidence of discriminatory animus—he was repeatedly called an “unhappy person”¹¹¹ and told he would be monitored for bad behavior.¹¹² Nevertheless, Lakshman was still unable to persuade the judge that the reorganization to consolidate resources was just pretext and that the reconfiguration of the entire research science staff was “to retaliate against him alone.”¹¹³ Thus, retaliation claims can be extremely difficult to prove if the university can show that it was not acting in a manner that singled out one employee. Of course, the major question raised is how could a plaintiff, let alone a judge, distinguish between a major reorganization in the same month of filing a complaint—possibly unrelated to the plaintiff’s complaint, and the employer purposefully choosing to reorganize to turn other employees against the plaintiff and create a hostile work environment so that the plaintiff would leave? Any administrator worth their salary would not send incriminating emails about their motives, so a court is apt to side with a clever administration over a vulnerable employee in such a situation.

4. *Time*

The short statute of limitations (between 1–3 years) is extremely problematic for faculty cases for two reasons. First it bars what paychecks can be examined as evidence of a pay disparity, and thus the damages that could be awarded to the plaintiff given a decision in her favor. Second, it also bars any evidence of discriminatory animus outside of the given period. This is especially harmful for faculty members of universities because tenure-track employment requires 5–10 years of employment as an assistant professor with very few relative protections. This is the time period when faculty are most vulnerable to discriminatory actions, and during which time the faculty member would be least likely to report those discriminatory actions.

In *Reiff*, for instance, the plaintiff waited until earning tenure to come forward so that she had some job security and clout in her department. In *Lakshman*¹¹⁴ the faculty member was vulnerable as a non-tenure-track scientist who occupied positions that undervalued his credentials; he waited to see if he could stay at the university to find a tenure-track position to no avail. The fact that professors are most vulnerable at the assistant-professor level means that they are likely to wait to get tenure before reporting their situation. The academic job market has experienced declines in tenure-track faculty positions in recent years,¹¹⁵ and marital and family conditions have differential effects for men and women on the academic job market, leading female pre-tenured faculty to be appropriately

111 *Id.* at 114.

112 *Id.* at 114.

113 *Id.* at 115.

114 *Id.*

115 NATIONAL SCIENCE FOUNDATION, DOCTORATE RECIPIENTS FROM U.S. UNIVERSITIES 2015 1 (2017), <https://www.nsf.gov/statistics/2017/nsf17306/static/report/nsf17306.pdf> (last visited Dec 23, 2017).

risk averse.¹¹⁶ In other industries, this time bar may make more sense because promotions are not on a set schedule and the possibility to gain more power or responsibility could conceivably be found by moving laterally to another employer or team/department. This not only could hurt the professional reputation of a faculty member, it is virtually impossible given the declines in the academic job market and the small world of one's discipline. Furthermore, the equivalence of a delay in tenure promotion and failure to promote in the courts is also problematic, since tenure (unlike traditional promotion) is almost guaranteed according to a set schedule if the job duties are performed as expected.

B. How Current Case law affects Universities

The following section discusses how current case law affects universities. Two themes that emerged from the cases in this note: systemic fixes and failures, and time, are examined.

1. Systemic fixes and failures

The systematic application of some facially-neutral policies can sometimes lead to gender bias in pay. For instance, according to Hart, *Kovacevich* is instructive in exemplifying the idea that universities can have a facially-neutral system of merit pay that in application is biased against women.¹¹⁷ Similarly, some ways of correcting for pay disparities like the CUPA market raises in *Reiff* can actually cause disparities where previously they did not exist. The case law is not currently uniform across the circuits, so a university may be putting itself at risk by awarding systemic pay increases or implementing other system-wide changes¹¹⁸ without carefully examining the ways in which it could be perpetuating gender bias.¹¹⁹ That said, the trend of the courts to relegate structural challenges to a footnote, "as the EPA's statutory requirements push the court into the one-to-one comparisons that dominate the opinion" means the decision is more often than not in favor of the university in these kinds of cases.¹²⁰

2. Time

An extremely problematic aspect of the EPA and Title VII cases in academia has to do with the social construction of time in higher education. Faculty are on a tenure clock from the day they are offered their assistant professor position. When encountering structural barriers to one's success or wellbeing, a professor on the tenure track must repeatedly weigh the risks of coming forward or waiting

116 Nicholas H. Wolfinger, Mary Ann Mason & Marc Goulden, *Problems in the Pipeline: Gender, Marriage, and Fertility in the Ivory Tower*, 79 J. HIGH. EDUC. 388 (2008).

117 Hart, *supra* note 9 at 885.

118 See *ARTHUR V. COLLEGE OF ST. BENEDICT*, *supra* note 17 in which a merger of two colleges created two tuition remission benefits packages, one which favored men. Summary judgment was granted to the university, but it should serve as a warning.

119 For an example of how bias in the awarding of merit pay can be studied, see Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 AMERICAN JOURNAL OF SOCIOLOGY 1479–1526 (2008).

120 Hart, *supra* note 9 at 883.

until they have tenure to address the issue. Unfortunately, the case law for wage discrimination does not favor those who wait. Recovery for discrimination that professors have experienced in the past may be barred by the statute of limitations.¹²¹ Therefore, administrators and faculty alike need to be aware of the kind of psychological toll it takes on faculty who are “waiting around” for tenure to report bias incidents and discrimination. Similarly, universities must be prepared to provide support for faculty who experienced a history of discrimination that was not considered at trial.

Because litigation is so time consuming, universities must also consider how to ensure the supervisors or administrators involved in a faculty EPA or Title VII claim are acting appropriately throughout the entire time when the statute protects the plaintiff. In *Scroggins*¹²² it seems the university counsel was not consulted at all when an overzealous dean made the university liable for retaliation. On the other hand, in the decade long saga in *Summy-Long*¹²³ the defendants clearly documented their attempts to work with and assist the plaintiff such that the university was granted summary judgment at every stage.

IV. Policy Recommendations

This section discusses what possible policy changes could be made to further protect faculty and universities from future instances of wage discrimination and the possible resulting litigation.

A. *Protecting the Faculty*

The following subsections discuss ideas to consider when crafting policy in higher education that protects faculty from wage discrimination. The first section raises questions around stereotypes, the second, around power differentials, and the third discusses the issues surrounding statutes of limitations.

1. *Recognizing how stereotypes are engendered in the academy*

The first step in protecting faculty through policy is to recognize how gender stereotypes are embedded in the structure and made salient in the social realities of the academy. Work assignments, for instance, are an example of how implicit bias manifests itself in the academy; women are disproportionately asked to serve on committees, and take on extra teaching and mentoring work.¹²⁴ This is not solely

121 See LAKSHMAN V. UNIVERSITY OF MAINE SYSTEM, *supra* note 47; SUMMY-LONG V. PENNSYLVANIA STATE UNIVERSITY, *supra* note 49; REIFF V. BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN-SYSTEM, *supra* note 17.

122 SCROGGINS V. TROY UNIVERSITY, *supra* note 12.

123 SUMMY-LONG V. PENNSYLVANIA STATE UNIVERSITY 2016, *supra* note 50 at 379-383.

124 ADALBERTO AGUIRRE JR., WOMEN AND MINORITY FACULTY IN THE ACADEMIC WORKPLACE: RECRUITMENT, RETENTION, AND ACADEMIC CULTURE. ASHE-ERIC HIGHER EDUCATION REPORT, VOLUME 27, NUMBER 6. JOSSEY-BASS HIGHER AND ADULT EDUCATION SERIES. 51 (2000), <https://eric.ed.gov/?id=ED447752>. Cassandra M. Guarino & Victor M. H. Borden, *Faculty Service Loads and Gender: Are Women Taking Care of the Academic Family?*, 58 RES HIGH EDUC 672-694 (2017).

the work of the university to fix, despite the court's explanation in *Sauceda*.¹²⁵ Nevertheless, it could be instructive to train administrators and committee members or other decision makers on the differences in expectations of women and men in the academy, (and how things change when race factors in). Calling decision makers' attention to the ways in which "leadership" opportunities are assigned to women and men faculty could hopefully result in thinking about how such decisions affect others.¹²⁶ This is essential to preventing further bifurcation of job duties or specializations, and therefore to ensuring that women faculty can identify appropriate male comparators even if the department has historically held gendered expectations (e.g., women do more advising/teaching, while men do more research/grant proposing).

2. *Drawing specific attention to power differentials*

The *Spencer* cases¹²⁷ raise important concerns about the way the court understands academic hierarchies and governance and the impact this has on pay. In *Spencer (I)*¹²⁸ the court did not understand the inappropriate behavior of the provost towards the plaintiff, an associate professor. The nature of the relationship between provost and professor was not actually addressed in either opinion; the plaintiff showed the interactions were problematic by further expounding on how they affected the plaintiff. Nevertheless, a simple lesson on the structure of academia should have been more than enough to draw the court's attention to the extreme power differential between any associate professor and a provost. Such power when wielded spitefully or simply ignorantly can be used to manipulate or misapply all sorts of policies regarding pay, including refusing to sign timesheets, preferentially awarding pay increases, and, as in the case of *Scroggins*, refusing to renew a contract.¹²⁹ It would be in the best interest of the faculty for the university to spell out in an employee handbook specifically what constitutes abuse of power (e.g., acts of willful disregard for policy and procedure to the faculty member's detriment; public humiliation; repeated failure to return contact) by an administrator (or faculty member) so that employees can be kept accountable for their actions by the governing board or their own supervisor (e.g., the president). An explicit statement on the expectations of senior administrators to perform their duties in ways that prioritize equity (e.g., do not single out any one faculty member on a task force) and to not tolerate or enact discriminatory actions, policies, or preferences could serve to educate judges on the power differentials inherent to a provost- or vice president-associate professor relationship. Without such explicit statements, faculty plaintiffs seem to struggle to convince the courts how actions taken by a supervisor three levels removed are abnormal and discriminatory by virtue of the fact that they happened at all.

125 SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE, *supra* note 17.

126 Joyce S. Sterling & Nancy Reichman, *Navigating the Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession*, 8 FIU LAW REV. 515 (2013).

127 SPENCER V. VIRGINIA STATE UNIVERSITY (2016), *supra* note 59, SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59.

128 SPENCER V. VIRGINIA STATE UNIVERSITY (2016), *supra* note 59.

129 SCROGGINS V. TROY UNIVERSITY, *supra* note 12.

3. *Continuing violations and statutes of limitations*

The Ledbetter act indicates that each paycheck is a separate violation, but inherent in this reasoning is that each wage discriminatory paycheck does not constitute a “continuing violation.”¹³⁰ In other words, you are only litigating the period 2–3 years before filing suit for an EPA claim, and 300 days for a Title VII claim. However, it is unclear from the cases within the last 20 years, how the courts might deal with the issue of the tenure clock. Research has shown that the introduction of gender-neutral, tenure-clock-stopping policies have a disproportionately negative impact on women.¹³¹ This means that women are even more vulnerable as assistant professors because their likelihood to get tenure in universities with gender-neutral policies is much lower than if parental leave (for instance) were only available for women. This is due to the fact that men are more likely to publish in the top five journals in their field during the clock-stopping period, whereas women are not.¹³² Thus, not only is there a disincentive for women to use precious time pre-tenure fighting for equal wages, but if they do make use of the clock-stopping procedures it would likely lengthen the time spent as assistant professor before receiving a promotional raise, thereby increasing inequality among those who stop the clock and those who do not. Furthermore, if increases in salary are based on percentages and a male and female assistant professor hired the same year both take parental leave, but the male decides to go up early for tenure due to his productive leave, the tenured male will not only earn more the first year he goes up for tenure, but every subsequent year as well. While it is possible the courts could be persuaded that our hypothetical female professor could make up the difference through a merit pay policy (if available at her institution), it is also possible that with good research and expert witnesses these policies could be challenged as in *Kovacevich*.¹³³ If, hypothetically, this female assistant professor had filed a claim prior to earning tenure because the males in her department all earned more than she, and they were subsequently tenured while she remained an assistant, presumably they would not be appropriate comparators under the EPA (thus also most likely under Title VII) simply by occupying different ranks. While she may still be able to argue a disparate impact claim under Title VII, as I have already said, it would be challenging.

Furthermore, while the Ledbetter act is good insofar as it ensures the statute of limitations doesn’t run out two years after the first discriminatory payment decision is made, it is problematic because it means that it is very easy to dismiss prior discriminatory acts. The statute of limitations on discriminatory acts to show prejudice or intent should not be the same as that which affects how much money

130 Justin M. Swartz, Jennifer L. Liu & Nantiya Ruan, “Time after time”: *Compensation litigation under the Lilly Ledbetter Fair Pay Act*, 1 2 (2010), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/2010_eeo_008.authcheckdam.pdf (last visited Nov 26, 2017).

131 HEATHER ANTECOL, KELLY BEDARD & JENNA STEARNS, EQUAL BUT INEQUITABLE: WHO BENEFITS FROM GENDER-NEUTRAL TENURE CLOCK STOPPING POLICIES? 1 24 (2016), <http://ftp.iza.org/dp9904.pdf> (last visited Nov 26, 2017). Please note, tenure-clock policies vary by institution and some institutions may have clock-stopping policies beyond those discussed in this article.

132 *Id.* at 24.

133 KOVACEVICH v. KENT STATE UNIVERSITY, *supra* note 17.

one is entitled to. One, perhaps radical, way that policy could protect faculty beyond the current law would be to acknowledge the power of administrators to right past wrongs within an institution. For instance, implementing an institutional policy of making amends when a new administration comes in, could potentially be extremely helpful in honoring the experiences of faculty and welcoming conversation about how to fix the mistakes of the past that may still influence the present.

B. Protecting the University

When it comes to policy implications, the most likely changes to be made are those that protect the university from liability. This section discusses the recommendations for policy changes that could potentially protect the university from EPA and Title VII litigation brought by faculty. Most of these policy recommendations are for internal university policies; however, some scholars have made recommendations for federal policy changes to improve or transform the EPA statute, for instance by offering incentives for equal pay rather than punishment for failing to do so.¹³⁴ Each of the three subsections offers suggestions for how policy might address the respective issue.

1. First do no harm

One scenario a university must consider is how they will respond to evidence that demonstrates a gender-wage gap. Melissa Hart suggests an approach to this scenario that she calls “first do no harm.”¹³⁵ Per Hart, when an employer encounters a disparity in wages, they could be “barred from offering raises which exacerbate the disparity.”¹³⁶ Instead, the employer must offer raises that either maintain or diminish inequality in pay. While this could be extremely problematic if not uniformly applied across the university, an institution-wide implementation, given the proper democratic process, may actually work to undermine the systems which have previously increased inequality over time.

2. Expectations of administrators

As discussed in section IV.A.2. above, one extremely important way for universities to protect themselves from liability is to ensure the proper training and conduct of their administrators. Administrators are responsible, not only to ensure that the statutes are followed so that there are no instances of retaliation, but also to ensure that the policies and procedures are fair and equitably applied. Administrators who are trained on how facially neutral policies can easily be used as vehicles for legitimizing favoritism or nepotism also learn how to promote transparency and accountability in their salary structures, incentive pay systems, and other accounting procedures. Despite the degree of transparency inherent to

¹³⁴ Brenton, *supra* note 16. I see two main issues with moving to incentive-based statutes rather than punitive statutes. First, there are few incentives powerful enough to pull universities from the academic molasses to make systemic changes. Second, it is essential when dealing with all victims of discriminatory practices to provide recourse for making employees whole.

¹³⁵ Hart, *supra* note 9 at 891.

¹³⁶ *Id.* at 891.

running public universities, there are still plenty of gray areas that employees are not made aware of (e.g., the balance or yearly allotment of another professor's research account).

Because many administrators are given a great deal of power over their reports (faculty and/or staff) it is essential that they be properly trained in what to do when faced with a claim of discrimination. Failure to act in accordance with the statute (as in *Scroggins*¹³⁷) is a completely preventable liability that universities need not risk. Yet, the conduct of their administrators in their interpersonal dealings with faculty is certainly something for which the university should be held liable. Therefore, a policy that also strictly delineates expectations of professional conduct for those with power over other employees is integral to ensuring administrators are held responsible for any misconduct and to absolve the university of liability for their behavior. Importantly, such a policy would acknowledge the potential for a misuse of power by irresponsible administrators and provide a procedure to protect all parties. This kind of policy could be used to ensure that conduct like that of the provost in *Spencer*¹³⁸ would be not tolerated, and in enforcing such a policy the university would also show support for its staff and professoriate.

3. *Transparency and consistency*

Finally, it is essential to have transparency and consistency when it comes to salaries, across-the-board raises, and merit-pay schemes. In private institutions this is especially important since there is no mandate that they make any information about salaries publicly available. This issue was raised in multiple articles on the cases within legal academia.¹³⁹ Scholars agree that there is insidious gender bias in assuming the moral rectitude of prior salary decisions that remain secret even after gender inequity comes to light.¹⁴⁰

When issues of wage discrimination bubble to the surface in a private institution, it is the duty of that institution to conduct a thorough review of past policies. One example of this approach took place at MIT, which was generally successful but took more than four years of work, according to Perry.¹⁴¹ The MIT approach included an internal salary study and an internal audit of the distribution of laboratory space, resources, and offices which resulted in "salary increases to female faculty members, [additional] discretionary research funding and more laboratory space, and renovated offices and labs."¹⁴² Nevertheless, MIT did not share the actual salary data or statistics that led them to do this work in the first place, and in its failure to do so has been critiqued for its lack of transparency, despite its eventual pursuit of equality.¹⁴³

137 SCROGGINS V. TROY UNIVERSITY, *supra* note 12.

138 SPENCER V. VIRGINIA STATE UNIVERSITY (2017), *supra* note 59.

139 Hart, *supra* note 9; Paula A. Monopoli, *The Market Myth and Pay Disability in Legal Academia*, 52 IDA. REV 867 (2016).

140 Hart, *Id.* at 890; Monopoli, *Id.* at 875.

141 Perry, *supra* note 18 at 36.

142 *Id.* at 36

143 *Id.* at 36

For public universities, transparency may be less of an issue, but the need for consistency is as urgent and important as ever. For example, in *Reiff* the court accorded considerable deference to the defendant who claimed the raises awarded the plaintiff and comparators were all part of the same scheme, given the fact that “neither the faculty salary letters nor the Rate and Jobcode History consistently use the same labels to identify the increases received by faculty members.”¹⁴⁴ While this kind of systemic breakdown will not sound uncommon to those familiar with the public university’s bureaucratic structures, it is no less problematic because it is familiar. In fact, it is all the more concerning that the inconsistency in reporting could be plainly understood by an employee to imply that she is undervalued compared to her male peers. The university’s transparency mandate is not simply a responsibility to the public but also to the faculty and staff it employs; transparency without consistency is not transparency at all. Policies that keep universities accountable for their consistency in reporting and documentation through periodic internal or external audits are essential to the pursuit of pay equity and the public mission of the university.

V. Conclusion

In sum, this article explored the implications of faculty wage-discrimination case law for faculty and universities, and it offered suggestions for possible policy adjustments to better protect faculty and universities. The case law discussed offers both reasons to be hopeful and concerned. This article did not discuss state statutes or protections for employees or universities, which may help illuminate what has or has not worked in terms of offering the protections recommended in the discussion section. Still, there are important differences in how the circuit courts have addressed the issues of equal pay for faculty that exemplify how these federal protections are not equally applied. While the court in *Sauceda*¹⁴⁵ provided a much-needed explanation of how the market defense has been used to justify gender discrimination, the debate over what factors remain legitimate causes for pay differentials continues in the courts.¹⁴⁶ Nevertheless, most courts have yet to recognize the gendered funneling of female faculty into less valuable feminized disciplines as a cause for pay disparities in a gender-conscious market. Had Saucedá’s comparator been outside her discipline, who knows if the court would have allowed the market forces defense?

Finally, there are still issues with statutes of limitations as they apply to a professoriate whose jobs are not secure for years. While the jobs of faculty filing an EPA or Title VII suit may be more secure under statutory protection, retaliation is a risk very few would be willing to take pre-tenure. And for universities, the temptation to ignore systemic injustices because it is easier than attempting an institution-wide fix too often leads to overlooking the responsibility they have to their employees. As exemplified in the cases since 2000, there are aspects of

144 REIFF V. BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN-SYSTEM, *supra* note 17 at 10.

145 SAUCEDA V. UNIVERSITY OF TEXAS AT BROWNSVILLE, *supra* note 17.

146 Kaplin & Lee *supra* note 33 at 447.

the EPA and Title VII statutes that weaken their ability to protect faculty from discriminatory pay. In addition to advocating for new legislation to strengthen the protection offered to victims of discrimination, universities have the opportunity to model the values of equity, democracy, and human dignity by creating internal policies that protect their employees.

Book Review
of
FREE SPEECH ON CAMPUS
BY ERWIN CHEMERINSKY AND
HOWARD GILLMAN

By

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If you haven't noticed on your own, at the frequency of about every other day for the past three years a piece has appeared in the "Chronicle of Higher Education" that references "free speech."¹ It is by now pure platitude to say that free speech issues permeate college and university life for students, faculty, administrators and campus guests,² that the issues presented are complicated,³ or that there is no answer to questions that require reconciliation of First Amendment ideals with the evolving cultural norms and mores of college and university life.⁴ While the issue of free speech on campuses is, as Erwin Chemerinsky and Howard Gillman write in *Free Speech on Campus*, "as old as universities and as current as the daily news," they wrote the book because they "believe that colleges must promote inclusive learning environments in a way that also preserves and respects the unfettered expression of ideas on campus."⁵ To be sure, the need for an explication of this topic has perhaps not been greater.

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1 An online search of the *Chronicle of Higher Education* (www.chronicle.com) conducted May 22, 2018 for articles containing the term "free speech" reveals that 638 pieces containing this term were published in the past three years.

2 See, e.g., Alina Tugend, "Colleges Grapple with Where—or Whether—to Draw the Line on Free Speech," *The New York Times*, June 5, 2018, available at <https://www.nytimes.com/2018/06/05/education/learning/colleges-free-speech.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region®ion=top-news&WT.nav=top-news>.

3 See, e.g., Lata Nott, "The First Amendment Doesn't Guarantee You the Rights You Think it Does," *CNN Politics*, August 8, 2017, available at <https://www.cnn.com/2017/04/27/politics/first-amendment-explainer-trnd/index.html> (saying of the First Amendment's text that "[t]here's a lot going on in those few sentences").

4 See, e.g., Susan Kelley, "Psychologists: 'There is No alternative To Free Speech,'" *The Cornell Chronicle*, May 2, 2018, available at <http://news.cornell.edu/stories/2018/05/psychologists-there-no-alternative-free-speech>.

5 FREE SPEECH ON CAMPUS, Erwin Chemerinsky and Howard Gillman, Yale University Press, 2017, xi.

The reasons why this book makes an impact are numerous but chiefly *Free Speech on Campus* is an accessible, concise, and yet remarkably thorough reference on issues faced by campuses with regard to the First Amendment. It goes into significant depth and detail while maintaining a level of accessibility and clarity that will aid students, faculty, campus counsel, and broader administration alike in comprehension and understanding of the issues. For anyone seeking to explain to students or colleagues the complexity of free speech issues on campuses, or the interplay of freedom of expression and academic freedom and its centrality to the advancement of knowledge and our democracy, this book is a tremendous resource.

The authors begin with a summary of notable instances of free speech episodes on college campuses.⁶ This compendium works not only to contextualize the book but also to convey the depth and breadth of freedom of speech issues in the context of daily college and university life. From controversial guest speakers and articles to trigger warnings, Halloween costumes to Greek life, the very act of compiling recent events is evidence of the timeliness of and need for the book. From there, Chemerinsky and Gillman explain their central thesis that:

[A]ll ideas and views should be able to be expressed on college campuses, no matter how offensive or how uncomfortable they make people feel. But there are steps that campuses can and should take to create inclusive communities where all students feel protected.⁷

The challenge stemming from this argument, they admit, “is to develop an approach to free speech on campus that both protects expression and respects the need to make sure that a campus is a conducive learning environment for all students.”⁸

To support the claim that all ideas are entitled to expression on college campuses Chemerinsky and Gillman outline a thorough history of free speech, contextualizing its importance as central to freedom of thought and in turn our democracy.⁹ The authors follow this discussion with a chapter tracing free speech and expression specifically at colleges and universities with a focus on the interplay of free speech and academic freedom.¹⁰ For anyone working or living in higher education who may benefit from a renewed sense of purpose, this chapter should be required reading. The authors’ account of the importance of the free exchange of ideas in educational institutions would give even the most cynical or faint of heart renewed inspiration about the hallowed role of education in society and to democracy. The authors provide an account of the transformation of education from a system of indoctrination, primarily religious, to a system of free thought, pointing out that “[i]f we still thought that the purpose of higher education was indoctrination, there would be no need for freedom of thought and speech. If one starts from an assumption of already knowing the truth—religious, political, or otherwise—then higher education is merely about instructing students to become

6 *See id.*, Chapter 1.

7 *Id.*, 19.

8 *Id.*

9 *Id.*, Chapter 2.

10 *Id.*, Chapter 3.

disciples.”¹¹ Chemerinsky and Gillman harken to the plight of Galileo—whose theory of a heliocentric solar system was widely rebuked and denounced—as an example of the degenerative qualities of a system of indoctrination as opposed to one based on free thought and open inquiry.¹²

From a discussion on the centrality of free speech and expression to democracy and the academy, the authors turn to what has become a centrally controversial topic on campuses: hate speech.¹³ Chapter Four is an invaluable resource summarizing the basic rules around hate speech and tracing the caselaw on campus speech codes. This chapter culminates in perhaps the toughest assertion of the book: that attempts to limit hate speech “inescapably” result in a “ban [on] the expression of unpopular ideas and views, which never is tolerable in colleges and universities.”¹⁴

Acknowledging that “[t]hose of us who believe in free speech values will not win over this generation of students by mocking them, calling them weak or coddled, or dismissing their legitimate concerns,” the authors then devote the following Chapter Five to the question of “What Campuses Can and Can’t Do.”¹⁵ The authors affirm that Colleges and universities “can never punish the expression of ideas” and that the central purpose of colleges and universities necessarily “requires protection of all views, no matter how objectionable or offensive they may be to some students and faculty.”¹⁶ Affirming that campuses can instead censor and punish speech that falls within the legal definitions of harassment, true threats, or other unprotected speech areas such as destruction of property, the chapter is substantively rich with how current doctrine might apply under various factual scenarios to colleges and universities. Offering advice in terms of “can and can’t do”¹⁷ scenarios, this chapter is functionally a desk-top reference for current fact patterns on campus that may involve threats, harassment, or other unprotected speech, providing helpful guidance and frameworks for faculty and administration navigating these issues in real time.¹⁸

11 *Id.*, 50.

12 *Id.*

13 *Id.*, Chapter 4.

14 *Id.*, 110.

15 *Id.*, 111.

16 *Id.*, 113.

17 *Id.*

18 An aspect of these issues that the chapter does not treat in detail is the impact of social media and strategies for dealing with social media. For an interesting account of the impact of social media on the recent events at U.C. Berkeley see Andrew Marantz, “How Social-Media Trolls Turned U.C. Berkeley into A Free-Speech Circus,” *The New Yorker*, July 2, 2018, available at <https://www.newyorker.com/magazine/2018/07/02/how-social-media-trolls-turned-uc-berkeley-into-a-free-speech-circus> (“Speech is fundamentally different in the digital context,” [Carol Christ] said. ‘I don’t think the law, or the country, has even started to catch up with that yet.’ The University of California had done everything within its legal power to let Yiannopoulos speak without allowing him to hijack Berkeley’s campus. It was a qualified success that came at a steep price, in marred campus morale and in dollars—nearly three million, all told.”).

Chapter 5 concludes with “An Agenda for Campuses,” a bulleted list of suggested action items for campuses seeking to ensure both the free exchange of ideas and the well-being of students in an inclusive living and learning environment.¹⁹ All on the list are good suggestions but each would certainly have differing applications in practice across the spectrum of higher educational institutions. For example, what constitutes a “clear and effective grievance procedure for those who believe the institution is not taking seriously its legal obligations to create nondiscriminatory workplace and learning environments”²⁰ may differ from public institution to private, or research institution to liberal arts college. In my view, however, most if not all of the items on their list are fundamentally educational in nature: trainings, clarity around procedures and reporting, effective grievance procedures, clear and strong position statements, “sensitizing” a community, and speaking up and speaking out. This educational purpose cuts across typology in higher education, and is centrally positioned in the core mission of the advancement of knowledge within the context of academic freedom. Each suggestion is rooted in their central tenant that “[o]ne of the most powerful tools that campuses and their officials possess—and one too often overlooked—is the ability to speak.”²¹

My greatest evidence for the impact of this book came when I was an invited guest in a political science seminar called the “Politics of Higher Education” at Hobart and William Smith Colleges where I serve as Vice President and General Counsel.²² The class session could easily have been described as a microcosm of the data on the issues surrounding the topic of free speech. *Free Speech on Campus* was assigned reading for the class and the message back from at least this subset of students was clear: students today question wholesale worship at the altar of the First Amendment that comes at the expense of respect, dignity, and a sense of personal safety.²³ Students in the seminar grappled with the notion that something could be deliberately hurtful, indeed hateful, and yet still “protected.” Vigorous discussion ensued. While the conversations were not easy by any measure, *Free Speech on Campus* provided a clean and succinct framework for discussion and open critique, and a resourceful entrée to the issues. Ultimately, I think, the students left with a deeper understanding of the nuance of the issues at play. This could indeed be the ultimate success of this work and the authors’ success in having written it: to have made a complicated subject less so, to have used words and dialogue to educate students about the multiple perspectives which these important issues raise.

19 Chemerinsky and Gillman, *Id* at 150.

20 *Id.*

21 *Id.*, 146.

22 I am grateful to Associate Professor of Political Science Justin Rose for the invitation and to the class for their insightful discussion.

23 For survey data on this topic see the Knight Foundation’s “Future of the First Amendment: 2016 Survey of High School Students and Teachers” as cited in Jeffrey Herbst’s presentation at the National Association of College and University Attorneys’ February 2018 CLE Workshop on Free Speech and Campus Unrest.