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### **Values and Value: University Endowments, Fiduciary Duties, and ESG Investing**

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The trustees managing university endowment funds must comply with fiduciary duties that require the trustees to act in the best interests of the university and to act as prudent investors when managing the funds. This article shows that these fiduciaries may adopt investment policies that consider material environmental, social, and governance (ESG) factors as part of an overall investment strategy. The article explains why older arguments that fiduciaries should avoid “social investing” are no longer relevant and how the prudent investor standard has evolved to include ESG investing. The article discusses the changes in socially responsible investing since the anti-apartheid era and reviews a significant number of empirical studies that show that ESG investing has had a neutral or positive effect on financial return. Based on the empirical work, evidence of the financial industry’s growing use of extra-financial factors in investment analysis, and recent guidance from the Department of Labor, the article concludes that a trustee responsible for a university endowment will not breach the duty of loyalty or the duty to act as a prudent investor by directing the endowment’s use of ESG investing as part of an overall financial investment strategy.

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# VALUES AND VALUE: UNIVERSITY ENDOWMENTS, FIDUCIARY DUTIES, AND ESG INVESTING

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## I. INTRODUCTION

Universities and other charities<sup>1</sup> often hold significant funds in endowments.<sup>2</sup> A university typically seeks to make annual distributions from its endowment fund, while maintaining the value of the fund over time so that support for the university will continue into the future.<sup>3</sup> Endowments can grow through investment returns and through additional contributions, and university endowments typically grow in both ways.<sup>4</sup>

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1. The legal definition of charity, derived from the English Statute of Charitable Uses of 1601, encompasses universities. *See, e.g.*, UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 2(1) (2006) (“‘Charitable purpose’ means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.”); RESTATEMENT (THIRD) OF TRUSTS § 28 (2003). This article focuses on universities, but the analysis applies to all types of charities.

2. A legal definition of “endowment” is a donor-restricted fund that cannot be spent in its entirety in the current year. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 2(2) (2006) (UPMIFA). Universities and others often use the term to refer to all investible assets, both restricted and unrestricted. The amount being invested may include donor-restricted endowment, board-designated endowment, and unrestricted funds set aside for uses beyond the current year and invested as part of the overall strategy. The discussion in this article applies equally to donor-restricted endowment as defined in UPMIFA and to endowment as often used in the lay sense to apply to any pool of investment assets. Some universities manage their endowments directly, and some universities, particularly state universities, have created separately incorporated foundations to manage their endowments. The discussion of university endowments in this article applies to both university-managed endowments and separate endowments managed for the benefit of universities.

3. The Yale University Investments Office begins its description of its strategy for supporting the university by stating: “The Endowment spending policy, which allocates Endowment earnings to operations, balances the competing objectives of supporting today’s scholars with annual spending distributions while promising to maintain support for generations to come.” *See Supporting the University*, YALE UNIVERSITY INVESTMENTS OFFICE, <http://investments.yale.edu/index.php/2011-09-22-18-13-43/support> (last visited Mar. 4, 2016). Yale and Harvard both say their endowments provide approximately a third of their net revenues. *Id.* *See also Investment Return of 20.2% Brings Yale Endowment Value to \$23.9 Billion*, YALENEWS (Sept. 24, 2014), <http://news.yale.edu/2014/09/24/investment-return-202-brings-yale-endowment-value-239-billion>; *Harvard at a Glance*, HARVARD UNIV., <http://www.harvard.edu/about-harvard/harvard-glance/endowment> (Last visited June 6, 2015).

4. *See Harvard Endowment Raises to 36.4 Billion*, HARVARD MAGAZINE (Sept. 23, 2014), <http://harvardmagazine.com/2014/09/harvard-endowment-rises-to-36-4>

As of June 30, 2014, U.S. colleges and universities reported holding \$516 billion in endowment assets.<sup>5</sup>

University fiduciaries responsible for university endowments may wonder whether investment policies can consider environmental, social, and governance (ESG) factors as part of the investment strategy. Misinformation about the fiduciary duties of trustees has misled trustees and their lawyers and sometimes blocked even a discussion of this question.<sup>6</sup> The trustees and their advisors need legal guidance that explains how the consideration of ESG factors as part of an investment policy fits within the fiduciary duties of loyalty and prudence.<sup>7</sup> Little recent legal discussion of this topic exists, at least in the U.S.,<sup>8</sup> and some people

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billion.

5. National Association of College and University Business Officers and Commonfund Institute, *2014 NACUBO-Commonfund Study of Endowments 1* (2015) [hereinafter NCSE]. The study reported that the 832 colleges and universities that participated in the study held \$516.0 billion in combined endowment assets and 91 institutions had endowments of over \$1 billion. Harvard reported a \$36.4 billion endowment for the fiscal year ending June 30, 2014, see Harvard, *supra* note 4, while Yale's endowment was \$23.9 billion. See Yale, *supra* note 3.

6. See Commonfund Institute, *Commonfund Study of Responsible Investing: A Survey of Endowments and Their Affiliated Foundations* (Apr. 2015), available at [agb.org/sites/default/files/u27175/nct15\\_commonfund.pdf](http://agb.org/sites/default/files/u27175/nct15_commonfund.pdf). [hereinafter Commonfund Study of Responsible Investing]. The study surveyed 200 institutions who agreed to participate as a follow-up to the NCSE. *Id.* at 1. When asked about impediments to adoption of ESG integration, 15% identified violation of fiduciary duty as a substantial impediment and 47% identified it as a moderate impediment. *Id.* at 7, 15. Concern about investment performance was identified as a substantial impediment by 35% and as a moderate impediment by 43%. *Id.* Only 58% of respondents said their boards had at least a "good" understanding of the difference between ESG integration and SRI. *Id.* See also *infra* Part V.C.

7. The Commonfund Study of Responsible Investing found that only 9% of the participants had concluded that responsible investing was consistent with fiduciary duties and 3% had concluded that it was not. Most respondents said that they did not know. *Id.* at 16.

8. Much of the legal discussion in the U.S. has focused on investments by pension plans. See, e.g., Jay Youngdahl, *The Time Has Come for a Sustainable Theory of Fiduciary Duty in Investment*, 29 HOFSTRA LAB. & EMP. L.J. 115 (2011); Benjamin J. Richardson, *Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment?*, 22 BANKING & FIN. L. REV. 145 (2007) (arguing that SRI can be implemented using methods that comply with the duties of prudence and loyalty). With respect to SRI and charities, see Joel C. Dobris, *A Letter About Investing to a New Foundation Trustee, with Some Focus on Socially Responsible Investing*, 34 ACTEC J. 234 (2009); Lewis D. Solomon & Karen C. Coe, *Social Investments By Nonprofit Corporations And Charitable Trusts: A Legal And Business Primer For Foundation Managers And Other Nonprofit Fiduciaries*, 66 UMKC L. REV. 213 (1997). See also Edward J. Waltzer & Douglas Sarro, *Fiduciary Society Unleashed: The Road Ahead for the Financial Sector*, 69 BUS. LAW. 1081 (2014) (describing the evolution of fiduciary duty law in the financial services sector); Benjamin J. Richardson, *Fiduciary Relationships for Socially Responsible Investing: A Multinational Perspective*, 48 AM. BUS. L.J. 597 (2011) (discussing whether a fiduciary should consult with beneficiaries

concerned about fiduciary duties in this context worry about statements made in the early years of socially responsible investing (“SRI”).<sup>9</sup> In the past 30 years, SRI has changed. New strategies for investing for value have developed, and ESG investing, a term often used to capture this idea, differs significantly from the negative screens used when the apartheid system in South Africa drove interest in SRI funds.<sup>10</sup>

In recent years, some investors have begun to focus on the significance of ESG factors in improving returns while reducing risk.<sup>11</sup> Yet only a small

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to determine whether SRI follows the beneficiaries’ “best interests” and then the complexity of determining “best interests” in trusts with a large group of beneficiaries with conflicting views (e.g. pension plans)). In the U.K., discussion of the fiduciary issues has been more robust. On Sept. 24, 2014, the U.K. Law Commission issued a recommendations paper, which suggests the creation of a new statutory rule to clarify the ability of charities to engage in social investment. *Social Investment by Charities: The Law Commission’s Recommendations*, U.K. LAW COMM’N (2014), available at [www.lawcom.gov.uk/wp-content/uploads/2015/06/cp216\\_charities\\_social\\_investment\\_recommendations.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/06/cp216_charities_social_investment_recommendations.pdf).

The paper concludes that trustees can make social investments if they determine that the investments are in the best interests of the charity and provide both “mission benefit” and financial return. *Id.* at 2. The U.K. Law Commission also issued a report focusing on the fiduciaries who manage pensions. *Fiduciary Duties of Investment Intermediaries*, U.K. LAW COMM’N (2014), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/325509/41342\\_HC\\_368\\_LC350\\_Print\\_Ready.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/325509/41342_HC_368_LC350_Print_Ready.pdf). The report concludes that trustees may take ESG factors into consideration “given the evidence that ESG factors can lead to better returns over the longer-term. . .” *Id.* at 97. The report noted that some comments submitted on an earlier Consultation Paper argued that “trustees have a fiduciary obligation to take ESG factors into account and to expedite engagement with their portfolio companies.” *Id.* at 98. The report found that because the ESG label was used in so many different ways, stating categorically that trustees must take an ESG approach would not make sense. However, the report concluded that trustees “should take account of risks to their investments. When investing in long-term equities, this includes risks to the long-term sustainability of a company’s performance.” *Id.* at 101. See also *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment*, UNEP FINANCE INITIATIVE 114 (2005) [http://www.unepfi.org/fileadmin/documents/freshfields\\_legal\\_resp\\_20051123.pdf](http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf) (referred to as the “Freshfields report”).

9. See *infra* Part VI.A.

10. See John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72 (1980) (discussing the use of SRI by trustees in the context of screens related to divestment from South African and other social concerns). In the 1960s protests in the U.S. began to raise public awareness of apartheid, a system of racial segregation in South Africa. Student organizations pushed universities to divest all or part of their endowments of any companies doing business in South Africa. “The college-based divestment efforts may or may not have played a role in immediately affecting the South African economy. But they did raise awareness about the problem of apartheid.” Gregory Gethard, *Protest Divestment and the End of Apartheid*, INVESTOPEDIA (Jul. 16, 2008), <http://www.investopedia.com/articles/economics/08/protest-divestment-south-africa.asp>.

11. See *infra* Part V.D. One reason for the growth in awareness of ESG factors is

percentage of university endowments report using ESG factors as part of their investment strategies.<sup>12</sup> Some university trustees may have considered whether to adopt an ESG policy and decided against it, but many university fiduciaries may have failed to consider the use of ESG factors due to concerns about potential breaches of fiduciary duties.

The legal concerns about proper fiduciary behavior rest on two issues. The duty of loyalty requires a trustee<sup>13</sup> to act “in the sole interests” of the beneficiaries – in the case of a charity the charitable mission.<sup>14</sup> The duty of care or prudence requires the trustee to exercise the care of a reasonably prudent person in managing the property of the organization, and in particular in investing its funds.<sup>15</sup> Further, fiduciaries should review their endowment’s investment policies periodically, to consider changes in investment norms reflected in those policies.<sup>16</sup>

This article examines whether the fiduciaries who manage university endowments can consider ESG factors when developing investment policies. After a brief introduction, Part II examines the fiduciary duties of

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the concern over climate change. Climate change threatens to alter social, economic, and environmental structures. Investors worry not only about effects on the quality of life, but also on the impact climate change will have on investments. For example, changes in regulations on the burning of fossil fuels may affect the value of companies with oil, gas, and coal reserves. Climate change may also affect both supply chains and markets. Attempts to address climate change through investment choices can protect a portfolio against risk (oil and gas investments may lose value if regulations curtail extraction) and may protect the overall investment structure in a more general way, by focusing on long-term value rather than short-term returns. If climate change adversely affects the economy, an economic downturn will lower all boats (except those floating in the areas flooded by expanding seas). See, e.g., Terry Macalister, *Investors Could Lose \$4.2tn Due to Impact of Climate Change, Report Warns*, THE GUARDIAN (Jul. 24, 2015), <http://www.theguardian.com/environment/2015/jul/24/investors-could-lose-42tn-due-to-impact-of-climate-change-report-warns>.

12. See NCSE, *supra* note 5, at vii (stating that 14% of the respondents reported using ESG factors, 25% reported using negative screens, 15% reported investments that further the institution’s mission, 7% said they were considering changing their investment policies to include ESG integration, and 6% reported that their boards “had voted to exclude responsible investing considerations”).

13. Fiduciary duties for anyone acting on behalf of another in a fiduciary capacity derive from trust law. See *Tibble v. Edison Int’l*, 135 S. Ct. 1823 (2015) (“We have often noted that an ERISA fiduciary’s duty is ‘derived from the common law of trusts.’”) This case discusses fiduciary duties in the context of “trustees.” The same duties apply to the fiduciaries of all charities, whether the charity is organized as a nonprofit corporation and managed by directors, as a charitable trust and managed by trustees, as a governmental unit managed by regents, or in some other form.

14. See *infra* Part II.B (describing the duty of loyalty).

15. See *infra* Part II.C (describing the duty of care and the prudent investor standard).

16. See *Tibble*, 135 S. Ct. at 1823 (confirming a fiduciary’s ongoing duty to monitor investments).



those who manage university endowments, with particular attention to the duty to act as a prudent investor. Part III turns to the history of SRI, with an explanation of terminology and strategies. Part IV examines the use of ESG factors in investing, with attention to performance data. This Part discusses early concerns about SRI, particularly an argument that SRI necessitated a financial cost due to restrictions on diversification. Part IV then reviews recent empirical research that shows that ESG investing can result in returns that meet or exceed non-SRI benchmarks. Part IV also discusses growing financial industry interest in ESG factors and the development of integrated reporting. Based on changes in investing practices, Part V concludes that the prudent investor standard has evolved to include ESG investing. Recent guidance from the Department of Labor supports this conclusion. Thus, fiduciaries responsible for university endowments can adopt investment policies directing the use of ESG factors without breaching the fiduciary duties of loyalty and prudence.

## II. FIDUCIARY DUTIES OF TRUSTEES OF UNIVERSITY ENDOWMENTS

The trustees who manage university endowments must act as fiduciaries with respect to the endowments. Whether the endowment is structured as a trust or a nonprofit corporation, the fiduciary duties of obedience, loyalty, and care (prudence) apply.<sup>17</sup> These duties developed in trust law and now apply in any circumstance in which one person manages property for someone else, or in the case of a charity for the charity's purposes.<sup>18</sup> The standards vary somewhat between trust law and business law, but the standards as applied to charities should be essentially the same, whether the charity is organized as a charitable trust or a nonprofit corporation.<sup>19</sup>

Fiduciary duties address the problem that would otherwise occur when one person manages property for someone else's benefit. In a private trust, the trustee controls the property and might be tempted to use the property for her own benefit, rather than that of the beneficiaries. In a charitable trust the same concern, that the trustee might not put the interests of the charity first when making decisions, applies. As this section describes, the

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17. RESTATEMENT (THIRD) OF TRUSTS § 76 (obedience), § 77 (prudence), § 78 (loyalty) (2007); UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 3 (2006).

18. RESTATEMENT (THIRD) OF TRUSTS § 76 (2007).

19. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT Prefatory Note (2006); RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGANIZATIONS § 1.02 cmt. d (Choice of Legal Form) (Tentative Draft No. 1 Apr.13, 2016).

duties require the trustee to follow the wishes of the settlor<sup>20</sup> as expressed when the settlor created the trust, to act for the benefit of the beneficiaries or the charitable purposes, and to manage the property with care and prudence. The fiduciary of a charity must act to carry out the charity's purposes, subject to any restrictions imposed by donors. The duties are of particular importance in the charitable context, given the limited amount of oversight of the actions of charitable fiduciaries.<sup>21</sup>

#### A. Duty of Obedience

In trust law the duty of obedience is the duty to carry out the terms of the trust, as established by the settlor.<sup>22</sup> For a charitable trust or nonprofit corporation, the duty of obedience is the duty to carry out the charitable purposes of the charity. The duty encompasses both the duty to keep the charity's mission in mind in decision making and to respect donor intent associated with restricted gifts. The duty of obedience complements the other two key duties—the duties of loyalty and care—and plays an important role in the way fiduciaries manage an organization.<sup>23</sup>

#### B. Duty of Loyalty

The duty of loyalty requires a trustee to act in the “sole interests” of a trust beneficiary<sup>24</sup> and requires a director of a nonprofit corporation to act in the “best interests” of the corporation.<sup>25</sup> The utility of a “sole interests” standard has been challenged in connection with private trusts, with the view that a “best interests” standard will yield better results for beneficiaries.<sup>26</sup> For a charity, a best interests standard seems optimal. In essence, the duty of loyalty is a duty to avoid conflicts of interest in

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20. Trust law uses the term settlor to mean the person who “settles” the trust by transferring property to another to act as trustee, following the directions of the settlor. The Uniform Trust Code treats any donor to a charitable trust as a settlor with respect to the portion of the trust contributed by the donor. UNIF. TRUST CODE § 103(15) (2010).

21. Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749, 817–19 (2008); Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law and Tax Law*, 21 U. HAW. L. REV. 593, 609 (2000).

22. RESTATEMENT (THIRD) OF TRUSTS § 76 (2007).

23. See Rob Atkinson, *Obedience as the Found. of Fiduciary Duty*, 34 J. CORP. L. 43 (2008), for a thorough analysis of the duty of obedience.

24. RESTATEMENT (THIRD) OF TRUSTS § 78 (2007).

25. RESTATEMENT OF THE LAW OF CHARITABLE NONPROFIT ORGANIZATIONS § 2.02(a) (Tentative Draft No. 1 Apr.13, 2016).

26. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 980–86 (2005).

connection with actions taken on behalf of the trust if the conflicted transaction will hurt the beneficiaries.<sup>27</sup> An action need not benefit the trustee personally to be prohibited.<sup>28</sup>

For charities the duty of loyalty can be understood as a duty to act for the benefit of the charitable mission and not for the fiduciary's personal benefit. Sometimes a conflict of interest transaction will benefit the charity, for example if a trustee provides goods or services to the charity below cost. However, every decision a trustee makes should put the interests of the charity first, above any interest the trustee may have and above the interests of third parties.<sup>29</sup>

### C. Duty of Care<sup>30</sup> - Prudent Investor Rule

The third general duty is the duty to manage the property of the trust or nonprofit corporation as a prudent person would, keeping in mind the purposes of the charity.<sup>31</sup> A trustee or director must exercise reasonable care and skill in managing the property, and must use the level of caution appropriate to the circumstances of the charity.<sup>32</sup> The fiduciary must keep the property safe,<sup>33</sup> must not commingle the property with the fiduciary's own property,<sup>34</sup> and must keep proper records and accountings related to

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27. RESTATEMENT (THIRD) OF TRUSTS § 78 (2007). Under both trust law and nonprofit corporation law, exceptions have developed so that trustees and directors can engage in conflict of interest transactions that are in the best interests of the charity. *See* UNIF. TRUST CODE § 802(b) (transactions authorized by the terms of the trust, by all beneficiaries, or by a court do not violate the duty of loyalty) (last amended 2010).

28. *Id.*

29. RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. f (2007).

30. This duty has been historically called the duty of care and now is also referred to as the duty of prudence. *See* RESTATEMENT (SECOND) OF TRUSTS § 174 (1959) (Duty to Exercise Reasonable Care and Skill). The Restatement (Third) of Trusts now refers to the general duty as the duty of prudence, and provides that the duty "requires the exercise of reasonable care, skill and caution." RESTATEMENT (THIRD) OF TRUSTS § 77(2) (2007).

31. *See* RESTATEMENT (THIRD) OF TRUSTS § 77 (2007); UNIF. TRUST CODE § 804 (2010) ("Prudent Administration"); UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 3 (2006).

32. *See* RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. b (2007).

33. GEORGE G. BOGERT, GEORGE T. BOGERT, & AMY MORRIS HESS, *THE LAW OF TRUSTS AND TRUSTEES* § 541 (3d. 2014); UNIF. TRUST CODE § 809 (2010).

34. BOGERT, BOGERT & HESS, *supra* note 33, at § 596; RESTATEMENT (THIRD) OF TRUSTS § 84 (2007).

the property.<sup>35</sup> The fiduciary must act as a prudent investor with respect to any investment assets.<sup>36</sup> This article focuses on the prudent investor rule.

The understanding of what a prudent investor should do has changed over time. Indeed, the evolving ideas of what constitutes prudent behavior makes prudence valuable as a legal standard. If the standard applies industry norms to the task of managing investments, then as the norms change, the standard can adjust and continue to be useful.<sup>37</sup> An overview of the history of the prudent investor standard reveals changes in the application and meaning of the standard over the years since the idea surfaced in the nineteenth century.

*1. Prudence in Trust Law.* – The first judicial articulation of a prudence standard for trustees in the United States occurred in 1830, in the famous case of *Harvard College vs. Amory*.<sup>38</sup> The Supreme Judicial Court of Massachusetts declared that a trustee must act with the care a prudent man would use to manage his own assets.<sup>39</sup> The court explained that trustees should “observe how men of prudence . . . manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.”<sup>40</sup> The prudent man standard set forth in this

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35. RESTATEMENT (THIRD) OF TRUSTS § 83 (2007); BOGERT, BOGERT & HESS, *supra* note 33 at 961.

36. See RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. a (2007) (referring to §§ 90–92).

37. The Introductory Note to the Prudent Investor Rule in Restatement (Third) of Trusts concurs: “Trust investment law should reflect and accommodate current knowledge and concepts. It should also avoid repeating the mistake of freezing its rules against future learning and developments.” RESTATEMENT (THIRD) OF TRUSTS § 90 Reporter’s General Note (2007).

38. 26 Mass. 446 (1830). The court’s famous statement, which became the foundation of the prudent man rule, was either an alternative holding or dictum. See Harvey P. Dale et al., *Evolution Not Revolution: A Legislative History of the New York Prudent Management of Institutional Funds Act*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 377, 385 (2014).

39. Prior to this case, trustees relied on “legal lists” to guide their decision making. The trustees could invest in anything on the list, but had to avoid anything not on the list. See John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 643–45 (1996) (describing the history and development of the prudence standard prior to the Uniform Prudent Investor Act (UPIA)). See also Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Market Risk: An Empirical Analysis*, Discussion Paper 816, The Harvard John M. Olin Discussion Paper Series, [http://www.law.harvard.edu/programs/olin\\_center/](http://www.law.harvard.edu/programs/olin_center/); Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?* 50 J.L. & ECON. 681, 683–686 (2007).

40. Harvard Coll., 26 Mass. at 461.

case was then adopted by many state legislatures and courts<sup>41</sup> and eventually by the Restatement (Second) of Trusts.<sup>42</sup> Although initially a flexible standard in contrast to the legal lists of acceptable investments prevailing in 1830, interpretations of the standard restricted much of the flexibility.<sup>43</sup>

Cases interpreting the prudent man standard focused on the language “not in regard to speculation” and “safety of capital” to assert that trustees should avoid risk.<sup>44</sup> As a result, the standard came to mean that investments in long-term government and corporate bonds were prudent but investments that involved buying stock on margin or investing in land or new enterprises were not.<sup>45</sup> As the twentieth century wore on, the standard grew increasingly out of date.

In the second half of the twentieth century an influential study showed that the inflation-adjusted returns for stocks far exceeded those of bonds.<sup>46</sup> Economists developed the theory of efficient markets in connection with modern portfolio theory, and professional investment managers influenced by those theories began to develop new strategies for better investment results.<sup>47</sup> The evolving view of what a prudent investor should do led to several changes in the fiduciary laws applicable to trustees.

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41. See RESTATEMENT (THIRD) OF TRUSTS § 90 Reporter’s General Note (2007). In 1942 the American Bankers Association created a model act that influenced adoptions in state legislatures. The Model Prudent Man Investment Act provided that in connection with investment decision making, “a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as probable safety of their capital.” See Mayo A. Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 OHIO ST. L.J. 491, 508–09 (1951), for the text of this model act.

42. See RESTATEMENT (SECOND) OF TRUSTS § 174 (1959) (describing the duty “to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property. . .”). The prudent man rule became the prudent person rule and then the prudent investor rule, to avoid the gendered “prudent man” language.

43. See RESTATEMENT (THIRD) OF TRUSTS § 90 Reporter’s General Note (2007).

44. Langbein, *supra* note 39 at 644–45.

45. See RESTATEMENT (SECOND) OF TRUSTS § 227 cmt. f (1959). The Restatement also explains that although “a man of intelligence” may invest in something if the risk of loss is not out of proportion with the opportunity for gain, a trustee could not do so because preservation of the fund must be a primary consideration. *Id.* at cmt. e.

46. See Roger G. Ibbotson & Rex A. Sinquefeld, *STOCKS, BONDS, BILLS, AND INFLATION: HISTORICAL RETURNS (1926-1978)* 29-30 (2d ed. 1979).

47. See Jonathan R. Macey, *AN INTRODUCTION TO MODERN FINANCIAL THEORY* (ACTEC Foundation, 2d ed. 1991). See also Langbein, *supra* note 39 at 642 (explaining the effect of these theories on the development of UPIA).

In the 1980s several states enacted new prudent man or prudent person standards.<sup>48</sup> Commentators voiced concern about the way the prudent man rule had been interpreted and characterized by the commentary of the Restatement (Second) of Trusts, other treatises, and courts.<sup>49</sup> Responding to that concern, the American Law Institute undertook a project to modernize and clarify the prudence standard.<sup>50</sup> The result of that effort was the adoption in 1990 and publication in 1992 of the prudent investor rule as part of the Restatement (Third) of Trusts.<sup>51</sup> Shortly thereafter, the Uniform Law Commission<sup>52</sup> (ULC) promulgated the Uniform Prudent Investor Act (UPIA),<sup>53</sup> a model states could use to adopt a standard based on then-current thinking about investment decision-making by fiduciaries.

UPIA directs trustees to manage risk across the trust's portfolio, and to consider "the risk and return objectives" of the trust in making decisions.<sup>54</sup> Rather than making the goal risk avoidance, under UPIA a trustee should manage risk, as appropriate for the particular trust. UPIA also emphasizes a prudent investor's duty to diversify investments,<sup>55</sup> in keeping with the

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48. See RESTATEMENT (THIRD) OF TRUSTS § 90 Reporter's General Note (2007). In 1991 Illinois became the first state to adopt a prudent investor rule.

49. See BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE (1986); Jeffrey N. Gordon, *The Puzzling Survival of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52 (1987); Harvey E. Bines, *Modern Portfolio Theory and Investment Management Law: Refinement of Legal Doctrine*, 76 COLUM. L. REV. 721 (1976).

50. See RESTATEMENT (THIRD) OF TRUSTS § 90 Reporter's General Note (2007).

51. The American Law Institute adopted the prudent investor rule in 1990 and published the rule as §§ 227–229 of the Restatement (Third) of Trusts in 1992. The prudent investor rule was renumbered and now appears as §§ 90-92. See RESTATEMENT (THIRD) OF TRUSTS Pt. 6, Ch. 17, Forenote (2007). The wording of the Restatement standard intentionally avoided taking a position on the issue of whether the trustee should invest as a prudent manager investing his own funds (the structure of the Restatement (Second) of Trusts version) or investing the funds of others (the version in Uniform Probate Code § 7-302). See RESTATEMENT (THIRD) OF TRUSTS § 90 Reporter's General Note (2007). The UPC described the standard as the duty to "observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another. . ." UNIF. PROBATE CODE § 7-302 (2010). See also BOGERT, BOGERT & HESS, *supra* note 33, at § 612 (citing cases that explain that this duty, to act as a prudent trustee for another, means that the trustee is not simply dealing with the property as he would for himself, but is dealing with the property as if for someone for whom he has a moral obligation).

52. At the time it adopted UPIA, the organization was known as the National Conference of Commissioners on Uniform State Laws or NCCUSL. UNIF. PRUDENT INVESTOR ACT (1994).

53. See *id.*

54. *Id.* at § 2(b).

55. *Id.* at § 3.

findings of modern portfolio theory.<sup>56</sup> UPIA permits delegation of investment decision making authority so long as the trustees “exercise reasonable care, skill, and caution” in establishing the scope and terms of the delegation and in selecting and monitoring financial managers.<sup>57</sup> Finally, UPIA directs trustees to consider the purposes of the trust in making investment decisions.<sup>58</sup> Statutes based on UPIA or the prudent investor rule of the Restatement have been adopted in all states.<sup>59</sup>

*2. Prudent Investor Standard for Nonprofit Corporations.* – The Uniform Prudent Investor Act applies to trustees, but the prudent investor standard applies more broadly to other fiduciaries.<sup>60</sup> Trust law has long informed legal rules related to charities, and the prudent investor rule will likely apply to any charity, however structured.<sup>61</sup> In addition, the Uniform Prudent Management of Institutional Funds Act (UPMIFA) adopts the prudent investor standard from UPIA for charities organized as nonprofit corporations.<sup>62</sup>

Due to concerns in the 1960s that trust law governed the investment and spending of university endowments,<sup>63</sup> the Uniform Law Commission developed a uniform act called the Uniform Management of Institutional Funds Act (UMIFA).<sup>64</sup> The act, promulgated in 1972 and eventually enacted in almost all states,<sup>65</sup> provided guidance on endowment spending

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56. A central tenet of modern portfolio theory is that diversification reduces risk. See UNIF. PRUDENT INVESTOR ACT § 3 cmt. (1994).

57. UNIF. PRUDENT INVESTOR ACT § 9 (1994). See also Tibble, 135 S. Ct. at 1823 (confirming the ongoing duty to monitor the prudence of investments and investment policy).

58. UNIF. PRUDENT INVESTOR ACT § 2(a) (1994).

59. Forty-five states have adopted statutes based on UPIA or adopting its principles. The other states have comparable statutes that pre-dated the promulgation of UPIA in 1994. Thus, the principles discussed as the “prudent investor rule” guide fiduciary practice in all states. See UNIF. PRUDENT INVESTOR ACT, Editor’s Notes (1994).

60. See UNIF. PRUDENT INVESTOR ACT, Prefatory Note (1994).

61. See *id.* (“Although the Uniform Prudent Investor Act by its terms applies to trusts and not to charitable corporations, the standards of the Act can be expected to inform the investment responsibilities of directors and officers of charitable corporations.”).

62. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, Prefatory Note (2006).

63. Trustees that felt constrained by trust standards invested endowment funds primarily in bonds. See WILLIAM L. CARY & CRAIG B. BRIGHT, *THE LAW AND THE LORE OF ENDOWMENT FUNDS* 66 (1969).

64. UNIF. MGMT. OF INST. FUNDS ACT, 7A U.L.A. 484 (1972).

65. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT, Prefatory Note (2006) (explaining that UMIFA was enacted in 47 jurisdictions).

and adopted a prudent investor standard for managers of charities organized as nonprofit corporations.<sup>66</sup>

In 2006 the ULC completed a revision to UMIFA.<sup>67</sup> The new act, UPMIFA, adopted the language from the Uniform Prudent Investor Act, with minor changes to make the language applicable to charities.<sup>68</sup> UPMIFA directs fiduciaries to consider the purposes of the charity along with the other economic factors a prudent investor should consider.<sup>69</sup> Every state except Pennsylvania has adopted UPMIFA,<sup>70</sup> and the prudent investor rule applies to charities throughout the country, either through UPIA or UPMIFA or because the rule influences general fiduciary standards.

3. *Evolution of the Prudence Standard.* — As the prior section describes, a prudent man-person-investor standard has applied to trustees since 1830. For its first 100 years or so interpretations of the standard led to conservative investment strategies for trustees. In the mid-twentieth century, investors familiar with modern portfolio theory began to change their strategies, and as the industry standard changed, the prudent investor standard for trustees needed to change as well. The Restatement and UPIA provided statutory protection and direction for trustees who wanted to invest prudently within the new understanding of what it meant to be a prudent investor.<sup>71</sup> After the adoption of UPIA throughout the country, trustees increased stock holdings relative to investments such as government bonds that had been considered more “safe.”<sup>72</sup> In addition, trustees expanded investment strategies to include hedge funds, buying on margin, and buying futures. In the right circumstances, a variety of investments that might have been considered too risky in the past are now considered acceptable, when considered as part of an entire portfolio.

Prudence is undergoing another change, as awareness that ESG factors affect the financial bottom line of companies grows. Ideas about how an investor can best use ESG factors in making prudent decisions continues to

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66. UNIF. MGMT. OF INST. FUNDS ACT, 7A U.L.A. 484 (1972).

67. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT (2006)

68. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT Prefatory Note (2006).

69. UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 3(a) (2006).

70. See *Legislative Fact Sheet – Prudent Management of Institutional Funds Act*, UNIFORM LAW COMMISSION, <http://www.uniformlawcommission.com/LegislativeFactSheet.aspx?title=Prudent%20Management%20of%20Institutional%20Funds%20Act>.

71. RESTATEMENT (THIRD) OF TRUSTS §§ 90–92 (2007); UNIF. PRUDENT INVESTOR ACT (2006).

72. Schanzenbach & Sitkoff, *supra* note 39 at 682.



develop, but whether an investor can consider those factors is no longer problematic. The Introductory Note to the Restatement's explanation of the prudent investor rule anticipated the changes to come:

[T]he rules must be general and flexible enough to adapt to changes in the financial world and to permit sophisticated, prudent use of any investments and courses of action that are suitable to the purposes and circumstances of the diverse trusts to which the rules will inevitably apply.<sup>73</sup>

The "purposes and circumstances" of charitable trusts, and in particular university endowments, lead fiduciaries to the use of ESG investing as part of an overall investment policy. The explanation of this evolution in the prudent investor rule requires an understanding of the changes in socially responsible investing since the 1980s and of recent financial information about SRI funds and ESG investing strategies.

### III. THE USE OF EXTRA-FINANCIAL FACTORS IN INVESTMENT DECISIONS

This section looks at the development of investment strategies – from SRI screens to ESG investing – that use extra-financial factors together with traditional financial information to make investment decisions. Although the environmental, social, and governance factors are typically referred to as non-financial factors, investors have realized that extra-financial data can provide useful information about a company's long-term risks and opportunities. In effect, the so-called extra-financial data has financial implications.

In discussions of SRI several different terms are used, sometimes interchangeably even though the terms often convey different concepts. Socially responsible investing (SRI) was the earliest term used and continues to be used to cover various types of investing strategies that use extra-financial factors, although the terms "responsible investing" and "sustainable investing" are increasingly used.<sup>74</sup> Other terms have been devised to convey differences in strategy. This article uses the term ESG investing to convey a particular strategy, but some observers use the term

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73. RESTATEMENT (THIRD) OF TRUSTS, Pt. 6, Ch. 17, intro note (2007).

74. See *Demystifying Responsible Investment Performance*, THE ASSET MANAGEMENT WORKING GROUP OF THE UNITED NATIONS ENV'T PROGRAMME FINANCE INITIATIVE AND MERCER, (2007), available at [http://www.unepfi.org/fileadmin/documents/Demystifying\\_Responsible\\_Investment\\_Performance\\_01.pdf](http://www.unepfi.org/fileadmin/documents/Demystifying_Responsible_Investment_Performance_01.pdf) [hereinafter UNEP-FI & MERCER]. See COMMONFUND INSTITUTE, FROM SRI TO ESG, THE CHANGING WORLD OF RESPONSIBLE INVESTING (2013), for an excellent explanation of the development of SRI and the terminology used.

SRI to describe the same kind of strategy. This section reviews the history of SRI and the development of investment strategies that use extra-financial factors. This section also discusses the term “mission-related investing,” a term that describes the way some charities use the investment strategies.

Although this section provides explanations of various terms used in connection with social investing, broadly understood, it is important to recognize that these terms are not used with precision.<sup>75</sup> The discussion is provided here for readers who may be unfamiliar with the terms and may benefit from a general sense of some of the differences. This section also describes a bit of the history of social investing.

#### A. Socially Responsible Investing

Socially responsible investing (SRI) has roots in the anti-slavery efforts of Quakers in the 18th century.<sup>76</sup> Interest in SRI grew in the 1960s and 1970s when critics of South African apartheid urged universities and pensions to divest any stocks held in companies located in or doing business in South Africa.<sup>77</sup> Over time SRI expanded to include a variety of social, ethical, and environmental issues.<sup>78</sup> As SRI strategies developed, a general definition of an SRI fund was a fund that considered social or ethical issues as well as financial information in building its portfolio, and an SRI investor was someone who sought to effect positive social change as well as generate financial gain.<sup>79</sup> Early SRI funds used negative screens, refusing to invest in companies that did not fit a fund’s guidelines,<sup>80</sup> and positive screens, seeking companies with practices that

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75. See Commonfund Study of Responsible Investing, *supra* note 6, at 2 (providing definitions and noting the “fluid nature of the current responsible investing environment” when it comes to terminology).

76. Benjamin J. Richardson, *Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment*, 46 OSGOODE HALL L.J. 243, 245 (2008), available at <http://ohlj.ca/english/documents/OHLJ46>.

77. See Joel C. Dobris, *Arguments in Favor of Fiduciary Divestment of “South African” Securities*, 65 NEB. L. REV. 209 (1986); Langbein & Posner, *supra* note 10, at 72.

78. See SOCIAL INVESTMENT FORUM, *After South Africa: The State of Socially Responsible Investing in the United States* (1995), available at [http://www.ussif.org/files/Publications/95\\_trends\\_Report.pdf](http://www.ussif.org/files/Publications/95_trends_Report.pdf). (describing issues addressed in early negative and positive screens) [hereinafter *1995 Trends Report*].

79. See Maria O’Brien Hylton, *Socially Responsible Investing: Doing Good Versus Doing Well in an Inefficient Market*, 42 AM. U.L. REV. 1, nn. 2–3 (1993) (citing several attempts at defining socially responsible investing).

80. *1995 Trends Report*, *supra* note 78. The 1995 Trends Report found that of managers using screens, 86% avoided tobacco stocks, 73% avoided alcohol stocks, and

supported the guidelines.<sup>81</sup> SRI funds also engaged in shareholder advocacy, using proxy voting to encourage behavior in keeping with the fund's guidelines.<sup>82</sup> For example, in 2002, Domini Social Investments and a coalition of investors holding 500,000 shares of stock in Procter & Gamble urged the company to offer Fair Trade Certified coffee.<sup>83</sup> The coalition eventually filed a related shareholder resolution, and in 2003, Procter & Gamble announced that it would begin marketing Fair Trade Certified coffee products.<sup>84</sup> Pressure from consumers and humanitarian organizations also influenced Procter & Gamble, but the shareholder action played a role in the company's decision.<sup>85</sup>

As SRI developed, fund managers and policy makers developed new strategies, with new labels to express the differences from early SRI. ESG investing and ESG integration are terms used to describe a different way of engaging in responsible investing. After a quick review of how ESG investing differs from the screens of early SRI, and then explanations of some other terms that are used in connection with SRI, the article will turn to financial experience with various forms of SRI, including ESG investing.

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64% avoided weapons stocks. *Id.*

81. *See id.* Of managers who applied screens, 42% applied a positive screen for human rights, 38% for environmental concerns, 24% for animal rights, and 22% for employee relations, including unions and advancement of women and people of color in the workplace.

82. The 2005 Trends Report identified assets involved in SRI as 68% in social screening only, 26% in shareholder advocacy, 5% in screening and shareholder advocacy, and 1% in community investing. SOCIAL INVESTMENT FORUM, *2005 Report on Socially Responsible Investing Trends in the United States*, Figure 1.1. (2005), available at [http://www.ussif.org/files/Publications/05\\_Trends\\_Report.pdf](http://www.ussif.org/files/Publications/05_Trends_Report.pdf).

83. Press Release, Global Exchange, Advocacy Groups and Shareholders Persuade Procter and Gamble, GLOBAL EXCHANGE (Sept. 15, 2003), available at <http://www.globalexchange.org/update/press/1043.html>. Domini worked with the Center for Reflection, Education and Action (CREA), a research, education, and action organization. *Id.*

84. *Id.*

85. *Id.*

## B. ESG investing<sup>86</sup>

ESG investing uses environmental, social, and governance factors related to a potential investment as part of a decision-making process that includes financial factors.<sup>87</sup> The goals are to improve stock selection by expanding the information considered about a company and to invest in a sustainable and responsible manner. An ESG investor seeks to identify material risks and opportunities related to investment performance that may not be reflected in traditional financial data. The term “ESG investing” is used to distinguish this strategy from some other forms of SRI and to emphasize an overall investment strategy that seeks to maximize financial gain. An investor with no interest in addressing social or environmental problems could use ESG investing as a strategy to seek better returns, and as the reporting mechanisms become more useful,<sup>88</sup> more investors will likely consider ESG factors in their overall investment strategies.<sup>89</sup> ESG investing should yield blended value, as that term is described in

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86. RCM uses the term “sustainability investing” and its definition matches the general understanding of ESG investing:

Sustainability investing is broader than an ethically or socially responsible investment strategy. Material environmental, social and governance factors are considered alongside financial factors, identifying risks and opportunities that have not been fully priced in by the markets thus supporting enhanced stock selection and providing RCM with an information advantage.

RCM SUSTAINABILITY WHITE PAPER, SUSTAINABILITY: OPPORTUNITY OR OPPORTUNITY COST?, (2011), *available at* <https://www.allianz.com/media/responsibility/documents/rcmsustainabilitywhitepaper2011.pdf>. *See also* COMMUNFUND INSTITUTE, *supra* note 74. (explaining that in contrast with early SRI, “ESG analysis takes a broader view, examining whether environmental, social and governance issues may be material to a company’s performance, and therefore to the investment performance of a long-term portfolio.”).

87. *See* GOVERNANCE & ACCOUNTABILITY INSTITUTE, *2012 Corporate ESG/Sustainability/Responsibility Reporting; Does it Matter?* 6 (2012). (“How a company performs in terms of managing environmental and energy issues, how it addresses and resolves societal or civic issues and the state of corporate governance of the enterprise are three important groups of determinants.”).

88. *See infra* Part IV.E (discussing sustainability reporting and integrated reporting).

89. *See* Lloyd Kurtz, *No Effect or No Net Effect? Studies on Socially Responsible Investing*, 6 J. INVESTING 37, 39–40 (1997) (discussing the possibility of an “SRI effect” that could lead to better returns). If integrated reporting becomes the norm, market prices may reflect more of the ESG factors than is currently the case. Some of the current financial benefits in ESG investing lie in identifying undervalued stocks. If market value more accurately reflects the ESG risks and opportunities, then some of the current financial benefit of ESG investing may be reduced. However, given that ESG investing emphasizes long-term value over short-term returns and given that the market is not completely efficient, the purposes of ESG investing will not be completely altered. Also, as more investors use ESG factors, those who do not may be at a competitive disadvantage.

connection with impact investing, but this article will analyze ESG investing as a tool that seeks to improve financial, as well as non-financial, performance.<sup>90</sup>

The difference between a strategy that depends on negative screens and one that uses ESG investing can be described, simplistically, with two examples.<sup>91</sup> A fund using exclusionary screens might screen out oil and gas companies.<sup>92</sup> The exclusionary screens would reduce the choices the fund manager could make in constructing the portfolio, but many other choices still exist.<sup>93</sup> Whether the fund matches, exceeds or falls below its benchmarks will depend in part on how the oil and gas sector performs and in part on other selections made for the fund. If the oil and gas stocks decline in value more than stocks in other sectors, perhaps due to increased regulation,<sup>94</sup> the fund might outperform its benchmarks. Alternatively, if the oil and gas stocks go up, as they did in 2004,<sup>95</sup> the screened fund might do less well than its benchmarks, depending on its other investments. The screen may have an effect on performance, and that effect could be to improve or reduce performance or there might be no effect at all. The important distinction in comparison with the ESG investing strategy described below, is that certain decisions were made for the screened fund without regard to the value of the stocks being excluded, except to the extent that someone had concluded that the entire group of stocks would perform less well.<sup>96</sup>

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90. The author agrees with the premise of the Emerson book that investing for blended value is preferable to investing solely for financial value, but for purposes of analysis of existing fiduciary duty laws, the article will assume that the duty of prudence requires a fiduciary to invest for financial value or for values that match the interests of private beneficiaries or the mission of a charity.

91. See G.M. HEAL, *WHEN PRINCIPLES PAY: CORPORATE SOCIAL RESPONSIBILITY AND THE BOTTOM LINE* (2008), for the basic ideas for these examples.

92. The divestment movement operates like a negative screen.

93. The fact that SRI funds have fared well financially suggests that other choices can counter any perceived downside for a constrained universe of potential investments. See *infra* Part IV.C.

94. Adam M. Kanzer, *Exposing False Claims about Socially Responsible Investing: A Response to Adler and Kritzman*, *ADVISOR PERSPECTIVES* 3 (Jun. 4, 2013), [http://www.advisorperspectives.com/newsletters13/Exposing\\_False\\_Claims\\_about\\_Socially\\_Responsible\\_Investing.php](http://www.advisorperspectives.com/newsletters13/Exposing_False_Claims_about_Socially_Responsible_Investing.php). (“Some investors argue that fossil-fuel companies are dramatically overvalued and at risk of collapse due to peak oil or unburnable carbon, the estimated 80% of proven fossil fuel reserves that must remain in the ground if we are to hold global temperature increases to 2 degrees Celsius.”)

95. HEAL, *supra* note 91.

96. See Kanzer, *supra* note 94, at 3.

In contrast, a fund manager using ESG factors might start with her usual process to create a list of potential stocks.<sup>97</sup> For example, a manager whose strategy is to look for undervalued stocks could do so, in whatever sectors the manager or the fund favors (large cap, small cap, etc.). The manager could create a list of stocks that meet her goals in terms of financial data. Then the manager would narrow the initial list by analyzing the companies' ESG ratings. The ESG factors add information that can help the manager identify stocks more likely to perform well. In this scenario no stock is screened out, except based on financial quality.

Domini Social Investments uses a different process that also incorporates both ESG and financial factors in creating a portfolio.<sup>98</sup> Domini starts with an internal research process and creates a list of companies that meet its standards based on extra-financial criteria. Domini's analysts create a profile for each company being considered, and

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97. See HEAL, *supra* note 91.

98. Domini Social Investments LLC, founded in 1991, operates three mutual funds and "specializes exclusively in socially responsible investing." See DOMINI, *About Domini*, <https://www.domini.com/why-domini/about-domini> (last visited June 6, 2015). The company serves "investors who wish to create positive social and environmental outcomes while seeking competitive financial returns." *Id.* Domini's website explains its research process. See *Evaluating Corporations—Our Research Process*, DOMINI, available at <https://www.domini.com/responsible-investing/choosing-our-investments/evaluating-corporations—our-research-process> (last visited June 6, 2015). See also *Approving Corporations for our Funds*, DOMINI, available at <https://www.domini.com/responsible-investing/choosing-our-investments/approving-corporations-our-funds> (last visited June 6, 2015). Domini has created 24 industry classifications and four to seven subcategories within each industry. Domini analysts use Key Performance Indicators for each industry and subindustry to guide the research with respect to business alignment and stakeholder relations. Each industry is classified as fundamentally aligned, partially aligned, partially misaligned, or fundamentally misaligned with Domini's standards. Companies are evaluated on where their business model fits within the industry alignments and on their stakeholder relations—how they treat employees and customers and how they address their environmental impacts. Domini uses a matrix, so that a company that is fundamentally aligned (e.g. a solar energy company) would have more leeway on stakeholder relations than a company that is partially misaligned (an oil and gas company). A company that is fundamentally misaligned (a tobacco company) would not be eligible for inclusion in the funds. The website explains that Domini seeks "to identify companies that are responsibly addressing the key sustainability challenges and rewards presented by their business model." Domini does not look for "socially responsible companies," because all companies face some challenges. See *Socially Responsible Companies*, DOMINI, <https://www.domini.com/responsible-investing/socially-responsible-companies> (last visited June 6, 2015). Domini tries to find the companies that are making the best efforts given their challenges. Most companies fall within the middle of the matrix, and Domini looks for companies that are trying to address the challenges they face. Domini also uses shareholder advocacy in some situations to move companies toward actions that are, in Domini's view, more responsible. See DOMINI, *How We Invest*, available at <https://www.domini.com/why-domini/how-we-invest> (last visited June 6, 2015).

inclusion on the list depends not on a finding that the company is “perfect,” but instead on whether the company is working to address sustainability challenges it faces.<sup>99</sup> Domini then provides the list to Wellington Management, an investment company that constructs the portfolios using its usual financial analysis tools.<sup>100</sup>

### C. Impact Investing and Blended Value

The term “impact investing” conveys the idea of an investor who invests in selected projects or companies to have an impact on a social or environmental issue.<sup>101</sup> An impact investor invests in a project or a company with two goals: the social or environmental benefit the project will create and the financial return on the investment. The investor considers the social or environmental benefit as part of the investment, to be considered together with the financial return to determine whether the investment has generated value for the investor.

A recent book by Antony Bugg-Levine and Jed Emerson describes impact investing as a way to create “blended value,” meaning economic value combined with social or environmental value.<sup>102</sup> The authors explain that all companies create three forms of value: economic, social, and environmental, or put another way, that any company that creates economic value will also generate or destroy social or environmental value.<sup>103</sup> A common view, however, is that the business world creates economic value and the nonprofit world creates social or environmental value.<sup>104</sup> This bifurcated view affects investing when investment decisions focus on economic value and fail to acknowledge the other value that the investments create. Bugg-Levine and Emerson use the term impact

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99. *Id.*

100. *Id.*

101. See COMMONFUND INSTITUTE, *supra* note 74; ANTONY BUGG-LEVINE & JED EMERSON, *IMPACT INVESTING: TRANSFORMING HOW WE MAKE MONEY WHILE MAKING A DIFFERENCE* (2011).

102. *Id.* Mr. Emerson was part of a group that coined the term “blended value” in 2000. *Id.* at 5. For other articles by Mr. Emerson discussing impact investing, blended value, and total foundation asset management, see Jed Emerson, *The Nature of Returns: A Social Capital Markets Inquiry into Elements of Investment and the Blended Value Proposition*, (Harvard Bus. Sch., Social Enterprise Series No. 17, 2000); Jed Emerson, *A Capital Idea: Total Foundation Asset Management and the Unified Investment Strategy*, STANFORD (2002); Jed Emerson, *Where Money Meets Mission: Breaking Down the Fire Wall Between Foundation Investments and Programming*, STANFORD SOC. INNOVATION REV. (2003); Jed Emerson, *The Blended Value Proposition: Integrating Social and Financial Returns*, CAL. MGMT. REV. (2003).

103. *Supra* note 101, at 10.

104. *Id.* at 10.

investing to mean both investment in specific projects and investment in funds that analyze social and environmental factors in making investment decisions about companies to include in the funds.<sup>105</sup> The latter fits within the scope of SRI funds, while the former represents more direct engagement.

Organizations that engage in micro-financing are early examples of impact investors. For example, Dr. Mohammad Yunus began lending to poor women in Bangladesh and eventually founded Grameen Bank, a bank that lends to poor people without requiring collateral.<sup>106</sup> A loan might assist in the creation or expansion of a business, with resulting social benefits in employment and improvement of the local economy, as well as income in the form of interest.<sup>107</sup> A more recent example involves John McCall-McBain, who invested through his for-profit investment fund in a wood chipping business in Liberia. The new business converted old rubber trees into renewable fuel for power plants, to help reduce dependency on existing coal-fired plants. Mr. McCall-McBain combined an impact investment with grant-making to pursue his goal of addressing climate change.<sup>108</sup>

Bugg-Levine and Emerson discuss the difficulty of rating companies based on their generation of social and environmental value.<sup>109</sup> The authors explain that information about companies' performance on social and environmental metrics will need to be transparently available for research and benchmarking.<sup>110</sup> A system that could analyze a company's value in all three categories would give investors a better understanding of the company and would permit more informed investment decisions. An additional challenge is that standard metrics must be created so that an

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105. *Id.* at 9–11.

106. *See* [http://www.grameen.com/index.php?option=com\\_content&task=view&id=16&Itemid=112](http://www.grameen.com/index.php?option=com_content&task=view&id=16&Itemid=112) (last visited Mar. 25, 2016).

107. *Id.* Grameen Bank is a for-profit entity.

108. Bugg-Levine, *supra* note 101, at 188. The man-made grants to advocacy campaigns in Europe to block development of coal-fired power plants, using the impact investment and the grants to further his goal of reducing the use of fossil fuels.

109. *Id.* at 165.

110. *Id.*



investor can compare companies consistently.<sup>111</sup> Work has begun on rating systems and standardized terminology, but more work remains.<sup>112</sup>

Impact investing need not result in lower financial returns,<sup>113</sup> but the concept Bugg-Levine and Emerson describe looks at blended value rather than value that is limited to financial value. The authors conclude by saying:

You can execute investment strategies that achieve an appropriate level of financial performance while simultaneously generating social and environmental value. Only you can define an appropriate mix of financial and social return for you. You do not need to give up financial returns to generate impact, but flexibility on financial expectations and risk appetite will expand the investment options available to you.<sup>114</sup>

Any investor can engage in impact investing, but for a charity impact investing can be viewed as a more sophisticated way to think about mission-related investing. Charities often view their investments as separate from their mission, and the idea of obtaining blended value from investments may help a charity think about an investment policy that is consistent with the charity's mission.<sup>115</sup> The Internal Revenue Code's authorization of program-related investments (PRIs) for private foundations reflects the idea that an investment may serve a dual purpose.<sup>116</sup> PRIs are

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111. *Id.* at 175. The Impact Reporting and Investment Standards (IRIS), launched in 2009, include definitions of clinic, hospital and patient treated so medical care providers can report with greater consistency. *See infra*, Part IV.E (discussing integrated reporting).

112. Bugg-Levine, *supra* note 101, at 173. One intriguing idea is the creation of a three-dimensional valuation system. The current system puts risk on the x axis and return on the y axis. The authors would add a z-axis for the social impact of an investment.

113. *See infra* Part IV.C (describing studies that have found neutral or positive returns when compared with benchmarks).

114. Bugg-Levine, *supra* note 101, at 252.

115. *See, e.g.*, the Jessie Smith Noyes Foundation's explanation of its decision to engage in mission-related investing. JESSIE SMITH NOYES FOUNDATION, *Foundation Investment Policy*, <http://www.noyes.org/mission-based-investing/investment-policy> (last visited May 8, 2015). Bugg-Levine and Emerson would argue that any investment analysis should incorporate blended value returns. *See* Bugg-Levine, *supra* note 101. The idea that a fiduciary acting as a prudent investor should go beyond a focus on financial returns and include social and environmental value, even without specific directions to do so, is worthy of additional consideration, as is the idea that a fiduciary should consider blended value when making decisions in a beneficiary's best interests. Although interesting, a conclusion that a fiduciary can invest for blended value is not necessary for purposes of the arguments made in this article that a fiduciary can consider ESG factors as part of a prudent investment strategy.

116. I.R.C. § 4944(c) (2012). PRIs are exceptions to the general rule that imposes a

more narrowly defined than the general concept of mission-related investing, however, because a PRI is an investment for which the primary goal is to further the charity's mission and the production of financial return is not a significant purpose.<sup>117</sup>

#### D. Mission-Related Investing

Mission-related investing does not refer to a different investment strategy, and any of the three terms already described can, depending on the circumstances, be used in connection with mission-related investing. Mission-related investing or mission-related investments (MRIs) are terms used to describe investments that carry out a charity's mission.<sup>118</sup> If a charity acquires an asset with a dual purpose, both as an investment and as a means to carry out its mission, then the charity is complying with its duty of loyalty even if the acquisition does not generate as much return as another investment might. The mission part of the investment can compensate for a somewhat lower investment return.

Whether an SRI fund can be considered mission-related depends on a charity's mission and whether the fund's guidelines help carry out that mission. A cancer organization might choose not to invest in tobacco stocks; an environmental organization might choose to invest in a company developing solar energy. The concept of blended value is particularly relevant in thinking about mission-related investing. The charity receives two types of value from the investment, something that helps carry out its mission and the financial return. The fiduciary of the charity has not breached her duty of loyalty, assuming otherwise prudent behavior, because the investment brings both types of returns.

Mission-related investing does not necessarily result in lower-than-benchmark returns. The Jessie Smith Noyes Foundation, for example, ties its investments to a mission-driven portfolio, but monitors the funds and the fund managers against non-screened benchmarks.<sup>119</sup> The Noyes Foundation's investment policy states that its goals include producing

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penalty on a charity and its managers for a "jeopardizing investment," defined as an investment for which the foundation managers "have failed to exercise ordinary business care and prudence, under the facts and circumstances prevailing at the time of making the investment, in providing for the long- and short-term financial needs of the foundation to carry out its exempt purposes." Treas. Reg. § 53.4944-1(a)(2)(i).

117. *Id.*

118. See Susan N. Gary, *Is It Prudent to be Responsible: The Legal Rules for Charities that Engage in Socially Responsible Investing and Mission Investing*, 6 NW. J.L. & SOC. POL'Y 106 (2011), for a discussion focused on mission-related investing

119. Noyes-Foundation, *supra* note 115.

income and capital gains to support operations and grant-making, providing capital directly to enterprises that further the mission, owning equity or debt in companies that further its mission, and avoiding investments in “companies whose environmental or social impacts contribute to the issues that the Foundation’s grant-making seeks to address.”<sup>120</sup> The Foundation strives for a six percent 6% annual payout while seeking to preserve the inflation-adjusted value of its assets over the long term,<sup>121</sup> which suggests that it is unwilling to reduce financial returns based on its ESG policy. The rigorous review process for managers<sup>122</sup> suggests that any managers who do not succeed financially as well as with respect to the Foundation’s mission will be replaced.

In response to growing interest in—and questions about—mission-related investing, the IRS issued Notice 2015-62 in September 2015.<sup>123</sup> The Notice applies to private foundations, a category of charities that typically have only one or a few donors,<sup>124</sup> but the analysis of fiduciary duties applies to any charity. The Notice confirms that an investment made both to further the charity’s purposes and to produce financial returns, is not a breach of fiduciary duties, even if returns are lower than they might otherwise be.<sup>125</sup>

The Internal Revenue Code (I.R.C) imposes penalties on private foundation managers who make investments that jeopardize the carrying out of the foundation’s exempt purposes.<sup>126</sup> Jeopardizing investments are those entered into by managers who “have failed to exercise ordinary business care and prudence.”<sup>127</sup> The focus of this rule is the financial performance of the investments.<sup>128</sup> An exception to the rule permits program-related investments (PRIs), defined as investments entered into primarily to accomplish one or more of the charitable purposes of the private foundation.<sup>129</sup> A PRI might produce some financial gain, but any financial return is considered incidental to the primary purpose of carrying out the charity’s mission.

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120. *Id.*

121. *Id.*

122. *Id.*

123. Notice 2015-62, 2015-39 I.R.B. 1 (Sept. 14, 2015).

124. I.R.C. § 509 (2012).

125. Notice, *supra* note 123.

126. IRC, *supra* note 116.

127. IRC, *supra* note 116.

128. *Id.*

129. *Id.*

Until Notice 2015-62 no I.R.C. provision directly addressed the treatment of mission-related investments that were not *primarily* related to mission. The Notice clarifies that a mission-related investment will not be considered a jeopardizing investment, even if the return on the investment is less than would be expected for an investment unrelated to the charity's purposes.<sup>130</sup> The Notice explains that this result is consistent with state law.<sup>131</sup> Thus, Notice 2015-62 supports the conclusion that a charity's trustees or directors can engage in mission-related investing without breaching their fiduciary duties.

#### E. Corporate Social Responsibility

Corporate social responsibility (CSR) describes an approach taken by a company to integrate ESG policies and practices throughout the operations of the company. CSR can include policies related to corporate governance, employee relations, supply chain relationships, customer relationships, environmental management, philanthropy, and community involvement.<sup>132</sup> An ESG investor might use information a company reports about its CSR practices as indications of strong management, reduced risk, and enhanced ability to attract capital. Companies increasingly issue reports concerning their CSR practices, both to respond to investor interest and so that the company will focus on issues such as exposure to social and environmental risk.<sup>133</sup>

#### F. Evolution of SRI

A review of biennial reports describing the extent of the use of SRI in the United States provides a snapshot of the evolution of SRI investing. The Social Investment Forum issued the first Trends report, called *After South Africa: The State of Socially Responsible Investing in the United States*, in 1995.<sup>134</sup> That report discusses the aftermath of the end of apartheid and the end, in 1993, of negative screens applied to businesses located in or doing business with South Africa. The report found that SRI funds operating in 1995 used negative screens (tobacco, alcohol and

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130. Notice, *supra* note 123.

131. *Id.*

132. UNEP-FI & MERCER, *supra* note 74, at 7.

133. Ioannis Ioannou & George Serafeim, *The Impact of Corporate Social Responsibility on Investment Recommendations: Analysts' Perceptions and Shifting Institutional Logics*, 36 STRATEGIC MGMT. J. 1053 (2015) (citing to a number of studies and scholarly articles describing the importance to companies of establishing CSR policies and practices).

134. Social Investment Forum, *supra* note 78.

weapons) and had increased the use of positive screens (human rights, environment, animal rights, and employee rights).<sup>135</sup>

Ten years after the first Trends report, the Social Investment Forum issued a ten-year review. This report discussed the growth in funds under SRI management “using one or more of the three core socially responsible investing strategies—screening, shareholder advocacy, and community investing.”<sup>136</sup> The report talks about the growth in the use of SRI funds, and increases in shareholder advocacy and community investing, but the report describes strategies that were more or less the same as those used in 1995.

By the time the organization, now called The Forum for Sustainable and Responsible Investment, issued the 2014 Trends report, the SRI landscape had changed significantly. In the 2014 report,<sup>137</sup> the word screening has disappeared. The report talks about ESG incorporation and shareholder advocacy as the two general categories. ESG incorporation includes the following strategies: negative/exclusionary, ESG integration (what this article calls ESG investing), positive/best-in-class, impact investing, and sustainability themed investing. The term “ESG incorporation” better conveys the idea that exclusion is based on thoughtful application of ESG criteria, rather than an automatic screen. The Executive Summary of the report notes, “the incorporation strategy that affected the highest number of assets, \$4.74 trillion, was ESG integration.”<sup>138</sup>

A similar report but on a global scale, the 2014 Global Sustainable Investment Review,<sup>139</sup> identifies some strategies as screens but the report explains that sustainable investment includes the following strategies: negative/exclusionary screening, positive/best-in-class screening, norms-based screening, integration of ESG factors, sustainability-themed investing, impact/community investing, and corporate engagement and shareholder action.<sup>140</sup> The report notes that sustainability-themed investing and ESG integration were the fastest growing strategies, and that the U.S.

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135. *Id.* at Executive Summary.

136. Social Investment Forum, *supra* note 82.

137. THE FORUM FOR SUSTAINABLE AND RESPONSIBLE INVESTING, *Report on US Sustainable, Responsible and Impact Investing Trends 2014* (2014), available at [http://www.ussif.org/Files/Publications/SIF\\_Trends\\_14.F.ES.pdf](http://www.ussif.org/Files/Publications/SIF_Trends_14.F.ES.pdf).

138. *Id.*

139. GLOBAL SUSTAINABLE INV. ALLIANCE, *Global Sustainable Investment Review* (2014), available at [http://www.gsi-alliance.org/wp-content/uploads/2015/02/GSIA\\_Review\\_download.pdf](http://www.gsi-alliance.org/wp-content/uploads/2015/02/GSIA_Review_download.pdf).

140. *Id.* at 3.

and Europe were the biggest contributors to ESG integration growth, in percentage terms.<sup>141</sup>

SRI has changed dramatically since the 1970s and 1980s, and ESG investing as a strategy now plays an important role in SRI. Funds continue to use screens and shareholder advocacy, but the difference in the way SRI funds function, with an emphasis on ESG integration and significant attention to ESG investing, changes the fiduciary analysis with respect to SRI.<sup>142</sup> A prudent investor considers available financial information, so the next section examines performance data for SRI funds.

#### IV. SRI AND ESG INVESTING – PERFORMANCE DATA REGARDING THE USE OF EXTRA-FINANCIAL FACTORS IN INVESTMENT DECISIONS

Ever since the interest in SRI began, researchers have wondered whether a decision to use SRI in building a portfolio will lead to lower returns for the portfolio. This section discusses some of the studies analyzing this question but does not provide independent analysis of financial information, which is beyond the scope of this article.<sup>143</sup> The purpose of the section is to provide a look at existing financial information from the perspective of a legally prudent fiduciary. Two themes emerge from a review of recent research. First, in the majority of portfolios under study the use of SRI strategies has had a neutral or positive effect on returns. Second, the use of ESG investing as a strategy, in contrast with screening, may improve returns. The studies refute the old idea that

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141. *Id.* at 8. The report uses five regions: Europe (63.7% of global SRI assets), U.S. (30.8%), Canada (4.4%), Australia/NZ (0.8%), and Asia (0.2%). *Id.* at 7.

142. The Jessie Smith Noyes Foundation's investment policy provides a good example of a current ESG investment policy. The policy describes the Foundation's expectations that each investment manager will use ESG factors in investment decisions for a fund and will also meet or exceed the peer group universe benchmark and market index benchmark set for the fund. The Foundation "views its investments as an integrated component of its overall mission" and includes in its investment philosophy consideration of "the environmental impact of a business," "issues of corporate governance," and "a corporation's openness and accountability to all stakeholders." To guide the investment managers, the policy details factors the managers should consider in avoiding or including companies as investments. See *Jessie Smith Noyes Foundation Investment Policy*, JESSIE SMITH NOYES FOUND., <http://www.noyes.org/mission-based-investing/investment-policy> (last visited May 8, 2015).

143. This article cites to some of the most recent studies and discusses a few of them, but given the flood of published work on this topic from the financial perspective in recent years, the article does not provide a comprehensive review of the existing literature. The focus is primarily on the U.S.

“SRI”<sup>144</sup> necessarily leads to underperformance.<sup>145</sup> Before turning to the empirical studies, this section reviews the now out-of-date concerns about diversification.

#### A. The Diversification Issue

1. *Diversification and Modern Portfolio Theory.* – Some commentators have argued that constraints imposed by an SRI strategy on portfolio development necessitate a cost to the portfolio.<sup>146</sup> As already discussed,<sup>147</sup> the prudent investor standard adopted in UPIA is based on the concepts of modern portfolio theory, and modern portfolio theory emphasizes the importance of diversification as a way to reduce risk in the portfolio.<sup>148</sup> Any restriction on the universe of potentially available stocks could reduce the risk-adjusted return of the portfolio.<sup>149</sup> The use of negative screens, a common strategy in the early development of SRI, limits the universe of available stocks, so some commentators have argued that the restriction necessarily results in costs to the portfolio.<sup>150</sup>

The importance of diversification, and hence the duty to diversify in UPIA,<sup>151</sup> are based on efficient market theory, the idea that the market reflects all relevant information.<sup>152</sup> If the market is efficient, then broad

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144. I have put SRI in quotes because part of the problem is in the definition used by commentators. As discussed *infra* Part IV.A.3, Mark Kritzman, who still insists that SRI necessitates a cost, defines SRI as a type of strategy that is no longer (and probably never was) used. See *infra* Part IV.A.3.

145. See UNEP-FI & MERCER, *supra* note 74, at 7.

146. See Christophe Revelli & Jean-Laurent Viviani, *Financial Performance of Socially Responsible Investing (SRI): What Have We Learned? A Meta-Analysis*, 24 BUSINESS ETHICS: A EUROPEAN REVIEW 158, 161 (Apr. 2015) (citing a number of articles on both sides of the argument).

147. See *supra* Part II.C.

148. See UNIF. PRUDENT INVESTOR ACT, Prefatory Note (1992).

149. Harry Markowitz, *Portfolio Selection*, 7 J. FIN. 77 (1952). See also UNIF. PRUDENT INVESTOR ACT, Prefatory Note (1992), for articles cited therein. Langbein and Posner “are skeptical that a portfolio constructed in accordance with consistent, and consistently applied, social principles could avoid serious under-diversification.” Langbein & Posner, *supra* note 10, at 88. However, they conclude “that a social-investing portfolio will probably have the same expected return as a standard investment portfolio (of the same systematic risk)” but with higher administrative costs as compared to a passive fund, although “it need not generate higher administrative costs than an investment strategy that involves research and active trading.” *Supra* note 10, at 93.

150. Adler and Kritzman continue to make this argument. Timothy Adler & Mark Kritzman, *The Cost of Socially Responsible Investing*, 35 J. PORTFOLIO MGMT. 52 (2008). See *infra* Part IV.A.3 for a discussion of their argument.

151. See UNIF. PRUDENT INVESTOR ACT § 3 (1992).

152. Markowitz, *supra* note 149, at 7.

diversification should reduce risk. In the years since the adoption of UPIA, a number of studies have challenged the efficient market theory.<sup>153</sup> Diversification becomes less important if the market is shown to be less efficient.

Andreas Hoepner analyzed portfolio diversification in connection with the use of ESG criteria and found that although using negative screens reduces the number of stocks available, a firm's ESG rating reduces its specific risk and therefore improves portfolio diversification by reducing specific stock risk.<sup>154</sup> Hoepner found that negative screening produced a diversification penalty, but best-in-class screening produced a diversification bonus.<sup>155</sup>

Renneboog, Jenketer Horst, and Zhang studied the question of diversification by measuring net selectivity.<sup>156</sup> They found that the SRI and non-SRI funds did not differ significantly in net selectivity, and therefore did not differ in costs of diversification.<sup>157</sup> They noted that this finding is consistent with "the classic view that a well-diversified portfolio does not require a large number of stocks . . . ."<sup>158</sup> Comparing SRI funds with each other, the authors found that returns increased with the number of screens – more screens led to better returns.<sup>159</sup> The authors conclude: "This

153. In 1987 Merton demonstrated that a perfectly diversified market portfolio was no longer efficient given the presence of incomplete information. He argued that assets with concentrated information should show increased returns. See Revelli & Viviani, *supra* note 146, at 161 (citing R.C. Merton, *A Simple Model of Capital Market Equilibrium with Incomplete Information*, 42 J. FIN. 483 (1987)). See also Hylton, *supra* note 79, at 92–113 (discussing theoretical and empirical work that has eroded the efficient markets hypothesis and citing, at n. 97, a number of those articles).

154. Andreas Hoepner, *Portfolio Diversification and Environmental, Social or Governance Criteria: Must Responsible Investments Really Be Poorly Diversified?*, UNIV. OF ST ANDREWS (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1599334](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599334).

155. *Id.*

156. Luc Renneboog, Jenketer Horst, & Chendi Zhang, *The Price of Ethics: Evidence from Socially Responsible Mutual Funds*, ECGI FINANCE, (Working Paper No. 168/2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=985265](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=985265) (2007).

157. *Id.* at 20.

158. *Id.* The study explains: "A number of studies show that 5 to 30 stocks are needed to make a well-diversified portfolio" (citing J. Evans & S. Archer, *Diversification and the Reduction of Dispersion: An Empirical Analysis*, 23 J. FIN. 761(1968); M. Statman, *How Many Stocks Make a Diversified Portfolio?*, 22 J. FIN. & QUANTITATIVE ANALYSTS 353 (1987); M. Brennan & W. Torous, *Individual Decision Making and Investor Welfare*, 28 ECON. NOTES 119 (1999)).

159. Renneboog *et al.*, *supra* note 157, at 25. The study found that the returns of funds employing a corporate governance and social screen increased while those of funds employing environmental screens decreased. *Id.* The study found that using in-house research increased returns, which they thought "supports the hypothesis that the screening process generates value-relevant non-public information." *Id.* at 26.



finding supports the hypothesis that SRI criteria help fund managers to pick stocks.”<sup>160</sup>

2. “*There Must Be a Cost*”. – In a 2007 article, Dylan Minor observes: “according to fundamental economic principles, there must be a net *financial* cost to SRI.”<sup>161</sup> He then analyzes SRI and non-SRI funds against three principles: (1) supply and demand,<sup>162</sup> (2) portfolio theory’s emphasis on diversification,<sup>163</sup> and (3) externalities.<sup>164</sup> Minor’s conclusion, after testing these principles, is that the cost that “must” occur cannot be seen.<sup>165</sup> He finds no statistically significant difference between the SRI and non-SRI funds.<sup>166</sup> He then says that perhaps the cost does not appear because SRI managers are superior to non-SRI managers, and that superior performance compensates for higher management fees.<sup>167</sup> He suggests that the superior results for the SRI managers could come from working with a more narrowly defined universe of stocks, because the narrowing may allow SRI managers to find value in stocks overlooked by “the masses.”<sup>168</sup> Thus, limiting diversification may have contributed to better performance. He does not identify as a possible reason for better performance by the SRI managers the idea that the externalities that SRI managers consider help them make better choices. The studies he cited in connection with environmental events and corporate social performance did not find correlations between those events and stock market pricing.<sup>169</sup>

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160. *Id.* at 25. As the use of ESG information increases, stock prices may begin to reflect this information.

161. Dylan B. Minor, *Finding the Financial Cost of Socially Responsible Investing*, 18 J. INVESTING 55 (2007). The full sentence reads: “This study’s purpose is to show while there may be no net *total* cost (i.e., financial *and* social costs and benefits) with SRI, according to fundamental economic principles, there must be a net *financial* cost to SRI.” *Id.* at 54.

162. *Id.* at 54–58.

163. *Id.* at 58–63. Portfolio theory says that constrained choices should result in a diversification cost.

164. *Id.* at 63–66. Externalities include non-financial criteria like environmental events and corporate social performance. *Id.* at 63.

165. *Id.* at 66. Minor used the Domini 400 Social Equity Fund to test the principles.

166. Minor compared the Domini 400 Society Equity Fund with the Vanguard 500 fund and found approximately a 1% higher return for Vanguard based on the supply and demand analysis, but deemed the difference not statistically significant. *Id.* at 58.

167. Minor, *supra* note 161, at 58.

168. *Id.* at 67.

169. *Id.* at 63. He cites Paul H. Rubin and Kari Jones, *Effects of Harmful Environmental Events on the Reputations of Firms*, 6 ADVANCES FIN. ECON., 161 (2001), and says that this study looked at all negative environmental events reported in the Wall Street Journal from 1970–1992 and found no statistically relevant effects on companies’ stock prices. He also cites Marc Orlitzky, Frank L. Schmidt, & Sara L.

3. *Kritzman and Adler's Simulation.* – Another article by authors who assume there must be a cost to SRI due to economic principles has gotten attention in connection with discussions about fossil-fuel divestment.<sup>170</sup> Mark Kritzman and Timothy Adler used a Monte Carlo simulation<sup>171</sup> to find a cost to a portfolio when a percentage of otherwise available stocks are randomly excluded. The problem with Kritzman and Adler's methodology is that their simulation does not simulate the way an SRI fund actually works.

Kritzman and Adler explain that their simulation only applies to non-actively managed funds, and add that if an investor expects to get improved returns by investing in “good” companies then the investor is not engaging in SRI.<sup>172</sup> Adam Kanzer, the Managing Director and General Counsel of Domini Social Investments, points out that all SRI funds are actively

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Rynes, *Corporate Social and Financial Performance: A Meta-analysis*, 24 ORG. STUD. 403 (2003) and explains that this meta-analysis reviewed CSP studies “spanning some 30 years and found a positive bi-directional relationship between CSP and corporate financial performance (CFP). However, they found little relation between *stock performance* and CSP.” *Id.* at 63–64. The studies discussed later in this section do find correlations, but the correlations focus on financial performance rather than stock performance. The ESG factors affect long-term performance and may not be immediately reflected in market pricing.

170. Kritzman participated in a panel on the topic of divestment at Middlebury. See Kanzer, *supra* note 95. Kanzer quotes Kritzman as saying, “I know you all accept that there's a cost [to fossil-fuel divestment], right? I'm going to tell you how you go about measuring it.” *Id.* See also Adam Jared Abt, *Measuring the Cost of Socially Responsible Investing*, ADVISOR PERSPECTIVES (May 21, 2013) (reporting on Kritzman's remarks at a meeting of analysts in Boston).

171. Monte Carlo simulations are used in finance to model the probability of different outcomes based on random variables. See *What is the 'Monte Carlo Simulation'*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/montecarlosimulation.asp> (last visited Apr. 18, 2016).

172. “If investors are motivated to own good companies because they expect higher returns from them, they are not socially responsible investors. They are simply pursuing an active management strategy centered on the belief that good companies generate above average returns and bad companies generate below average returns.” Adler & Kritzman, *supra* note 151. In an essay in the Chronicle of Higher Education, Kritzman said about his simulation: “The analysis showed that the financial cost of excluding investments based on criteria *other than expected performance* can be substantial. . .” [emphasis supplied] Mark Kritzman, *What Fossil-Fuel Divestment Would Cost*, CHRON. HIGHER EDUC. (Mar. 18, 2013). As Domini's explanation of how it selects stocks for its portfolios, see Part III.B, shows, all decisions are based on a combination of financial and non-financial factors. No decisions are made “based on criteria other than expected performance” and therefore the simulation does not apply to SRI as currently practiced. Further, an investor considering ESG factors may well seek financial benefits. Kritzman and Adler would exclude those investors from the simulation as well.

managed.<sup>173</sup> Decisions about which stocks to include or exclude are not made randomly, as in the simulation. In some cases, a fund might exclude all stocks in a particular sector, for example tobacco stocks or oil and gas stocks, but in that case the fund manager would then construct the portfolio with that information in mind. Further, economic as well as social or environmental reasons may be part of the decision to screen a category of stocks.<sup>174</sup> Kanzer writes, “Each of these decisions [in selecting stocks to include or exclude], often driven by moral concerns, carries a set of financial implications. One fails to see this by viewing the world through the distorting lens of so-called good and bad companies.”<sup>175</sup>

Kritzman and Adler use as their definition of SRI a quotation from the 1980 Langbein and Posner article that addressed SRI in the context of the anti-apartheid divestment movement.<sup>176</sup> As the prior section of this article explains, SRI has evolved beyond its roots in anti-apartheid divestment.<sup>177</sup> SRI as currently practiced is complex and involves careful analysis of both financial and extra-financial factors. ESG investing as a strategy focuses on factors that may have financial consequences for a company but may not be reflected in the company’s market value and therefore may improve returns for investors.<sup>178</sup>

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173. Kanzer, *supra* note 94, at 2 (“All forms of social investment are forms of active management, because SRI involves a process of principled decision-making. Even passively managed SRI funds track indices that are themselves actively managed (compare, for example, the management of the MSCI KLD 400 Social Index with the Russell 3000). Truly passive SRI is a contradiction in terms.”). In writing about the Adler and Kritzman article, Adam Jared Abt said, “A failure to recognize this distinction between active and passive socially responsible investing is the principal misconception that underlies many of the criticisms of his paper.” Abt, *supra* note 170. If in fact passive SRI funds do not exist, then the simulation simulates non-existent funds and should not be used as a critique of existing SRI funds.

174. Kanzer notes: “Some investors argue that fossil-fuel companies are dramatically overvalued and at risk of collapse due to peak oil or unburnable carbon. . .” Kanzer, *supra* note 94, at 3.

175. *Id.* at 4.

176. Adler & Kritzman, *supra* note 150. The Langbein & Posner definition states that SRI involves “excluding the securities of otherwise attractive companies from an investor’s portfolio because the companies are judged to be socially irresponsible, and including the securities of certain otherwise unattractive companies because they are judged to be behaving in a socially laudable way.” Langbein & Posner, *supra* note 10, at 73. The Langbein and Posner article goes beyond the South African screens, but the context of the article is the SRI situation in the late 1970s.

177. *See supra* Section III.F.

178. Adler and Kritzman say that they “withhold judgment” about the assertion that “good” companies may perform better than “bad companies” and therefore that SRI may enhance performance. Adler & Kritzman, *supra* note 150. *See supra* note 154 (discussing articles showing that the market is not entirely efficient).

The simulation might have the most relevance in connection with divestment, which removes stocks on a list from an existing portfolio.<sup>179</sup> However, divestment does not remove stocks randomly, and any analysis of the consequences of divestment would need to examine the industry subject to removal.<sup>180</sup> Divestment of fossil-fuel stocks might have different financial results than divestment of tobacco stocks. Further, other decisions for that portfolio will be made based on the knowledge of which stocks were removed, so the portfolio can be adjusted accordingly (and not randomly).

Adler and Kritzman ignored the existing empirical work on SRI performance, preferring to rely on a hypothetical scenario. Kritzman has stated that “[h]is objection to these studies, often adduced in opposition to his argument, is that they rely on historical data, and so reflect just the particular period of the study, which can’t be taken as representative of the future.”<sup>181</sup> While this is true, and is true of any financial analysis based on historical returns, a simulation does not demonstrate what will happen any more than an analysis of historical returns would. The results in a simulation are not a representation of what *will* happen but only what *might* happen. The historical returns demonstrate what has happened, and can be analyzed against overall stock market behavior during the periods tested.<sup>182</sup> As the studies use longer timeframes, the data have become more useful.

#### B. Why ESG Factors Have Financial Consequences

A question in considering whether the use of ESG factors will improve performance is whether the environmental, social, and governance information that will affect a company’s performance is already reflected in the company’s financial data. If the market and the financial indicators already reflect all of the potential social and environmental harms or benefits that could affect the company, the ESG factors will contribute no additional information. Under some circumstances, consideration of ESG factors may lead to that information. The two hypotheticals that follow

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179. Kritzman spoke on a panel at Middlebury concerning divestment. He started by saying, “I know you all accept that there’s a cost [to fossil-fuel divestment], right? I’m going to tell you how you go about measuring it.” Kanzer, *supra* note 94 at 2.

180. *See id* at 2–3.

181. Abt, *supra* note 170, at 4.

182. *See* HEAL, *supra* note 91. G.M. Heal has noted that SRI funds might have been overweighted in tech stocks during the 1990s when those stocks did well, and underweighted in oil and gas in 2004 when those stocks surged. Neither of those situations will necessarily repeat, but as data covers longer periods, the information should become more useful. Also, ESG factors are more likely to correspond to financial benefit over the long-term rather than on a short-term basis.

provide examples of the types of information that might not be included in the financial indicators.

Assume that Company A uses international suppliers that keep costs down by allowing employees to work long hours under unsafe conditions. The suppliers have had no dramatic problems, and the supply chain has never been broken. Company B uses suppliers that conform to production standards it imposes. Factories are safe and employees work under conditions that minimize on-the-job accidents. Company B has also faced no dramatic problems. Company B may have a slightly higher cost for the goods produced by its suppliers, and that information could make Company B's financial data look slightly less favorable than Company A's data. What the data will not reflect is the possibility that a catastrophic fire in a factory used by one of Company A's suppliers could kill hundreds of workers. The repercussions for Company A could include a break in the supply chain, loss of consumer goodwill if the company is linked to the supplier, and even a consumer boycott. The financial impact on Company A could be significant, but current financial data probably does not reveal that risk. The risk is a long-term risk, and merely a risk, not a certainty, but in a process that purports to evaluate financial risk, the risk to Company A may be missing if the evaluator uses only traditional financial data.

Adam Kanzer explains the reason that SRI/ESG information should improve analysis as follows:

The core financial performance claim for SRI is that corporate value depends upon numerous relationships, including those with employees, customers, communities and the natural environment. Companies that manage these relationships well should prosper in the long run, and those that damage them will face obstacles to their long-term success.<sup>183</sup>

ESG factors relate to a company's long-term value, and will have a greater impact when viewed on a long-term basis. Short-term financial strategies

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183. Kanzer, *supra* note 94, at 3. The website of Domini Social Investments explains that its funds "seek to invest in companies committed to the following: Strong stakeholder relations, including investments in employees; High labor and environmental standards for suppliers; Serving the greatest needs of local communities; Managing environmental affairs responsibly; Monitoring the human rights implications of their activities. Domini also favors companies involved in clean technology and energy efficiency, alternative energy, microfinance, mobile communications, organic agriculture and vaccines." (May 19, 2015), <https://www.domini.com/responsible-investing/socially-responsible-companies>.

are less likely to benefit from ESG analysis,<sup>184</sup> but an investor concerned about long-term value may benefit from an investment strategy that incorporates an ESG analysis.<sup>185</sup> If variables are predictive then a prudent investor would want to consider those variables.

### C. Research on SRI and ESG Performance

Various academic and financial industry studies have attempted to understand whether different types of SRI strategies have a negative, positive, or neutral effect on portfolios.<sup>186</sup> Several challenges exist in reviewing the studies. First, the studies review different SRI strategies (e.g., screening, shareholder advocacy, ESG investing), often without differentiating among the strategies. Second, the time frame for some of the studies is short (e.g. five years) and ESG factors are more likely to affect long-term performance than short-term performance.<sup>187</sup> Third, the strategies continue to evolve so information gained from reviewing one set of funds or factors has to be considered in light of changing strategies. Fourth, as more investors and investment managers become familiar with

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184. As the use of ESG information increases, share prices may reflect some of the information. If an investor purchased an undervalued stock that then experiences a price increase as the ESG information becomes more widely used, the investor might take short-term profits. However, an ESG strategy is typically concerned with long-term value rather than short-term returns. See John Kay, *The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report* (July 2012), for a critique of the U.K. equity market, which concluded that “the central problem was “short-termism”, in which many investment managers traded on the basis of short-term movements in share price rather than “investing” on the basis of the fundamental value of the company.” U.K. Law Comm’n, *Fiduciary Duties of Inv. Intermediaries* 1 (2014) (a report focused on fiduciaries and pensions).

185. The Domini funds benefitted from the exclusion of two companies, BP and Toyota, even before their problems became obvious to the market. “Domini avoided investments in BP [and] Toyota. . .major companies that have recently experienced devastating public scandals and catastrophes. That Domini avoided these three companies demonstrates that social and environmental standards can help to mitigate certain investment risk by providing early warning signals for major disasters to come.” *Annual Report 2010*, DOMINI SOCIAL INV. TRUST, <http://www.sec.gov/Archives/edgar/data/851680/000119312510222939/dncsr.htm> (last visited May 28, 2015) at 4.

186. Curiously, the Adler and Kritzman article ignored the existence of the empirical work. As Adam Kanzer pointed out, “When a hypothetical model produces results that directly contradict the empirical data, it is incumbent upon the researcher to address these conflicts and adjust the model if necessary.” Kanzer, *supra* note 94, at 5.

187. See UNEP-FI & MERCER, *supra* note 74 (noting that “some of the studies still refer to a relatively short sample period that makes statistical analysis difficult to interpret.”).

SRI/ESG investing strategies, the potential for arbitrage in the face of market inefficiency may be lost.<sup>188</sup>

Two generalizations follow from a review of the studies. First, the use of ESG factors in analyzing stocks independently or in building portfolios may improve investment results.<sup>189</sup> Second, the performance of SRI funds compared with non-SRI funds has been, in most cases, neutral or positive. Few of the studies show negative results when comparing SRI funds with non-SRI funds,<sup>190</sup> and none of the empirical studies support the idea that SRI necessarily leads to lower returns.<sup>191</sup>

While some studies found outperformance using ESG factors and comparison of fund performance with benchmarks provides information about the performance of the fund, any attempts to draw conclusions must be done carefully.<sup>192</sup> The difference in performance between an SRI fund and a conventional fund may relate to any of a number of variables, including the skill of the fund manager,<sup>193</sup> investment style, time period, and decisions about when to be in cash and when to be in the market.<sup>194</sup> Thus, the difference may not be caused by the decision to invest based on an SRI policy.<sup>195</sup> Another caution is that some of the studies focus on the

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188. Minor, *supra* note 161, at 68 (“In the meantime, we witness a paradox as SRI investors continue their campaign to convert Non-SRI to SRI investors; they are, ironically, increasing their financial cost.”).

189. Among other studies, the two meta-studies described in this section reach this conclusion. In addition, Commonfund notes, “Studies identify issues such as energy efficiency, carbon emissions, toxic waste treatment, workplace safety, employee relations and corporate governance as materially affecting traditional financial indicators such as price/earnings ratio and reputation with investors.” *Commonfund White Paper*, COMMONFUND (2013), <https://www.commonfund.org/InvestorResources/Publications/Pages/WhitePapers.aspx>, at 2. See also SUSTAINABLE INVESTING/ESTABLISHING LONG-TERM VALUE AND PERFORMANCE, DEUTSCHE BANK GROUP (June 2012); Hoepner, *supra* note 154 (best in class leads to better returns).

190. Both the Deutsche Bank meta-study and the UTEP-FI & Mercer meta-study conclude that the performance of funds that use negative screens is more likely to be neutral than negative or positive when compared with benchmarks.

191. Adler and Kritzman base their assertion that this is the case on a simulation and do not back their assertion with empirical evidence. See Adler & Kritzman, *supra* note 150.

192. HEAL, *supra* note 91. See also *Commonfund White Paper*, *supra* note 189. “Preliminary studies suggest that while integrating ESG issues into fundamental investment analysis procedures can improve investment performance, it is too early to draw comprehensive conclusions.” *Id.* at 3.

193. Katzer notes that SRI funds are managed funds, so the manager’s skill in using the data will affect performance. Katzer, *supra* note 94. Some SRI funds could be non-managed funds, for example a fund following the Domini Index.

194. HEAL, *supra* note 91. See UNEP-FI & MERCER, *supra* note 74, at 8.

195. G.M Heal describes an example of the ways in which short-term market

strength of the companies in the study rather than on current returns to investors. That is, a determination of out-performance may not translate into immediate benefits to investors. However, the long-term strength of companies may benefit investors over the long-term by reducing risk.

This Part IV.C briefly reviews some of the studies, beginning with two meta-studies that capture a lot of the empirical work done over the past several years. As will be noted, the studies explore different SRI strategies. The growth of interest in ESG factors at major investment firms is discussed in the following section.

1. *Deutsche Bank Meta-Study (2012) – Outperformance in Corporate Financial Performance.* – A meta-study published by the Climate Change Investment Research division of Deutsche Bank found that companies with high ratings in CSR and ESG outperformed in corporate financial performance.<sup>196</sup> The study examined more than 100 academic studies of responsible investing, 56 research papers, two literature reviews, and four meta-studies.<sup>197</sup> The report categorized the studies based on CSR, ESG (and E, S, and G separately), and SRI, and then looked for a correlation between scores in those three categories and the cost of capital (equity or debt), corporate financial performance (both market based returns and accounting measures), and fund returns for funds based on these factors (most funds were SRI).<sup>198</sup> The report is useful both because of the large number of studies included in the research and because the analysis differentiated between different investment strategies.

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conditions can affect comparisons of SRI and non-SRI funds. He noted that several SRI funds outperformed benchmark indices in the period 1995-2000. A possible reason, he suggests, is that SRI funds would be underweighted in companies that pollute or deal in alcohol, guns or tobacco. As a consequence, they would likely be overweighted in tech stocks, which are less likely to be screened out for environmental or social reasons. The tech stocks did particularly well during that five year period, so perhaps the overweight position improved returns for the fund. If so, that relatively better performance might not be repeated in another time period. Similarly, oil stocks experienced a surge in 2004. Funds that were underweighted in oil stocks might have had below-benchmark results for a period that included 2004. Again, both of these circumstances would be unlikely to repeat in long-term comparisons. HEAL *supra* note 91.

196. DEUTSCHE BANK GROUP, *Sustainable Investing/Establishing Long-term Value and Performance* (2012). In a statement introducing the report the Managing Director describes the study as “one of the most comprehensive reviews of the literature ever undertaken.” Although that language was written to promote the report, the study was broad-ranging and conducted with attention to quality control. *See id.* at 5 (discussing papers excluded because they did not meet “a minimum level of academic rigor”).

197. *Id.*

198. *Id.*



For securities, the Deutsche Bank report found “overwhelming evidence” that companies with high ratings for CSR and ESG have a lower cost of capital, both debt and equity.<sup>199</sup> The study found “compelling evidence” that high ratings in either category correlated with outperformance in corporate financial performance.<sup>200</sup> The correlations for SRI securities were weaker, but more studies found a positive or neutral correlation between high SRI ratings and outperformance in corporate financial performance than negative.<sup>201</sup> With respect to fund performance, most studies were neutral or mixed.<sup>202</sup> The report found no studies that reported underperformance at either the security or fund level.<sup>203</sup>

2. *UNEP-FI and Mercer Meta-Study (2007) – New Strategies Show Positive Results.* – A prior meta-study, conducted by the United Nations Environmental Program Financial Initiative (UNEP-FI) and Mercer, examined 20 academic studies and 10 broker studies that examined the link between ESG factors and investment performance.<sup>204</sup> Most studies found the use of ESG factors led to neutral or positive results.<sup>205</sup>

The UNEP-FI and Mercer report characterizes the academic studies based on the type of responsible investing strategy studied. Fifteen of the studies focused on screening, three on activism,<sup>206</sup> one on ESG integration, and one was described as ESG/screening.<sup>207</sup> Of the studies that focused on screening, two showed a positive relationship between ESG and

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199. The researchers found evidence within 100% of the studies that companies with high ratings for either CSR or ESG have a lower cost of capital. *Id.* Note that a lower cost for capital may not benefit investors in the short-term.

200. The report found that for CSR, 100% of the studies showed that firms with higher ratings showed both market and accounting based outperformance. For ESG, 89% of the studies showed market based outperformance and 85% showed accounting based outperformance. The report notes that governance has had the strongest influence, followed by environment and social factors, which appear to be increasingly gathering impact (particularly environment). A literature review used in the analysis of CSR securities had found 9 neutral and 2 negative studies, but was counted as positive because the majority of studies (23) were positive. Deutsche Bank Group, *supra* note 196.

201. *Id.* For SRI securities, 42% of the studies found that companies with high ratings exhibited higher market-based performance than lower-scoring securities. *Id.*

202. *Id.* at 8–9.

203. *Id.* at 9.

204. UNEP-FI & MERCER, *supra* note 74.

205. *Id.* The three studies that showed negative results all focused on screening as the ESG strategy.

206. The report defines activism as “Intervention by shareholders using their ownership rights to influence the actions of corporate management with a view to enhancing the value of the company.” *Id.* at 68.

207. *Id.* at 13–14.

performance, six were neutral (with one neutral-positive and one neutral-negative), and three were negative.<sup>208</sup> One activism-focused study was neutral and all the other strategies showed positive results. Thus, only three of the 20 studies found a negative relationship and all of those were studies that analyzed screening as a strategy.<sup>209</sup>

Of the 10 broker studies discussed in the UNEP-FI report, half were thematic in nature and the other half used some form of quantitative analysis. Although the authors of the thematic studies all discussed positive effects of ESG factors on performance, because no quantitative tests were conducted, the meta-study reported these five studies as “neutral.” Of the other studies, three were positive and two were neutral. Only one study examined screening as a strategy, and it reached a neutral result.

3. *Revelli and Viviani International Meta-Study (2015) – Neutral Results.* – An international study<sup>210</sup> found that consideration of CSR in stock selection neither strengthens nor weakens portfolios.<sup>211</sup> Christophe Revelli of the KEDGE Business School in Marseilles, France, and Jean-Laurent Viviani of the Université de Rennes I examined 85 studies and 190 experiments to test the relationship between SRI and financial performance while also analyzing researcher methodologies with respect to dimensions of SRI.<sup>212</sup> They found that differences between the studies they examined resulted from the differences in the dimensions studied.<sup>213</sup> The authors conclude that CSR does not result in stronger or weaker returns compared with conventional investments.<sup>214</sup> They suggest that because SRI does not

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208. The three studies that found that ESG factors had a negative effect on fund performance all focused on negative screens, particular those related to sin stocks. James Chong, Monica Her & G. Michael Phillips, *To sin or not to sin? Now that's the question*, 6 J. ASSET MGMT. 406–417 (2006); Christopher C. Geczy, Robert F. Stambaugh & David Levin, *Investing in Socially Responsible Mutual Funds* (Working Paper, 2005); Harrison G. Hong & Marcin T. Kacperczyk, *The Price of Sin: The Effects of Social Norms on Markets* (Working Paper, 2006).

209. UNEP-FI & MERCER, *supra* note 74.

210. Revelli & Viviani, *supra* note 146. The authors believe their study represents the first international meta-analysis of financial performance of SRI. *Id.* at 159.

211. *Id.*

212. *Id.* at 158–59.

213. These dimensions included markets, financial performance measures, investment horizons, SRI thematic approaches, family investments and journal impact. *Id.* at 158.

214. A problem with the study is that it reaches one conclusion without differentiation for changes in ESG strategies over time. It does not differentiate between screening and ESG integration or consider changes in strategies over the time period of the studies, which spanned the period 1972 – 2012, with most studies from the 1990s on.

increase costs, investors can invest in SRI funds without financial sacrifice while addressing the investors' social, environmental, and ethical concerns.<sup>215</sup>

4. *Renneboog, ter Horst and Zhang (2007) – Underperformance in Europe, not in U.S. and U.K.* – A 2007 study analyzed SRI funds around the world to test the authors' hypothesis that investors pay a price for SRI screening.<sup>216</sup> The authors studied the risk and return characteristics of SRI mutual funds, grouped in the following regions: the U.S., the U.K., Europe (other than the U.K.), and "the Rest of the World," and compared them with conventional (non-SRI) benchmarks from the U.S. and the U.K.<sup>217</sup> Confirming the authors' hypothesis in part, the study found that SRI funds in Europe and Asia-Pacific countries underperformed benchmarks on average 5% per year.<sup>218</sup> In contrast, however, in the U.S. and the U.K. the returns of SRI and non-SRI funds were not statistically different.<sup>219</sup> The finding of underperformance in Europe supports the hypothesis "that ethical considerations influence the stock prices and that ethical firms are overpriced by the market"<sup>220</sup> but only in certain countries.<sup>221</sup> The study did not differentiate by type of SRI strategy, so it is possible that differences in strategies may have led to differences in results.

5. *Eccles, Ioannou, and Serafeim (2011) - High Sustainability Companies Outperform Low Sustainability Companies.* – In a 15-year study,<sup>222</sup> Robert G. Eccles, Ioannis Ioannou, and George Serafeim analyzed

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215. Revelli & Viviani, *supra* note 146, at 171.

216. Renneboog, et al., *supra* note 156. The working paper provides a list of earlier studies in note 15.

217. The 463 SRI funds in the study come from 23 countries and offshore jurisdictions. Europe includes Austria, Belgium, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, and Switzerland. U.K. includes Guernsey and the Isle of Man. The "Rest of the World" includes Australia, Canada, Cayman Islands, Japan, Malaysia, the Netherlands Antilles, Singapore, and South Africa. Benchmark data comes from 716 conventional funds in the U.K. and 12,624 conventional funds in the U.S. *Id.* at 4–6 (explaining the methodology in creating the sample and the sources of data).

218. *Id.* at 12.

219. *Id.* SRI funds in the U.K. and the U.S. underperform at 1%, which is not statistically significant.

220. *Id.* at 28. The authors suggest that perhaps "ethical companies" are less risky and hence should earn a lower return or that higher demand for ethical companies may cause the companies to be priced higher than their fundamental values. Renneboog, *supra* note 156, at 13.

221. "SRI funds in Belgium, France, Ireland, Japan, Norway, Singapore, and Sweden are lower than -5% per annum." *Id.* at 12.

222. Robert G. Eccles, Ioannis Ioannou, & George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance* (Mar. 1, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1507874](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507874).

the governance and organizational structure and financial performance of 180 U.S. companies. Half of the companies had “voluntary incorporation of social and environmental issues into a company’s business model and operations”<sup>223</sup> by 1993 and half had few or no sustainability policies.<sup>224</sup> The companies in the first group were dubbed High Sustainability companies and those in the second group were Low Sustainability companies.<sup>225</sup>

The researchers matched and then compared companies in the two groups so they could “shed light on the organizational and performance implications of integrating social and environmental issues into a company’s strategy and business model through the adoption of corporate policies.”<sup>226</sup> Among other organizational findings, High Sustainability companies were more likely to create a process to engage stakeholders in identifying risks and opportunities, to be long-term oriented, and to measure and disclose more extra-financial data.<sup>227</sup> The researchers found that High Sustainability companies outperformed Low Sustainability companies in both stock market performance and accounting performance.<sup>228</sup> Further, the market underestimated the future profitability of the High Sustainability companies compared to the other group.<sup>229</sup>

6. *Private Equity and Venture Capital Funds.* – In June 2015 Cambridge Associates and the Global Impact Investing Network (GIIN) announced that they had collaborated to create the Impact Investing Benchmark.<sup>230</sup> The new benchmark gathers data from 51 private equity and venture capital funds with a range of social objectives.<sup>231</sup> The funds operate across sectors, target both risk-adjusted market rate returns and social impact objectives, are available to institutional rather than individual

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223. *Id.* at 2.

224. *Id.* at 3–4.

225. *Id.*

226. *Id.* at 3.

227. Eccles, *supra* note 222, at 3–4.

228. *Id.* at 4.

229. *Id.*

230. Amit Bouri et al., *Introducing the Impact Investing Benchmark* (2015), available at [http://www.thegiin.org/binary-data/Introducing\\_the\\_Impact\\_Investing\\_Benchmark.pdf](http://www.thegiin.org/binary-data/Introducing_the_Impact_Investing_Benchmark.pdf).

231. *Id.* at i. The funds included pursue one or more of the following themes: financial inclusion, employment, economic development, sustainable living, agriculture, and education. Although environmental funds are excluded, some of the social themes address sustainability issues. *Id.* at 3.

investors, and were launched from 1998 to 2010.<sup>232</sup> Cambridge Associates will update the benchmark on a quarterly basis.<sup>233</sup>

The report analyzing the funds in the benchmark found the returns of funds launched from 1998 to 2004 in line with or better than returns of non-impact investing funds.<sup>234</sup> More recently launched impact investing funds trailed their non-impact investing comparators, but the report suggests that the returns for the impact investing funds were largely unrealized at the time of the analysis.<sup>235</sup> Emerging market impact investing funds raised from 1998 to 2004 outperformed their comparators 15.5% to 7.6%, while later funds lagged behind their non-impact investing peers.<sup>236</sup> Many smaller impact investing funds, defined as those raising less than \$100 million, outperformed their smaller non-impact investing counterparts, especially the older funds.<sup>237</sup>

The new benchmark will become more useful as the sample size and available data grow, and the report notes that definitive conclusions on performance would be premature, but the report observes: “Despite a perception among some investors that impact investing necessitates a concessionary return, the Impact Investing Benchmark has exhibited strong performance in several of the vintage years studied.”<sup>238</sup> The report also notes that the findings support the view that manager selection and due diligence are key to superior returns and risk management, in impact investing just as much as in non-impact investing.<sup>239</sup>

7. *Other Studies – Neutral or Positive.* – Other studies generally have found either neutral or positive effects of ESG factors on investment performance.<sup>240</sup> An 18-year study compared a U.S. social investment

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232. *Id.* at 1–2. The report notes that some impact investing funds seek concessionary returns, but explained that the Benchmark is limited to funds that target risk-adjusted market rate returns consistent with other private investment funds.

233. *Id.* at 1.

234. Bouri, *supra* note 230, at 8–9.

235. *Id.* at i.

236. *Id.* at 10.

237. *Id.* at 14.

238. *Id.* at 19.

239. Bouri, *supra* note 230, at 19.

240. This section describes a handful of the many recent studies looking at various aspects of ESG investing. For additional reports of empirical work analyzing the link between CSR and financial performance and between environmental performance specifically and financial performance, see Ioannou & Serafeim, *supra* note 133, at 13 (“The studies addressing environmental performance argue that “positive relationship between environmental and financial performance may represent a focus on innovation and operational efficiency, reflect superior organizational or management capabilities, enhance a company’s legitimacy, and may empower the firm to meet the needs of

index, the MSCI KLD 400 Social Index, with the S&P 500.<sup>241</sup> The study found that differences between the two indices could be explained by conventional investment factors.<sup>242</sup> That is, the ESG factors did not affect the returns in either a negative or positive way. The author's conclusion is that any risk exposures created by SRI can be addressed through portfolio construction.<sup>243</sup> The authors noted that they found no evidence of market advantage in using ESG factors, perhaps because "the field is getting crowded."<sup>244</sup> They concluded that "values-based investors" can achieve financial results comparable to non-SRI investing, but that alpha-seeking social investors may be disappointed.<sup>245</sup>

A study published in 2011 by RCM, a global asset management company, analyzed the best-in-class strategy.<sup>246</sup> The study used data mainly from MCI ESG Research for the period of December 2005 to September 2010. The researchers evaluated ESG factors on a sector-by-sector basis to identify best-in-class companies and worst-in-class companies. The researchers then created portfolios using the data and found that the best-in-class portfolios outperformed the benchmark during the test period, while the worst-in-class portfolios underperformed. The white paper reports: "investing in companies that operate best-in-class ESG strategies did not detract from returns. Even in extreme market conditions, performance was not negatively impacted. Not only that, but

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diverse stakeholders [citations deleted].") *Id.* See Sally Hamilton, Hoje Jo, & Meir Statman, *Doing Well While Doing Good? The Investment Performance of Socially Responsible Mutual Funds*, FINANCIAL ANALYSTS JOURNAL 62 (1993), for one of the first studies, which found that SRI funds obtained competitive returns

241. Lloyd Kurtz & Dan DiBartolomeo, *The Long-Term Performance of a Social Investment Universe*, 20 J. INVESTING 95 (2011).

242. *Id.* at 97–98.

243. *Id.* at 100.

244. *Id.* Another long-term study, 1990–2008, found slight underperformance of SRI funds when compared with non-SRI funds, and slight outperformance on a risk-adjusted basis, in both cases with results that were neither statistically nor economically significant. David M. Blanchett, *Exploring the Cost of Investing in Socially Responsible Mutual Funds: An Empirical Study*, 19 J. INVESTING 93, 102 (2010). The Blanchett article also provides descriptions of eleven prior studies, with most finding a neutral impact on cost and performance. *Id.* at 93–94.

245. *Id.*

246. *Sustainability: Opportunity or Opportunity Cost? Applying ESG factors to a Portfolio Does Not Negatively Impact Performance and May Enhance it*, RCM (2011), available at <https://www.allianz.com/media/responsibility/documents/rcmsustainabilitywhitepaper2011.pdf>.

outperformance was seen across the range of global sectors and geographies.”<sup>247</sup>

A recent European study analyzed eight SRI funds and the five top holdings of each, evaluating the five holdings by using four categories of factors: intellectual capital, financial and economic performance, social and environmental performance, and sustainability performance.<sup>248</sup> The study found a relationship between the social and environmental factors of companies and the financial performance of those companies. The study also found that the intellectual capital and social and environmental performance of companies held by the funds influenced fund performance.<sup>249</sup>

Finally, studies have shown that corporate responses to ESG issues benefit the company. A 2013 study by EY (formerly Ernst & Young) and Boston College reported that a large institutional shareholder’s successful interventions in corporate social responsibility increased share price by an average of 4.4% a year. The study also found that the most transparent companies tended to have higher cash flows, innovation in processes, reduction in waste, and greater insight into where growth may come from. A 2009 study published in the Harvard Business Review found that corporations that complied fully and as early as possible with environmental regulations benefitted financially even if initial costs were substantial.<sup>250</sup> The study showed that sustainable practices, rather than being a financial burden on the cost of doing business, can lower that cost and increase revenues.<sup>251</sup> Earlier studies demonstrated a positive relationship between the adoption of CSR practices and policies and corporate financial performance.<sup>252</sup> Recent information from Europe shows similar results.<sup>253</sup>

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247. *Id.* at 12. The study also found that investing in companies identified as best-in-class on sustainability did not lead to greater volatility when compared with the market. *Id.*

248. See Jelena Stankevičienė & Julija Čepulytė, *Sustainable Value Creation: Coherence of Corporate Social Responsibility and Performance of Socially Responsible Investment Funds*, 27 *ECONOMIC RESEARCH – EKONOMSKA ISTRAŽIVANJA* 882 (2014).

249. *Id.*

250. Ram Nidumolu, CK Prahalad & MR Rangaswami, *Why Sustainability is Now the Key Driver of Innovation*, *HARV. BUS. REV.* (2009) (studying 30 large corporations over a long time period).

251. *Id.* A study published in 2011 showed that companies with strong employment practices outperformed the market over a period of many years. See Alex Edmans, *Does the Stock Market Fully Value Intangibles? Employee Satisfaction and Equity Prices*, 101 *J. FIN. ECON.* 621 (2011).

252. See Jennifer J. Griffin & John F. Mahon, *The Corporate Social Performance*

8. “*Apparent Contradictions*”. – After reviewing these recent studies, it is interesting to reflect on an article published in 1997, in the early years of SRI expansion after the end of the anti-apartheid divestment period.<sup>254</sup> Lloyd Kurtz reviewed the available literature but explained that only a few studies existed at that time.<sup>255</sup> At the outset of his paper he notes three “apparent contradictions:”

First, despite apparently unavoidable diversification costs, the universe of SRI stocks does not appear to have systematically underperformed the market portfolio in recent years, on either a nominal or risk-adjusted basis. . . .

Second, some management science studies have found that factors monitored by social investors, such as environmental policies, employee relations, and R&D spending, could be associated with positive abnormal returns. The results are mixed, however . . . .

The third contradiction is born of the first two. Money managers who have handled both screened and unscreened accounts for many years report that, over time, the performance of these accounts does not differ materially.<sup>256</sup>

The studies discussed in this section have helped to explain the contradictions. SRI strategies do not result in “unavoidable diversification

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*and Corporate Financial Performance Debate: Twenty-Five Years of Incomparable Research*, 36 BUS. & SOC’Y 5 (1997); Ronald M. Roman, Sefa Hayibor & Bradley R. Agle, *The Relationship Between Social and Financial Performance: Repainting A Portrait*, 38 BUS. & SOC’Y 109 (1999); Marc Orlitzky, Frank L. Schmidt & Sara L. Rynes, *Corporate Social And Financial Performance: A Meta-Analysis*, 24 ORGANIZATION STUDIES, 403 (2003); M. L. Wu, *Corporate Social Performance, Corporate Financial Performance, and Firm Size: A Meta Analysis*, 8 J. AM. ACADEMY BUS. 163 (2006).

253. See John Howell, *European Companies Profit from Sustainability*, 3BL MEDIA, LLC, (June 15, 2015), available at <https://3blmedia.com/News/European-Companies-Profit-Sustainability-Minute#sthash.KNFyirX0.dpuf>. “CDP, a research firm that collects environmental data on more than 5,000 companies worldwide, reports that companies with published targets for cutting their CO2 emissions are more profitable, delivering a return on invested capital of 9.9 percent, compared with 9.2 percent for those with no targets. And Euronext’s Low Carbon 100 Europe index, which includes those European firms with the lowest CO2 emissions in their respective industries, has risen by 60 percent since the end of 2010. That rise compares with a 45 percent lift in the same time period in the broader STOXX Europe 600 index, from which the Low Carbon 100 Europe list was selected.”

254. See Kurtz, *supra* note 89.

255. *Id.* at 37.

256. *Id.* “[D]espite apparently unavoidable diversification costs, the universe of SRI stocks does not appear to have systematically underperformed the market portfolio in recent years, on either a nominal or risk-adjusted basis.”



costs” and SRI strategies, in particular ESG investing, can improve financial investment results.<sup>257</sup>

#### D. Investor Interest and Investment Company Responses

1. *Numbers.* – The attention devoted to ESG investing by investment firms reflects both a response to demands of investors<sup>258</sup> and a growing awareness that integrating ESG factors into overall analysis can improve returns, especially on a risk-adjusted basis.<sup>259</sup> The most recent Trends report from the Forum for Sustainable and Responsible Investment shows a growth in investment funds incorporating ESG factors from \$12 billion in assets in 1995, when the first Trends report was compiled, to \$4,306 billion in 2014.<sup>260</sup> Further, the report identified \$6,572.2 billion in assets engaged in sustainable and responsible investing in 2014.<sup>261</sup> A dramatic upward shift in assets engaged in ESG investing began between the 2007 and 2010 Trends reports, and since 2010 the numbers have risen rapidly.<sup>262</sup> Not

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257. An outlier, as of 2009, appeared to be “sin” stocks. Companies involved in producing alcohol or tobacco and companies involved in gambling have historically outperformed the market. See Harrison Hong & Marcin Kacperczyk, *The Price of Sin: The Effect of Social Norms On Markets*, 93 J. FIN. ECON. 15 (2009). See also Hoje Jo, et al., *Socially Responsible Investing vs. Vice Investing*, ACADEMIC & BUS. RESEARCH INST., available at [www.aabri.com/LV2010Manuscripts/LV10107.pdf](http://www.aabri.com/LV2010Manuscripts/LV10107.pdf) (comparing VICEX, a mutual fund established in 2002 to invest in alcohol, gaming, tobacco, and defense, with DSEFX, an SRI fund based on the DS 400).

258. *Report on US Sustainable, Responsible and Impact Investing Trends 2014*, THE FORUM FOR SUSTAINABLE AND RESPONSIBLE INVESTMENT (2014), available at [http://www.ussif.org/Files/Publications/SIF\\_Trends\\_14.F.ES.pdf](http://www.ussif.org/Files/Publications/SIF_Trends_14.F.ES.pdf). “Of the managers that responded to an information request about reasons for incorporating ESG, the highest percentage, 80 percent, cited client demand as their motivation.” *Id.* at 16.

259. DEUTSCHE BANK GROUP, *supra* note 196. The Managing Director of the division stated: “We believe that ESG analysis should be built into the investment processes of every serious investor, and into the corporate strategy of every company that cares about shareholder value. ESG best-in-class focused funds should be able to capture superior risk-adjusted returns if well executed.” *Id.* See also Michael E. Porter & Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, 84 HARV. BUS. REV. 75 (2006) (advocating that companies develop and implement corporate-wide CSR initiatives because doing so would “add quantifiable value to companies.”).

260. *Report on Investing Trends 2014*, *supra* note 258. This number includes mutual funds and various types of pooled products, but it does not include separate account vehicles and community investing institutions.

261. *Id.* at 15. This number includes community-investing institutions.

262. *Id.* The numbers from 1995 to 2014, with the number of funds preceding amount of assets, in billions, are as follows: 1995: 55, \$12; 1997: 144, \$96; 1999: 168, \$154; 2001: 181, \$136; 2003: 200, \$151; 2005: 201, \$179; 2007: 260, \$202; 2010: 493, \$569; 2012: 720, \$1,013; 2014: 925, \$4306.

surprisingly, investment firms have increased the resources they devote to ESG investing.<sup>263</sup>

2. *Investment Firms Integrate ESG Analysis.* – Firms that offer traditional investment services to institutional investors and individuals increasingly tout their sustainability products or ESG approaches. Russell Investments says on its “about Russell” page that it has “five distinct capabilities that we believe are required to run money.”<sup>264</sup> The second of these is responsible investment, and Russell explains: “Russell Investments recognizes the importance of environmental, social, and corporate governance issues. They not only affect our clients’ investments and financial security. They affect our business and communities in which we live and work. To reinforce our commitment to these issues, we are a signatory of the UN Principles for Responsible Investment (UN PRI).”<sup>265</sup> The website then describes the work of the Russell Sustainability Council.<sup>266</sup>

Breckinridge Capital Advisors has incorporated the use of ESG factors into its analysis of fixed income assets.<sup>267</sup> Nicholas Elfner, Director of Corporate Research, explains that ESG analysis is “fully integrated in the credit research group.”<sup>268</sup> Current methodologies to analyze fixed income assets may not assess extra-financial risks affecting companies and municipalities.<sup>269</sup> With its focus on fixed income investments, Breckinridge is particularly concerned with risk mitigation and has found that ESG factors may identify risks that do not surface in the traditional credit process.<sup>270</sup> Mr. Elfner explained that the result of ESG factor analysis is a “better, more comprehensive, forward looking assessment of a debt issuer’s creditworthiness. Additionally, Breckinridge believes that a company or

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263. *Id.* at 14. As of 2014, 480 registered investment companies incorporated ESG factors in their investment management. The amount managed in the ESG funds more than tripled from 2012 to 2014. *Id.*

264. RUSSELL INVESTMENTS, *About Russell*, <http://www.russell.com/us/about-russell/default.page> (last visited March 14, 2016).

265. RUSSELL INVESTMENTS – RESPONSIBLE INVESTMENTS, <http://www.russell.com/us/about-russell/corporate-responsibility/responsible-investment.page> (last visited March 14, 2016).

266. *Id.*

267. Beckinridge, *Learn More About Our ESG Approach*, FAST.WISITA (Apr. 19, 2016), <http://fast.wistia.net/embed/iframe/2sy4yochuj>.

268. *Id.*

269. *Id.*

270. *Id.*

municipality that works to manage its material ESG risks may be a more stable credit and a better long-term investment.”<sup>271</sup>

Goldman Sachs integrates ESG analysis into its financing, investing, and asset management work, and applies ESG considerations in how it runs itself.<sup>272</sup> The firm established an Environmental Policy Framework in 2005, and its Board continues to review the framework.<sup>273</sup> Under the framework Goldman has “committed to deploy our people, capital and ideas to help find effective market-based solutions to environmental issues.”<sup>274</sup> To that end, Goldman finances, co-invests, and serves as a financial advisor for a variety of clean energy transactions.<sup>275</sup> Goldman also incorporates ESG analysis in its own business structure, for example by reducing the carbon footprint of its offices,<sup>276</sup> and uses ESG factor analysis in work for asset management clients. The website for Goldman Sachs Asset Management<sup>277</sup> explains:

[W]e believe responsible and sustainable investing extends beyond the evaluation of quantitative factors and traditional fundamental analysis. Where material, it should include the analysis of an entity’s material impact on its stakeholders, the environment and society. We recognize that these environmental, social and governance (ESG) factors can affect investment performance, expose potential investment risks and provide an indication of management excellence and leadership. As a result, it is important for our investment professionals to understand how environmental, social and governance factors influence our

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271. *Id.* Email from Kristin Wetherbee to author (Feb. 12, 2016).

272. *See* GOLDMAN SACHS, ENVIRONMENTAL, SOCIAL, AND GOVERNANCE IMPACT REPORT, <http://www.goldmansachs.com/citizenship/esg-reporting/index.html> (last visited May 21, 2015). Goldman began publishing an Environmental Report in 2006. It became an Environmental, Social and Governance Report in 2010. *Id.*

273. GOLDMAN SACHS, OUR IMPACT DRIVES GLOBAL PROGRESS: SELECTED HIGHLIGHTS FROM 2012 ESG REPORT, (2012), *available at* <http://www.goldmansachs.com/citizenship/esg-reporting/esg-2012-highlight-pdf-report.pdf>. Board engagement reflects a high-level commitment to the environmental framework. Goldman also prepares a governance report each year, following the G3 reporting framework.

274. *Id.*

275. *Id.* at 2–3.

276. *Id.* at 4 (describing Goldmans’s operational impact).

277. As an investment firm Goldman Sachs engages in investment banking, securities work, investing and lending, and investment management. GSAM is one of two divisions within investment management; the other is private wealth management. Thus, GSAM is the core of Goldman Sachs’ investment management work, not a separate “socially responsible” division. *See* GOLDMAN SACHS, <http://www.goldmansachs.com> (last visited May 21, 2015).

investment decisions. To this end, GSAM is working to more formally integrate the analysis of these factors into our investment processes, where appropriate and consistent with our fiduciary duties.<sup>278</sup>

Goldman views its use of ESG in part as “good citizenship” as indicated by the discussion of ESG in the citizenship link on the website, but as the quoted passage explains, Goldman’s asset managers view ESG analysis as an important tool to improve results for clients.

BNY Mellon makes its own corporate social responsibility a central part of its explanation of “who we are.” The firm files a CSR report annually,<sup>279</sup> and says that it is expanding its social responsibility “beyond our already strong employee engagement, environmental stewardship and community commitments.”<sup>280</sup> BNY Mellon uses the term “social finance” to mean “investment activities that include both financial and significant social and/or environmental impact.”<sup>281</sup> BNY Mellon has created a framework that integrates ESG factors into investment decisions and includes environmental finance, impact investing, and development finance. The website notes: “Social finance has increasing value for mainstream investors because it can provide a sustainable set of tools to help manage investment risk, diversify portfolios and support long-term financial performance.”<sup>282</sup> The description of social finance recognizes that some investors want to build their investments around their social and environmental values, but also notes that for mainstream investors “we believe there’s untapped market potential in social finance.”<sup>283</sup>

One more example is Mirova, a subsidiary created by the international investment firm, Natixis Asset Management.<sup>284</sup> In 2013 Natixis established

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278. *Responsible and Sustainable Investing*, GOLDMAN SACHS, <http://www.goldmansachs.com/s/esg-impact/governance/responsible-and-sustainable-investing/>. Goldman became a signatory of the U.N. Principles for Responsible Investing in 2011. *Id.*

279. *See* 2013 ANNUAL CSR REPORT, BNY MELLON, <https://www.bnymellon.com/us/en/who-we-are/social-responsibility/2013-annual-report.jsp> (last visited May 21 2015).

280. *Corporate Social Responsibility*, BNY MELLON, <https://www.bnymellon.com/us/en/who-we-are/social-responsibility/index.jsp> (last visited May 21, 2015).

281. *Social Finance*, BNY MELLON, <https://www.bnymellon.com/us/en/who-we-are/social-finance/index.jsp> (last visited May 21, 2015).

282. *Id.*

283. *Id.*

284. *Natixis Asset Management announces the creation of Mirova, a management company*, MIROVA (Jan. 6 2014), available at <http://www.mirova.com/Content/Documents/Presse/va/PR%20Mirova.pdf>.

Mirova as an investment division focused on responsible investment.<sup>285</sup> Then in January 2014 Natixis moved the division into a management company called Mirova, a wholly owned subsidiary.<sup>286</sup> The creation of the subsidiary reflects the desire “to accelerate the development of its responsible investment activities.”<sup>287</sup> Mirova seeks to offer “a new approach to responsible investment” and its “philosophy is based on the conviction that integrating sustainable development themes can generate solutions that create value for investors over the long term.”<sup>288</sup>

The websites and other materials produced by these investment firms provide examples of the integration of ESG factors into their investment analysis and other work. The websites provide evidence of the growing interest large investment firms have in ESG analysis and its potential to improve financial results for their clients.<sup>289</sup>

3. *Financial Analysts Use ESG Factors.* – In addition to managing and promoting SRI funds to investors interested in social responsibility and sustainability,<sup>290</sup> investment firms increasingly seek extra-financial information disclosed by companies to make better financial decisions.<sup>291</sup> A study published in 2011 by Robert G. Eccles, Michael P. Krzus, and George Serafeim found a high level of market interest in ESG disclosure, based on an analysis of “hits” accessing extra-financial metrics in the Bloomberg database during three bimonthly periods in late 2010 and early

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285. *See id.*

286. *See id.*

287. *See id.*

288. *See* MIROVA – PHILOSOPHY, <http://www.mirova.com/EN-INT/mirova/Philosophy> (last visited Mar. 14, 2016).

289. The selection of these investment firms does not reflect research on all investment firms. Another firm, Morgan Stanley, integrates ESG investing less directly, listing it as a separate entry, separate from wealth management and investment management, but recognizes its growing importance to clients. The website includes “sustainable investing” as a link under a list of “what we do.” MORGAN STANLEY, <http://www.morganstanley.com> (last visited May 21, 2015). The firm has established an Institute of Sustainable Investing, which has produced a number of short articles, including one called “Sustainable Investing Enters the Mainstream.” That article notes: “Today’s sustainable investors do not expect to compromise financial return for positive environmental and social impact.” SUSTAINABLE INVESTING ENTERS THE MAINSTREAM, MORGAN STANLEY, <http://www.morganstanley.com/ideas/sustainable-investing-enters-mainstream/> (last visited May 21, 2015).

290. Client demand is certainly an incentive for the development of ESG investing resources.

291. Robert G. Eccles, Michael P. Krzus & George Serafeim, *Market Interest in Nonfinancial Information*, (Harv. Bus. School, Working Paper 12-018 at 1, 2011) (providing information about market interest in ESG data at a “granular” level).

2011.<sup>292</sup> Their report suggests that investors may be interested in transparency concerning ESG performance and policies as a way to understand whether companies are using that extra-financial information.<sup>293</sup> In addition, the authors' hypothesize that the market perceives less risk in transparent companies, because there is less uncertainty about them.<sup>294</sup> The companies are better positioned to deliver on expected performance if they are "using effective ESG management to capture revenue-generating opportunities, achieve cost savings, and minimize the downside of failures, fines, and lawsuits."<sup>295</sup>

Transparency and governance information also appear to be used as a proxy for good management,<sup>296</sup> because "more capable executives are confident in providing more performance information for which they are held accountable."<sup>297</sup> Investors may be relying in part on research that shows the connection between governance and firm performance,<sup>298</sup> and in part on management's ability to address ESG factors to the long-term benefit of the company.<sup>299</sup>

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292. *Id.* at 6. The Bloomberg database contains 247 extra-financial metrics, which the study grouped into five categories: disclosure scores, environmental metrics, social metrics, governance metrics, and Carbon Disclosure Project data. Bloomberg calculates the disclosure scores based on how many of the other metrics a company reports. *Id.* The study answers the question: "What specific types of nonfinancial information are being used by investors?" *Id.* To do so the study compares data from the global and U.S. markets, across different components of ESG, and across asset classes and firm types. *Id.* at 15.

293. Eccles, *supra* note 291, at 7. The paper explains, "While these disclosure scores are not specific performance metrics, they indicate the degree to which a company is using and reporting on nonfinancial information." *Id.* Another paper, *see also* RCM SUSTAINABILITY WHITE PAPER, *supra* note 86, reports that analysts rated "high-visibility companies with evolved ESG policies" higher than other companies, and that "high-visibility businesses with poor ESG ratings were disproportionately penalized."

294. Eccles et al., *supra* note 291, at 7.

295. *Id.*

296. UNEP-FI & MERCER, *supra* note 74, at 50–51.

297. Eccles et al., *supra* note 291, at 10.

298. *Id.* The article describes the existence of "[a] long and significant stream of literature and research findings on the implications of governance for firm performance and riskiness. *Id.* at 1 (citing Marco Becht, Patrick Bolton & Ailsa Roell, *Corporate Governance and Control*, in G.M. CONSTANTINIDES, M. HARRIS & R. M. STULZ (ED.), *HANDBOOK OF THE ECONOMICS OF FINANCE* 1 (2003).

299. Eccles et al., *supra* note 292, at 2 ("transparency around ESG performance and policies is used as a proxy for management quality and the potential for the management to grow profitably the business in the future."). *See also* GOLDMAN SACHS, <http://www.goldmansachs.com> (last visited May 22, 2015). Although ESG factors often relate to long-term performance, the UNEP-FI study found that consideration of long-term investment factors may provide guidance on short-term investment volatility. *See* UTEP-FI & MERCER, *supra* note 74, at 51 (citing J. Hudson

Overall, analysts increasingly rate companies with strong CSR ratings higher than those without strong CSR ratings.<sup>300</sup> Ioannis Ioannou and George Serafeim studied sell-side analysts' stock recommendations for a large sample of companies from 1993-2007<sup>301</sup> and found a change in the analysts' views of CSR ratings over that period of time.<sup>302</sup> In the early years of the study, companies with relatively high CSR ratings received less favorable recommendations than other companies.<sup>303</sup> The authors attribute this finding to the fact that analysts were influenced by the then prevailing agency theory, which saw CSR policies as serving non-shareholder stakeholders and destroying shareholder wealth.<sup>304</sup> In the later years of the study, analysts' recommendations for companies with high CSR ratings shifted to less pessimistic and eventually to optimistic recommendations.<sup>305</sup> The authors attribute this shift to a change in the perceptions of CSR for both shareholders and analysts.<sup>306</sup> The authors explain that by the end of the period of the study CSR had been re-interpreted "as a legitimate part of corporate strategy, minimizing operational risks and even contributing positively towards long-term financial performance."<sup>307</sup> In an interesting related finding, the authors showed that analysts with more experience or higher status were likely to adjust their assessments of CSR ratings more quickly than other analysts.<sup>308</sup>

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& S. Knott, *Alternative alpha: Infrastructure – The long view*, UBS INVESTMENT RESEARCH (2006)). The report noted that this finding could indicate "that dealing properly with ESG issues could have a positive contribution to financial risk mitigation, hence, a proxy for good management." *Id.* (discussing a study published by Goldman Sachs in 2007: "Their research has discovered a strong link between the management's ability to address ESG issues and its ability to steer the company towards sustained growth and profitability and, accordingly, enhanced stock valuation.").

300. Ioannou & Serafeim, *supra* note 133.

301. *Id.* at 4.

302. The study used CSR ratings based on policies and practices adopted by corporations with respect to corporate governance, environmental and social issues. *Id.* at 4, 18.

303. *Id.* at 4.

304. The authors describe the analysts as influenced by the then prevailing agency theory which saw CSR policies as serving non-shareholder stakeholders and destroying shareholder wealth. They note the influence of Milton Friedman who wrote, in 1970 that "the social responsibility of the firm is to increase its profits". *Id.* at 7–8 (citing Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, NEW YORK TIMES MAGAZINE 32(13), 122–126 (1970)).

305. UNEP-FI & MERCER, *supra* note 74, at 4, 26–27.

306. *Id.* at 3.

307. *Id.* at 12.

308. *Id.* at 27.

4. *U.N. Principles for Responsible Investment*. – The Principles for Responsible Investment (PRI) provide additional evidence of investor interest in ESG investing.<sup>309</sup> Convened by the U.N. Secretary-General, a group of international institutional investors developed the Principles in 2006.<sup>310</sup> The preamble states:

As institutional investors we have a duty to act in the best long-term interests of our beneficiaries. In this fiduciary role, we believe that environmental, social, and corporate governance (ESG) issues can affect the performance of investment (to varying degrees across companies, sectors, regions, asset classes and through time). We also recognise that applying these Principles may better align investors with broader objectives of society.<sup>311</sup>

Over 1300 institutions have signed the Principles,<sup>312</sup> agreeing to “incorporate ESG issues into investment analysis and decision-making processes,”<sup>313</sup> to incorporate ESG issues into active ownership practices, to seek appropriate disclosure on ESG issues, and to promote the implementation of the Principles.<sup>314</sup> The Principles encourage investors to consider ESG factors as part of a conventional investment analysis.

#### E. Sustainability Reporting and Integrated Reporting

Investors, customers, and other stakeholders increasingly request extra-financial as well as financial information about companies.<sup>315</sup> In response,

309. *The Six Principles*, U.N. PRINCIPLES FOR RESPONSIBLE INVESTING, <http://www.unpri.org/about-pri/the-six-principles/> (last visited May 22, 2015).

310. *Id.*

311. *Id.*

312. *Signatories to the Principles for Responsible Investing*, U.N. PRINCIPLES FOR RESPONSIBLE INVESTING, <http://www.unpri.org/signatories/signatories/> (last visited Feb. 4, 2016). There are three signatory categories: asset owners (304), investment managers (969), and professional service partners (203). *Id.* Russell Investments, Breckinridge Capital Advisors, Goldman Sachs Asset Management, Mellon Capital Management Corporation, and Mirova are signatories in the investment manager’s category. *Id.*

313. *The Six Principles*, *supra* note 309. This is the first of six Principles.

314. *The Six Principles*, *supra* note 309.

315. *2012 Corporate ESG/Sustainability/Responsibility Reporting – Does It Matter?*, GOVERNANCE AND ACCOUNTABILITY INSTITUTE 3, [http://www.gainstitute.com/fileadmin/user\\_upload/Reports/SP500\\_-\\_Final12-15-12.pdf](http://www.gainstitute.com/fileadmin/user_upload/Reports/SP500_-_Final12-15-12.pdf) (last visited May 22, 2015) at 5–6; Eccles et al., *supra* note 291, at 4; MIKE KRZUS, BRIAN BALLOU & DAN L. HEITGER, *THE ECONOMICS OF SUSTAINABILITY INITIATIVES 2* (2013), available [at http://www.aicpa.org/interestareas/frc/assuranceadvisoryservices/downloadabledocuments/whitepaper\\_economics\\_of\\_sustainability\\_initiatives.pdf](http://www.aicpa.org/interestareas/frc/assuranceadvisoryservices/downloadabledocuments/whitepaper_economics_of_sustainability_initiatives.pdf).



the numbers of companies reporting on ESG factors has risen sharply in recent years.<sup>316</sup> As already noted, analysts use transparency as a proxy for good management, so companies that do not report will increasingly be at a disadvantage.<sup>317</sup> Thus, reporting that includes extra-financial information will continue to increase. Indeed, Robert G. Eccles, Michael P. Krzus, and George Serafeim predict an exponential increase in interest in ESG reporting “as more companies disclose more nonfinancial information, as more knowledge is developed by research and teaching programs in business schools and as more sophisticated valuation models are developed by investors . . . .”<sup>318</sup>

Sustainability reporting refers to reporting by a company about its environmental, social, and economic impacts.<sup>319</sup> Sustainability reporting began in a somewhat piecemeal fashion, but growing interest led to the development of a framework and guidelines. CERES, the Coalition for Environmentally Responsible Economies, working with the Tellus Institute, took the lead.<sup>320</sup> In the early 1990s, advisors connected with

316. The Governance and Accountability Institute reports that as of 2012 more than half the S&P 500 companies disclosed ESG information. The number increased from 19-20% of S&P 500 companies in 2010 to 53% in 2012. GOVERNANCE AND ACCOUNTABILITY INSTITUTE, *supra* note 315; *see also* Eccles et al., *supra* note 291, at 1; *Sustainability Reporting – The Time is Now*, EY & GRI, [http://www.ey.com/Publication/vwLUAssets/EY-Sustainability-reporting-the-time-is-now/\\$FILE/EY-Sustainability-reporting-the-time-is-now.pdf](http://www.ey.com/Publication/vwLUAssets/EY-Sustainability-reporting-the-time-is-now/$FILE/EY-Sustainability-reporting-the-time-is-now.pdf) (last visited May 23, 2015) at 11 (“Growth in reporting has been driven in large part by the out-performance of those companies that do report.”).

317. *See supra* Part IV.D; *see also* EY & GRI, *supra* note 316, at 4, 21 (“Failure to engage with the reporting process could have a negative impact on performance, reputation, and even the ability to raise capital.”); *see also* Eccles et al., *supra* note 291 (showing that analysts use transparency as a proxy for good management); Krzus, Ballou & Heitger, *supra* note 315, at 3 (“effective use of relevant, reliable nonfinancial reports represents an opportunity for organizations to enhance trust and create value with shareholders and key stakeholders.”).

318. Eccles et al., *supra* note 291, at 15.

319. The Global Reporting Initiative (GRI) defines sustainability reporting as follows:

A sustainability report is a report published by a company or organization about the economic, environmental and social impacts caused by its everyday activities.

A sustainability report also presents the organization’s values and governance model, and demonstrates the link between its strategy and its commitment to a sustainable global economy.

*Sustainability Reporting*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/information/sustainability-reporting/Pages/default.aspx> (last visited May 22, 2015).

320. *See Sustainability Reporting: Ceres Catalyzes a Worldwide Movement*, CERES (Mar. 2014), <http://www.ceres.org/about-us/our-history/sustainability-reporting-ceres-catalyzes-a-worldwide-movement>; *What Is GRI?*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/information/about-gri/what-is-GRI/Pages/default.aspx>

CERES began developing a framework for environmental reporting, and in 1997 CERES created the Global Reporting Initiative (GRI).<sup>321</sup> As work on the initiative continued, the scope expanded to include social, governance and economic reporting.<sup>322</sup> GRI issued the first Sustainability Reporting Framework, with Reporting Guidelines, in 2000.<sup>323</sup> At that time, CERES separated from GRI and GRI became a separate international nonprofit organization.<sup>324</sup> GRI's mission is to "to make sustainability reporting standard practice for all companies and organizations."<sup>325</sup> GRI has continued to update the Reporting Framework, and issued the most recent version of its Sustainability Reporting Guidelines, G4, in May 2013.<sup>326</sup>

Integrated reporting is the merging of financial and extra-financial information about a company based on an assumption that both financial and extra-financial information are needed to assess a company's true value.<sup>327</sup> While sustainability reporting focuses on the extra-financial data, integrated reporting presents all data relevant to a company in one report.<sup>328</sup> Integrated reporting can assist those who manage a company to link long-

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(last visited May 22, 2015).

321. See *Sustainability Reporting: Ceres Catalyzes a Worldwide Movement*, CERES (Mar. 2014), <http://www.ceres.org/about-us/our-history/sustainability-reporting-ceres-catalyzes-a-worldwide-movement>.

322. *Id.*

323. *Id.*

324. *Id.* GRI is now based in Amsterdam, The Netherlands, and has regional offices in Australia, Brazil, China, India, South Africa, and the United States. Its most recent biannual conference, held in 2013, drew 1500 delegates from 69 countries. *Id.*

325. *About GRI*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/information/about-gri/Pages/default.aspx> (last visited May 22, 2015).

326. *What Is GRI?*, *supra* note 320.

327. See *Integrated Reporting: Tips for Organizations*, EY, <http://www.ey.com/GL/en/Services/Specialty-Services/Climate-Change-and-Sustainability-Services/EY-integrated-reporting-tips-for-organizations> (last visited May 22, 2015) (explaining: "Intangible assets have gone from accounting for just 17% of market value in 1975 to 80% in 2010.").

328. See ROBERT G. ECCLES & MICHAEL P. KRZUS, *ONE REPORT: INTEGRATED REPORTING FOR A SUSTAINABLE STRATEGY* (2010) (describing the "emerging trend" of integrated reporting" and the value it can bring to a company, its shareholders, and its other stakeholders). See also ROBERT G. ECCLES & MICHAEL P. KRZUS, *THE INTEGRATED REPORTING MOVEMENT: MEANING, MOMENTUM, MOTIVES, AND MATERIALITY* (2014) (examining the evolution of integrated reporting, explaining the current frameworks and standards, and making recommendations for effective implementation); J.C. Jensen & N. Berg, *Determinants of Traditional Sustainability Reporting Versus Integrated Reporting. An Institutional Approach*, 21 BUS. STRAT. ENV. 299–316 (2012) (comparing companies that use sustainability reporting with those that use integrated reporting, against the backdrop of country-level determinants).

term strategies with environmental, social, and financial objectives. Integrated reporting has been defined as follows:

An integrated report is a concise communication about how an organization's strategy, governance, performance and prospects, in the context of its external environment, lead to the creation of value in the short, medium, and long term.<sup>329</sup>

The International Integrated Reporting Council (IIRC), "a global coalition of regulators, investors, companies, standard setters, the accounting profession and NGOs,"<sup>330</sup> was created to develop a globally accepted reporting framework that would integrate information about the creation of value over time into one concise report.<sup>331</sup> The initial version of its International Integrated Reporting <IR> Framework was released in December 2013. This framework incorporates six types of capital: financial, manufactured, human, social and relationship, intellectual and natural, and it provides Guiding Principles and Content Elements,<sup>332</sup> but it does not establish measurement and reporting standards.

A company can use the Generally Accepted Accounting Principles (GAAP) for financial information included in an integrated report. For extra-financial information, the Climate Change Reporting Framework<sup>333</sup> developed by the Climate Disclosure Standards Board and the G4 Guidelines provide guidance on disclosures but do not provide reporting standards. The Sustainability Accounting Standards Board (SASB),<sup>334</sup> created in July 2011,<sup>335</sup> has already developed seven standards for sustainability information for seven sectors and will finish the remaining

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329. The International Integrated Reporting Council (IIRC), *The International <IR> Framework*, at 7 (2013), <http://integratedreporting.org/wp-content/uploads/2013/12/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf>.

330. *The IIRC*, <http://integratedreporting.org/the-iirc-2/> (last visited July 22, 2015).

331. *Id.*; see also Robert G. Eccles & George Serafeim, *A Tale of Two Stories: Sustainability and the Quarterly Earnings Call*, 25 J. APPLIED CORP. FIN. 66 (Summer 2013) (explaining that The Prince's Accounting for Sustainability Project (A4S) and the GRI collaborated to create the IIRC).

332. International Framework, *supra* note 329, at 4–5.

333. See *CDSB Reporting Framework*, CLIMATE DISCLOSURE STANDARDS BOARD, <http://www.cdsb.net/cdsb-reporting-framework> (2013).

334. SASB has been accredited to establish sustainability standards by the American National Standards Institute (ANSI). SASB's website states: "The mission of SASB is to develop and disseminate sustainability accounting standards that help public corporations disclose material, decision-useful information to investors." *Vision and Mission*, SUSTAINABILITY ACCOUNTING STANDARDS BOARD, <http://www.sasb.org/sasb/vision-mission/> (last visited May 23, 2015).

335. See *id.*

standards by 2016.<sup>336</sup> These standards are industry-specific, and create performance metrics and a process for determining materiality of issues.<sup>337</sup>

Although a standardized reporting format that captures extra-financial data has not been available, increasing numbers of companies provide some form of sustainability reporting or integrated reporting.<sup>338</sup> The reports assist investors and other stakeholders in understanding a company's progress and overall strategy<sup>339</sup> and assist companies in developing sustainability strategies that can be incorporated into business operations.<sup>340</sup> In a poll taken by people attending GRI's Global Conference on Sustainability and Reporting a majority of respondents said that principal objectives of a sustainability strategy were "to add value" and "to identify and mitigate risks."<sup>341</sup> Business reasons, including financial benefits, appear to be leading to greater use of sustainable and integrated reporting

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336. See SUSTAINABILITY ACCOUNTING STANDARDS BOARD, <http://www.sasb.org/standards/status-standard/> (last visited May 23, 2015); *Vision and Mission*, SUSTAINABILITY ACCOUNTING STANDARDS BOARD, <http://www.sasb.org/sasb/vision-mission/> (last visited May 23, 2015).

337. See *Conceptual Framework*, SUSTAINABILITY ACCOUNTING STANDARDS BOARD 3-4, <http://www.sasb.org/wp-content/uploads/2013/10/SASB-Conceptual-Framework-Final-Formatted-10-22-13.pdf> (last visited May 23, 2015). "SASB standards are designed for disclosure in mandatory filings to the Securities and Exchange Commission (SEC), such as the Form 10-K and 20-F." *Id.* at 3.

338. See *The KPMG Survey on Corporate Responsibility Reporting 2013*, KPMG (2013), <http://www.kpmg.com/global/en/issuesandinsights/articlespublications/corporate-responsibility/pages/corporate-responsibility-reporting-survey-2013.aspx>. The survey found that 71% of companies worldwide reported on corporate responsibility or sustainability, and 93% of the world's 250 largest companies reported. *Id.* at 22. Of those reporting, 78% of worldwide companies and 82% of the largest 240 companies refer to the GRI reporting guidelines. *Id.* at 12. The companies surveyed were the largest 100 companies in each of 41 countries. *Id.* at 21. The increases in reporting are driven in part by growing numbers of mandatory reporting policies, both government and stock exchange. See KPMG, United Nations Environment Programme, Global Reporting Initiative and Unit for Corporate Governance in Africa, *Carrots and Sticks, Sustainability Reporting Policies Worldwide* (2013) (reporting on mandatory and voluntary reporting policies in 45 countries); Initiative for Responsible Investment, *Corporate Social Responsibility Disclosure Efforts By National Governments and Stock Exchanges* (The Hauser Inst. for Civil Soc'y, Working Paper, 2014) (updated quarterly) (collecting information about disclosure initiatives of regulatory authorities and stock exchanges around the world).

339. As the EY and GRI report concluded: "Once reporting has become standardized and easy to compare, there is little doubt that performance indicators on sustainability issues will become as important for business as financial performance." EY & GRI, *supra* note 316, at 4.

340. *The KPMG Survey on Corporate Responsibility Reporting 2013*, *supra* note 338, at 10 ("CR reporting is the means by which a business can understand both its exposure to the risks of these [environmental and social] changes and its potential to profit from the new commercial opportunities.").

341. EY & GRI, *supra* note 316, at 7.

as a means of improving companies' responses to ESG issues. Allen White, co-founder of GRI, claims: "Sustainability reporting has gone from the extraordinary, to the ordinary, to the expected."<sup>342</sup>

Firms that assist companies with preparing financial statements now actively market their ability to assist with integrated reporting.<sup>343</sup> For example, the website of Ernst & Young (now EY) includes information on integrated reporting and sustainable reporting and states: "Integrated reporting has been created to better articulate the broader range of metrics that contribute to long-term value . . . ." <sup>344</sup> EY explains that in order to create sustainable value, organizations must be able to adapt to "challenges and opportunities in their environments" and must demonstrate the ability to manage their intangible assets effectively.<sup>345</sup> Thus, investors will benefit from the information provided, and companies will benefit because by engaging in sustainability reporting a company will be better able to develop "a sustainable strategy (that is, a coherent plan to balance long term viability—for the benefit of both shareholders and society—with demands for short term competitiveness and profitability.)"<sup>346</sup>

#### V. CAN THE FIDUCIARIES OF A UNIVERSITY ENDOWMENT USE ESG INVESTING?

This article has reported on substantial empirical findings that ESG factors, if properly included with conventional financial analysis as part of an overall investment policy, will not necessarily adversely affect fund performance and may improve returns on a risk-adjusted basis. With those results in mind, the article returns to the question of the fiduciary duties of those who manage university endowments. Can an endowment's investment policy include ESG investing as a strategy? To answer that question this section returns to the fiduciary duties of loyalty and care,

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342. *Id.* at 21. As founder of GRI Mr. White has reason to promote sustainability reporting, and as an accounting firm seeking new business, so does EY.

343. A report by GRI found that the number of U.S. firms publishing externally assured GRI-based GRI reports rose from 10% in 2011 to 16% in 2013. *Trends in External Assurance of Sustainability Reports*, GRI at 4–5 (July 2014), [http://www.gainstitute.com/fileadmin/user\\_upload/Reports/GRI\\_Trends-in-External-Assurance-of-Sustainability-Reports\\_July-2014.pdf](http://www.gainstitute.com/fileadmin/user_upload/Reports/GRI_Trends-in-External-Assurance-of-Sustainability-Reports_July-2014.pdf). Globally, 45% of GRI reports were externally assured in 2013. *Id.*

344. Integrated Reporting: Tips for Organizations, *supra* note 327. EY, in association with the Global Reporting Initiative, produced a report titled: *Sustainability Reporting – The Time is Now*, *supra* note 316 (assessing the status of sustainability reporting and concluding that it has moved into the mainstream).

345. *See id.*

346. KRZUS, BALLOU & HEITGER, *supra* note 315 at 1.

specifically considering the issue of whether using ESG factors in investing could somehow be considered a breach of either of those duties.

#### A. Duty of Loyalty

The fiduciaries of a university have a duty of loyalty to act in the best interests of the university. Similarly, the fiduciaries of a separately managed university endowment have a duty of loyalty to the endowment, and therefore to the university it supports. A comment to UPIA suggests that a trustee might breach the duty of loyalty by engaging in SRI or ESG investing. An analysis of that Comment in the context of the current understanding of SRI explains why fiduciaries should not be concerned about a potential breach of the duty of loyalty.

The Comment to UPIA states:

No form of so-called “social investing” is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries—for example, by accepting below-market returns—in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause.<sup>347</sup>

This Comment made sense in the context of 1992 when the Uniform Law Commission promulgated UPIA. At that time, SRI was in its early stages and attention had focused on South African divestment screens. Little empirical evidence existed about returns on SRI funds, and the assumption was that restrictions on diversification would lead to lower returns.<sup>348</sup> John Langbein, the Reporter for UPIA and therefore the author, with the Drafting Committee of UPIA, of the Comments, had co-authored an article arguing that SRI as practiced at the time could breach the duty of loyalty.<sup>349</sup>

The UPIA Comment should not be read to preclude SRI as practiced today. The Comment’s concerns focus on “sacrificing the interests of trust beneficiaries . . . by accepting below-market returns.” The studies described in this article<sup>350</sup> have shown that below-market returns are not an inevitable consequence of ESG investing or SRI more generally, as was thought at the time Professor Langbein wrote the Comment. Thus, neither the Comment nor the earlier article by Professors Langbein and Posner should be of concern to a fiduciary considering ESG investing.

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347. UNIF. PRUDENT INVESTOR ACT § 5 cmt. (1994).

348. *See supra* Part IV.A.

349. Langbein & Posner, *supra* note 10.

350. *See supra* Part IV.C.

### B. Duty of Care – Prudent Investor Standard

SRI has evolved from the 1980s when the early SRI strategies relied on negative screens. Over the years, SRI funds adopted best-in-class strategies and more recently ESG integration—the consideration of environmental, social, and governance factors as part of an overall investment strategy. The use of material extra-financial factors has become part of mainstream investment analysis, because investment managers understand that extra-financial factors provide a great deal of useful information about a company’s opportunities and risks, especially as a long-term investment.<sup>351</sup> A growing number of studies have shown that SRI funds perform as well as or better than non-SRI funds, and ESG factors have been shown to enable analysts to identify value that might not be reflected in conventional financial reports.<sup>352</sup> Demand for better and more easily digestible information has led to the development of new reporting frameworks and the SASB standards for sustainability information.<sup>353</sup> Companies have found financial benefits in developing sustainability strategies.<sup>354</sup>

The use of ESG factors in investment decision making is sufficiently widespread<sup>355</sup> that ESG integration can now be considered within the scope of what a prudent investor can do. Thus, a decision to incorporate ESG investing in an investment policy is consistent with a fiduciary’s duty to be a prudent investor. As investment strategies evolve, prudent fiduciaries

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351. See HARVARD MGMT. COMPANY, [http://www.hmc.harvard.edu/investment-management/sustainable\\_investment.html](http://www.hmc.harvard.edu/investment-management/sustainable_investment.html) (“Aligned with our mission to provide strong long-term investment results to Harvard University, we include material ESG criteria in our investment analysis and decision-making processes.”).

352. See *supra* Part IV.C. See also *Studies of Socially Responsible Investing*, SRISTUDIES.ORG, [www.sristudies.org](http://www.sristudies.org) (covering academic studies on SRI through 2010-11).

353. See *supra* Part IV.E.

354. A publication of EY’s Climate Change and Sustainability Services division describes sustainability reporting as a “best practice” of companies worldwide, and notes that 95% of the Global 250 issue sustainability reports. The publication lists benefits of sustainability reporting, including improved access to capital, increased efficiency, and waste reduction. Sustainability reporting can, in the view of the EY article, “prepare firms to avoid or mitigate environmental and social risks that might have material financial impacts on their business while delivering better business, social, environmental and financial value. . .” Of course the EY paper is written to encourage companies to use its services for GRI reporting. *The Value of Sustainability Reporting*, ERNST & YOUNG LLP, <http://www.ey.com/US/en/Services/Specialty-Services/Climate-Change-and-Sustainability-Services/Value-of-sustainability-reporting> (last visited May 28, 2015).

355. See Eccles et al., *supra* note 222.

will review their investment policies and consider whether revisions to include ESG investing are appropriate, based on current information.

### C. Guidance from Department of Labor

The fiduciaries who manage retirement plans governed by the Employer Retirement Income Security Act (ERISA) must act as prudent investors for the plans under fiduciary standards.<sup>356</sup> Guidance issued by the Department of Labor (DOL) in October 2015 confirms that fiduciaries can consider ESG factors without breaching their fiduciary duties.<sup>357</sup> The DOL issued the guidance in response to concerns expressed about ESG investing by pension plans,<sup>358</sup> and the new guidance should provide comfort to any fiduciary worried about whether a prudent investor can engage in ESG investing strategies.

In 1994, the DOL issued Interpretive Bulletin 94-1 to clarify that the fiduciary of a retirement plan could consider collateral economic or social benefits of investments in making decisions for the plan, so long as the financial returns of the investments were comparable to the expected returns of other investments available to the plan.<sup>359</sup> This and subsequent guidance also emphasized that the economic interests of plan participants always take priority over policy interests.<sup>360</sup> Plan assets cannot be used “to promote social, environmental, or other public policy causes at the expense of the financial interests of the plan’s participants and beneficiaries”<sup>361</sup> and fiduciaries cannot accept lower returns in order to promote policy interests.<sup>362</sup>

In 2008, the Department of Labor issued Interpretive Bulletin 2008-1, replacing IB 94-1.<sup>363</sup> The new bulletin said it did not change the basic legal principles of the earlier bulletin, but it stated that consideration of “collateral, non-economic factors” should be rare and well documented.<sup>364</sup>

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356. 29 U.S.C. § 1104(a)(1)(B) (2012) (restating the prudent person rule).

357. U.S. Dep’t of Labor, I.B. 2015-1. After listing various terms associated with investing for extra-financial purposes, including SRI and ESG investing, the 2015 guidance explains that it will use the term economically targeted investments (ETIs).

358. *Id.*

359. I.B. 1994-1, 59 FR 32606 (Jun. 23, 1994). The 2015 Bulletin explains that I.B. 1994-1 was issued “to correct a popular misperception at the time that investments in ETIs are incompatible with ERISA’s fiduciary obligations.” I.B. 2015-1.

360. I.B. 2015-1.

361. *Id.*

362. *Id.*

363. I.B. 2008-1, 73 Fed. Reg. 61,734 (Oct. 17, 2008) (codified at 29 C.F.R. § 2509.08-01 (2016)).

364. *Id.*



This statement led to concern that fiduciaries could not consider ESG factors, even if they improved financial returns.<sup>365</sup>

To address the confusion caused by IB 2008-1, the DOL has removed it and reinstated IB 94-1. The new guidance explains:

Environmental, social, and governance issues may have a direct relationship to the economic value of the plan's investment. In these instances, such issues are not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary's primary analysis of the economic merits of competing investment choices.<sup>366</sup>

The new guidance reflects the growing understanding of the role of ESG factors in an integrated investment strategy. Indeed, the guidance notes, "fiduciaries should appropriately consider factors that potentially influence risk and return."<sup>367</sup> Rather than discouraging consideration of ESG factors, the DOL wants to make clear that fiduciaries *should* consider these factors, when appropriate. The new guidance should reassure all fiduciaries, including those who serve university endowments.

#### D. Conclusion

In 2015 the Supreme Court confirmed that "a trustee has a continuing duty—separate and apart from the duty to exercise prudence in selecting investments at the outset—to monitor, and remove imprudent, trust investments."<sup>368</sup> The case reminds fiduciaries of university endowments to review and reconsider their investment policies periodically.<sup>369</sup> As they do so, fiduciaries must comply with the prudent investor standard and the duty of loyalty and must act with care and prudence on behalf of the endowments.

In a complex, constantly changing world having as much information as possible about risks and opportunities in investments should contribute to better investment performance. The DOL Bulletin reflects this view, suggesting that adding extra-financial factors to a robust financial analysis may reduce risks and improve financial results. The financial institutions described in Part IV.D have reached this conclusion as well.

As this article has explained, the prudent investor standard has evolved to include consideration of ESG factors. ESG investing cannot be

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365. IB. 2015-1.

366. *Id.*

367. *Id.*

368. *Tibble v. Edison Int'l*, 135 S Ct. 1823 (2015).

369. See Jay Youngdahl, *US Supreme Court Clears Way for Actions Against Fiduciaries Who Do Not Monitor Their Investments*, RESPONSIBLE-INVESTOR.COM (June 8, 2015), [https://www.responsible-investor.com/home/article/youngdahl\\_tibble/](https://www.responsible-investor.com/home/article/youngdahl_tibble/).

considered a breach of the duties of loyalty or care, so long as the factors are considered as part of an overall investment strategy with appropriate levels of risk and return. Thus, a fiduciary following the prudent investor standard can permit and encourage the use of ESG factors in investment decision making.<sup>370</sup>

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370. The Freshfields report concluded that, in the U.S. context, “there appears to be a consensus that, so long as ESG considerations are assessed within the context of a prudent investment plan, ESG considerations can (and, where they affect estimates of value, risk and return, should) form part of the investment decision-making process.” ASSET MANAGEMENT WORKING GROUP OF THE UNEP FINANCE INITIATIVE, *A Legal Framework for the Integration of Environmental, Social, and Governance Issues into Institutional Investment* 114 (2005). Germany requires the use of these criteria as part of the managers’ fiduciary duty. *Global CSR Disclosure Requirements*, INITIATIVE FOR RESPONSIBLE INVESTMENT, <http://hausercenter.org/iri/about/global-csr-disclosure-requirements> (last visited May 25, 2015).

# AN OVERVIEW OF THE RESEARCH MISCONDUCT PROCESS AND AN ANALYSIS OF THE APPROPRIATE BURDEN OF PROOF

GARY S. MARX\*

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## INTRODUCTION

The number of research misconduct cases faced by institutions has increased substantially over recent years.<sup>1</sup> The proffered explanations for this increase range from greater pressure on scientists to publish quickly to there simply being more emphasis in identifying research misconduct.<sup>2</sup>

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1. The Office of Research Integrity (ORI) is a component of the Office of the Assistant Secretary for Health in the Office of the Secretary, within the U.S. Department of Health and Human Services (HHS). The ORI's mission includes research misconduct investigations. The ORI's Annual Report for 2012 states as follows:

In 2012, the 6,714 funded institutions reported 323 allegations, inquiries, or investigations. The count in year 2012 is a record of what institutions submitted in their 2011 Annual Report, which is submitted to ORI in 2012. . . .; From all sources, ORI received 423 allegations in 2012, an increase of 56 percent over the 240 allegations handled in 2011, and well above the 1992-2007 average of 198; [The Division of Investigative Oversight's ] review process involved opening 41 new cases, closing 35, and carrying 45 cases into 2013. The number of open cases was the highest number in 16 years. \*\*\*In 2012, ORI made findings of research misconduct in 40 percent of the cases (14/29). In contrast, the historical average of this finding is 36 percent; Administrative actions imposed on those who committed research misconduct included: debarred 6 respondents for a varying number of years, prohibited 14 from working as advisors, and required 9 to be supervised in any PHS-supported research activity. OFFICE OF RESEARCH INTEGRITY, 2012 ANNUAL REPORT.

See also, Dr. Jim Kroll, Director, Research Integrity and Administrative Investigations Unit, NATIONAL SCIENCE FOUNDATION OFFICE OF INSPECTOR GENERAL, *NSF OIG: Stories from the Case Files* ("Kroll Presentation"), available at <http://www.slideserve.com/poppy/nsf-oig-stories-from-the-case-files-national-science-foundation-office-of-the-inspector-general> (contains statistics on NSF's research misconduct investigations). To assist the reader, there is an appendix setting forth the most common abbreviations used in this article.

2. A 2015 article in Science News noted that researchers are facing unprecedented funding challenges that put "scientist under extreme pressure to publish quickly and often." According to the article "[t]hose pressures may lead researchers to publish results before proper vetting or to keep hush about experiments that didn't pan out." Tina Hesman Saey, *Repeat Performance: Too Many Studies, When Replicated, Fail to Pass Muster*, 187 SCIENCE NEWS 21 (Jan. 24, 2015). In a PowerPoint presentation at the INORMS 2014 CONCURRENT SESSIONS, the presenters answered the question of why there is an increase in research misconduct cases at NSF by setting forth the following: "We have become better at catching it. Increased

“Research misconduct” is broadly defined to mean fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. For purposes of that definition: (a) “fabrication” is making up data or results and recording or reporting them;<sup>3</sup> (b) “falsification” is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record;<sup>4</sup> and (c) “plagiarism” is the appropriation of another person’s ideas, processes, results, or words without giving appropriate credit.<sup>5</sup> Research misconduct does not include honest error or differences of opinion.<sup>6</sup>

This article discusses the administrative process in research misconduct cases pursuant to regulations adopted by the Department of Health and Human Services (HHS) and by the National Science Foundation (NSF). It also analyzes key legal terms and discusses the burden of proof applied in research misconduct cases with a focus on those instances where HHS or NSF seek to debar the researcher from future government contracts or grants.

Consider the following simplified example.<sup>7</sup>

Dr. White was the principal investigator on Project X. Dr. Black was a post-doctoral researcher working with Dr. White. Dr. White’s team ran three complex and expensive experiments to test a particular hypothesis—Experiment 1, Experiment 2 and Experiment 3. Experiments 1 and 3 were consistent with the

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competition for limited resources; Technology makes it easier to cheat and to catch a cheat. High profile cases increase awareness. RCR training increases awareness. Government interaction with research communities raise awareness of our role in handling RM allegations.” NATIONAL SCIENCE FOUNDATION, OFFICE OF THE INSPECTOR GENERAL RESEARCH INTEGRITY AND ADMINISTRATIVE INVESTIGATIONS DIVISION, *Navigating the Research Misconduct Process: Observations from the U.S. National Science Foundation OIG* (2016), available at [tmcstrategies.net/wp-content/uploads/2016/04/NSF-OIG-Presentation.pptx](http://tmcstrategies.net/wp-content/uploads/2016/04/NSF-OIG-Presentation.pptx).

3. See, e.g., *Case Summary: Chen, Li*, OFFICE OF RESEARCH INTEGRITY, <http://ori.hhs.gov/chenli> (last visited May 29, 2016).

4. See, e.g., *Case Summary: Bijan, Ahvazi*, OFFICE OF RESEARCH INTEGRITY, <http://ori.hhs.gov/content/case-summary-ahvazi-bijan> (last visited May 29, 2016).

5. See, e.g., 20 OFFICE OF RESEARCH INTEGRITY NEWSLETTER 1, 7 (2011), available at [https://ori.hhs.gov/images/ddbblock/dec\\_vol20\\_no1.pdf](https://ori.hhs.gov/images/ddbblock/dec_vol20_no1.pdf). More information on plagiarism can be found at 26 *Guidelines at a Glance on Avoiding Plagiarism*, OFFICE OF RESEARCH INTEGRITY, <http://ori.hhs.gov/plagiarism-0> (last visited May 29, 2016).

6. 42 CFR § 93.103 (2015); 45 CFR § 689.1(a) (2015).

7. Use of the hypothetical is not intended to suggest that HHS or NSF would seek debarment in such a case. To the contrary, a review of HHS and NSF debarment cases indicates that the agencies seek debarment only when the evidence of misconduct is significantly stronger. Nevertheless, under the current regulations, nothing would preclude the agencies from seeking debarment even under the facts of the hypothetical.

hypothesis although the results of the experiments were not identical. The results of Experiment 2 were inconsistent with the hypothesis. Dr. White determined that Experiment 2 was flawed in some undetermined way. He decided not to repeat Experiment 2 because he felt it would be an unnecessary cost and unduly delay the publication of his report. Dr. Black, on the other hand, felt that Dr. White's decision not to repeat Experiment 2 was a mistake and he expressed his opinion to Dr. White. During the course of the project, Dr. White required Dr. Black to change statistical assumptions relating to certain tests and, as result of such changes, the results more strongly supported Dr. White's hypothesis than would otherwise have been the case. Dr. Black expressed his view to Dr. White that the manipulation of the assumptions could cause the report to not accurately represent the research record. Dr. White explained to Dr. Black why he felt the modifications were statistically justified based upon his experience. Dr. White determined that it was not worth the time and expense to retain a statistical expert to validate his decision. Eventually Dr. White published his report without reference to Experiment 2 or a discussion of the statistical assumptions challenged by Dr. Black. In Dr. Black's view, Dr. White's decisions were a significant departure from accepted practices.

The fact pattern here would seem to be one where the objective evidence is not completely clear as to whether Dr. White's decisions were appropriate. In the past, Dr. Black may have simply kept quiet as to Dr. White's report, accepting the dispute as merely an academic disagreement and one in which he should defer to Dr. White as the principal investigator. But today, with the greater emphasis being placed on research misconduct, Dr. Black may very well have felt warranted in filing a complaint with his institution asserting that Dr. White acted inappropriately.

Assuming Dr. Black filed a complaint against Dr. White, there would potentially begin a long and expensive process whereby the institution would investigate Dr. White's conduct and decision-making. Ultimately, the institution would have to make a judgment as to whether Dr. White acted inappropriately in excluding Experiment 2.<sup>8</sup> It would also have to

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8. See Dov Greenbaum, *Research Fraud: Methods For Dealing With An Issue That Negatively Impacts Society's View Of Science*, 10 COLUM. SCI. & TECH. L. REV. 61 (2009). Dr. Greenbaum noted the following:

Additionally, experienced scientists might drop outliers in their data or add in fudge factors, relying not on scientific rigor but on honed hunches, justifying the disposal of those points as spurious. Again, dropping data points without scientific justification may border on falsification of data, or not. The gut reaction, acceptable in many other areas of life, might be necessary when researching uncharted corners of science.

*Id.* See also, Raymond De Vries, Melissa S. Anderson, & Brian C. Martinson, *Normal Misbehavior: Scientists Talk about the Ethics of Research*, 1 J. EMPIRICAL RES. ON

determine if Dr. White's changes in his statistical assumptions constituted the falsification of data. To some degree, the institution's decision would depend upon the investigating committee's view of the credibility of Dr. White and Dr. Black and the communications between them.

As described below, after the institution completed its investigation and made its decision, its report would then be evaluated by the appropriate agency (typically HHS or NSF), which might undertake its own investigation and would make its own determination as to whether Dr. White's decisions constituted research misconduct. If Dr. White were found to have engaged in research misconduct, he could be debarred from receiving future government grants or contracts.

Under current regulations of HHS and NSF, the "preponderance of the evidence" standard would be applied to Dr. White's case. In other words, whether Dr. White would be found to have engaged in research misconduct would depend upon whether the factfinders determined that it was more likely than not that his decisions constituted research misconduct. As some courts have held, preponderance of the evidence means 50% of the evidence and "a feather."<sup>9</sup> Thus, in the foregoing hypothetical, Dr. White's

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HUM. RES. ETHICS 43, 45 (2006) (cited by Dr. Greenbaum) which quotes a researcher as follows:

One gray area that I am fascinated by . . . is culling data based on your 'experience' . . . [T]here was one real famous episode in our field . . . [where] it was clear that some of the results had just been thrown out . . . [When] queried [the researchers] . . . said, 'Well we have been doing this for 20 years, we know when we've got a spurious result . . . ' [When that happens] . . . [d]o you go back and double check it or do you just throw it out . . . [and] do you tell everybody you threw it out? I wonder how much of that goes on?

*Id.* See also, Dan L. Burk, *Research Misconduct: Deviance, Due Process, and the Disestablishment of Science*, 3 GEO. MASON INDEP. L. REV. 305, 333-34 (1995). Professor Burk stated:

The discord between the scientific and legal approaches to misconduct is well illustrated by the efforts of federal agencies to settle upon a proper definition of "misconduct." . . . The division between misconduct and legitimate science may be difficult to distinguish, and not even a mens res requirement such as "deliberate falsification" is sufficient to adequately distinguish the two. For example, consider the problem of selective reporting of data. The scientific report is by no means a stenographic or historical description of the research completed, nor is it meant to be. The scientist chooses carefully and deliberately what aspects of his research deserve to be reported. In doing so, he exercises the creativity that lies at the heart of science. . . . The essence of scientific genius is the ability to choose what ought to be left out.

*Id.*

9. *Colon v. Sec. Dept. Health and Human Services*, 2007 WL 268781 (Fed. Cl. 2007) (the preponderance of the evidence means "50% and a feather."). See also, *United States v. Restrepo*, 946 F.2d 654, 661 (9th Cir.1991) (Norris, J., dissenting), (en banc), cert. denied, 503 U.S. 961 (1992) (noting that preponderance standard "allows a fact to be considered true if the factfinder is convinced that the fact is more probably true than not, or to put it differently, if the factfinder decides there is a 50%-plus chance

future career may rest on that “feather.”<sup>10</sup> If, on the other hand, the standard of proof were “clear and convincing” evidence—the traditional common law standard in fraud cases—the factfinders would be required to have a much greater degree of certainty in their conclusion before finding that Dr. White engaged in research misconduct.<sup>11</sup>

This article acknowledges the strong public interest in research integrity. But, it suggests that there are constitutional arguments supporting the contention that the clear and convincing standard of proof (rather than the preponderance standard) is required in cases such as Dr. White’s, at least when the agencies seek to debar a researcher. And while the article concludes that the application of the preponderance standard is likely constitutional, it argues that the HHS and NSF’s regulations may nevertheless be invalid under the Administrative Procedures Act (“APA”).<sup>12</sup> It further suggests that, regardless of the legality of the current regulations, HHS and NSF should undertake rulemaking to evaluate whether the clear and convincing standard should be applied in research misconduct cases, especially where debarment is the proposed remedy.<sup>13</sup>

#### PART ONE

Part One of this article discusses the primary facts that must be established to support a finding of research misconduct, the applicable standard of proof, and the allocation of the burden of proof between the parties.

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that it is true”). Comment Note, *Instructions Defining Term “Preponderance or Weight of Evidence*, 93 A.L.R. 155 (originally published in 1934).

10. Roger Wood, *Scientific Misconduct – The High Cost of Competition*, INFOEDGE (Sept. 8, 2014), <http://researchadministrationdigest.com/high-cost-competition-scientific-misconduct/> (“The impact on individual researcher’s careers is more significant, with most – but not all – researchers found to have engaged in misconduct by the DHHS Office of Research Integrity experiencing a “severe decline in research productivity.”). Andrew M. Stern et al., *Financial Costs and Personal Consequences of Research Misconduct Resulting in Retracted Publications*, ELIFE (Aug. 14, 2014), <https://elifesciences.org/content/3/e02956> (“We found that in most cases, authors experienced a significant fall in productivity following a finding of misconduct”).

11. *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (“the possibility of mistaken factfinding [is] inherent in all litigation”); *Addington v. Texas*, 441 U.S. 418, 423 (1979) (It is because of the possibility of mistakes, the standard of proof “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”).

12. 5 U.S.C. § 706(2)(B) (2012).

13. *Id.*



#### A. What Evidence Is Required To Show Misconduct In Administrative Actions?

Under the regulations adopted by HHS and by NSF, the following evidence is required to establish research misconduct: (a) there must be a significant departure from accepted practices of the relevant research community, (b) the misconduct must be committed intentionally, knowingly, or recklessly; and (c) the allegation must be proven by a preponderance of the evidence.<sup>14</sup>

One threshold question is the meaning of “significant departure from accepted practices of the relevant research community.” The phrase is not defined in the HHS or NSF regulations. However, the limited judicial precedent discussing similar terminology suggests that it means more than a departure that could be explained by mere negligence. Rather, it is a degree of departure that in and of itself might suggest a fraudulent intent.<sup>15</sup> Applying the foregoing to Dr. White’s situation, the question would be whether his decisions relating to Experiment 2 and the modifications of his statistical assumptions were, even if incorrect, significantly at odds with the normative practices of his field.

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14. 42 CFR § 93.104 (2015); 45 CFR § 689.3(c) (2015). The NSF Regulations defines “research” to include proposals submitted to NSF in all fields of science, engineering, mathematics, and education and results from such proposals. 45 CFR § 689.1(a)(4) (2015). See also, *Public Health Service (PHS) Policies on Research Misconduct – 42 CFR Part 93 – June 2005*, U.S. DEPT. OF HEALTH & HUMAN SERVICES, THE OFF. OF RES. INTEGRITY, [http://ori.hhs.gov/FR\\_Doc\\_05-9643](http://ori.hhs.gov/FR_Doc_05-9643) (last visited May 30, 2016) (hereinafter referred to as the “PHS Regulations”); NATIONAL SCIENCE FOUNDATION, *Part 689—Research Misconduct*, available at [http://www.nsf.gov/oig/\\_pdf/cfr/45-CFR-689.pdf](http://www.nsf.gov/oig/_pdf/cfr/45-CFR-689.pdf) (hereinafter referred to as the “NSF Regulation”).

15. See *Collignon v. Milwaukee County*, 163 F.3d 982 (7th Cir. 1998); *Williams v. City of New York*, 508 F.2d 356 (2d Cir. 1974). When HHS adopted its current regulations, it noted that it was changing “serious deviation” to “significant departure” from the standards of the relevant research community. It expressed the following in explanation of this change:

We propose to revise slightly the burden for establishing research misconduct in three ways: First, in keeping with the OSTP policy, the proposed regulation would require that the FFP be a “significant departure” from accepted practices as opposed to ORI’s current standard of “serious deviation.” As discussed in the OSTP policy statement, the phrase “significant departure” intends to make clear that behavior alleged to invoke research misconduct should be assessed in the context of practices generally accepted by the relevant research community. As the current definition requires a serious deviation from practices generally accepted in the particular scientific community, we do not anticipate that this change in phraseology would alter the burden of proving or disproving research misconduct in any significant way. However, we specifically ask for comments on this issue.

Public Health Service Policies on Research Misconduct, 69 Fed. Reg. 20778, 20780 (Apr. 16, 2004).

A second question is whether the terms “intentional” and “knowingly” mean that the researcher must intend to deceive or simply intends to do an act that constitutes a significant departure from accepted practices of the relevant research community. In the 1993 case of Mikulas Popovic, M.D., PH.D.,<sup>16</sup> before what was then the Research Integrity Adjudications Panel of HHS, the panel indicated that there must be an affirmative intent to deceive (i.e., mens rea). ORI vehemently argued that this decision was in error.<sup>17</sup>

Under the current regulations, the importance of the researcher’s state of mind is somewhat unclear. HHS’s initial proposed regulation provided that the researcher had the burden of proving “honest error” as an affirmative defense. HHS received a number of objections contending that HHS and institutions should have the burden of proving the absence of “honest error.” HHS rejected this argument, reasoning that the Office of Science and Technology Policy’s Federal Policy on Research Misconduct (OSTP)<sup>18</sup> (on which the HHS Regulations were based), excluded honest error from the definition of research misconduct. Nevertheless, both HHS and NSF agree that the terms “misconduct or misconduct in science” do not include honest error or honest differences in interpretations or judgments of data.<sup>19</sup>

Thus, to the extent the term “honest error” can be interpreted to mean “an absence of fraudulent motive” neither HHS nor NSF are required to prove a fraudulent intent in order to make out a prima facie case. Instead, it is up to the researcher to try to convince the factfinder that he/she made an “honest error”. Thus, going back to Dr. White’s situation, it would be the view of HHS and NSF that the agencies (and Dr. White’s institution) are not required to determine Dr. White’s intent in making the decisions challenged by Dr. Black. Rather, the burden of proof would be on Dr. White to convince the factfinders that his decisions relating to Experiment

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16. Mikulas Popovic, DAB 1446 (1993), available at <http://www.hhs.gov/dab/decisions/dab1446.html> (The decision was under the 1989 HHS regulations that were superseded by the current regulations.).

17. OFFICE OF RESEARCH INTEGRITY, 2(1) ORI NEWSLETTER 1 (Dec. 1993), available at [http://ori.hhs.gov/images/ddblock/vol2\\_no1.pdf](http://ori.hhs.gov/images/ddblock/vol2_no1.pdf). For a discussion of early cases before the DAB see Alan R. Price, *Research Misconduct And Its Federal Regulation: The Origin And History Of The Office Of Research Integrity*, 20 ACCOUNTABILITY IN RES. 291, fn. 8 (2013), available at <http://www.tandfonline.com/doi/pdf/10.1080/08989621.2013.822238#.UkunjZ0o5eU> (hereinafter referred to as “Price Article”). The author of the Price Article, Alan Price, was from 1987 to 2006 an employee of the Federal Government, serving as a senior official of the Office of Scientific Integrity (1989-1992) and later the ORI (1992-2006).

18. *Federal Research Misconduct Policy*, OFFICE OF RESEARCH INTEGRITY, <http://ori.hhs.gov/federal-research-misconduct-policy> (last visited May 30, 2016) (hereinafter the “OSTP Policy”). For an interesting article on the history of the Office of Research Integrity of HHS see Price, *supra* note 17.

19. 42 CFR § 93.103 (2015); 49 CFR § 689.1(a) (2015).

2 and his statistical modifications constituted “honest error” if the factfinders otherwise conclude there was research misconduct. But regardless of who has the burden of proof on the issue, the honest error concept suggests that, at least to some degree, the researcher’s state of mind is a factor that must be considered in determining whether he/she acted intentionally or knowingly in engaging in the challenged conduct.<sup>20</sup>

Nevertheless, HHS continues to emphasize that “honest error is not included in the definition of research misconduct,” which suggests that it does not consider intent a component of research misconduct.<sup>21</sup> As noted by HHS, this view is supported by the OSTP Policy, which states in its Preamble:

*Issue:* Despite general support for the rationale for the phrase “does not include honest error or honest differences of opinion,” several comments requested various clarifications.

*Response:* This phrase is intended to clarify that simple errors or mere differences of judgment or opinion do not constitute research misconduct. The phrase does not create a separate element of proof. Institutions and agencies are not required to disprove possible “honest error or differences of opinion.”

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*Issue:* Several comments requested clarification regarding the level of intent that is required to be shown in order to reach a finding of research misconduct.

*Response:* Under the policy, three elements must be met in order to establish a finding of research misconduct. One of these elements is a showing that the subject had the requisite level of intent to commit the misconduct. The intent element is satisfied by showing that the misconduct was committed “intentionally, or knowingly, or recklessly.” Only one of these needs to be demonstrated in order to satisfy this element of a research misconduct finding.<sup>22</sup>

Of course, the term “reckless”—which is an independent basis for finding research misconduct—suggests something other than a requirement of “a mental state embracing intent to deceive, manipulate, or defraud” (i.e., scenter).<sup>23</sup> The 1989 federal regulation governing research

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20. For an article critical of the agencies’ approach to the issue of honest errors, see Jacqueline D. Wright Bonilla, *Illusory Protections for Those Accused of Scientific Research Misconduct: Need for Reform*, 16 J. TECH. L. & POL’Y 107 (2011).

21. *Update on the Philippe Bois Research Misconduct Case*, OFFICE OF RESEARCH INTEGRITY, <http://ori.hhs.gov/blog/update-philippe-bois-research-misconduct-case> (last visited May 30, 2016).

22. See OSTP Policy, *supra* note 18.

23. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n. 12 (1976) for the

misconduct did not expressly include the term “recklessness.” When those regulations were replaced in 2005,<sup>24</sup> HHS expanded the level of intent from “beyond an intentional and knowing standard to include recklessness.”<sup>25</sup> Therefore, the remaining question is what the term “recklessness” means if honest error is a defense to a claim of research misconduct.

Although the term “recklessly” is not defined in the regulations, it has been characterized in judicial opinions as an extreme version of ordinary negligence<sup>26</sup> or gross negligence plus.<sup>27</sup> On the other hand, courts have recognized that “the definition of ‘reckless behavior’ should not be a liberal one lest any discernible distinction between ‘scienter’ and ‘negligence’ be obliterated.”<sup>28</sup> Nevertheless, it is fair to assume that by the addition of the term “recklessly” to the regulations, the agencies intend to put the burden of proof on the researcher to show that he/she was not indifferent to the truth whenever the researcher asserts a lack of fraudulent intent.<sup>29</sup> This

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definition of “scienter.” The False Claims Act, 31 U.S.C. § 3729(a)(2) (2012), discussed *infra*, expressly does not require an intent to defraud. The FCA imposes upon individuals and contractors receiving public funds ‘some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek,’ and to ‘preclude ‘ostrich’ type situations where an individual has ‘buried his head in the sand’ and failed to make any inquiry that would have revealed the false claim.” United States ex rel. Mikes v. Straus, 84 F. Supp. 2d 427, 438 (S.D.N.Y. 1999) (quoting S. Rep. No. 99-345 at 20–21, reprinted in 1986 U.S.C.C.A.N. 5266, 5285-86). However, as argued below, the fact that scienter is not required under the FCA is not necessarily dispositive of the issue in research misconduct cases both because “honest error” is an affirmative defense in such proceedings and because the context and nature of scientific disputes are demonstrably different from those in the straight commercial context applicable to most FCA cases.

24. 42 C.F.R. § 93.104(b) (2015).

25. 69 Fed. Reg. 20780 (Apr. 16, 2004) (“consistent with the OSTP policy, the level of intent would be expanded beyond an intentional and knowing standard to include recklessness”). See Plaintiff’s Trial Motion, Memorandum and Affidavit, Brodie v. Dept. of Health and Human Services, 2010 WL 3416349 (D.D.C.) for a detailed discussion about the change from the 1989 to the 2005 standard; see also court’s opinion in Brodie v. Dept. of Health and Human Services Brodie, 715 F. Supp. 2d 747 (D.D.C. 2010).

26. Gulf Grp. Gen. Enter. Co. W.L.L. v. United States, 114 Fed. Cl. 258, 315 (2013); United States Ex Rel. K & R Ltd. P’ship v. Mass. Hous. Fin. Agency, 530 F.3d 980, 983 (D.C. Cir. 2008).

27. Riley Constr. Co. v. United States, 65 Fed. Cl. 264, 270 (2005).

28. Sanders v. John Nuveen & Co. 554 F.2d 790, 793 (7th Cir. 1977). Recklessness is distinct from innocent mistakes, negligence, and the common errors a scientist may make. But, it does encompass the refusal to learn of information which an individual, in the exercise of prudent judgment, should have discovered. See, e.g., United States ex rel. Bettis v. Odebrecht Contractors of California, Inc., 297 F. Supp. 2d 272, 277 (D.D.C. 2004); U.S. ex rel. Bettis v. Odebrecht Contractors of Cal., Inc., 393 F.3d 1321 (D.C. Cir. 2005) (citing *Hindo v. Univ. of Health Sciences The Chicago Med. Sch.*, 65 F.3d 608, 613-14 (7th Cir.1995), cert. denied, 116 S. Ct. 915 (1996); United States ex rel. Wang v. FMC Corp., 975 F.2d 1412, 1420-21 (9th Cir. 1992)).

29. See Dr. Rameshwar K. Sharma, Dec. No. 1431, 1993 WL 742551 (HHS Dept. App. Bd. 1993).

position would be consistent with the agencies' view that "honest error" is in the nature of an affirmative defense. Thus, going to back to the hypothetical regarding Dr. White, the burden of proof would be on him to show that he was not demonstrating an indifference to the truth by excluding Experiment 2 or by not bringing in an outside statistical expert after Dr. Black challenged him on the modifications of his statistical assumptions.

To date, courts and administrative judges in research misconduct cases seem to have relied on a finding of "recklessness" as an alternative basis for their holdings when the researcher asserted honest error but there was significant evidence of misconduct.<sup>30</sup> This approach allows the factfinder to state that even if it were to credit the researcher's argument that his/her actions were unintentional, there was at least recklessness sufficient to warrant a finding of research misconduct.<sup>31</sup>

#### B. What is the Burden of Proof?

Section 93.106 of the HHS Regulations states:

Evidentiary standards. The following evidentiary standards apply to findings made under this part. Standard of proof. An institutional or HHS finding of research misconduct must be

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30. See, e.g., *Bois v. Dept. of Health and Human Services*, Civil Action No. 11-1563 (ABJ) (D.D.C. 2012).

31. According to Dr. Price, "that in the eight years since the revised HHS regulation went into effect (June 2005, to date in 2013), ORI has not made a finding of misconduct committed "recklessly." Price, *supra* note 17, at 16. Dr. Price states the following as to the use of the "recklessness" standard:

Some institutions have tried to make such findings for reckless misconduct. However, in the author's experience as an expert consultant for seven years, there is a danger in institutions using the "reckless" standard too loosely. For example, the author has seen investigation committees and officials propose or make findings of research misconduct for a professor being a poor mentor—or for failing to do forensic image analysis on figures for publication (when the professors had trusted a graduate student or postdoctoral fellow to publish the same raw-data figure that they had showed to the professor earlier).

The author notes that, in the prior decade, two distinguished, nationally-prominent professors had missed such manipulation of images by their graduate students or postdoctoral fellows (until it was detected by others during manuscript review by a journal or after the publication process); these professors were praised for making rapid public retractions of the falsified research publications (ORI findings against Urban under Hood, 1995; ORI findings against Kumar under Hood, 1996; and ORI findings against Hajra under Collins, 1997). No one ever publically accused these professors of being "responsible for the research misconduct" that was committed by their graduate students or postdoctoral fellows. *Id.* at 16 n. 12.

proved by a preponderance of the evidence.<sup>32</sup>

And Section 689.3 of the NSF Regulations states as follows:

(d) For those cases governed by the debarment and suspension regulations, the standards of proof contained in the debarment and suspension regulations shall control. Otherwise, NSF will take no final action under this section without a finding of misconduct supported by a preponderance of the relevant evidence.<sup>33</sup>

Both agencies also apply the preponderance of evidence standard in debarment proceedings resulting from findings of research misconduct.<sup>34</sup> Accordingly, the institutions,<sup>35</sup> the agencies, the ALJ (in the case of HHS proceedings), and the debarment officials all may find research misconduct if they conclude that a preponderance of the evidence supports that conclusion.

Whether the preponderance of the evidence standard is the correct one was addressed in the Federal Register notice promulgating the final OSTP Research Misconduct Policy.<sup>36</sup> OSTP stated the following in response to the question: “Shouldn’t the burden of proof be more stringent, e.g., require “clear and convincing evidence” to support a finding of research misconduct?”:

While much is at stake for a researcher accused of research misconduct, even more is at stake for the public when a researcher commits research misconduct. Since “preponderance of the evidence” is the uniform standard of proof for establishing culpability in most civil fraud cases and many federal administrative proceedings, including debarment, there is no basis for raising the bar for proof in misconduct cases which have such a potentially broad public impact. It is recognized that non-

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32. 42 C.F.R. § 93.106 (2015).

33. 45 C.F.R. § 689.3 (2015); Dr. Brett M. Baker, NATIONAL SCIENCE FOUNDATION, OFFICE OF INSPECTOR General, *2014 Suspension and Debarment Workshop* (Mar. 28, 2014), available at [https://www.nsf.gov/oig/outreach/presentations/2014suspdebar/pres/panel\\_4b\\_s&d\\_resulting\\_from\\_audits\\_&\\_inspections.pdf](https://www.nsf.gov/oig/outreach/presentations/2014suspdebar/pres/panel_4b_s&d_resulting_from_audits_&_inspections.pdf).

34. 45 C.F.R. § 76.850 (2015) (HHS) (“What is the standard of proof in a debarment action? (a) In any debarment action, we must establish the cause for debarment by a preponderance of the evidence. (b) If the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met.”); 45 CFR § 620.314(c)(1)(c)(1) (2015) (“Standard of proof. In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.”).

35. An institution may use a higher standard for its own investigation but is required to use preponderance of the evidence in reporting to ORI or NSF. 67 Fed. Reg. 11936 (Mar. 18, 2002).

36. 65 Fed. Reg. 76260 (Dec. 6, 2000).

Federal research institutions have the discretion to apply a higher standard of proof in their internal misconduct proceedings. However, when their standard differs from that of the Federal government, research institutions must report their findings to the appropriate Federal agency under the applicable Federal government standard, i.e., preponderance.<sup>37</sup>

Two parts of the foregoing statement stand out. First, there is the assertion that the actual harm to the researcher wrongly found to have committed research misconduct is outweighed by the potential harm to the public which might occur if a researcher is mistakenly found not to have committed research misconduct. However, the OSTP does not provide any support for this proposition. Rather, the OSTP seems to have assumed that simply because a researcher is not found to have committed “research misconduct,” (i) his/her research will be published, (ii) that such research will go unchallenged if already published, or (iii) that such researcher will still obtain future federal grants or contracts. None of these assumptions, however, are necessarily correct.

Given the heightened level of scrutiny and analysis inherent in a “research misconduct” proceeding, any flaws in the research that were the basis for the action will prevent any questionable findings from being published regardless of the outcome of the case. Similarly, if the work is already published, there will in all likelihood be counter publications challenging the flawed research. In addition, the flaws found in the research can be considered by the government in making future contract or grant awards even absent a finding that the researcher committed “research misconduct.” In other words, the public interest may be vindicated by the facts revealed in the research misconduct proceedings regardless of the standard of proof. And, to the extent there is a possible harm to the public interest that would result from the lower standard, it would occur only in the very rare case where a researcher would have prevailed under the clear and convincing standard but lost under the preponderance standard (and, to date, most reported cases suggest that the outcome of contested research misconduct cases would have been the same under either standard).

The second questionable statement is the OSTP’s assertion that the preponderance of the evidence is the uniform standard of proof for establishing culpability in most civil fraud cases. As discussed in detail below, that assertion is incorrect.<sup>38</sup> In both state and federal courts

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37. *Id.* at 76262 (emphasis added).

38. See, Roy G. Spece & Carol Bernstein, *Investigating Scientific Misconduct: What Is Scientific Misconduct, Who Has To (Dis)Prove It, And To What Level Of Certainty?*, 26 MED. & LAW 493 (2007) (“There is no support for the OSTP’s statement that “preponderance of the evidence’ is the uniform standard for establishing culpability in most civil fraud cases.” It is quite common for various jurisdictions to

applying common law, clear and convincing evidence is the majority rule for finding civil fraud absent a statute mandating a different standard.<sup>39</sup> And as to the statement's reference to the preponderance of the evidence standard being applied in other proceedings, there is no discussion of the unique circumstances of scientific researchers.

The standard of proof issue was also addressed as part of the rulemaking at NSF in 2002, where the agency stated:

One of the commenters also expressed concern over the preponderance of evidence standard of proof for a finding of research misconduct. The commenter expressed concern that this standard will increase the risk of a false finding of research misconduct, and recommended a higher standard of proof such as "clear and convincing evidence" or "beyond a reasonable doubt."

The Federal policy adopted the preponderance of evidence standard. In the preamble to the Federal policy, OSTP noted that this is the uniform standard of proof for most civil fraud cases and most Federal administrative proceedings, including debarment. (65 FR 76262). Awardee institutions have the discretion to apply a higher standard of proof in their internal misconduct proceedings. However, if a higher standard is used, and the awardee institution wishes for NSF to defer to its investigation, the awardee institution should also evaluate whether the allegation is proven by a preponderance of evidence.<sup>40</sup>

To the extent NSF relied upon the OSTP's statement that the preponderance standard is the uniform standard of proof for most civil fraud cases, NSF's position is erroneous and, as discussed below, is a factor in considering the validity of the NSF's regulation on this point under the Administrative Procedure Act.

As to HHS, there appears to have been no discussion in the record as to why the agency adopted the preponderance standard as opposed to the clear and convincing standard.<sup>41</sup> Presumably, HHS merely continued the policy

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require that civil fraud be established by "clear and convincing evidence." The OSTP's comments do not represent objective reasoning, but bureaucratic embrace of an easy path to convictions regardless of their fairness.").

39. *Id.*

40. 67 Fed. Reg. 11936, 11936 (Mar. 18, 2002).

41. ORI stated the following regarding the preponderance standard but this statement was well before the adoption of the current regulations:

PREPONDERANCE RECOMMENDED AS STANDARD OF PROOF  
Preponderance of the evidence, rather than clear and convincing, is the standard of proof recommended by the HHS Review Group on Research Misconduct and Research Integrity for determining whether research misconduct has occurred in PHS-supported research. The standard is consistent with government-wide debarment and suspension regulations and



adopted by OSTP. However, statements by HHS suggest that it adopted the preponderance rule because that standard is applied in typical debarment proceedings brought by federal agencies against commercial entities where the goal is to ensure that the government conducts “business only with responsible persons”.<sup>42</sup> But even this rationale does not address the particular circumstances of a scientific researcher (as opposed to a commercial business) and whether a higher burden of proof is warranted

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the proposed common Federal procedures for responding to allegations of research misconduct. See the ORI web site. “Debarment and other sanctions are taken to protect the public’s and the Federal Government’s interests, not for purposes of punishment,” the Review Group report stated. “The debarment regulations appropriately adopt an evidentiary standard of preponderance of the evidence, the usual standard of proof in civil actions.” The more rigorous standard, clear and convincing, was considered by the Review Group because of significant reputational interests at stake for scientists found to have engaged in research misconduct, but was not recommended. “Because the government’s purpose in imposing debarment or other sanctions is to protect its interest in conducting business only with responsible persons, the Review Group concluded that the application of a more demanding evidentiary standard before sanctions for research misconduct could be imposed would not adequately serve the government interest,” the Review Group report stated. Consistent with prior ORI policy, institutions may apply a different standard of evidence in making internal decisions on misconduct, but must apply the preponderance standard in reporting cases to ORI. OFFICE OF RESEARCH INTEGRITY, 8(1) ORI NEWSLETTER 1, 13–14 (Dec. 1999), *available at* [http://ori.hhs.gov/images/ddblock/vol8\\_no1.pdf](http://ori.hhs.gov/images/ddblock/vol8_no1.pdf).

As to the statement’s suggestion that the preponderance of the evidence standard is not required because the purpose of debarment is not punishment, it ignores that the label given to a government-initiated proceeding is not dispositive if the proceeding results in significant harm to the individual. *Santosky v. Kramer*, 455 U.S. 745, 757 (1982) (“Notwithstanding ‘the state’s civil labels and good intentions,’” the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with ‘a significant deprivation of liberty’ or ‘stigma.’) (first quoting *In re Winship*, 397 U.S. 358, 365–366 (1970); then quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979).)

42. See, *Spece & Bernstein*, *supra* note 38. In his article, Dr. Price, states: However, it became clear in the 1990s (and remains clear in 2013) to the author and other scientists in OSI/ORI who review institutional reports of scientific and research misconduct, that institutional committees and officials are often uncomfortable using such a low standard of proof. Given the serious impact on reputations and careers from allegations and findings of misconduct in science, they appeared to prefer using some level that is closer to a “clear and convincing standard” or to a “beyond a reasonable doubt standard” (generally without so stating in the investigation reports and notification letters to ORI). ORI even found that one major public university in Maryland had formally adopted in the early 1990s a “beyond a shadow of a doubt” standard, which is a literary (not a legal) standard.

Price, *supra* note 17, at 17, fn. 13.

given the stigma attached to a finding of research misconduct<sup>43</sup> and the long-term impact on the researcher's career.<sup>44</sup>

Although doing no better than NSF in describing its rationale for the preponderance standard, the HHS regulations go further than those issued by NSF by stating the following on the burden of proof:

- (a) The institution or HHS has the burden of proof for making a finding of research misconduct.
- (b) The destruction, absence of, or respondent's failure to provide research records adequately documenting the questioned research is evidence of research misconduct where the institution or HHS establishes by a preponderance of the evidence that the respondent intentionally, knowingly, or recklessly had research records and destroyed them, had the opportunity to maintain the records but did not do so, or maintained the records and failed to produce them in a timely manner and that the respondent's conduct constitutes a significant departure from accepted practices of the relevant research community.
- (c) The respondent has the burden of going forward with and the burden of proving, by a preponderance of the evidence, any and all affirmative defenses raised.<sup>45</sup>
- (d) In determining whether HHS or the institution has carried the burden of proof imposed by this part, the finder of fact shall give due consideration to admissible, credible evidence of

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43. *Addington*, 441 U.S. at 425–26 (higher standard of proof required due to stigma associated with adverse factual finding); see *In re Winship*, 397 U.S. at 374 (Harlan, J., concurring).

44. The Supreme Court has consistently held that the right to pursue one's chosen occupation is a fundamental personal freedom guaranteed by the Constitution that cannot be denied by the Government without due process. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); *Truax v. Raich*, 239 U.S. 33, 44 (1915); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 n.23 (1976). Moreover, the Court has long recognized that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct." *Ex parte Garland*, 71 U.S. 333, 377 (1866). Thus, to the extent a finding of research misconduct will effectively end a researcher career, it is a valid question as to whether HHS should have provided more of an explanation for its decision to use the preponderance of the evidence standard than merely referring to the practice in traditional debarment proceedings against commercial entities. See *Addington*, 441 U.S. at 423 (1979) ("The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'").

45. Honest error would be an example of an affirmative defense. See, *Office of Research Integrity v. Bois*, 2011 WL 2164169 (H.H.S.).

honest error or difference of opinion presented by the respondent.

- (e) The respondent has the burden of going forward with and proving by a preponderance of the evidence any mitigating factors that are relevant to a decision to impose administrative actions following a research misconduct proceeding.<sup>46</sup>

## PART TWO

Part Two of this article provides an overview of the investigatory and adjudicatory process of research misconduct cases. It broadly describes the NSF procedures and some of the differences between those procedures and the procedures used by HHS. It then illustrates how the process works by discussing two research cases that were litigated in Federal District Court.

### A. What Are The Administrative Procedures Applicable To Research Misconduct Cases?

The NSF's Office of Inspector General ("OIG")<sup>47</sup> is responsible for investigating research misconduct cases at NSF. At HHS, it is the Office of Research Integrity<sup>48</sup> ("ORI") that is responsible for investigating research misconduct complaints.<sup>49</sup>

In December 2012, NSF's Office of Inspector General issued a "Dear Colleague" letter (the "DCL"), which described NSF's processes for investigating research misconduct claims pursuant to the agency's

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46. 42 CFR § 93.106 (2015).

47. *Office of Inspector General*, NATIONAL SCIENCE FOUNDATION, <http://www.nsf.gov/oig/> (last visited June 1, 2016).

48. OFFICE OF RESEARCH INTEGRITY, <http://ori.hhs.gov/> (last visited June 1, 2016).

49. Both the OIG and the ORI make publically available presentations on the research misconduct process. *See, e.g., Presentations*, NATIONAL SCIENCE FOUNDATION, [https://www.nsf.gov/oig/outreach/presentations/srafau2003\\_files/v3\\_document.htm](https://www.nsf.gov/oig/outreach/presentations/srafau2003_files/v3_document.htm) (last visited June 1, 2016); Brett M. Baker, Assistant Inspector General for Audit Office of Inspector General, PowerPoint Presentation at the National Science Foundation Regional Grants Conference (Oct. 7, 2014), *available at* [http://www.nsf.gov/bfa/dias/policy/outreach/grantsconf/oig\\_oct14.pdf](http://www.nsf.gov/bfa/dias/policy/outreach/grantsconf/oig_oct14.pdf).

Many research institutions make publically available descriptions of their procedures for investigating research misconduct claims. *See, e.g., Research Integrity*, CLEMSON UNIVERSITY, <http://www.clemson.edu/research/compliance/integrity.html> (last visited June 1, 2016); *Procedures for Dealing with Issues of Professional Misconduct*, JOHN HOPKINS MEDICINE, [http://www.hopkinsmedicine.org/som/faculty/policies/facultypolicies/professional\\_misconduct.html](http://www.hopkinsmedicine.org/som/faculty/policies/facultypolicies/professional_misconduct.html) (last visited June 1, 2016).

regulations.<sup>50</sup> The following description is from that letter. ORI's regulations set forth a similar procedure, but include much more detail.

As set forth in the DCL, the investigation process begins when a complainant reports allegations to the OIG or to his/her institutional official. When an institution becomes aware of substantive allegations of NSF-related misconduct, it must notify the OIG. When reporting allegations, the DCL states that complainants are to inform OIG rather than a program office. If program officers become aware of allegations of misconduct, the allegations must be referred for to the OIG for assessment.<sup>51</sup>

When OIG receives an allegation, it determines whether the complaint meets the agency's definition of research misconduct and whether the alleged research misconduct is connected with an NSF activity. It is insufficient for the alleged research misconduct to have occurred in an institution receiving NSF funds.<sup>52</sup> If OIG determines that NSF has jurisdiction, then the OIG will conduct an initial inquiry on whether an allegation has sufficient substance to warrant an investigation.<sup>53</sup>

As described in the DCL, the first communication with the subject researcher will be a letter from OIG that: (a) states that OIG has received an allegation about the individual and describes the allegation; (b) requests information about the allegation that assists OIG's understanding and assessment; (c) informs the individual that OIG is conducting an inquiry, and that the office has not yet notified the individual's institution; (d) informs the subject of his or her rights under NSF's research misconduct regulation and the Privacy Act<sup>54</sup>; and (e) establishes a deadline by which OIG expects a reply.<sup>55</sup>

If OIG receives a satisfactory explanation in response to its initial letter, it will declare the matter closed and inform both the researcher and the original complainant. On the other hand, if OIG is not satisfied with the researcher's explanation, it usually refers the allegation to the subject's institution for investigation.<sup>56</sup> When an institution conducts the investigation, which is typically the case, NSF will usually defer its own

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50. National Science Foundation, Office of Inspector General, Dear Colleague Letter (Dec. 1, 2012), *available at* [https://www.nsf.gov/oig/\\_pdf/dearcolleague.pdf](https://www.nsf.gov/oig/_pdf/dearcolleague.pdf) (hereinafter "DCL").

51. *Id.* at 1–2.

52. If the OIG lacks jurisdiction, it may forward the allegation to the appropriate agency or institutional official for resolution. *Id.*

53. *Id.*

54. 5 U.S.C. § 5552(a) (2012).

55. 45 C.F.R. § 689.5 (2015).

56. DCL, *supra* note 50, at 2.

inquiry until the institution has completed its proceeding and provided its inquiry report.<sup>57</sup>

If the institution agrees to conduct the investigation, OIG will write a letter to the institution's research misconduct official describing the results of OIG's initial inquiry, including the allegation and the researcher's response.<sup>58</sup> The institution's investigation constitutes a formal development, examination, and evaluation of relevant facts to determine whether research misconduct has occurred. If the institution determines that research misconduct has occurred, it is required to assess its gravity and to propose appropriate action.<sup>59</sup>

According to the DCL, an institution is allowed 180 days to conduct an investigation and report its findings to OIG:

- (a) The report must include: a description of the allegation(s) investigated (including any additional allegation(s) discovered in the course of the investigation); (b) the *curriculum vita* for each individual responsible for conducting the investigation; (c) the methods and procedures used to gather information and evaluate the allegation; (d) a summary of the records compiled; (e) a statement of the findings with the reasoning and specific evidence supporting those conclusions; and (f) a description and explanation of any actions recommended and/or imposed by the institution.<sup>60</sup>

The OIG will review each investigation report for accuracy and completeness in deciding whether to accept the institution's conclusions. The OIG can accept an institution's report in whole or in part, request additional information, or initiate its own independent investigation.<sup>61</sup>

If OIG concludes that research misconduct *did not* occur, it will close the case and notify the subject and the complainant.<sup>62</sup> If OIG concludes research misconduct *did* occur, it develops its own investigation report. The report includes recommended actions for NSF management. It offers the subject an opportunity to respond to a draft version of OIG's report.<sup>63</sup> The researcher's comments or rebuttals

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57. *Id.*

58. In a small number of cases where, for example, the OIG believes there is unmanageable conflict of interests, the OIG will not refer an investigation to the institution. In these instances, the OIG immediately proceeds with its own investigation. *Id.* at 2.

59. 45 C.F.R. § 689.4 (2015).

60. DCL, *supra* note 50, at 2–3.

61. 45 C.F.R. § 689.6 (2015).

62. DCL, *supra* note 50, at 3.

63. *Id.*; 45 C.F.R. § 689.9 (2015).

receive full consideration and may lead to a revision of the investigation report before it is submitted to NSF's Deputy Director for adjudication.<sup>64</sup> As stated in the DCL, OIG does not make findings or take actions, but rather makes recommendations to NSF's Deputy Director for findings and actions.<sup>65</sup>

When NSF's investigation report is complete, OIG sends it to the Deputy Director of NSF for adjudication (unless OIG has recommended debarment, in which case the matter will be referred to the debarring official).<sup>66</sup> If the Deputy Director finds that research misconduct has occurred and decides to take action, NSF will provide a notice of the proposed action and information about appeal rights directly to the individual or institution involved.<sup>67</sup> The Deputy Director's decision can be appealed to the Director of NSF.<sup>68</sup>

As described in the DCL, if NSF finds that research misconduct did occur, it may take action to protect the interests of the federal government (in addition to any action the institution may take). Actions that NSF management can take fall into three non-exhaustive categories. First, NSF can send a letter of reprimand to the individual or institution involved, can set conditions on NSF awards that affect the individual or institution involved, or can require special certifications or assurances of compliance. Second, NSF can place restrictions on activities or expenditures under present and future awards. Third, NSF can suspend or terminate an active award, or can initiate an action to debar an individual or institution from receiving awards from any agency of the federal government, and from working under any other federal awards.<sup>69</sup> To date, debarment and suspensions have generally been limited to individuals, and not institutions.<sup>70</sup>

#### B. ORI's Procedures

HHS's Office of Research Integrity has issued regulations, which provide much more detail than the NSF procedures described above.<sup>71</sup> In

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64. DCL, *supra* note 50, at 4.

65. *Id.* at 3; 45 C.F.R. § 689.9 (2015).

66. 45 C.F.R. §689.9(c)(1) (2015) ("In cases in which debarment is considered by OIG to be an appropriate disposition, the case will be referred to the debarring official pursuant to 45 CFR part 620 and the procedures of 45 CFR part 620 will be followed, but: The debarring official will be either the Deputy Director, or an official designated by the Deputy Director.").

67. *Id.*

68. 45 C.F.R. § 689.10 (2015).

69. 45 C.F.R. § 689.3 (2015).

70. *Handling Misconduct - Inquiry Issues*, OFFICE OF RESEARCH INTEGRITY, <http://ori.hhs.gov/ori-responses-issues#12> (last visited June 5, 2016).

71. 42 C.F.R. Parts 50 and 93 (2015).

addition, ORI has prepared a detailed sample policy of procedures for responding to research misconduct allegations.<sup>72</sup> However, in broad terms, the process followed by ORI is similar to that at NSF.<sup>73</sup>

One key difference at HHS is that the researcher has the right to seek a hearing before an Administrative Law Judge. Under the ORI Regulations, should ORI review an institution's investigation report and determine that research misconduct has occurred, it will typically attempt to negotiate with the researcher a Voluntary Exclusion Agreement (VEA), in which the respondent accepts the imposition of administrative actions.<sup>74</sup> If such an agreement is not reached, ORI will make a formal finding of research misconduct and typically recommend administrative actions to the HHS Assistant Secretary for Health (ASH). Under the HHS Regulations, the ASH makes the final HHS decision on the imposition of administrative actions after reviewing the recommendations made by ORI (except when the administrative actions include debarment or suspension). The ASH may accept, modify, or reject the administrative actions recommended by ORI. If the ASH accepts the recommendations, ORI sends the respondent a copy of the final ORI report and a notification letter (the "Charge Letter") that describes the proposed administrative actions to be taken against the researcher. ORI also provides notice of the researcher's right to request a hearing before the HHS Departmental Appeals Board ("DAB"). If a hearing is not requested, the research misconduct finding and administrative actions of the ASH become final.<sup>75</sup>

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72. See e.g., OFFICE OF RESEARCH INTEGRITY, *Sample Policy & Procedures for Responding to Research Misconduct Allegations*, available at <http://ori.hhs.gov/sites/default/files/SamplePolicyandProcedures-5-07.pdf>.

73. See Kroll Presentation, *supra* note 1 (discussion of the differences between the HHS and NSF processes). Susan J. Garfinkel, Holley Thames Lutz, & Linda Youngman, *Misconduct: How Did We Get in this Mess and How Can We Avoid it in the Future?*, 2009 AHLA-SEM (2009) (an overview of the HHS procedures).

74. Jacqueline Bonilla, *Illusory Protections For Those Accused Of Scientific Research Misconduct: Need For Reform*, 16 J. TECH. L. & POL'Y, 107, 115-16 (2011): One might think a researcher can "appeal" a purely institutional determination to the ORI, but this is not the case. As it turns out, regardless of what the ORI ultimately decides to do (and even if it determines that no research misconduct took place), once an institution makes a finding of research misconduct on its own, that finding, and any imposed sanctions, can stand on a permanent basis. Researchers may have no avenue, via the ORI or any other agency, to initiate an objective review of an institution's adverse decision, or to otherwise "reverse" the decision or institutional sanctions.

75. Dr. Price states as follows regarding the ALJ Appeal process:

As noted by former PHS Counsel, turned defense attorney, Charrow (2010), this appeal system at HHS can be challenging to the appellant: First, as a practical matter, few if any scientists will have the resources to seek full review by the DAB. . . . Second, recent changes in the regulations have made an appeal to the DAB less attractive. . . access to an appeal [hearing] is no longer automatic. To qualify you must now specify those aspects of the ORI

If the researcher requests a DAB hearing, it is conducted by an Administrative Law Judge (ALJ), who may consult one or more technical or scientific experts. During the hearing, the researcher may be represented by counsel, file motions and pleadings, participate in case-related conferences held by the ALJ, request discovery, stipulate to facts or law, present and cross examine witnesses, submit evidence, make legal arguments, and submit briefs. Decisions of the DAB are available on Westlaw.

The decision by the ALJ may be reviewed by the ASH except when debarment and suspension is involved, in which case the decision will be reviewed by the debarring official. The ALJ ruling becomes final if the ASH does not indicate an intent to review the decision within 30 days. If the ALJ rules in favor of the researcher and the ASH approves the ruling, the misconduct finding will be overturned and/or the proposed administrative actions will not take effect. Whatever the outcome, a final notification letter is sent to the institution where the investigation was conducted and to the current employing institution if the researcher has relocated.<sup>76</sup>

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finding that are factually incorrect and why they are incorrect. Even if you were to prevail at the DAB, the ALJ decision is no longer a true ruling as in the past, but now constitutes a recommended decision to the Assistant Secretary for Health. Since 1996, no ORI/PHS findings of research misconduct have been overruled by the DAB. Since 2005 (to date in 2013), in response to four such appeals, no formal hearings have been held by the ALJs, who have upheld the ORI/PHS findings and recommended administrative actions. Price, *supra* note 17 at 18 (quotations and citations omitted).

Dr. Price further states:

[I]n the eight years under the revised HHS regulation (from June 2005 to date in 2013), the HHS ALJs have granted no formal hearings for such appeals; they have found the appellants have not yet raised issues that would require further adjudication. The author notes that some defense attorneys have expressed the opinion that the revised HHS/ORI regulation has turned the process for appeal of ORI findings – with notice of proposed PHS findings by ORI often after one or several years of review within ORI following an institutional investigation finding—from “scientific debates with ORI” into “legal arguments with ALJs,” making appeals untenable. Price, *supra* note 17 at 18 n. 16.

76. The fundamental fairness of this process has been challenged. See Bonilla, *supra* note 74 at 115–116:

[I]f an institution makes a questionable finding of research misconduct, for example, based on dubious evidence, bias of guilt or personal grudge, or even a mistake, is there any recourse for affected scientists? One must consider that federal regulations have set up misconduct proceedings to be adversarial; that is, it is the accused researcher versus the investigating institution and the people it chooses to represent it. Especially after spending significant time and money to “prove” its case, institutions often have a vested interest in making a negative finding in order to justify bringing the case in the first instance, and to show “zero tolerance” for misconduct in a global sense.



### C. Debarment

As noted above, at the conclusion of the misconduct investigation, ORI at HHS and the OIG at NSF can recommend that the subject of a research misconduct complaint be debarred.<sup>77</sup> Generally, government-wide, debarred persons are prohibited from participating in any federal nonprocurement or procurement (contract) transactions.<sup>78</sup> Thus, as recognized by the courts, debarment directs the power and prestige of the

Moreover, an institution can easily make negative findings in light of, for example: (1) the institution's low burden to prove research misconduct, that is, a preponderance of the evidence; (2) the fact that the definition of research misconduct includes conduct committed "recklessly," not just "intentionally" or "knowingly"; and (3) respondents have the burden to prove affirmative defenses, such as good faith or difference of opinion. Thus, accused scientists sit in the dangerous position of being investigated, evaluated, and judged by the same entity, often involving many of the same people throughout the process, where an institution can easily make a devastating finding. *Id.*

77. Both agencies have presentations on the web on the debarment process. *See e.g.*, Scott J. Moore, Investigative Scientist, NATIONAL SCIENCE FOUNDATION OFFICE OF INSPECTOR GENERAL, *Navigating NSF Regulatory Requirements for Responsible Research*, (Apr. 14-15, 2016), available at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKewi-h9WksJTNAhVBQSYKHbTqBAEQFggjMAE&url=http%3A%2F%2Fori.hhs.gov%2Fmeetings%2F2016%2Fslides%2FSCOTT%2520MOORE%2FDefinitions%2520and%2520Requirements.ppt&usq=AFQjCNE6hBPz3mgi4\\_YOwluDY7bfPUs0eg&sig2=10zqbHGlcUTa4txZUutjvw&bvm=bv.123664746,d.eWE](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKewi-h9WksJTNAhVBQSYKHbTqBAEQFggjMAE&url=http%3A%2F%2Fori.hhs.gov%2Fmeetings%2F2016%2Fslides%2FSCOTT%2520MOORE%2FDefinitions%2520and%2520Requirements.ppt&usq=AFQjCNE6hBPz3mgi4_YOwluDY7bfPUs0eg&sig2=10zqbHGlcUTa4txZUutjvw&bvm=bv.123664746,d.eWE); COUNCIL OF THE INSPECTORS GENERAL FOR INTEGRITY AND EFFICEINCY AND INTERAGENCY SUSPENSION AND DEBARMENT COMMITTEE, *Suspension and Debarment: Basic Concept, Rules, and Process* (Mar. 28, 2014), available at [https://www.nsf.gov/oig/outreach/presentations/2014suspdebar/pres/panel\\_1\\_primer\\_on\\_suspension\\_and\\_debarment.pdf](https://www.nsf.gov/oig/outreach/presentations/2014suspdebar/pres/panel_1_primer_on_suspension_and_debarment.pdf).

78. The ORI website states the following as to "debarment":

Who can be debarred? Both individuals and entities may be subject to debarment. In the area of grant and cooperative agreement supported research, this includes anyone who participates in the research: the principal investigators, researchers, contractors, students, and technical and support staff. To date, all ORI debarments have involved individuals, not institutions or other entities. What types of nonprocurement transactions are barred? With some exceptions, because debarments are government-wide, debarred persons may not participate in any Federal nonprocurement or procurement (contract) transactions. Nonprocurement transactions include, but are not limited to, grants, cooperative agreements, subsidies, contracts, subcontracts, scholarships, fellowships, loans, and other forms of Federal funding. . . .\*\*How long is a debarment? The usual term is three years. However, debarments may be for longer periods depending on the seriousness of the debarred person's actions and any aggravating or mitigating circumstances. *Handling Misconduct - Inquiry Issues*, OFFICE OF RESEARCH INTEGRITY, <http://ori.hhs.gov/ori-responses-issues#12> (last visited June 5, 2016).

government at a particular person and has a serious impact on that person's life and career.<sup>79</sup>

The actual decision to debar the researcher is made by the respective agencies' debarment official. At NSF the debarment official is NSF's Deputy Director (or his/her designee)<sup>80</sup> and at HHS it is the Deputy Assistant Secretary for Office of Grants and Acquisition.<sup>81</sup> The debarring official may debar the researcher for violations such as willful failure to perform in accordance with the terms of one or more contracts, a history of failure to perform, or unsatisfactory performance of one or more contracts.<sup>82</sup> Consistent with the agencies' position as to the other aspects

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79. *Canales v. Paulson*, 2007 WL 2071709 (D.D.C. July 16, 2007), at 10 (quoting *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964)).

80. 48 C.F.R. § 2509.403 (2015).

81. See, *Office of the Assistant Secretary for Financial Resources Functional Statement*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *Office of the Assistant Secretary for Financial Resources Functional Statement*, <http://www.hhs.gov/about/agencies/asfr/functional-statement/index.html> (last visited June 11, 2016) ("The Deputy Assistant Secretary for OGAPA serves as HHS's suspension and debarment Official"). As to when additional proceedings are or are not necessary 45 C.F.R. § 76.314 states:

(a) *No additional proceedings necessary*. In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause. (b) *Additional proceedings necessary*. (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record. (2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous. (3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts. *Id.*

82. 42 C.F.R. § 93.408 states:

The purpose of HHS administrative actions is remedial. The appropriate administrative action is commensurate with the seriousness of the misconduct, and the need to protect the health and safety of the public, promote the integrity of the PHS supported research and research process, and conserve public funds. HHS considers aggravating and mitigating factors in determining appropriate HHS administrative actions and their terms. HHS may consider other factors as appropriate in each case. The existence or nonexistence of any factor is not determinative: (a) Knowing, intentional, or reckless. Were the respondent's actions knowing or intentional or was the conduct reckless? (b) Pattern. Was the research misconduct an isolated event or part of a continuing or prior pattern of dishonest conduct? (c) Impact. Did the misconduct have significant impact on the proposed or reported research record, research subjects, other researchers, institutions, or the public health

of the research misconduct process, the burden of proof in debarment proceedings is “preponderance of the evidence”.<sup>83</sup> Generally, NSF and HHS may debar a researcher for any cause of so serious or compelling a nature that it affects his or her present responsibility.<sup>84</sup> A researcher who is debarred (or suspended) may seek judicial review of the debarment under the Administrative Procedure Act.<sup>85</sup>

ORI’s website contains summaries of its research misconduct cases.<sup>86</sup> There is also a PHS Administrative Action Report on the ORI’s website which includes a chart of individuals who currently have administrative actions imposed against them by ORI, the ASH and/or HHS.<sup>87</sup> According to that chart, dated January 19, 2015, sixteen individuals listed on the chart were debarred. Three of the debarments were for life. NSF provides

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or welfare? (d) Acceptance of responsibility. Has the respondent accepted responsibility for the misconduct by—(1) Admitting the conduct; (2) Cooperating with the research misconduct proceedings; (3) Demonstrating remorse and awareness of the significance and seriousness of the research misconduct; and (4) Taking steps to correct or prevent the recurrence of the research misconduct. (e) Failure to accept responsibility. Does the respondent blame others rather than accepting responsibility for the actions? (f) Retaliation. Did the respondent retaliate against complainants, witnesses, committee members, or other persons? (g) Present responsibility. Is the respondent presently responsible to conduct PHS supported research? (h) Other factors. Other factors appropriate to the circumstances of a particular case. *Id.*

At HHS, if a hearing has been held before an ALJ, and the ALJ had recommended debarment, the ASH is required to serve a copy of the ALJ’s decision on the HHS debaring official, and the ALJ’s decision would constitute findings of fact to the debaring official. The debaring official has the discretion to reject the ALJ’s findings of fact, in whole or in part, but “only after specifically determining them to be arbitrary, capricious or clearly erroneous.” 2 C.F.R. § 180.845(c). The debaring official’s decision is the final HHS decision concerning the administrative action of debarment. 42 C.F.R. § 93.523(c).

83. 45 C.F.R. § 76.314 states:

(c) *Standard of proof.* (1) In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met. (2) *Burden of proof.* The burden of proof is on the agency proposing debarment.”

84. 45 C.F.R. § 76.800 (2004). The term “present responsibility” is not defined in the regulations. However, present responsibility is typically determined based upon consideration of the factors listed in note 83, *supra*.

85. 5 U.S.C. § 706(2)(B) (2012).

86. *See, Case Summaries*, OFFICE OF RESEARCH INTEGRITY, [http://ori.hhs.gov/case\\_summary](http://ori.hhs.gov/case_summary) (last visited June 5, 2016).

87. OFFICE OF RESEARCH INTEGRITY, *PHS Administrative Action Report*, available at [http://ori.hhs.gov/ORI\\_PHS\\_alert.html](http://ori.hhs.gov/ORI_PHS_alert.html).

information on its research misconduct cases in its Semiannual Reports to Congress. Those reports are accessible on NSF's website.<sup>88</sup>

#### D. The Bois and Brodie Cases

A review of two research misconduct cases litigated in federal court both illustrate the procedures described above and put in context the burden of proof issue discussed in Part III below.

The more recent of the two cases is *Bois v. U.S. Department of Health and Human Services*.<sup>89</sup> From 1999 through 2006, Dr. Philippe Bois was a Postdoctoral Fellow at St. Jude Children's Research Center.<sup>90</sup> On February 1, 2006, senior leadership of St. Jude Children's Research Hospital was informed of several allegations of research misconduct by Dr. Bois concerning five images found in three separate articles.<sup>91</sup> A seven member investigation committee evaluated the allegations of data falsification and fabrication.<sup>92</sup> The investigation committee met ten times. The committee also interviewed ten people, reviewed the research notebooks of Dr. Bois and his co-author and reviewed selected documents taken from Dr. Bois and his co-author's hard drive.<sup>93</sup>

In its final report St. Jude found, by unanimous decision of the Investigation Committee, that Dr. Bois intentionally engaged in research misconduct with respect to the falsification or fabrication of two of the figures contained in two separate articles— FOXO1a Acts as a Selective Tumor Suppressor in Alveolar Rhabdomyosarcoma, (the "JCB article") and the "Structural Dynamics of  $\alpha$ -Actinin-Vinculin Interactions" (the "MCB article").<sup>94</sup> As to the JCB article, there were two issues: (i) failing to report the results from a test (the "February test") that were inconsistent with Dr. Bois' hypothesis and (ii) reporting on the results ("Figure 1") of a second test (the "December test") when that experiment lacked a control and

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88. *Reports and Publications*, NATIONAL SCIENCE FOUNDATION, <http://www.nsf.gov/oig/pubs.jsp> (last visited June 5, 2016).

89. Civil Action No. 11-1563 (ABJ) (DC March 2, 2012), available at [http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1\\_11-cv-01563/pdf/USCOURTS-dcd-1\\_11-cv-01563-0.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_11-cv-01563/pdf/USCOURTS-dcd-1_11-cv-01563-0.pdf).

90. The facts set forth are as those as set forth in the Defendant's Opposition To Plaintiff's Motion For Preliminary Injunction And Memorandum In Support Of Defendant's Motion For Summary Judgment in the civil action in the District Court for the District of Columbia (hereinafter "Defendant's Opposition"). Defendant's Motion for Summary Judgment and Opposition to Plaintiff's Motion for Preliminary Injunction, *Bois v. United States Dep't of Health and Human Services*, No. 11-cv-1563 (D.D.C. Oct. 4, 2011).

91. *Id.* at 6.

92. *Id.* at 7-8.

93. *Id.* at page 7-8.

94. The St. Jude Committee concluded that there was insufficient evidence to support a finding of research misconduct as to a number of other allegations.

allegedly did not in fact produce the reported results. As to the MCB article, the issue was whether an image (“Figure 4B”) was wrongfully manipulated to reflect the result that Dr. Bois wanted.

St. Jude’s investigation report was transmitted to ORI, which undertook its own review and conducted its only analysis of the charges. Ultimately, ORI sent Dr. Bois a 17-page Charging Letter notifying him that ORI “made two (2) findings of research misconduct” against him; and that based on the evidence it had gathered, it had concluded that Dr. Bois “knowingly, intentionally or recklessly fabricated and falsified data reported in two papers.”<sup>95</sup> In the same letter, ORI notified Dr. Bois that the debarring official proposed debarring him for a period of three years “from eligibility for any contracting or subcontracting with any agency of the United States Government and from eligibility for, or involvement in, nonprocurement programs of the United States Government.”<sup>96</sup> The letter also informed him that he could contest the findings and debarment proposal by requesting an administrative hearing before an ALJ with the DAB.<sup>97</sup>

Dr. Bois filed a response to ORI’s Charge Letter in the form of a Request for a Hearing. In his hearing request, he admitted some, but denied most, of the allegations contained in ORI’s Charge Letter.<sup>98</sup> ORI ultimately filed a motion to dismiss Dr. Bois’ request for a hearing, arguing that the undisputed facts showed that Dr. Bois had intentionally, knowingly or recklessly engaged in researched misconduct. As noted by the ALJ, “I must find, by a preponderance of the evidence, that Respondent Bois ‘intentionally, knowingly, or recklessly’ significantly departed from accepted practices of the relevant research community.”<sup>99</sup> The ALJ ultimately granted ORI’s motion, determining that a hearing was not necessary.<sup>100</sup> The ALJ determined that a 3-year debarment was the “minimum necessary to protect public health and safety, promote integrity of publically-supported research, and to conserve public funds.”<sup>101</sup> In fact, the ALJ stated that “[c]onsidering that [Dr. Bois] committed multiple

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95. Bois v. U.S. Department of Health and Human Services, Civil Action No. 11-1563, 3 (ABJ) (D.C. March 2, 2012), available at [http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1\\_11-cv-01563/pdf/USCOURTS-dcd-1\\_11-cv-01563-0.pdf](http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_11-cv-01563/pdf/USCOURTS-dcd-1_11-cv-01563-0.pdf).

96. *Id.*

97. *Id.*

98. Defendants Opposition, *supra* note 90, at 8-9.

99. Office of Research Integrity v. Bois, DAB No. CR2366 (2011), 2011 WL 2164169 (H.H.S.) at 1.

100. *Id.* at 11-12.

101. *Id.* at 12.

offenses, any one of which would justify a debarment, the three-year period seems minimal.”<sup>102</sup>

Dr. Bois brought suit in the District Court for the District of Columbia alleging, in part, that the ALJ’s decision was arbitrary, capricious, an abuse of discretion, not in accordance with the law, and contrary to Dr. Bois’ constitutional rights, and that the ALJ failed to observe proper procedures, in violation of the APA because the ALJ failed to consider material facts raised by Dr. Bois in his hearing request.<sup>103</sup>

The court issued a Memorandum Opinion upholding the ALJ’s finding of research misconduct in connection with Dr. Bois’s work on the JCB article. As stated by the court:

Finally, there is a question as to whether the factual allegation [Dr. Bois’s explanation of why he did not include the results from the February test and the reporting of the December Test even though it lacked a control and allegedly did not in fact produce the reported result] even if it were true, is material: the claimed results do not necessarily cure the problem that a representation was made in the article that a particular experiment performed at a particular point in December yielded results that it did not in fact yield, and that a figure – found on Dr. Bois’s computer – was created and included in a scientific publication, which falsely depicted those results. Even after the ALJ considered the evidence that Dr. Bois proffers here, and even though she dismissed his argument in part as implausible, she also found that his failure to review his lab notebooks before reporting the results of the December test was sufficient to support a finding of reckless research misconduct *on its own*.

According to the ALJ the required level of deference, the Court therefore cannot find that it was arbitrary and capricious to deny the hearing request on the grounds that plaintiff failed to raise a genuine dispute over facts material to the finding of research misconduct in the JCB article.<sup>104</sup>

However, the court reversed and remanded the matter back to the ALJ for a hearing in connection with the allegations of research misconduct in connection with the MCB article. The court reasoned that Dr. Bois had produced at least minimal evidence to suggest a possibility that he relied upon the representations of a co-worker in creating the figure at issue and that therefore Dr. Bois was entitled to a

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102. *Id.* at 11.

103. *See Bois v. U.S. Department of Health and Human Services*, Civil Action No. 11-1563, 5 (ABJ) (D.C. March 2, 2012).

104. *Id.* at 18.

hearing on that point. As stated by the court:

So, according the ALJ some deference, the Court finds that while it may not have been unreasonable for the ALJ to conclude that the evidence was sufficient for ORI to meet its burden of proving misconduct by a preponderance of the evidence, Dr. Bois made factual allegations in support of his defense that were specific enough to warrant a hearing. . . This is not intended to suggest that ORI will not be able to meet its burden at a hearing; it just means that there should be a hearing.<sup>105</sup>

The court made clear, however, that its “ruling should not be read as any sort of exoneration, and it does not purport to address the merits of Dr. Bois’s case; rather, it is simply a determination that Dr. Bois must have the opportunity to present his highly factual defense, which may or may not withstand cross-examination and any rebuttal evidence ORI elects to present.”<sup>106</sup>

After the court’s ruling, HHS moved for reconsideration. While that motion was pending, “Dr. Bois and HHS reached a settlement whereby Dr. Bois denied that he committed research misconduct but agreed not to further appeal ORI’s findings of research misconduct for the falsification of the two figures in *MCB* and *JCB*. He further agreed to have his research supervised for a period of three years.”<sup>107</sup>

The other research misconduct case to be litigated in federal court was *Brodie v. United States Department of Health And Human Services*.<sup>108</sup> Dr. Brodie was a Research Assistant Professor and Director of the Retrovirus Pathogenesis and Molecular Virology Laboratories at the University of Washington. In these positions, Dr. Brodie submitted grant applications, published scientific articles, and conducted presentations. In 2002, the university initiated an investigation into whether Dr. Brodie had submitted false or fabricated images in his grant applications, articles, and

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105. *Id.* at 27.

106. *Id.* at 7.

107. *Update on Philippe Bois Research Misconduct Case*, OFFICE OF RESEARCH INTEGRITY, <http://ori.hhs.gov/blog/update-philippe-bois-research-misconduct-case> (last visited June 5, 2016).

108. 796 F. Supp. 2d 145 (D.D.C. 2011). There are multiple court decisions relating to the claims of Dr. Brodie. The first published opinion was by Judge Friedman denying Dr. Brodie’s motion for preliminary injunction. *Brodie v. United States Department of Health and Human Services*, Civil Action No. 2010-0544 (D.C. 2010) available at <https://www.courtlistener.com/opinion/2665829/brodie-v-united-states-department-of-health-and-hu/>. The second opinion (the one discussed in the text) was by Judge Boasberg and is reported at 796 F.Supp.2d 145 (D.D.C. 2011). Dr. Brodie subsequently brought an action against HHS and various official, which the courts held were precluded on the grounds of res judicata and collateral estoppel. 951 F.Supp.2d 108 (D.D.C. 2013) affirmed 2014 WL 211222 (D.C. Cir. 2014).

presentations.<sup>109</sup> The university later concluded that Dr. Brodie had submitted or presented materials that contained images that he had knowingly and intentionally falsified or fabricated. As a result, the university banned Dr. Brodie from future employment at the university.<sup>110</sup>

Based on the findings of the university and additional analysis conducted by ORI in its oversight review, “ORI made fifteen findings of research misconduct based on evidence that Dr. Brodie knowingly and intentionally fabricated and falsified data reported in nine PHS grant applications and progress reports and several published papers, manuscripts, and PowerPoint presentations.”<sup>111</sup> ORI issued a Charge Letter enumerating the above findings of research misconduct and proposing HHS administrative actions. Dr. Brodie subsequently requested a hearing before an Administrative Law Judge. Ultimately, “the ALJ issued a recommended decision to the HHS Assistant Secretary for Health (ASH) granting summary disposition to ORI. The ALJ also stated that Dr. Brodie committed scientific misconduct on multiple occasions and that its extent amply justified debarment for a period of seven (7) years.”<sup>112</sup> The matter was then referred to HHS’s debarring official.

Dr. Brodie submitted to the HHS debarring official documents supporting his contention that she should reject the ALJ’s recommended decision. He also requested a meeting with the debarring official. However, the HHS debarring official determined that Dr. Brodie had been afforded an opportunity to contest ORI’s findings of scientific misconduct in accordance with HHS’s regulations and that the issues in Dr. Brodie’s opposition to the ALJ’s recommended decision did not raise a genuine dispute over facts material to the recommended debarment. The HHS debarring official also denied Dr. Brodie’s request to make an oral presentation and issued a notice of debarment.<sup>113</sup> Dr. Brodie then brought suit in the District Court for the District of Columbia alleging that the ALJ erred in determining by summary disposition both that Dr. Brodie acted improperly and that a seven-year debarment was appropriate.

In ruling against Dr. Brodie, the District Court stated:

Plaintiff’s last challenge to the ALJ’s determination that he committed research misconduct focuses on the sufficiency of the evidence for each of the fifteen findings. Plaintiff claims that the ALJ erred in granting summary disposition because there were material facts in dispute for each finding. In so arguing, Plaintiff

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109. *CASE SUMMARY: BRODIE, SCOTT, J.*, OFFICE OF RESEARCH INTEGRITY, <http://ori.hhs.gov/content/case-summary-brodie-scott-j> (last visited June 5, 2016).

110. *Brodie*, 796 F. Supp. 2d at 148.

111. *Id.*

112. *Id.*

113. *Id.*



points to evidence that was not before the ALJ because it was not timely submitted. It is axiomatic that this Court must judge the arbitrary and capricious nature of the ALJ's decision on the evidence that he had before him at the time of his decision.

Plaintiff contends that his late evidence, including a personal affidavit, should have been considered because he would have had the opportunity to testify at a hearing. Plaintiff fails to explain, even if that is the case, why he did not submit this evidence as required by the ALJ's scheduling order or as part of his opposition to summary disposition before the ALJ. As Plaintiff failed to avail himself of either of these opportunities, this Court cannot properly consider the untimely evidence in deciding whether a dispute of material fact existed.

Having reviewed the evidence that the ALJ did consider, the Court cannot find that its holding on each of the acts of misconduct was not [sic] arbitrary or capricious. The ALJ's findings on intent, moreover, were reasonable given the overwhelming evidence of fabrication and falsification. The ALJ's decision makes clear that he "examine[d] the relevant data and articulate[d] a satisfactory explanation for [the Agency's] action including a rational connection between the facts found and the choice made." As such, the Court concludes that the ALJ's findings should be upheld.<sup>114</sup>

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114. *Id.* at 155 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Dr. Brodie argued before the District Court that the ALJ erred in applying a preponderance-of-the-evidence standard to the debarment proceedings. He contended—as discussed in Part Three of this article—that the Fifth Amendment requires the more stringent clear and convincing standard in proceedings that impose a seven-year debarment. In refusing to address this argument, however, the District Court stated: "Yet Plaintiff never raised this issue before the administrative agency, and he offers no reason why this Court should consider it now. 'Arguments that are not raised before an administrative agency cannot be raised, for the first time, to the reviewing court.'" *Id.* at 157 (citing *Stephens v. Dep't of Labor*, 571 F. Supp. 2d 186, 190 n. 4 (D.D.C.2008)).

In upholding the seven year debarment, the court reasoned:

Here, the ALJ determined that it was in the public interest to debar Plaintiff from receiving federal funds for seven years. He wrote, "I have considered [the seven-year ban] in light of the undisputed facts relating to the seriousness of [Plaintiff's] misconduct and the aggravating and mitigating factors governing the length of debarment that are set forth at 42 C.F.R. § 93.408." The ALJ found that the instances of Plaintiff's misconduct were "extremely serious," "numerous," and "striking." He determined that the misconduct had a "substantial impact" on several grant applications and journal articles . . . He considered and rejected as irrelevant, moreover, the fact that some of Plaintiff's current colleagues considered him to be honest. All of this led to the ALJ's determination that Plaintiff "is manifestly untrustworthy to receive, utilize, or distribute federal funds." . . . It is clear from his decision, therefore,

*Bois* and *Brodie* likely represent the most hotly litigated research misconduct cases in recent years (other than those that were prosecuted as criminal violations).<sup>115</sup> What stands out in both instances is the degree to which the factual record was so well developed. But what also stands out is that the administrative and judicial decisions suggest that in neither case would a higher standard of proof (clear and convincing evidence) have made a difference in the outcome. In other words, as to either case, at either the administrative or judicial level, the opinions suggest that the decision maker would have recommended debarment even if the standard of proof had been clear and convincing evidence rather than simply a preponderance. This conclusion is significant because it may suggest that in most cases the evidence of research misconduct will be sufficiently clear that the burden of proof will not make a difference in the outcome. And, if that suggestion is correct, it raises the issue addressed in Part III of this article as to who should bear the risk of a wrong decision being reached in the rare close case (like Dr. White in the hypothetical)—the researcher or the ORI/OIG—especially given the fact that the alleged flaws in the research will become publicly available as part of the proceedings (thereby protecting the public interest) even if there is no finding of actual research misconduct by the researcher (and the de facto imposition of the stigma associated with that conclusion).

### PART THREE

The question raised in this Part of this article is whether the Due Process Clause requires use of the clear and convincing evidence standard or, in the alternative, whether HHS and NSF should adopt such a standard

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that the ALJ considered both aggravating and mitigating factors in determining that it was in the public interest to debar Plaintiff for seven years. *Id.* Plaintiff has thus failed to demonstrate that the ALJ's recommendation was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. As such, the Court will grant summary judgment for Defendants on this issue. *Id.* at 156 (citations omitted).

115. See, SHAW, EXAMPLES OF CRIMINAL ACTIONS FOR RESEARCH FRAUD AND MISCONDUCT included as exhibit in Government Enforcement for Research Fraud and Misconduct 20100926 AHLA-SEM 35 (2010). Available on Westlaw. The most representative criminal case in this area is Eric Poehlman (D. Vt.) No. 05-cr-00038 (6/29/06). Poehlman was a professor of medicine at the Univ. of Vermont Medical School. GOVERNMENT ENFORCEMENT FOR RESEARCH FRAUD AND MISCONDUCT 20100926 AHLA-SEM 35 (2010). The government brought suit under 18 U.S.C. § 1001 (making false statement to a governmental agency) alleging that Poehlman fabricated research data presented in seventeen grant applications and that he presented false data in research and academic papers. Ultimately, Poehlman agreed to criminal, civil, and administrative settlement. Including imprisonment for 12 months and a day and 100 hours of community service following release. *Id.* See also, SHAW, GOVERNMENT ENFORCEMENT FOR RESEARCH FRAUD AND MISCONDUCT, 20120625 AHLA-SEM 42 (2012) and Burk, *Research Misconduct: Deviance, Due Process, And The Disestablishment Of Science*, 3 GEO. MASON INDEP. L. REV. 305, 323 (1995).

on their own at least in the circumstances when they are seeking to debar an individual or institution for research misconduct. The conclusion reached is that the courts will likely hold the “preponderance of the evidence” standard to be sufficient for Due Process purposes given decisions in analogous contexts rejecting the argument that “clear and convincing” evidence is required (such as in cases involving physician licensing and lawyer debarment). However, this Part also concludes that the NSF and HHS regulations adopting the preponderance of evidence standard may be invalid under the Administrative Procedures Act. It suggests that, at a minimum, the agencies should undertake rulemaking on this issue based upon: (i) the rationale of Supreme Court cases which have held that the preponderance of the evidence standard can violate Due Process in certain circumstances, (ii) the agencies’ mistaken belief that the common law rule is that fraud must be proven by the preponderance of the evidence, and (iii) the failure of the agencies to perform any meaningful analysis of the type suggested by Supreme Court precedent in this area.

A. Does the Due Process Clause Require the Application of the Clear and Convincing Standard?

A threshold issue is whether an individual’s due process rights can be violated if a court or administrative agency applies too low of a standard of proof. In *Addington v. Texas*,<sup>116</sup> the Supreme Court unequivocally held yes. At issue in *Addington* was the proper burden of proof to be applied in involuntary commitment proceedings. In holding that due process required the application of the clear and convincing standard, the Court reasoned that such a standard is required when the individual interests at stake are both “particularly important” and involve more than mere loss of money.

The *Addington* Court noted, “the function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to ‘instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’”<sup>117</sup> As stated by the Court, “[t]he standard serves to allocate the risk of error between the

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116. 441 U.S. 418 (1979).

117. *Id.* (quoting *In re Winship*, 397 U.S. 358, 370, (1970) (Harlan, J., concurring)). In *In Re Winship*, the Court held that a civil proceeding to have a child declared a juvenile delinquent required the beyond a reasonable doubt standard of proof. According to the Court the private interest was exposure of the juvenile “[t]o a complete loss of his personal liberty through a state-imposed confinement away from his home, family, and friends [and] a delinquency determination, to some extent at least, stigmatizes a youth in that it is by definition bottomed on a finding that the accused committed a crime.” *Winship*, 397 U.S. at 374.

litigants and to indicate the relative importance attached to the ultimate decision.”<sup>118</sup>

In reaching this result, the Court noted that “[g]enerally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases.”<sup>119</sup> It then discussed each of the standards as follows:

Preponderance of the evidence:

At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff’s burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.<sup>120</sup>

Beyond a reasonable doubt:

In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.<sup>121</sup>

Clear and convincing:

The intermediate standard, which usually employs some combination of the words ‘clear,’ ‘cogent,’ ‘unequivocal,’ and ‘convincing,’ is less commonly used, but nonetheless ‘is no stranger to the civil law.’ One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof. Similarly, this Court has used the ‘clear, unequivocal and convincing’ standard of proof to protect particularly important individual interests in various civil cases.<sup>122</sup>

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118. *Addington*, 441 U.S. at 423.

119. *Id.*

120. *Id.*

121. *Id.* at 424.

122. *Id.* (citing *Woodby v. INS*, 385 U.S. 276, 285, (deportation); *Chaunt v. United States*, 364 U.S. 350, 353, (1960) (denaturalization); *Schneiderman v. United States*,

The Court recognized that even if the particular standard of proof catchwords do not always make a great difference in a particular case, adopting a standard of proof is more than an empty semantic exercise. According to the Court, the standard of proof reflects the value society places on individual liberty.<sup>123</sup>

#### B. Use of Clear and Convincing Standard in Fraud Cases

As noted by the Supreme Court in *Addington* (and contrary to the statement of OSTP in its Federal Register notice promulgating the final OSTP Research Misconduct Policy), the clear and convincing standard was historically employed in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.<sup>124</sup> The rationale behind this higher standard was that the individual interest at stake in those cases was deemed to be more substantial than mere loss of money.

The Restatement (Third) of Torts: Liability for Economic Harm, Tentative Draft No. 2 (April 7, 2014), states as follows regarding the common law rule requiring clear and convincing evidence:

Standard of proof. The elements of a tort claim ordinarily must be proven by a preponderance of the evidence, but most courts have required clear and convincing evidence to establish some or all of the elements of fraud.<sup>125</sup>

According to the Restatement, “[a] majority of courts apply the clear-and-convincing standard of proof to all elements of a claim for fraud”<sup>126</sup> and

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320 U.S. 118, 125, 159, (1943) (denaturalization)).

123. *Addington*, 441 U.S. at 425. As discussed *infra* at note 135, empirical studies suggest that the differing standards of proof do in fact make a difference in the outcome of cases.

124. *Id.* *Lalone v. United States*, 164 U.S. 255, 257–58 (1896) (the standard of “mere preponderance of evidence” is “not sufficient to warrant a finding of fraud, and will not sustain a judgment based on such finding”); *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 677 (1888) (“for fraud . . . the testimony . . . must be clear, unequivocal and convincing . . .”); *Schneiderman v. United States*, 320 U.S. 118, 120–21, 125 (1943), (a civil fraud action “needs more than a bare preponderance of the evidence to prevail.” The “evidence must be clear, unequivocal and convincing.”); *see also*, *Baumgartner v. United States*, 322 U.S. 665, 671 (1944) (proof of civil fraud must be “clear, unequivocal and convincing”); *Nowak v. United States*, 356 U.S. 660, 663 (1958) (fraud requires proof by “clear, unequivocal and convincing evidence”).

125. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 TD No 2 (2014) (comment e).

126. *Id.* at comment f (citing *Elcon Constr., Inc. v. E. Washington Univ.*, 273 P.3d 965 (Wash. 2012); *Estate of Alden v. Dee*, 35 A.3d 950 (Vt. 2011); *Bank Ctr. v. Wiest*, 793 N.W.2d 172 (N.D. 2010); *Flegles, Inc. v. TruServ Corp.*, 289 S.W.3d 544 (Ky. 2009); *Bowman v. Presley*, 212 P.3d 1210 (Okla. 2009); *Kelly v. VinZant*, 197 P.3d 803 (Kan. 2008); *Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12 (Ariz. 2002); *Langman v. Alumni Ass’n of University of Virginia*, 442 S.E.2d 669 (Va. 1994); *Hercules & Co., Ltd. v. Shama*

these courts tend to express the rationale that fraud imputes venality and corruption to the person charged with it.<sup>127</sup>

When the federal courts have been required to resolve the correct standard of proof in fraud cases as a matter of federal law, they have often held that, in the absence of a statute or rule, the clear and convincing standard should be applied.<sup>128</sup>

### C. What Is The Meaning of Clear and Convincing?

Given that due process requires the clear and convincing standard to be applied in certain contexts, the next question is exactly what does the term mean other than a standard of proof that falls between the preponderance and beyond a reasonable doubt.

As stated by the Supreme Court in *Cruzan by Cruzan v. Director, Missouri Department of Health*,<sup>129</sup> clear and convincing evidence is that weight of proof which “produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts [of the case].”<sup>130</sup>

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Restaurant Corp., 566 A.2d 31 (D.C.1989)). There are, however, some cases requiring proof by a preponderance of the evidence with respect to claims of fraud. *See, e.g.*, *Bomar v. Moser*, 251 S.W.3d 234 (Ark. 2007); *State by Humphrey v. Alpine Air Products, Inc.*, 500 N.W.2d 788 (Minn. 1993); *Wieczorek v. H & H Builders, Inc.*, 475 So. 2d 227 (Fla. 1985).

127. *Gibson v. Smith*, 422 S.W.2d 321 (Mo. 1968).

128. *Ty Inc. v. Softbelly's, Inc.* 517 F.3d 494 (7th Cir. 2008) (distinguishing between the standard of proof in fraud cases at common law and those under Federal statutes). The Seventh Circuit in *Ty, Inc.* also relied upon *Barr Rubber Products Co. v. Sun Rubber Co.*, 425 F.2d 1114 (2d Cir. 1990). In *Barr* the Second Circuit held: “there is ample authority of long standing that to substantiate charges of fraud or of undue influence, at least in actions seeking the recovery of monies paid or the rescission or cancellation of contracts, a litigant must present ‘clear and convincing proof.’” The Second Circuit cited: *United States v. American Bell Telephone Co.*, 167 U.S. 224, 241 (1897); *Lalone v. United States*, 164 U.S. 255, 257 (1896) (“the rule is of long standing and is of universal application, that the evidence tending to prove . . . fraud . . . must be clear and satisfactory.”); *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381, (1887); *Atlantic Delaine Co. v. James*, 94 U.S. 207, 214 (1876); *McDonnell v. General News Bureau, Inc.*, 93 F.2d 898, 901 (3d Cir. 1937); *New York Life Ins. Co. v. Kwetkauskas*, 63 F.2d 890 (3rd Cir.), cert. denied, 289 U.S. 762 (1933); *Bowen v. B. F. Goodrich Co.*, 36 F.2d 306, 308 (6th Cir. 1929); *United States v. Hays*, 35 F.2d 948 (10th Cir. 1929).

129. 497 U.S. 261, 285 fn 11 (1990).

130. *Id.* at 285. Given this definition of “clear and convincing,” it should be readily apparent how much more difficult it would be to find research misconduct in cases like *Dr. White's* in the hypothetical if the clear and convincing standard were applied rather than preponderance of the evidence.

Similarly, the Court suggested in *Colorado v. New Mexico*<sup>131</sup> that, in contrast to the “preponderance standard”, the “clear and convincing” standard requires the trier of fact to reach an abiding conviction that the truth of a factual contention is “highly probable.”<sup>132</sup>

While the proof must be of a heavier weight than merely the greater weight of the credible evidence, it does not require the evidence be unequivocal or undisputed.<sup>133</sup>

Empirical studies support the instinctive conclusion that results will vary in close cases depending upon whether the burden of proof is a preponderance or clear and convincing evidence.<sup>134</sup> The most recent of these studies was prepared by David L. Schwartz and Christopher B. Seaman. Professors Schwartz and Seaman based their study on the Supreme Court’s decision in *Microsoft Corp. v. i4i Ltd. Partnership*<sup>135</sup> in which the Court unanimously affirmed the U.S. Court of Appeals for the Federal Circuit’s longstanding interpretation that patent invalidity must be proven “by clear and convincing evidence.” Using a patent scenario, Professors Schwartz and Seaman ran numerous experiments in which

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131. 467 U.S. 310 (1984).

132. *Id.* at 316. An excellent discussion on the differences between the “preponderance of evidence” and “clear and convincing standard” can be found in F. Vars, *Toward A General Theory Of Standards Of Proof*, 60 CATH. U. L. REV. 1 (2010).

133. *See*, *In re Medrano*, 956 F.2d 101, 102 (5th Cir.1992) (Clear and convincing evidence is “that weight of proof which ‘produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts’ of the case.”); *Hobson v. Eaton*, 399 F.2d 781, 784, n.4 (6th Cir. 1968) (“Clear and convincing evidence is ‘that measure of degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.”); *Kaszuk v. Bakery and Confectionary Union*, 638 F. Supp. 365, 374 (N.D. IL 1984) (Clear and convincing does not mean evidence which unequivocally proves a point, or dispels all reasonable doubt; rather, to the extent that the phrase is susceptible of precise definition it is best described as evidence which produces in the mind of the trier of fact an abiding conviction that the truth of the factual contentions are highly probable); *see also*, *In re Martin*, 538 N.W.2d 399 (Mich. 1995); *Moran v. Fairley*, 919 So. 2d 969, 975 (Miss. Ct. App. 2005); *Castellano v. Bitkower*, 346 N.W.2d 249 (Neb. 1984); *Estate of Schmidt v. Derenia*, 822 N.E.2d 401, 405 (Ohio Ct. App. 2004); *Spartan Radiocasting, Inc. v. Peeler*, 478 S.E.2d 282, 283 n. 4 (S.C. 1996); and *Middleton v. Johnston*, 273 S.E.2d 800, 803 (Va. 1981).

134. D. Schwartz and C. Seaman, *Standards Of Proof In Civil Litigation: An Experiment From Patent Law*, 26 HARV. J.L. & TECH 429 (2013) (finding that here were significant differences in mock jurors’ decisions between the clear and convincing condition and the preponderance in the patent law context). For examples of other scholarly works on the clear and convincing standard, *see, e.g.*, Vance, *The Clear And Convincing Evidence Standard In Texas: A Critique*, 48 BAYLOR L. REV. 391 (1996).

135. 564 U.S. 91 (2011).

jurors' participated in mock trials and were giving jury instructions with different standards of proof. Professors Schwartz and Seaman noted that previous studies had found that standards of proof matter in jurors' decision making, but that none of the studies directly compared the clear and convincing standard with the preponderance standard.<sup>136</sup> Their experiments suggested that jurors are, in fact, sensitive to these two standards of proof and may reach different decisions based upon which standard they are asked to apply.

#### D. Mathews v. Eldridge Three-Part Test

While *Addington* held that due process could require a particular burden of proof be used in a proceeding, it was the Court's decision in *Mathews v. Eldridge*,<sup>137</sup> that established a three-part test for analyzing due process procedural claims. In *Mathews*, the Court held that due process did not require an evidentiary hearing before revocation of disability benefits. In reaching this result, the Court held that the following three factors must be considered in determining whether a judicial or administrative procedure violates due process: (a) "the private interest that will be affected by the official action;" (b) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (c) "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."<sup>138</sup> After *Mathews*, most courts addressing the appropriate standard of proof in judicial or administrative proceedings have applied this three-part test.<sup>139</sup>

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136. Schwartz and Seaman, *supra* note 134, at 468. For example, Professors Schwartz and Seaman noted that in the early 1980s, C.M.A. McCauliff conducted a survey of all active, senior, and retired federal judges regarding the level of certainty, on a scale of 0%-100%, required by nine phrases treated as standards of proof. As stated by Professors Schwartz and Seaman, "[McCauliff's] results generally paralleled the judges' responses in the Simon & Mahan study. For preponderance of the evidence, the overwhelming majority of judges (154 of 175) equated this standard with a probability of 50% or 60%, with an average probability of 55.3%. For beyond a reasonable doubt, nearly all judges (160 of 171) rated this standard between 80% to 100% probability, with an average probability of 90.3%. Finally, for the clear and convincing evidence standard, the majority of judges (111 of 170) rated this standard as 70% to 80% probability, with an average probability of 75.0%." *Id.* at 439 (citations omitted).

137. 424 U.S. 319, (1976).

138. *Id.* at 335.

139. See, e.g., *Eaves v. Bd. of Med. Exam'rs*, 467 N.W.2d 234, 237 (Iowa 1991); *Rucker v. Michigan Bd. of Med.*, 360 N.W.2d 154, 155 (Mich. Ct. App. 1984); *Anonymous v. State Bd. of Med. Exam'rs*, 496 S.E.2d 17, 19-20 (S.C. 1998); *Gandhi v. Med. Examining Bd.*, 483 N.W.2d 295, 298-300 (Wisc. Ct. App. 1992).



### E. Impact of *Steadman v. SEC*

The Supreme Court case most often cited on the issue of what standard of proof to apply in civil administrative decisions is *Steadman v. S.E.C.*<sup>140</sup> In *Steadman*, the Court addressed the standard of proof required in disciplinary proceedings before the Securities and Exchange Commission (“SEC”). Applying the preponderance of the evidence standard, the SEC had debarred Steadman. On appeal, the Court of Appeals for the District of Columbia Circuit held that when the SEC chooses to order the most drastic remedies at its disposal, it was required to apply the clear and convincing standard.<sup>141</sup> The Supreme Court reversed the DC Circuit, reasoning that Congress intended the preponderance of evidence standard be applied in SEC disciplinary proceedings. In reaching this result, the Supreme Court stated:

Where Congress has not prescribed the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding, this Court has felt at liberty to prescribe the standard, for “[i]t is the kind of question which has traditionally been left to the judiciary to resolve.” *Woodby v. INS*, 385 U.S. 276, 284, 87 S.Ct. 483, 487, 17 L.Ed.2d 362 (1966). However, where Congress has spoken, we have deferred to “the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts” absent countervailing constitutional constraints. *Vance v. Terrazas*, 444 U.S. 252, 265, 100 S.Ct. 540, 548, 62 L.Ed.2d 540 (1980). For Commission disciplinary proceedings initiated pursuant to 15 U.S.C. § 80a-9(b) and § 80b-3(f), we conclude that Congress has spoken, and has said that the preponderance-of-the-evidence standard should be applied.<sup>142</sup>

Importantly, however, the Court specifically noted that the “petitioner [made] no claim that the federal constitution require[d] application of a clear-and convincing-evidence standard.”<sup>143</sup> Thus, the Court did not address whether the Federal Constitution required a clear and convincing standard in disciplinary proceedings before an administrative agency.

The dissenters in *Steadman*, citing *Addington* and evaluating the three factors cited in *Mathews*, would have addressed the Federal Constitutional requirements and would have held that that SEC was required to apply the clear and convincing standard. As stated by Justice Powell, with whom Justice Stewart joined, in dissenting:

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140. 450 U.S. 91 (1981).

141. *Steadman v. SEC*, 603 F.2d 1126 (D.C. Cir. 1979).

142. *Id.* at 96.

143. *Id.* at 97, n. 15.

[I]n the absence of any specific demonstration of congress' purpose, we should not assume that congress intended the SEC to apply a lower standard of proof than the prevailing common-law standard for similar allegations. With all respect, it seems to me that the court's decision today lacks the sensitivity that traditionally has marked our review of the government's imposition upon citizens of severe penalties and permanent stigma.<sup>144</sup>

The dissent supported its conclusion by citing numerous cases for the proposition that, at common law, it was plain that allegations of fraud had to be proved by clear and convincing evidence.<sup>145</sup>

For a number of reasons, reliance on *Steadman* is misplaced as a basis for rejecting a constitutional challenge to a claim that a court or administrative body used an impermissibly low standard of proof. First, the majority and dissenters in *Steadman* agreed that the petitioner in that case did not pursue a constitutional challenge before the Court. Second, the fact that the majority relied so heavily on what it perceived as Congressional intent, and given that such intent is not a factor under *Mathews*, it is clear that the Court in *Steadman* was not analyzing the petitioner's claim as a question of constitutional due process. And third, if use of the clear and convincing standard is required by the Due Process Clause in particular circumstances (as held in *Addington*), Congress would not have the authority to require a lesser standard, regardless of Congressional intent. Accordingly, *Steadman* is not dispositive of the issue of whether the "clear and convincing" standard may be constitutionally required in "research misconduct" cases.

#### F. Stigma To Defendant Requiring Clear And Convincing Evidence

In *Santosky v. Kramer*<sup>146</sup> the Supreme Court indicated that the potential stigma to a defendant may require use of the clear and convincing evidence standard in appropriate circumstance. The *Santosky* Court held that before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence. In reaching this conclusion, the Court reasoned:

This Court has mandated an intermediate standard of proof—"clear and convincing evidence"—when the individual interests at stake in a state proceeding are both "particularly important"

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144. *Id.* at 106 (Powell, dissenting).

145. *Id.* at 105 (citing, *Woodby v. INS*, 385 U.S. 276, 285, n. 18 (1966); *Weininger v. Metro. Fire Ins. Co.*, 195 N.E. 420, 426 (1935); *Bank of Pocahontas v. Ferimer*, 170 S.E. 591, 592 (1933); *Bowe v. Gage*, 106 N.W. 1074, 1076 (1906)).

146. 455 U.S. 745, 756-57 (1982).

and “more substantial than mere loss of money.” Notwithstanding “the state’s ‘civil labels and good intentions,’” the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with “a significant deprivation of liberty” or “stigma.”<sup>147</sup>

Courts have long recognized that the potential stigma to a person wrongfully accused of serious misconduct warrants extra protections. As stated by the United States Court of Appeals for the First Circuit over a century ago in *Troeder v. Lorsch*:<sup>148</sup>

When a person is charged with all the elements which constitute a heinous crime, although it be only on a civil issue, it shocks the judicial mind to refuse to give him the benefit of the usual presumption of innocence unless the adverse proofs are so far satisfactory as to be convincing.<sup>149</sup>

There is an obvious stigma associated with a finding of research misconduct. Nevertheless, the importance of this consideration in determining whether the Constitution requires application of the clear and convincing standard in such cases is undercut by federal court decisions generally limiting the category of cases in which the potential “stigma” to the defendant warrants a higher standard of proof. For example, in *Sedima, S.P.R.L., v. Imrex Company, Inc.*,<sup>150</sup> a civil RICO case, the Supreme Court held that there is no requirement that a civil action by a private party can proceed only against a defendant who has already been convicted of a predicate act or of a RICO violation. The Court of Appeals below had reached a different result based on the fear that any other construction would raise severe constitutional questions, as it “would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation ‘racketeer,’ authorize the award of damages which are clearly punitive, including attorney’s fees, and constitute a civil remedy aimed in

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147. *Id.* at 757 (citations omitted).

148. 150 Fed. 710, 714 (1st Cir. 1906).

149. *Id.* In Burk, *Research Misconduct: Deviance, Due Process, And The Disestablishment Of Science*, 3 GEO. MASON INDEPENDENT L. Rev. 305 (1995), Professor Burk stated: “But far more is at stake in a misconduct investigation than the meaning of some new data or the correctness of an empirical model—the rights, reputation, and livelihood of an individual hang in the balance. These are not matters of science, but matters of law. Science can wait until better data become available; law must decide now. Science can focus on accuracy and precision; law must frequently sacrifice these values for equity and expedience. Scientific dialogue has its place in the pages of learned journals or the symposia of a learned society, but it is a poor model for the investigative procedures of a federal agency, with all the legal consequences such an investigation entails.” *Id.* at 328 (citations omitted).

150. 473 U.S. 479 (1985).

part to avoid the constitutional protections of the criminal law.”<sup>151</sup> In rejecting this concern, the Supreme Court stated:

We do not view the statute as being so close to the constitutional edge. As noted above, the fact that conduct can result in both criminal liability and treble damages does not mean that there is not a bona fide civil action. The familiar provisions for both criminal liability and treble damages under the antitrust laws indicate as much. Nor are attorney’s fees “clearly punitive.” As for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings. Furthermore, requiring conviction of the predicate acts would not protect against an unfair imposition of the “racketeer” label. If there is a problem with thus stigmatizing a garden variety defrauder by means of a civil action, it is not reduced by making certain that the defendant is guilty of *fraud* beyond a reasonable doubt. Finally, to the extent an action under § 1964(c) might be considered quasi-criminal, requiring protections normally applicable only to criminal proceedings, the solution is to provide those protections, not to ensure that they were previously afforded by requiring prior convictions.<sup>152</sup>

Similarly state courts have held that stigma alone is insufficient to require an administrative agency to apply the clear and convincing standard where there is a countervailing public interest—at least in the context of professional disciplinary proceedings.<sup>153</sup>

#### G. Federal Precedent On Disqualification Of Attorneys In Federal Court

One area of Federal authority that supports the use of the clear and convincing standard can be found in cases dealing with the debarment of attorneys in federal courts. In *In re Ruffalo*,<sup>154</sup> the Supreme Court reversed a disbarment order entered by the Sixth Circuit on the ground that the Ohio Board of Commissioners on Grievances and Discipline failed to provide fair notice of the charges leveled against the attorney. In reaching this result the Court held:

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151. 741 F.2d 482, 500 fn. 49 (2d Cir. 1984), rev’d, 473 U.S. 479 (1985).

152. *Sedima*, 473 U.S. at 492 (citations omitted).

153. *See, e.g.* Tsirelman v. Daines, 19 F. Supp. 3d 438, 2014 WL 1930355 (E.D.N.Y. 2014); Eaves v. Bd. of Med. Exam’rs, 467 N.W.2d 234, 237 (Iowa 1991); Rucker v. Michigan Bd. of Med., 360 N.W.2d 154, 155 (1984); Anonymous v. State Bd. of Med. Exam’rs, 496 S.E.2d 17, 19-20 (1998); Gandhi v. Med. Examining Bd., 483 N.W.2d 295, 298-300 (Ct. App.1992).

154. 390 U.S. 544, (1968).

Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which includes fair notice of the charge.<sup>155</sup>

The Court characterized disbarment actions as “adversary proceedings of a quasi-criminal nature.”<sup>156</sup>

Although the Supreme Court in *Ruffalo* did not address the standard of proof,<sup>157</sup> many Federal Courts of Appeals have held that clear and convincing evidence is required in proceedings to disbar an attorney from a Federal Court.<sup>158</sup> For example, *In re Medrano*<sup>159</sup> the Fifth Circuit held:

A disbarment proceeding is adversarial and quasi-criminal in nature and the moving party bears the burden of proving all elements of a violation. The notice of the allegations and the debarment proceeding must satisfy the requirements of procedural due process. A federal court may disbar an attorney only upon

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155. *Id.* at 550 (citations omitted).

156. *Id.* at 551.

157. *See*, *In Matter of Friedman*, 1996 WL 705322 (E.D.N.Y. 1996) (The Supreme Court did not reach the issue of the standard of proof to be applied in attorney debarment proceedings).

158. *See, e.g.*, *In re Liotti*, 667 F.3d 419, 426 (4th Cir. 2011); *In re Lebbos*, 2007 WL 7540984 (9th Cir. 2007); *Crowe v. Smith*, 261 F.3d 558, 563 (5th Cir. 2001); *In re Ryder*, 381 F.2d 713, 714–15 (4th Cir. 1967) (per curiam). Courts have also required clear-and-convincing evidence for the imposition of attorneys’ fees as a sanction. *See* *Autorama Corp. v. Stewart*, 802 F.2d 1284, 1287–1288 (10th Cir. 1986); *Weinberger v. Kendrick*, 698 F.2d 61, 80 (2d Cir. 1982). And a number of circuits have held that clear-and-convincing evidence is required before a court can grant a dismissal under its inherent powers to sanction. *See, e.g.*, *Shepherd v. American Broadcasting Cos., Inc.*, 62 F.3d 1469, 1476 (D.C. Cir. 1995); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 538 F.2d 180, 195 (8th Cir. 1976); *see also* *Ford v. Fogarty Van Lines, Inc.*, 780 F.2d 1582, 1583 (11th Cir. 1986) (per curiam); *Pardee v. Stock*, 712 F.2d 1290, 1292 (8th Cir. 1983); *Titus v. Mercedes Benz of N. America*, 695 F.2d 746, 749 (3d Cir. 1982); *Graves v. Kaiser Aluminum & Chemical Co.*, 528 F.2d 1360, 1361 (5th Cir. 1976).

159. 956 F.2d 101 (5th Cir. 1992). Even though Federal courts have applied the “clear and convincing standard” to disbarment of attorneys from their own courts, they have been unwilling to force state courts to apply the higher standard. As stated in *In re Barach*, 540 F.3d 82 (1st Cir. 2008):

We understand the importance of a lawyer’s right to practice law and agree that, once granted, that right cannot be taken away in an arbitrary or capricious manner. Yet the Due Process Clause is flexible, and reasonable minds can differ as to the need for elevated levels of proof in particular situations. Viewed in this light, the use of a preponderance of the evidence standard in bar disciplinary proceedings does not offend due process. After all, many types of important property rights typically rest, in contested proceedings, on proof by preponderant evidence. [citations omitted] . . . Although there is something to be said on policy grounds for requiring a more sturdy quantum of proof, the use of a preponderance standard is not so arbitrary or irrational as to render state disciplinary proceedings that use it fundamentally unfair. *Id.* at 86–87.

presentation of clear and convincing evidence sufficient to support the finding of one or more violations warranting this extreme sanction.<sup>160</sup>

And, in *In re Charges of Judicial Misconduct*,<sup>161</sup> the United States Court of Appeals for the District of Columbia Circuit noted the following in a case regarding a complaint of misconduct by a Federal Judge:

In the analogous context of attorney disciplinary proceedings, the American Bar Association's Model Rules and most state and federal jurisdictions that have addressed the question require complainants (or disciplinary counsel) to establish misconduct by clear and convincing evidence. . . .<sup>162</sup>

It is important to note, however, that generally the federal courts in this context have not relied upon *Mathews* to conclude that the clear and convincing standard should be applied. Rather, the courts rely upon a limitation in their own inherent power to discipline attorneys who practice before them.<sup>163</sup>

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160. 956 F.2d 101, 102 (5th Cir. 1992) (citations omitted). *See* *In re Bird*, 353 F.3d 636, 641 (8th Cir. 2003); *Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1436 (10th Cir. 1994); *In re Bell South*, 334 F.3d 941, 963 (11th Cir. 2003); *Jaskiewicz v. Mossinghoff*, 822 F.2d 1053, 1058 (Fed. Cir. 1987); *In re Halperin*, 139 F.2d 361, 361 (D.C. Cir. 1943); *In re Fisher*, 179 F.2d 361, 370 (7th Cir. 1950) (“the charges must be sustained by clear and convincing proof and the misconduct must be shown to have been fraudulent and the result of improper motives, and the proof must show intent”); *see also* *In re Sheridan*, 362 F.3d 96, 111 at fn.18 (1st Cir. 2004); *In re Fallin*, 255 F.3d 195, 197 (4th Cir. 2001); *In re Crayton*, 192 B.R. 970, 975 (9th Cir. BAP 1996).

161. 769 F.3d 762 (D.C. Cir. 2014).

162. *Id.* at 767. *See, e.g.*, *Sealed Appellant 1 v. Sealed Appellee 1*, 211 F.3d 252, 254–55 (5th Cir.2000); *In re Oladiran*, No. 10–0025, 2010 WL 3775074, at \*7 (D. Ariz. Sept. 21, 2010); *In re Levine*, 675 F. Supp. 1312, 1318 & n. 4 (M.D. Fla.1986); *In re Jaques*, 972 F. Supp. 1070, 1079 (E.D. Tex.1997); *In re Placid Oil*, 158 B.R. 404, 413 (N.D. Tex.1993); *In re Ryder*, 263 F. Supp. 360, 361 (E.D. Va.1967). The DC Circuit noted, however, that a number of states do apply the preponderance of the evidence standard. *See, e.g.*, *In re Crews*, 159 S.W.3d 355, 358 (Mo. 2005) (en banc); *In re Capoccia*, 59 N.Y.2d 549, 551, 466 N.Y.S.2d 268, 453 N.E.2d 497 (1983).

163. *See, e.g.*, *In re Grodner*, 2014 WL 5510994 (5th Cir. 2014). It should also be noted that in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) the Supreme Court recognized that awards of attorneys' fees for bad faith conduct serve the same punitive and compensatory purposes as fines imposed for civil contempt and, as a result, as a result, courts generally require clear and convincing evidence of misconduct before imposing attorneys' fees under their inherent power. *See, e.g.*, *Washington–Baltimore Newspaper Guild, Local 35 v. The Washington Post Co.*, 626 F.2d 1029, 1031 (D.C. Cir. 1980).

Outside the attorney disciplinary context, Federal Courts have held that entering a default judgment as a sanction for misconduct in litigation requires clear and convincing evidence. *See, e.g.*, *Sheppard v. American Broadcasting Co.*, 62 F.3d 1469 (D.C. Cir. 1995) (“A heightened standard of proof is particularly appropriate because most inherent power sanctions, including default judgments, are fundamentally punitive. Our judicial system has a cherished tradition of using a heightened standard of proof to guard against the erroneous imposition of criminal punishments and analogous deprivations of liberty, property, or reputation.”)

#### H. Loss of Professional or Other License

At the state level, the most analogous decisions to research misconduct debarment are those dealing with the standard of proof for taking a license away from a professional (*e.g.*, physician, attorney) or other service provider. There are a few decisions in this context that have held that the clear and convincing standard must be applied.<sup>164</sup> Several other decisions have applied the preponderance of the evidence standard in the absence of a constitutional challenge.<sup>165</sup> However, the vast majority of decisions hold that the clear and convincing standard is not required by either the Federal Constitution or particular state constitution.<sup>166</sup> It is this last category of cases that most strongly suggest that most courts would not find the clear and convincing standard constitutionally required in research misconduct cases, even ones resulting in debarment.

*Tsirelman v. Daines*<sup>167</sup> is representative of recent cases involving state licenses. In that case, a physician whose license had been revoked brought an action in Federal District Court against the New York Department of

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Federal courts have also consistently held that in order to substantiate charges of fraud seeking rescission or cancellation of contracts, a litigant must present clear and convincing proof contracts. See, *e.g.*, *Centex Construction Co. v. James*, 374 F.2d 921 (8th Cir. 1967). But, these holding simply reflect the common law rule as opposed to a requirement of due process.

164. See, *e.g.*, *Painter v. Abels*, 998 P.2d 931 (Wyo. 2000) (physician); *Johnson v. Bd. Of Governors of Registered Dentists*, 913 P.2d 1339, 1345 (Okla.1996); *Mississippi State Bd. Of Nursing v. Wilson*, 624 So.2d 485 (Miss.1993); *Devous v. Wyoming State Bd. Of Med. Examiners*, 845 P.2d 408 (Wyo. 1993); *Davis v. Wright*, 503 N.W.2d 814 (1993) (Psychiatrist); *Ettinger v. Bd. of Med. Quality Assurance*, 135 Cal.App.3d 853 (Ct. App.1982).

165. See, *e.g.*, *Golan v. Sobol*, 195 A.D.2d 634, (3d Dept.1993) (Doctor); *Matter of The Disciplinary Action against the Dentist License of Wang*, 441 N.W.2d 488 (Minn. 1989) (Dentist); *Ferguson v. Hamrick*, 388 So.2d 981 (Ala. 1980) (Doctor); *In Re Kincheloe*, 157 S.E.2d 833 (1967) (Doctor); *Texas State Board of Medical Examiners v. Haynes*, 388 S.W.2d 258 (Tex. Civ. App.1965) (Doctor).

166. See, *e.g.*, *Swiller v. Commissioner of Public Health & Addiction Serv.*, 1995 W.L. 611754 (Conn. 1995) (Chiropractor); *Sobel v. Bd. Of Pharmacy*, 882 P.2d 606 (1994) (Pharmacist); *Pickett v. Utah Dept. Of Commerce*, 858 P.2d 187 (Utah Ct. App. 1993) (Pharmacist); *Petition of Grimm*, 635 A.2d 456 (1993) (Psychologist); *Gandhi v. Med. Examining Bd.*, 483 N.W.2d 295 (1992); *Eaves v. Bd. Of Med. Examiners*, 467 N.W.2d 234 (Iowa 1991) (Physician); *Johnson v. Arkansas Bd. Of Examiners of Psychology*, 305 Ark. 451, 808 S.W.2d 766 (1991) (Psychologist); *Lyness v. Commonwealth, State Bd. Of Medicine*, 561 A.2d 362 (1989) (Physician); *Foster v. Bd. Of Dentistry*, 714 P.2d 580 (1986) (Dentist); *Thangavelu v. Dept. of Licensing & Regulation*, 386 N.W.2d 584 (1986) (Physician); *Matter Of Proposed Disciplinary Action Against Dentist License Of Roger W. Schultz*, 375 N.W.2d 509 (Minn. Ct. App.1985) (Dentist); *Rucker v. Michigan Bd. Of Med.* 360 N.W.2d 154 (1984) (Physician); *In Re Polk*, 449 A.2d 7 (1982) (Physician); *Sherman v. Commission On Licensure To Practice The Healing Art*, 407 A.2d 595 (D.C. Ct. App.1979) (Physician).

167. 19 F.Supp.3d 438, 2014 WL 1930355 (E.D.N.Y. 2014), *aff'd*, — F.3d —, 2015 WL 4491766 (2d Cir. 2015).

Health and others claiming that the application of the preponderance of the evidence standard in his disciplinary hearing failed to comport with the requirements of due process. The defendants moved to dismiss. In rejecting the physician's argument, the District Court first noted that "[t]he federal and New York courts that have considered the issue have all determined that the preponderance of the evidence standard of proof comports with due process in medical disciplinary proceedings"<sup>168</sup> and that "[t]he highest courts of several other jurisdictions have similarly rejected calls for a higher standard of proof."<sup>169</sup> It then applied the *Mathews*' factors to the issue of the revocation of the physician's license.<sup>170</sup>

The District Court in *Tsirelman* conceded that, as to the first *Mathews* factor (the private interest), "physicians have an important private interest in their medical license."<sup>171</sup> But, the court noted that the physicians' interest in practicing medicine was short of the private interest involved in the cases where the Supreme Court held that the clear and convincing standard was required.<sup>172</sup> According to the court, that interest must be balanced against the need for ethical medical practices protecting the public. As to the second *Mathews*' factor (the governmental interest at stake), the court concluded that without question, New York has an

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168. See, e.g., *Chalasanani v. Daines*, 2011 WL 4465564 (E.D.N.Y. 2011) report and recommendation adopted, 10-CV-1978, 2011 WL 4465408 (E.D.N.Y. 2011); *In re Gould v. Bd. of Regents of Univ. of State of N.Y.*, 478 N.Y.S.2d 129, 130 (3d Dep't 1984); *Giffone v. De Buono*, 693 N.Y.S.2d 691, 694 (3d Dep't 1999).

169. See, e.g., *Sherman v. Comm'n on Licensure to Practice the Healing Art*, 407 A.2d 595, 601 (D.C.App.1979); *Petition of Grimm*, 138 N.H. 42, 635 A.2d 456, 461 (1993); *In re Polk*, 90 N.J. 550, 449 A.2d 7 (N.J. 1982); *N.D. State Bd. of Med. Examiners v. Hsu*, 726 N.W.2d 216, 230 (N.D. 2007).

170. *Tsirelman*, 19 F. Supp. 3d at 449-50 ("In determining the proper standard of proof, the three factors set forth in *Mathews v. Eldridge* must be considered: (1) "the private interest that will be affected by the official action;" (2) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail;" and (3) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))).

171. *Tsirelman*, 19 F. Supp. 3d at 450 ("As plaintiff asserts, the loss of a professional license is a serious matter for the license holder. It represents the loss of a livelihood and a career."). See also *RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911, 917 n. 4 (2d Cir. 1989) ("plaintiffs denied licenses required for pursuing a particular occupation . . . have a liberty interest in earning a livelihood and are normally not required to show an entitlement to the license they seek in order to state a claim").

172. As stated by the court: "The private interest at issue here does not quite rise to the level at which the Supreme Court has held a clear and convincing standard of evidence to be constitutionally required. *Tsirelman*, 19 F. Supp. 3d at 453 (citing *Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil commitment); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (denaturalization)).



important state interest in protecting the health of its citizens by regulating the practice of medicine within its borders.<sup>173</sup> Finally, as to the third *Mathews*' factor (an undue risk of error) the court concluded that given the judicial-like process of the state's physician misconduct hearing, there was no undue risk of error sufficient to create a constitutionally required clear and convincing standard.

The plaintiff in *Tsirelman* stressed that medical disciplinary proceedings based primarily on fraud are unique in that they threaten the charged individual with "stigma" as well as the deprivation of an important private interest, necessitating clear and convincing evidence.<sup>174</sup> But, the District Court rejected that argument based on the Supreme Court precedent discussed above where the Court held that the preponderance of the evidence standard comported with due process in federal administrative proceedings involving the commission of fraud<sup>175</sup> as well as similar New York cases<sup>176</sup> and cases in other jurisdictions finding the "stigma"

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173. *Selkin v. State Bd. for Prof'l Med. Conduct*, 63 F. Supp. 2d 397, 402 (S.D.N.Y. 1999); *Doe v. Connecticut*, 75 F.3d 81, 85 (2d Cir. 1996); *Blake v. Lang*, 669 F. Supp. 584, 589 (S.D.N.Y. 1987); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *see also Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.").

174. The plaintiff relied on *Santosky* and cases applying the clear and convincing standard in common law fraud cases. *See, e.g., Ty Inc. v. Softbelly's, Inc.*, 517 F.3d 494, 499 (7th Cir. 2008) (noting "in the absence of a statute or rule," traditional common law or equitable principles dictate that fraud must be proved by clear and convincing evidence).

175. *See, e.g., Steadman v. S.E.C.*, 450 U.S. 91 (1981) (upholding use of preponderance standard in SEC hearing involving antifraud provisions of securities law). The court noted that Congress and the Supreme Court have repeatedly applied the preponderance standard under federal fraud statutes. *Tsirelman*, 19 F. Supp. 3d at 450 (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (applying preponderance standard to civil enforcement of antifraud provisions of securities law); *Grogan v. Garner*, 498 U.S. 279, 288 (1991) (holding Congress chose the preponderance standard for substantive causes of action for fraud (collecting cases and statutes)); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491 (1985) (suggesting preponderance standard applies to civil actions under RICO).

176. The court cited the following New York State cases upholding the preponderance of the evidence standard in medical disciplinary proceedings involved charges of fraudulent misconduct: *Matter of Bazin v. Novello*, 754 N.Y.S.2d 446 (3d Dep't 2003) (physician charged with misconduct including fraudulent billing of insurance companies); *Matter of Giffone v. DeBuono*, 693 N.Y.S.2d 691 (3d Dep't 1999) (charging physician with improper touching under guise of providing legitimate medical treatment). The court also noted that in disciplinary proceedings against attorneys involving allegations of fraud, the Court of Appeals for the Second Circuit held that the preponderance standard provides adequate due process. *See, e.g., In re Theodore Friedman*, 51 F.3d 20, 22 (2d Cir. 1995) (upholding preponderance standard where attorney was charged with knowingly making false affidavit); *In re Friedman*,

insufficient to require a higher standard of proof.<sup>177</sup> Thus, the court held: “In light of the compelling government interest and the procedural safeguards provided to the physicians, the preponderance of the evidence standard is constitutionally adequate in physician misconduct proceedings based primarily on fraud.”<sup>178</sup>

In affirming the local court’s decision in *Tsirelman*, the Second Circuit reasoned that physicians have an important, but not compelling, property interest in their medical licenses and a liberty interest in pursuing their chosen profession;<sup>179</sup> the preponderance standard “fairly distributes the risk of error” between the state and the physician;<sup>180</sup> and the countervailing governmental interest is strong. The State, on behalf of the public, has a

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1996 WL 705322, at \*7 (E.D.N.Y. 1996) (upholding preponderance standard where attorney was charged with instructing witness to give false testimony).

177. The court noted that the preponderance standard had been upheld in the following cases involving other stigmatizing state actions. *See, e.g.*, *Valmonte v. Bane*, 18 F.3d 992, 994 (2d Cir. 1994) (maintenance and publication of names on central registry of suspected child abusers); *Petition of Grimm*, 635 A.2d 456 (N.H. 1993) (physician disciplinary proceedings involving sexual relations with patient); *Gandhi v. State of Wisconsin Med. Bd.*, 307, 483 N.W.2d 295 (Wis. Ct. App. 1992) (physician disciplinary proceeding involving inappropriate touching). *Tsirelman*, 19 F. Supp. 3d at 451-52.

178. *Tsirelman*, 19 F. Supp. 3d at 452.

179. *Tsirelman v. Daines*, 794 F.3d 310, 315 (2d Cir. 2015). The Second Circuit cited: *Donk v. Miller*, 365 F.3d 159, 163 (2d Cir. 2004); *RRI Realty Corp. v. Inc. Vill. of Southampton*, 870 F.2d 911, 917, n. 4 (2d Cir.1989). The Court of Appeals reasoned that: “if a physician loses his license, he remains free to pursue other employment and otherwise participate in life’s activities. For this reason, we find a physician’s interest in his license to be less compelling than those interests that the Supreme Court has determined require clear and convincing proof before the state can effect a deprivation.” *Tsirelman*, 794 F.3d at 315. *Tsirelman* had argued that a physician’s interest in a fraud-based medical disciplinary hearing is more substantial than in other disciplinary proceedings because the resulting reputational harm can extend beyond the medical field. In concluding that this distinction was unpersuasive, the Second Circuit stated:

A license revocation based on medical incompetence, sexual impropriety, or another serious charge would also tend to taint a physician’s other future endeavors. In any event, even if we accepted *Tsirelman*’s argument that physicians have a greater interest in fraud-based revocation proceedings, that interest still does not rise to the fundamental level that requires the application of a heightened standard of proof as a matter of federal due process. *Id.*

180. The Second Circuit reasoned that:

[T]he corresponding consequences of error to the physician and the state in a fraud-based license revocation are roughly equivalent. If a doctor’s license is erroneously revoked, he should be, but is not, allowed to practice medicine. If a doctor’s license is erroneously maintained, he should not be, but is, allowed to continue to practice. Thus, the “social disutility” of each potential outcome is about the same, and it is not in general more serious for a license to be erroneously revoked than to be erroneously maintained. *Tsirelman*, 794 F.3d at 315.

substantial interest in revoking the licenses of doctors who engage in fraud or are otherwise found to be unfit to practice medicine.<sup>181</sup>

A second representative case in this area is *Jones v. Connecticut Medical Examining Bd.*,<sup>182</sup> in which the Supreme Court of Connecticut held that use of the preponderance of the evidence standard in a physician disciplinary proceeding does not offend a physician's due process rights. In reaching this result, the state supreme court relied upon its prior decision in *Goldstar Medical Services, Inc. v. Department of Social Services*,<sup>183</sup> in which it had concluded that the preponderance standard is the default rule applicable in federal administrative proceedings, including those in which sanctions include the potential loss of a professional license.<sup>184</sup> The

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181. The court of appeals acknowledged a physician's interest in maintaining his license, but concluded that "the State has at least as substantial an interest in protecting the public, and the cost of error is about the same. Thus, we find no constitutional basis for exempting fraud-based medical disciplinary proceedings from the traditional powers of state legislatures to prescribe standards of proof in state proceedings." *Id.* at 316.

182. 72 A.3d 1034 (2013). Among the findings of the Connecticut Medical Examining Bd. against Dr. Jones were that he violated the standard of care with respect to his treatment of child patients (1) by prescribing an antibiotic to a patient he did not know and had never examined; (2) prescribing antibiotics for nearly one year without repeat examinations and without any arrangement with another physician to monitor the patient for the side effects of long-term antibiotic therapy; and (3) diagnosing a disease in two children patients when the exposure risk was extremely low, the medical history was nonspecific, the signs and symptoms were non-specific, and the laboratory tests were negative. *Id.* at 1037.

183. 955 A.2d 15 (Conn. 2008). The administrative proceeding at issue in *Goldstar* was before the Connecticut Commissioner of Social Services (commissioner). *See id.* at 798. Using the preponderance of the evidence standard, the commissioner found that the plaintiffs, who were Medicaid providers, had committed fraud and therefore suspended them from the Medicaid program and ordered restitution. *See id.* at 798–99, 818. The Connecticut Supreme Court in *Goldstar* rejected the plaintiffs' argument that the standard of proof should have been clear and convincing evidence, concluding instead that, "[i]n the absence of state legislation prescribing an applicable standard of proof . . . the preponderance of the evidence standard is the appropriate standard of proof in administrative proceedings. . . ." *Id.* at 821. The Federal standard was relevant to the Connecticut Court, in part, because Medicaid is a cooperative program between the states and the Federal government.

184. The Connecticut Supreme Court in *Goldstar* stated as follows:

We begin by noting that, in this state, proof by preponderance of the evidence is the "ordinary civil standard of proof. . . ." The plaintiffs accurately state, however, that the clear and convincing standard is the appropriate standard of proof in *common-law* fraud cases.

In federal administrative proceedings, the preponderance of the evidence standard is applicable, even when the issue is the commission of fraud. The United States Supreme Court has held that the preponderance of the evidence standard traditionally applies in administrative cases in the absence of a legislative directive to the contrary. *Goldstar*, 955 A.2d at 33–34 (citations omitted).

physician in *Jones* argued, however, that the Supreme Court's decisions in *Mathews* and *Addington* required the clear and convincing standard.<sup>185</sup> In rejecting this argument, the Connecticut Supreme Court concluded that the *Mathews* test warranted the application of the preponderance of the evidence standard.<sup>186</sup> It said:

As stated by the court in *Jones*:

Although the United States Supreme Court has not yet considered whether, under the *Mathews* framework, the federal constitution mandates a higher standard of proof in physician disciplinary proceedings, a majority of our sister states has concluded that the preponderance of the evidence standard satisfies the requirements of due process in such cases. Applying the *Mathews* test in the present case, we agree with the majority of our sister jurisdictions that the use of the preponderance of the evidence standard in a physician disciplinary proceeding does not offend a physician's due process rights. With respect to the first *Mathews* factor, we are mindful of the plaintiff's important property interest in his medical license, the deprivation of which, the plaintiff claims,

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185. The plaintiff in *Jones* also cited *Nguyen v. Dept. of Health*, 29 P.3d 689 (Wash. 2001), cert. denied sub nom; *Washington Medical Quality Assurance Comm' v. Nguyen*, 535 U.S. 904 (2002). *Jones v. Connecticut Medical Examining Bd.*, 72 A.3d 1034 (2013). In rejecting the plaintiff's reliance on the Supreme Court cases, holding that a clear and convincing standard was required, the Washington court stated:

The United States Supreme Court "has mandated an intermediate standard of proof—clear and convincing evidence—when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money. . . . [T]he [c]ourt has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty or stigma." "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants."

*Jones*, 72 A.3d 1034, 1042 fn. 6 (quoting *Santosky v. Kramer*, 454 U.S. 745, 755–57 (1982)).

186. The court stated:

As the United States Supreme Court has explained, [p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the [d]ue [p]rocess [c]lause of the [f]ifth or [f]ourteenth [a]mendment. [D]ue process is flexible and calls for such procedural protections as the particular situation demands. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner, and, specifically, to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction. . . .

*Jones*, 72 A.3d at 1040 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332–333 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (quotations omitted).

could both preclude him from practicing medicine and subject him to social stigma. Nonetheless, this interest does not rise to the level of those for which the United States Supreme Court has concluded that due process mandates the application of the clear and convincing evidence standard rather than the preponderance of the evidence standard . . . . Regarding the risk of erroneous deprivation, the second factor under the *Mathews* framework, we agree with the board that the procedures adequately protect against an unacceptable risk of error. Turning to the final *Mathews* factor, we are persuaded that the governmental interest weighs in favor of maintaining the preponderance of the evidence standard because a heightened standard of proof necessarily renders it more difficult for the state to protect the public from unsafe medical practitioners.\*\*\*Weighing these three factors, we are not persuaded that the constitution requires a heightened standard of proof when a physician's license is imperiled in an administrative proceeding before the board. We therefore decline the plaintiff's invitation to judicially impose the heightened standard of proof imposed by a minority of our sister states.<sup>187</sup>

Another recent noteworthy case is *Olympic Healthcare Services II LLC v. Department of Social & Health Services*,<sup>188</sup> a decision by the Court of Appeals of Washington. The case involved the revocation of the license of an operator of an adult family home. What is interesting about the case is the Court of Appeals' discussion of three earlier Washington Supreme Court cases, *Nguyen v. Department of Health Medical Quality Assurance Commission*,<sup>189</sup> *Ongom v. Department of Health, Office of Professional Standards*<sup>190</sup>, and *Hardee v. Dep't of Soc. & Health Servs.*,<sup>191</sup>. In *Nguyen* the state supreme court applied the three-part *Mathews* test to conclude that due process required proof by clear and convincing evidence to revoke a

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187. The Jones Court found unpersuasive the plaintiff's argument that the disciplinary procedures to which attorneys are subjected should have some bearing on the appropriate disciplinary procedures applied to physicians. According to the court the plaintiff's argument fails to recognize that attorney discipline, unlike physician discipline, is overseen by the Judicial Branch. *Jones*, 72 A.3d at 1044. *See also*, *Statewide Grievance Committee v. Rozbicki*, 558 A.2d 986 (1989) (noting that regulation of attorney conduct is "within the court's inherent authority" and that statewide grievance committee is authorized "to act as an arm of the court in fulfilling this responsibility").

188. 304 P.3d 491 (Wash. Ct. App. 2013).

189. 29 P.3d 689 (Wash. 2001), *cert. denied*, 535 U.S. 904 (2002).

190. 148 P.3d 1029 (Wash. 2006), *overruled by Hardee*, 256 P.3d 339 (Wash. 2011).

191. 256 P.3d 339 (Wash. 2011).

professional license.<sup>192</sup> In *Ongom* the state supreme court held that revocation of state registration as a nursing assistant was indistinguishable from revocation of a medical license and, thus, due process required proof by clear and convincing evidence. And, in *Hardee* the Washington Supreme Court overruled *Ongom*, reasoning that there was a distinction between professional and other licenses. In reaching this result, the court in *Hardee* focused on the time, expense, and education invested in obtaining the licensing. The court identified three factors that distinguished a home child care license from a professional license: (1) the license adheres to the facility and not the individual provider, (2) the state agency can revoke the license for the misconduct of someone other than the provider, and (3) obtaining a license only requires completion of state approved training. Based on *Hardee*, the Washington Court of Appeals in *Olympia* held that the preponderance of the evidence standard was appropriate for revocation of an adult family home license.<sup>193</sup>

#### I. Burden of Proof Under Federal Contract Statutes

Most claims of fraud relating to government contracts involve one or more of the following statutes: the False Claims Act (FCA)<sup>194</sup>, Contract Disputes Act (CDA)<sup>195</sup> Fraud Provision and Forfeiture of Fraudulent Claims Act (FFCA).<sup>196</sup>

To establish that a plaintiff is liable under the False Claims Act, the government must show that: (1) the contractor presented a claim for payment, (2) the claim was false or fraudulent, (3) the contractor knew that the claim was false or fraudulent, and (4) the government suffered damages because of the false or fraudulent claim.<sup>197</sup> For purposes of the FCA, the terms “knowing” and “knowingly” mean: (A) that a person, with respect to information-(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information; and (B) that no proof of specific intent to defraud is required.<sup>198</sup> However, there must be a

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192. As noted above, the decision in *Hardee* represents the minority view. It was based primarily on the court’s reasoning that an individual has a “profound” interest in his or her professional license. Most courts hold that such personal interest is insufficient to warrant application of the clear and convincing standard.

193. *Hardee*, 304 P.3d 491 (Wash. Ct. App. 2013).

194. 31 U.S.C. § 3729 (2000).

195. 41 U.S.C. § 604 (2000).

196. 28 U.S.C. § 2514 (2000).

197. *See, e.g.*, *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994).

198. 31 U.S.C. § 3729(b). *See, e.g.*, *Ulysses Inc. v. United States*, 117 Fed. Cl. 772 (2014).

showing by the government of more than innocent mistake or mere negligence.<sup>199</sup>

The FCA specifically provides that the government need only prove the elements of a FCA claim by a preponderance of the evidence.<sup>200</sup> Arguments have been made challenging this standard.<sup>201</sup> But, to date, there have been no significant judicial decisions addressing the issue.<sup>202</sup>

Under the Contract Disputes Act (CDA), if a contractor is unable to support any part of his claim and it is determined that such inability is attributable to a misrepresentation of fact or fraud on the part of the contractor, then the contractor is liable to the government for an amount

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199. *UMC Elec. Co. v. United States*, 43 Fed. Cl. 776, 795 (1999); *Comm. Contractors Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998); *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992).

200. 31 U.S.C. § 3731(C) (2000).

201. Eric Askanase, *Qui Tam And The False Claims Act: Criminal Punishment In Civil Disguise*, 70 DEF. COUNS. J. 472 (2003):

In discussion on the 1986 amendments to the FCA, it was clearly expressed that the FCA's burden of proof was to be broadened precisely because courts had found that FCA cases often required "specific intent" and "clear and convincing, even unequivocal, evidence." The framers of the FCA, in contending that it was a traditional civil case, argued for the traditional civil burden: preponderance of the evidence, precisely because they feared the move courts had been making to put more stringent burdens of proof. As a result of the 1986 amendments, "preponderance of the evidence" is the current standard under 31 U.S.C. § 3731(c).

There are circumstances in which the FCA is acts like a criminal, rather than civil, statute. It is punitive and exposed to double jeopardy and double jeopardy challenges. In light of the recent rulings [ ] that the FCA acts enough like a criminal statute to trigger the traditional criminal defenses of double jeopardy and excessive fines, a simple conjecture is possible: if the FCA acts enough like a criminal statute to concern the Supreme Court with its implications for excessive fines and double jeopardy, its burden of proof should reflect not the lightest civil burden but one closer to a criminal statute. But that is for the courts to decide. *Id.* at 483 (citations omitted).

202. There have been a number of FCA claims regarding research misconduct. *See United States Ex Rel. Jones v. Brigham and Women's Hospital*, 678 F.3d 72 (1st Cir. 2012); *U.S. v. Univ. Of Med.*, 2010 WL 4116966 (D.N.J.); *United States Ex Rel. Gober v. Univ. Of Alabama at Birmingham*, No. 01-CU-00877-VEH (N.D. Ala. settled Apr. 14, 2005) (settlement agreement available at <https://www.justice.gov/sites/default/files/civil/legacy/2014/04/18/Univ.Ala.%202005.pdf>); *United States Ex Rel. Long v. Mayo Foundation*, No. CV02-522-ADM/SRN (D. Minn. settled May 26, 2005) (settlement agreement available at <https://www.justice.gov/sites/default/files/civil/legacy/2014/04/18/MayoClinic%202005.pdf>). The elements of making out a FCA claim are not the same as those under the NSF and HHS regulations regarding research misconduct. For an analysis of FCA claims in the research misconduct context, see Brief of Defendants-Appellees, *United States Ex Rel. Jones v. Brigham and Women's Hospital*, 2011 WL 2309192. As to the evidentiary role that the investigative reports of ORI and OIG can have in an FCA case, see, *U.S. ex rel. Milam v. Regents of University of California*, 912 F. Supp. 868 (D. Md. 1995).

For a discussion of FCA cases involving research misconduct see, B. Stanković, *Pulp Fiction: Reflections on Scientific Misconduct*, 2004 WIS. L. REV. 975 (2004).

equal to such unsupported part of the claim in addition to all costs to the government attributable to the cost of reviewing said part of his claim.<sup>203</sup> While the CDA does not provide a standard of proof, the United States Court of Appeals for the Federal Circuit has applied the preponderance of evidence standard to claims brought under the CDA's fraud provision.<sup>204</sup>

Finally, under the Fraud Provision and Forfeiture of Fraudulent Claims Act (FFCA), a claim against the United States shall be forfeited by any person who fraudulently submits a false claim to the government.<sup>205</sup> The Federal Circuit has held that, to prevail on a claim alleging fraud under the FFCA, the government is required to establish by clear and convincing evidence that the contractor knew that its submitted claims were false, and that it intended to defraud the government by submitting those claims.<sup>206</sup> The distinction between the application of the preponderance of the evidence standard in the FCA (which expressly states that the preponderance of the evidence standard applies) and the clear and convincing standard in the FFCA appears to be solely based on the different language of the two statutes.<sup>207</sup>

#### J. Does Due Process Require The Clear And Convincing Standard To Be Applied At Least In Circumstances When ORI Or OIG May Seek To Debar A Researcher Based On Research Misconduct?

Applying the foregoing to the research misconduct context, it is clear under *Addington* and *Mathews* that there are circumstances under which the

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203. 41 U.S.C. § 604 (2000).

204. See *Grand Acadian, Inc. v. United States*, 105 Fed. Cl. 447, 457–58 (2012); *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1362 (Fed. Cir. 1998).

205. 28 U.S.C. § 2514 (2000).

206. See, *Ulysses, Inc. v. United States* 117 Fed. Cl. 772 (2014); *Alcatec, LLC v. U.S.*, 100 Fed. Cl. 502, 517 (2012). In *Chapman Law Firm, LPA v. United States*, 113 Fed. Cl. 555, 610-611 (Fed. Cl. 2013) the court stated:

Under the statute, “the government must establish by clear and convincing evidence that the contractor knew that its submitted claims were false, and that it intended to defraud the government by submitting those claims.” Mere negligence, inconsistency, or discrepancies are not actionable under the Special Plea in Fraud statute. The United States Court of Appeals for the Federal Circuit has described the clear and convincing evidence standard as follows: “A requirement of proof by clear and convincing evidence imposes a heavier burden upon a litigant than that imposed by requiring proof by preponderant evidence but a somewhat lighter burden than that imposed by requiring proof beyond a reasonable doubt. Clear and convincing evidence has been described as evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is highly probable.”

*Id.* (quoting *Daewoo Eng'g & Constr. Co. v. United States*, 557 F.3d 1332, 1341 (Fed. Cir. 2009); *Alcatec, LLC v. United States*, 100 Fed. Cl. 502, 517 (2011); *Am-Pro Prot. Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed. Cir. 2002) (internal quotations omitted)).

207. See, *Alcatec, LLC v. U.S.* 100 Fed. Cl. 502 (Fed. Cir. 2011) (discussing different burdens of proof under FCA and FFCA based upon statutory language).



Due Process Clause might require an agency or court to apply a clear and convincing standard of proof before taking an adverse action against a private person. What is less clear is exactly where the line is drawn between those circumstances requiring clear and convincing evidence and those for which a preponderance of the evidence will suffice. The argument has been made that the debarring of a researcher for misconduct fits within the category of cases that constitutionally requires application of the clear and convincing standard.<sup>208</sup> As demonstrated above, however, the strength of such an argument is far from clear. In fact, the precedent strongly suggests that the Constitution does not require HHS and NSF to apply the “clear and convincing” standard in research misconduct.

Nevertheless, the precedent also supports the conclusion that HHS and NSF should have more fully evaluated whether there are circumstances where the clear and convincing standard can or should be applied while still ensuring that the public interest is adequately protected. It may very well be that those agencies can articulate why the public interests outweigh the countervailing due process concerns and justify use of the preponderance standard. But, to date, they have not adequately done so.

There is undoubtedly a possibility of mistake when there are factual disputes relating to research misconduct.<sup>209</sup> As the Supreme Court noted in *Addington*, the purpose of the standard of proof is “to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”<sup>210</sup> And, as also recognized by the Court in *Addington*, there are circumstances where an “individual should not be asked to share equally with society the risk of error.”<sup>211</sup> That is especially true “when the possible injury to the individual is significantly greater than

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208. See Trial Motion, Memorandum and Affidavit, *Brodie v. Dep’t. of Health and Human Services*, 2010 WL 3416349 (D.D.C.) in which the Plaintiff stated:

The Fifth Amendment protects several rights of citizenship, including the right not to be deprived of liberty without due process of law, an interest that encompasses the right to be free from official stigmatization. The core requirements of due process are notice and the opportunity to be heard. The Court of Appeals for the District of Columbia Circuit has recognized that “debarment is a form of punishment which stigmatizes the target.” The Court of Appeals further recognized that such stigmatization is “a blow to a protected ‘liberty’ interest, which, of course, triggers an inquiry as to whether the process it has been afforded is adequate.”*Id.* (quoting *Fischer v. Resolution Trust Corp.*, 59 F.3d 1344, 1349 (D.C. Cir. 1995)). See also *Trifax v. District of Columbia*, 314 F.3d 641, 643 (D.C. Cir. 2003) (“Because this liberty concept protects corporations as well as individuals, formally debarring a corporation from government contract bidding constitutes a deprivation of liberty that triggers the procedural guarantees of the Due Process Clause.”).

209. See *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

210. *Addington*, 441 U.S. at 423.

211. *Id.* at 427.

any possible harm to the state.”<sup>212</sup> Of course, the purpose of the three-factor *Mathews* test is to balance those factors to determine the appropriate balance of the risk of error.

There is no indication that HHS or NSF did the balancing required by *Mathews* in adopting the preponderance standard. Moreover, if the agencies were to undertake such an analysis, there are arguments to support the conclusion that the “clear and convincing” standard is appropriate.

As to *Mathews*’ first factor—“the private interest that will be affected by the official action”—the Supreme Court has consistently recognized the importance of allowing a person to pursue his or her chosen career.<sup>213</sup> And while debarment may or may not be permanent, a finding of research fraud by HHS or NSF will, for all practical purposes, either end or substantially limit the ability of a researcher to pursue an academic career. In addition, irrespective of an agencies’ characterization of the purpose of debarment, it cannot be viewed as a decision by the relevant federal agency to punish the researcher for his conduct.<sup>214</sup> And, as the Court suggested in *In Re Ruffalo*, the punishment is being imposed in what is essentially a quasi-criminal proceeding.<sup>215</sup>

Similarly, the decision to debar a researcher subjects the researcher to the type social stigma that the Court suggested in *Santosky*<sup>216</sup> warrants application of the clear and convincing standard. This reasoning is implicit in *Addington* where the Court noted that the clear and convincing standard of proof is applied in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant in part because “[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money” but directly impact the reputation of the alleged wrongdoer.<sup>217</sup>

As to *Mathews*’ second factor—“the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”—the institutional proceedings generally will not have all the procedural safeguards that would apply in the judicial context. Moreover, the cases where the standard of proof can be expected to make a difference are likely to be the more complicated proceedings where additional procedural safeguards may be of more importance.

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212. *Id.*

213. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); *Truax v. Raich*, 239 U.S. 33, 44 (1915); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 n.23 (1976).

214. *See Woodby v. Immigration Service*, 385 U.S. 276, 285 (1966) (simply calling a proceeding remedial does not justify by itself applying the preponderance of the evidence standard).

215. *In re Ruffalo*, 390 U.S. 544, 550 (1968).

216. *Santosky v. Kramer*, 455 U.S. 745, 757 (1982).

217. *Addington v. Texas*, 441 U.S. 418, 424 (1979).

And as to *Mathews*' third factor—"the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"—there is no reason to believe that an institution or an agency will do any less (or more) of an investigation depending on the standard of proof. Presumably, regardless of the standard, the institution and the agencies will do what is required to determine the true facts underlying the challenged research. And, if the result of applying the clear and convincing standard does result in a more thorough investigation, that would seem to be a positive public benefit that would outweigh any extra administrative burden.

Moreover, by the time a research misconduct case reaches a debarment official (that is, after completion of the institution's and agencies' proceedings), the evidence that is necessary for a decision has been compiled. Thus, the main impact of applying the higher standard of proof is to serve to impress upon the debarment official the importance of the decision and thereby perhaps reduce the chances that an erroneous decision will be made with tremendous impact on the researcher.<sup>218</sup>

To the extent the courts have held that the preponderance of the evidence standard is necessary to protect the public interest in the state licensing context, there is a distinction between taking away a license from a physician or lawyer and debarring a researcher. There is an obvious immediate risk of harm to individual members of the public if an unqualified physician is allowed to treat patients (or an attorney is allowed to practice) that is absent in the researcher context. At the time of the debarment proceeding, the researcher's work will typically have been thoroughly reviewed and, where appropriate, modified. And, in those instances where the debarment proceeding occurs after the publication of the research, presumably any needed retractions or corrections to that work can occur independent of a proceeding at which the ultimate issue is whether the researcher should be debarred (that is, the validity of the research can be questioned in multiple forums apart from the debarment proceeding).

And as to the possibility of future misconduct by a researcher, any researcher who has been the subject of a proceeding that resulted in a recommendation of debarment will have his/her work highly scrutinized going forward regardless of the conclusion of the debarment official.<sup>219</sup>

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218. *Id.* at 426–27.

219. For example, nothing would preclude a debarment official from stating his or her conclusion that the research was significantly flawed and still conclude that there was not clear and convincing evidence of research misconduct. Presumably, the debarment official could even state that he or she would have imposed debarment under the preponderance standard.

One might argue that the punishment of debarment deters researchers from engaging in

The foregoing is not intended to suggest that there is no public harm if a researcher is wrongly found not to have engaged in research misconduct. Clearly there is a public interest in making sure that all researchers act with the highest integrity. But, HHS and NSF should consider whether that public interest can be vindicated without the need for having a researcher's career depend on fifty percent of the evidence and "a feather." At a minimum, the agencies should thoughtfully consider whether—in the rare close case—the harm to the individual researcher who is wrongly debarred under the preponderance of evidence standard outweighs the potential public harm which may occur should a researcher who did engage in misconduct escapes debarment under the clear and convincing standard. It is noteworthy in this regard that cases such as *Brodie* and *Bois* suggest that application of the clear and convincing standard may only rarely affect the outcome.

#### K. Did HHS And NSF's Violate the APA In Adopting the Preponderance Of The Evidence Standard?

As noted, HHS and NSF adopted the preponderance of the evidence standard both for the determination as to whether research misconduct occurred and for the decision of the debarment official as to whether to impose debarment as a sanction. The question this raises is whether the agencies' adoption of the preponderance standard violated the Administrative Procedures Act.

Under the APA, a court is required to set aside an agency regulation that is contrary to a constitutional right.<sup>220</sup> Therefore, a court could theoretically hold that the HHS and NSF regulations applying the preponderance of the evidence standard to research misconduct are invalid under this provision by application of the *Mathews*' test. Alternatively, a court may set aside even a constitutional regulation if the court concludes that the regulation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>221</sup> Under this provision, a researcher, educational institution, or other organization with standing could challenge the regulations of HHS and NSF.

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misconduct. While it seems reasonable that such is the case, the mere fact that a researcher may be subject to a debarment proceeding—regardless of the standard of proof—would seem to create deterrent enough.

220. 5 U.S.C. § 706(2)(B).

221. 5 U.S.C. § 706(2)(A); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359 (1998) (holding that § 706(2)(a) governs substantive review of agency's interpretation of its own regulations); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 (1991) (reviewing agency's interpretation of regulations for "reasonableness"); *Edwards v. Califano*, 619 F.2d 865, 868 (10th Cir.1980) (holding that acknowledged deference to agency's interpretation of own regulation does not preclude review under § 706(2)(A)).

It is well established that courts are generally required to give deference to an agency's interpretations of the statutes that the agency administers.<sup>222</sup> However, there are a number of arguments as to why deference should not be required as to HHS's and NSF's adoption of the preponderance standard. First, the agency deference rule has been held not to apply to questions of law and the proper standard of proof in research misconduct cases would seem to be a legal issue.<sup>223</sup> Second, when an agency's interpretation of its own regulation is based not on its expertise in a particular field, but on general common law principles, it is not entitled to great deference.<sup>224</sup> In this case, the agencies relied, in part, upon the erroneous assumption that the common law standard in fraud cases was preponderance of the evidence, when in fact, the common law rule is clear and convincing.<sup>225</sup> It also relied upon the standard rule applicable to commercial debarment cases without considering the different circumstances of a scientific researcher. And while HHS and NSF have expertise relating to the importance of public confidence in scientific research, they have no particular expertise in balancing considerations of due process. Third, an agency's failure to consider an important aspect of a problem is "arbitrary and capricious" under the APA.<sup>226</sup> In this instance, the record does not reflect any meaningful consideration of the factors, which would support use of the clear and convincing standard (i.e., the *Mathews* factors). Fourth, an agency's failure to articulate a satisfactory explanation for its conclusions may make its decision arbitrary and capricious, and as noted above,<sup>227</sup> neither HHS nor NSF set forth any

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222. See *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

223. See *Wolfe v. Barnhart*, 446 F.3d 1096, 1100 (10th Cir.2006); *Artesian Indus., Inc. v. Dep't of Health and Human Servs.*, 646 F. Supp. 1004, 1006 (D.D.C.1986).

224. See, e.g., *Bd. of County Commissioners v. Isaac*, 18 F.3d 1492, 1497 (10th Cir. 1994) ("An agency's interpretation of its own regulation is not entitled to great deference if it is based on general common law principles rather than the agency's expertise. . . ."); *Mission Group Kansas, Inc. v. Riley*, 146 F.3d 775 (10th Cir. 1998); *Bambidele v. Immigration & Naturalization Service*, 99 F.3d 557, 561 (3d Cir. 1996) (little deference is owed when the dispute involves a legal issue that is not within the agency's particular expertise, such as the interpretation of a statute of limitations); *Edwards v. Califano*, 619 F.2d 865 (10th Cir. 1980) (an agency's interpretation of its own regulation, which is not based on expertise in its particular field but is rather based on general common law principles, is not entitled to great deference); *Jicarilla Apache Tribe v. Federal Energy Regulatory Comm'n*, 578 F.2d 289, 292–93 (10th Cir.1978).

225. *Supra* text at note 124.

226. See *Motor Vehicle Mfrs. Ass'n V. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983).

227. *Id.* at 43.

meaningful analysis as to why the public interest could not be protected by application of the clear and convincing standard.<sup>228</sup>

Accordingly, even if the clear and convincing standard is not constitutionally mandated (and it likely is not), a reasonable argument could be made that the agencies' adoption of the preponderance of the evidence standard violated the APA based on:

- (i) the arguments set forth above supporting the conclusion that application of the clear and convincing standard would comport more with due process than the preponderance standard (even in not constitutionally mandated);
- (ii) the fact that OSTP and NSF wrongfully stated in their rulemaking process that the uniform standard of proof in fraud cases is preponderance of the evidence, and
- (iii) the apparent lack of any meaningful analysis during the agencies' rulemaking of the *Mathews*' factors and whether a higher standard of proof should be applied to research misconduct cases in light of the unique circumstances of a scientific researcher.

#### L. New rulemaking by HHS and NSF.

Rather than HHS and NSF being faced with a legal challenge to their regulations in the absence of a full consideration of the correct standard of proof, the agencies should initiate rulemaking on their own to consider whether application of the preponderance of the evidence standard is appropriate in all circumstances. Should the agencies choose not to initiate such rulemaking, then interested parties should petition the agencies to open rulemaking on this issue pursuant to 5 U.S.C. § 553 which provides that "each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."<sup>229</sup> Should the agencies deny such a petition, that denial can be appealed to the courts.<sup>230</sup>

### CONCLUSION

The NSF and HHS have adopted procedures which allow for the creation of a reasonably complete evidentiary record for determining whether research misconduct has occurred.<sup>231</sup> Researchers have an

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228. See *Securitypoint Holdings, Inc. v. Transportation Sec. Admin.* 769 F.3d 1184, 2014 WL 5432132 (D.C. Cir. 2014).

229. 5 USC § 553(e); Sean Croston, *The Petition is Mightier than the Sword: Rediscovering an Old Weapon in the Battles over "Regulation Through Guidance,"* 63 ADMIN. L. REV. 381 (2011); Reeve T. Bull, *Building a Framework for Governance: Retrospective Review and Rulemaking Petitions,* 67 ADMIN. L. REV. 265 (2015).

230. 5 USC §§ 702, 706; *Auer v. Robbins*, 519 U.S. 452 (1997).

231. For articles representative of the view that the procedures adopted by HHS and NSF are fundamentally unfair to researchers see, Jacqueline Bonilla, *Illusory*

opportunity to rebut allegations, and, given how few cases are actually litigated before the DAB and in the courts, it may be fair to assume that in the majority of cases the underlying facts are ultimately not significantly contested. Nevertheless, there are certainly cases which are the result of honest error by the researcher. There will also be cases, such as the hypothetical involving Dr. White, where the evidence is less than clear. And, it would be naïve to believe that there will not be instances where a researcher will be the subject of a malicious complaint or intentional sabotage. In such cases, it is a fair question whether the agencies should be able to impose substantial harm to a researcher's career based merely on a preponderance of the evidence. As shown above, there are legitimate arguments that can be made that due process requires a higher burden of proof. But, even if not constitutionally required, the issue is one that has not been fully vetted and warrants future discussion as part of the rulemaking process.

## APPENDIX

Key Agency Abbreviations

ASH	Assistant Secretary for Health (of HHS)
DAB	Departmental Appeals Board (of HHS)
HHS	U.S. Department of Health and Human Services
NSF	National Science Foundation
OIG	Office of Inspector General of National Science Foundation
ORI	Office of Research Integrity (a division of HHS)
OSTP	Office of Science and Technology Policy
PHS	Public Health Service of HHS

Other Abbreviations

ALJ	Administrative Law Judge
APA	Administrative Procedures Act
CDA	Contract Disputes Act
DCL	Dear Colleague Letter (of HHS)
FCA	False Claims Act
FFCA	Fraud Provision and Forfeiture of Fraudulent Claims Act
RICO	Racketeer Influenced and Corrupt Organizations Act
SEC	Securities Exchange Commission
VEA	Voluntary Exclusion Agreement



# THE FRATERNITY AS FRANCHISE: A CONCEPTUAL FRAMEWORK

JARED S. SUNSHINE\*

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*A fraternity: it's almost as though it's a franchise operation with terrible quality control. You could get a Big Mac in Cleveland and it's going to look pretty much like a Big Mac in Jacksonville. In a fraternity, you could go to Sigma Chi, the biggest American fraternity on one campus, and those guys are exemplary student leaders. They're doing tons of community service, they're raising money for charities. You could go to the next campus over to Sigma Chi and it's a bunch of thuggish kids who are perpetrating criminal acts and being drunk all the time.<sup>1</sup>*

## I. INTRODUCTION

The local fraternity chapter,<sup>2</sup> for all its ubiquity at North American institutions of higher education, is something of a study in contradictions. It is a voluntary association of like-minded individuals, but one with notoriously onerous rites of admission.<sup>3</sup> It is a student society independent

1. Interview by David Greene with Caitlin Flanagan, author of *The Dark Power of Fraternities*, THE ATLANTIC, Feb. 19, 2014 (Nat'l Pub. Radio, Feb. 5, 2014) (transcript on file with author) [hereinafter Flanagan NPR Interview].

2. This Article uses “national” and “local” throughout both adjectivally and nominally (e.g., “the Alpha Beta Gamma national took a keen interest in its local chapter at MIT”) to refer respectively to a national (or regional or international) fraternal organization and its subordinate local chapter. No implication is intended to exclude from the term “national” organizations regional or international in scope. *E.g.*, Jared S. Sunshine, *A Lazarus Taxon in South Carolina: A Natural History of National Fraternities’ Respondeat Superior Liability for Hazing*, 5 CHARLOTTE L. REV. 79, 79 n.4 (2014); Eric A. Paine, *Recent Trends in Fraternity-Related Litigation*, 23 J.L. & EDUC. 191, 191 n.2 (1994). Care should be taken to distinguish such local chapters of national fraternities from so-called “local” fraternities—those unique to a single campus, with no national organization. For clarity, this Article does not use “local” in the latter sense except in quotations of other materials. For like reasons of clarity, this Article uses “fraternity” and “fraternal” throughout to refer to both men’s and women’s fraternal organizations. *See* C. Sidney Neuhoff, *The Legal Status of Fraternities*, 11 WASH. U. L. REV. 30, 30 (1925) (“No distinction is made in the cases between fraternities and sororities. The word ‘fraternity,’ in its generic sense includes organizations of either or both sexes.”); *e.g.*, Sunshine, *supra*; Shane Kimzey, *The Role of Insurance in Fraternity Litigation*, 16 REV. LITIG. 459, 460 n.2 (1997); Paine, *supra*, at 191 n.1; Susan J. Curry, *Hazing and the “Rush” Toward Reform: Responses from Universities, Fraternities, State Legislatures, and the Courts*, 16 J.C. & U.L. 93, 93 n.1 (1989).

3. *See* Dara Aquila Govan, “Hazing Out” the Membership Intake Process in Sororities and Fraternities: Preserving the Integrity of the Pledge Process Versus Addressing Hazing Liability, 53 RUTGERS L. REV. 679, 679–80 (2000–2001); Gregory E. Rutledge, *Hell Night Hath No Fury Like a Pledge Scored . . . And Injured: Hazing Litigation in U.S. Colleges and Universities*, 25 J.C. & U.L. 361, 363–65 (1998); *e.g.*,

from the university, yet screened and recognized (or derecognized and banned) by that university.<sup>4</sup> It is a self-administering group equipped with officers and committees,<sup>5</sup> yet often meticulously regulated by school authorities.<sup>6</sup> It is a uniquely local institution catering to a cloistered

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Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity, 507 N.E.2d 1193, 155 Ill. App. 3d 231, 237 (Ill. App. Ct. 1987) (“[M]embership in the defendant fraternity was a ‘much valued status.’ It can be assumed that great social pressure was applied to plaintiff to comply with the fraternity’s membership ‘qualifications,’ perhaps to the extent of blinding plaintiff to any dangers he might face.”); see also Edward J. Schoen & Joseph S. Falchek, *You Haze, I Sue: A Fraternity Stew*, 18 J. LEGAL STUD. EDUC. 127, 127–30 (2000) (case study in hazing).

4. Gregory F. Hauser, *Social Fraternities at Public Institutions of Higher Education: Their Rights Under the First and Fourteenth Amendments*, 19 J.L. & EDUC. 433, 435–38 (1990) (“A critical tool for the institutions has been the power to ‘recognize’ a chapter.”); James C. Harvey, *Fraternities and the Constitution: University-Imposed Relationship Statements May Violate Student Associational Rights*, 17 J.C. & U.L. 11, 34–37 (1990–1991); e.g., Lloyd v. Alpha Phi Alpha Fraternity, 1999 WL 47153 (N.D.N.Y. 1999); Mu Chapter of Delta Kappa Epsilon v. Colgate Univ., 176 A.D.2d 11 (N.Y. App. Div. 1992); Psi Upsilon v. Univ. of Pa., 591 A.2d 755 (Pa. Super. Ct. 1991); see Kerri Mumford, *Who Is Responsible for Fraternity Related Injuries on American College Campuses?*, 17 J. CONTEMP. HEALTH L. & POL’Y 737, 744 (2001); Govan, *supra* note 43, at 704–06; Rutledge, *supra* note 3, at 385–86; cf. Curry, *supra* note 2, at 111 (comparing universities who strictly regulate fraternities with those that disassociate themselves entirely). *But see* Govan, *supra* note 4, at 706 (“Currently, many universities do not have a formal relationship with their Greek organizations.”).

5. E.g., Smith v. Delta Tau Delta, 9 N.E.3d 154, 161 (Ind. 2014); Estate of Hernandez v. Flavio, 930 P.2d 1309, 1313 (Ariz. 1997) (“Each [fraternity] member had the opportunity and the power to vote for the president and two vice presidents, who appointed the social chairman; each fraternity member could have voted to disapprove any of the social chairman’s proposed activities that involved furnishing alcohol to minors; and each member could have run for an officer position or applied for a committee chairmanship.”); see, e.g., Foster v. Purdue Univ., 567 N.E.2d 865, 870–71 (Ind. Ct. App. 1991); Furek v. Univ. of Del., 594 A.2d 506, 514 (Del. 1991); Univ. of Denver v. Whitlock, 744 P.2d 54, 60–61 (Colo. 1987); see also, e.g., Shaheen v. Yonts, 394 F. App’x 224 (6th Cir. 2010).

6. Govan, *supra* note 3, at 698, 699–704 (“Many [colleges] have restricted the independence of fraternities and sororities, and have chosen to regulate them beyond recognition.”); Hauser, *supra* note 4, at 435–37; Rutledge, *supra* note 3, at 378, 385–386; Mumford, *supra* note 4, at 744, 751–53, 769; e.g., Furek v. Univ. of Del., 594 A.2d 506, 520 (Del. 1991); see Paine, *supra* note 2, at 193; Nancy S. Horton, *Traditional Single-Sex Fraternities on College Campuses: Will They Survive in the 1990s?*, 18 J.C. & U.L. 419, 469–70 (1991–1992); Harvey, *supra* note 4, at 15, 31–41; cf. Curry, *supra* note 2, at 111 (comparing universities who strictly regulate fraternities with those that disassociate themselves entirely). *But see* Univ. of Denver v. Whitlock, 744 P.2d 54, 60 (Colo. 1987) (“[T]he University did not attempt to regulate the recreational pursuits of members of the fraternities and sororities on campus. Indeed, fraternity and sorority self-governance with minimal supervision appears to have been fostered by the University.”); Paine, *supra* note 2, at 201 (discussing Whitlock v. Univ. of Denver, 712 P.2d 1072 (Colo. Ct. App. 1985), *rev’d*, 744 P.2d 54 (Colo. 1987)).

community,<sup>7</sup> yet is chartered, licensed, and overseen by an umbrella national organization.<sup>8</sup> It collects dues from and remits services to its members in a self-contained economy of sorts,<sup>9</sup> but itself pays dues to and receives services from that national.<sup>10</sup> What is the essence of the college fraternity that underlies such ramified ambivalences?

Such a question is not merely academic. Much litigation has foundered in the inherent incoherence of what a fraternity is, casting aimlessly amongst the actual tortfeasors, other local members and officers, alumni organizations, the national office and staff, the university and its administration, and state government (in the case of public universities) in search of the parties properly responsible.<sup>11</sup> In one relatively early case, the plaintiff sued not only the individual member of Sigma Phi Epsilon, but also his local chapter, the national fraternity, and the university.<sup>12</sup> The Delaware Supreme Court affirmed dismissal against the local chapter and verdict in

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7. Horton, *supra* note 6, at 437, 469; see Harvey, *supra* note 4, at 41–42; e.g., Pi Lambda Phi Fraternity v. Univ. of Pittsburgh, 229 F.3d 435 (3d Cir. 2000).

8. Angela N. Marshlain, *Non-Hazing Injuries to Fraternity and Sorority Members: Should the Fraternal Association Be Required to Assume a Parental Role?*, 5 APPALACHIAN J.L. 1, 3 (2006); Mumford, *supra* note 4, at 763–66; Paine, *supra* note 2, at 191–93; see Shaheen v. Yonts, 394 F. App'x 224 (6th Cir. 2010); Alexander v. Kappa Alpha Psi Fraternity, Inc., 464 F. Supp. 2d 751, 753 (M.D. Tenn. 2006); Marshall v. Univ. of Del., 1986 WL 11566, at \*8 (Del. Super. Oct. 8, 1986); Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1118 (La. App. Ct. 1999); Walker v. Phi Beta Sigma Fraternity (RHO Chapter), 706 So. 2d 525, 529 (La. App. 1997); Furek v. Univ. of Del., 594 A.2d 506, 514 (Del. 1991). *But see* Paine, *supra* note 2, at 202.

9. E.g., Estate of Hernandez v. Flavio, 930 P.2d 1309, 1310 (Ariz. 1997); see WM. RAIMOND BAIRD, BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES 495–96 (6th ed. 1905); Horton, *supra* note 6, at 469–70; see also, e.g., Estate of Hernandez v. Flavio, 924 P.2d 1036, 1039 (Ariz. Ct. App. 1997) (Fernandez, J., concurring in part and dissenting in part), *aff'd in part and rev'd in part on other grounds*, 930 P.2d 1309 (Ariz. 1997).

10. E.g., Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 410 (Kan. 2002) (The Pi Kappa Alpha national “serves as a national clearinghouse for the various chapters, members, alumni, and interested groups to share ideas and fellowship, to distribute such information or assistance, to arrange periodic national meetings, to publish fraternal communications, and to collect dues to defray expenses.”); see Horton, *supra* note 6, at 469–70; Byron L. LeFlore Jr., *Alcohol and Hazing Risks in College Fraternities: Re-evaluating Vicarious and Custodial Liability of National Fraternities*, 7 REV. LITIG. 191, 221 & n.151, 232 (1987–1988); Kimzey, *supra* note 2, at 467–68, 472–73.

11. E.g., Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105 (La. App. Ct. 1999) (plaintiff sued the local chapter, the local president, the national, and the State of Louisiana via the Board of Trustees for State Colleges and Universities); see Reni Gertner, *Fraternity Lawsuits Becoming More Common*, LAWYERS WEEKLY USA, Mar. 14, 2005; Mumford, *supra* note 4, at 737–38; Paine, *supra* note 2, at 191–94; Marshlain, *supra* note 8, at 2–4; Kimzey, *supra* note 2, at 464–66; Rutledge, *supra* note 3, at 366–68.

12. Furek v. Univ. of Del., 594 A.2d 506, 509 (Del. 1991).

favor of the national fraternity, while remanding for apportionment of liability between the university and the tortfeasor.<sup>13</sup> This result must seem somewhat peculiar: why was the university responsible for the fraternity member's action when no organ of the fraternity itself was?<sup>14</sup> Absent a framework as to how the local chapter of a fraternity functions vis-à-vis the national organization, courts are bound to revisit the same conceptual difficulties time and time again.

The present Article suggests a partial answer for such questions, conjecturing that the local chapter is functionally a franchisee of the national fraternity franchisor, serving a population of university students (with the university acting as a sort of a local gatekeeper-*cum*-regulator).<sup>15</sup> In Part II, the Article briefly details the history of franchises, along with the nature and purpose of franchisor-franchisee relationships. Part III discusses how the franchise organizational structure finds close analogy with the structure of the fraternity system, along with a few notes on the role of the university. Part IV takes up the franchising framework to examine broadly how issues of intellectual property, liability, disclosure, and due process could be addressed under its rubric. The Article closes in Part V with remarks on the more abstract merit or demerit of the franchise framework in analyzing fraternities, in light of alternative legal theories and public policy concerns.

This Article will not push the questionable argument that locals are somehow actual franchisees *de jure* of their nationals in the context of state law, federal statutes, and agency regulations, all of which prescribe detailed strictures to which franchisors and franchisees must adhere.<sup>16</sup> (If nothing else, it is clear that fraternities are not being held to any adherence to such strictures.<sup>17</sup>) Nor, for that matter, can or ought fraternities be artificially reduced from a broader social institution to a purely commercial arrangement.<sup>18</sup> However, the principles animating precedent on franchises may well prove useful in assessing how to view responsibility in the context of fraternity cases, as well as providing a better understanding of how

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13. *Id.* at 526.

14. According to the court, jurisdiction was not obtained over the local by service on its former president, as the unincorporated association had dissolved by the time of trial, and the members of the local had not been served individually. *Id.* at 513–14. As for the national, the jury had absolved it of responsibility, and the court did not see sufficient evidence of knowledge and control to disturb that finding. *Id.* at 514.

15. This author previously raised the possibility of analyzing fraternities in the context of franchise law while reviewing national vicarious liability for hazing in *respondeat superior*; this Article represents a more rigorous exploration of that proposed avenue of investigation. Sunshine, *supra* note 2, at 136.

16. *See, e.g.*, sources cited *infra* notes 55–59.

17. *See infra* Part III.C.

18. *See infra* Part V.

fraternities actually function. By stepping back from formalities stymied by the ambivalent nature of fraternities' local chapters, and looking closer at the practical and functional place of the fraternity in its natural ecology, the law may well be able to yield more satisfactory answers—and justice—for all who participate in and interact with the fraternity system.

## II. THE HISTORY, PURPOSE, AND DEFINITION OF FRANCHISING

Notwithstanding the prevalence of McDonald's hamburger joints and Subway sandwich shops throughout the world,<sup>19</sup> the concept of the franchise or chain store is relatively new to business.<sup>20</sup> Some trace its progenitors to various sponsorship and licensing schemes in Europe,<sup>21</sup> but it is generally accepted that the franchising model as such appeared only in the mid-nineteenth century in America.<sup>22</sup> Its original form was what is now called product franchising or distributorship, whereunder a manufacturer contracts with retailers to exclusively distribute its products to customers, assuring the former of access to the market, and the latter of a ready supply of merchandise to sell.<sup>23</sup> In this category belong pioneers Isaac Singer and Cyrus McCormick, whose vertically-integrated sewing machine and harvester empires represented two of the first true franchises.<sup>24</sup> With the expansion of industrial production in the twentieth century, such arrangements rapidly spread, with the predominant categories of product franchising to this day being automobile dealerships, soda bottling companies, and gas stations.<sup>25</sup>

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19. As of mid-2013, Subway numbered over 40,000 stores, while McDonald's was not far behind with 34,700. Venessa Wong & Steph Davidson, *Subway at 40,000: Fast Food's Global King Keeps Growing*, BLOOMBERG BUSINESSWEEK, Aug. 26, 2013, available at [businessweek.com](http://businessweek.com); cf. Michael I. Swygert, *Harold Brown, Franchising: Trap for the Trusting*, 4 VAL. U. L. REV. 224, 225–26 (1969).

20. THOMAS S. DICKE, *FRANCHISING IN AMERICA: THE DEVELOPMENT OF A BUSINESS METHOD, 1840–1980* at 3–4 (1992); ROGER D. BLAIR & FRANCINE LAFONTAINE, *THE ECONOMICS OF FRANCHISING* 3–4 (2005).

21. See DONALD W. HACKETT, *FRANCHISING: THE STATE OF THE ART* 5 (1977); Philip Mark Abell, *The Regulation of Franchising in the European Union*, at 34 & nn.71–72, 38 & n.87 (July 4, 2011) (Ph.D. dissertation, Queen Mary University of London) (on file with author), available at <https://qmro.qmul.ac.uk/jspui/handle/123456789/2326>.

22. See DICKE, *supra* note 20, at 1, 3; HACKETT, *supra* note 21, at 5; Joseph H. King Jr., *Limiting the Vicarious Liability of Franchisors for the Torts of Their Franchisees*, 62 WASH. & LEE L. REV. 417, 421–22 (2005).

23. DICKE, *supra* note 20, at 3; BLAIR & LAFONTAINE, *supra* note 20, at 5; Jerome L. Fels, *Franchising: Legal Problems and the Business Framework of Reference—an Overview*, in *THE FRANCHISING SOURCEBOOK* § 1.2 at 5–6 (Jim McCord ed. 1970); GLADYS GLICKMAN, *FRANCHISING* § 2.01 at 2-2.1 (2014 rel. 128).

24. DICKE, *supra* note 20, at 12–47; see BLAIR & LAFONTAINE, *supra* note 20, at 5–6; Abell, *supra* note 21, at 34–35 & n.73.

25. See BLAIR & LAFONTAINE, *supra* note 20, at 6, 10; DICKE, *supra* note 20, at 3

More pertinent to the present discussion is a second category, business-format franchising, which arose around the end of the nineteenth century.<sup>26</sup> (The pioneer here would be Martha Mathilda Harper, whose hundreds-strong intercontinental network of beauty shops seems curiously less remembered than Singer's and McCormick's enterprises.<sup>27</sup>) Under this model, the franchisor purveys a commercial enterprise wholesale, licensing a successful brand name, and offering a general business plan and "bundle of services" to the franchisee.<sup>28</sup> Such arrangements rose to popularity as "perceptive entrepreneurs realized that, to use a popular example, there was more money to be made selling hamburger stands than selling hamburgers."<sup>29</sup> Although there were some early success stories, business format franchising only reached full steam in the 1950s, as fast-food staples like McDonald's and Burger King multiplied to meet swelling peacetime demand after World War II.<sup>30</sup>

But business-format franchising is not limited to archetypal restaurant operations like McDonald's.<sup>31</sup> Although such establishments comprise a quarter of business-format franchises, the remaining three-quarters span the entire service economy: automotive products and services (12%); white-collar businesses like dentistry and insurance (17%); construction, home improvement, and maintenance (6%); convenience stores (5%); educational services (3%); hotels and other accommodations (3%); laundry (1%); entertainment and travel (3%); car and equipment rental (4%); food retailing

(1992); HACKETT, *supra* note 21, at 5–6; Abell, *supra* note 21, at 38.

26. DICKE, *supra* note 20, at 3; BLAIR & LAFONTAINE, *supra* note 20, at 6–7; Abell, *supra* note 21, at 35 n.75.

27. BLAIR & LAFONTAINE, *supra* note 20, at 6–7; Abell, *supra* note 21, at 35 & n.75 (“The first true business format franchise was created by Martha Mathilda Harper, who developed her network of Harper Beauty Shops at the turn of the century into over 500 shops in the USA, Canada and Europe by the mid-1920s.”).

28. DICKE, *supra* note 20, at 3; *see* BLAIR & LAFONTAINE, *supra* note 20, at 6–8; Fels, *supra* note 23, § 1.2 at 3; Seth W. Norton, *Towards a More General Theory of Franchise Governance*, in *ECONOMICS AND MANAGEMENT OF FRANCHISING NETWORKS* 20 (Josef Windsperger, Gérard Cliquet, George Hendrikse & Mika Tuunanen, eds. 2004); GLICKMAN, *supra* note 23, §§ 2.01 at 2-2.1, 2.02[2] at 10.

29. DICKE, *supra* note 20, at 3; *see* William L. Killion, *Franchisor Vicarious Liability—The Proverbial Assault on the Citadel*, 24 *FRANCHISE L.J.* 162, 163–64 (2004–2005).

30. BLAIR & LAFONTAINE, *supra* note 20, at 7, 18; Abell, *supra* note 21, at 35–36; King, *supra* note 22, at 422.

31. *See* BLAIR & LAFONTAINE, *supra* note 20, at 7–10, 27 (“[F]ranchising is not an industry but a way of doing business that is used in a number of different retail and service sectors”); Fels, *supra* note 23, § 1.2 at 4–7 (“Franchising is merely a new form of business organization, and as such, it cuts across industrial lines.”); *see also* Abell, *supra* note 21, at 38 (“Business format franchising encompasses a wide range of goods and services across many sectors”).

(6%); non-food retailing (15%); and a grab bag of miscellany like the original beauty parlors of Ms. Harper.<sup>32</sup> The continued expansion of franchising since the fast-food boom in the 1950s and 1960s has been the work of other sectors: white collar business establishments and automotive services drove numbers in the 1970s, while the 1980s and 1990s saw dramatic expansion in the personal service sector: maids, day-care, health and fitness, and so forth.<sup>33</sup> Development has not always proceeded apace; the 1960s and 1970s saw backlash against what many perceived as the abuses of a then-largely-lawless regime,<sup>34</sup> leading to the statutory systems of protections now in place.<sup>35</sup> But in the present day, though claims of stratospheric growth are unfounded,<sup>36</sup> the state of franchising as a form of business operations remains strong.<sup>37</sup>

Economists identify two main rationales for the franchising system.<sup>38</sup> The “economizing” or “agency” theory proposes that franchisees will be more incentivized to succeed than employees of a national organization, because the successes (or failures) of their outlets accrue to them personally, unlike a fixed-salary manager who might shirk his duties absent costly supervision.<sup>39</sup> However, franchisees may be incentivized to free-ride: to underinvest in products, service, or marketing; to rely on the brand’s power to maintain demand; and then to pocket the savings.<sup>40</sup> Robust econometric

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32. BLAIR & LAFONTAINE, *supra* note 20, at 10 (figures as of 1986); *see also* Norton, *supra* note 28, at 20.

33. BLAIR & LAFONTAINE, *supra* note 20, at 18.

34. *See* GLICKMAN, *supra* note 23, § 2.01 at 3–4. *See generally* HAROLD BROWN, *FRANCHISING: TRAP FOR THE TRUSTING* (1969).

35. GLICKMAN, *supra* note 23, § 2.01 at 3–5; *see* BROWN, *supra* note 34, at 87–94; Harold Brown, *Legislative Proposals to Curb Franchisor Abuses: The Realities of Franchising*, in *THE FRANCHISING SOURCEBOOK* § 12.2 at 191–202 (Jim McCord ed. 1970); Abell, *supra* note 21, at 36; *see also* sources cited *infra* notes 55–59 (modern state and federal statutes).

36. BLAIR & LAFONTAINE, *supra* note 20, at 27–34.

37. *See* Norton, *supra* note 28, at 17; Venessa Wong & Steph Davidson, *Subway at 40,000: Fast Food’s Global King Keeps Growing*, *BLOOMBERG BUSINESSWEEK*, Aug. 26, 2013, available at [businessweek.com](http://businessweek.com) (describing how Subway added 1,761 outlets since from January to August 2013, and plans to add 10,000 more by 2017).

38. *See* Janet E.L. Bercovitz, *The Organizational Choice Decision in Business Format Franchising: An Empirical Test*, in *ECONOMICS AND MANAGEMENT OF FRANCHISING NETWORKS* (Josef Windsperger, Gérard Cliquet, George Hendrikse & Mika Tuunanen, eds. 2004); Abell, *supra* note 21, at 50–53; *see also* BROWN, *supra* note 34, at 3, 23, 29 (quoting Hugh C. Sherwood, *Franchising: Big Business Cashes in on the American Dream*, *BUSINESS MANAGEMENT*, Aug. 1968); King, *supra* note 22, at 422–23.

39. Bercovitz, *supra* note 38, at 40–41; Abell, *supra* note 21, at 50–51; *see* King, *supra* note 22, at 423; *see also* Seth W. Norton, *An Empirical Look at Franchising as an Organizational Form*, 62 *JOURNAL OF BUSINESS* 197, 202–03 (1988).

40. Bercovitz, *supra* note 38, at 40–41; *see* Gillian K. Hadfield, *Problematic*



evidence shows that companies more commonly employ franchising when the risk of employee shirking is higher and the risk of franchisee free-riding lower.<sup>41</sup> Franchising is thus favored in “physically dispersed operations,” given the expense of monitoring distant local outposts.<sup>42</sup>

The parallel “resource scarcity” theory holds that companies turn to franchising to outsource capital needs for expansion that the company cannot or does not wish to expend itself,<sup>43</sup> a view that has been empirically demonstrated to have considerable validity as well.<sup>44</sup> The incentives available to the franchisee for success compensate the franchisee for the funding that permits the franchisor faster expansion than would otherwise be possible.<sup>45</sup> Relatedly, by coopting a locally-knowledgeable franchisee, the franchisor can obtain more talented labor without the expense of assaying local conditions—valuable to a franchisor seeking to rapidly conquer unfamiliar or hostile markets.<sup>46</sup> This consideration thus also shows franchising to be preferred for geographically diffuse enterprises.<sup>47</sup>

Despite much discussion, a precise definition of a franchise is elusive.<sup>48</sup> One early author observed that it is “distinctly different from other distribution forms because of the independence from one another of the parties to the contract and the sharing of a common trademark,”<sup>49</sup> and commentators generally agree that the shared brand name is the hallmark of franchising.<sup>50</sup> Courts too concur that the “cornerstone of a franchise system

*Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927, 949–50 (1989–1990).

41. Bercovitz, *supra* note 38, at 55–57, 62–63; Norton, *supra* note 39, at 204, 209–11, 214; *see also* Abell, *supra* note 21, at 50–51.

42. Norton, *supra* note 39, at 202, 209–11, 214; King, *supra* note 22, at 423.

43. Bercovitz, *supra* note 38, at 41–42; Abell, *supra* note 21, at 51–52; *see also* Norton, *supra* note 39, at 199–200.

44. Bercovitz, *supra* note 38, at 58, 62–63. *But see* Norton, *supra* note 39, at 199–200.

45. Abell, *supra* note 21, at 51–52.

46. *Id.* Norton, *supra* note 39, at 204–05, 211–14.

47. Norton, *supra* note 39, at 211–14.

48. Rochelle Spandorf, *Structuring Licenses to Avoid the Inadvertent Franchise*, LANDSLIDE, Mar.-Apr. 2010, at 38 (“Most people think they know a franchise when they see one. . . . There is no uniform definition of a franchise.”); HACKETT, *supra* note 21, at 3–4 (“[F]ranchising as a distribution form is sometimes ill defined and misunderstood because of its diverse, heterogenous and hybrid forms”); Fels, *supra* note 23, § 1.2 at 3 (“Franchising cannot be easily explained or defined.”); *see* Norton, *supra* note 28, at 17 (“Franchising is a common term in daily life, business discourse, and the law. Nevertheless, the term is used in different contexts and with different meanings.”).

49. *E.g.*, HACKETT, *supra* note 21, at 11.

50. *See, e.g.*, GLICKMAN, *supra* note 23, § 2.02 at 6; *see also* Scott P. Sandrock, *Tort Liability for a Non-Manufacturing Franchisor for Acts of Its Franchisee*, 48 U. CIN. L. REV. 699, 701 (1979) (describing reliance on national brand in patronizing local

must be the trademark or trade name of a product. It is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for the product.”<sup>51</sup> The franchisor must therefore assiduously cultivate uniformity of quality to avoid dilution of its valuable brand, an undertaking that inherently involves some degree of supervision and control of franchisees.<sup>52</sup> These complementary elements were summed up by the Pennsylvania high court in 1978:

In its simplest terms, a franchise is a license from the owner of a trademark or trade name permitting another to sell a product or service under the name or mark. More broadly stated, the franchise has evolved into an elaborate agreement by which the franchisee undertakes to conduct a business or sell a product or service in accordance with methods and procedures prescribed by the franchisor, and the franchisor undertakes to assist the franchisee through advertising, promotion and other advisory services.<sup>53</sup>

State and federal law provide more concrete guidance.<sup>54</sup> Consistent with history and precedent, the use of a common trademark or brand name is the *sine qua non*,<sup>55</sup> along with some payment by the franchisee for the use of the trademark.<sup>56</sup> But trademark license and payment are not enough: the Federal

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establishment).

51. *Krebs Chrysler Plymouth v. Valley Motors*, 141 F.3d 490, 497 (3d Cir. 1998) (quoting *Susser v. Carvel Corp.*, 206 F. Supp. 636, 640 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505 (2d Cir. 1964), *appeal dismissed*, 381 U.S. 125 (1965)); *accord. Instruction Sys., Inc. v. Computer Curriculum Corp.*, 614 A.2d 124 (N.J. 1992).

52. *See Norton*, *supra* note 28, at 32; John Dwight Ingram, *Vicarious Liability of an Employer-Master: Must There Be a Right of Control?*, 16 N. ILL. U. L. REV. 93, 106–08 (1995–1996); Killion, *supra* note 29, at 164 (“Franchising is not just about the product tasting or looking the same from store to store. It is about one store being no different than another. . . . This is what franchising is all about—finding a business model that works and then insisting that each franchise adhere religiously to the model.”); Kevin M. Shelley & Susan H. Morton, *Control in Franchising and the Common Law*, 19 FRANCHISE L.J. 119, 121 (1999–2000).

53. *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736, 740 (Pa. 1978) (quoting *Piercing Pagoda, Inc. v. Hoffner*, 465 Pa. 500, 351 A.2d 207, 211 (Pa. 1976)); *see Artman v. Int’l Harvester Co.*, 355 F. Supp. 476 (W.D. Pa. 1972).

54. *See Spandorf*, *supra* note 48, at 38–41. This paragraph’s discussion omits regulations concerning franchising in specific industries, where the definition is particular to the concerns of that particular sector. *See, e.g.*, 15 U.S.C. §§ 1221(b) (definition under the Automobile Dealer’s Franchise Act), 2801 (definition under the Petroleum Marketing Practices Act). *See generally* GLICKMAN, *supra* note 23, §§ 2.02[4][c] at 46.3–46.6, 3.07[1]–[2] at 36–39 (discussing various specialized franchising regimes under state law).

55. Federal Trade Commission Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436.1(h)(1) (2007); GLICKMAN, *supra* note 23, § 2.02[4][a] at 21–27 & n.50 (collecting and summarizing state law).

56. Federal Trade Commission Disclosure Requirements and Prohibitions

Trade Commission requires that the franchisor “exert a significant degree of control over the franchisee’s method of operation, or provide significant assistance,”<sup>57</sup> while state laws typically demand that the franchisee operate “under a marketing plan or system prescribed in substantial part by a franchisor,”<sup>58</sup> or more generally in a “community of interest in the marketing of goods or services.”<sup>59</sup> The legal necessities for a franchise can thus be paraphrased as (a) the franchisor’s license of a trademark or brand name (b) for which a franchisee pays consideration, (c) for use in an enterprise operated with some significant oversight or support of the franchisor, whether in a formal plan or informal guidance.<sup>60</sup> In one form or another, these elements will control.<sup>61</sup>

### III. THE FRATERNITY AS FRANCHISE

The original advent of the franchising model came at around the same time as fraternities arose in American society, the middle of the nineteenth century, though neither enjoyed widespread success before the dawn of the twentieth.<sup>62</sup> The two models have waxed and waned in tandem in more recent times, seeing stagnation in the years leading up to World War II only to enjoy healthy growth thereafter, face contretemps from societal pushback in the 1970s, and look forward to fairly bright contemporary prospects.<sup>63</sup> And both college fraternities and franchising first blossomed in the United

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Concerning Franchising, 16 C.F.R. § 436.1(h)(3) (2007); GLICKMAN, *supra* note 23, § 2.02[4][a] at 21–27 & n.50 (collecting and summarizing state law).

57. Federal Trade Commission Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436.1(h)(2) (2007); *see* Spandorf, *supra* note 48, at 38–39.

58. GLICKMAN, *supra* note 23, § 2.02[4][a] at 21–27 & n.50 (collecting and summarizing state law); *see* Spandorf, *supra* note 48, at 38–40.

59. GLICKMAN, *supra* note 23, § 2.02[4][a] at 28 & n.52; *see* Spandorf, *supra* note 48, at 38–40.

60. *See* Spandorf, *supra* note 48, at 38.

61. It may be interesting to compare European Union law, which is perhaps more restrictive, calling for “a common name or sign with uniform presentation of premises, communication of know-how from franchisor to franchisee, and continuing provision of commercial or technical services by the franchisor to the franchisee.” Norton, *supra* note 28, at 19. *See generally* Abell, *supra* note 21.

62. As to franchises, *see supra* notes 20–30 and accompanying text. As to fraternities, *see* Sunshine, *supra* note 2, at 82–83; Craig L. Torbenson, *From the Beginning: A History of College Fraternities and Sororities*, in *BROTHERS AND SISTERS: DIVERSITY IN COLLEGE FRATERNITIES AND SORORITIES* 20–34 (Craig L. Torbenson & Gregory S. Parks, eds. 2009); *see also* Govan, *supra* note 3, at 685.

63. As to franchises, *see supra* notes 30, 33–37 and accompanying text. As to fraternities, *see* Sunshine, *supra* note 2, at 83–34, 110–13; Govan, *supra* note 3, at 685–87; Harvey, *supra* note 4, at 12–13; Torbenson, *supra* note 62, at 34–38.

States, and remain far more prevalent there than abroad.<sup>64</sup> To propose an equivalence between franchise and fraternity structure is therefore not to invoke coincidence or serendipity, but to recognize that the two may be different developments of the same kernel of an idea. Indeed, both may be considered outgrowths of ancient professional guilds and fraternal organizations; the Freemasons, for example, stand at the juncture of such precursors.<sup>65</sup> Given the wide breadth of industries in which franchising has taken hold,<sup>66</sup> the not-so-cloistered university campus is hardly beyond the pale.

#### A. The Business of the Fraternity Chapter

A preliminary objection to the franchise conceit is that fraternities are not engaged in business at all—that they are communal societies, not commercial vendors.<sup>67</sup> Certainly fraternity chapters do not fit the classical archetypes of chain restaurants or licensed automobile dealers.<sup>68</sup> At first blush, then, organizational analogues to franchising falter at the question of what fraternities are selling, aside from collateral transactions in Greek-emblazoned jewelry, sweatshirts, and other paraphernalia.<sup>69</sup> But even as early as 1925, an article concluded with the observation that “whether fraternity houses could be called a business” is “among the interesting questions which may arise.”<sup>70</sup> Fraternities are not so far outside the bounds of ordinary commerce as they might superficially seem.

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64. As to franchises, *see* Abell, *supra* note 21, at 40–50. As to fraternities, *see* Sunshine, *supra* note 2, at 82 n.10.

65. *See* sources cited *supra* note 21 (tracing early history of franchising to professional guilds and warrants); Sunshine, *supra* note 2, at 81–83 & n.10 (tracing early history of fraternal societies in America). *See generally* BAIRD, *supra* note 9; ALBERT C. STEVENS, CYCLOPÆDIA OF FRATERNITIES (2d ed. 1907). Discussion of these earlier and parallel fraternal organizations would exceed the scope of an article examining college fraternities, but for a more rigorous comparison between historical liability for benevolent fraternities such as the Odd Fellows and Elks and social college fraternities. *See generally* Sunshine, *supra*.

66. *See supra* text accompanying notes 31–32.

67. *See, e.g.*, LeFlore, *supra* note 10, at 233 (“A national organization of a fraternity is not in business to make a profit.”).

68. *Cf.* LeFlore, *supra* note 10, at 220 (“The fraternity, however, is not the typical business entity.”).

69. *E.g.*, L.G. Balfour Co. v. FTC, 422 F.3d 1, 7–8 (7th Cir. 1971) (fraternity-licensed jewelry); Abraham v. Alpha Chi Omega, 781 F. Supp. 2d 396, 401 (N.D. Tex. 2011) (paddles, pins, clothing, glasses, mugs, etc.), *aff’d*, 708 F.3d 614 (5th Cir. 2013); *see also* Sarah Otte Graber & Sean K. Owens, *Trademark Infringement: It Can Run Both Ways*, FRATERNAL L., Nov. 2012, at 1 (“These marks can also identify collateral products that these organizations authorize to be licensed and sold to enhance their revenue stream”).

70. Neuhoff, *supra* note 2, at 41.

The fraternity chapter offers a varied package of attractive services to the college community, including recreational and sporting pursuits, academic assistance, leadership training, humanitarian endeavors, social functions, scholarships, and most concretely, dining and housing.<sup>71</sup> The more social decadences of fraternity life are often viewed as paramount is a long-standing,<sup>72</sup> even if unjustified, minimization of the multifarious services provided.<sup>73</sup> And in return for this *à la carte* menu of options, the chapter seeks and obtains payment for its arranging and provision of these amenities.<sup>74</sup> Some options (like athletic competitions or philanthropies) might be available *gratis* to any member, while others (such as housing or a social event) involve payment of a premium by members wishing to avail themselves of the option.<sup>75</sup> Colleges themselves acknowledge that “fraternities will be treated ‘like any other private business that markets services to students off-campus, just like a hardware store.’”<sup>76</sup>

A fraternity chapter’s primary purveyances, however, are not these services considered piecemeal, but rather memberships. The fundamental commercial transaction occurs not every time dues are paid by its members,

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71. See Hauser, *supra* note 4, at 454 (citing “shared living arrangements” and “academics, athletics, social events, community service” as services offered); Daniel J. McCarthy, *Updates on Chico State and UCF Campus-Wide Suspensions*, FRATERNAL L., May 2013, at 4–5 (“Of course, social events, philanthropy events and intramural sports form a large part of the daily activities for chapters and their members.”); Govan, *supra* note 3, at 681; Mark D. Bauer, *Small Liberal Arts Colleges, Fraternities, and Antitrust: Rethinking Hamilton College*, 53 CATH. U. L. REV. 347, 356 (2003–2004); Horton, *supra* note 6, at 459; LeFlore, *supra* note 10, at 210. See *infra* Subpart III.B.3, for a complete discussion of how the national assists in providing these services.

72. See DIANA B. TURK, BOUND BY A MIGHTY VOW: SISTERHOOD AND WOMEN’S FRATERNITIES, 1870–1920, at 44 (2004) (“[In the early 1900s] a shift occurred among the women’s Greek-letter organizations, as the sisters turned away from intellectual and scholarly pursuits and centered instead on social and what some perceived as largely superficial affairs.”); *id.* at 47–53; NICHOLAS L. SYRETT, THE COMPANY HE KEEPS: A HISTORY OF WHITE COLLEGE FRATERNITIES 156–57 (2008).

73. See *Estate of Hernandez v. Flavio*, 924 P. 2d 1036, 1038 (Ariz. Ct. App. 1997) (“The national fraternity invites membership in a loosely associated group of clubs, one of the primary purposes of which is to engage in parties where liquor is served. Indeed, alcohol abuse is, as the national fraternity recognizes, a serious problem in college fraternities.”), *aff’d in part and rev’d in part on other grounds*, 930 P.2d 1309 (Ariz. 1997); Govan, *supra* note 3, at 681; Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014.

74. See Horton, *supra* note 6, at 469–70.

75. E.g., *Estate of Hernandez v. Flavio*, 930 P.2d 1309 (Ariz. 1997), *aff’d in part and rev’d in part on other grounds*, 930 P.2d 1309 (Ariz. 1997); see BAIRD, *supra* note 9, at 495–96; Horton, *supra* note 6, at 469–70.

76. Daniel J. McCarthy, *Tragedy Leads to Off-Campus Fraternity System*, FRATERNAL L., Jan. 2007, at 6.

but when a prospective member agrees to join and pay those dues in subsequent years.<sup>77</sup> Prior to joining, the college student has no financial obligations to the chapter, and after joining, the newly-minted fraternity member has accepted what amounts to an installment plan of payments over the course of his academic career in exchange for membership and the benefits thereof.<sup>78</sup> This view is given force by the fact that fraternities generally include some sort of formal acceptance of responsibility for these financial obligations as a necessary part of admission to the chapter.<sup>79</sup> Properly conceived, the local fraternity chapter is marketing its package of services to the college community as a whole, seeking to find new members—that is, new customers for the Greek business model.

Particular note should be made of chapter housing: “Industry wide, Greek organizations own and operate in excess of \$3 billion in real estate, often located in prime locations. These buildings house some 250,000 students. In short, chapter housing is a big business.”<sup>80</sup> For well over a century,<sup>81</sup> many if not most fraternities have (for payment) provided room and board to a substantial portion of their members.<sup>82</sup> And numerous if not

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77. *E.g.*, *Kenner v. Kappa Alpha Psi Fraternity, Inc.*, 808 A.2d 178, 182–83 (Pa. Super. Ct. 2002) (“Kenner was obliged to pay Kappa an application fee of \$237.00 and sign a membership agreement with Kappa. In exchange, Kenner was permitted to seek membership with Kappa. Such a relationship is, at a minimum, contractual in nature, requiring performance by both parties.” (citations omitted)); *see Estate of Hernandez v. Flavio*, 930 P.2d 1309, 1314–15 (Ariz. 1997) (referring to fraternity policy of informing prospective members of the financial obligations of membership). Viewing the underlying transaction as between the chapter and a prospective member also sidesteps the rather paradoxical situation of a chapter contracting with a member of its own management. Similar concerns animated the belief that a local chapter might be acting as an agent of the national. *Cf. Evans v. Junior Order United Am. Mech. Soc’y*, 111 S.E. 526, 527 (N.C. 1922) (“The subordinate lodge acts for and represents the [national] defendant in making the contract with the member, unless we adopt as correct the idea that the member, by some one-sided arrangement, makes a contract with himself through his agent.” (quoting *Bragaw v. Supreme Lodge*, 38 S.E. 905 (1901))).

78. *Kenner*, 808 A.2d at 182–83; *Estate of Hernandez*, 930 P.2d at 1314–15; *see Horton*, *supra* note 6, at 469–70.

79. *Kenner*, 808 A.2d at 182–83; *Estate of Hernandez*, 930 P.2d at 1314–15; *see Horton*, *supra* note 6, at 469–70.

80. Sean P. Callan, *The Chapter House Rules; How Corporate Structure Can Handcuff a House Corporation*, FRATERNAL L., Nov. 2012, at 3–4; *accord* David Cook, *Good Read: From Joe Biden’s Next Steps, to a Fox News Challenger, to Backpack Nukes*, CHRISTIAN SCIENCE MONITOR, Apr. 1, 2014 (“Fraternities are a big business, housing 1 in 8 students at four-year colleges and owning property worth an estimated \$3 billion.” (discussing Flanagan, *supra* note 1)); *cf.* BAIRD, *supra* note 9, at 33–34 (conservatively estimating the value of fraternity real estate holdings in 1905 at \$3 million); Neuhoff, *supra* note 2, at 31 (referring to fraternities’ “immense holdings of property” in early 1900s).

81. SYRETT, *supra* note 72, at 162–64; BAIRD, *supra* note 9, at 32–34; Neuhoff, *supra* note 2, at 31.

82. Horton, *supra* note 6, at 439, 470; Bauer, *supra* note 71, at 355–57.

most colleges have depended heavily on fraternities to house their students,<sup>83</sup> though this symbiosis has increasingly come under attack by colleges desirous of insourcing this valuable business opportunity.<sup>84</sup> Such accommodations are offered exclusively to the fraternity membership,<sup>85</sup> and are competitive with if not far superior to residential options available from the school.<sup>86</sup>

Accordingly, from the earliest days, state courts considering taxation law viewed fraternity housing as a commercial enterprise.<sup>87</sup> Notwithstanding fraternities' origins as literary societies,<sup>88</sup> Massachusetts and Maine found their properties to be taxable despite an exemption for literary or scientific purposes,<sup>89</sup> while New York went further in imposing taxation given an additional exception for educational use.<sup>90</sup> Even when universities own fraternity houses, educational exceptions may not apply because of the non-scholastic purposes to which a fraternity house is put.<sup>91</sup> That fraternities do not fall within such general noncommercial exemptions is underscored by statutes expressly excluding fraternities from taxation when legislatures

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83. See Bauer, *supra* note 71; Harvey, *supra* note 4, at 13; see Torbenson, *supra* note 62, at 33, 35; BAIRD, *supra* note 9, at 32–33; see also SYRETT, *supra* note 72, at 162–64 (commenting on the advent of fraternity housing).

84. Bauer, *supra* note 71.

85. Hauser, *supra* note 4, at 454.

86. E.g., Bauer, *supra* note 71, at 380 (“[F]raternities submitted evidence that fraternity houses at Hamilton offered superior lodging, meals, and social space, as compared to facilities owned by the college”), 387–88 (“The existing college dormitory facilities ‘paled in comparison’ to the fraternity houses.” (quoting Philip F. Smith, *The Demise of Fraternities at Williams*, CHRON. OF HIGHER EDUC., Apr. 2, 1999, at B6)); see also *id.* at 390; SYRETT, *supra* note 72, at 163–64.

87. See Veil B. Chamberlain, *Tax Exemption of Greek Letter Fraternities*, 4 U. CIN. L. REV. 186 (1930); Neuhoff, *supra* note 2, at 38–40 (discussing and comparing cases in this paragraph).

88. See Sunshine, *supra* note 2, at 82 & n.11; TURK, *supra* note 72, at 32–33 & 180 n.91.

89. *Inhabitants of Orono v. Sigma Alpha Epsilon Soc’y*, 74 A. 19, 21 (Me. 1909); *Phi Beta Epsilon Corp. v. City of Boston*, 65 N.E. 824, 824–25 (Mass. 1903); see also *Powers v. Harvey*, 103 A.2d 551, 555 (R.I. 1954); *Mu Beta Chapter Chi Omega House Corp. v. Davison*, 14 S.E.2d 744, 746 (Ga. 1941). But see *Alpha Rho Zeta of Lambda Chi Alpha, Inc., et al v. Inhabitants of City of Waterville*, 477 A.2d 1131, 1141 (Me. 1984) (distinguishing *Orono* based on the titleholder of the property).

90. *People ex rel. Delta Kappa Epsilon Soc’y of Hamilton College v. Lawler*, 77 N.Y.S. 840 (N.Y. App. Div. 1902), *aff’d*, 71 N.E. 1136 (N.Y. 1904)

91. Compare *Knox College v. Bd. of Review of Knox Cty.*, 139 N.E. 56 (Ill. 1923) (non-scholastic purposes control), with *Alpha Rho Zeta*, 477 A.2d at 1140–41 (exempt from tax because university owns and uses property for its own purposes, “notwithstanding the buildings, with college license, may be occupied by fraternity corporations which may also use the same for social intercourse and recreation”).

sought that result.<sup>92</sup> Fraternities thus are at least operating commercially when they act as landlords (or *de facto* property agents, when title is formally held by a housing corporation or university<sup>93</sup>) for their members.<sup>94</sup>

Chapterhouses are no *sine qua non*, however. The fraternity's general business model—offering paid membership to a selective few, who may then avail themselves of an *à la carte* menu of services both included and premium—is hardly unusual. Indeed, it is employed by virtually every social club in existence,<sup>95</sup> though many do let accommodations to members as well.<sup>96</sup> Lower courts have repeatedly found social clubs such as the Boys Clubs of America, Boy Scouts, and Lions Clubs to be business establishments when the legal issue has arisen.<sup>97</sup> So too has the Supreme Court in holding both the Rotary Club<sup>98</sup> and New York State Club Association<sup>99</sup> to be commercial in nature. Key to these decisions were the

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92. *E.g.*, *Beta Theta Pi Corp. v. Bd. of Comm'rs of Cleveland Cty.*, 234 P. 354, 356 (Okla. 1925); *Kappa Kappa Gamma House Ass'n v. Percy*, 142 P. 294, 296 (Kan. 1914); *State ex. rel. Daggy v. Allen*, 127 N.E. 145, 146 (Ind. 1920); *see* *Delta Psi Fraternity v. City of Burlington*, 969 A.2d 54, 59 (Vt. 2008) (describing modern fraternal taxation exemptions of the nine states that have them).

93. *See, e.g.*, *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 411 (Kan. 2002); *Foster v. Purdue Univ.*, 567 N.E.2d 865, 871–72 (Ind. Ct. App. 1991); Hauser, *supra* note 4, at 452–53; Olcott O. Partridge, *The Legal Status of a College Fraternity Chapter*, 42 AM. L. REV. 168, 173 (1908); *see* LeFlore, *supra* note 10, at 194 n.7; *see also* *Campbell v. Bd. of Tr. of Wabash Coll.*, 495 N.E.2d 227, 228 (Ind. Ct. App. 1986) (chapter leased house from the university).

94. *See* sources cited *supra* notes 80–92 and accompanying text. *But see* Neuhoff, *supra* note 2, at 37 (“Where the fraternity contracting is not incorporated, the transaction is no doubt governed by the law applicable to voluntary associations *not for purposes of trade or profit*. The great weight of authority is that such associations, *unlike those organized for trade or profit*, are not partnerships and the liability of its members for debts contracted in behalf of the association is governed by the principles of agency.” (emphasis added)).

95. *E.g.*, *Isbister v. Boys' Club of Santa Cruz*, 707 P.2d 212, 214–15 (Cal. 1985).

96. *See, e.g.*, Paul H. Plotz, *Harvard Club of New York: Social Focus for Locals*, HARVARD CRIMSON (Cambridge, Mass.), Jan. 8, 1957 (subtitled “Clubhouse Is Hotel for Visiting Members, Too”), <http://www.thecrimson.com/article/1957/1/8/harvard-club-of-new-york-social/?page=2>; Carolyne Zinko, *New Private SF Club The Battery*, S.F. CHRONICLE, Feb. 14, 2014, available at [sfgate.com](http://sfgate.com).

97. *See, e.g.*, *Isbister*, 707 P.2d at 217–19 (Boys Clubs of America constitute business establishment under Unruh Act); *Curran v. Mount Diablo Council of The Boy Scouts of America*, 195 Cal. Rptr. 325 (Cal. Ct. App. 1983) (Boy Scouts constitutes business establishment under Unruh Act), *appeal dismissed*, 468 U.S. 1205 (1984); *Rogers v. Int'l Ass'n of Lions Clubs*, 636 F. Supp. 1476 (E.D. Mich. 1986); *Lloyd Lions Club v. Int'l Ass'n of Lions Clubs*, 724 P.2d 887 (Or. App. 1986). *But see* *Isbister*, 707 P.2d at 226–27 (Mosk, J., dissenting); *see also* *Kiwanis Int'l v. Ridgewood Kiwanis Club*, 806 F.2d 468 (3d Cir. 1986), *reh'g denied*, 811 F.2d 247 (1987), *cert. dismissed*, 483 U.S. 1050 (1987).

98. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *see* *Horton*, *supra* note 6, at 455–56 (discussing case).

99. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1987); *see* *Horton*,



fundamentally pecuniary natures of such organizations in providing premium services and business opportunities while exacting fees.<sup>100</sup>

Finally, the economics of fraternities have not gone without scholarly analysis.<sup>101</sup> One rigorously mathematical proof revealed that the selection process and *de facto* accreditation by fraternal membership is a robust indicator of applicant quality in the labor market, making the fundamental service that fraternities provide—membership—valuable indeed.<sup>102</sup> Other authors have questioned whether fraternity membership is truly economically advantageous from a business networking perspective.<sup>103</sup> And one article analyzed the market for collegiate housing and argued that collegiate campaigns to take over fraternities' facilities constituted anticompetitive monopolization of the market by eliminating competitors.<sup>104</sup> Whatever the social aspects of fraternities (and they are manifold), they are conceptually analyzable as economic entities.

#### B. The Sundry Analogues Between Franchises and Fraternities

Given their pecuniary undertakings, it cannot be maintained that fraternities are beyond the bounds of commerce. Nor is their business model categorically insusceptible of franchising. To be sure, some social clubs stridently condemn franchising as diluting the exclusivity or panache of their establishment.<sup>105</sup> But the far reach of franchising has grasped even such hoary institutions: The Camping and Caravanning Club in Britain is over a century old and franchises about 15% of its clubs,<sup>106</sup> while similar if less

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*supra* note 6, at 452–53 (discussing case).

100. *E.g.*, *N.Y. State Club Ass'n.*, 487 U.S. at 11–12; *Bd. of Dir. of Rotary Int'l.*, 481 U.S. at 543.

101. In this day and age, very little has gone without scholarly analysis, including the phenomenon that little has gone without scholarly analysis. *See, e.g.*, Joseph J. Brannin & Mary Case, *Reforming Scholarly Publishing in the Sciences: A Librarian Perspective*, 45 NOTICES AM. MATH. SOC'Y 475 (1998).

102. Sergey V. Popov & Dan Bernhardt, *Fraternities and Labor-Market Outcomes*, AMERICAN ECONOMIC JOURNAL: MICROECONOMICS, Feb. 2012, at 116–41.

103. *E.g.*, Hauser, *supra* note 4, at 455 & n.164 (“Actual indications are that any economic advantage of college fraternity membership is negligible.”).

104. Bauer, *supra* note 71.

105. *E.g.*, Nicole LaPorte, *Soho House Is Taking the Party Global*, N.Y. TIMES, Jun. 1, 2012 available at [http://www.nytimes.com/2012/06/03/fashion/soho-house-is-taking-the-party-global.html?\\_r=0](http://www.nytimes.com/2012/06/03/fashion/soho-house-is-taking-the-party-global.html?_r=0) (“‘We’re absolutely not becoming a franchise,’ he said, emphasizing that last word with disdain. ‘Our team does get bigger, but I still wrap my arms around every single bit that goes on in Soho House. I’m just more of an octopus now.’”).

106. The British Franchise Association – The Camping and Caravanning Club (Franchising) Ltd., <http://www.thebfa.org/members/the-camping-and-caravanning-club-franchising-ltd>.

venerable examples can be found amongst the social, recreational, and country clubs of the United States.<sup>107</sup> As for the courts, the Seventh Circuit has found that a local Girl Scouts council fell within Wisconsin franchise law protections.<sup>108</sup> The inquiry thus turns to whether college fraternities' idiosyncratic national-local structure can be usefully analogized to that of franchisor and franchisee.

### 1. Trademarks: Greek Letters as Brand Names

The most central and obvious connection between the fraternal and franchise relationship is the role of trademarks.<sup>109</sup> Fraternities originally opted to brand themselves with Greek letters to "more closely identify with the glories of ancient civilization, including athletics, art, literature, philosophy, and democratic values."<sup>110</sup> Although there remain a few exceptions,<sup>111</sup> virtually all fraternities use two or three Greek letters to identify their organizations, both at the national and chapter level.<sup>112</sup> Indeed, so fundamental are such trademarks to fraternities that their business model is often known as Greek life on campuses and even in scholarly literature.<sup>113</sup>

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107. *See, e.g.*, About Us - Nautical Boating Country Clubs, <http://nauticalboatclubs.com/about/> (discussing both membership and franchise opportunities); Franchise Opportunities: Grand Rapids Sport & Social Club, <http://grssc.com/pages/franchise> (discussing qualifications for franchisees).

108. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S.A. Inc.*, 549 F.3d 1079 (7th Cir. 2008).

109. Although fraternity names are generally not only trademarks but also service marks and collective membership marks, *see* Donald F. Frei & Kurt L. Grossman, *Protection of Fraternity Names*, FRATERNAL L., Mar. 1984, at 4, for concision, this Article uses the term "trademark" generically to refer to any mark in which the organization may have an intellectual property interest. For example, while the fraternity letters on a baseball cap represent a trademark, the use of a Greek name to market a social event or other chapter affairs is more in the way of a service mark. While there are legal distinctions between these subspecies of marks, they are not relevant at the high level of generality regarding intellectual property discussed herein. *See generally* Joseph M. Lightman, *Economic Aspects of Trademark in Franchising*, 14 PAT. TRADEMARK & COPY. J. RES. & ED. 481 (1970-1971) (reviewing use of trademarks and service marks in franchises with little distinction); David Laufer & David Gurnick, *Minimizing Vicarious Liability of Franchisors for Acts of Their Franchisees*, 6 FRANCHISE L.J. 3 (1986-1987) (same).

110. Bauer, *supra* note 71, at 352.

111. Of the seventy-odd members of the North-American Interfraternity Council, only three - Acacia, FarmHouse, and Triangle - do not have a Greek letter name. *See* Member Fraternities | North-American Interfraternity Council, *available at* <http://www.nicindy.org/member-fraternities.html>.

112. *See* BAIRD, *supra* note 9, at 2-3; *Abraham v. Alpha Chi Omega*, 781 F. Supp. 2d 396 (N.D. Tex. 2011), *aff'd*, 708 F.3d 614 (5th Cir. 2013); *L.G. Balfour Co. v. FTC*, 422 F.3d 1, 7 (7th Cir. 1971).

113. *E.g.*, Rutledge, *supra* note 3, at 362-63, Govan, *supra* note 3, at 681.

Many neighborhoods where fraternity houses cluster, prominently displaying letters to advertise their affiliations, are aptly known as Greek rows.<sup>114</sup>

Nor is there any question that these Greek letters are brand names—indeed, well-protected trademarks.<sup>115</sup> A half century ago, only a third of national college fraternities had registered their letters under the Lanham Act, and fewer still had sought statutory trademark protection.<sup>116</sup> Even so, fraternities of the day were (too) shrewd in licensing these trademarks exclusively to official purveyors, catching the attention of antitrust regulators.<sup>117</sup> In the modern day, however, most fraternities diligently maintain trademark registrations and licensing operations.<sup>118</sup> One scholar counseled in 2002 that “Greek organizations should be just as aggressive to use the civil lawsuits to enforce their trademarks as they would to use the criminal process to prosecute an armed robber.”<sup>119</sup> Fraternities have taken this advice to heart, launching suits to protect their brands against rogue chapters<sup>120</sup> and unauthorized commercial use alike.<sup>121</sup> And in a dramatic show of interfraternal force, thirty-two national fraternities recently prevailed in a lawsuit against a decorative paddle manufacturer who had been using their trademarks without permission, a sweeping victory affirmed

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114. *E.g.*, Page Jones, *Renovation and Reconstruction Plans for OU's Greek Row*, OKLAHOMA DAILY, Sept. 16, 2014, available at [http://www.oudaily.com/news/renovation-and-reconstruction-plans-for-ou-s-greek-row/article\\_ab552084-3b70-11e4-9da3-0017a43b2370.html](http://www.oudaily.com/news/renovation-and-reconstruction-plans-for-ou-s-greek-row/article_ab552084-3b70-11e4-9da3-0017a43b2370.html).

115. *Abraham*, 781 F. Supp. 2d at 409-410 (holding that Greek letter names have the second-highest level of trademark protection as “arbitrary” marks). *See generally* Robert E. Manley, *Intellectual Property in the Twenty-First Century*, FRATERNAL L., Mar. 2001, at 6; Frei & Grossman, *supra* note 109, at 4-6.

116. *L.G. Balfour*, 442 F.2d at 7.

117. *Id.* at 8, 22-26.

118. *Abraham*, 781 F. Supp. 2d at 403 (“In the 1990s, the Greek Organizations began to increase their vigilance in policing their marks. At present, each of the Greek Organizations has a licensing program, and hundreds of vendors are licensed to produce memorabilia containing their Greek letter combinations, insignia, crests, and symbols.”); *id.* at 401 (“Most of the Greek Organizations are the owners of valid registrations of trademarks of these Greek letter combinations and insignia issued by the United States Patent and Trademark Office.”).

119. Robert E. Manley, *Enforcement of Trademarks*, FRATERNAL L., Nov. 2002, at 2.

120. *E.g., id.*; Gary E. Powell, *Fraternity Sues Students*, FRATERNAL L., Nov. 1996, at 2.

121. *E.g.*, *Alpha Tau Omega Fraternity, Inc. v. Pure Country, Inc.*, 185 F. Supp. 2d 951 (S.D. Ind. 2004); Robert E. Manley, *Trademark Enforcement*, FRATERNAL L., Nov. 2004, at 4 (discussing case); *Alpha Kappa Alpha Sorority Inc. v. Converse Inc.*, 175 F. App'x 672, 680 (5th Cir. 2006).

on appeal.<sup>122</sup>

As these cases indicate, it is the national fraternity that holds the trademark,<sup>123</sup> and licenses its use by its local chapters: “The relationship between the national fraternity and the local fraternity involves the national fraternity offering . . . its brand to the local fraternity.”<sup>124</sup> National by-laws and manuals typically provide explicitly for such licensing provisions,<sup>125</sup> and national licensing contracts for official paraphernalia are compulsorily “imposed” on local chapters.<sup>126</sup> Locals that are expelled from the national fraternity and stripped of their operating charter are forbidden from continued use of the fraternity’s name, even if individual members remain on campus.<sup>127</sup> It is thus clear that the local operates under at least a *de facto* license, even if there is no written agreement.<sup>128</sup> The local chapter employs the national fraternity’s brand only at the latter’s sufferance, just as in a franchise relationship.

Although local fraternity chapters typically have both national and local names, it is the national trademark by which a chapter primarily identifies itself.<sup>129</sup> This makes good sense: the local chapter is by design the national’s

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122. *Abraham*, 781 F. Supp. 2d 396, *aff’d*, 708 F.3d 614 (5th Cir. 2013); see Timothy M. Burke, *Court of Appeals Upholds Paddletramps Decision*, FRATERNAL L., Jan. 2013, at 3.

123. See *Abraham*, 781 F. Supp. 2d at 401–04 (“The [national] Greek Organizations act as holding-type companies which hold ownership of their properties, including their trademarks.”).

124. *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 164 (Ind. 2014); accord *Yost v. Wabash College*, 3 N.E.3d 509, 521–22 (Ind. 2014) (“The designated facts show that the relationship between the national fraternity and local fraternity involves the national fraternity offering . . . a brand to the local fraternity.”).

125. E.g., Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 14, available at <http://www.join deltasig.com/files/Fraternity%20Manual%202010.pdf> (outlining trademark policy and allowance of local commercial use given national permission).

126. *L.G. Balfour Co. v. FTC*, 422 F.3d 1, 10 (7th Cir. 1971).

127. E.g., Robert E. Manley, *Enforcement of Trademarks*, FRATERNAL L., Nov. 2002, at 2; see, e.g., Jim Ewbank, *Kappa Alpha Order Prevails Against Break Away Group*, FRATERNAL L., May 2013, at 4; Timothy M. Burke, *Loss of Charter Leads to Litigation*, FRATERNAL L., Sept. 2008, at 6; Gary E. Powell, *Fraternity Sues Students*, FRATERNAL L., Nov. 1996, at 2.

128. Cf. Spandorf, *supra* note 48, at 39 (describing situations in which *de facto* licenses are inferred in franchise relationships).

129. Different fraternities use different styles for local chapter names—some simply proceed alphabetically from the Alpha chapter through the Omega, then begin again with Alpha Alpha. Others proceed similarly, but maintain separate lists in each state, yielding names like Alpha of Pennsylvania. And some assign chapter letters out of alphabetical order. The full name of a local chapter might therefore be the Alpha Chapter of the Beta Gamma Delta Fraternity. See BAIRD, *supra* note 9, at 2–3; e.g. *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402 (Kan. 2002), *Walker v. Phi Beta Sigma Fraternity (RHO Chapter)*, 706 So. 2d 525 (La. App. 1997).

sole outpost on any given campus.<sup>130</sup> As will be discussed below, the prestige of a fraternity brand has two distinct but interrelated effects. *First*, a more reputable brand is more likely to attract new chapters to affiliate with the national fraternity—that is, more franchisees.<sup>131</sup> *Second*, a better brand allows the local chapter to better market itself to prospective members by parlaying the many benefits available from a successful national organization: the very reason the national brand is valuable to the chapter.<sup>132</sup>

The overarching conclusion is that the national fraternity grants its imprimatur to each of its chapters, holding them out as approved outposts of an organization worthy of attracting new customers.<sup>133</sup> Most fraternities also offer trademarked iconography besides their names, such as official coats of arms, badges, flags, flowers, logos, mottos, or even color schemes.<sup>134</sup> This is no different from any franchise, where the valued name of the chain is augmented with unique trade dress, imagery, and slogans to reinforce the experience being marketed to customers.<sup>135</sup> The quintessence of franchising—the mutual use and promotion of a common brand identity amongst legally distinct but cooperating parties<sup>136</sup>—lies at the heart of the fraternity system.

## 2. Consideration: Chapter Dues and Fees

Similarly, the dues paid by the local to the national should address the requisite that a fee be paid for the use of the national brand. Every fraternity assesses regular dues on its local chapters, which must be paid in order to remain in good standing.<sup>137</sup> These are often denominated as chapter dues—

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130. See *infra* notes 179–182 and accompanying text.

131. See *infra* notes 166–167, 200–202 and accompanying text.

132. See generally *infra* Part III.B.3.a.

133. Cf. Ingram, *supra* note 52, at 106–07 (“The franchisor, by displaying the brand name, is saying to the public that at this particular drive-in you will receive the same kind of food and beverages that you receive at any other drive-in at which this sign is displayed. In short, the franchisor is ‘holding out’ all the franchises as the same.”).

134. See Abraham v. Alpha Chi Omega, 781 F. Supp. 2d 396, 401–04 (N.D. Tex. 2011), *aff’d*, 708 F.3d 614 (5th Cir. 2013); Sarah Otte Graber & Sean K. Owens, *Trademark Infringement: It Can Run Both Ways*, FRATERNAL L., Nov. 2012, at 1; Robert E. Manley, *Intellectual Property in the Twenty-First Century*, FRATERNAL L., Mar. 2001, at 6; see also Alpha Kappa Alpha Sorority Inc. v. Converse Inc., 175 F. App’x 672, 680 (5th Cir. 2006) (color scheme); BAIRD, *supra* note 9, at 3–4.

135. E.g., Donald R. Kirk, *Franchise Dual-Branding: The Irony of Association*, 10 DEPAUL BUS. L.J. 1 (1997–1998); Robert Butts, *Franchise Trade Dress: What Do Courts Mean by the Terms Distinctiveness, Functionality, and Likelihood of Confusion?*, 16 FRANCHISE L.J. 129 (1996–1997).

136. HACKETT, *supra* note 21, at 11.

137. E.g., Timothy M. Burke, *Potential Liability for National*, FRATERNAL L., Mar.

payable by virtue of the chapter's agreement with the national fraternity, to compensate for the services the national provides.<sup>138</sup> Frequently, a substantial portion of the total fee is earmarked for the chapter's insurance coverage through a nationally-provided policy.<sup>139</sup> In almost all cases, special pledge payments or initiation fees are due on the submission of a new member's application or formal initiation into the chapter.<sup>140</sup> Yet in all this profusion of payments, there do not appear to be any instances of chapters paying "franchise fees" or "license fees" as such.

But nomenclature is ultimately beside the point: "From the time the first franchise disclosure statute was passed, regulators recognized that an initial fee or franchise fee for entering a business could be disguised as some other kind of charge,"<sup>141</sup> and accordingly the consideration requirement "captures all sources of revenue which the franchisee must pay to the franchisor or its affiliate for the right to associate with the franchisor and market its goods and services."<sup>142</sup> This is not to say that fraternity fees involve any subterfuge, but rather that consideration for affiliation may take many forms.<sup>143</sup> Where payment is required as a condition of the local chapter's association with the national fraternity, the fee is at least arguably in the nature of a franchise fee.<sup>144</sup>

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1990, at 6 ("Members of local chapters pay dues to Zeta Psi and are governed by the rules, regulations and membership criteria of Zeta Psi, all as set forth in the Bylaws of Zeta Psi."); see LeFlore, *supra* note 10, at 232.

138. *E.g.*, *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 410 (Kan. 2002) (The Pi Kappa Alpha national "serves as a national clearinghouse for the various chapters, members, alumni, and interested groups to share ideas and fellowship, to distribute such information or assistance, to arrange periodic national meetings, to publish fraternal communications, and to collect dues to defray expenses."); see *Horton*, *supra* note 6, at 469–70; LeFlore, *supra* note 10, at 232; *e.g.*, Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 28–29, available at [www.deltasig.org](http://www.deltasig.org).

139. *Kimzey*, *supra* note 2, at 467–68, 472–73; see LeFlore, *supra* note 10, at 221 & n.151; *e.g.*, Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 28–29, available at [www.deltasig.org](http://www.deltasig.org).

140. *E.g.*, *Kenner v. Kappa Alpha Psi Fraternity, Inc.*, 808 A.2d 178, 182–83 (Pa. Super. Ct. 2002); Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 28–29, available at [www.deltasig.org](http://www.deltasig.org).

141. GLICKMAN, *supra* note 23, § 2.02[4][a] at 30–31.

142. *Id.* §§ 2.02[2] at 14, 2.02[4][a] at 30.1–30.2; see Spandorf, *supra* note 48 at 40–41.

143. *Cf.* Spandorf, *supra* note 48 at 40–41 (discussing the various kinds of payments that may constitute franchise fees generally).

144. That said, the general federal consideration requirement looks to up-front fees rather than continuing obligations, and thus a fraternity ought to be able to structure its chartering process to avoid any fee payments at all within the relevant six-month statutory sampling period prescribed by the FTC. See GLICKMAN, *supra* note 23, § 2.02[2] at 16–17 n.29; Federal Trade Commission Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436.2(a)(3)(iii) (2007); Spandorf, *supra* note 48 at 40–42 (examining how to avoid meeting franchise definition). Many

One distinction should be mentioned: in some cases, fraternity candidates, members, or other customers make certain payments directly to the national organization, bypassing the local chapter's accounts.<sup>145</sup> Yet this does not differ categorically from commercial franchises. Dunkin' Donuts regulars might purchase gift cards offered by a national licensee, only to present them to local franchises to obtain goods and services. Or an aficionado of the AutoZone chain of car part stores might order a trademarked baseball cap from a central website rather than from a local franchise. That some fees or dues may flow straight from ground-level customers does not matter; what matters is that the chapter-*qua*-franchise itself must provide ongoing payments to the national in order to remain in good standing. Only if the chapter were excluded from nearly all intercourse between members and the national would its similarity to a franchise come into question, and that is hardly the case.

### 3. Support and Oversight: The Carrot and the Stick

The local chapter's use of, and payment for, the Greek-letter brand name is hardly the end of similarities to the franchising framework. Consider how one early text described the franchisor-franchisee relationship:

The sound franchisor grants a franchisee contractually limited use of a proven trademark, good will and know-how, including use of trade secrets and copyrights, access to a pre-sold market developed by him for an established business, product and/or service, system-wide promotion, proven standardized operating procedures, product and service research and mass purchasing power. In many cases, the franchisor grants the franchisee an exclusive right to distribute a trademarked product or otherwise conduct the licensed business in a particular territory. He should train the franchisee in the use of the know-how and establishment and operation of the business and maintain and agree to maintain continuing interest and assistance.<sup>146</sup>

Or one might look to a briefer formulation: "Franchising is a continuing relationship in which a franchisor provides a licensed privilege to do

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states' laws, however, have no such temporal limit on payments, making deferral of dues an incomplete remedy. *See, e.g.,* GLICKMAN, *supra* note 23, § 2.02[4][a] at 34 (discussing To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am., Inc., 152 F.3d 658 (7th Cir. 1998), *aff'g* 953 F. Supp. 987 (N.D. Ill. 1997)).

145. *See, e.g.,* Kenner v. Kappa Alpha Psi Fraternity, Inc., 808 A.2d 178, 182–83 (Pa. Super. Ct. 2002) (describing candidates as paying application fee of \$237 directly to the national).

146. Fels, *supra* note 23, § 1.2 at 4; *see* BROWN, *supra* note 34, at 3–5.

business, plus assistance in organizing, training, merchandising, and management, in return for a consideration from the franchisee.”<sup>147</sup>

These sound rather like what a fraternity does, albeit in commercial parlance. The Indiana Supreme Court recently used more fraternal terms: “The relationship between the national fraternity and the local fraternity involves the national fraternity offering informational resources, organizational guidance, common traditions, and its brand to the local fraternity.”<sup>148</sup> The national’s “primary purpose,” after all, is to support the local chapters “by providing services.”<sup>149</sup> Fraternities employ consultants whose portfolio is traveling to the local chapters to deliver these services in person, and some have ramified supervisory establishments at the local, regional, and national level.<sup>150</sup> Just as in a franchise, this national support and oversight are the carrot and the stick used to impose some measure of uniform standards throughout the network of chapters.

*a. The Carrot: Benefits Conferred by the National Organization*

The national fraternity confers many benefits and services that are close analogues to the more business-like franchise. For example, what are ritual practices and ceremonies but closely-guarded trade secrets? Indeed, “all central fraternal activities are carried on behind closed doors. Fraternities conduct all their meetings in an atmosphere of privacy, secrecy, and confidentiality so that initiation ceremonies and other ritual-based activities are carefully guarded from public view. Only initiated fraternity members may attend meetings and other ritual ceremonies.”<sup>151</sup> Even closely-affiliated persons like faculty advisors are not permitted to attend the fraternity’s

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147. Hadfield, *supra* note 40, at 958 (quoting HARRY KURSH, *THE FRANCHISE BOOM* 22 (ed. 1968)).

148. *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 164 (Ind. 2014); *see Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 410 (Kan. 2002) (the Pi Kappa Alpha national “serves as a national clearinghouse for the various chapters, members, alumni, and interested groups to share ideas and fellowship, to distribute such information or assistance, to arrange periodic national meetings, to publish fraternal communications, and to collect dues to defray expenses.”); *see also Yost v. Wabash College*, 3 N.E.3d 509, 521–22 (Ind. 2014) (“The designated facts show that the relationship between the national fraternity and local fraternity involves the national fraternity offering networking opportunities and a brand to the local fraternity, along with providing aspirational goals and encouraging good behavior by individual members.”).

149. LeFlore, *supra* note 10, at 205.

150. Barbara S. Bromberg, *Just What Are Fraternal Educational and Charitable Purposes Anyway?*, *FRATERNAL L.*, Mar. 1997, at 2–3; *e.g.*, *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 161–62 (Ind. 2014); *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1118 (La. App. Ct. 1999); *Furek v. Univ. of Del.*, 594 A.2d 506, 514 (Del. 1991).

151. *Horton*, *supra* note 6, at 438; *see BAIRD*, *supra* note 9, at 488.



councils at which business is transacted, in order to secure these fraternal secrets.<sup>152</sup>

The use of any number of valuable copyrighted materials and training accrue to the local chapter. These include membership handbooks used for the instruction of new recruits,<sup>153</sup> as well as more traditional fare such as regular newsletters, group-wide catalogues of membership, histories, and songbooks.<sup>154</sup> Catalogues are of particular use to the chapter for networking purposes, as well as in marketing to legacy students favorably disposed towards membership.<sup>155</sup> Nationals typically provide training and manuals for the management of risk, both to protect their brand and their own insurance from claims against the fraternity.<sup>156</sup> They may also directly oversee or offer guidance to a “house risk manager” so that eyes and ears on the ground are able to effectively minimize liability.<sup>157</sup>

Nationals are likely most vigorously involved in scholastic and eleemosynary affairs, given their wholly salubrious character. Fraternities often offer academic scholarships, and generally promote academic scholarship through printed resources, local outreach, and scholastic awards.<sup>158</sup> Many also hold regional or national leadership conferences to which high-achieving members are invited.<sup>159</sup> A commitment to charity is in the creed of “virtually every national fraternity”; many have nationwide affiliations with major philanthropies, and thus provide significant know-how to chapters in organizing successful fund- and awareness-raising events.<sup>160</sup> Such benevolent causes are amongst the most laudable aspects of

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152. *E.g.*, Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1119 (La. App. Ct. 1999).

153. Walker v. Phi Beta Sigma Fraternity (RHO Chapter), 706 So. 2d 525, 528–29 (La. App. 1997).

154. Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 409–10 (Kan. 2002); BAIRD, *supra* note 9, at 20–31.

155. BAIRD, *supra* note 9, at 21–23.

156. Kimzey, *supra* note 2, at 487–88; Bromberg, *supra* note 150, at 2–3; *e.g.*, Yost v. Wabash Coll., 2 N.E.3d 509, 520 (Ind. 2014); Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647, 660 (Iowa 2000) (Lavorato, J., dissenting); Walker v. Phi Beta Sigma Fraternity (RHO Chapter), 706 So. 2d 525, 529 (La. App. 1997).

157. *E.g.*, Smith v. Delta Tau Delta, 9 N.E.3d 154, 162–63 (Ind. 2014).

158. See Barbara S. Bromberg, *Just What Are Fraternal Educational and Charitable Purposes Anyway? Part II*, FRATERNAL L., Nov. 1997, at 4–5; Bromberg, *supra* note 150, at 2–3; Timothy M. Burke, *Potential Liability for National*, FRATERNAL L., Mar. 1990, at 6; see also Sean Callan & John Christopher, *IRS Denies Exemption to Local Foundation*, FRATERNAL L., Sept. 2010, at 5; TURK, *supra* note 72, at 28–29.

159. Bromberg, *supra* note 150, at 2–3.

160. Timothy M. Burke, *Publisher’s Note on Associational Rights*, FRATERNAL L., Sept. 2011, at 2 (“Fraternities and sororities on a national level encourage broad range of philanthropic activities. Chapters, to be in the best position to fight for their

the Greek system, which is often at pains to emphasize them, presumably in part to offset more negative perceptions of perpetual partying.<sup>161</sup> By contrast, nationals (undoubtedly prudently) have essentially no involvement with local social functions.<sup>162</sup>

Most centrally to the commercial aspects of their mission, national fraternities offer guidance, training, and know-how on the recruitment and induction of new members. At times, national personnel work directly with local chapters' recruitment and new member training officers to advise on effective strategies.<sup>163</sup> Given nationals' focus on reducing risk, such assistance is often focused on preventing hazing and ensuring the new member intake process proceeds legally and without risk to fraternity or member.<sup>164</sup> In many cases, the induction of each new member is scrutinized and must be pre-approved by the national organization.<sup>165</sup> And, of course, the initiation of new members is accomplished by the secret ceremonies and

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associational rights, must actively participate in the philanthropic activities supported by the national organizations. Philanthropic efforts by national Greek organizations and their foundations include programs like Sigma Gamma Rho's dedication to teaching young people the concepts of financial savings and investing. Phi Delta Theta is maintaining a commitment to defeating ALS, which took the life of Lou Gehrig, one of their most famous brothers. Chi Omega supports Make a Wish Foundations. These are but examples."); Bromberg, *supra* note 150, at 2–3.

161. See Burke, *supra* note 160, at 2; Bromberg, *supra* note 150, at 2–3; Govan, *supra* note 3, at 681; Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014; see also Horton, *supra* note 6, at 438 (public relations efforts by chapters).

162. See Marshlain, *supra* note 8, at 4–5; e.g., *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 410 (Kan. 2002) ("The Court further finds that as to the allegations in Plaintiff's Petition regarding the Pledge Dad Night, Tennessee did not plan, participate in, schedule, coordinate, direct or have any involvement with that event, or any similar event in which intoxicating beverages were consumed."); *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 654 (Iowa 2000); *Miller v. Int'l Sigma Pi Fraternity*, 41 Pa. D. & C. 4th 282, 286 (Pa. Ct. Com. Pl. 1999); *Millard v. Lambda Chi Alpha*, 611 A.2d 715, 485 (Pa. 1992).

163. See Barbara S. Bromberg, *Revisiting the Phi Gamma Delta IRS Settlement – Part I*, FRATERNAL L., Jan. 1999, at 3–4 (national consultants' non-educational work includes rush assistance); Bromberg, *supra* note 150, at 2–3 (same); e.g., *Walker v. Phi Beta Sigma Fraternity (RHO Chapter)*, 706 So. 2d 525, 529 (La. App. 1997); Craig G. Moore, *Social Media Alert – Facebook Used Against Rush Candidates*, FRATERNAL L., Jan. 2011, at 4 (national should advise chapters on social media in recruitment); Timothy M. Burke, *Beta Theta Pi Sanctions*, FRATERNAL L., Mar. 2002, at 6 (national involvement in encouraging diversity in recruitment).

164. E.g., *Walker v. Phi Beta Sigma Fraternity (RHO Chapter)*, 706 So. 2d 525, 529 (La. App. 1997).

165. E.g., *Alexander v. Kappa Alpha Psi Fraternity, Inc.*, 464 F. Supp. 2d 751, 753 (M.D. Tenn. 2006); *Kenner v. Kappa Alpha Psi Fraternity, Inc.*, 808 A.2d 178, 183 (Pa. Super. Ct. 2002); see, e.g., *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1118 (La. App. Ct. 1999) (national has "the right to control intake" of members).

rituals provided by the national fraternity.<sup>166</sup>

Thus the national fraternity brings significant resources to bear in aid of its locals: the maintenance of its prestige and brand name; the use of its secret traditions and printed materials; risk management guidance; assistance with scholastic and philanthropic undertakings; practiced know-how on recruitment. Without these nationally-provided benefits, the fraternity's chapters would be less successful, providing the local outposts of a national organization with powerful advantages over a single-location independent fraternity.<sup>167</sup> Aspiring groups therefore seek to become chapters—franchises, as it were—of a national organization, and extant independent groups often seek to affiliate with a national as the benefits become clear.<sup>168</sup> By 1970, over 90% of campus chapters across the country had become affiliated with nationals.<sup>169</sup>

*b. The Stick: National Oversight and Discipline*

Nor is all this helpful guidance from the national always hortatory. Just as in franchising, the national's oversight of the local may be mandatory and pervasive, extending at times even to “day-to-day activities,” in order to “ensure they are carrying out the fraternity's purpose.”<sup>170</sup> To be sure, not every quotidian action of a far-flung chapter is or plausibly could be under the thumb of national overseers, as commentators and courts have repeatedly

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166. See Schoen & Falchek, *supra* note 3, at 133–34 (“National fraternity organizations normally prescribe the manner in which induction ceremonies are conducted.”); Horton, *supra* note 6, at 438; Rutledge, *supra* note 3, at 39.

167. SYRETT, *supra* note 72, at 83 (“While local fraternities [*i.e.*, as quoted in this note, those with no national organization] did exist, many saw the benefits of national membership as being preferable to a purely local membership.”); see Hauser, *supra* note 4, at 435 (“As for local fraternities, recognition and the attendant benefits - including access to campus facilities and other resources - are critical to survival, especially since they lack the professional and other support provided by national fraternities.”).

168. SYRETT, *supra* note 72, at 83–85 (“Usually, a group of young men would join together for the purpose of petitioning a national fraternity for a charter to start a chapter of that fraternity at their school.”); see Torbenson, *supra* note 62, at 27; *e.g.*, Malachi Barrett, *TKE Fraternity Returns After 14 Year Absence*, CENTRAL MICHIGAN LIFE (Mt. Pleasant, Mich.), Sept. 15, 2014 (“Five years ago, a group of CMU students contacted Nate Lehman, current regional director for TKE, and his predecessor expressing their interest to start a chapter”); Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014.

169. L.G. Balfour Co. v. FTC, 422 F.3d 1, 7 (7th Cir. 1971).

170. Mumford, *supra* note 4, at 763; see *Marshall v. Univ. of Del.*, 1986 WL 11566, at \*8 (Del. Super. Oct. 8, 1986); *Estate of Hernandez v. Flavio*, 924 P.2d 1036, 186 Ariz. 517, 519 (Ariz. Ct. App. 1997) (“The national fraternity exercises control over many aspects of the activities of its local chapters.”), *aff'd, in part and rev'd, in part on other grounds*, 930 P.2d 1309 (Ariz. 1997).

and rightly reminded.<sup>171</sup> But particularly as regards risk management and potential legal infractions, the national's instructions are not suggestions: the chapter disregards guidance against alcohol, hazing, assaults, and other illegal or risky behaviors at its own existential peril.<sup>172</sup> One fraternity executive admitted that "the national organization is, in a sense, responsible for all that goes on in its chapters, as it has the right to control intake, expel or suspend members, and revoke charters."<sup>173</sup>

Apropos of that entitlement, what of the wayward franchisee that refuses to pay its fees or disregards the franchisor's mandates? Per the formative franchising scholar Harold Brown:

If the franchisee fails to follow these instructions, the agreement will provide for the termination of the franchise. If this happens,

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171. LeFlore, *supra* note 10, at 211, 229–30, 236 (national has little to no control over locals' "day-to-day" activities); G. Coble Caperton & Mary L. Wagner, *Tennessee Court Holds That National Fraternity Does Not Owe a Duty to Third Parties*, FRATERNAL L., Mar. 2012, at 4–5 (same); Smith v. Delta Tau Delta, 9 N.E.3d 154, 163 (Ind. 2014) (no "right to exercise direct day-to-day oversight and control of the behavior of the activities of the local fraternity and its members"); Yost v. Wabash Coll., 2 N.E.3d 509, 520 (Ind. 2014) (same); Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 410 (Kan. 2002); Walker v. Phi Beta Sigma Fraternity (RHO Chapter), 706 So. 2d 525, 529–30 (La. App. 1997); Furek v. Univ. of Del. 594 A.2d 506, 514 (Del. 1991); Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 548, 553 (Mo. 1987) (en banc); see Alumni Ass'n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan, 572 A.2d 1209, 572 Pa. 356, 365 (Pa. 1990); Stein v. Beta Rho Alumni Ass'n, Inc., 621 P.2d 632, 637 (Or. 1980).

172. See, e.g., Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 410 (Kan. 2002) (Pi Kappa Alpha "has a standard concerning hazing contained in 'Standards for Retention of Membership, Officer Status, and a Chapter Charter in Good Standing.' The standard defines hazing, in summary, as including physical abuse, sleep deprivation, or anything that is contrary to the appropriate laws. The standard also includes the need of chapters to comply with all applicable laws regarding alcohol. The standard states that the Chapter should abide by the standards for retention, and if they do not, they are subject to a charter suspension or termination. The standard further specifically prohibits hazing activities as defined in the standard."); Flavio, 186 Ariz. at 519–20 ("The argument that the national fraternity had no power to control the activities of the local chapter or its members is belied by the much stricter alcohol policy adopted by the local chapter at the request of the national after the incident in this case."); see also, e.g., Garofalo v. Lambda Chi Alpha Fraternity, 616 N.W.2d 647, 654 (Iowa 2000) (national fraternity policy against underage drinking "may authorize discipline" of the chapter); Foster v. Purdue Univ., 567 N.E.2d 865, 872 (Ind. Ct. App. 1991) (national fraternity sanctioned chapter for alcohol violations). But see Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 548 (Mo. 1987) (en banc) ("Though the National had adopted a policy against 'hazing' and required compliance with that directive, the National did not participate in the day-to-day management of the Local. Further, the National neither disciplined nor took corrective action when it came to its attention that a local chapter furnished alcoholic beverages to those under the lawful age because such measures were considered impractical.").

173. Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1118 (La. App. Ct. 1999).

the franchisee will lose his franchise and, through activation of the covenant not to compete, is barred from engaging in a competitive business within a prescribed territory over a prescribed period of time.<sup>174</sup>

So too with local fraternity chapters. Invariably, the national organization reserves the power to revoke the charter of chapters that become delinquent in their fees,<sup>175</sup> or violate the terms of that charter and its associated bylaws and risk management policies.<sup>176</sup> These rules, together with membership agreements that local members sign, have legal weight.<sup>177</sup> And like the dispossessed franchisee, the members of the dissolved university chapter are not then free to set up a rival fraternity on campus: fraternity constitutions specify that members, once admitted, are not permitted to affiliate with any other fraternity.<sup>178</sup> Indeed, such prohibitions are often not time-delimited

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174. BROWN, *supra* note 34, at 4; *see id.* 26–28.

175. *E.g.*, Malachi Barrett, *TKE Fraternity Returns After 14 Year Absence*, CENTRAL MICHIGAN LIFE (Mt. Pleasant, Mich.), Sept. 15, 2014 (chapter lost its charter “because of financial issues”); Smith v. Delta Tau Delta, 9 N.E.3d 154, 162–63 (Ind. 2014) (national has power to inspect chapters financial ledgers and books and revoke the charter of chapters out of compliance).

176. Kimzey, *supra* note 2, at 476 (“[F]raternities that fail to comply with risk management guidelines face the possibility of suspension or closure of their chapters.”); Mumford, *supra* note 4, at 763 (“The National Fraternity has rules, regulations and requirements that each local chapter must abide by in order to remain in good standing. That National Fraternity controls the local chapter by enforcing the National Chapter’s policies and by-laws, supervising local chapters’ day-to-day activities, punishing or revoking the local chapter’s charter . . . .”); *e.g.*, Smith v. Delta Tau Delta, 9 N.E.3d 154, 162–63 (Ind. 2014); Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 410 (Kan. 2002); Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1118–19 (La. App. Ct. 1999); Furek v. Univ. of Del. 594 A.2d 506, 514 (Del. 1991). *But see* Heaton v. Hull, 28 Misc. 97 (Sup. Ct. N.Y. 1899) (enjoining national fraternity from de-chartering one of its chapters, based on lack of due process under fraternity rules); Partridge, *supra* note 93, at 176–78 (discussing case at length); Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 548 (Mo. 1987) (en banc) (arguing for a lack of practical national disciplinary power).

177. *See, e.g.*, Jim Ewbank, *Kappa Alpha Order Prevails Against Break Away Group*, FRATERNAL L., May 2013, at 4 (“The Court also found that the former chapter members and alumni House Corporation Board members had violated their membership agreements (Oaths, Charter, Constitution and Bylaws) by taking votes contrary to the best interests of KAO.”).

178. *See* Timothy M. Burke, *Loss of Charter Leads to Litigation*, FRATERNAL L., Sept. 2008, at 6 (“The suit, currently in its very early stages, claims that the new members had not been properly advised of the Chapter’s past misconduct and the possibility that the Chapter could be stripped of its Charter, leaving them with no membership in a Greek social organization. They say that was particularly damaging since having been initiated in Sigma Sigma Sigma, they could not then join a different women’s Greek social organization.”); SYRETT, *supra* note 72, at 46 (“Fraternity membership was understood to be exclusive; a man could not join more than one.”); BAIRD, *supra* note 9, at 15

like the franchisee's, but lifelong.<sup>179</sup>

Perhaps the most striking similarity of all is the territorial exclusivity granted both franchisees and local chapters. Just like many franchisees,<sup>180</sup> a local chapter receives a charter for a geographical territory—the university at which it operates—embodying a promise from the national fraternity to authorize no other representative on that campus.<sup>181</sup> The local chapter thus gains greater selling power than if the national opted to sponsor competing groups to see which proved the stronger in the long run. While such an alternative might sound odd, it is no less natural than a chain's choice between granting a single franchisee locational exclusivity and allowing multiple franchisees to battle for supremacy, at potential cost to the brand name.<sup>182</sup> Better for both national fraternity and chain, it seems, to authorize a single standard-bearer to compete with rival fraternities and chains than to allow infighting within their brands.<sup>183</sup>

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(“Membership in two fraternities has been a source of trouble and vexation. It is almost universally forbidden.”); see Partridge, *supra* note 93, at 169 (“Membership in the fraternity does not terminate if the chapter goes out of existence.”); see, e.g., Timothy M. Burke & Daniel J. McCarthy, *Kappa Alpha Order Sues Former Chapter at UT-Austin*, FRATERNAL L., Nov. 2011, at 1–2; Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 15, available at [www.deltasig.org](http://www.deltasig.org) (“There is no inactive class of membership. An initiated member may not resign. An initiated member may not join any other men's general fraternity.”).

179. SYRETT, *supra* note 72, at 46 (“[I]n the first edition of his *Baird's Manual of College Fraternities*, Baird objected to a practice called ‘lifting,’ whereby a man left one fraternity and joined another in the same college. Competing for new members was, of course, acceptable, but once a man joined a fraternity, he was expected to remain a brother for life.”); e.g., Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 15 (“IMPORTANT NOTE: ONCE INITIATED, MEMBERSHIP IS FOR LIFE” [*sic*]); cf. BAIRD, *supra* note 9, at 15.

180. See Luis Vázquez & Ana Branca Carvalho, *Territorial Exclusivity in Franchisee Systems*, June 25, 2010, at 2–5, available at <http://ssrn.com/abstract=1630427>; Arturs Kalnin, *An Empirical Analysis of Territorial Encroachment Within Franchised and Company-Owned Branded Chains*, 23 *MARKETING SCIENCE* 476 (2004); Frank Matthewson & Ralph Winter, *Territorial Restrictions in Franchise Contracts*, 32 *ECONOMIC INQUIRY* 181 (1994); see also *supra* text accompanying note 146.

181. See SYRETT, *supra* note 72, at 83–84 (noting expansion was only possible if there were not already a chapter of the same fraternity on campus); TURK, *supra* note 72, at 202 n.106 (fraternity promulgating a rule that “No chapter shall invite to membership a girl from the normal territory of another chapter without first consulting that chapter and securing its approval of the girl”); BAIRD, *supra* note 9, at 18–19.

182. See Vázquez & Carvalho, *supra* note 180, at 2–5; Kalnin, *supra* note 180; Matthewson & Winter, *supra* note 180.

183. See Vázquez & Carvalho, *supra* note 180, at 9–11; Matthewson & Winter, *supra* note 180; BAIRD, *supra* note 9, at 13–14; TURK, *supra* note 72, at 62–63; see also Horton, *supra* note 6, at 437 (“[F]raternities continue to compete extensively for new members of the same sex.”).

#### 4. Economics: A Geographically Diffuse Body

This brings the discussion neatly to the common economic motivators for both fraternity and franchise. National fraternities, by their very nature, are geographically dispersed organizations, with the central office often far removed from any given local chapter.<sup>184</sup> Indeed, courts have often pointed to this distance as a reason why national offices are limited in their control of local chapters.<sup>185</sup> Particularly in their early days, fraternities were forced to rely on remote contacts when colonizing new chapters.<sup>186</sup> Even today, national offices have neither the staff and cash nor the localized know-how to prosecute serious programs of expansion and colonization absent involvement by local students or alumni volunteers.<sup>187</sup> Meanwhile, groups of would-be members are familiar with the campus, and highly motivated to succeed in order to gain the many benefits that flow from the resources of a national organization.<sup>188</sup>

For their part, universities rigorously regulate expansion into their markets by refusing recognition of new fraternities absent extensive screening processes.<sup>189</sup> In doing so, universities are often explicitly seeking to protect the welfare of incumbents as well as to control supply and demand in both Greek recruitment and student housing.<sup>190</sup> To this end, universities usually delegate recognition of new chapters to a quasi-official school-controlled council of existing fraternities, whose interests in forestalling new competition are self-evident.<sup>191</sup> Fraternities that try to expand outside the ægis of official recognition are deemed “hostile” and “recognition of such groups will not be endorsed” by school authorities,<sup>192</sup> with courts being

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184. Mumford, *supra* note 4, at 765–66; *see* LeFlore, *supra* note 10, at 211.

185. *E.g.*, Walker v. Phi Beta Sigma Fraternity (RHO Chapter), 706 So. 2d 525, 529–30 (La. App. 1997); Millard v. Osborne, 611 A.2d 715, 719 (Pa. Sup. Ct. 1992); Marshall v. Univ. of Del., 1986 WL 11566, at \*8 (Del. Super. Oct. 8, 1986); *see also* Shaheen v. Yonts, 394 F. App'x 224 (6th Cir. 2010).

186. *See* TURK, *supra* note 72, at 26–27.

187. *See, e.g.*, Malachi Barrett, *TKE Fraternity Returns After 14 Year Absence*, CENTRAL MICHIGAN LIFE (Mt. Pleasant, Mich.), Sept. 15, 2014; Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014.

188. *See supra* notes 167–168 and accompanying text.

189. Hauser, *supra* note 4, at 436–37; Harvey, *supra* note 4, at 34–37.

190. *See* Hauser, *supra* note 4, at 437; Harvey, *supra* note 4, at 36–37.

191. *See* Harvey, *supra* note 4, at 35–37; Hauser, *supra* note 4, at 464–65; *see also* Timothy M. Burke, *Is a Greek Council a State Actor?*, FRATERNAL L., Jan. 2012, at 5–6 (reviewing status of Greek councils at public universities); *e.g.*, Delta Sigma Phi Fraternity, Delta Sigma Phi Fraternity Manual of 2010, at 11, *available at* [www.deltasig.org](http://www.deltasig.org).

192. Hauser, *supra* note 4, at 437.

invoked to preserve the university's right of refusal.<sup>193</sup> Sometimes, universities themselves reach out to desired fraternities to invite them to colonize.<sup>194</sup> And it is only fraternities—not other university social clubs or groups—that are subject to these severe restraints.<sup>195</sup> (Indeed, commentators have raised concerns about antitrust aspects of university regulation of fraternities, a question that deserves more scrutiny.<sup>196</sup>)

These are just the conditions under which franchising is economically favored: The fraternity franchisor is geographically diffuse;<sup>197</sup> the franchisee group at the university is motivated to provide the manpower and resources that the limited national organization cannot;<sup>198</sup> and the entrenched university powerbroker makes recruitment and selection of membership reliant on local connections.<sup>199</sup> Under these circumstances, fraternities pursuing aggressive expansion are highly dependent on the availability of start-ups keen to create a new chapter from scratch under the auspices of the national, or an existing chapter looking to affiliate with a new national organization.<sup>200</sup> The more prestigious the national fraternity is, the more likely a local group will wish to petition or affiliate.<sup>201</sup> Like any other franchisors, national fraternities are strongly incentivized to continue burnishing their brand, lest competitors end up with the most promising local groups.<sup>202</sup> Moreover, a better-reputed national fraternity is more likely to

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193. See, e.g., *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2d Cir. 2007) (reversing trial court's holding that the chapter must be recognized); Gregory F. Hauser, *Chi Iota Colony v. CSI: What Happened and Why*, FRATERNAL L., Mar. 2008, at 4–5 (discussing case). But see James C. Harvey, *Court Upholds Damage Award Against University of Iowa*, FRATERNAL L., Mar. 2009, at 1–2 (successful suit against college for suspension of fraternity).

194. E.g., Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN, Sept. 24, 2014 (“Universities with Greek systems in place typically reach out to national fraternities and sororities, inquiring if they would like to establish a chapter on that campus.”).

195. Hauser, *supra* note 4, at 461.

196. E.g. Bauer, *supra* note 71, at 400–12; see, e.g., Burke, *supra* note 191, at 6 (noting antitrust concerns in regard of university-sponsored Greek councils).

197. See *supra* notes 39–47 and accompanying text.

198. See *supra* notes 39–41, 45–47 and accompanying text.

199. See *supra* note 46 and accompanying text.

200. See *supra* notes 167–168 and accompanying text.

201. SYRETT, *supra* note 72, at 83 (“As fraternities became more well known during this period, certain fraternities had particularly appealing reputations—often dependent upon the schools where the fraternities already had chapters—and thus were chosen as the nationals to which the hopeful students addressed their petition.”); BAIRD, *supra* note 9, at 12–13; see, e.g., Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014 (petitioning group reached out to Kappa Sigma because it was the oldest and largest fraternity).

202. See BAIRD, *supra* note 9, at 12–13.



obtain the necessary approvals from university authorities.<sup>203</sup> All things considered, for the fraternity, the franchising framework is not so much a choice as an economic necessity in addressing its idiosyncratic market.

Of course, fraternities do not employ the franchise framework identically.<sup>204</sup> Some emphasize quantity over quality, seeking to found as many chapters as possible, at any school that will have them.<sup>205</sup> Under such a “sink or swim” model, some local chapters will emerge as successful, while weaker chapters are left to flounder and fail.<sup>206</sup> Other fraternities take an opposite approach, and colonize only more prestigious schools, or accept only groups of a certain measured caliber, in order to maximize every established chapter’s long-term success.<sup>207</sup> Most fraternities fall naturally somewhere in the middle of the continuum defined by these antipodal strategies. Such a continuum is to be found in the greater world of business-format franchising as well,<sup>208</sup> which only reinforces the economic correspondence between the fraternity and franchising systems.

### C. Fraternities as Inadvertent De Jure Franchises?

The purpose of this Article is not to press a dubious argument that fraternities are actually franchises within the definition of statute. But it is worth pausing for a moment to consider that possibility, given the evident similarities in structure and purpose between the models. This is all the more so given that ordinary licensing business relationships sometimes accidentally meet statutory requirements for franchises, because one “cannot avoid a franchise relationship simply by disclaiming its existence. What the

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203. See, e.g., Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014 (noting the university invited service fraternities to campus and adverting to the prestige of having such national organizations represented).

204. See BAIRD, *supra* note 9, at 12–13.

205. E.g., Jenna Mulligan, *Students Construct Charter in Attempt to Bring Greek Life to GU*, GONZAGA BULLETIN (Spokane, Wash.), Sept. 24, 2014 (Kappa Sigma, as the largest fraternity, is “the most willing to take a chance on any group, so we had the opportunity to define it however we wanted to,” Rasmussen said. “They’re aggressive in terms of recruiting because they are willing to expand.”).

206. See, e.g., Kae Holloway, *WKU Chapter of Delta Tau Delta Suspended*, COLLEGE HEIGHTS HERALD (Bowling Green, Ky.), Aug. 27, 2014.

207. See, e.g., Malachi Barrett, *TKE Fraternity Returns After 14 Year Absence*, CENTRAL MICHIGAN LIFE (Mt. Pleasant, Mich.), Sept. 15, 2014 (“We hand select our campuses very carefully, we know this is a school that will support these young men in what they are trying to do.”).

208. See, e.g., Killion, *supra* note 29, at 163–64 (describing expansion strategies employed historically by different fast food chains).

parties call themselves is immaterial.”<sup>209</sup> So-called “inadvertent franchises” are frequently discovered when business associates fall out and one side belatedly realizes, undoubtedly on the advice of counsel, that he may have another arrow in his quiver for litigation.<sup>210</sup> Accordingly, much ink and effort has gone into detailing how licensors may avoid qualifying as a franchisor.<sup>211</sup> At base, such maneuvers must negate at least one of the three prongs of statutory franchising tests: the license of a trademark, consideration, and substantial oversight or guidance by the licensor.<sup>212</sup>

Such traditional remedies may be less available to fraternities, which permit their local chapters to operate under their trademark, exact payments from those chapters, and both offer critical support to and exercise substantive oversight over the chapters’ operations.<sup>213</sup> As with more traditional for-profit relationships, a cogent argument can often be made that the national’s oversight is still too attenuated to create a franchise relationship.<sup>214</sup> Fraternities might also structure initial payments from the local so as to avoid federal definitions of consideration.<sup>215</sup> But at least one categorical saving grace for fraternities lies elsewhere, in the perhaps misleading reference to a unitary local fraternity chapter, which obscures the nature of an essentially obscure entity.<sup>216</sup>

Local chapters are typically unincorporated voluntary associations of university students.<sup>217</sup> Within a half-decade, the local will be comprised of a completely different set of members and officers by the regular

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209. Spandorf, *supra* note 48, at 38.

210. *See id.* at 37–38 (recounting cases involving such situations).

211. Jonathan Solish, *Unrecoverable Investments Define Franchise Relationship*, 26 FRANCHISE L.J. 3, 3 (2006–2007) (“The danger of inadvertently crossing the line into the realm of franchising has been raised in many articles and treatises. Franchise practitioners are keenly aware of the problem of what might be a franchise and often structure business relationships to avoid inadvertently stepping over the line.”); *e.g.*, Spandorf, *supra* note 48, at 39–42; James R. Sims III & Mary Beth Trice, *The Inadvertent Franchise and How to Safeguard Against It*, 18 FRANCHISE L.J. 54 (1998–1999).

212. *E.g.*, Spandorf, *supra* note 48, at 39–41 (addressing methods for negating each of three statutory prongs); *see supra* notes 55–61 and accompanying text (statutory requirements).

213. *See supra* Subparts III.B.1–3.

214. *See* Spandorf, *supra* note 48, at 39–40; *e.g.*, sources cited *supra* note 171.

215. *See supra* note 144 and accompanying text.

216. *Cf.* Neuhoff, *supra* note 2, at 113 (“Most national college fraternities consist of three units; the national organization, the local chapter, and the property holding unit for the local chapter. These various units are sometimes incorporated and sometimes not incorporated. The property holding unit, however, is generally either a corporation or a common law trust. In considering these units they will be spoken of as the ‘fraternity.’”).

217. Marshlain, *supra* note 8, at 5–7; LeFlore, *supra* note 10, at 195–96; Partridge, *supra* note 93, at 169–70; *see also* Neuhoff, *supra* note 2, at 113; *e.g.*, Smith v. Delta Tau Delta, 9 N.E.3d 154, 161 (Ind. 2014).

matriculation and graduation of an ephemeral student body.<sup>218</sup> The more persistent local organizations—alumni social groups or alumni-controlled housing corporations—are legally distinct parties;<sup>219</sup> indeed, often the local chapter members are themselves lessees from the housing corporation lessor.<sup>220</sup> To treat alumni as part of the local college chapter would ignore the reality that alumni pay no dues, participate little if at all in local chapter affairs, and may not avail themselves of key services such as the room and board so central to the business of the fraternity.<sup>221</sup>

The unincorporated local chapter, as such, therefore may not be a proper legal party to any franchise contract.<sup>222</sup> As early commentator Olcott Partridge set forth:

In the case of the undergraduates of a fraternity chapter, these individuals are residents of different States; most of them are minors,<sup>223</sup> and nearly all of them remain resident at the college or university for a period of only four years or less, and then are scattered far and wide throughout the country. A contract with such an organization, in most States, does not bind the successors or predecessors of the persons who make it, but binds only the makers themselves.<sup>224</sup>

The author concludes: “a contract with the undergraduate members of a fraternity chapter is often difficult to enforce.”<sup>225</sup> So too would be any

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218. Hauser, *supra* note 4, at 453; Partridge, *supra* note 93, at 170; *see Foster v. Purdue Univ.*, 567 N.E.2d 865, 870 (Ind. Ct. App. 1991) (“It retains its character as a local fraternal chapter, despite the continual change in membership due to graduating and incoming students.”).

219. *See* Neuhoff, *supra* note 2, at 36–37; Partridge, *supra* note 93, at 170–73.

220. Hauser, *supra* note 4, at 452–53; Partridge, *supra* note 93, at 173; *see* LeFlore, *supra* note 10, at 194 n.7; *e.g.*, *Foster*, 567 N.E.2d at 871–72.

221. Hauser, *supra* note 4, at 452–53; *see also* LeFlore, *supra* note 10, at 211 n.88 (“This argument applies to alumni associations and house corporations as well. By definition, their membership is often spread out across the state or nation, unable to oversee or act except through local alumni on a volunteer basis.”); *supra* Subpart III.A. *But see* Partridge, *supra* note 93, at 168–69.

222. *See* *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 405 (Kan. 2002) (“[I]n the absence of a statute to the contrary, an unincorporated association is not a legal entity.” (quoting *Kansas Private Club Ass’n v. Londerholm*, 408 P.2d 891 (Kan. 1965))); *see also* *Johnston v. Meredith*, 840 So. 2d 315 (Fla. Dist. Ct. App. 2003).

223. Partridge writes in an era in which the age of majority was twenty-one, but his point is scarcely attenuated by the change in such statute – in addition to which, some fraternity members will be minors even today.

224. Partridge, *supra* note 93, at 170 (footnote added).

225. *Id.*; *see also* Neuhoff, *supra* note 2, at 114 (difficulty of assessing debt against members of unincorporated fraternity chapter); *cf.* Marshlain, *supra* note 8, at 5–7 (difficulty of suit against unincorporated fraternity chapter); LeFlore, *supra* note 10, at

supposed franchise agreement, being solely a creature of contract.<sup>226</sup> Indeed, a local chapter can simply dissolve and avoid any civil or even criminal liability.<sup>227</sup> Construing the fraternity charter for a chapter and ensuing national-local relationship as a *de jure* franchising agreement runs into the likely insuperable barrier that the national has no consistent legal counterparty with whom to contract. While Partridge half-heartedly suggests undergraduate chapters might incorporate and provide that membership in the corporation somehow pass to initiates as successors,<sup>228</sup> few modern chapters appear to have done so, whether because of prudence or passivity.<sup>229</sup>

But perhaps the franchise may be agreed with the founding local members as individuals, who in turn transfer partial ownership of the franchise to each new initiate, and withdraw from the franchise as they graduate? After all, the national grants charters to those founding members as explicit beneficiaries of the agreement.<sup>230</sup> Such a notion still runs into the logistical difficulties proffered by Partridge in setting up an undergraduate corporation, largely concerning the lack of formalities—votes, legal writings and the like—to such regular transferences and withdrawals, as well as the lack of detailed notice to initiates of the compact to which they would then be acceding.<sup>231</sup> Moreover, franchises are not freely alienable, but rather are subject to restrictions on sale and subject to franchisor approval, making such frequent *ad hoc* exchanges in membership problematic to say the least.<sup>232</sup> And other structural differences – for example, the cross-recognition of

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195–96 (same).

226. BROWN, *supra* note 34, at 32; see Jerrold G. Van Cise, *A Franchise Contract*, in THE FRANCHISING SOURCEBOOK § 5 at 95 (Jim McCord ed. 1970).

227. See, e.g., *Furek v. Univ. of Del.*, 594 A.2d 506, 513–14 (Del. 1991) (no jurisdiction obtained over dissolved chapter in civil case); Michael John James Kuzmich, *In Vino Mortuus: Fraternal Hazing and Alcohol Related Deaths*, 31 MCGEORGE L. REV. 1087, 1125 & nn.327–29 (1999–2000) (chapter dissolved when faced with a criminal indictment for manslaughter).

228. Partridge, *supra* note 93, at 171–72 & n.5.

229. E.g., *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 161 (Ind. 2014); *Prime v. Beta Gamma Chapter of Pi Kappa Alpha*, 47 P.3d 402, 409 (Kan. 2002) (“[T]here were 200 different chapters in the Pi Kappa Alpha Fraternity in February of 1997 which were located in 200 different colleges and universities throughout the United States and Canada. Each chapter is a separate, unincorporated association composed of undergraduate college students.”); *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 657 (Iowa 2000) (Lavorato, J., dissenting).

230. See, e.g., BLANCHE GARTEN, *THE ANCHORA OF THE DELTA GAMMA FRATERNITY* 247, 277, 282 (1915) (describing charters being granted to the individual founding members of a chapter); WALTER BENJAMIN PALMER, *THE HISTORY OF THE PHI DELTA THETA FRATERNITY* 386 (1906) (same).

231. Partridge, *supra* note 93, at 171.

232. See BROWN, *supra* note 34, at 24–26; see also Spandorf, *supra* note 48, at 38 (It is a “felony to sell a franchise without complying with a franchise sales law”).

members transferring between schools – make a formal identity between the fraternal and franchise system elusive.<sup>233</sup>

Then again, the admission of new members is typically preceded by official votes and due ceremony,<sup>234</sup> and the national fraternity might be said to preemptively consent as franchisor to such *pari passu* transfers by prescribing and sanctioning the process for admitting new members to the chapter.<sup>235</sup> Indeed, in many cases chapters must apply (in writing) to the national organization for permission to bring in each new member.<sup>236</sup> Prospective members may even be given a chance to review in detail the obligations that will accrue to them upon admission,<sup>237</sup> for whatever good that will do for an undergraduate intent on joining.<sup>238</sup> Were national-local fraternity relations ever to be found to meet state or federal requirements for a franchise inadvertently, such reasoning is one avenue a court could take.

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233. See, e.g., Horton, *supra* note 6, at 437 (“Furthermore, fraternity chapters are so selective that even when one local chapter selects and initiates a student, another chapter often does not have to extend full membership to the transfer student duly initiated into the national fraternity at the first chapter”).

234. Horton, *supra* note 6, at 437 (“A fraternity’s extension of a membership bid is definitely not made to the public community, but rather is limited to selected students of a particular sex enrolled at the college or university of the local chapter. All current members of the fraternity chapter vote on whether to extend a bid to a specific individual to join the fraternity”).

235. See, e.g., Alexander v. Kappa Alpha Psi Fraternity, Inc., 464 F. Supp. 2d 751, 753–54, 756 (M.D. Tenn. 2006) (describing national rules, oversight, and investigation of local initiation practices); Kenner v. Kappa Alpha Psi Fraternity, Inc., 808 A.2d 178, 179–80, 183–84 (Pa. Super. Ct. 2002) (describing how the national fraternity issued an “executive order” preventing all its chapters from initiating new members, and once the moratorium was lifted, allowed the admission of new members only after national certification of the process); see also, e.g., Morrison v. Kappa Alpha Psi Fraternity, 738 So. 2d 1105, 1119 (La. App. Ct. 1999) (“Following the battery on Kendrick, however, Kappa National banned further membership intake at Tech.”); Ballou v. Sigma Nu General Fraternity, 352 S.E.2d 488, 291 S.C. 140, 152 (S.C. Ct. App. 1986).

236. E.g., Kenner, 808 A.2d at 183; see, e.g., Alexander, 464 F. Supp. 2d at 753.

237. See, e.g., Kenner, 808 A.2d at 182–83 (noting that new members were required to review and execute a membership agreement in order to accede to the fraternity); Daniel J. McCarthy, *Arbitration Clause Is Enforceable in Hazing Case*, FRATERNAL L., Sept. 2007, at 5–6 (discussing Griffen v. Alpha Phi Alpha, Inc., No. 06-1735, 2007 WL 707364 (E.D. Pa. Mar. 2, 2007)).

238. Cf. BROWN, *supra* note 34, at 5–7 (“Although the franchisee may consult an attorney before signing his franchise agreement, in fact this is seldom done. . . . The prospective franchisee, with little business or management background, is usually all too anxious to become associated with a ‘national’ product and will sign whatever is placed before him. The franchisee places his faith and confidence in the franchisor as his teacher and guide, with seldom a question about the terms of the contract. Although an opportunity to study the agreement is not necessarily denied the prospective franchisee, ordinarily he will have little to no understanding of all the legal and practical implications”).

Wisely, however, no court has yet crossed (or even approached) this dubious doctrinal Rubicon.

#### IV. COROLLARIES FROM FRAMING THE FRATERNITY AS FRANCHISE

That fraternities are not *de jure* franchises is not to say that all of the structural and economic parallels between fraternity and franchise should be disregarded. As has been demonstrated, fraternities operate in a manner that is quite analogous to purely for-profit franchising, and seem rather unlike any other sort of arrangement. This Part therefore briefly reviews a few of the more instructive legal corollaries following from conjecturing a franchise relationship between the fraternity national and local.<sup>239</sup>

##### A. “Naked Licenses” and Quality Control

It has already been mentioned that while fraternities were once not as assiduous as they might have been with their intellectual property, modern nationals employ better practices.<sup>240</sup> Fraternities derive considerable benefit from the exclusive use of their trade and service marks, and the courts’ protection of those marks.<sup>241</sup> The other side of the coin, however, is that fraternities are thereby obligated to maintain some modicum of oversight to assure the quality of the services provided under their name.<sup>242</sup> Yet even casual inspection reveals that fraternities are not uniformly successful in guaranteeing the quality of their chapters.<sup>243</sup> Even though fraternities are now taking their trademarks seriously, they face persistent problems in discharging the duties necessary to preserve their property.

Such duties are imposed on all trademark owners under the Lanham Act.<sup>244</sup> In the first place, owners must contest any unauthorized use of their brands or risk losing them.<sup>245</sup> As for those they do authorize through

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239. The purpose of this Article is not to plumb the depths of every corollary; rather, it is to propose the availability of franchise law in resolving fraternity cases given the close structural ties between the two. As such, the review in this Part is more exemplary of the franchise framework’s potential, and further research is called for to fully explore the sundry consequences of a franchise relationship being imputed to fraternities.

240. See *supra* notes 115–122 and accompanying text.

241. Frei & Grossman, *supra* note 109, at 4–6; e.g., Abraham v. Alpha Chi Omega, 781 F. Supp. 2d 396 (N.D. Tex. 2011), *aff’d*, 708 F.3d 614 (5th Cir. 2013); Alpha Kappa Alpha Sorority Inc. v. Converse Inc., 175 F. App’x 672 (5th Cir. 2006); Alpha Tau Omega Fraternity, Inc. v. Pure Country, Inc., 185 F. Supp. 2d 951 (S.D. Ind. 2004).

242. See *infra* notes 245–255.

243. See Caitlin NPR Interview, *supra* note 1.

244. 15 U.S.C. §§ 1051–1127.

245. Compare, e.g., Warner Bros. Inc. v. Gay Toys, Inc., 724 F.2d 327, 334 (2d Cir. 1983) with Exxon Corp. v. Oxxford Clothes, Inc., 109 F.3d 1070, 1080 (5th Cir. 1997).

licenses, established law views owners who fail to impose quality controls over the licensees' use of their marks—issuing so-called “naked licenses”—as having abandoned their claims of exclusive use.<sup>246</sup> Written but unenforced standards are not enough: a trademark owner must actually implement controls, not merely mouth the proper niceties.<sup>247</sup> And franchisors, in their role as licensors of their marks, must comply with the same requirements.<sup>248</sup> Although cogent arguments have been made that strict requirement of quality controls does not comport with normative policy interests,<sup>249</sup> the Lanham Act's plain language continues to place naked licensors at risk of dispossession.<sup>250</sup>

There is little doubt that general intellectual property standards apply to fraternities with equal force.<sup>251</sup> Generally speaking, fraternities must challenge any unauthorized use of their name, on pain of losing it.<sup>252</sup> As for local oversight, chapters are at least *de facto* licensees of the national fraternity brand,<sup>253</sup> and “the fraternity must be very careful to establish standards of quality for the licensee's merchandise and/or services. Moreover, the fraternity must regularly check to ensure that quality standards are being maintained by the licensee in order to preserve the legal rights of the fraternity to its name. Absence of effective quality control can result in

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246. See Irene Calboli, *The Sunset of Quality Control in Modern Trademark Licensing*, 57 AM. U. L. REV. 341, 354–56 (2007); Michelle S. Friedman, *Naked Trademark Licenses in Business Format Franchising: The Quality Control Requirement and the Role of Local Culture*, 10 J. TECH. L. & POL'Y 353, 356–60 (2005); Ann E. Doll, *Trademark Licensing: Quality Control*, 12 J. CONTEMP. L. ISSUES 203, 204 (2001–2002); e.g., *Movie Mania Metro, Inc. v. GZ DVD's Inc.*, 2014 WL 4435590 (Mich. App. Sept. 9, 2014).

247. See Doll, *supra* note 246, at 204.

248. See Sandroek, *supra* note 50, at 706; Friedman, *supra* note 246, at 365–73; Laurence R. Hefter, *Collateral Product Licensing: Benefits and Pitfalls for the Franchisor*, 6 FRANCHISE L.J. 3, 3–4 (1986–1987); e.g. *Dawn Donut Co. v. Hart's Food Stores, Inc.*, 267 F.2d 358, 367–68 (2d Cir. 1959).

249. E.g., Calboli, *supra* note 246.

250. See *id.* at 356 & nn. 62–64 (citing cases and 15 U.S.C. § 1064(3) for the proposition that “the Lanham Act also provides that lack of quality control can lead to the forfeiture of trademark rights if consumers are misled.”); *Movie Mania*, 857 N.W.2d 677, 684 (Mich. Ct. App. 2014) (“The Lanham Act explicitly states that naked licensing constitutes ‘abandonment’ of a trademark, in that trademark holders who engage in naked licensing relinquish all rights to their mark.”).

251. See, e.g., *L.G. Balfour Co. v. FTC*, 422 F.3d 1 (7th Cir. 1971) (finding fraternities liable for anticompetitive trademark licensing); *Abraham*, 708 F.3d 614 (confirming fraternities' right to exclude manufacturer from unlicensed use of trademarks).

252. See Graber & Owens, *supra* note 69, at 1–2; Manley, *supra* note 119; Frei & Grossman, *supra* note 109, at 5.

253. See *supra* notes 123–128 and accompanying text.

loss of those valuable rights to the name.”<sup>254</sup> Fraternities therefore must involve themselves in the operations of their chapters to the extent necessary to enforce quality, lest their valuable trademark be lost. When a fraternity holds out its chapters as dependably worthy outposts of its organization by granting them use of its name,<sup>255</sup> the fraternity must actually exercise the necessary diligence to make sure that its imprimatur is warranted.<sup>256</sup>

Yet the evidence suggests that fraternities find such diligence challenging.<sup>257</sup> Commentators have described nationals grappling with quality control at their chapters as being “forced to attempt the impossible.”<sup>258</sup> Many courts too have viewed nationals as lacking meaningful day-to-day control over their chapters’ conduct and operations.<sup>259</sup> Given limited resources, nationals may be limited at times to *post facto* remedial action rather than proactive quality control campaigns.<sup>260</sup> Hence while national fraternities’ responsibility to monitor may be clearly set forth in the law, their actual ability to fully comply remains questionable.<sup>261</sup>

Moreover, these intellectual property duties are in tension with the sword of Damocles posed by litigation. One writer on fraternity tort liability suggested that nationals “must sever ties [with chapters] to whatever extent is necessary to counterbalance the implication of control. This means getting out of the supervision business altogether and becoming similar to a licensing agency for its fraternity.”<sup>262</sup> But this runs athwart trademark law, which forbids nationals from disclaiming control and becoming naked licensors, at least if they want to preserve the exclusivity of their brand.<sup>263</sup>

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254. Frei & Grossman, *supra* note 109, at 5–6; *see* Graber & Owens, *supra* note 69, at 1–2.

255. *See supra* notes 123–133 and accompanying text.

256. *Cf.* Frei & Grossman, *supra* note 109, at 4 (explaining that when fraternities license their name, they place their “imprimatur” on the licensee’s offerings, and “members are likely to believe that the enterprise is sponsored by [the national] and that its goods or services meet [its] standards of quality”).

257. *See* Caitlin NPR Interview, *supra* note 1.

258. LeFlore, *supra* note 10, at 223 (“The national fraternity has been forced to attempt the impossible . . . . The standard of care that it has set for itself, after assuming this duty through its nationwide guidelines, will be impossible to meet.”); *see also* Paine, *supra* note 2, at 204 (“despite national directives . . . underage students will continue to drink”).

259. *See* cases cited *supra* note 171.

260. *See infra* note 312.

261. *See* Jonathan F. Farr, *Troubled Times in a New England University’s Fraternity System*, in *THE HAZING READER* 130, 136 (Hank Nuwer ed., 2004) (quoting an administrator that “assigning *responsibility* over the fraternities . . . has nothing to do with exerting *control* over people”).

262. LeFlore, *supra* note 10, at 191.

263. *See supra* notes 245–255 and accompanying text.



This problem confronts every franchisor, who must walk the careful line between maintaining sufficient control to protect its trademarks without assuming responsibility for torts its franchisees commit.<sup>264</sup> Much scholarly effort has gone into advising how to accomplish this delicate task<sup>265</sup>—a task made all the more difficult for lack of clarity about the nature and extent of franchisor tort liability, the subject of the next Subpart.

## B. Responsibility and Liability in Tort

The discussion of trademark controls thus provides an apt segue to tort liability for franchises. This is because the franchisor's accountability turns on the same sort of oversight that it is required to exercise to safeguard its trademarks.<sup>266</sup> Or as one commentator put it more vividly, the "typical vicarious liability case boils down to an argument between lawyers over the significance of the franchisor's controls."<sup>267</sup>

### 1. An Historical Précis of Franchise Tort Law

The franchise relationship is *sui generis*: neither one of independently contracting entities nor that of principal and agent, but rather some intermediate hybrid between these two extremes.<sup>268</sup> This uniqueness posed problems for early jurists seeking to adjudicate responsibility and liability for torts involving franchises.<sup>269</sup> Compounding the problem, cases from franchises' early days were few and far between, leading courts to "shoehorn" this novel relationship into a more traditional body of law.<sup>270</sup>

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264. See Shelley & Morton, *supra* note 52, at 119, 126–27; Laufer & Gurnick, *supra* note 109, at 4–5; Sandrock, *supra* note 50, at 702–06; see also Friedman, *supra* note 246, at 365–73.

265. E.g., Laufer & Gurnick, *supra* note 109; Sandrock, *supra* note 50; Shelley & Morton, *supra* note 52, at 127.

266. See Shelley & Morton, *supra* note 52, at 119, 127; Laufer & Gurnick, *supra* note 109, at 4–5.

267. Killion, *supra* note 29, at 165.

268. See John L. Hanks, *Franchisor Liability for the Torts of Its Franchisees: The Case for Substituting Liability as a Guarantor for the Current Vicarious Liability*, 24 OKLA. CITY U. L. REV. 1, 3 (1999) ("The franchisor-franchisee relationship is neither that of an employer-employee (or master-servant) nor of an employer and independent contractor. It was developed purposefully to have attributes of both and of neither."); Hadfield, *supra* note 40, at 928 ("The franchising structure combines elements of integration and delegation, control and independence. The franchise contract creates neither an employment relation nor an independent contracting relationship."); *id.* at 931–32; Michael R. Flynn, Note, *The Law of Franchisor Vicarious Liability: A Critique*, 1993 COLUM. BUS. L. REV. 89, 89–90 (1993).

269. See Flynn, *supra* note 268, at 89–90.

270. Killion, *supra* note 29, at 164; accord Flynn, *supra* note 268, at 89–90.

What emerged from these straits was a rather crabbed jurisprudence where franchise relationships were analyzed not on their own terms, but rather in an effort to categorize them as either principal and agent or independent contractors.<sup>271</sup> The dichotomy is typically dispositive: “If the former, the franchisor—like any ‘master’—is subject to vicarious liability through the doctrine of *respondeat superior*; if the latter, no liability ensues.”<sup>272</sup>

In practice, this artificial framework led to courts parsing endless and unpredictable series of factors to determine whether the franchisor had employer-like overall day-to-day control over a franchisee, or merely contractor-like general authority over the enterprise as a whole.<sup>273</sup> Even express agreements that the relationship is one of independent contract are often ignored by courts in favor of their own assessment of the “true” nature of the relationship.<sup>274</sup> Finding the overall relationship contractual typically barred recovery, even when a franchisor might intuitively appear responsible for the particular injury.<sup>275</sup> On the other hand, imposing vicarious liability on innocent franchisors would be unfair when franchisees in fact enjoy ample independence, leaving the franchisor responsible for torts it could not have prevented.<sup>276</sup>

All in all, the results were highly inconsistent and often contradictory.<sup>277</sup> Commentators could regularly advert to poignant examples of a single franchisor both being found liable and exonerated for nearly identical torts under nearly identical franchise agreements, sometimes within in the space of a single year.<sup>278</sup> Such uncertainty is, of course, undesirable for any of the parties in a franchise relationship, or even for plaintiffs seeking recourse.<sup>279</sup> By the end of the twentieth century, legal scholars were criticizing this regime stridently, calling with increasing urgency for a doctrinal

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271. See Flynn, *supra* note 268, at 89–94; Hanks, *supra* note 268, at 3–4.

272. Flynn, *supra* note 268, at 90; see also Hanks, *supra* note 268, at 3–4.

273. See Flynn, *supra* note 268, at 91–94; see also Shelley & Morton, *supra* note 52, at 122.

274. Shelley & Morton, *supra* note 52, at 127; e.g., *J.M. v. Shell Oil Co.*, 992 S.W.2d 759 (Mo. 1996), *reh'g denied* (Mo. 1996).

275. See Sandroock, *supra* note 50, at 700–02.

276. See Flynn, *supra* note 268, at 94–102; Killion, *supra* note 29, at 165.

277. See Killion, *supra* note 29, at 165; Flynn, *supra* note 268, at 91–94.

278. Compare *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808 (Iowa 1994), with *Miller v. McDonald's Corp.*, 945 P.2d 1107 (Or. Ct. App. 1997); compare *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975) with *Murphy v. Holiday Inns, Inc.*, 219 S.E.2d 874 (Va. 1975). See Killion, *supra* note 29, at 165 (discussing *McDonald's*); Flynn, *supra* note 268, at 92 & n.17 (discussing *Holiday Inns*); Comment, *Theories of Liability for Retail Franchisors: A Theme and Four Variations*, 39 MD. L. REV. 264, 267 n.14 (1979) (same).

279. See Roy Strom, *Uncertainty Isn't Easy to Stomach for Franchisees*, CHI. DAILY L. BULL., Aug. 6, 2014; cf. Sunshine, *supra* note 2, at 129 (disutility of uncertainty in fraternity tort cases).

reevaluation that better reflected the distinctly different franchise relationship.<sup>280</sup>

Broadly speaking, three credible options were put forward to circumvent the vicious dichotomy that had emerged: (a) promulgate a uniform statutory regime setting forth the contours of vicarious liability for franchisors; (b) impose vicarious liability in all franchise relationships, effectively transforming franchisors into employers; or (c) determine liability based on whether the franchisor or franchisee exercised predominant control over the tortious act itself.<sup>281</sup> In the event, neither Congress nor state legislatures pursued the first path, leaving the judiciary to sort out the situation.<sup>282</sup> The second path, while expedient in application, abolishes the unique status of the franchisor as distinct from employer—a drastic step justifiable only if franchising is so prone to abuse that it must be eradicated as a distinct legal relationship.<sup>283</sup> To adopt this theory would “turn franchising on its head,” ignoring the economic reality that the franchisor has bargained away much control and profit to the franchisee in exchange for the franchisee taking on many of the risks, which include losses from injuries to third parties.<sup>284</sup>

This left the third approach, which has found considerable currency in contemporary franchise cases. One of the earliest,<sup>285</sup> *Exxon Corp. v. Tidwell*, explained:

The focus should be on whether Exxon had the right to control the alleged security defects that led to Tidwell’s injury. If Exxon did not have any right to control the security of the station, it cannot have had any duty to provide the same. If Exxon had such a right of control, on the other hand, its conduct may be found to have contributed to Tidwell’s injury. Applying the traditional test of right of control over general operations simply does not answer

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280. *E.g.*, Killion, *supra* note 29, at 165–67; Flynn, *supra* note 268, at 103–07; Hanks, *supra* note 268 at 5–9, 31–34; *see, e.g.*, Shelley & Morton, *supra* note 52, at 119–22.

281. Flynn, *supra* note 268, at 103–06. Flynn dismissed out of hand the possibility of insulating franchisors from liability entirely: “After all, that would legitimate the use of franchisees as liability-free substitutes for employees in many cases where some form of franchisor liability is warranted.” *Id.* at 103. In a 1999 article, the late Professor John L. Hanks of Cardozo School of Law proposed a fourth option: leaving the franchisor immune from liability except as a guarantor in the event that a franchisee tortfeasor cannot satisfy a judgment, thus ensuring that victims are properly paid. *See* Hanks, *supra* note 268. Although this is a conceptually attractive idea in allocating responsibility, and a temptingly easy to administer rule, it does not appear to have been well-accepted by the courts.

282. *See* Flynn, *supra* note 268, at 103–04.

283. *Id.* at 104–05.

284. Killion, *supra* note 29, at 165; *see also* Flynn, *supra* note 268, at 104–05.

285. *See* Killion, *supra* note 29, at 166 (stating it was the first case on point).

this question. It requires a factfinder to surmise a general right of control from factors unrelated to safety, and then to infer from that general control a right of control over the safety conditions that are the real issue in the case.<sup>286</sup>

The question must be whether the franchisor reserved and exercised the right to control *the particular instrumentality that caused the tort*.<sup>287</sup> Such reasoning has the benefit of apparent fairness, absolving franchisors for local actions beyond their control, while imposing liability for torts occurring in zones of oversight the franchisor reserves to itself.<sup>288</sup> Indeed, this approach neatly defers to the contractual wellspring of franchising by allowing the local and national parties to negotiate which of them will ultimately control—and thereby be responsible for—each aspect of the franchisee’s operations.<sup>289</sup> It is thus unsurprising that the instrumentality-focused analysis has been taken up in many courts, both state and federal.<sup>290</sup> This judicial reevaluation is by no means universal; other courts continue to apply something like the original generalized day-to-day control analysis.<sup>291</sup> Regardless of such judicial division, however, in seeking the best model to export from franchise liability, the instrumentality approach conforms best to normative expectations of predictability, responsibility and fairness.

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286. *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 23 (Tex. 1993); see Killion, *supra* note 29, at 166 (discussing *Exxon*).

287. *Exxon*, 867 S.W.2d at 23; King, *supra* note 22, at 432–33 n.58 (collecting authorities and cases); cf. Flynn, *supra* note 268, at 105 (proposing the rule in assigning liability as resting on “which party had greater control over whatever proximately caused the accident”).

288. Flynn, *supra* note 268, at 105–06.

289. See Flynn, *supra* note 268, at 105–06. Viewed in this light, the instrumentality approach is a sort of contractual assumption of the risk. See Killion, *supra* note 29, at 167.

290. King, *supra* note 22, at 432–33 & n.58 (expansively detailing such authority); Note, *Court Addresses Appropriateness of Summary Judgment in Case of Vicarious Liability Against Franchisors*, FRANCHISE L. INSIDER, at 8 (Jan.-Mar. 2001); e.g., *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 734 (Tex. 1998) (“[B]y requiring its distributors to sell vacuum cleaners only through in-home demonstration, Kirby had retained control over that portion of the distributor’s work [and] . . . must therefore exercise this control reasonably.”); see, e.g., *Kerl v. Dennis Rasmussen, Inc.*, 682 N.W.2d 328, 331–32 (Wis. 2004); *Johnson v. Burger King Corp.*, 2000 WL 1160490 (Tex. App. Aug. 17, 2000); *Wu v. Dunkin’ Donuts, Inc.*, 105 F. Supp. 2d 83, 90 (E.D.N.Y. 2000), *aff’d*, 4 F. App’x 82 (2d Cir. 2001); *Walters v. Ramada Franchise Systems, Inc.*, 2000 WL 1201688 (Tex. App. Aug. 24, 2000); *Miller v. D.F. Zee’s, Inc.*, 31 F. Supp. 2d 792, 808 (D. Or. 1998); *Helmchen v. White Hen Pantry, Inc.*, 685 N.E.2d 180, 182 (Ind. Ct. App. 1997); *Martin v. McDonald’s Corp.*, 572 N.E.2d 1073 (Ill. App. 3d 1991), *appeal denied*, 580 N.E.2d 117 (Ill. 1991); *Hayman v. Ramada Inn., Inc.*, 357 S.E.2d 394, 397 (N.C. Ct. App. 1987).

291. See, e.g., King, *supra* note 22, at 431–32 & nn. 57–58 (juxtaposing courts applying generalized “day-to-day” control tests to those looking to the “specific aspects of the franchisee’s business operations from which the injury arose”).

Finally, there are entirely separate sources of liability, prominently apparent agency: the theory that the franchisor is vicariously liable because the plaintiff reasonably relied on the belief that the franchisee was an agent rather than mere franchisee of the national brand.<sup>292</sup> Courts, however, have largely been dismissive of apparent agency in this context,<sup>293</sup> ostensibly because the common brand cannot *ipso facto* create reasonable reliance,<sup>294</sup> given that the nature of franchising is “common knowledge”—that is, everyone knows a local McDonald’s is owned and operated separately from the international McDonald’s Corporation.<sup>295</sup> Perhaps more honestly, however, apparent agency has been rejected because it would eviscerate the franchising system in subjecting every franchisor to vicarious liability based only on the shared brand name.<sup>296</sup> Other arguments against franchisors include product liability<sup>297</sup> and reliance on national advertising,<sup>298</sup> but these miscellany are more honored in the breach than in the observance,<sup>299</sup> and discussion would in any event wade overfar into the weeds.

## 2. Lessons for Fraternities from Contemporary Franchise Liability

Instead, the argument is better served returning to fraternities: what lessons can be gleaned about their responsibility in tort from franchise law? It is hard to even briefly review the evolution of franchise law without glimpsing some of the problems inherent in fraternity decisions. Liability for a Greek national “typically relies on a phalanx of ill-defined factors that

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292. See Robert W. Emerson, *Franchisors’ Liability When Franchisees Are Apparent Agents*, 20 HOFSTRA L. REV. 609 (1991–1992); e.g., *Buchanan v. Canada Dry Corp.*, 226 S.E.2d 613 (Ga. Ct. App. 1989); *Crinckley v. Holiday Inns, Inc.*, 844 F.2d 156, 167 (4th Cir. 1988); *Fernanden v. Thigpen*, 293 S.E.2d 424 (S.C. 1982).

293. Hanks, *supra* note 268, at 14 (“Numerous courts have rejected franchisor liability founded on an apparent agency theory.”).

294. See *Gonzalez v. Walgreens Co.*, 878 F.2d 560, 562 (1st Cir. 1989); *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 729 N.E.2d 1113, 1121–22 (Mass. 2000); *Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 121 (Fla. 1995).

295. See Emerson, *supra* note 292, at 610 & n.2 (collecting cases); *id.* at 645–48; Hanks, *supra* note 268, at 15 (citing *Hoytt v. Docktor Pet Center, Inc.*, 1986 WL 11619, at \*2–3 (N.D. Ill. Oct. 10, 1986); *Ortega v. General Motors Corp.* 392 So. 2d 40, 44 (Fla. Dist. Ct. App. 1980); *Wash. v. Courtesy Motor Sales, Inc.*, 199 N.E.2d 263, 265 (Ill. App. Ct. 1964)). *But see* Emerson, *supra*, at 648–60 (empirical data refuting the common knowledge doctrine); e.g., *Beck v. Arthur Murray, Inc.*, 245 Cal. App. 2d 976, 979–81 (Cal. Ct. App. 1966).

296. See Hanks, *supra* note 268, at 25–26.

297. E.g., *Kosters v. Seven-Up Co.*, 595 F.2d 347, 352 (6th Cir. 1979).

298. E.g., *Beck*, 245 Cal. App. 2d 976.

299. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act 1, sc. iv.

might or might not give rise to a custodial duty to control, supervise, or otherwise restrain its undergraduate chapters from injurious behavior.”<sup>300</sup> Much like the initial approach to franchise liability,<sup>301</sup> this *ad hoc* identification and application of such factors can only lead to a broadly inconsistent body of law and engenders undesirable uncertainty in all parties as to whether liability will attach.<sup>302</sup> Perhaps most perversely, uncertainty compromises preventative measures by leaving unclear (until a court’s ruling) who will be responsible and thus who has the most interest in prophylaxis.<sup>303</sup>

Specifically, traditional national fraternity liability in tort looks to state common law to inquire whether the national has accrued a duty to act in respect of the third party plaintiff and breached it.<sup>304</sup> Courts generally employ a set of broad criteria, including vague appeals to public policy, social utility, and foreseeability, to assess duty in any given case.<sup>305</sup> The Restatement does identify a few common situations such as parent-over-child and master-over-servant where the former’s duty to supervise the latter unambiguously arises, but fraternity cases typically depend on a “catch-all category” imposing a duty for “other relationships giving rise to a danger to third parties.”<sup>306</sup> Whether the national fraternity has a duty at all therefore depends on the overall relationship between national and chapter.<sup>307</sup>

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300. Sunshine, *supra* note 2, at 80; *see id.* at 113–15, 129; *see also* sources cited *id.* at 80 n.6.

301. *See supra* notes 277–280 and accompanying text.

302. *See* Prime v. Beta Gamma Chapter of Pi Kappa Alpha, 47 P.3d 402, 410 (Kan. 2002) (“A quick look at the cases cited by Prime reveals that some state courts impose liability on national fraternities and others do not.”); Sunshine, *supra* note 2, at 113–15 (discussing inconsistent decisions); *id.* at 129 (“Such uncertainty is hardly desirable for the national, local, prospective members, or a society at large seeking to curb injurious hazing.”).

303. *See, e.g., infra* notes 398–399 and accompanying text.

304. *See, e.g.,* Sparks v. Alpha Tau Omega Fraternity, Inc., 255 P.3d 238, 245–46 (Nev. 2011) (examining whether national had and breached a duty to supervise a local’s tailgate party); Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 553 (Mo. 1987) (en banc) (examining whether national had and breached a duty to supervise local alcohol service); Alumni Ass’n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan, 572 A.2d 1209, 1213 (Pa. 1990) (same).

305. *See, e.g.,* Kenner v. Kappa Alpha Psi Fraternity, Inc., 808 A.2d 178, 182 (Pa. Super. Ct. 2002) (looking to “(1) the relationship between the parties; (2) the social utility of the actor’s conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.” (quoting Althaus *ex rel.* Althaus v. Cohen, 562 Pa. 547, 756 A.2d 1166 (Pa. 2000))).

306. Rutledge, *supra* note 3, at 373 n.70; *see* RESTATEMENT (SECOND) OF TORTS §§ 315–20 (1965); LeFlore, *supra* note 10, at 208–10 & nn.85–86 (discussing at length).

307. *See* RESTATEMENT (SECOND) OF TORTS §§ 315–20 (1965); LeFlore, *supra* note 10, at 208–10 n.85; *e.g.,* Sparks, 255 P.3d at 245–46 (finding no duty after reviewing general nature of relationship of national and local); Andres, 730 S.W.2d at 553 (same);

Fraternity cases should not, however, turn on the abstract and normatively inapt question of whether this relationship is sufficient to give rise to a generalized duty, while disregarding the involvement (or lack thereof) of the national in the actual injury done the plaintiff.<sup>308</sup> Such an all-or-nothing inquiry harkens back to the blunt original test in franchise cases that has proven unsatisfactory to many authorities.<sup>309</sup>

The instrumentality doctrine used in franchise law would bring greater fairness to disputes involving fraternities: the question would be whether the national fraternity had specifically reserved to itself the right to direct and control the sort of acts or negligence that gave rise to the injury. Unlike the approach in tort, in which duty is decided *ad hoc* employing factors of social utility and public interest, the instrumentality doctrine assigns responsibility to the party with predetermined control. This is more just to both national and local, permitting parties to structure their relationship to create predictable zones of accountability. Such an approach is neither uniformly to the benefit nor detriment of either party: An otherwise uninvolved national might be inculcated because it deliberately retained some narrow area of authority,<sup>310</sup> or a more restrictive national might be exculpated because the injury occurred in a zone over which it disclaimed any authority.<sup>311</sup>

At a highly generalized level, the instrumentality doctrine most clearly tends to exonerate nationals from torts committed during social and recreational events. General guidance about avoiding risky behavior and the overarching ability to expel members or chapters *post facto* do not add up to responsibility for a national that has nothing to do with the parties thrown by their local members (and any misdeeds occurring thereat).<sup>312</sup> This is further

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*Sullivan*, 572 A.2d at 1213 (same).

308. See generally Marshlain, *supra* note 8; LeFlore, *supra* note 10.

309. See *supra* notes 268–280 and accompanying text.

310. See, e.g., Ballou v. Sigma Nu General Fraternity, 352 S.E.2d 488, 492–95 (S.C. Ct. App 1986).1986).

311. See, e.g., Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 553 (Mo. 1987) (en banc).

312. Compare, e.g., *Sullivan*, 572 A.2d at 1213 (Pa. 1990) (“National organizations do not have the ability to monitor the activities of their respective chapters which would justify imposing the duty appellant seeks. The national organization in fraternal groups has only the power to discipline an errant chapter after the fact. It does not possess the resources to monitor the activities of the chapter contemporaneous with the event. . . . From this factual matrix, there is no basis in the relationship to expand the liability of the national body to include responsibility for the conduct of one of its chapters.”), *Sparks*, 255 P.3d at 245–46 (following *Sullivan*), and *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 164 (Ind. 2014) (“It is significant, however, that these alleged enforcement powers are remedial only. The national fraternity has no right to direct or control a local fraternity member’s personal actions and behavioral choices.”) with *Hayman v. Ramada Inn., Inc.*, 357 S.E.2d 394, 397 (N.C. Ct. App. 1987) (like logic in traditional franchise context).

illustrated by analogy to franchise cases in which the victims of violent crimes unsuccessfully sought recompense from a national franchisor because the tort occurred at a franchisee, alleging the national brand had an obligation to assure their security.<sup>313</sup> But national fraternities are not and cannot be guarantors of the general safety of every person at or after local fêtes and functions.<sup>314</sup> Only a national that reserves specific control over a local party should face potential vicarious liability.<sup>315</sup>

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313. *E.g.*, *Hayman*, 357 S.E.2d at 397; *Wu v. Dunkin' Donuts, Inc.*, 105 F. Supp. 2d 83, 90 (E.D.N.Y. 2000), *aff'd*, 4 F. App'x 82 (2d Cir. 2001); *Helmchen v. White Hen Pantry, Inc.*, 685 N.E.2d 180, 182 (Ind. Ct. App. 1997). *But cf.*, *e.g.*, *J.M. v. Shell Oil Co.*, 922 S.W.2d 759, 763–64 (Mo. 1996) (finding question of specific control in violent tort committed on franchise premises unsuitable for summary judgment); *Walters v. Ramada Franchise Systems, Inc.*, 2000 WL 1201688 (Tex. App. Aug. 24, 2000) (same).

314. *See* *Marshlain*, *supra* note 8, at 4–5; *e.g.*, *Garofalo v. Lambda Chi Alpha Fraternity*, 616 N.W.2d 647, 654 (Iowa 2000); *Miller v. Int'l Sigma Pi Fraternity*, 41 Pa. D. & C. 4th 282, 286 (Pa. Ct. Com. Pl. 1999) (“Unless defendants fraternity and university had actual knowledge of the party at which plaintiff was injured, liability will not follow. Plaintiff fails to aver actual knowledge on the part of plaintiff. Therefore, in the absence of actual knowledge, plaintiff claims of negligence against defendants fraternity and university must be dismissed.”); *Millard v. Lambda Chi Alpha*, 611 A.2d 715, 720 (Pa. 1992); *Campbell v. Bd. of Tr. of Wabash College*, 495 N.E.2d 227, 232 (Ind. Ct. App. 1986); *see also* *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 255 P.3d 238, 245–46 (Nev. 2011) (finding no duty to supervise local tailgate); *Andres v. Alpha Kappa Lambda Fraternity*, 730 S.W.2d 547, 553 (Mo. 1987) (en banc) (finding no duty or negligence for national over local service of alcohol at party); *Alumni Ass'n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan*, 572 A.2d 1209, 1213 (Pa. 1990) (same). *But see, e.g.*, *Marshall v. Univ. of Del.*, 1986 WL 11566, at \*8 (Del. Super. Ct. Oct. 8, 1986); *cf. supra* note 281 (discussing Professor Hanks' proposal that guarantor liability be imposed on franchisors).

315. *See* *Sparks*, 255 P.3d at 245–46 (no control and no liability); *Miller*, 41 Pa. D. & C. 4th at 286 (same); *Andres*, 730 S.W.2d at 553 (same); *Sullivan*, 572 A.2d at 1213 (same); *LeFlore*, *supra* note 10, at 231 (summarizing of *Sullivan* that “plaintiff failed to state a case . . . absent allegations that the national organization authorized or ratified the serving of alcohol at the party”); cases cited *supra* note 162; *see also* *Estate of Hernandez v. Flavio*, 186 Ariz. 517, 519, 924 P.2d 1036 (Ariz. Ct. App. 1997) (“The national fraternity, having sponsored what amounts to a group of local drinking clubs, cannot disclaim responsibility for the risks of what it has sponsored.”), *aff'd in part, and rev'd in part on other grounds*, 930 P.2d 1309 (Ariz. 1997) (discussing theories of national and local involvement with social events).

Liability in this arena is more plausible if, for example, a “dry” national fraternity expressly forbade any alcohol at its chapters' in-house functions in its by-laws, and the injury complained of was alcohol poisoning. (To be sure, general guidelines about responsible alcohol use are not the same as forbiddance.) It may be argued that such a regime would dissuade fraternities from imposing hard-line regulations against alcohol use, and this is likely so. *See, e.g.*, *LeFlore*, *supra* note 10, at 234–37. But that is the point: if fraternities hold themselves out as enforcing teetotaling rules on alcohol to ensure health and safety, then they must actually do so. Proffering such rules while allowing local chapters to flout them is worse than having no rules at all. A national fraternity that finds its local chapters cannot be realistically restrained from some measure of alcohol use is better served promulgating policies that channel this behavior into safer forms, not a misleading policy that pretends to unfeasibly high standards. But



Contrariwise, torts committed in the process of inducting new members can more plainly be laid at the national's door. This author has elsewhere argued that the induction of new members is conducted within an agency relationship of *respondeat superior*, because the local chapter acts for the direct benefit of the national—local inductions are the only way the national can obtain new members—and because the local operates under the express authorization and direction of the national in conducting initiations.<sup>316</sup> Nationals not only prescribe what must be done, but proscribe in excruciating detail what may not.<sup>317</sup> Viewed through the lens of the instrumentality doctrine, the induction of new members is clearly a zone in which every national fraternity has reserved the right to command and control.<sup>318</sup> local chapters must use the nationally-mandated process, and have no authority to induct new members without national assent.<sup>319</sup> National liability for hazing, therefore, is well-founded within the context of the franchising framework.<sup>320</sup>

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failure is hardly certain *a priori*: experience shows that some fraternities have been successful at eliminating alcohol from chapterhouses. *See, e.g.*, Robert E. Manley, *Alcohol-Free Housing Works*, FRATERNAL L., Jan. 2006, at 1; Robert E. Manley, *Chapter Houses and Fraternity Culture*, FRATERNAL L., Jan. 2005, at 1–2. Rogue chapters that refuse to fall in line can be drummed out of the fraternity. *E.g.*, Timothy M. Burke, *Phi Delta Theta's Alcohol-Free Policy Upheld*, FRATERNAL L., Sept. 2008, at 1–2.

316. *See* Sunshine, *supra* note 2, at 129–37; *see also id.* at 87–109 (reviewing and analyzing historical precedent attributing vicarious liability for hazing to national fraternal organizations).

317. *See, e.g.*, *Smith v. Delta Tau Delta*, 988 N.E.2d 325, 329–30 (Ind. Ct. App. 2013) (“[N]o chapter of Delta Tau Delta shall indulge in any physical abuse or undignified treatment (hazing) of its pledges or members. Hazing is defined as any action taken or situation created intentionally, whether on or off Fraternity premises, to produce mental or physical discomfort, embarrassment, harassment, or ridicule. Such activities and situations include paddling in any form, creation of excessive fatigue, physical and psychological shocks, quests, treasure hunts, scavenger hunts, road trips or any other such activities, kidnapping of actives by pledges or pledges by actives as well as the forced consumption of alcohol, wearing apparel which is conspicuous and not normally in good taste, engaging in any public stunts and buffoonery, morally degrading or humiliating games and activities, late work sessions which interfere with academic activity . . . .” (quoting by-laws)), *rev'd on other grounds*, 9 N.E. 154 (Ind. 2014).

318. *See* sources cited *supra* note 235–236 (fraternities exercising direct control over local induction).

319. *See id.*; Rutledge, *supra* note 3, at 391 (“persons could only become members by joining a local chapter” and the national “prescribed the initiation ceremony as the tool for joining”); Schoen & Falchek, *supra* note 3, at 133–34 (“National fraternity organizations normally prescribe the manner in which induction ceremonies are conducted.”); Sunshine, *supra* note 2, at 131–32 (“That national fraternities have the right to control the physical details of inductions to their orders can hardly be gainsaid.”).

320. *See, e.g.*, *Ballou v. Sigma Nu General Fraternity*, 352 S.E.2d 488, 492–95 (S.C. Ct. App. 1986) (affirming national liability for hazing); *e.g.*, *Alexander v. Kappa Alpha Psi Fraternity, Inc.*, 464 F. Supp. 2d 751, 753–54, 756 (M.D. Tenn. 2006) (denying

A closer question concerns whether recruitment efforts—what most fraternities call “rush”—should engender liability.<sup>321</sup> On the one hand, such recruitment efforts are prerequisite to the goal of obtaining new members, and nationals often provide guidance on how to maximize recruitment and cultivate prospects.<sup>322</sup> On the other hand, the national typically does not prescribe or proscribe any particular course of attracting new members,<sup>323</sup> and local chapters are therefore free (and likely) to develop approaches based on their local campus conditions.<sup>324</sup> Saliently, those conditions are under the pervasive authority of the university,<sup>325</sup> which usually regulates the details of fraternity rush fastidiously.<sup>326</sup> If anyone beyond the local chapter were to

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summary judgment to national for hazing injury); *cf., e.g.,* *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 734 (Tex. 1998) (holding franchisor that exercised control over specific practices by franchisee liable when they were not conducted safely).

321. From the point of view of analyzing liability, it is therefore necessary to draw a clear line between recruitment and induction activities. Fortunately, fraternities do so themselves. Rush activities are addressed to the university population at large and intended to identify and attract prospective members. At the conclusion of rush, the identified collegian is extended a bid: an offer to join the fraternity. If the bid is accepted, the prospective member becomes a pledge or neophyte and proceeds through the process of induction into the fraternity (pledging), culminating in an initiation ceremony that signifies the completion of the process. It is during this pledging period that hazing as such may occur. *See generally* Hauser, *supra* note 4, at 435–36; Horton, *supra* note 6, at 437, 469, 472; Harvey, *supra* note 4, at 25; *e.g.,* Tim Burke & Chris Hoskins, *Tragedy at University of Northern Colorado: Complaint Filed Against Delta Tau Delta*, FRATERNAL L., Nov. 2012, at 6 (distinguishing injuries occurring during pledging, after a bid, from earlier period of rush).

322. *See supra* notes 163–164 and accompanying text.

323. *See Smith*, 988 N.E.2d at 329–30 (reversing summary judgment in favor of national on agency grounds because “the national fraternity prescribed rules and requirements for recruiting and initiating new members, and for approved conduct in daily activities”), *rev’d*, 9 N.E. 154 (Ind. 2014) (finding no such agency relationship). It must be noted that most if not all fraternities have adopted a dry rush—that is, a recruitment process free from alcohol. This is at best a tautological requirement, however, because prospective members are reliably below the legal drinking age, and therefore providing rushes with alcohol would be *per se* illegal. *See* Matthew W. Fellerhoff, *Comprehensive Party Planning*, FRATERNAL L., Sept. 1997, at 1 (“Most, if not all fraternities, prohibit alcohol at rush events. Considering the likelihood that most rushes are underage, that is as it should be. From a risk management standpoint, dry rush should be the only option.”); *e.g., Smith*, 988 N.E. 2d at 330; Editorial, *ATQ Launches Risk Avoidance Campaign*, FRATERNAL L., Mar. 1986, at 4 (“Chapters shall, if not already mandated by the sheltering institution, implement a ‘Dry Rush’ program, using the guidance provided in the ATO Rush Manual.”). High-level expectations of legal behavior ought not engender liability without more. *See infra* notes 336–337 and accompanying text.

324. *See* Hauser, *supra* note 4, at 462; Robert E. Manley, *Chapter Officers’ Checklist*, FRATERNAL L., Sept. 1989, at 3; *see also* Harvey, *supra* note 4, at 36 (considering how university governing bodies can override local members’ recruitment plans).

325. *See supra* notes 4, 6, 189–196 and accompanying text.

326. *See* Hauser, *supra* note 4, at 435–36 (“Host campuses have also long regulated

be vicariously liable for injuries in rush, university overseers and their Greek council proxies are the more likely parties,<sup>327</sup> not the national fraternity.<sup>328</sup> That said, the implications for supervisory collegiate liability under the franchise framework, although fecund territory for future research, would exceed the scope of this initial Article.

Other activities are similarly susceptible to fact-laden dissection. National fraternities often assist directly with philanthropic or academic undertakings, and where the national is the animating force behind an event, the instrumentality doctrine would presumably place liability there. Whereas a general fraternity policy to engage in philanthropy would not suffice, national direction in conducting a particular charitable event likely would. Likewise, a national granting academic scholarships or offering scholastic assistance incurs no generalized responsibility for a recipient's actions, but the national might be responsible for torts committed at a leadership or academic conference it convened. Such hypotheticals remain largely that, however, as few cases arise from misbehavior at fraternity-sponsored symposia.<sup>329</sup>

What is the unifying principle amongst these admittedly high-level generalizations of liability?<sup>330</sup> At base, the question is with what precision a fraternity holds the reins on local operations. National organizations are usually uninvolved with any detail of social events: they have no opinion or interest as to whether a tennis-themed gala in the quad or a riverside dance

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membership in fraternity chapters by exercising control of the chapters' recruitment (usually known as 'rushing'."); *id.* at 462–64; Daniel J. McCarthy, *Tragedy Leads to Off-Campus Fraternity System*, FRATERNAL L., Jan. 2007, at 4–6; Daniel J. McCarthy, *Local Sorority Sues Chico State University*, FRATERNAL L., Mar. 2006, at 1; James C. Harvey, *Deferred Rush: A Violation of Equal Protection*, FRATERNAL L., Sept. 2005, at 1–2; *see also* Robert E. Manley, *People Problems*, FRATERNAL L., Sept. 1982, at 2 ("A college has the right to impose regulations over the rush process").

327. *See* Robert E. Manley & Timothy M. Burke, *All-Greek Councils*, FRATERNAL L., Mar. 1996, at 6 ("If an all-Greek council attempts to impose regulations such as the regulation of the use of alcohol or the regulation of rush its members may very well be sued for mistakes in the regulatory process."); *cf.*, *e.g.*, *Marshall v. Univ. of Del.*, 1986 WL 11566, at \*28–32 (Del. Super. Ct. Oct. 8, 1986).

328. *See, e.g.*, *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 305 (Ida. 1999) (no national liability for injuries sustained following inebriation at "several parties sponsored by campus fraternities celebrating the end of 'Rush Week.'").

329. *But see, e.g.*, Complaint, *Loomba v. Zeta Psi Fraternity, Inc.*, Case No. RG15774019 (Super. Ct. Cal. Jun. 12, 2015) (alleging negligence in death at social event associated with fraternity leadership conference); *cf.*, *e.g.*, Jason Schultz, *New York Girl Sues Benjamin School, Alleges She Was Sexually Assaulted by Student on Field Trip*, PALM BEACH POST, Sept. 17, 2013 (school sued for alleged assault by one of its students at school-sponsored participation in model United Nations conference).

330. These generalizations are high-level indeed. The resolution in any given case will depend on the facts surrounding the relationship of the particular national and local chapter to the injury done.

with jazz quartet is scheduled. As far as the national is concerned, local chapters are free to host no social functions at all.<sup>331</sup> On the other hand, the national mandates and describes minutely the forms for inducting new members, and encourages its chapters to bolster its numbers; it is not agnostic about whether and how new members are initiated.<sup>332</sup> The fact that national fraternities might have general guidelines regarding both parties and pledging is ultimately not the issue; what matters is whether the national fraternity reserves an interest in the activity giving rise to the tort. Under that microscope, parties are ultimately a local affair, while initiations are under national control.

If national fraternities say anything germane to a social event, it usually concerns alcohol, that persistent plague on fraternities.<sup>333</sup> Incidents arising out of alcohol use unfortunately occur at rush, pledging, social, athletic, and even purely domestic affairs.<sup>334</sup> The calculus of liability, however, derives not from a beverage but from the national fraternity's role (or lack thereof) in the service of the beverage.<sup>335</sup> Fraternities regurgitate legalities by rote: mandates for "dry rush" and against providing alcohol to the underage or intoxicated are tautological reminders not to break the law, not a reservation of control.<sup>336</sup> Without more, advisories against criminality, even with the

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331. It should be reiterated that nationals that *does* micromanage the details of local social functions can hardly disclaim responsibility for their execution. *See supra* notes 314–315. National fraternities are free to structure their contractual relations with their chapters however they wish, and accept the responsibilities that come with it. *See supra* text accompanying notes 287–289.

332. Indeed, it is because of this encouragement that this Article rush activities might arguably come with the scope of national responsibility, even though it is the chapter and university who are the principle actors in determining the actual contours of rush. *See supra* notes 321–328.

333. *Cf.* Harvey, *supra* note 4, at 14 ("Virtually every other problem faced by fraternities (including hazing incidents and sexual assaults) can be traced directly to substance abuse by individual members.").

334. *See generally* Kuzmich, *supra* note 227.

335. *See, e.g.,* Ballou v. Sigma Nu General Fraternity, 352 S.E.2d 488, 492–95 (S.C. Ct. App. 1986) (finding the fraternity's role in providing and pressuring the decedent to imbibe dispositive); Andres v. Alpha Kappa Lambda Fraternity, 730 S.W.2d 547, 553 (Mo. 1987) (en banc) (finding no duty or negligence for national over local service of alcohol at event); Alumni Ass'n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan, 572 A.2d 1209, 1213 (Pa. 1990) (same); *see also supra* note 315.

336. *See supra* note 323 and accompanying text; *e.g.,* Shaheen v. Yonts, 394 F. App'x 224, 229 (6th Cir. 2010) ("With regard to alcohol, specifically, Farkas testified that no one at the national chapter is charged with the responsibility of monitoring underage drinking at the local chapters. There is a general policy statement regarding social welfare and alcohol. However, there are no specific rules or policies dedicated to alcohol consumption. The fraternity is expected to abide by federal, state and local law. Period. However, there is no oversight in this regard."); Mitchell Schnurman, *7-Eleven Must Step Up To Prevent Worker Abuses By Franchisees*, DALLAS MORNING NEWS (June 22, 2013), <http://www.dallasnews.com/business/columnists/mitchell->

*post facto* penalty of expulsion, should provide no basis for liability: friends, parents, counsel, and even law enforcement officers may advise against breaking the law and warn of the ensuing repercussions; none is liable for criminal acts contrary to advice.<sup>337</sup> To find otherwise would reify the worst fears of pundits that wiser minds be foreclosed from admonishing collegians to behave properly.<sup>338</sup> That said, a national that specifically commands a local chapter to serve alcohol in a particular fashion might find itself vulnerable should that service lead to injury.<sup>339</sup>

These implications are hardly revolutionary. Some courts in fraternity cases have already effectively recognized that the question must be whether the national had control over the instrumentality of injury; an Arizona court found no agency liability for a national sued for a local member's drunk-driving incident that followed a chapter social event, explaining:

We affirm summary judgment for the national on other theories of liability. The members of the local chapter were not employees or servants of the national fraternity so as to impose *respondeat superior* liability for their torts. That the local may have been an agent of the national for purposes of collecting dues or accepting members does not create liability for all tortious activity of the agents.<sup>340</sup>

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schnurman/20130622-7-eleven-has-to-step-up-to-prevent-worker-abuses.ece June 22, 2013 ("The company also said that franchise owners must follow the law and 7-Eleven's franchise agreement, which assigns all labor issues to the franchisees.").

337. *Shaheen*, 394 F. App'x 224 (finding national not liable given no oversight over alcohol use despite general policy advising responsible and legal behavior); *cf.*, *e.g.*, Marshlain, *supra* note 8, at 14–16 ("If individuals are threatened with the possibility of their friends suing them for failing to warn them not to stand too close to the edge of the deck, or place their bed near a window, they may avoid entering such friendships. Even if it was practical to require fraternity and sorority members to take a parental role with their friends who are also members of the same fraternity or sorority, there is no proof that their policing will have any effect on the student seeking protection."). *Contra* Estate of Hernandez v. Flavio, 924 P.2d 1036, 1038 (Ariz. Ct. App. 1995) ("The national fraternity exercises control over many aspects of the activities of its local chapters. That a duty exists in this circumstance was implicitly admitted by the act of the national fraternity in sending to local chapters instructions to abide by local laws and university regulations in serving alcohol at chapter functions. Whether such an admonitory letter is sufficient to discharge any duty to exercise reasonable care is, of course, for the jury to decide.").

338. *E.g.*, LeFlore, *supra* note 10, at 220.

339. *E.g.*, Smith v. Delta Tau Delta, 988 N.E.2d 325, 337–38 (Ind. Ct. App. 2013) (reversing summary judgment in favor of national because of extensive national control of alcohol use and policy), *rev'd*, 9 N.E. 154 (Ind. 2014); *see supra* notes 312–315 and accompanying text.

340. Estate of Hernandez v. Flavio, 924 P.2d at 1039 (Ariz. Ct. App. 1995), *aff'd in part and rev'd in part on other grounds*, 930 P.2d 1309 (Ariz. 1997). Tellingly, despite affirming summary judgment on these agency theories based on a more instrumentality-

Consider the facts adduced in the peculiar case mentioned in the introduction, *Furek v. University of Delaware*.<sup>341</sup> There, the plaintiff had suffered severe chemical burns during the “culmination of the initiation process[,] a secret ritual known as ‘Hell Night’—an extended period of hazing during which the pledges are physically and emotionally abused.”<sup>342</sup> The jury absolved the national of liability under traditional tort rules,<sup>343</sup> but application of the instrumentality doctrine would throw such a verdict into question. The national fraternity required initiation for membership, forbade hazing, and conducted an annual certification from the local that it was complying with national rules for initiation, yet a few years before the incident, the local had reported that their program “was *not* free of hazing.”<sup>344</sup> Given that the national prescribed the rituals and rules for its initiation process and required regular certification of compliance (which it knew the local had recently failed), it would be difficult to gainsay national control over the instrumentality that caused the injury: the abusive secret ritual.

Embracing the instrumentality doctrine will not make the resolution of fraternity cases effortless. Franchise statutes vary by state; courts must contend with disputed facts; and liability will turn on the details of contractual assignments of control between the fraternal parties—though, as discussed, this last is more a feature than a bug in the system. While the *ad hoc* traditional approach to liability might sometimes reach the same result as an instrumentality approach, the vague and various factors employed in the former mean cases may fall out either way. The wisdom of focusing on relative control over the instrumentality of injury is compelling, and broader acceptance of this reasoning would go far in providing predictability and fairness (if not uniformity of result) to cases involving fraternities.

### C. Disclosure and Due Process Duties

Stepping back from fraught questions of liability, viewing the fraternity as a franchise also highlights the need for equitable disclosures and due process. Much of the criticism of franchising during its Wild West era in the 1960s and 1970s centered on franchisors’ failure to adequately disclose restrictions and legalities that trapped comparatively unschooled franchisees.<sup>345</sup> In many cases, franchisors invoked the secrecy required to

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focused approach, *Flavio* denied the national summary judgment under the traditional tort analysis.

341. *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991).

342. *Id.* at 509.

343. *Id.* at 511.

344. *Id.* at 510.

345. *See, e.g.*, BROWN, *supra* note 34, at 7–9; *see also id.* at 10–18 (undisclosed charges and fees).

protect valuable trade practices and secrets being divulged to competitors.<sup>346</sup> Even after franchisees were inevitably given access to the franchise terms, trade secrets and know-how in order to properly conduct their business, franchisors often sought to prevent any further dissemination through expansive non-disclosure agreements.<sup>347</sup> These had the incidental (or perhaps intended) side effect of preventing franchisees from warning about any exploitation perpetrated by the franchisor.<sup>348</sup> Today, however, federal and state law prescribe a lengthy list of disclosures that must be made available to any prospective franchisee.<sup>349</sup>

Fraternities face similar concerns and criticism. Detractors have long focused on fraternities' refusal to publicize the details of their secret rituals and ceremonies.<sup>350</sup> Perhaps in response, a few groups adopted "open rituals" in which the full details of their processes for inducting and initiating new members are freely available to both prospective members and the public.<sup>351</sup> Other fraternities have insisted that the confidentiality of their rituals is essential to their mystical origins and mission.<sup>352</sup> One group that faced intractable problems during pledging and initiation rituals has recently eliminated such ceremonies entirely, throwing the proverbial baby out with the bathwater.<sup>353</sup> But there is no need for such extremes: so long as

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346. See Tom Arnold, *Protecting Intellectual Property and Good Will in Franchised Business Operations*, in THE FRANCHISING SOURCEBOOK §§ 17.20-23, at 406-10 (Jim McCord ed. 1970); GLICKMAN, *supra* note 23, § 3A.03[2] at 3A-33 to 36.

347. See Arnold, *supra* note 346, at §§ 17.20-23; BROWN, *supra* note 34, at 7.

348. See BROWN, *supra* note 34, at 7 ("The reason for such secrecy is rather obvious. Its purpose is to conceal from the general scrutiny of the public, the bar, and the court a unique contract, whose publication would put the franchisors to shame.")

349. See Emerson, *supra* note 292, at 615-16 & nn.16-17; e.g., Disclosure Requirements and Prohibitions Concerning Franchising, 16 C.F.R. § 436.1 (2007).

350. E.g., BAIRD, *supra* note 9, at 485-89 (discussing three early critiques of fraternities' secrecy); TURK, *supra* note 72, at 114-17 (tracing criticism of secrecy to nineteenth century).

351. BAIRD, *supra* note 9, at 137-40 (Delta Upsilon); Ryan Anderson, *Greek Rituals Set Chapters Apart*, IOWA STATE DAILY (Apr. 3, 2013), [http://www.iowastatedaily.com/news/article\\_3e0f81ca-970e-11e2-9689-001a4bcf887a.html](http://www.iowastatedaily.com/news/article_3e0f81ca-970e-11e2-9689-001a4bcf887a.html) ("The rituals that occur in fraternities and sororities range from chapter events, ceremonies, and new member initiations. There are two fraternities, FarmHouse and Delta Upsilon, that hold open rituals which non-members can attend."); Rebecca Castagna, *Delta Upsilon Comes to QU*, QUINNIPIAC CHRON. (Hamden, Conn.), Feb. 6, 2013.

352. See Anderson, *supra* note 351; sources cited *supra* note 151; see also BAIRD, *supra* note 9, at 487-89 (arguments for why ritual secrecy is innocuous).

353. See Peter Jacobs, *The Deadliest Fraternity in the US Just Banned Its Secret Initiation Rituals*, BUSINESS INSIDER (Mar. 7, 2014), <http://www.businessinsider.com/sae-bans-initiation-rituals-2014-3> ("The bad publicity Sigma Alpha Epsilon has received is challenging and regretful because we know that some of our groups have great new-member (pledge) programs and do the right thing.")

prospective members themselves are informed of the process they will be undertaking,<sup>354</sup> third-party detractors' morbid curiosity need not be satisfied. Fraternities have a legitimate—and arguably constitutional—right to keep their innocuous secrets.<sup>355</sup>

In any case, outside the ritualistic context, fraternities are more open than their detractors would have it. For example, fraternities generally inform prospective members of the sundry rights and obligations that accrue with membership.<sup>356</sup> As a modern innovation, many fraternities have begun employing mandatory arbitration agreements between themselves and their members, while taking seriously their obligation to obtain informed consent.<sup>357</sup> (Courts have evidently agreed, by upholding these arbitration clauses against challenges.<sup>358</sup>) Certainly, however, many fraternities could and should do better in advising prospective members and the public at large of what they can expect from Greek life, both in the new member induction process and afterwards. At the very least, fraternities should make transparently clear that any member is not only free but obligated to report abuses of any kind, notwithstanding putative strictures of secrecy.<sup>359</sup>

Perhaps the most strenuous early criticisms of franchising were directed at the franchisor's reserved right to unilaterally dispossess the franchisee of his livelihood entirely.<sup>360</sup> Despite a diligent franchisee's putting much effort into building a successful enterprise, a capricious or covetous franchisor could extinguish his interest at a whim,<sup>361</sup> and invoke non-compete clauses to prevent his establishing an independent business thereafter.<sup>362</sup> Modern

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354. See, e.g., Paine, *supra* note 2, at 208–09 (addressing the discussion in *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991) of the importance of informing candidates of the specific risks they will face and obtaining informed consent).

355. See, e.g., Harvey, *supra* note 4, at 25–26 (discussing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)); Timothy M. Burke, *History Channel Looks at Fraternities*, FRATERNAL L., Sept. 2003, at 4.

356. See *supra* note 237 and accompanying text.

357. See Jim Ewbank, *Mandatory, Binding Arbitration: Will It Work in the Greek System?*, FRATERNAL L., Mar. 2008, at 1–2.

358. See, e.g., Daniel J. McCarthy, *Colorado Court Compels Arbitration*, FRATERNAL L., Jan. 2014, at 4–6; Daniel J. McCarthy, *Arbitration Clause Is Enforceable in Hazing Case*, FRATERNAL L., Sept. 2007, at 5–6.

359. Cf. Elianna Marziani, *There Is Such a Thing as 'Too Much Fun'*, FRATERNAL L., Mar. 2001, at 2 (“My primary duty is not to my friends in the Greek system, to ignore the problems in their system in hopes of encouraging a freshman class to rush and pledge without thinking of any possible consequences. My primary duty is to let people know what I’ve seen in my years here, and warn them of the dangers.”).

360. E.g., BROWN, *supra* note 34, at 22–30.

361. See BROWN, *supra* note 34, at 22 (“Worst of all, the franchisee must live in constant peril of termination of his franchise and loss of his investment.”); *id.* at 26 (discussing “litigated cases of arbitrary terminations”); Hadfield, *supra* note 40, at 966.

362. See BROWN, *supra* note 34, at 27–28; Hadfield, *supra* note 40, at 966; see also GLICKMAN, *supra* note 23, § 3A.05 at 3A-42 to 47.



regulations, however, protect franchise agreements from being terminated without a meaningful quantum of due process.<sup>363</sup> Even a social organization as innocuous as the Girl Scouts—which, prior to the intervention of the courts, might never have imagined a local council to be a franchisee—have been enjoined from expelling a local council, based on statutory franchise protections.<sup>364</sup>

Fraternities should take note. Like those early-day franchisors, national fraternities typically can and do revoke local charters at their discretion.<sup>365</sup> In practice, few fraternities would do so unless the local should have amassed substantial arrears or seriously violated fraternity rules or the law, and as such it would be difficult for a local to complain that its equitable expectations were flouted.<sup>366</sup> Nonetheless, fraternities should be mindful to diligently afford a reasonable procedure for a chapter accused of financial or behavioral delinquency to defend itself. Courts typically defer to the internal adjudicative rules of the organization.<sup>367</sup> But where those rules are disregarded or fail to afford the accused basic due process, fair-minded jurists may feel compelled to intervene,<sup>368</sup> as in the influential early case *Heaton v. Hull*,<sup>369</sup> which the Yale Law Journal summarized with a concision this author could not hope to excel:

Charges were brought against a chapter of a college fraternal organization by its president because of lack of culture and refinement among the women of the college. No proof was offered that any rule of the order was broken except the exhibition of the

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363. See Hadfield, *supra* note 41, at 929. See generally GLICKMAN, *supra* note 23, § 10.13 at 10-146.13 to 177.

364. See *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S.A. Inc.*, 549 F.3d 1079 (7th Cir. 2008).

365. See *supra* notes 175–176 and accompanying text.

366. See, e.g., *supra* cases cited note 176.

367. See Timothy M. Burke, *Wise Use of Free Speech*, FRATERNAL L., Jan. 2012, at 4 (“The law across the country is generally very clear that courts will avoid becoming involved in second guessing the disciplinary decisions of private social organizations so long as in doing so, the organizations have complied with their own rules and procedures.”); Timothy M. Burke, *Phi Delta Theta’s Alcohol-Free Policy Upheld*, FRATERNAL L., Sept. 2008, at 1–2 (“Private organizations are vested with broad discretion when making internal disciplinary decisions, and if such decisions are “made honestly and in good faith, [they] will not be reviewed by the courts” on their merits.” (quoting Pennsylvania Court of Common Pleas)).

368. See Burke, *Wise Use*, *supra* note 367; Burke, *Phi Delta Theta*, *supra* note 367; cf. James C. Harvey, *Court Upholds Damage Award Against University of Iowa*, FRATERNAL L., Mar. 2009, at 1–2 (successful suit against college for violations of process in suspension of fraternity).

369. *Heaton v. Hull*, 59 N.Y.S. 281 (N.Y. Sup. Ct. 1899), *aff’d*, 64 N.Y.S. 279 (N.Y. App. Div. 1900).

constitution to counsel by a member of the order. No causes of expulsion are provided for by the constitution. Nor was any chance given the chapter to defend itself against the charges. *Held*, the court would enjoin consummation of the expulsion.<sup>370</sup>

So significant was this holding in protecting a chapter against a despotic central organization that the venerable Baird reprinted both the trial court and appellate decisions in full as an appendix to the edition of his standard manual on fraternities appearing shortly thereafter.<sup>371</sup>

In many ways, the relationship of fraternity national and local is still mired in the sort of Wild West jurisprudence that characterized early franchise law, with courts hesitating to insert themselves into the internal matters of a unified organization.<sup>372</sup> Moreover, the increasing regularity of properly executed arbitration agreements will only increase such judicial abstinence.<sup>373</sup> Fraternities, however, should draw important lessons from the backlash against abuses once perpetrated by franchisors, and proactively maintain practices of disclosure and due process that would stand up to equitable scrutiny if haled into court.

#### V. WHITHER FRATERNALISM: MERITS AND DEMERITS OF THE FRANCHISE FRAMEWORK

The conceit of forcing the venerable institution of fraternalism into a functional franchisor-franchisee relationship is undoubtedly reductionist in the extreme. The candidate's motivation for joining a fraternity is likely to be social in nature, seeking recognition or prestige;<sup>374</sup> by contrast, for business-format franchises, "[a]lthough appeals such as 'prestige' or 'community recognition' may be part of the sales message, the strongest motivator is generally the economic one."<sup>375</sup> If dreams of commercial success tempt franchisees to accept onerous terms,<sup>376</sup> the prospect of a

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370. Recent Cases, *Fraternal College Societies—Expulsion of Subordinate Chapters—Injunction*, 9 YALE L.J. 99 (1899).

371. BAIRD, *supra* note 9, at 472–84.

372. See sources cited *supra* note 367.

373. See *supra* notes 357–358 and accompanying text.

374. See SYRETT, *supra* note 72, at 154; Govan, *supra* note 3, at 691–92, 682 n.18; Rutledge, *supra* note 3, at 391; e.g., *Quinn v. Sigma Rho Chapter of Beta Theta Pi Fraternity*, 507 N.E.2d 1193, 1197–98 (Ill. App. Ct. 1987); see also Curry, *supra* note 2, at 110–11; Paine, *supra* note 2, at 203 n.58; Kuzmich, *supra* note 227, at 1119, 1126.

375. Douglas C. Basil & Curtis W. Cook, *Managerial Behavior and Management Styles in Franchising*, in THE FRANCHISING SOURCEBOOK § 9.3 at 155 (Jim McCord ed. 1970); see also Swygert, *supra* note 19, at 233 (commenting on in-group motivations for franchisees).

376. See BROWN, *supra* note 34, at 7–18; Swygert, *supra* note 19, at 226–32.

respected place in the university milieu inspires candidates to undergo the rigors of affiliating with a fraternity.<sup>377</sup> These deviating motivations counsel caution in attempting to analogize statutes and precedent protecting the franchisee to the fraternity chapter.

But as the history of franchise jurisprudence illustrates, it is at least as reductionist to try to force fraternities into ill-fitting molds of liability.<sup>378</sup> On one extreme, some courts have viewed nationals as inherently responsible for the misdeeds of their chapters, reasoning that the “national fraternity, having sponsored what amounts to a group of local drinking clubs, cannot disclaim responsibility for the risks of what it has sponsored.”<sup>379</sup> On the other extreme, courts have found that the communal fraternal structure is categorically insusceptible of the hierarchical control that could support national liability.<sup>380</sup> Like the original dichotomized test in franchise law, such generalist oversimplifications of fraternal arrangements blithely elide over the factual circumstances of the injury in question, missing the trees to focus on the forest.<sup>381</sup>

Numerous courts have held that national fraternities do not have the “right to exercise direct day-to-day control and oversight” over every aspect of their chapters,<sup>382</sup> and that may well be so in the mine-run of cases (outside the context of inducting new members, where control seems clearer).<sup>383</sup> Such a holding tends to exonerate the national under theories involving duty in tort and *respondeat superior*.<sup>384</sup> Yet can it be that the national, whose

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377. See *Sunshine*, *supra* note 2, at 137; *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 667 N.Y.S.2d 650, 652 (N.Y. Sup. Ct. 1997).

378. See *supra* notes 277–284 and accompanying text.

379. *Estate of Hernandez v. Flavio*, 924 P.2d 1036, 1038 (Ariz. Ct. App. 1995), *aff'd in part and rev'd in part on other grounds*, 930 P.2d 1309 (Ariz. 1997); see *Morrison v. Kappa Alpha Psi Fraternity*, 738 So. 2d 1105, 1118–19 (La. App. Ct. 1999).

380. *E.g.*, *Alumni Ass'n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan*, 572 A.2d 1209, 1213 (Pa. 1990) (“It is equally clear appellee Sigma Chi Fraternity is an inappropriate body from which to require the duty urged by appellant. By definition such organizations are based upon fraternal, not paternal, relationships. . . . Fraternal organizations are premised upon a fellowship of equals; it is not a relationship where one group is superior to the other and may be held responsible for the conduct of the other. From this factual matrix, there is no basis in the relationship to expand the liability of the national body to include responsibility for the conduct of one of its chapters.”).

381. See sources cited *supra* notes 286–290.

382. *E.g.*, *Smith v. Delta Tau Delta*, 9 N.E.3d 154, 163 (Ind. 2014); *Yost v. Wabash Coll.*, 2 N.E.3d 509, 522 (Ind. 2014); see sources cited *supra* note 171.

383. See *Marshlain*, *supra* note 8, at 2–4 (“[R]equiring fraternities and sororities to act as parental figures has negative policy implications and thus they should be immune from liability in non-hazing situations”); see also *Sunshine*, *supra* note 2, at 130–37 (arguing for control and liability in the specific context of hazing).

384. See sources cited *supra* note 171.

primary purpose is to support the local chapters, and which depends upon the success of those chapters, is wholly divorced from their conduct?<sup>385</sup> The more nuanced contours of a franchise-like liability regime better apportion responsibility between the on-the-ground local members and the national that supports and benefits from them. It allows the local and national to clearly and contractually allocate responsibility and thus invest appropriately in preventative measures.<sup>386</sup> And the franchise framework valuably underscores that national fraternities must ensure some modicum of quality control by virtue of granting chapters the use of their national brand.<sup>387</sup>

There remain serious conceptual difficulties with the franchise framework. The most knotty is that college students, the essential customers of the fraternity chapter, do not merely purchase services, but also “buy in” on becoming members of the local chapter—fractional owners of the conjectural franchise.<sup>388</sup> So viewed, the business of the chapter-*qua*-franchisee then seems to be recruiting new co-owners of the franchise, which looks uneasily like a pyramid scheme.<sup>389</sup> Such ploys are of ancient provenance and widely banned by federal and state law.<sup>390</sup> The mantra of the fraternity is only to “replace yourself” rather than profit by inveigling ever-growing numbers of recruits,<sup>391</sup> but the conflation of customers and franchisees implies that the fraternity chapter is somewhat different from a franchise proper. Indeed, the national fraternity is at base not out for profit, but rather to support and regulate the various local chapters for the benefit of all,<sup>392</sup> which suggests an entity more like a cooperative than a franchisor.<sup>393</sup> Such cooperative organizations are categorically excluded from federal regulation as franchisors,<sup>394</sup> though there may remain antitrust issues where

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385. See *Sunshine*, *supra* note 2, at 106–09; *cf. supra* note 281 (rejecting out of hand on policy grounds the possibility that franchisors be completely insulated from liability).

386. See *supra* notes 289, 302–303 and accompanying text; *infra* notes 398–399 and accompanying text.

387. See *supra* Subpart IV.A.

388. See *supra* notes 230–238 and accompanying text.

389. See GLICKMAN, *supra* note 23, § 2.03[3][a] at 2–61 (“A pyramid distribution scheme is one in which distributors are recruited to recruit additional distributors rather than to sell products.”).

390. See *id.* § 3.03[a] at 2-62 to 2-71 & n.30.

391. *E.g.*, M. David Hunter, *Participate This Fall!*, THE UPZETE, (Sept. 17, 2007) <http://archive.constantcontact.com/fs028/1101134317095/archive/1101802195921.html> (“Also, at your school, remember it is your obligation to replace yourself while a Zete. Actively participate in the recruitment process and do your part to insure Zeta Psi continues at your school.”).

392. See, *e.g.*, LeFlore, *supra* note 10, at 205, 233.

393. See GLICKMAN, *supra* note 23, § 2.03[6] at 2–76.

394. *Id.*; Federal Trade Commission Disclosure Requirements and Prohibitions Concerning Franchising, 72 Fed. Reg. 15,529–30 (Mar. 30, 2007) (explaining that although the final rule does not include an express exception for cooperatives, “the

the cooperative imposes geographical exclusivity, as does a fraternity.<sup>395</sup> The fit between the franchise framework and fraternity is imperfect, to say the least.

All in all, however, the franchise framework at least provides a more nuanced analysis of how the national and local bodies actually divide responsibility for the collective endeavors of the order, hopefully allowing for more practical avoidance of injury in the first place. Indeed, the central mission of vicarious liability regimes is to place responsibility with the parties who are best able to avoid the injury.<sup>396</sup> Holding a national fraternity to task for local events over which it has no control is perverse and pointless.<sup>397</sup> But insisting—via the imposition of liability—that national fraternities ensure that the protocols of nationally-prescribed induction and initiation are followed safely may help eliminate subcultures of hazing that still permeate some outposts of Greek life.<sup>398</sup> A national at greater risk from local hazing infractions is a national more likely to bring its resources to bear to eradicate such behavior.<sup>399</sup>

Courts and commentators have fretted that imposing any national liability poses an existential threat to the fraternity system.<sup>400</sup> Some have

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Commission continues to hold that these business relationships do not meet the criteria for such coverage”).

395. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

396. E.g., *Shaheen v. Yonts*, 394 F. App'x 224, 229 (6th Cir. 2010) (“Following *Carneyhan*, crucial to the analysis of the relationship between the LXA and its local chapter is whether the imposition of a duty would ‘meaningfully reduce the risk of the harm that actually occurred.’ *Carneyhan*, 169 S.W.3d at 851. The concern here is the imposition of duty where the responsible party has no real means of controlling the behavior of the one supervised. So, this Court must ask, assuming a special relationship giving rise to a duty existed, would it have reduced the risk of Yonts’ intoxication and consequent behavior? The obvious answer is no.”); see *LeFlore*, *supra* note 10, at 231–33; see also *Kenner v. Kappa Alpha Psi Fraternity, Inc.*, 808 A.2d 178, 182 (Pa. Super. Ct. 2002) (citing as factors in imposing a duty in tort as “(4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution”).

397. See *Shaheen*, 394 F. App'x 224; *Marshallain*, *supra* note 8, at 15–16; *LeFlore*, *supra* note 10, at 233–37.

398. See *Rutledge*, *supra* note 3, at 395–97; see also *LeFlore*, *supra* note 10, at 223–24, 235.

399. See, e.g., *LeFlore*, *supra* note 10, at 223–24, 235 (describing how, in the face of liability, Alpha Tau Omega stepped up supervision and enforcement of local conduct); *Jacobs*, *supra* note 353 (discussing Sigma Alpha Epsilon’s decision to eliminate pledging entirely when faced with perennial hazing violations). As discussed, nationals may also reserve control over other zones of local operations; command and control of inductions and initiations is discussed here as the most universal of such zones, given the essential nature of fraternities.

400. E.g., *LeFlore*, *supra* note 10, at 220, 223; *Colangelo v. Tau Kappa Epsilon Fraternity*, 517 N.W.2d 289, 292 (Mich. Ct. App. 1994); *Alumni Ass’n, Delta Zeta Zeta*

predicted direly that “[i]f the courts continue to impose liability on the national fraternities, it will effectively force the national organizations to withdraw from the field and leave the local fraternities completely without guidance or regulation in areas of acute fraternity liability.”<sup>401</sup> Other authorities would not go so far, but still worry that “the purpose of organizations like the national fraternity would fundamentally change from an instructor of the principles, rituals, and traditions of the fraternity to a central planning and policing authority.”<sup>402</sup> One court even saw liability as a direct threat to higher education as a whole by impeding the virtuous mission of the fraternity.<sup>403</sup> But the franchising framework is parsimonious, excluding much quotidian local conduct from national responsibility, leaving only that over which the national has reserved control.

Drawing lessons for fraternities from the franchise framework is no harbinger of a return to the deprecated days of *in loco parentis*, when universities were held liable for virtually any injury to their students: “College students and fraternity members are not children. Save for very few legal exceptions, they are adult citizens, ready, able, and willing to be responsible for their own actions. Colleges and fraternities are not expected to assume a role anything akin to *in loco parentis* or a general insurer.”<sup>404</sup> If college students engage in athletic games, take road trips, or host parties at which injuries occur, national fraternities should not be held accountable simply because the students were also fraternity members.<sup>405</sup> Like

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of Lambda Chi Alpha Fraternity v. Sullivan, 572 A.2d 1209, 572 Pa. 356, 366 (Pa. 1990).

401. LeFlore, *supra* note 10, at 220. LeFlore further argued that fraternities could easily sidestep any such liability regime: “A national organization of a fraternity is not in business to make a profit. Fraternities can always reorganize in such a fashion as to eliminate the national entity that is being sued if the cost of defending or insuring against lawsuits becomes prohibitive. This could be accomplished by reliance on annual conventions as the sole means of national identity and allowing related business concerns to provide the services associated with a national organization.” *Id.* at 232–33.

402. Colangelo v. Tau Kappa Epsilon Fraternity, 517 N.W.2d 289 (Mich. Ct. App. 1994).

403. Alumni Ass’n, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan, 572 A.2d 1209, 1213 (Pa. 1990) (“Moreover, the increased cost which would enure to such bodies could seriously impede the mission of these institutions which serve a vital role in the development of our youth.”).

404. Campbell v. Bd. of Tr., 495 N.E.2d 227, 232 (Ind. Ct. App. 1986); see Marshlain, *supra* note 8, at 11–16. *But see* Eric Posner, *Universities Are Right—and Within Their Rights—to Crack Down on Speech and Behavior*, SLATE (Feb. 12, 2015), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2015/02/university\\_speech\\_codes\\_students\\_are\\_children\\_who\\_must\\_be\\_protected.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/02/university_speech_codes_students_are_children_who_must_be_protected.html) (arguing that “students themselves . . . , apparently recognizing that their parents and schools have not fully prepared them for independence, want universities to resume their traditional role in loco parentis”).

405. See Marshlain, *supra* note 8, at 1–7, 14–16; see Swanson v. Wabash College, 504 N.E.2d 327, 330 (Ind. Ct. App. 1987).

franchisees, local chapters and members enjoy a wide ambit to conduct their own affairs within their own wheelhouse—and to take responsibility for the consequences.<sup>406</sup> That some of those consequences may involve the termination of the franchise or chapter does not make the national any more liable than a court system that imposes fines or punishment *post facto* as well.<sup>407</sup>

Beyond liability, the franchise framework also shines a light on key issues in fraternity culture. Set against the milieu of mystery and rote tradition characteristic of Greek societies, the virtues of full disclosure and fair treatment are all the more important to reiterate.<sup>408</sup> In the wake of a fatal hazing incident, one member of the chapter “explained the twin watchwords that were drilled into their pledges: ‘[s]ecrecy and obedience.’”<sup>409</sup> Fraternities have a right to their privacy, and to maintain an internal system for disciplining their chapters and membership, but such rights neither are nor should be limitless.<sup>410</sup> By looking to the history of franchising, fraternities can learn lessons as to how much latitude they may expect in these critical arenas.

The franchise framework is thus valuable because it heuristically approximates the essential nature of fraternalism. Considerations that animate franchise law apply powerfully to fraternities as well: expecting the owners of well-known brands to act responsibly with their marks; imposing liability on nationals that command and control local conduct for their own benefit, without making them answer for behavior beyond their bailiwick; and requiring fair disclosure to and due process for participants in the system.<sup>411</sup> As this Article’s epigram said, fraternities are rather like franchises—but franchises with a serious quality control problem.<sup>412</sup> By placing the franchise framework in the foreground, fraternities can better grasp and grapple with these issues, and ensure that all of their chapters live up to the high standards to which every organization aspires. Like the franchises to which they are so similar, fraternities have survived an

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406. *Id.* at 14–16 (“College students should be required to take responsibilities for their actions, as they are viewed as adults by our court systems and given many of the rights and privileges which come along with adulthood.”). *But see* Posner, *supra* note 404.

407. *See supra* note 312 and accompanying text.

408. *See* Paine, *supra* note 2, at 208–09 (“Because of the secret nature of most fraternity initiations, plaintiffs often remain ignorant of the situation until immersed in it.”).

409. Sunshine, *supra* note 2, at 133 n.350 (quoting HANK NUWER, *BROKEN PLEDGES: THE DEADLY RITE OF HAZING* 183 (1990)).

410. *See supra* Part IV.C.

411. *See supra* Part IV.

412. Caitlin NPR Interview, *supra* note 1.

uncertain childhood and unruly adolescence to become mature participants in civil society.<sup>413</sup> Franchises were compelled into this adulthood by the imposition of statutory responsibilities,<sup>414</sup> and fraternities must likewise put away childish things,<sup>415</sup> and embrace the panoply of both the rights and responsibilities they have grown into.<sup>416</sup>

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413. See *supra* notes 62–63 and accompanying text.

414. See BROWN, *supra* note 34, at 95–102 (“[F]ranchisors act at their extreme peril in taking this attitude, since it is such repressive and abusive actions which have given rise to the remedies that now exist and will give rise to others.”); *e.g.*, *supra* notes 34–35, 345–349, 360–363 and accompanying text.

415. 1 *Corinthians* 13:11 (King James).

416. Cf. Marshlain, *supra* note 8, at 13–16 (explaining the importance of treating college students like adults and imposing responsibility on them for their own actions); Robert E. Manley, *New Risks Facing Campus IFCs and Panhellenic Conferences*, FRATERNAL L., Jan. 1992, at 5 (“The Delta Tau Delta lawsuit is the first step on a new level of maturity for campus [fraternity councils].”).



THE IMPACT OF U.S. EXPORT CONTROLS AND  
ECONOMIC SANCTIONS ON  
COLLEGES AND UNIVERSITIES

JOSEPH D. GUSTAVUS\*

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## I. INTRODUCTION<sup>1</sup>

At the core, a University holds most dear the ability for faculty and students to freely engage in research in an open environment, permitting unrestricted access to the University's underlying research data, the research methods used, and the dissemination of the final research results. Unfortunately, this core value may at times run in direct conflict with a University's obligations to comply with U.S. export controls and economic sanctions.

## II. THE INHERENT CONFLICT BETWEEN UNIVERSITY OPENNESS AND EXPORT CONTROLS AND SANCTIONS.

There is a great likelihood that University research conducted by faculty and students, at one time or another, will be subject to U.S. export control and economic sanctions that (a) impose access, dissemination, and/or participation restrictions on transfers to foreign persons of research regulated for national security reasons or (b) prohibit or limit collaborations with certain foreign persons. This may arise when a University accepts research grants and enters into agreements with governmental agencies or even private companies from the defense, aerospace, or satellite industries. It can place limits in some way on the publication of research results or on the participation of researchers on the basis of citizenship, which thereby takes research in sensitive areas outside of the realm of "fundamental research" that otherwise could be more freely released. This can happen in other circumstances outside of the research setting as well when, for example, University faculty and students participate in an international outreach effort with foreign persons. Additionally, Universities may face item-based restrictions when performing research within industries such as defense, aerospace, or satellite industries, or destination-based controls when involved in outreach to certain destinations, or end-use based controls when performing research for restricted end-uses such as nuclear.

Many Universities are unaware of the increasing impact U.S. export controls and economic sanctions have on the University setting. As will be explored later in this article, there have been a myriad of investigations and prosecutions of Universities, as well as faculty and students, in recent years for violations or suspected violations of U.S. export control laws and sanctions.

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1. For the sake of brevity, colleges and universities will hereinafter be referred to collectively as "Universities" in this article.

### III. U.S. EXPORT CONTROLS AND ECONOMIC SANCTIONS.

In general terms, U.S. export controls and economic sanctions serve to regulate (a) the release of sensitive items, and (b) the conduct of certain international collaborations for U.S. national security reasons. If an item or collaboration is controlled, then a University may be required to obtain a license or governmental authorization before the University, professors, or students may proceed with the project.

U.S. export controls and economic sanctions consist primarily of (a) the International Traffic in Arms Regulations (ITAR) administered by the U.S. Department of State which regulates munitions,<sup>2</sup> (b) Export Administration Regulations (EAR) administered by the U.S. Department of Commerce which regulates dual-use items,<sup>3</sup> and (c) U.S. economic sanctions administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury which regulates transactions to certain listed person/entities or destinations.<sup>4</sup>

The four types of restrictions arising from U.S. export controls and economic sanctions consist of the following: (1) item-based controls regulate items listed on the ITAR's U.S. Munitions List (USML)<sup>5</sup> or the EAR's Commerce Control List (CCL);<sup>6</sup> (2) end-use-based controls under the EAR regulate the export of all U.S. items put to restricted uses, such as use with military applications, rocket systems, maritime nuclear propulsion, foreign vessels, or foreign aircraft;<sup>7</sup> (3) end-user-based controls restrict the export of any items to certain listed persons and business entities; while (4) destination-based controls restrict transactions with certain destinations such as Iran, Syria, and the Crimean Peninsula of Ukraine.<sup>8</sup> In sum, if University professors and students engage in controlled technology research or participate in international outreach programs with foreign persons, then the University may be required to obtain a license or government authorization before proceeding. Without a license or government authorization the University may be obligated to refrain from the controlled technology research or outreach program.

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2. 22 C.F.R. Parts 120-130, "ITAR."

3. 15 C.F.R. Parts 730-774, "EAR."

4. *Office of Foreign Assets Control - Sanctions Programs and Information*, US DEPT. OF TREAS. (Jan. 15, 2016, 1:49 PM) <https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>.

5. ITAR Part 121.

6. EAR Part 774.

7. EAR Part 744.

8. *Id.*

## IV. EXPORT CONTROL REFORM.

Since 2010, the U.S. government has engaged in major reforms of U.S. export controls by reassessing controlled items category-by-category (Export Control Reform).<sup>9</sup> Export Control Reform focuses on transferring items unnecessarily listed on the strictly controlled USML to the lesser controlled CCL.<sup>10</sup> The items of high strategic importance remaining on the USML are subject to the ITAR, while the items transferred to the CCL are only subject to the less strict EAR.<sup>11</sup>

Also, with the advent of Export Control Reform, there has been an expanded focus on controlling items that could convey a significant intelligence advantage.<sup>12</sup> This would include intelligence technologies, such as information gathering, surreptitious listening, personnel location and tracking, and communication obfuscation technologies.<sup>13</sup> The heightened focus of export controls on intelligence technologies is an important new consideration for Universities.

To embrace Export Control Reform, Universities must assess existing compliance programs and take advantage of the new classification of items and technology transferred from the strictly controlled USML to the lesser controlled CCL by performing the following:

1. Identification of University Projects Subject to U.S. Export Controls.

Whether as an initial baseline assessment, or as a reassessment, Universities should conduct a comprehensive audit of current and future research projects to determine the effect of Export Control Reform. More specifically, Universities must establish: (a) whether research subject matter constitutes a controlled technology subject to the item-based or end-use-based controls, or (b) whether a collaboration partner could be subject to end-user-based or destination-based controls. Universities neglecting to perform such an assessment run the risk of complying with the wrong U.S. export controls (e.g., ITAR, not EAR). Or worse, the University may fail entirely to identify controlled technologies or collaborations violating U.S. export controls. Additionally, new intelligence technologies, such as information gathering, surreptitious listening, personnel location and

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9. THE WHITE HOUSE, *Fact Sheet on the President's Export Control Reform Initiative* (Apr. 20, 2010), available at <http://www.whitehouse.gov/the-press-office/fact-sheet-presidents-export-control-reform-initiative>.

10. *Id.*

11. *Id.*

12. BUREAU OF INDUSTRY AND SECURITY, *Remarks of Eric L. Hirschhorn, Under Secretary for Industry and Security, United States Department of Commerce; Export Control Reform Workshop, Colorado Springs, Colorado* (May 19, 2014), available at <https://www.bis.doc.gov/index.php/enforcement/oe/89-about-bis/newsroom/speeches>.

13. *Id.*

tracking, and communication obfuscation technologies may require heightened focus, as the item-based restrictions on such technologies continue to strengthen.

## 2. University Projects Subject to Multiple U.S. Export Controls.

As a result of Export Control Reform, the ITAR's USML and the EAR's CCL now contain "positive" (i.e., quantifiable) measurements that make controlled item identification and classification easier.<sup>14</sup> However, the measurement criteria introduced by Export Control Reform must be reviewed with care because similar technologies with varying performance capabilities may be listed on either the USML or the CCL. For example, a research project on camera technology that enables a ground vehicle to see in the dark may be listed either on the USML (e.g., cryogenically cooled) or the CCL (e.g., non-cryogenically cooled), and therefore, variants in the technical data arising from the research may be subject to the ITAR or EAR. Universities that have traditionally been accustomed to complying with ITAR may now find research projects governed by both the ITAR and EAR.

## V. UNIVERSITY PROJECTS SUBJECT TO U.S. ECONOMIC SANCTIONS.

As a component to the U.S. destination-based and end-user controls, OFAC administers and enforces economic sanctions in support of U.S. foreign policy and national security goals.<sup>15</sup> Economic sanctions target foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, cyber-terrorists, as well as other threats to U.S. national security, foreign policy, or the economy.<sup>16</sup> In varying degrees, the countries currently sanctioned by the U.S. are Afghanistan (Taliban), Balkans, Belarus, Burma, Cuba, Democratic Republic of the Congo, Iran, Iraq, Lebanon, Libya, North Korea, Southern Sudan, Russian Federation, Somalia, Syria, Yemen, and Zimbabwe.<sup>17</sup> If the University, professors or students intend on engaging in collaborative research or international outreach to any of these destinations, or with persons from these

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14. Amendment to the International Traffic in Arms Regulations: United States Munitions List Category XI (Military Electronics), and Other Changes, 79 Fed. Reg. 37,536 (July 1, 2014).

15. *Office of Foreign Assets Control—Sanctions Programs and Information*, U.S. DEP'T OF THE TREAS. (Apr. 23, 2016, 1:49 PM), available at <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>.

16. *Id.*

17. *Id.*

destinations, then care must be taken to ensure the proposed collaboration or outreach is not restricted.

#### VI. UNIVERSITY SCREENING FOR END-USER CONTROLS.

For end-user-based controls, there are eleven export screening lists within the Departments of Commerce, State, and the Treasury that require Universities to conduct screens of potential parties before engaging in collaborative research or international outreach efforts with foreign persons.<sup>18</sup> In the event that a company, entity or person on the list appears to match a party potentially involved in the collaborative endeavor, a University should conduct additional due diligence before proceeding. There may be a strict export prohibition for this party, a requirement for seeking a license application, or an evaluation of an end-use or end-user required to ensure the collaborative endeavor does not result in an activity prohibited by end-user-based controls.

#### VII. UNIVERSITY EXCLUSIONS FROM U.S. EXPORT CONTROLS.

There are certain U.S. export control exclusions specific to the University setting:

##### 1. ITAR Exclusion: Technical Data in the Public Domain.

Technical Data normally controlled by ITAR may be excluded from control, if the Technical Data is within the Public Domain. “Technical Data” within the “Public Domain” is defined under ITAR §120.10 and §120.11 respectively.<sup>19</sup> ITAR §120.10(b) excludes from the definition of controlled Technical Data information concerning general scientific and engineering principles commonly taught in Universities.<sup>20</sup> While, ITAR §120.11(a) defines “Public Domain” to include data that is published and generally accessible to the public via libraries open to the public or unlimited distribution at a conference, meeting, seminar, trade show or exhibition, or through University “*fundamental research*,” as such term is further defined and limited within ITAR §120.11(a)(8).<sup>21</sup> This ITAR exclusion must be narrowly construed and followed closely by Universities. There is a proposed rule that would change the ITAR definition of Public Domain, specify the requirements therefore, and provide a separate standalone definition in ITAR for Technical Data arising

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18. *About Export Control Reform*, EXPORT.GOV (Oct. 15, 2015, 10:55 AM), available at [http://export.gov/ecr/eg\\_main\\_023148.asp](http://export.gov/ecr/eg_main_023148.asp).

19. 22 C.F.R. §§ 120.10 & 120.11 (2016).

20. 22 C.F.R. §120.10(b) (2016).

21. ITAR §120.11(a).

from fundamental research.<sup>22</sup> These developments must be monitored for the final rule language and timing for implementation.

## 2. EAR Exclusion: Published Controlled Information and Software.

Information and software listed on the CCL may be excluded from control under the EAR by publication in compliance with EAR §734.7.<sup>23</sup> EAR §734.7 includes information and software which is publicly available through any of the following means of distribution at a price not exceeding the cost of production/distribution:

- Generally available periodicals, books, print, electronic, or any other general distribution media;
- University libraries open to the public;
- Releases at open conferences, meetings, seminars, or trade shows; or
- Websites that provide free uncontrolled access.<sup>24</sup>

There is a proposed rule that would change EAR §734.7 to more closely harmonize the U.S. definition of published information with multilateral export regimes to which the U.S. is a member.<sup>25</sup>

## 3. EAR Exclusion: Fundamental Research.

Research in areas involving sensitive export-controlled subject matter may be excluded from control, if the research is fundamental in nature. “Fundamental Research” under EAR §734.8 is basic and applied research in science and engineering, conducted by scientists, engineers, or students at a University and published and shared broadly.<sup>26</sup> Research will not be “Fundamental Research” (i) if the University or its researchers have agreed that a sponsor may withhold from publication some or all of the information provided by the sponsor, (ii) if access and dissemination controls are placed by a funding agency of the U.S. Government, or (iii) if the University or individual researchers otherwise accept or place restrictions on the publication of the resultant scientific and technical

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22. International Traffic in Arms: Revisions to Definitions of Defense Services, Technical Data, and Public Domain; Definition of Product of Fundamental Research; Electronic Transmission and Storage of Technical Data; and Related Definitions, 80 Fed. Reg. 31,525 (proposed June 3, 2015).

23. 15 C.F.R. § 734.7 (2016).

24. *Id.*

25. Revisions to Definitions in Export Administration Regulations, 80 Fed. Reg. 31,505 (proposed June 3, 2015).

26. 15 C.F.R. § 734.8(a) (2016).

information.<sup>27</sup> A University cannot cavalierly assume a particular research project qualifies as Fundamental Research. The University must perform a specific documented analysis to determine whether a research project qualifies under the Fundamental Research exclusion.

#### 4. EAR Exclusion: Educational Information.

Under EAR §734.9 “Educational information” is not to be subject to the EAR, if the information is released by instructions in catalog courses and associated teaching laboratories of academic institutions.<sup>28</sup>

There is a proposed rule to revise EAR §734.8 and §734.9, which would serve to harmonize the EAR terminology used therein with the same terminology in the ITAR, post-Export Control Reform.<sup>29</sup> For these sections, this new proposed rule is not intended to change the scope of the EAR.<sup>30</sup> The developments must be monitored for the final language and timing for implementation.

### VIII. WHAT TO WATCH FOR IN THE UNIVERSITY SETTING.

The following typical University activities may pose concerns and should receive greater compliance scrutiny by the University:

- Direct exports, Cooperative Research and Development Agreements (CRADAs); and donations, sales, or transfers of surplus equipment;
- International and domestic collaborations and technical exchange programs, including lab-to-lab programs;
- Publications, such as conference papers, abstracts, and journal articles;
- Written materials in general, ranging from memos and letters to trip reports and work notes;
- Presentations at conferences and other public meetings, both domestic and foreign;
- Visits and assignments by foreign nationals;
- Foreign travel by University professors and other employees; and,
- Other types of communication, including telephone calls, faxes, emails, and the placement of materials on a website.

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27. *Id.*

28. 15 C.F.R. §734.9 (2016).

29. Revisions to Definitions in Export Administration Regulations, 80 Fed. Reg. 31,505 (proposed June 3, 2015).

30. *Id.*



IX. U.S. EXPORT CONTROLS AND ECONOMIC SANCTIONS ENFORCEMENT CASES.

The following are some recent cases involving Universities, professors and students who have been investigated or prosecuted for potential violations.

- **Dr. Mohammad Nazemzadeh, MD, research fellow at University of Michigan.** As of the date of this article, Dr. Nazemzadeh is being prosecuted for sending a medical MRI coil device to Iran, a country subject to OFAC Sanctions. Dr. Nazemzadeh allegedly arranged to ship the item through an intermediary in the Netherlands, this constitutes “transshipping” through the Netherlands to Iran, which is prohibited. His plans were discovered by an undercover federal agent.<sup>31</sup>
- **Dr. Thomas Campbell Butler, MD, professor at Texas Tech University.** Dr. Butler was convicted of forty-seven (47) counts of a sixty-nine count indictment that stemmed from a U.S. Commerce Department investigation. Dr. Butler was convicted of illegally exporting a plague bacterium to Tanzania, and falsely reporting to U.S. government authorities that the material was stolen. Dr. Butler was sentenced to two years in prison.<sup>32</sup>
- **Dr. John Roth, professor at University of Tennessee.** Dr. Roth was convicted and sentenced to four (4) years in prison for violating the ITAR. Dr. Roth developed plasma technology for use on an advanced unmanned air vehicle which is a technology controlled under the ITAR. Dr. Roth then released the corresponding Technical Data to a Chinese and an Iranian student. Dr. Roth traveled to China where he downloaded his project data using a Chinese colleague’s computer.<sup>33</sup>
- **University of Massachusetts at Lowell Charged with Export Control Violations.** University of Massachusetts at Lowell was charged with exporting atmospheric testing equipment to a party

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31. *United States v. Nazemzadeh*, 2013 WL 544054 (S.D. Cal. 2013).

32. Janice Hopkins Tanne, *Infectious Diseases Expert Convicted Over Missing Plague Bacteria*, 327 BMJ 1307, 1307 (2003).

33. Press Release, U.S. Attorney’s Office, Former University of Tennessee Professor John Reece Roth Begins Serving Four-Year Prison Sentence on Convictions of Illegally Exporting Military Research Data (Feb. 1, 2012), *available at* <https://www.fbi.gov/knoxville/press-releases/2012/former-university-of-tennessee-professor-john-reece-roth-begins-serving-four-year-prison-sentence-on-convictions-of-illegally-exporting-military-research-data>.

in Pakistan who the U.S. Commerce Department designated on their Entity List and subjected to end-user-based export controls. As part of its settlement agreement with the U.S. Commerce Department, the University paid a \$100,000 fine and is required to change their procedures, and hire dedicated export control staff.<sup>34</sup>

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34. Order Relating to University of Massachusetts at Lowell (Mar. 2013), *available at* <http://efoia.bis.doc.gov/exportcontrolviolations/E2306.pdf>.

## FOREWORD TO THE *MISSOULA BOOK ESSAYS*

As our parting gift to readers of this journal, we offer two reviews of Jon Krakauer's book, *Missoula: Rape and the Justice System in a College Town*. We have asked the authors of both reviews to address both Krakauer's book and, in more detail than is customary in a book-review, the hotly contested policy issues that the book raises at several points. One of those contested policy issue is this: What rules should govern the disciplinary hearings that colleges and universities conduct when the complainant says of the respondent that he (in the vast majority of cases) had sexually assaulted her (again, in the vast majority of cases) on the day (or days) and at the time (or times) in question? Five years and a few months before this issue of our journal goes to press, the Office for Civil Rights in the federal Department of Education issued a Guidance that addresses just this question. That Guidance concluded, controversially, (and among other things) that the standard of proof that should be in play at hearings of that sort is the mere preponderance standard, and not a more demanding clear and convincing evidence standard.

One of the authors featured here, Wendy Murphy, vigorously defends the OCR's imposition of that standard, under the aegis of Title IX, on every American college and university that is a recipient of federal funds. The authors of the other review featured here, Joseph Storch and Andrea Stagg, also find the mere preponderance standard of proof to be an appropriate one for sexual-assault based hearings. They do, however, note that some critics of the OCR Guidance "find fault with this standard due to the potential for innocent accused individuals to be punished," and they give the reader some sense of why those critics think as they do. In the recent past, several courts, state and federal, have sided with the critics of the OCR Guidance and have asserted that, either as a matter of federal or state constitutional law (in the case of public institutions) or as a matter of contract law (in the case of private institutions) accused students should enjoy significantly more procedural protection against factual error in sexual-assault based disciplinary proceedings than that Guidance envisaged for them. Those courts have said that when the disciplinary proceeding in question could result in a student's suspension or dismissal from the college or university that he or she had been attending, and when it could mark that student for life as either a rapist or something akin, morally and

societally, to a rapist, those potential consequences require substantial procedural protection against erroneous findings of responsibility for sexual assault.

As lawyers are wont to say, the jury is still out on the set of questions that the OCR Guidance of 2011 has raised. It may be that the argument that Professor Murphy and others have made in favor of the mere preponderance standard is better, legally and morally, than any argument that their adversaries have made for the clear and convincing evidence standard, and so on for the other procedural issues addressed by that Guidance (and its successors). Professor Murphy does, after all, have the OCR interpretation of Title IX on her side, while there are only a modest set of recent judicial decisions—most of them from trial courts—in support of the other side in this debate. We trust that, in this instance, as in most, you, our readers, should have the opportunity to read Professor Murphy's case for the propriety of the use of a mere preponderance standard in collegiate disciplinary hearings in which sexual assault is alleged, and, having read it, to make up your own mind as to the strength of her case. So, fasten your (mental) seat belts, and read on.

John Robinson  
William Hoye

# MISSOULA: JON KRAKAUER’S STORY OF COLLEGE SEXUAL VIOLENCE THAT IS BOTH COMPLEX AND ENTIRELY COMMON

BY JOSEPH STORCH<sup>1</sup> AND ANDREA STAGG<sup>2</sup>

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## INTRODUCTION

Perhaps the most notable thing about Jon Krakauer’s 2015 book *Missoula: Rape and the Justice System in a College Town*<sup>3</sup> is how standard the stories Krakauer describes will seem to higher education attorneys and student affairs professionals. The situations he describes are certainly terrifying, and often frustrating, but ultimately not entirely surprising. *Missoula* is not a story about events unique to one college or university town, one state, or one time period. In some ways, the book could have had many titles: Tallahassee, South Bend, Charlottesville, Los Angeles, Manhattan, or frankly the

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3. JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (2015) [hereinafter KRAKAUER].

name of nearly any college or university town or city.<sup>4</sup> The book could have taken place in the 1990s, 1970s or 1950s. But Krakauer concentrated on modern-day Missoula, Montana, and he weaves together individual stories with societal and cultural information that paints a devastating picture of the way people were treated when they reported sexual and interpersonal violence.<sup>5</sup>

#### A. A NEW TAKE ON A MUCH-COVERED SUBJECT

Journalism surrounding sexual and interpersonal violence on college campuses has had its share of troubles, which have done as much damage to the search for facts in this area as they have raised issues. In December 2014, Rolling Stone retracted a terrifying story about an alleged gang rape at the University of Virginia after it was revealed that the magazine did not fact-check the information from the main source, made no attempt to contact the accused individuals, and included misstatements of fact about timing and other logistics.<sup>6</sup>

When *Missoula* came out, the media story was about the mistakes made by the University of Montana.<sup>7</sup> But anyone reading the book will find the story much more complicated and more devastating. While the University of Montana's actions were not perfect, Krakauer's descriptions of the actions of local law enforcement and especially certain members of the District Attorney's office revealed all but an intentional attack on people who report these crimes and incidents. The University of Montana's responses to sexual and interpersonal violence were, in most cases, more comprehensive than those of local law enforcement and the District Attorney's office.

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4. Krakauer quotes with approval a story itself quoting a twenty-year-old drug dealer in Missoula who "lamented 'People think we're the 'rape capital' of America now,' before immediately noting, 'but we're not. Missoula is just like any other college town.'" *Id.* at 9.

5. Sexual and interpersonal violence is a term used throughout New York State Education Law Article 129-B to encompass sexual assault, domestic violence, dating violence, and stalking. This language had input from domestic violence and sexual assault advocates in the state of New York.

6. See e.g. Will Dana, *A Note to Our Readers*, ROLLING STONE (Dec. 5, 2014), <http://www.rollingstone.com/culture/news/a-note-to-our-readers-20141205>; Sheila Coronel, Steve Coll, and Derek Kravitz, *Rolling Stone's investigation: 'A failure that was avoidable'*, COLUM. REV. OF JOURNALISM (Apr. 5, 2015), [http://www.cjr.org/investigation/rolling\\_stone\\_investigation.php](http://www.cjr.org/investigation/rolling_stone_investigation.php).

7. See e.g. Emily Bazelon, *Jon Krakauer's 'Missoula,' About Rape in a College Town*, N.Y. TIMES (Apr. 28, 2015), [http://www.nytimes.com/2015/05/03/books/review/jon-krakauers-missoula-about-rape-in-a-college-town.html?\\_r=0](http://www.nytimes.com/2015/05/03/books/review/jon-krakauers-missoula-about-rape-in-a-college-town.html?_r=0); Jake New, *Missoula's Mistakes*, INSIDE HIGHER EDUC. (Apr. 24, 2015), <https://www.insidehighered.com/news/2015/04/24/new-book-details-u-montanas-citys-mishandling-sexual-assault>.

The book's structure can be a challenge to those unfamiliar with the author's writing style. Krakauer writes about at least six women, but goes into a different level of detail with each, perhaps because of a varying level of access to documents and to the students themselves.<sup>8</sup> He mentions, and even makes up pseudonyms for, people who are unnecessary to his story. There are enough people that the back of the book contains a "dramatis personae" identifying and explaining individual roles, but it does not help that many of the names (real and pseudonymous) are similar.<sup>9</sup> Still, readers familiar with campus sexual assault prevention efforts and legal compliance will find *Mis-soula* to be a great issue-spotting exercise. Put on your audit hat and think about Title IX, the Violence Against Women Act, the First Amendment, attorney ethics, and best practices in talking to victims of trauma. Then, embrace your role as a human, remember the role you can play in teaching our students how to prevent violence and respect each other, and, when violence occurs, how to treat victims with respect and dignity, while maintaining a firm but fair and evenhanded approach to students who violate law and policy.

#### B. GETTING INTO THE BOOK

In a field in which almost every article and statement is written from just one point of view with no acknowledgement or discussion of the other side, where single incidents are taken to be completely representative of all students, or all institutions, or all fact patterns, and where many people who have no experience in the area of campus safety or response to those who have experienced trauma hold themselves out as experts to criticize policies, legislation, and regulation from all sides,<sup>10</sup> nuance is important. While no

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8. For example Kelsey Belnap, Kerry Barrett, and Kaitlynn Kelly.

9. KRAKAUER, *supra* note 3, at 351.

10. For example, the *Chronicle* covered a "debate" about sexual assault and a campus versus criminal justice response that featured four law professors, none of whom appear to have anything beyond theoretical knowledge and their own opinion. Sarah Brown, *Can a Debate About Who Should Decide Campus-Rape Cases Change Minds?*, CHRON. OF HIGHER EDUC. (Sep. 18, 2015), <http://chronicle.com/article/Can-a-Debate-About-Who-Should/233207>; See also Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html>; KC Johnson, *Rebalance the campus sex assault scales: After the University of Virginia rape hoax, we must put the brakes on the crazed crusade against campus sexual assault*, N.Y. DAILY NEWS (Mar. 29, 2015), <http://www.nydailynews.com/opinion/kc-johnson-rebalance-campus-sex-assault-scales-article-1.2164945>; Paul H. Robinson, *The Legal Limits of 'Yes Means Yes'*, THE CHRON. OF HIGHER EDUC. (Jan. 10, 2016), [http://chronicle.com/article/The-Legal-Limits-of-Yes/234860?cid=at&utm\\_source=at&utm\\_medium=en&elq=c9cc519f817e46899202a800d07014c6&elqCampaignId=2218&elqaid=7518&elqat=1&elqTrackId=0ebdd0f0d74846feb92cd288e96a6ad](http://chronicle.com/article/The-Legal-Limits-of-Yes/234860?cid=at&utm_source=at&utm_medium=en&elq=c9cc519f817e46899202a800d07014c6&elqCampaignId=2218&elqaid=7518&elqat=1&elqTrackId=0ebdd0f0d74846feb92cd288e96a6ad); Editorial, *A Big Maybe About 'Yes'*, N.Y. DAILY NEWS (Dec. 3, 2014), <http://www.nydailynews.com>

one should mistake Krakauer for an unbiased observer, his points and arguments are made slowly, building note on note, rather than in a blithe sound bite or a quick op-ed. He weaves first-person narrative with detailed statistical and sociological discussions, focusing on showing instead of telling. Although the book can sometimes be choppy as it weaves between stories, Krakauer bolsters the work's credibility with his extensive reliance on direct quotes and primary sources.<sup>11</sup>

The book is divided informally into sections that cover problems in reporting sexual violence, problems in the societal view of such violence and those who report it, and problems with the criminal justice system. We say informally as aspects of these three problems appear in all parts of the book.

If *Missoula* represents any argument, it's the basis for why the federal government has tasked colleges<sup>12</sup> to promptly respond to known incidents and reports of sexual assault, despite the media, legislators, and even some

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ews.com/opinion/editorial-big-yes-article-1.2030960; Andy Thomasen, *What's So Controversial About Saying the Police Should Handle Campus Rape?*, THE CHRON. OF HIGHER EDUC. (Jan. 12, 2016), [http://chronicle.com/blogs/ticker/whats-so-controversial-about-saying-the-police-should-handle-campus-rape/107780?cid=pm&utm\\_source=pm&utm\\_medium=en&elq=568f71636be04ebbb1e018886d28c5da&elqCampaignId=2214&elqaid=7512&elqat=1&elqTrackId=fc63b90ba0944c73923d5000a0300bea](http://chronicle.com/blogs/ticker/whats-so-controversial-about-saying-the-police-should-handle-campus-rape/107780?cid=pm&utm_source=pm&utm_medium=en&elq=568f71636be04ebbb1e018886d28c5da&elqCampaignId=2214&elqaid=7512&elqat=1&elqTrackId=fc63b90ba0944c73923d5000a0300bea); New York Post Editorial Board, *Will Any University Stand Up to the Bogus 'Rape Epidemic' Hype?*, N.Y. POST (Sep. 27, 2015), <http://nypost.com/2015/09/27/will-any-university-stand-up-to-the-bogus-rape-epidemic-hype/>; Naomi Schaefer Riley, *The Myth of the College 'Rape Culture'*, N.Y. POST (Sep. 27, 2015), <http://nypost.com/2015/09/27/the-myth-of-the-college-rape-culture/>; Ashe Schow, *American Bar Association Jumps on Campus Sexual Assault Bandwagon*, WASH. EXAMR. (Aug. 5, 2015), <http://www.washingtonexaminer.com/american-bar-association-jumps-on-campus-sexual-assault-bandwagon/article/2569608>.

11. KRAKAUER, *supra* note 3, at xiv. In an interview with the Columbia School of Journalism, Krakauer recounted that, aside from Cecelia Washburn who is represented pseudonymously and was not interviewed, all other victims participated openly, were interviewed, and were given a chance to review the chapters where they appeared, but that, except for total withdrawal or repair of clear errors, they would not have control over how he wrote those chapters. Brendan Fitzgerald, *Krakauer's "Missoula" and the Scrutiny of Reporters Who Cover Rape*, COLUM. JOURNALISM REV. (Aug. 2015), [http://www.cjr.org/analysis/the\\_scrutiny\\_of\\_reporters\\_who\\_cover\\_rape.php](http://www.cjr.org/analysis/the_scrutiny_of_reporters_who_cover_rape.php)

12. Alexandra Brodsky and Elizabeth Deutsch, *No, We Can't Just Leave College Sexual Assault to the Police*, POLITICO (Dec. 3, 2014), <http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294>; Robin Wilson, *Should Colleges Be Judging Rape?*, CHRON. OF HIGHER EDUC. (Apr. 12, 2015), [http://chronicle.com/interactives/assault\\_judging](http://chronicle.com/interactives/assault_judging).



student affairs professionals<sup>13</sup> who seek to leave sexual assault complaints to be handled only by the police.<sup>14</sup>

The overwhelming dysfunctionality of the local police department and District Attorney's office dominates *Missoula*. There are almost too many missteps to name, but in Office for Civil Rights (OCR) parlance, the investigations were not timely, prompt, thorough, impartial, or trauma-informed.<sup>15</sup> At one point a former prosecutor appears as an attorney for a charged defendant soon after leaving state service. Such representation would surely violate New York's ethics laws.<sup>16</sup> It's difficult to tell if misogyny, a love of college football, or a distaste for hard work fuels this inept and often intentionally negative response to reports of sexual assault; perhaps it is a combination of all three.<sup>17</sup>

### C. FALSE ALLEGATIONS

Krakauer spills significant ink working through the myth of false sexual assault reports, providing studies and expert statistics that show the small number of false reports. A number of individuals with whom Krakauer spoke

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13. See Clea Mitchell and Trent Lott, *Rethinking How We Deal with Campus Sexual Assault*, WASH. POST (Oct. 4, 2015), [https://www.washingtonpost.com/opinions/rethinking-how-we-deal-with-campus-sexual-assault/2015/10/04/8b69c744-6aa3-11e5-9bfe-e59f5e244f92\\_story.html](https://www.washingtonpost.com/opinions/rethinking-how-we-deal-with-campus-sexual-assault/2015/10/04/8b69c744-6aa3-11e5-9bfe-e59f5e244f92_story.html); Philip N. Cohen, *College Sex-Assaults Trials Belong in Court, Not on Campus*, CHRON. OF HIGHER EDUC. (Dec. 11, 2014), <http://chronicle.com/article/College-Sex-Assault-Trials/150805/>; Editorial Board, *Editorial: Police Should Handle Campus Sex Assaults*, THE DETROIT NEWS (June 13, 2015), <http://www.detroitnews.com/story/opinion/editorials/2015/06/12/let-police-handle-campus-rape/71137180/>; Editorial Board, *Editorial: Cops Should Handle Campus Sex Assaults*, THE DETROIT NEWS (Aug. 11, 2015), <http://www.detroitnews.com/story/opinion/editorials/2015/08/10/edit-cops-campus-sexual-assault/31424025/>; Lee Burdette Williams, *The Dean of Sexual Assault*, INSIDE HIGHER EDUC. (Aug. 7, 2015), <https://www.insidehighered.com/views/2015/08/07/how-sexual-assault-campaign-drove-one-student-affairs-administrator-her-job-essay>; Dahlia Lithwick, *The University of Virginia Finally Confronts Its Rape Problem*, SLATE (Nov. 24, 2015), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/11/university\\_of\\_virginia\\_gang\\_rape\\_investigation\\_rolling\\_stone\\_reveals\\_limits.single.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/11/university_of_virginia_gang_rape_investigation_rolling_stone_reveals_limits.single.html).

14. Katherine Mangan, *Should Colleges Be Forced to Swiftly Report Rapes to the Police?* CHRON. OF HIGHER EDUC. (Feb. 2, 2015), <http://chronicle.com/article/Should-Colleges-Be-Forced-to/151581>.

15. See Office for Civil Rights, *Dear Colleague Letter on Sexual Violence*, U.S. DEP'T. OF EDUC. (April 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>, at 5 [hereinafter DCL].

16. See, e.g., N.Y. State Public Officers Law §73(8)(a)(i)-(ii), available at <http://www.jcope.ny.gov/about/ethc/PUBLIC%20OFFICERS%20LAW%2073%20JCOPE.pdf>.

17. From January 2008 through April 2012, under the direction Kirsten Pabst, the District Attorney's Office received 114 referrals for rape from the Missoula Police (itself a small sample of all crimes reported) but only filed charges in 14 of those cases. KRAKAUER, *supra* note 3, at 250-251.

discussed the belief that a woman who makes a report of sexual assault is merely trying to cover up the fact that she is cheating on a boyfriend.<sup>18</sup> Others simply believe the reporting individual is just making it up.<sup>19</sup> At best, only 20% of all rapes are ever reported to police.<sup>20</sup> The actual percentage of false reports of sexual assault range from as low as 2%, an FBI statistic consistent with false reports of other violent crime,<sup>21</sup> and as high as 8% to 10% of reports recanted, a term that can differ significantly from false reporting as people recant for a variety of reasons (including falseness of report, pressure from friends and family, self-blaming, worry about being charged with other crimes, etc.).<sup>22</sup> Krakauer cites studies showing false reporting in 2% to 10% of cases.<sup>23</sup> That being said, Krakauer relates a discussion with Mark Muir, Missoula Chief of Police where Muir cites a well-known (but debunked) study that found the rate of false claims of rape to be approximately 50%.<sup>24</sup> Krakauer gives voice to several individuals falsely accused of sexual assault and describes the devastation of a false accusation of such a heinous crime, but balances that against the reality that false reporting of such crimes is a very rare exception, far from the rule.<sup>25</sup>

Many people who think about sexual assault on college or university campuses worry about the role that fear of reporting a crime while drunk or after using drugs plays in lowering willingness to report, and this fear plays

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18. Keely Williams reported that when she told an ex-boyfriend she was raped he accused her of trying to cover up sex with other men. KRAKAUER, *supra* note 3, at 21; Kelsey Belnap was asked by officers investigating an accusation of sexual assault by multiple individuals whether she was dating anyone. When she responded yes, she recalled, “the way he reacted made me feel like he assumed I had cheated on my boyfriend and then lied about being raped to cover it up, even though that wasn’t the case at all.” *Id.* at 40; Kerry Barrett recalled that the police officer taking her statement when she reported an attempted rape said, “Oh, and one more thing: Do you have a boyfriend?” When she said no and asked why, he stated words to the effect that “Well, sometimes girls cheat on their boyfriends, and regret it, and then claim they were raped.” *Id.* at 53–54.

19. *Id.* at 154–155.

20. *Id.* at 5.

21. Kimberly Lonsway, Joanne Archambault and David Lisak, *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, THE VOICE, Vol. 3, No. 1,

22. *Id.*

23. KRAKAUER, *supra* note 3, at 109.

24. *Id.* at 103–106. *See also* Shaun King, *No Wonder Campus Sex Assault is a Problem When Some College Police Chiefs Think Women Are Lying*, N.Y. DAILY NEWS (Nov. 13, 2015). <http://www.nydailynews.com/news/national/king-campus-police-chief-thinks-women-lie-sex-assault-article-1.2433898>.

25. KRAKAUER, *supra* note 3, at 103–110.

a role in reporting in *Missoula*.<sup>26</sup> New York<sup>27</sup> and California<sup>28</sup> have specific legislation offering amnesty from drug and alcohol use charges for those reporting violence, and such amnesty is being considered by Congress as a provision of the Campus Accountability and Safety Act.<sup>29</sup>

#### D. THE STORIES

*Missoula* details several reports of sexual assault that led to varying outcomes. Some victims, reporting individuals, and respondents/defendants are named while others are represented by pseudonyms.

In September 2010, Allison Huguet reported to law enforcement that Beau Donaldson, a childhood friend and football player for the University of Montana, raped her while she was sleeping.<sup>30</sup> The two were at a party, and Huguet reported that she felt no risk in sleeping by herself near him, since they had been longtime friends. She woke up to him raping her. Because of the size advantage, she reported that she did not fight back, but when it was over, she ran out of the house calling her mother, with Donaldson in chase. She underwent a forensic exam that gathered evidence of the assault. At first, Huguet did not go to police and instead met with Donaldson to confront him and elicit a promise that he would undergo treatment for alcohol use and not offend again. He admitted committing the crime. Unbeknownst to him, Huguet was recording the admission. However, due to Montana law, that recording would not be admissible in court. After observing that he was not making changes, and acknowledging her own trauma, Huguet reported to police, who took her report seriously and investigated. They arranged for a recorded call between Huguet and Donaldson, wherein he admitted to raping her.<sup>31</sup> Donaldson was arrested and again confessed to raping her on a video recorded interrogation.<sup>32</sup> A prior incident where he had attempted to assault a woman came to light and that victim, although hesitant, agreed to participate.<sup>33</sup> Even with a confession and strong evidence, the District Attorney's office was hesitant to take a rape accusation against a popular football player to trial, and significant time in the book is spent on the plea negotiations and

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26. In *Missoula* Kaitlynn Kelly reported that she hesitated in reporting a sexual assault since she was underage and worried she might get in trouble for alcohol use. *Id.* at 66.

27. See N.Y. EDUC. LAW § 6442 (2015).

28. See S. 967, 2014—15 Reg. Sess. (Cal. 2014).

29. Campus Accountability and Safety Act, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/590/text>.

30. KRAKAUER, *supra* note 3, at 3–34, 44–48, 151–175, 191–222 (detailing Huguet's story).

31. *Id.* at 45.

32. *Id.* at 46–47.

33. *Id.* at 152–157.

the interplay between the parties.<sup>34</sup> A plea was reached, which led to an emotional and difficult hearing on an appropriate sentence, where the judge sentenced Donaldson to ten years in prison—a thirty year sentence with twenty years suspended.<sup>35</sup> Although Donaldson in his plea agreement had agreed not to appeal the sentence, his lawyers still sought a sentence review, requiring Huguet to go through the process again; his sentence was upheld.<sup>36</sup>

In December 2010, Kelsey Belnap was sexually assaulted while she attended a party with a friend at which they consumed alcohol and marijuana until, while incapacitated, she was assaulted by multiple individuals.<sup>37</sup> After the assault, she went to get a forensic exam which showed that she had a high level of blood alcohol and that there was evidence of injury and sexual contact with multiple individuals. Belnap reported the assault to police and indicated that she wanted to press charges. She stated that she was clear in statements such as “I don’t want to,”<sup>38</sup> but that she was forced to engage in oral and vaginal sex against her will. Belnap observed later that she was interviewed by two male police officers shortly after the trauma, not told she could have a victim advocate accompany her to the interviews, and ran into significant skepticism from the officers who interviewed her and who seemed to believe that “she was just another drunk girl” and she “began to feel like [she] was the perp.”<sup>39</sup> She did not have the support of the friend with whom she had attended the party, and who was dating the host, and police waited nearly two months to interview any of the suspects (some longer). The suspects reported to police that Belnap was “moaning” during the encounter and, based on that, police determined the suspects would have believed the sex was consensual and therefore concluded that there was not probable cause.<sup>40</sup> The District Attorney’s Office agreed.<sup>41</sup> Krakauer details some issues with their analysis of the evidence and interpretation of Montana law on incapacitation.<sup>42</sup>

In September 2011, Kerry Barrett reported that after an evening spent at a bar where she met a man with the pseudonym Zeke Adams, Adams attempted to rape her.<sup>43</sup> Both Barrett and Adams agreed that she stated to him that she did not want to have sex and fell asleep fully clothed. She reported that she woke up to find him naked, her pants pulled down, and him rubbing

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34. *Id.* at 158.

35. *Id.* at 191–222.

36. KRAKAUER, *supra* note 3, at 313–321

37. *Id.* at 34–44 (detailing Belnap’s story).

38. *Id.* at 39.

39. *Id.* at 40.

40. *Id.* at 42.

41. *Id.* at 43.

42. KRAKAUER, *supra* note 3, at 41–44.

43. *Id.* at 51–62 (detailing Barrett’s story).

up against her. She left and reported the incident to her parents, and to Missoula police. She recounted that the officer asked her “what do you want to come of this?”<sup>44</sup> The question surprised her. She recalled that the officer continued, “I’m not a lawyer or anything. . .but since no one saw you, and you were fooling around before it happened, it’s hard to really prove anything.”<sup>45</sup> Barrett was interviewed by a detective twenty days after the incident; Adams was interviewed the day after Barrett. Although he was briefly questioned the night of the report, he was intoxicated and did not answer questions coherently. The detective asked Adams if he had ever been arrested. He falsely stated no, but the detective did not check this or follow up.<sup>46</sup> Adams denied attempting to assault Barrett and the detective believed him, stating she believed the incident to be a “misunderstanding” and stating to him that “We have a lot of cases where girls come in and report stuff they are not sure about, and then it becomes rape. And it’s not fair. It’s not fair to you.” She continued that “You guys both went into this together. . .She came home willingly with you. The fact that she changed her mind and went home on her own. . .that’s not your fault.”<sup>47</sup> The detective told Adams she had to interview him because if she had “just flushed the case, [Barrett would] say the police don’t do anything,” and “That’s not the message we want to send to people.”<sup>48</sup>

In September 2011, Kaitlynn Kelly met a friend of a friend, with the pseudonym Calvin Smith, while sitting on a bench outside her residence hall after a night of drinking.<sup>49</sup> She invited Smith up to her room for sexual activity, although when she arrived at the room with Smith and saw that her roommate was present, she changed her mind, told him so, and they went to sleep without engaging in sexual activity. She reported that she awoke to Smith violently penetrating her vagina and told him “stop, no” numerous times. She reported that he forced her to perform oral sex and she was in pain and gagging. She then reported that he got on top of her and tried to have sex with her, she was in pain and said she had to use the bathroom. Smith then followed her into the bathroom and looked over the stall. Then he left taking a pair of her jeans with him. When Kelly came back to her room, she reported that her sheets were covered in blood.

Kelly underwent a sexual assault forensic exam and reported the incident to the University. She later reported the incident to campus police, who turned the case over to local police. Detectives asked Kelly why she used a quiet voice when asking Smith to stop, and whether he would have stopped

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44. *Id.* at 53.

45. *Id.* at 53.

46. *Id.* at 57.

47. *Id.* at 57–60.

48. KRAKAUER, *supra* note 3, at 59.

49. *Id.* at 63–101 (detailing Kelly’s story).

if she had screamed instead of being quiet,<sup>50</sup> telling Kelly, “I can see that you’re upset. You are a strong gal, and you probably have very good judgment most of the time.”<sup>51</sup> The detective informed Kelly that due to the role of alcohol, it would be very difficult to investigate, charge, or obtain a conviction, saying that is the “problem with these kinds of cases. . . You can’t give consent when you are so doped up, or high, or drunk that you have no idea. . . It is pretty simple, but it gets clouded when everyone is intoxicated.”<sup>52</sup> The detective reasoned that simply questioning Smith would be enough; he would tell his friends that he would be going to the police station, and “they are going to know. . . that this is not okay. One bad thing can actually have a good and healthy ripple effect on people, and hopefully prevent this kind of thing from happening to others.”<sup>53</sup> Smith denied the charges, saying that if Kelly had said stop, he would have stopped.<sup>54</sup> The detective determined there was insufficient probable cause to charge anything (even stealing the pants that he admitted to taking and throwing away) and closed the case.<sup>55</sup> Reportedly, the Missoula Police Department declined to show Kelly a copy of her case file.<sup>56</sup>

Kelly also reported the incident to the University. The Dean of Students charged Smith under the conduct code and wrote that if an investigation indicated he was responsible for the violation, the Dean would seek expulsion.<sup>57</sup> Smith initially met with the Dean without an attorney; after he had denied the charges, his family hired an attorney in anticipation of a hearing.<sup>58</sup> Smith declined the opportunity to voluntarily withdraw without a notation on his record, and the case proceeded to a hearing.<sup>59</sup> Smith’s attorney sought

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50. *Id.* at 69.

51. *Id.* at 71.

52. *Id.* at 72–73.

53. KRAKAUER, *supra* note 3, at 73.

54. *Id.* at 74–76.

55. *Id.* at 76–77.

56. *Id.* at 78.

57. *Id.* at 78–79.

58. *Id.* at 79–80.

59. KRAKAUER, *supra* note 3, at 82–83. Voluntary withdrawals with student conduct charges pending may allow a student to enroll elsewhere as a transfer with a clean transcript, and no requirement that they face the student conduct charges. Allowing such voluntary withdrawal and a clean transcript has been controversial. *See* Tyler Kingkade, *How Colleges Let Sexual Predators Slip Away to Other Schools*, THE HUFFINGTON POST (Oct. 23, 2014), [http://www.huffingtonpost.com/2014/10/23/college-rape-transfer\\_n\\_6030770.html](http://www.huffingtonpost.com/2014/10/23/college-rape-transfer_n_6030770.html). New York State’s Education Law 129-B addresses this by requiring that “For the respondent who withdraws from the institution while such conduct charges are pending, and declines to complete the disciplinary process, institutions shall make a notation on the transcript of such students that they “withdrew with conduct charges pending.” N.Y. EDUCATION § 6444 (6) (2015); Mary Ellen McIntire, *Spurred by Sex-Assault Concerns, Lawmakers Add Disciplinary Infractions to College Transcripts*,

to submit information to the hearing board about the district attorney's decision not to prosecute, but the request was denied by the Dean, citing the different standards and purposes of the criminal justice and college disciplinary systems.<sup>60</sup> Kirsten Pabst, the Assistant District Attorney who considered the charges (and who would play a prominent role in the remainder of the book)<sup>61</sup> testified on behalf of Smith.<sup>62</sup> The book contains significant detail on the testimony and colloquy which in and of itself is a worthwhile read for higher education attorneys. The section discusses the different standards of proof, factors used to determine consent (including a victim being awake), Pabst's decision not to speak with the reporting victim, the withdrawal of consent, and the role of trauma of a victim reporting a crime.<sup>63</sup> Smith exercised his right not to testify<sup>64</sup> and, after hearing a few other witnesses and considering other evidence, the panel unanimously found Smith responsible for the violation and, with a vote of 6-1, imposed a sanction of immediate expulsion and persona non grata status at the University.<sup>65</sup>

Krakauer spends the most time of any single case on an allegation by Cecelia Washburn that in February 2012, she was raped by University of Montana football quarterback Jordan Johnson.<sup>66</sup> Washburn and Johnson were casual friends who had dated a bit. At a campus dance, Washburn told Johnson, "Jordy, I would do you anytime."<sup>67</sup> The next night, she was relaxing at home and received a message asking her to pick him up and go to her house to watch a movie. Johnson had been drinking and received encouragement from housemates to "get 'er done, buddy" as he left.<sup>68</sup> At Washburn's house, they were making out. Washburn reported that Johnson, who was much bigger than she, pulled off her clothing and sexually assaulted her even as she told him no and that she did not want to have sex.<sup>69</sup> She then drove

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CHRON. OF HIGHER EDUC. (June 26, 2015), [http://chronicle.com/article/Spurred-by-Sex-Assault/231171/?cid=at&utm\\_source=at&utm\\_medium=en](http://chronicle.com/article/Spurred-by-Sex-Assault/231171/?cid=at&utm_source=at&utm_medium=en); Tyler Kingkade, *Colleges Take a Step Toward Including Sexual Assault Punishment on Transcripts*, THE HUFFINGTON POST (Feb. 24, 2016), [http://www.huffingtonpost.com/entry/college-sexual-assault-transcripts\\_us\\_56cdf7ffe4b041136f19256a?utm\\_hp\\_ref=college](http://www.huffingtonpost.com/entry/college-sexual-assault-transcripts_us_56cdf7ffe4b041136f19256a?utm_hp_ref=college).

60. *Id.* at 84–85.

61. For further discussion of Krakauer's views on Pabst, see Keila Szpaller, *Jon Krakauer: Missoula County Attorney's Actions 'Egregious'*, THE MISSOULIAN (Apr. 18, 2015), [http://missoulian.com/news/local/krakauer-missoula-county-attorney-s-actions-egregious/article\\_1991c385-feed-5771-a1f9-202ee3ff9465.html](http://missoulian.com/news/local/krakauer-missoula-county-attorney-s-actions-egregious/article_1991c385-feed-5771-a1f9-202ee3ff9465.html).

62. KRAKAUER, *supra* note 3, at 86–95.

63. *Id.* at 86–95.

64. *Id.* at 96.

65. *Id.* at 100.

66. *Id.* at 133–150, 176–187, 225–305 (detailing Washburn's story).

67. *Id.* at 134.

68. KRAKAUER, *supra* note 3, at 136.

69. *Id.* at 136–139.

him home. Krakauer writes of how Washburn was traumatized and, with the assistance of friends, sought a sexual assault forensic examination, which found injuries.<sup>70</sup>

Washburn reported the incident to the University and to local law enforcement. The University conducted an investigation and held a hearing that initially led to his expulsion.<sup>71</sup> Johnson then appealed to the State Board of Regents, which overturned the decision of the hearing board, which had been upheld by the President.<sup>72</sup> Johnson then returned to play as quarterback on the football team.<sup>73</sup> In 2016, the University of Montana settled a lawsuit with Johnson by, among other things, paying him \$245,000.<sup>74</sup>

Washburn also reported the incident to law enforcement and Johnson was charged criminally.<sup>75</sup> He was defended by two attorneys, one of whom was Kirsten Pabst, the former Assistant District Attorney who had testified on behalf of Calvin Smith.<sup>76</sup> It was a contentious trial at which Johnson was found not guilty.<sup>77</sup> At the trial, Dr. David Lisak testified about the role of trauma in victim reactions, as well as statistics regarding how sexual assault is very rarely committed by strangers.<sup>78</sup> The cross-examination relied on referring to Lisak as an outsider to Montana values, the “Boston professor” or

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70. *Id.* at 141–142.

71. *Id.* at 176–185.

72. *Id.* at 185–187.

73. *Id.* at 187, 301.

74. Michael E. Miller, *Montana Quarterback Receives \$245,000 Settlement for University’s ‘Unfair and Biased’ Rape Investigation*, THE WASH. POST (Feb. 17, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/02/17/montana-quarterback-receives-245k-settlement-for-universitys-unfair-and-biased-rape-investigation/>.

75. KRAKAUER, *supra* note 3, at 225–305.

76. *Id.* at 226.

77. *Id.* at 299–300.

78. *Id.* at 252–259. Lisak is widely seen as one of the experts in the field and his work is widely cited in discussions of acquaintance sexual assault and victim response. See David Lisak and Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, *Violence and Victims*, Vol. 17, No. 1 (Nov. 1, 2002) (in a sample of college-aged men who were not incarcerated for rape, the authors found approximately 4% self-identify as repeat rapists, committing 28% of the violence in the set and averaging six rapes per offender). *But see* Nick DeSantis, *Study Challenges Idea That Many Campus Rapists Are Serial Offenders*, CHRON. OF HIGHER EDUC. (July 13, 2015), <http://chronicle.com/blogs/ticker/study-challenges-idea-that-many-campus-rapists-are-serial-offenders/101969>; Linda M. LeFauve, *Campus Rape Expert Can’t Answer Basic Questions About His Sources*, REASON BLOG (July 28, 2015), <https://reason.com/archives/2015/07/28/campus-rape-statistics-lisak-problem>; Robby Soave, *How an Influential Campus Rape Study Skewed the Debate*, REASON BLOG, July 28, 2015 <https://reason.com/blog/2015/07/28/campus-rape-stats-lisak-study-wrong>; Jake New, *Paper on Campus Sexual Assault Called Into Question*, INSIDE HIGHER EDUC. (July 29, 2015), <https://www.insidehighered.com/quicktakes/2015/07/29/paper-campus-sexual-assault-called-question> (this criticism has its own issues and seems to be picking tiny, non-devastating, points in a survey more than a decade old for which Dr. Lisak did not have



the “professor from Massachusetts.”<sup>79</sup> Even a casual reader would note the difficulty for a reporting victim in bringing such a case against a prominent athlete.

#### E. LEGAL AND REGULATORY BACKDROP

In the spring of 2012, both the Office for Civil Rights and the Civil Rights Division of the Department of Justice commenced investigations of the University of Montana for its response to sexual harassment and sexual violence.<sup>80</sup> The events described in the book pre-date the reauthorization of the Violence Against Women Act (VAWA) with its amendments to the Clery Act<sup>81</sup> but came after the April 4, 2011 sexual violence response and prevention guidance from OCR.<sup>82</sup> Krakauer mentions the federal investigations that occurred at the University of Montana, but he does not focus on them or go into great detail; instead, he makes clear that many police and university investigations into claims of sexual assault on campus take place under the hazy spotlight of an audit and a perceived government crack-down.<sup>83</sup>

Although Krakauer does not lay it out, the legal backdrop here would provide readers unfamiliar with higher education law with considerable context. Federal law requires colleges and universities accepting federal funds to prohibit certain crimes, including sexual assault, to provide written information to victims about options, remedies, and resources, and to provide prompt, fair, and impartial proceedings to resolve complaints.<sup>84</sup> Taking universities out of this role would require rewriting federal law; involvement right now by college administrators is required; it’s not a choice. Failure to

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precise recall when called on it, but they are included here for thoroughness).

79. KRAKAUER, *supra* note 3, at 256.

80. See Letter of Findings from Anurima Bhargava, Chief of the Civil Rights Division of the U.S. Department of Justice, and Gary Jackson, Regional Director of the Office for Civil Rights of the U.S. Department of Education, to Royce Engstrom, President of The University of Montana, and Lucy France, University Counsel (May 9, 2013), *available at*, <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf>.

81. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat 54 (2013), *available at*, <https://www.govtrack.us/congress/bills/113/s47/text>. For a summary of the legislative changes, see Andrea Stagg and Joseph Storch, *Brief Analysis of the The Violence Against Women Act (VAWA) and Changes to the Clery Act & Title IX Compliance*, Mar. 2013, <http://www.nacua.org/documents/VAWASummary.pdf>.

82. DCL, *supra* note 15.

83. *Joint OCR/DOJ Resolution Agreement with University of Montana*, U.S. DEP’T. OF JUSTICE (May 8, 2013), <http://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/montanaagree.pdf>.

84. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, 127 Stat 54 (2013).

follow the law and guidance could very likely lead to investigation and penalties by the federal government, either through the Departments of Education, Justice, or both.

The Department of Education's Office for Civil Rights is responsible for enforcing, among other things, Title IX of the Education Amendments of 1972.<sup>85</sup> Title IX prohibits sex discrimination in educational programs and activities; everything the college does is essentially an educational program or activity, even employing people.<sup>86</sup> OCR guidance says that an institution must work to prevent sex discrimination, promptly respond when it occurs, remedy and limit the effects of the discrimination, and prohibit retaliation. Sex discrimination is an umbrella term that includes sexual harassment, sexual assault, as well as unequal pay based on gender, pregnancy discrimination, and other types of sex- and gender-based harassment and discrimination.

OCR issued a guidance document on April 4, 2011 focusing on a school's<sup>87</sup> obligations to prevent peer sexual violence and to respond appropriately to complaints of such violence.<sup>88</sup> Much of the guidance was common sense: publish your process, provide training to the staff running the process, designate an employee as the point person to receive and track complaints of sex discrimination, and investigate and adjudicate in a timely fashion.<sup>89</sup> OCR followed up this letter with additional guidance in 2014 and 2015, mostly to clarify the 2011 guidance.<sup>90</sup>

Another law in play in addition to Title IX is the Clery Act<sup>91</sup> as amended by the Violence Against Women Act (VAWA)<sup>92</sup> and its regulations.<sup>93</sup>

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85. Office for Civil Rights, *Title IX and Sex Discrimination*, U.S. DEP'T. OF EDUC. (Apr. 29, 2015), [http://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html).

86. *See id.* ("Some key issue areas in which recipients have Title IX obligations are: recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant and parenting students; discipline; single-sex education; and employment.").

87. Title IX Dear Colleague Letters are addressed to post-secondary institutions as well as elementary and secondary institutions.

88. DCL, *supra* note 15 at 2.

89. *See id.* at 5, 12.

90. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T. OF EDUC. (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Office for Civil Rights, *Dear Colleague Letter and accompanying resources*, U.S. DEP'T OF EDUC., Apr. 24, 2015, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

91. 20 U.S.C. § 1092(f); 34 C.F.R. § 668.46 (2016)

92. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat 54 (2013), *available at* , <https://www.congress.gov/bill/113th-congress/senate-bill/47/text>.

93. 34 C.F.R. § 668 (2014).

Among its many rules, VAWA requires institutions to notify reporting individuals<sup>94</sup> of their option to notify law enforcement, and of their option *not* to do so.<sup>95</sup> The idea behind such a requirement is that in situations of sexual and other forms of interpersonal violence the person who experienced the crime or incident gets to decide how to proceed, whether that is with law enforcement, internal school procedures, with counseling and resources, or with a combination or none of the above.<sup>96</sup> *Missoula* discusses the natural tension between local law enforcement and municipal officials, who request or demand that all reports of crimes are forwarded to local law enforcement, and the wishes of colleges and students to give the reporting individuals the options of where to report such crimes.<sup>97</sup>

A major distinction between an internal process of a company or a college and the criminal justice system is the standard of evidence,<sup>98</sup> which *Missoula* covers in some detail.<sup>99</sup> In the criminal system, the standard of evidence is beyond a reasonable doubt.<sup>100</sup> Guidance from OCR states that “preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.”<sup>101</sup> Critics find fault with this standard because of the potential for innocent accused individuals to be punished.<sup>102</sup> Prominent constitutional law scholar Alan Dershowitz interpreted a

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94. There are many words that could be used to describe a reporting individual depending on the applicable law or policy, including victim, survivor, or complainant.

95. Violence Against Women Act Regulations, 34 C.F.R. § 668.46(b)(11)(ii)(C)(3) (2016)

96. Discussion or preamble to VAWA Regulations, 79 Fed. Reg. 62761 (2016).

97. KRAKAUER, *supra* note 3, at 130–132.

98. See *A Plain Language Explanation of Distinctions Between the New York State Penal Law and the College Disciplinary Processes*, STATE UNIV. OF N.Y. (Oct. 28, 2015) <http://system.suny.edu/sexual-violence-prevention-workgroup/College-and-Criminal-Resource/>, for an explanation of distinctions between the college reporting and criminal justice processes, developed pursuant to New York Education Law 129–B.

99. KRAKAUER, *supra* note 3, at 83, 97–98, 100–101.

100. See *Criminal Cases*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases>.

101. DCL, *supra* note 15, at 11. See KRAKAUER, *supra* note 3, at 179–181, 344–347.

102. See, e.g., Alan Dershowitz, *Innocent Until Proven Guilty? Not Under ‘Yes Means Yes’*, WASH. POST (Oct. 14, 2015) <https://www.washingtonpost.com/news/in-theory/wp/2015/10/14/how-affirmative-consent-rules-put-principles-of-fairness-at-risk>; Letter from the American Association of University Professors to the Office for Civil Rights (June 27, 2011) <http://www.nacua.org/documents/AAUPLetterToOCRReSexualViolenceEvidence.pdf>; Tyler Kingkade, *Lawsuit targets Education Department Over Guidance on College Sexual Assault Policies*, THE HUFFINGTON POST (Apr. 19, 2016), [http://www.huffingtonpost.com/entry/sexual-assault-lawsuit-education-department\\_us\\_57165996e4b0018f9cbb2a55](http://www.huffingtonpost.com/entry/sexual-assault-lawsuit-education-department_us_57165996e4b0018f9cbb2a55); Letter from James Lankford, United States Senator, to John King, United States Secretary of Education (Jan. 7, 2016), <http://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%201.7.16.pdf>; Letter from Catherine Lhamon, Assistant Secretary for Civil

common description of the preponderance standard, “51 percent likelihood that the assault occurred,” to mean that for every 100 students disciplined for sexual assault, 49 may be innocent,<sup>103</sup> although the statement confuses a standard where more than half of the evidence leads to a finding with a question of whether each decision is 51% right or 49% wrong. Regardless of theoretical criticism, institutions are subject to investigations and compliance reviews by OCR and that agency’s guidance says that “in order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard.”<sup>104</sup> Such statements leave little room for interpretation and are the reason why institutions across the United States have updated policies since 2011 to include the preponderance standard.

Imagine the driver of a delivery company was accused of sexually assaulting a junior trainee, and the complaint came to company management. No manager in their right mind would go along, business as usual, and allow the driver to continue to be alone in a vehicle with the junior trainee, or frankly, any other employee. It is also highly unlikely that the manager would promptly call the police and then wait (perhaps for months or years) for law enforcement to conclude its investigation before making any changes to the schedule or initiating an internal investigation. The most likely scenario is an immediate suspension pending fact-finding, which will lead to a determination about whether to keep that driver employed and with what, if any, limitations. The investigation or internal disciplinary process would probably use a standard that is or looks a lot like “preponderance of the evidence.”

Like companies responding to employee misconduct, colleges have long set their own standards for membership in the campus community. Students must have a certain grade point average or they may be academically dismissed. Students living in residence halls may forfeit their right to have candles in their rooms.<sup>105</sup> And codes of conduct are extensive and prohibit behavior that’s unwelcome, including some behaviors that constitute crimes.

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Rights, United States Department of Education, to James Lankford, United States Senator (Feb. 17, 2016), <http://www.lankford.senate.gov/imo/media/doc/DEPT.%20of%20EDUCATION%20LANKFORD%20LETTER%202-17-16.pdf>.

103. Dershowitz, *supra* note 101, at 2.

104. DCL, *supra* note 15 at 11.

105. See, e.g., Vanderbilt Environmental Health & Safety, *Fire Safety Fact Sheet: Smoking & Candles Fires*, VANDERBILT UNIV. [http://www.vanderbilt.edu/firesafety/factsheets/firefacts\\_smoking\\_candles.pdf](http://www.vanderbilt.edu/firesafety/factsheets/firefacts_smoking_candles.pdf) (last visited Apr. 23, 2016) (“Don’t bring candles into your room, even as a decoration”); Residence Life & Housing, *Prohibited Items and Actions*, UNIV. OF DELAWARE, [http://www.udel.edu/reslife/community\\_living/prohibited.html](http://www.udel.edu/reslife/community_living/prohibited.html) (“Possession of candles is prohibited.”); University Housing and Residential Life, *Spring 2016 Move-In*, TEMPLE UNIV., <https://housing.temple.edu/resources-and-services/fall-and-spring-move-your-new-home/what->

Krakauer does not deeply discuss the Clery Act or Title IX, but the situations he describes justify some of the guidance and legislation. The detailed recounting of Jordan Johnson's trial alone perfectly explains why a victim would not press criminal charges. At that trial, Cecelia Washburn was belittled and blamed, her mental health history going back about a decade was discussed at length,<sup>106</sup> and her counseling records were combed through. The adversarial system so familiar to criminal justice cases has a brutal impact on the reporting individual.<sup>107</sup> Johnson's defense team painted Washburn as a social climber seeking celebrity, not only by claiming she was raped, but also in trying to land Johnson—a star football player on the Grizzlies—as her boyfriend.

None of this would have been possible at a student conduct hearing at the State University of New York, where both authors advised and coordinated a system-wide working group to unify five dozen campuses under one policy to address sexual violence prevention and response.<sup>108</sup> Under SUNY policy, the reporting individual has the right to “be free from any suggestion that the [reporting individual] is at fault” in cases of sexual assault, or that the reporting individual “should have acted in a different manner” to avoid victimization.<sup>109</sup> A reporting individual also has the right to exclude prior sexual history and mental health diagnosis or treatment from admission into the college hearing process. These principles are also embedded in a recent state law based on SUNY's policies.<sup>110</sup>

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bring/prohibited-items (last visited Apr. 23, 2016) (candles as a prohibited item); University Housing and Residential Life, *Prohibited Items*, BOSTON COLL., <http://www.bc.edu/offices/reslife/lifeinhalls/communityexp/safetyinfo.html> (last visited Apr. 23, 2016) (varying sanctions for possession of unlit v. used candles).

106. Many news outlets reported, as if surprised, that the University at Oregon accessed the mental health records of a student who had filed suit against the college, which led to a Congressional inquiry and a call from at least one advocate that no student should ever seek to access to on campus resources. Yet little mention is given to the fact that such access is routine and expected in the criminal justice system. While in Oregon it is alleged that attorneys looked at the records but did not share them, in the criminal justice system, they are released, looked through in detail, and the victim is subject to questioning about their details. See *Rep Bonamici Questions Gap in College Students' Medical Privacy*, U.S. REP. SUZANNE BONAMICI (Mar. 11, 2015), <http://bonamici.house.gov/press-release/rep-bonamici-questions-gap-college-students%E2%80%99-medical-privacy>; Katie Rose Guest Pryal, *Raped on Campus? Don't Trust Your College to Do the Right Thing*, THE CHRONICLE OF HIGHER EDUC. (Mar. 2, 2015), [http://www.huffingtonpost.com/2015/03/11/privacy-therapy-records\\_n\\_6848984.html](http://www.huffingtonpost.com/2015/03/11/privacy-therapy-records_n_6848984.html); Kathleen M. Styles, *Letter to Senator Wyden*, U.S. DEPT. OF EDUC., Office of Management (June 8, 2015) [http://media.oregonlive.com/education\\_impact/other/wydenletter.pdf](http://media.oregonlive.com/education_impact/other/wydenletter.pdf); KRAKAUER, *supra* note 3, at 290.

107. KRAKAUER, *supra* note 3, at 223, 242–243.

108. Sexual Violence Prevention Workgroup, THE STATE UNIVERSITY OF NEW YORK, <http://system.suny.edu/sexual-violence-prevention-workgroup/>.

109. N.Y. EDUCATION § 6443 (2015).

110. N.Y. EDUCATION § 6444 (5)(c)(vi) (2015).

The burden of proof in the conduct process is different from the one required in the criminal process; the standard is lower because the worst sanction is expulsion, not incarceration or even death. The rules of evidence, including limitations on witnesses and testimony, are completely different in a school's internal process from what they are in the criminal process. So long as those rules are fair, published, and applied equally, they may vary among institutions. A key point is that failure to convict or even a decision not to prosecute on the part of the state has no relationship to whether the college will investigate, hold a process, or find someone responsible. It's not clear to readers why UM reinstated Jordan Johnson after his not guilty verdict, whether it was because of the verdict, or an internal appeal that he won.

#### F. THE ROLE OF CAMPUS POLICE

Campus law enforcement plays a minor role in the book, although the University of Montana, like many public (and some private) colleges has sworn officers.<sup>111</sup> There is one mention of "campus security" when they provided security footage from cameras in one case (Barrett).

While there are always exceptions, strengths and weaknesses, the idea that sworn campus law enforcement are merely "security guards" is a very outdated concept. In general, even those institutions that, by law or policy, do not maintain sworn law enforcement, employ men and women with significantly more training than similarly situated private security in a corporate environment. Higher education as a sector has done a poor job in getting this information out to counter the popular culture stereotypes of campus safety officials, and in *Missoula*, with small exceptions, all of the major law enforcement based transgressions were committed by municipal officers, not campus law enforcement.

In the quarter century since passage of the Clery Act, the role of law enforcement on college campuses has increased significantly, and the officers themselves have professionalized to the point that it is usually hard to tell the difference between municipal and campus law enforcement; they are similar in their level of training, equipment and arms, vehicles, uniform and signage.<sup>112</sup> These officers may be required to have college degrees or military service before hire, receive more significant training in areas such as

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111. See *UM Police Department*, UNIV. OF MONTANA, <http://www.umt.edu/police/> (last visited Apr. 1, 2016).

112. See, e.g., Ellen Mayer, *Campus police: real deal or rent-a-cops?*, WBEZ CHICAGO (Nov. 5, 2014), <http://www.wbez.org/series/curious-city/campus-police-real-deal-or-rent-cops-111071>; Daniel Engber, *Are Campus Police Like Regular Cops?*, SLATE (November 7, 2011), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2011/11/penn\\_state\\_scandal\\_should\\_campus\\_cops\\_have\\_reported\\_the\\_allegations\\_of\\_abuse\\_.html](http://www.slate.com/articles/news_and_politics/explainer/2011/11/penn_state_scandal_should_campus_cops_have_reported_the_allegations_of_abuse_.html) ("These sworn officers have the same authority as any other members of the police—they carry weapons, make arrests, and enforce local, state, and federal laws."); Scott Carlson, *Campus Cops' Contested Role*, (Oct. 18, 2015), CHRON. OF

trauma-informed investigations,<sup>113</sup> have an incident response time that is a fraction of the surrounding municipality, and engage in community policing.<sup>114</sup>

### G. THE ROLE OF ATHLETICS

Many of the assailants featured or referenced in *Missoula* are members of the celebrated Grizzlies football team.<sup>115</sup> While the team is not a mainstay on ESPN or the Bowl Champion Series, and players rarely go on to play professionally, it is a successful team in its conference and division and players are honored and revered as much as players at bigger football colleges.<sup>116</sup> Almost immediately upon hearing that one of their heroes is accused of sexual assault, fans of the football team took to social media to vehemently deny the accusations and others ostracized reporting individuals; they often reason that successful athletes would never need to rape anyone since, in their view, women “throw themselves” at these athletes and with so many offers of consensual sex, there is no need to engage in non-consensual sex.<sup>117</sup> Others simply conflate success in playing a game or defending teammates with being an overall good person. They believe all athletes (at least on their favorite team) to be “good guys” rather than the mix of characters endemic to society as a whole.

Although Krakauer does not focus on the athletics department staff, he always mentions when accused individuals are players or when certain other

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HIGHER EDUC., [http://chronicle.com/article/Campus-Cops-Contested-Role/233798?cid=at&utm\\_source=at&utm\\_medium=en&elq=d7e43c521fdd41048ae2b1740123d684&elqCampaignId=1635&elqaid=6608&elqat=1&elqTrackId=3fb443439d7e4ff0b188e7ed4a011d0d](http://chronicle.com/article/Campus-Cops-Contested-Role/233798?cid=at&utm_source=at&utm_medium=en&elq=d7e43c521fdd41048ae2b1740123d684&elqCampaignId=1635&elqaid=6608&elqat=1&elqTrackId=3fb443439d7e4ff0b188e7ed4a011d0d); Joseph Storch, *Campus Security and Local Criminal Enforcement Entities*, Cynthia Baker and Patricia Salkin, Ed. TOWN AND GOWN: LEGAL STRATEGIES FOR EFFECTIVE COLLABORATION, Chapter 8, p. 177–180 (2013).

113. See Rebecca Campbell, *The Neurobiology of Sexual Assault*, NAT. INSTITUTES OF JUSTICE (Dec. 3, 2012), <http://nij.gov/multimedia/presenter/presenter-campbell/Pages/welcome.aspx>, for a useful outline of trauma among victims and survivors of sexual assault. Krakauer spends significant time discussing the role of trauma in reporting and trauma-informed response and questioning. See KRAKAUER, *supra* note 3, at 62, 70, 94–95, 139, 201–202, 252–259, 293–295.

114. See, e.g., *Community Policing*, MIAMI UNIVERSITY, <http://www.miamioh.edu/police/community-policing/index.html> (last visited Apr. 1, 2016); *Community Policing*, BINGHAMTON UNIV., <https://www.binghamton.edu/police/community-policing.html> (last visited Apr. 1, 2016); *Community Policing*, TUFTS UNIV., <http://publicsafety.tufts.edu/police/community-policing/> (last visited Apr. 1, 2016).

115. KRAKAUER, *supra* note 3, at 7, 33–34, 62, 127–28, 307–08, 311–12. An internal University report had found that “investigations ‘indicated a disproportionate association’ between the sexual-assault crisis and ‘patterns of behavior of a number of student athletes.’” *Id.* at 128.

116. *Id.* at 7–8, 320–321.

117. *Id.* at 48, 125, 161–163, 168, 183, 228–230, 300, 320–321.

key participants—prosecutors, defense attorneys—are fans, boosters, or coaches. When Jordan Johnson received his letter from the Dean of Students charging him in the Cecelia Washburn sexual assault, his first thought was to contact his coach.<sup>118</sup> The coach brought in the athletic director and, in Krakauer’s words, “the UM athletic department promptly mobilized to do everything possible to defend Jordan Johnson against Cecelia Washburn’s allegation.”<sup>119</sup> Once news broke that Johnson could not practice with the team, fans began posting statements online.<sup>120</sup> Initially, Johnson could not practice because he was subject to a restraining order, but when that became a civil no-contact order, the coach allowed him to practice.<sup>121</sup> Shortly thereafter, the University President fired the coach and athletic director.<sup>122</sup> The team responded with an open letter questioning that decision and the motives of anyone who would allege the numerous sexual assaults committed by team members.<sup>123</sup> Almost inexplicably, a Vice President of External Relations sought to have the Dean of Students take action against a reporting individual for publicly airing her views about the process.<sup>124</sup> Revealingly, the Vice President, who traveled with the football team and spent extensive time with them, bristled at a reporter’s use of the phrase “gang rape” and “football players” to describe a sexual assault alleged against four football players; he believed it would be more accurately described as “a ‘date rape’ by multiple ‘students.’”<sup>125</sup> The University’s athletics department arranged for legal representation for Johnson in the University’s own disciplinary process.<sup>126</sup>

The outsized role of athletics and athletes in sexual and interpersonal violence is not specific to a city in Montana, but echoes the treatment of athletes and athletics nationally at the professional, college, and secondary level.<sup>127</sup> An analysis of sexual assault claims by higher education insurance

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118. *Id.* at 143.

119. *Id.* at 143.

120. *Id.* at 144–145, 148.

121. KRAKAUER, *supra* note 3, at 145.

122. *Id.* at 146.

123. *Id.* at 146–148.

124. *Id.* at 149. There is no law that prohibits participants from criticizing a public college for their experience, and FERPA has been interpreted not to be a law that can be used to silence participants in a process. *See* DCL, *supra* note 15, at 14.

125. *Id.* at 149.

126. *Id.* at 176.

127. Paula Lavigne, *Lawyers, Status, Public Backlash Aid College Athletes Accused of Crimes*, ESPN (June 15, 2015), [http://espn.go.com/espn/otl/story/\\_/id/13065247/college-athletes-major-programs-benefit-confluence-factors-some-avoid-criminal-charges](http://espn.go.com/espn/otl/story/_/id/13065247/college-athletes-major-programs-benefit-confluence-factors-some-avoid-criminal-charges); Andrew Mytelka, “Athletes in Big-Time Programs Often Escape Prosecution, Report Says,” CHRON. OF HIGHER EDUC., <http://chronicle.com/blogs/ticker/athletes-in-big-time-programs-often-escape-prosecution-report-says/100663> (June 14, 2015); Paula



carrier United Educators in 2015 revealed that a disproportionate number of claims involving serial perpetration and multiple perpetrators implicated athletes or fraternity members.<sup>128</sup> The study provides examples of claims where the group mentality may lead to this behavior, including where teammates took turns sexually assaulting an unconscious student.<sup>129</sup> There is additional evidence that in Division I football colleges, sexual assaults increase when the team wins (more so when the team wins a home game, but also when the team wins prominent or rivalry away games).<sup>130</sup> Conversely, domestic violence increases when the favored team loses, especially when it loses a game in an upset.<sup>131</sup>

One problem is that skilled athletes, especially in revenue sports, are so desirable for athletic programs that the operators of those programs may decide to overlook violations at a past college<sup>132</sup> in recruiting that student athlete. Sometimes these violations, including violent crimes, are chalked up to

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Lavigne, *Baylor Faces Accusations of Ignoring Sex Assault Victims*, ESPN (Feb. 2, 2016), [http://espn.go.com/espn/otl/story/\\_/id/14675790/baylor-officials-accused-failing-investigate-sexual-assaults-fully-adequately-providing-support-alleged-victims](http://espn.go.com/espn/otl/story/_/id/14675790/baylor-officials-accused-failing-investigate-sexual-assaults-fully-adequately-providing-support-alleged-victims); Jake New, *Black Eye for Baylor*, INSIDE HIGHER EDUC. (Aug. 26, 2015), <https://www.insidehighered.com/news/2015/08/26/baylor-u-facing-questions-over-handling-sexual-assault-involving-football-player>; Joe Nocera, *After Settlement, Florida State Shows Sympathy for Victim: Itself*, N.Y. TIMES (Jan. 29, 2016), [http://www.nytimes.com/2016/01/30/sports/ncaaf-football/florida-state-protects-the-brand-but-what-about-the-students.html?\\_r=1](http://www.nytimes.com/2016/01/30/sports/ncaaf-football/florida-state-protects-the-brand-but-what-about-the-students.html?_r=1); Andy Thomasen, *Another Athletics Official at U. of Minnesota is Investigated*, CHRON. OF HIGHER EDUC. (Sep. 3, 2015), <http://chronicle.com/blogs/ticker/jp/another-athletics-official-at-u-of-minnesota-is-investigated>; Andy Thomasen, *Five Rutgers Players Are Charged with Assault as Coach is Investigated*, CHRON. OF HIGHER EDUC. (Sep. 3, 2015), <http://chronicle.com/blogs/ticker/5-rutgers-football-players-are-charged-with-assault-as-coach-is-investigated/104075>; Charles Huckabee, *Former Tennessee Player Says Coach Criticized Him for Helping Alleged Rape Victim*, CHRON. OF HIGHER EDUC. (Feb. 25, 2016), <http://chronicle.com/blogs/ticker/former-tennessee-player-says-coach-criticized-him-for-helping-alleged-rape-victim/108901>.

128. *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, UNITED EDUCATORS (Jan. 2015), [https://www.bgsu.edu/content/dam/BGSU/human-resources/documents/training/lawroom/Sexual\\_assault\\_claim\\_study.pdf](https://www.bgsu.edu/content/dam/BGSU/human-resources/documents/training/lawroom/Sexual_assault_claim_study.pdf), at 3–4; See also Akane Otani and Jeremy Scott Diamond, “Every Time a Fraternity or Sorority Got In Trouble This Year,” BLOOMBERG (June 4, 2015), <http://www.bloomberg.com/graphics/2015-frat-sorority-offenses/>.

129. *Id.* at 3.

130. James M. Lindo, Peter M. Siminski, and Isaac D. Swensen, *College Party Culture and Sexual Assault*, NAT. BUREAU OF ECONOMIC RESEARCH, Dec. 2015, <http://www.nber.org/papers/w21828>.

131. *Id.*

132. Of course, efforts to assist students found responsible for sexual assault at one college in transferring to another college, overcoming any limitations on transferring after such behavior, are not limited to athletes and have themselves become a lucrative business. Katie J.M. Baker, *This Woman Gets Students Accused of Rape Back into School—For a Price*, BUZZFEED NEWS (July 28, 2015), <http://www.buzzfeed.com/katiejmbaker/this-woman-gets-students-accused-of-rape->

“off field distractions” or “off field concerns.”<sup>133</sup> Members of the media have responded to characterizing sexual assault in this way, finding the minimization offensive.<sup>134</sup> Facing criticism of this sort, in 2015 the Southeastern Conference adopted a policy that would not allow members to accept transfers who have a history of domestic or sexual violence,<sup>135</sup> but there are always schools in conferences that do not have such rules, or in other divisions, who will happily take a (second or third) chance on such an athlete.<sup>136</sup>

The Campus Accountability and Safety Act, proposed legislation from Senators McCaskill (D-MO) and Gillibrand (D-NY), would require institutions to use the same policies and procedures for all students, regardless of team or club membership.<sup>137</sup> This rule is on the institutional response side—do not treat accused individuals differently because they are on a sports team. New York’s recent law is on the prevention side. It requires all athletes and club and organization leaders to complete training on preventing and responding to sexual and interpersonal violence.<sup>138</sup> In the past few years, the

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back-into-school-fo#.gp6MQaD5D.

133. Mike Florio, *Buccaneers finally make it official, taking Jameis Winston first overall*, NBC SPORTS, Apr. 30, 2015, <http://profootballtalk.nbcsports.com/2015/04/30/buccaneers-finally-make-it-official-taking-jameis-winston-first-overall/>; Mike Freeman, *49ers Give Away Games to Bears – Did off-Field Distractions Play a Part?*, BLEACHER REPORT (Sept 15, 2014), <http://bleacherreport.com/articles/2198766-49ers-give-away-game-to-bears-did-off-field-distractions-play-a-part>; Brett Jensen, *Winston Excels even with off-Field Distractions*, FOX SPORTS (Dec 7, 2014), <http://www.foxsports.com/carolinas/story/winston-excels-even-with-off-field-distractions-120714>; Nancy Armour, *U.S. Soccer has Itself to Blame for Hope Solo’s Continued Distractions*, USA TODAY (June 7, 2015), <http://www.usatoday.com/story/sports/2015/06/07/hope-solo-domestic-violence-distraction-world-cup/28647987/>; Joshua Davis, *In the Crossfire: No. 5 Bears Deal with Distractions Amid off-Field Issues*, BAYLOR LARIAT (Sept 22, 2015), <http://baylorlariat.com/2015/09/22/in-the-crossfire-no-5-bears-deal-with-distractions-amid-off-field-issues/>

134. See Ali Safran, *Rape is Not an ‘Off The Field Distraction’*, THE HUFFINGTON POST (May 4, 2015), [http://www.huffingtonpost.com/ali-safran/rape-is-not-an-off-the-field-distraction\\_b\\_7207972.html](http://www.huffingtonpost.com/ali-safran/rape-is-not-an-off-the-field-distraction_b_7207972.html).

135. Jake New, *SEC Adopts Rule Barring Transfers with Violent Pasts*, INSIDE HIGHER EDUC. (June 2, 2015), <https://www.insidehighered.com/quick-takes/2015/06/02/sec-adopts-rule-barring-transfers-violent-pasts>; Jake New, *Black Eye for Baylor*, INSIDE HIGHER EDUC. (Aug. 26, 2015), <https://www.insidehighered.com/news/2015/08/26/baylor-u-facing-questions-over-handling-sexual-assault-involving-football-player>.

136. See Jake New, *Community College Faces Criticism After Football Player Convicted of Rape in High School Joins Team*, INSIDE HIGHER EDUC., Oct. 21, 2015, <https://www.insidehighered.com/news/2015/10/21/community-college-faces-criticism-after-football-player-convicted-rape-high-school>.

137. Campus Accountability and Safety Act, S. 590, 114th Congress (2015–2016).

138. N.Y. EDUCATION § 6447(5) (2015).

University of Michigan chose to train all athletes, calling them a group with “influence on campus.”<sup>139</sup>

The prevalence of sexual and interpersonal violence and often inadequate response graduates from college into professional sports. When professional hockey player Patrick Kane was accused of sexually assaulting a woman in Buffalo, New York in 2015, the tweets and social media posts of fans of the player constituted an almost unending list of attacks on the unnamed victim.<sup>140</sup> Even after a video surfaced of Baltimore Raven Ray Rice knocking his fiancée unconscious in an elevator, domestic violence charges against Rice were eventually dropped.<sup>141</sup>

Certainly athletics is far from the only group that sees victim-blaming and unflinching belief in the innocence of those accused of sex crimes, even when there is an admission. In the Catholic Church pedophilia scandal, Church leadership in different locations blamed or partly blamed victims for their culpability.<sup>142</sup> Members of ultra-Orthodox Jewish communities have named victims who have accused community leaders and posted their photos on the Internet.<sup>143</sup>

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139. Katherine Rosman, *On The Front Line of Campus Sexual Misconduct*, N.Y. TIMES (Sep. 26, 2015), [http://www.nytimes.com/2015/09/27/fashion/on-the-front-line-of-campus-sexual-misconduct.html?\\_r=0](http://www.nytimes.com/2015/09/27/fashion/on-the-front-line-of-campus-sexual-misconduct.html?_r=0).

140. Examples include: “‘Why would Pat Kane need to rape anyone? Good looking millionaire who plays hockey. Girls are crawling all over the guy’ . . . ‘Cause if Kane’s really being investigated for rape then we all know it’s a lie’” and posts claiming the victim is a “gold digger” or that a rich and successful hockey player would never rape anyone because so any people would consensually sleep with that player. See Maki Becker, *People Take to Twitter to Victim-Blame After Patrick Kane Allegations.*, THE BUFFALO NEWS (Aug. 11, 2015), <http://www.buffalonews.com/city-region/people-take-to-twitter-to-victim-blame-after-patrick-kane-allegations-20150811>.

141. See Emmanuelle Saliba & Erin McClam, *Domestic Violence Charges Against Ray Rice Dismissed*, NBC NEWS (May 21, 2015), <http://www.nbcnews.com/story-line/nfl-controversy/domestic-violence-charges-against-ray-rice-dismissed-judge-confirms-n362581>; see also Bien, Louis, *A complete timeline of the Ray Rice assault case*, SB NAT. (Nov. 28, 2014), <http://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens>.

142. John O’Brien, *Child Victims Partly to Blame in Priest Sex-Abuse Cases, Syracuse Bishop Testified*, SYRACUSE POST STANDARD (Sept. 13, 2015), [http://www.syracuse.com/news/index.ssf/2015/09/victims\\_partly\\_to\\_blame\\_in\\_priest\\_sex-abuse\\_cases\\_syracuse\\_bishop\\_testified.html](http://www.syracuse.com/news/index.ssf/2015/09/victims_partly_to_blame_in_priest_sex-abuse_cases_syracuse_bishop_testified.html); Sharon Otterman, *Priest Puts Blame on Some Victims of Sexual Abuse*, N.Y. TIMES (Aug. 30, 2012), [http://mobile.nytimes.com/2012/08/31/nyregion/in-interview-the-rev-benedict-groeschel-says-abuse-victims-can-be-seducers.html?referrer=&\\_r=0](http://mobile.nytimes.com/2012/08/31/nyregion/in-interview-the-rev-benedict-groeschel-says-abuse-victims-can-be-seducers.html?referrer=&_r=0).

143. Josh Saul, *Hasidic Leader Convicted After Repeatedly Forcing Himself on Girl He Was Counseling*, N.Y. POST (Dec. 10, 2012), <http://nypost.com/2012/12/10/hasidic-leader-convicted-after-repeatedly-forcing-himself-on-girl-he-was-counseling/>.

Even prominent researchers accused of sexual harassment receive penalties that some find less than satisfactory based upon their behavior.<sup>144</sup>

#### H. THIS IS NOT A COLLEGE OR UNIVERSITY PROBLEM,

##### THIS IS A SOCIETAL PROBLEM

*Missoula* concentrates on assaults committed against college and university students, but Krakauer acknowledges that “young women who are not enrolled in college are probably at even greater risk”<sup>145</sup> of sexual and interpersonal violence. Although it is difficult to get a perfect assessment of prevalence of sexual and interpersonal violence on college and university campuses, a number of studies have coalesced around a prevalence somewhere between 20 and 25% for females and about seven percent for males.<sup>146</sup> Krakauer does not spend significant time on prevalence, nor does he discuss male victims with more than a passing mention.<sup>147</sup> While studies of prevalence of sexual violence on college and university campuses draw significant press reporting, the best federal statistics cover bands of ages (such as women aged 18-24), some of whom are in college, but many of whom are

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144. Colleen Flaherty, *Is an Apology Enough?*, INSIDE HIGHER EDUC. (Oct. 12, 2015), [https://www.insidehighered.com/news/2015/10/12/scientists-debate-conduct-prominent-berkeley-astronomer-found-have-sexually-harassed?utm\\_source=Inside+Higher+Ed&utm\\_campaign=ffb2aefcef-DNU201510012&utm\\_medium=email&utm\\_term=0\\_1fbc04421-ffb2aefcef-197439957](https://www.insidehighered.com/news/2015/10/12/scientists-debate-conduct-prominent-berkeley-astronomer-found-have-sexually-harassed?utm_source=Inside+Higher+Ed&utm_campaign=ffb2aefcef-DNU201510012&utm_medium=email&utm_term=0_1fbc04421-ffb2aefcef-197439957).

145. KRAKAUER, *supra* note 3, at xiv, 346–347.

146. See Scott Jaschik, *New Survey Finds 1 in 5 College Women Have Experienced Sexual Assault*, INSIDE HIGHER EDUC. (June 15, 2015), <https://www.insidehighered.com/news/2015/06/15/new-survey-finds-1-5-college-women-have-experienced-sexual-assault>; Katherine Mangan, *1 in 4 Females Undergrads Experienced Sex Assault or Misconduct*, AAU Survey Finds, CHRON. OF HIGHER EDUC. (Sept. 21, 2015), <https://chronicle.com/article/1-in-4-Female-Undergrads/233281/>; Quick Takes, *Survey: 22% of Female Students at Michigan Sexually Assaulted*, INSIDE HIGHER EDUC. (June 25, 2015), <https://www.insidehighered.com/quicktakes/2015/06/25/survey-22-female-students-michigan-sexually-assaulted>; Jake New, *Differing Definitions*, INSIDE HIGHER EDUC. (Sep. 2, 2015), <https://www.insidehighered.com/news/2015/09/02/rutgers-survey-using-broad-definition-finds-1-5-female-students-have-experienced>; Christopher Krebs, Christine Lindquist, Marcus Berzofsky, Bonnie Shook-Sa, and Kimberly Peterson, *Campus Climate Survey Validation Study Final Technical Report*, BUREAU OF JUSTICE STATISTICS, Jan. 2016, <http://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>. But see, Jake New, *Different Conclusions On Sex Assaults*, INSIDE HIGHER EDUC. (Sep. 1, 2015), <https://www.insidehighered.com/news/2015/09/01/survey-5-percent-kentucky-students-assaulted-past-year> (finding about 5% prevalence in a University of Kentucky survey); Libby Nelson, *Why Some Studies Make Campus Rape Look Like an Epidemic While Others Say It's Rare*, VOX (Dec. 11, 2014), <http://www.vox.com/2014/12/11/7378271/why-some-studies-make-campus-rape-look-like-an-epidemic-while-others> (discussing the role of different methods of asking about specific incidents of violence in leading to vastly different statistical outcomes).

147. KRAKAUER, *supra* note 3, at xiv.

not. For these women and men, law enforcement is one of their only options. While some communities offer significant free or low cost counseling and other services for victims and survivors, availability and quality is far from uniform.

A high school senior who graduates and takes a job rather than going to a college or university<sup>148</sup> has none of the labyrinth of protections guaranteed by the Clery Act, Violence Against Women Act, and Office for Civil Rights interpretations of Title IX. If they are assaulted in their apartment complex, there is no Title IX Coordinator to report to or to seek services from. Their landlord does not provide them with a Clery Act Annual Security Report detailing crimes occurring in relevant geography and establishing certain safety policies. Nobody asks whether they affirmatively consented to sexual contact, instead their option is limited to seeking assistance with law enforcement, which is not always the best option.<sup>149</sup>

Lawmakers do not like to admit it, but the stories of college sexual assault they have reacted to, and the protections they have put in place or sought to pass to address assaults, do little or nothing for the millions of young men and women who do not go on to college. Yet sexual and interpersonal violence are *not* problems specific to higher education; they are societal problems. Addressing these crimes outside of the ivory tower is much harder than is addressing them on campus, where students and staff are a captive audience, and federal funding binds campuses to action. To make a real effort to ending sexual and interpersonal violence, all people—not just students—need prevention education and proper response to complaints.

There is precedent for such major societal shifts in a relatively short time. When the authors were young, the first question you would hear at any restaurant was “smoking or non?” Smoking in restaurants was *de rigeur*, and if you told a host or hostess in the 1980’s that they would never utter that line 15-20 years later, they would not have believed you. Initially bans on smoking in restaurants were controversial, and commentators said they would put bars and restaurants out of business. But people adjusted, and the inconvenience of going outside to smoke (not insignificant in a place like New York or Montana with cold winters) was also a boon to non-smokers who could visit these establishments and not leave smelling like smoke, or having inhaled second-hand smoke. Now it is hard to find a restaurant in most cities and towns that allows smoking at the table. Society has completely shifted on the presence of smokers in restaurants in less than a generation.

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148. Mary Ellen McIntire, *Conversation About Sexual Violence is Often a New One for College Freshmen*, CHRON. OF HIGHER EDUC. (Aug. 26, 2015), <http://chronicle.com/article/Conversation-About-Sexual/232599>; Sarah Brown, *How One University Uses New-Student Orientation to Talk About Sexual Assault*, CHRON. OF HIGHER EDUC. (Aug. 26, 2015), <http://chronicle.com/article/How-One-University-Uses/232603>.

149. See, e.g., KRAKAUER at 326–347, in addition to the stories detailed elsewhere.

Drunk driving deaths have decreased significantly with the work of lawmakers and organizations such as Mothers Against Drunk Driving.<sup>150</sup> Gone are the days when police would slowly follow drunk drivers home to make sure they were safe; that now leads to mandatory arrest. Among other reasons, the bystander phrase “friends don’t let friends drive drunk” had a significant impact on societal views of drunk drivers.

While higher education can and should do much to address sexual and interpersonal violence on campus, society and lawmakers must ensure that such protections do not begin and end at the campus gates.

### I. MOVING FORWARD

Krakauer’s book does a good job of identifying the problem, but it spends no time on solutions. The task of developing prevention programming to reduce the number of assaults on college campuses is for higher education, not an author. There are many solutions proposed, both on the prevention and response sides, including gimmicks and quick fixes with dubious effectiveness,<sup>151</sup> but the field, for the most part, lacks data on what truly works.<sup>152</sup> The Violence Against Women Act’s requirements of training and ongoing prevention and awareness campaigns<sup>153</sup> will bring significant attention (and resources) to bear in studying what works well and what falls flat. But there are no silver bullets or simple answers.

Institutions are likely to see a reporting curve like the one displayed below.<sup>154</sup> As an institution does a better job publicizing reporting options, numbers of reports are likely to spike. This will put significant pressure on first responders, Title IX coordinators, judicial and conduct professionals, and the counseling center. This pressure is a risk, as time spent responding to cases may draw attention away from the time and effort needed to get to the next level, prevention-programming. This programming can include bystander intervention, creative programming within the VAWA campaign, and other

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150. See *History of Drunk Driving*, MOTHERS AGAINST DRUNK DRIVING, <http://www.madd.org/drun-driving/about/history.html> (last visited Apr. 2, 2016).

151. Tara Culp-Ressler, *Profit and Peril in the Anti-Rape Industry*, THINK PROGRESS (Sep. 10, 2014), <http://thinkprogress.org/health/2014/09/10/3564746/anti-rape-industry/>.

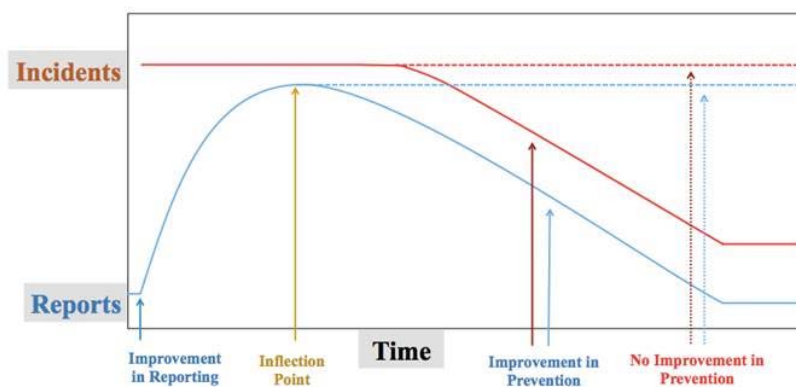
152. Sarah DeGue, *Preventing Sexual Violence on College Campuses: Lessons from Research and Practice*, CENTERS FOR DISEASE CONTROL (Apr. 2014), <https://www.notalone.gov/assets/evidence-based-strategies-for-the-prevention-of-sv-perpetration.pdf>.

153. 34 C.F.R. § 668 (2014); 79 FR §§ 62751, 62784–62785, 62788 (2016).

154. See Joseph Storch, *Sexual Violence: Responding to Reports Is Not Enough*, INSIDE HIGHER ED (Mar. 14 2016), <https://www.insidehighered.com/views/2016/03/14/colleges-must-not-only-respond-reports-sexual-violence-also-prevent-it-essay>.

efforts to change the culture<sup>155</sup> in order to lower the incidence of sexual and interpersonal violence. But these second-level efforts are absolutely critical to bringing the number of reports back down—not because the reporting will decrease, but because the incidents will decrease. This inflection point is where many institutions can become stuck, staff become overwhelmed, and morale can suffer. The curve below demonstrates how initially, incidents are high while reports are low. As an institution does a better job educating students about reporting options and resources, the number of reports will begin to climb (although it will never be as high as incidents occurring). It is at this point that the campus officials charged with response will be swamped with reports. And it is at this same inflection point that the need to keep developing prevention strategies can make the difference between reducing reports by reducing incidents (ideal, solid lines) and just continuing along with a higher number of incidents being reported, but not making a dent in the number of incidents occurring (dotted lines).

Theoretical Reporting Curve for Reports of Sexual Assault, Joseph Storch (2015).



It is important for institutions to be thoughtful in approaching response and prevention to ensure that positive momentum towards responding appropriately, increasing reporting, and then decreasing incidents of assault keeps moving forward.

155. See Stacey J.T. Hust et al., *Law & Order, CSI, and NCIS: The Association Between Exposure to Crime Drama Franchises, Rape Myth Acceptance, and Sexual Consent Negotiation Among College Students*, J. OF HEALTH COMM., 0:1-13 (Sep. 29, 2015), for an interesting analysis of the impact of television shows on the culture surrounding sexual assault and willingness to intervene to prevent an assault.

## CONCLUSION

Although it is not his job as an author, Krakauer's book is long on identifying problems and short on proposing solutions. That task is for the higher education community. His book provides powerful insight into how sexual assault complaints were handled in that community both on and off campus, including how the legal, ethical, investigatory, and judgment failures made by many offices tasked with responding to these crimes negatively impacted reporting individuals and did little to prevent future violations. The book raises frightening statistics and tells horrifying stories, but offers no concrete advice on how to avoid these tragedies in the future.

Despite copious news stories to the contrary, our experience is that higher education is full of professionals seeking to continually build capacity in lowering incidents of sexual and interpersonal violence. While no one college has all of the answers, significant effort and resources are going towards developing effective prevention and response resources and methods, and gathering evidence regarding which methods work best. There are many state and federal legislators, regulators, auditors, activists, journalists, and others who try to tell colleges and universities how to address sexual violence on campus, yet the methods keep evolving. Most (although not all) have little experience on college campuses. For them, the issue is clear and binary. People who believe what they themselves believe are good; people who believe the opposite are evil. There is no room for middle ground or the possibility that people of good faith can have different methods for addressing these crimes. Truthfully, sexual assault prevention, like the issue of sexual assault itself, is far more nuanced than any press-release length analysis could bring to bear. Krakauer's book does not provide the solution, but it is an analysis of the problem that is well worth reading by anyone in higher education interested in developing solutions.



## KRAKAUER'S *MISSOULA*:

### WHERE SUBVERSIVE MEETS VERISIMILITUDE

WENDY MURPHY

I wanted to like *Missoula*, Jon Krakauer's new book subtitled *Rape and the Justice System in a College Town*.<sup>1</sup> Krakauer promises on the book jacket to cut through the "abstract ideological debate" and "illuminate the human drama behind the national plague of campus rape."

While many stories have been written from the "human drama" perspective, Krakauer took on a particularly important story because the University of Montana in Missoula, along with prosecutors and law enforcement officials in the larger Missoula community, were facing a first-of-its kind joint investigation by the Department of Justice (DOJ) and the Department of Education's (DOE) Office for Civil Rights (OCR) during the time *Missoula* was being written. Allegations focused on conspiratorial violations of Title IX and Title IV, arising out of the mishandling of sexual assault complaints by university officials, civilian law enforcement, and the county prosecutor's office.<sup>2</sup>

Krakauer has an excellent reputation, and the last two lines on the inside back cover sounded promising. "College-age women<sup>3</sup> are not raped because

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1. JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (2015).

2. See, e.g., *Justice Department Announces Investigations of the Handling of Sexual Assault Allegations by the University of Montana, the Missoula, Mont., Police Department and the Missoula County Attorney's Office*, DEP'T OF JUSTICE (May 1, 2012), <http://www.justice.gov/opa/pr/2012/May/12-crt-561.html> (announcing Title IX compliance review and Title IV investigation of the University of Montana and noting, "Title IX of the Education Amendments of 1972 and Title IV of the Civil Rights Act of 1964 each prohibit sex discrimination, including sexual assault and sexual harassment, in education programs"); Amy Knight Burns, *Improving Prosecution of Sexual Assault Cases: Can the Justice Department Use 42 U.S.C. § 14141 to Investigate Prosecutors' Offices?*, 67 STAN. L. REV. ONLINE 17 (July 5, 2014) <http://www.stanfordlawreview.org/online/improving-prosecution-of-sexual-assault-cases> (noting the unprecedented nature of the investigation).

3. I am primarily focused on sexual assault as an offense committed by males against females, which is Krakauer's focus as well, although I readily acknowledge that males are victims too, and that gender itself is not an either or concept.

they are promiscuous, or drunk, or send mixed signals, or feel guilty about casual sex, or seek attention. They are the victims of a terrible crime and deserving of compassion from society and fairness from a justice system that is clearly broken.” Those words set the right tone, and made me feel hopeful that the book would reveal not only how the victims<sup>4</sup> suffered, but also why injustice happens.

Maybe I was wrong to expect incisive writing from an author who said at the outset that he was writing only about the “human drama” of injustice, but time and again Krakauer diverged from the “human drama” genre and dipped a literary toe into serious legal subjects like the constitutional rights of accused students, definitions of rape in the criminal justice system, and what happens during a criminal prosecution that causes victims to feel retraumatized. So while his claim that he was writing solely about “human drama” may have been sincere, he wrote about a lot more, and in that sense, he opened himself up to scathing reviews because his substantive writing on many legal issues is woefully inadequate, and, in several places, biased against the rights and interests of women and girls.

I set my standards low because I knew Krakauer is not an academic, and would not likely write about doctrinal problems, such as how the very structure of rape law produces high incidence rates because of its still-relevant roots in men’s ownership of and sexual access to women’s bodies.<sup>5</sup> A more scholarly author would have written about the need to redesign rape law away from sexual regulation, and toward a baseline of respect for women’s autonomy, bodily integrity, and self-determination. This idea is not

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4. I use the term “victim” throughout, not to imply that all people accused of sexual assault are always guilty, but for efficiency and clarity. Also, as an academic who teaches sexual violence law, I resent the plethora of literature premised on the tired myth that reports of rape are inherently suspicious, and that women as a class are worthy of extra skepticism. So long as the word “victim” is used in other articles, without public criticism, to describe the status of individuals who report civil rights assaults when they occur “on the basis of” categories such as race and ethnicity, I will use the word “victim” to describe the status of women who report civil rights assaults when they occur “on the basis of” sex. If a pattern emerges such that victims of other types of civil rights offenses are made to use skepticism-laden terms such as “alleged victim,” and “complainant,” I will re-evaluate my position. Note that I will never use the offensive word “accuser” as that term is a dangerous and offensive misnomer. The “accuser” in a criminal case is the government, and in a school-based civil rights proceeding there is no actual “accuser;” there is only a federal mandate that schools respond to and redress discrimination. Indeed, schools are obligated to prevent discrimination, just as law enforcement officials are obligated to deal with criminal violence, irrespective of whether a particular victim wants officials to do their jobs on behalf of the public interest. The label “accuser” implies falsely that the victim is the charging party, and that she bears all legal burdens and responsibilities.

5. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998).

new,<sup>6</sup> and should have been mentioned in a book about injustice and the “national plague” of sexual assault.

Krakauer could have at least talked to one of the countless scholars that have collectively written millions of pages on the pervasive problem of violence against women, and the ways that law and society conspire to incentivize violence and produce injustice. In my own book, *And Justice For Some*, first published almost ten years ago, I make many of the points Krakauer makes about society’s irrational readiness to excuse rape by discrediting and blaming victims—as if some people deserve to be sexually brutalized.<sup>7</sup> He did not have to cite me, though I did write the first law review article in the nation explaining the legal relationship between Title IX and sexual assault,<sup>8</sup> but with so many experts available to talk to him about the underlying causes of high rates of sexual violence in society, it is strange that he did not cite anyone with significant depth of knowledge on the legal and political aspects of the subject matter about which he was writing.

A scholar might have helped Krakauer expand on his observations about the problem of prosecutorial discretion, and how it enables prosecutors to refuse to file criminal charges even in rock solid cases.<sup>9</sup> Krakauer appears to believe, as do I, that prosecutorial discretion is profoundly anti-democratic because it allows a politician, rather than the evidence itself, to determine whether justice is served. In an effective democracy, individuals would have greater control over the means by which government officials determine which crimes are prosecuted, and purely political decision-making would at

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6. *Id.* See also, *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (noting that rape is “highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter’s privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the ‘ultimate violation of self.’ It is also a violent crime because it normally involves force or the threat of force or intimidation, to overcome the will and capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community’s sense of security, there is public injury as well.”); *Johnson v. State*, 328 P.3d 77, 89 (Alaska 2014) (“The criminal prohibition on rape has as its goal preventing the loss of autonomy, dignity, free will, and bodily integrity that comes with non-consensual sexual penetration. We have stated that ‘[t]he reason [rape] is most serious is because it amounts to a desecration of the victim’s person which is a vital part of her sanctity and dignity as a human being.’” (quoting *Newsom v. State*, 533 P.2d 904, 911 (Alaska 1975))); Dorothy E. Roberts, *Rape, Violence, and Women’s Autonomy*, 69 Chi.-Kent L. Rev. 359 (1993) (noting that rape law historically has regulated competing male interests in controlling sexual access to females, rather than protecting women’s interest in controlling their own bodies and sexuality).

7. WENDY MURPHY, *AND JUSTICE FOR SOME* (2007).

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

9. KRAKAUER, *supra* note 1, at 121.

least be subject to meaningful public oversight. Krakauer acknowledges that prosecutorial discretion in sex crimes cases is a problem, but he nowhere mentions the obvious remedy, which is that people can mobilize, politically, to elect only prosecutors who agree to file charges based not on whether they believe they will win, but whether they believe justice will be served. Too often, the decision not to file charges, as Krakauer recognizes, is driven not by a prosecutor's belief that a victim is not credible, but by his or her fear that a biased jury will, unfairly, find the victim not credible enough to justify a guilty verdict. This problem is easily fixed by the election of prosecutors who will confront, rather than indulge, such biases.

Like prosecutors, school officials also make unjust discretionary decisions not to subject sex offenders to meaningful consequences for their actions, and again, Krakauer understands this, but he seems almost mystified about whether the problem is fixable. And he obfuscates the critical role of federal oversight agencies in holding schools accountable by never pointing out how important it is for aggrieved victims to file complaints with OCR at the DOE, and OCR at the DHHS,<sup>10</sup> and that it is exceedingly easy to do so, on-line, for free, with the push of a button.

*Missoula* also fails to explain why the DOJ and the DOE had authority to conduct an investigation on behalf of women as a class. Readers would have benefitted from knowing that the investigation was initiated under the authority of civil rights laws, including Title IV of the Civil Rights Act of 1964,<sup>11</sup> which forbids sex discrimination (including sexual assault) by public entities and officials, including public schools, and Title IX of the Education

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10. See *Doe v. U.S. Dept. of Health and Human Services*, 85 F. Supp. 3d 1 (D.D.C. 2015)(mandamus action against DHHS for its failure to promptly resolve a student's complaint that had been filed with OCR at the DHHS.) Most students are not even aware that there is an OCR at the DHHS, and that it has co-equal authority to investigate and remediate violations of Title IX related to sexual assault when they occur in connection with a victim's medical treatment or health care. See *Laws and Regulations Enforced by OCR*, HHS.GOV, <http://www.hhs.gov/ocr/civilrights/resources/laws/index.html> (last visited April 17, 2016). I filed the above-referenced complaint with OCR at the DHHS, believed to be the first of its kind, against the University of Virginia (UVA). I alleged that UVA violated my client's Title IX rights when a university nurse took photographs of the victim's genital injuries, then filed a report with the school's disciplinary board saying there were no injuries indicative of sexual assault. When the perpetrator was found not responsible, the family asked for copies of the photographs showing the injuries so they could file an OCR complaint, but the nurse refused to provide copies, and a university official claimed there were no photographs, even though the victim recalled that numerous photographs had been taken, and her medical record had a notation stating that photographs of the victim's injuries were taken using special dye and catheterization. See *Petition for Writ of Mandamus & for Equitable Relief, Doe v. Sebelius*, (D.D.C. 2014) (No. 03-12-145773), available at <http://www.campusaccountability.org/docs/UVA-DHHS-MANDAMUS.pdf>.

11. 42 U.S.C. § 2000d et seq. (2012).

Amendments of 1972,<sup>12</sup> and its implementing regulation,<sup>13</sup> which forbids sex discrimination (including sexual assault) in public and private schools that receive federal funds. Krakauer could have explained how a conspiracy of official misconduct by university, prosecutorial and law enforcement officials contributes to a dangerous mindset in the community at large that conceives rape as harmless male behavior, or at worst, a night of bad judgment, rather than a serious civil rights issue for women and girls.

I can accept that Krakauer did not intend to write the book I was hoping for, but not only was the phrase “women’s civil rights” never used, the term “Title IV” appears nowhere, and “Title IX” is barely mentioned at all. When it is, Krakauer gets it wrong. For example, the first time he talks about Title IX, he says it was designed primarily to provide girls with more opportunities in sports.<sup>14</sup> This is a serious error because even a superficial review of Title IX’s history would have revealed that it had nothing do with sports when enacted.<sup>15</sup> Indeed, Title IX nowhere mentions sports; it simply states that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . .”<sup>16</sup>

As was recently emphasized by the Department of Justice in an important new findings letter issued against the University of New Mexico, Title IX is co-extensive with Title IV of the Civil Rights Act of 1964, hence requires schools to treat sex-based harms exactly the same as harms that occur based on other protected class categories, such as race and national origin.<sup>17</sup> This idea that women have exactly the same civil rights in education as racial and ethnic minorities, etc., is not new. When Title IX was enacted in 1972, it was intentionally modeled after Titles IV and VI of the Civil Rights Act of 1964. The language of Title VI states, “No person in the United States shall, *on the ground of race, color, or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial

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12. 20 U.S.C. § 1681(a) (2012).

13. 34 C.F.R. § 106 (2015).

14. KRAKAUER, *supra* note 1, at 83.

15. See Wendy Murphy, *From Explicit Equity to Sports to Sexual Assault to Explicit Subjugation: The True Story Behind Title IX and Women’s Ongoing Struggle for Equality in Education*, in *SEXUAL HARASSMENT IN EDUCATION AND WORK SETTINGS: CURRENT RESEARCH AND BEST PRACTICES FOR PREVENTION*, 47 (Michele A. Paludi, et al., eds., 2015).

16. 42 U.S.C. § 2000c et seq. (2012).

17. Justice Department Releases Investigative Findings on University of New Mexico’s Response to Sexual Assault Allegations, April 22, 2016, *available at* <https://www.justice.gov/opa/pr/justice-department-releases-investigative-findings-universtiy-new-mexico-s-response-sexual>.

assistance.”<sup>18</sup> Except for the word “sex,” Title VI uses exactly the same language as Title IX. And like Title IX, Title VI applies to schools that receive federal funds, including private schools. Title IV, by contrast, applies only to public schools, yet all three statutes impose the exact same legal obligations on school officials.<sup>19</sup>

Put simply, Title IX guarantees equality and forbids discrimination, based on sex, in education. That is it. And while Krakauer is correct that gender equity in sports is covered by Title IX, he is wrong that sports was the focus behind Title IX’s enactment. The focus in 1972 was equal employment opportunities for women in higher education, and equal access to education through gender-equitable admissions policies.<sup>20</sup> Although sexual assault was a problem for women in 1972, it was not widely discussed when Title IX was being debated, though it takes little effort to appreciate why violence and assault are the most serious forms of discrimination. Indeed, after the United States Supreme Court decision in *Brown v. Board of Education*,<sup>21</sup> armed guards were sent to accompany black students to school for fear they would experience race-based violence and harassment.<sup>22</sup> The guards were not present to ensure that black children would be allowed on the swim team. Likewise, most raped and beaten women do not give a damn about equal distribution of basketballs.

Krakauer’s fundamental lack of appreciation for the fact that Title IX was not designed as a sports-equity law taints the entire book because

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18. 42 U.S.C. §§ 2000d - 2000d-7 (2012).

19. Investigative Findings, *supra* note 17; 34 C.F.R. § 106.71 (2015) (“The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference.”). *See* the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (2012), making clear that substantive standards from Title VI apply with equal force to Title IX; 29 U.S.C. § 794 (2012), 42 U.S.C. § 2000d-4a (2012), 42 U.S.C. § 2000d-7 (2012) (requiring equal treatment on behalf of all protected class categories) and 42 U.S.C. § 6101 (2012); *accord* *Barnes v. Gorman*, 536 U.S. 181, 185 (2002); *see* U.S. Dep’t of Justice, Resolution Agreement among the University of Montana-Missoula, the U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section and the U.S. Department of Education, Office for Civil Rights, available at <http://www.justice.gov/crt/about/edu/documents/Montanaagree.pdf> (announcing resolution agreement with the University of Montana and noting that Title IV and Title IX both require “equity” and are subjected to the same standards of enforcement regarding discrimination, harassment, and violence); *see also* *Title IX Legal Manual*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/crt/about/cor/coord/ixlegal.php> (last visited April 18, 2016) (noting that “Congress consciously modeled Title IX on Title VI” and citing *Alexander v. Choate*, 469 U.S. 287, 294 (1985), for the proposition that because Title IX and Title VI contain parallel language, the same analytic framework should apply in the context of administrative redress proceedings because both statutes were enacted to prevent unlawful discrimination and to provide remedies for the effects of past discrimination).

20. Murphy, *supra* note 15.

21. 347 U.S. 483 (1954).

22. JEAN EDWARD SMITH, *EISENHOWER IN WAR AND PEACE* 723 (2012).

Krakauer then sets up a dangerous false premise making it appear as though the very idea of sexual assault as a civil rights issue under Title IX is a new concept, rather than a well-settled legal doctrine. He then exacerbates the problem by nowhere acknowledging that Title IX mandates “equitable” treatment for women, and that women can assert “rights” under Title IX, on campus, in federal oversight agencies, and in real world courts.

Title IX’s guarantee of gender “equity” was made explicit and mandatory through the promulgation of Title IX regulations in the 1970s.<sup>23</sup> Krakauer says he wrote *Missoula* to expose the unfair treatment of victims, yet he never once says that Title IX requires “equitable” treatment of women. He writes only that schools are mandated to establish “a comprehensive system for handling sexual-assault complaints.”<sup>24</sup> By never mentioning Title IX’s mandate of “equitable” redress, Krakauer implies that schools are allowed to treat victims as second-class citizens, so long as they do so “comprehensively” and “systematically.”

It is bad enough that Krakauer never frames Title IX as a civil rights law for women and girls, he then erroneously declares that perpetrators *do* have civil rights at stake.<sup>25</sup> Krakauer got it exactly backward. Victims of discrimination (including sexual assault) enjoy civil rights legal protections. Perpetrators of discrimination do not. Accused students sometimes have *other* rights at stake, as when a handbook says a student has a “right” to certain procedures in disciplinary matters, but they are not “civil rights.” Students in public schools have constitutional “due process” rights when they face suspension or expulsion, but the United States Supreme Court held in *Goss v. Lopez*, that such rights exist for children in public schools where there is a state-created right to a public education. *Goss* did not create similar rights for college students, public or private, and even if *Goss* can be read to extend to public universities, the “process” due prior to short-term suspensions is minimal. There is no right to counsel, to call witnesses, to conduct cross-examination, or to file appeals. It is enough that a student receives “notice and a rudimentary hearing.”<sup>26</sup>

More than minimal notice and hearing rights is likely required prior to lengthy suspensions or expulsions of public school students under *Goss*,<sup>27</sup> but exactly what process is due, and whether college students are constitutionally entitled to the same rights as K-12 students, is unclear because court rulings are inconsistent. Some find no substantive or

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23. 34 C.F.R. § 106.8(b) (2015); 20 U.S.C. §§ 1681-1688 (2012); and 28 C.F.R. § 54.135(b) (2015) (requiring schools to “adopt and publish” policies and procedures “providing for prompt and equitable resolution” of student complaints).

24. KRAKAUER, *supra* note 1, at 83.

25. *Id.*

26. *Goss v. Lopez*, 419 U.S. 565, 583-584 (1975).

27. *Id.*

procedural due process rights for suspended or expelled students enrolled in private or public colleges and universities,<sup>28</sup> while others recognize “due process” rights for students at *public* universities, when there is a constitutional interest at stake, such as reputational liberty.<sup>29</sup> A disciplined student might also have enforceable contract rights,<sup>30</sup> but such rights have nothing to do with due process in the commonly understood constitutional sense of the doctrine as it applies to the liberty interests of defendants being prosecuted in criminal court.<sup>31</sup>

To the extent school officials overly indulge offenders’ rights as a way of avoiding expensive lawsuits, they do so in part because *Goss* created due process rights only for punished students, not mistreated victims, or even students whose punishment does not exceed a few days of suspension. This necessarily means that correctly punished offenders who commit the most horrific acts of violence are more likely to sue than are horribly mistreated victims or offenders who suffered meager punishments because their conduct was not severe enough to warrant lengthy suspension or expulsion. In other words, current liability standards perversely reward the worst offenders with the greatest rights to sue. In turn, schools that make decisions based on concerns about lawsuits have the strongest incentives to rule in favor of the most brutal assailants on campus.

Schools are also generally incentivized to favor offenders over victims because the liability standards under which disgruntled offenders can sue schools are easier to meet than the liability standards under which victims can sue for violations of Title IX. Offender students can simply allege that officials failed to comply with promised disciplinary rules and/or due process.<sup>32</sup> A victim, by contrast, must prove that the school not only failed to comply with Title IX, but also that officials were “deliberately

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28. *Schaer v. Brandeis*, 432 Mass. 474 (2000)(private); *Dibrell v. University of Michigan*, 2:12-cv-15632, E.D. Mich. (May 18, 2016) (public) at 49-50 (Because the Supreme Court of the United States has never recognized a constitutionally protected interest in continued enrollment at a public university, there can be no substantive or procedural due process claim for wrongful suspension or expulsion).

29. See e.g., *Doe v. The Rector and Visitors of George Mason Univ.*, No. 1:15-cv-209, 2016 WL 775776 (E.D. Va., Feb. 25, 2016), *citing* *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961) (minimum due process required prior to expulsion from state college or university).

30. *Schaer*, 432 Mass. 474 (noting that a university should comply with its own policies, and that if a policy promises students “basic fairness,” and “due process,” students may have a right to sue for a breach of contract if those promises are not met in connection with a disciplinary proceeding).

31. *Id.* (“A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts. . . .”)

32. *George Mason Univ.*, 2016 WL 775776.



indifferent.”<sup>33</sup> Offenders are not held to the additional burden of proving “deliberate indifference,” although it should be noted that victims can equally effectively sue both public and private schools under Title IX, while disgruntled offenders can more easily sue public schools than private schools, under *Goss*. Overall, the liability advantage inures to offenders, and women will never be safe or fully equal until the law establishes liability parity.

Schools can *practice* liability parity in the meantime by applying *only* Title IX’s equitable legal standards when responding to sex-based violence on campus. Strict compliance with Title IX ensures that accused students receive fair treatment while preventing due process and breach of contract lawsuits because civil rights laws create no rights for perpetrators of civil rights violence.

As an example of the liability-free ease with which officials can expel students who commit civil rights violations, consider the case of a student in Indiana who was accused of beating a Muslim student on October 17, 2015 and was expelled three days later, on October 20.<sup>34</sup> The expelled student did not sue, and there were no public objections to his swift expulsion.

A small group of academics who have been speaking out in support of more rights for students accused of sexual assault on campus<sup>35</sup> stayed silent about the treatment of the Indiana student. Many of those individuals, including Harvard’s Nancy Gertner, are criminal defense advocates who argue that accused students should be afforded rights such as cross-examination, counsel, and application of a “clear and convincing evidence” burden of proof,<sup>36</sup> which is a more onerous burden of proof (70-75%)<sup>37</sup> than the “preponderance of the evidence” standard (51%)<sup>38</sup> which is required

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33. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285, 292-93 (1998).

34. *Indiana University expels student in attack on Muslim woman*, CHICAGO TRIBUNE (Oct. 20, 2015), <http://www.chicagotribune.com/news/nationworld/midwest/ct-indiana-student-muslim-woman-attack-20151020-story.html>.

35. Matthew Q. Clarida, *Law School Profs Condemn New Sexual Harassment Policy*, THE HARVARD CRIMSON (Oct. 15, 2014), <http://www.thecrimson.com/article/2014/10/15/law-profs-criticize-new-policy/>

36. *Id.*

37. *Clear and Convincing Evidence*, CORNELL UNIVERSITY LAW SCHOOL, [https://www.law.cornell.edu/wex/clear\\_and\\_convincing\\_evidence](https://www.law.cornell.edu/wex/clear_and_convincing_evidence). “Clear and convincing” is described as a “medium” burden of proof, between “preponderance” and “reasonable doubt.” While “clear and convincing” lacks a designated numerical value akin to the 51% value assigned to “preponderance,” it is reasonable to assign the standard a value of 70-75% as this is the mid-point between preponderance (51%) and “reasonable doubt,” which is necessarily a number somewhat less than 100%.

38. *Preponderance of the Evidence*, CORNELL UNIVERSITY LAW SCHOOL, [https://www.law.cornell.edu/wex/preponderance\\_of\\_the\\_evidence](https://www.law.cornell.edu/wex/preponderance_of_the_evidence).

under Title IX and other civil rights laws.<sup>39</sup> Despite fervent public demands for more rights for accused students, Gertner and her allies said absolutely nothing about the essentially summary expulsion of the Indiana student in an exceedingly short period of three days.

The demand of defense advocates that a “clear and convincing” standard be applied in sexual assault cases is especially galling because it is not a request for “due process” for offenders so much as a thinly-veiled demand that schools declare the word of a woman inherently inadequate to justify the punishment of a man. Obviously, the “preponderance of evidence” standard is the only “equitable” burden of proof because it presumes the *equal* credibility of all students at the outset. By contrast, the “clear and convincing” evidence standard accords greater presumptive credibility to the accused because the victim must be credible to a degree of “clear and convincing” while the offender can be vindicated by being much less credible, to a degree of only that amount of proof that rests between “clear and convincing” and 100%. A mathematical explanation helps to illustrate the point. If a victim’s report is determined to be 100% credible, and her assailant’s denial is determined to be 32% credible, the assailant will prevail because his less credible denial will be applied to diminish the weight of the victim’s statement to 68%, a credibility weight lower than the 70% amount of proof needed to satisfy the “clear and convincing” standard.

Many schools prefer to use a “clear and convincing” standard because it allows them to claim that they believe the victim, but not *enough* to punish the offender. Such an approach keeps tuition dollars flowing and avoids public scandal, but it also subjugates women as a class by declaring them inherently less credible than other members of the campus community. Such structured inequality is morally repugnant under any legal regime, but is unconscionable and the very antithesis of “equitable” treatment for women under Title IX.

People can disagree about whether certain rights should be in place for accused students, but obviously there should be no *extra* rights for offenders who target women. On this point, it bears repeating that when the Indiana student described above was expelled after only three days, without all of the rights Gertner et al. have been demanding for accused students, Gertner and the others stayed silent. I suppose it is possible that none of them heard or read about the widely publicized case, but their silence permits the inference that their demand for *extra* rights *only* for students accused of sex-based offenses is an ideological attempt to legitimize the subjugation of women,

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39. *Dear Colleague Letter*, U.S. Dept. of Education: Office for Civil Rights (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>. The letter points out the consistent application of the preponderance of evidence standard by federal courts, including the United States Supreme Court, and federal regulatory bodies, when addressing anti-discrimination claims. *Id.* at 10-11.

on campus and in larger society.

That Gertner calls herself a feminist makes it especially hard for the public to see through her claim that extra rights for accused sex offender students is somehow good for women as a class,<sup>40</sup> just as Krakauer's claim that he wrote *Missoula* because he cares about rape victims makes it hard for readers to see the ways that his book belies that claim.

Neither Krakauer nor Gertner and her allies seem to understand that when sexist violence happens, as when racist violence happens, only the victim has "civil rights" to assert. A student accused of committing a "civil rights" violation on campus is not elevated to the noble status of a student with "civil rights" at stake simply because he stands accused of *committing* a "civil rights" violation. Imagine a white student member of the KKK, accused of racist violence, claiming during a disciplinary proceeding that because he has been accused of a civil rights infraction, he enjoys the protection of "civil rights" laws, on par with his black victim. An accused student should always be treated fairly, but his rights, whatever their source, cannot encroach on the victim's predominant federal civil rights.<sup>41</sup> As the legal adage by Oliver Wendell Holmes Jr. has long made clear, "the right to swing one's fist ends where another person's nose begins," and as I like to add to that adage, when the nose is on the face of a person with civil rights at stake, the rights in your fist end much sooner.

Krakauer does not seem to understand this at all, though *Missoula* does succeed in rattling the cages simply because Krakauer has the platform to make people listen. Whatever else is said about *Missoula*, the book is embarrassing to the University of Montana, which means it might scare other schools into taking more effective steps to prevent sexual assault so that a similar book is not written about them.

While cage rattling has its place, I was hoping Krakauer would provide readers with basic information about how and why framing and redressing *all* violence against women on campus as a civil rights issue is essential. But on this fundamental issue, *Missoula* is deafeningly, inexplicably, silent.

Krakauer does expose some of the ugly underbelly within the criminal and campus justice systems, as when he writes about a prosecutor in *Missoula* who, after working on some of the cases highlighted in the book, abruptly leaves her job at the county attorney's office to work as a defense

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40. Wendy Murphy, *An Open Letter to Harvard Law Professor Nancy Gertner*, TITLE IX ON CAMPUS (Feb. 2, 2015), <http://titleix.us/an-open-letter-to-nancy-gertner/#.Vki9LF88LCQ>.

41. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 575 (1983) (finding that a compelling governmental interest in "eradicating racial discrimination in education" is sufficient to justify a limitation on the First Amendment right to the free exercise of religion).

attorney for one of the accused students.<sup>42</sup> Such a move is usually unethical under attorneys' professional codes, but Krakauer does not say whether it violated any ethical rules in Montana, and he makes the woman seem smart, if shady, for having exploited her position of public trust for personal gain.

Krakauer rightly takes the time to explain how it is not the victim's responsibility to "press charges" or determine whether and how law enforcement officials do their jobs. "In fact," Krakauer writes, "the criminal justice system gives victims no direct say in the matter," and he correctly points out that it is the responsibility of police and prosecutors to enforce the law irrespective of the fact that a victim does not want criminal charges to be pursued.<sup>43</sup> But he fails to add that schools are similarly obligated to address civil rights matters on campus even if a victim does not wish to pursue a formal complaint because civil rights injuries, by their nature, harm entire communities. This is why, when racist violence happens on campus, students of all "types" feel injured. The same response should occur when sexist violence happens, but it does not, in part because people like Krakauer, who have a platform to inform the public that sexist violence is as much a civil rights issue as racist violence, fail to communicate this simple point.

Rather than explaining why it is important to understand sexual assault as a civil rights issue, Krakauer conveys the opposite idea: that sexual assault is a private problem, to be resolved by private decision-making. In one section, for example, he quotes a university official saying that "if a victim says, 'I do not want this brought to the police,'" the university will honor that request and keep the incident secret.<sup>44</sup> Krakauer should have seized that moment to point out that because sexual assault is both a crime in the "real world," and a civil rights matter on campus, it is obviously a public, not a private, concern, and should be subject to public, not private, resolution, oversight and accountability.

Krakauer obviously understands that sexual assault is a crime, but why he misses the civil rights nature of sexual assault is perplexing, and whatever his explanation, it taints the whole book because the compelling stories from real victims who suffered terrible injustices come off as cranky carping rather than serious narratives about violations of important rights. Had he written the victims' stories through a civil rights lens, their voices would have been elevated and the book itself would have been established as the first widely available true story about how why our failure to understand violence against women and girls as a collective problem has contributed to profoundly high rates of sexual assault on campus and in larger society.<sup>45</sup>

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42. KRAKAUER, *supra* note 1, at 226.

43. *Id.* at 77

44. *Id.* at 131.

45. David Cantor, et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct* (Sept. 21, 2015),

By depriving the reader of a deeper understanding of the issue, *Missoula* waters down the very nature of what justice means, especially for women seeking redress on campus. Indeed, throughout the book, Krakauer presumes that rape on campus *should* be handled under student discipline codes, rather than civil rights laws. Which makes me wonder: what does Krakauer think should happen when a black Muslim woman is raped on the basis of her race, religion and sex? Should a school respond *equitably* under civil rights laws for the race and religion parts, and *inequitably* under non-civil rights laws, for the sex part? How would that even work with a single incident?

Many schools have second-class sexual assault policies in place, in addition to first-class civil rights policies,<sup>46</sup> but victims are generally unaware of the ways the policies differ, or that the second-class policies do not require “equitable” treatment. The second-class policies are typically long, and confusing, and they nowhere explain that victims who report incidents under Title IX can have their cases “downgraded” for second-class treatment, without the victim’s knowledge. Nor are victims informed that OCR cannot provide recourse for violations of rights when they occur under generic sexual misconduct policies because OCR only has jurisdiction to review violations of civil rights laws, such as Title IX.<sup>47</sup>

Krakauer could have said that because Title IX affords victims much better, “equitable,” redress, victims and their families are wise to insist in writing that school officials apply Title IX, and only Title IX, when sexual assault happens. The importance of ensuring *equitable* treatment cannot be

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[https://www.aau.edu/uploadedfiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf](https://www.aau.edu/uploadedfiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf) (more than one in four female undergraduates at 27 different universities report being sexually assaulted).

46. See, e.g., Columbia University, *Essential Policies for the Columbia Community*, <http://www.essential-policies.columbia.edu/gender-based-misconduct-policies-students>; *Student Sexual Assault Policy*, UNIVERSITY OF MICHIGAN, <https://studentsexualmisconductpolicy.umich.edu/> (last visited May 21, 2016); UNIVERSITY OF DELAWARE, *Sexual Misconduct Policy* (July 1, 2015), available at <https://sites.udel.edu/sexualmisconduct/files/2015/08/FINALSexual-Misconduct-PolicyJuly-2015-1-217elf5.pdf>; *Sexual Misconduct and Other Forms of Power-Based Personal Violence*, VANDERBILT UNIVERSITY, [http://www.vanderbilt.edu/student\\_handbook/sexual-misconduct/](http://www.vanderbilt.edu/student_handbook/sexual-misconduct/) (last visited May 21, 2016); *Student Sexual Misconduct Policy*, GEORGIA INSTITUTE OF TECHNOLOGY, <http://policylibrary.gatech.edu/student-affairs/student-sexual-misconduct-policy-change> (last visited May 21, 2016); *Student Conduct Code*, University of Oregon, <http://policies.uoregon.edu/vol-3-administration-student-affairs/ch-1-conduct/student-conduct-code> (last visited May 21, 2016).

47. See e.g., *Letter from Office for Civil Rights, Department of Education Docket Number 07142234 (August 20, 2014)* (responding to a complaint filed against St. Louis University and declined jurisdiction on the grounds that OCR has no authority to review violations of victims’ rights that occur when complaints are addressed on campus under the SaVE Act rather than Title IX).

overstated as it means sex-based civil rights harms will be redressed under the same first-class legal standards as civil rights harms that occur on the basis of other protected class categories such as race, color, or national origin.<sup>48</sup>

Krakauer also should have pointed out that in 2013 Congress passed a first-of-its-kind law authorizing (albeit unconstitutionally) schools to address sexual assault and other forms of gender-based violence under “second-class” policies, without complying with Title IX, and in a manner that evades the scrutiny of government oversight agencies such as the OCR. Although many schools had such policies in place prior to 2013,<sup>49</sup> the new law, popularly known as the “Campus SaVE Act” (“SaVE”),<sup>50</sup> made “second-class” treatment of women legal by expressly allowing schools to apply less protective, inequitable legal standards *only* in matters involving sex-based violence. All other forms of class-based violence remained protected by the gold standards of civil rights laws.

Unless he lived under a rock, Krakauer would have known about SaVE because Congress was actively debating the bill while he was writing *Missoula*. Any author writing about campus sexual assault, but especially one purporting to write a well-researched book, should have known that Congress was poised to enact a new federal law that, for the first time since Title IX’s enactment in 1972, would authorize schools to subject victimized women to “second-class” treatment.<sup>51</sup> In a sense, SaVE can be compared to the Supreme Court’s 1896 *Plessy v. Ferguson* decision, which was interpreted as allowing states to establish “separate but equal” schools for black children.<sup>52</sup> Of course, *Plessy* was later effectively overturned as unconstitutional in *Brown v. Board of Education*,<sup>53</sup> and *Plessy* and SaVE address very different issues, but SaVE allowed schools not only to segregate out sex-based violence for separate treatment, but also to apply unequal legal standards.<sup>54</sup> Most significantly, SaVE replaced Title IX’s mandate of “equitable” treatment and replaced it with the word “fair,” thus expressly permitting inequitable treatment.<sup>55</sup>

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48. See *supra* note 19.

49. See Murphy, *supra* note 8.

50. 20 U.S.C. 1092(f) (2012); 34 CFR 668.46 (2015); The Campus SaVE Act is also known as the 2013 Clery Act Amendments, and the 2013 Violence Against Women Reauthorization Act.

51. See Petition for Writ of Mandamus & for Equitable Relief, *supra* note 10 (this was a federal lawsuit filed by me and Bernice Sandler, PhD, which details the numerous ways that SaVE permits the second-class treatment of women).

52. 163 U.S. 537 (1896).

53. 347 U.S. 483 (1954).

54. See *supra* note 39.

55. Murphy, *supra* note 15.

SaVE was introduced into Congress in mid-April 2011, only days after the DOE released the DCL, which provided new clarity on the obligation of schools to address sexual assault and other gender-based violence under civil rights laws, and to apply Title IX's "equitable" legal standards.<sup>56</sup> The DCL was widely celebrated by victim advocates,<sup>57</sup> but universities were generally unhappy.<sup>58</sup> Hence, when I learned that SaVE was introduced into Congress only days later, I was naturally suspicious because victims have little lobbying power compared to the industry of higher education,<sup>59</sup> and I knew that advocacy groups had not asked for, drafted, or submitted any proposed language to Congress regarding campus sexual assault.

When I and other advocates expressed concerns about the ways that SaVE would weaken Title IX, the bill was tacked onto the Violence Against Women Reauthorization Act, which is a big funding bill, and advocates went silent.<sup>60</sup> Unwary advocates initially supported SaVE because they were told it would codify the DCL,<sup>61</sup> and an early version of the bill looked promising because it included important provisions from the DCL, such as the mandate that victims receive "equitable" treatment, and that the "preponderance of evidence" standard of proof be applied in redress proceedings. But those provisions were later removed, as one Congressman made clear when he thanked a congressional committee for amending the bill:

The majority bill said that college campuses must provide for 'prompt and equitable investigation and resolution' of charges of

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56. See *supra* note 39.

57. Allie Grasgreen, *Call to Action on Sexual Harassment*, INSIDE HIGHER ED (April 4, 2011), [https://www.insidehighered.com/news/2011/04/04/education\\_department\\_civil\\_rights\\_office\\_clarifies\\_colleges\\_sexual\\_harassment\\_obligations\\_title\\_ix](https://www.insidehighered.com/news/2011/04/04/education_department_civil_rights_office_clarifies_colleges_sexual_harassment_obligations_title_ix) (quoting the director of a leading campus security organization who described the DCL as "a significant advancement for the victims of sexual violence and preventing sexual violence. . . that. . . will better protect [victims and] better ensure that they have [justice and] access to protections in an educational environment").

58. See Jake New, *Guidance or Rule Making?*, INSIDE HIGHER ED (Jan. 7, 2016), <https://www.insidehighered.com/news/2016/01/07/senators-challenge-legality-us-guidance-campus-sexual-assault> (quoting Senator James Lankford, chairman of the Senate Subcommittee on Regulatory Affairs and Federal Management, stating that "[c]olleges and universities across the nation . . . view the [April 4, 2011] Dear Colleague letter[] as improperly issued guidance that require[s] constitutionally questionable and ill-conceived policies. . .").

59. Jon Collins, *Higher Ed Lobbyists: Growing Presence, Growing Power*, CBS NEWS (Nov. 13, 2008), <http://cbsnews.com/news/higher-ed-lobbyists-growing-presence-growing-power> (noting in 2008 the dramatic increase in higher education lobbying since the 1990s when members of Congress began treating higher education as a private good, rather than a public good, and that almost 68 million dollars was spent by higher education lobbyists in 2008 alone, the sixth highest spending on lobbying by any industry).

60. Murphy, *supra* note 15.

61. *Id.*

violence or stalking. This would have codified a proposed rule of the Department of Education that would have required imposition of a civil standard or preponderance of the evidence for what is essentially a criminal charge, one that, if proved, rightly should harm reputation. But if established on a barely ‘more probable than not’ standard, reputations can be ruined unfairly and very quickly. The substitute eliminates this provision.<sup>62</sup>

SaVE was filed as an amendment to the Higher Education Act, under which Title IX was enacted, hence SaVE posed a significant risk that the law would be construed as weakening Title IX because an amendment to one federal law usually affects all related laws.<sup>63</sup> This was a particularly serious concern given that SaVE did not include language typically included in new laws to ensure the courts would not interpret SaVE as an expression of congressional intent to weaken Title IX. For example, in 1994, Congress amended the General Education Provisions Act (GEPA) to add language specifying that nothing in GEPA “shall be construed to affect the applicability of Title VI of the Civil Rights Act of 1964, Title IX of Education Amendments of 1972, Title V of the Rehabilitation Act of 1973, the Age Discrimination Act, or other statutes prohibiting discrimination, to any applicable program.”<sup>64</sup> The Department of Education then interpreted GEPA to mean that if there were a conflict between the requirements of GEPA and the requirements of Title IX, the requirements of Title IX would override any conflicting provisions.<sup>65</sup> Similarly protective language was left out of SaVE, thus rendering Title IX vulnerable to the argument that Congress meant to weaken Title IX by enacting SaVE.

The bill was signed into law in March 2013 and was scheduled to take effect one year later.<sup>66</sup> During that year, many schools changed their policies to adopt SaVE’s worse standards while I, with the help of Dr. Bernice Sandler (well-known as the “Godmother of Title IX”), drafted a federal lawsuit to enjoin SaVE from being enforced on any campus on the grounds that it violated women’s equal protection and due process rights, and that

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62. Testimony of Senator Charles Grassley, Iowa, 158 Cong Rec. S 2761, Congressional Record, Sen., 112th Congress, 2nd Session Senate, April 26, 2012; Violence Against Women Reauthorization Act of 2011, Reference: Vol. 158, No. 61.

63. *Watt v. Lsk*, 451 U.S. 259, 267 (1981); *see also* *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001).

64. 20 U.S.C. § 1221(d) (2012).

65. *See* U.S. DEPARTMENT OF EDUCATION, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, (2001), <https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf>

66. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89–92 (2013) (modified Section 485(f) of the Higher Education Act of 1965).



Congress lacked authority to regulate violence against women.<sup>67</sup> My local counsel in D.C. filed the suit in federal court two weeks before SaVE was scheduled to take effect, and the court allowed the suit to proceed one day before SaVE's effective date of March 7, 2014.<sup>68</sup>

It is difficult to imagine that Krakauer was unaware of SaVE, or the lawsuit I filed, considering that he was fully aware of, and wrote repeatedly about, the DCL.<sup>69</sup> Had he done adequate research, he could have informed his readers that a new federal statute threatened to undermine the DCL because a statute trumps an interpretive "letter" from an oversight agency. Instead, Krakauer wrote about the DCL only that it had "decreed" that schools take certain steps in response to sexual assault, such as using a "preponderance of evidence" standard of proof.<sup>70</sup>

Krakauer described the "preponderance of evidence" as a radical new requirement because "most universities" prior to the DCL were using a more onerous "clear and convincing evidence" or "beyond a reasonable doubt" standard of proof.<sup>71</sup> Krakauer got this critical issue wrong. Over 80% of schools were using the preponderance standard before the DCL was issued.<sup>72</sup> Krakauer could have confirmed this fact with a phone call to the DOE. He also could have mentioned that Congress removed the "preponderance" standard and "equitable" treatment" for women in the SaVE Act, but he said nothing.

*Missoula's* silence about SaVE is perplexing because SaVE was very much in the news when Krakauer was writing *Missoula*. My lawsuit to stop SaVE was being litigated in federal court for an entire year, during which time numerous briefs were filed by me and by lawyers for the Department of Justice. Likewise, regulations related to SaVE were being debated and promulgated in Washington D.C.; regulations that were approved at the end of October 2014 and ameliorated *some*, but not all, of the inequities I identified in my lawsuit as unconstitutional.<sup>73</sup>

The lawsuit I filed against SaVE specifically implicated the University of Virginia, Harvard Law School, and Princeton University because OCR investigations were then pending against all three schools in cases of mine that had been filed years earlier alleging significant noncompliance with

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67. Petition for Writ of Mandamus & for Equitable Relief, *supra* note 10.

68. Murphy, *supra* note 15.

69. *Id.* at 87, 179.

70. *Id.* at 87.

71. *Id.* at 87, 179.

72. Stacy T. Khadaroo, *Feds Warn Colleges: Handle Sexual Assault Report Properly*, THE CHRISTIAN SCIENCE MONITOR (Sept. 2, 2011), [http://www.msnbc.msn.com/id/44376767/ns/us\\_news-christian\\_science\\_monitor/t/feds-warn-colleges-handle-sexual-assault-reports-properly](http://www.msnbc.msn.com/id/44376767/ns/us_news-christian_science_monitor/t/feds-warn-colleges-handle-sexual-assault-reports-properly).

73. 79 Fed. Reg. 62751 (Oct. 20, 2014); 34 C.F.R., 668.

Title IX. I filed suit not only to challenge the constitutionality of SaVE itself, but also because those investigations would be negatively affected if SaVE's "second class" legal standards were applied retroactively to OCR investigations that were still pending at the time of SaVE's enactment.

My OCR case against the University of Virginia was filed in 2012; cases against Harvard and Princeton were filed in 2010.<sup>74</sup> The University of Virginia had already adopted the preponderance standard in response to a different OCR case I won against them in 2010.<sup>75</sup> Harvard and Princeton were still using a standard akin to "clear and convincing" evidence, but they changed their policies to adopt the preponderance standard during the year when my lawsuit was pending.<sup>76</sup>

After all schools put preponderance standards in place, my lawsuit was resolved in a decision that held SaVE could have "no effect" on Title IX because Congress did not directly amend Title IX.<sup>77</sup> It was an important victory, but other problems were brewing because, following the filing of my lawsuit, a new bill was introduced into Congress to directly amend and weaken Title IX. Popularly known as the Campus Accountability and Safety Act ("CASA"),<sup>78</sup> the bill is still pending as of June, 2016. If enacted, CASA will weaken Title IX<sup>79</sup> by, among other things, allowing generic disciplinary policies to interfere with Title IX and mandating that schools teach and disseminate to students *criminal law definitions*, rather than civil rights definitions, of gender-based violence.<sup>80</sup> Disseminating criminal law definitions will inhibit students from understanding the important ways that criminal law terms such as "sexual assault" and "non-consent," differ significantly from Title IX's definition of an actionable offense, which requires only that a sex-based offense be "unwelcome." "Unwelcome" is "equitable" because it is a subjective test that honors women's autonomy and exclusive authority over their bodies by asking only whether they *wanted* sexual contact.<sup>81</sup> By contrast, criminal law and university definitions of

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74. Murphy, *supra* note 15.

75. OCR docket no., U.Va. 11-10-2086 (on file with author).

76. Matthew Q. Clarida & Madeline R. Conway, *Univ. Announces New Sexual Assault Policy Including Central Office, 'Preponderance of the Evidence' Standard*, THE HARVARD CRIMSON (July 3, 2014), <http://www.thecrimson.com/article/2014/7/3/new-sexual-assault-policies/>; Nicole Mulvaney, *Princeton University Incorporates New Sexual Assault Policies into Student Handbook*, NJ.COM (Sept. 29, 2014), [http://www.nj.com/mercer/index.ssf/2014/09/princeton\\_university\\_incorporates\\_new\\_sexual\\_assault\\_policies\\_into\\_student\\_handbook.html](http://www.nj.com/mercer/index.ssf/2014/09/princeton_university_incorporates_new_sexual_assault_policies_into_student_handbook.html)

77. *Doe v. United States Dep't of Health and Human Serv.*, 85 F. Supp. 3d 1, 3-4 (D.D.C. 2015).

78. Campus Accountability and Safety Act, S. 590, 114th Cong. (2015).

79. *Id.* at § 2 (20).

80. *Id.* at § 125.

81. *Sexual Harassment: It's Not Academic*, U.S. DEP'T OF EDUC. (Sept. 2008),

“non-consent” are inequitable because they ask not only whether a victim “consented,” but also whether an offender mistakenly *believed* the victim consented.<sup>82</sup>

Even trendy “affirmative consent” rules are inequitable in the way that they devalue women’s autonomy and bodily integrity by allowing an accused student’s alleged *mistake* to trump a perfectly credible victim’s *actual* non-consent.<sup>83</sup> This legal sleight-of-hand is not possible under Title IX’s “unwelcomeness” standard, yet many universities have adopted “affirmative consent” policies despite their derogatory effect on Title IX’s guarantee of “equitable” redress.<sup>84</sup>

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<http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html>. “Unwelcome” is defined as conduct the student “did not request or invite . . . and [that the student] considered the conduct to be undesirable or offensive. The age of the student, the nature of the conduct, and other relevant factors affect whether a student was capable of welcoming the sexual conduct. A student’s submission to the conduct or failure to complain does not always mean that the conduct was welcome.” *Id.*

82. See *People v. Mayberry*, 542 P. 2d 1337 (Cal. 1975), for an example of a criminal law definition of non-consent that permits an offender’s mistake to override a victim’s actual non-consent; see *Gender-Based Misconduct*, STONEHILL.EDU (June 24, 2014), [www.stonehill.edu/files/resources/2014-07-02-s114-gender-based-misconduct-policy.pdf](http://www.stonehill.edu/files/resources/2014-07-02-s114-gender-based-misconduct-policy.pdf), for an example of a university policy that permits the same harmful treatment of women’s autonomy. Consent to sexual activity includes consideration of whether an offender considered “the words or actions of the [victim] to have demonstrated agreement between them to participate in the sexual activity.” *Id.*

83. See e.g., 2016 Cal. Stat. AB1778. California’s new “affirmative consent” law (Section 67386 of the Education Code) which clearly permits a “reasonable mistake” as to consent defense in campus proceedings by forbidding the accused to assert such a defense only where: (A) The accused’s belief in affirmative consent arose from the intoxication or recklessness of the accused; or (B) The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant affirmatively consented. Another section forbids the mistake defense only when the accused “knew or should reasonably have known” that (A) The complainant was asleep or unconscious; (B) The complainant was incapacitated due to the influence of drugs, alcohol, or medication, so that the complainant could not understand the fact, nature, or extent of the sexual activity; or (C) The complainant was unable to communicate due to a mental or physical condition. *Id.* These provisions leave the door wide open for the accused to assert a mistake defense in virtually all circumstances because he can simply say as to the first category of ostensible restrictions, “my defense did not arise from the victim’s intoxication or my recklessness and I took reasonable steps to ascertain that she did consent.” *Id.* As to the second category, the accused can say, “I did not know, nor should I reasonably have known” that the victim was [fill in the blank with whatever facts the victim reports about why she lacked capacity to make a decision about sexual contact]. *Id.*

84. Janet Halley, *The Move to Affirmative Consent*, SIGNS (Apr. 25, 2016), [http://signsjournal.org/currents-affirmative-consent/halley/#\\_edn9](http://signsjournal.org/currents-affirmative-consent/halley/#_edn9). In footnote 3, Halley states that several universities that recently amended their policies to adopt affirmative consent standards. *Id.* at n.3. Halley also notes that New York legislators recently passed legislation mandating that colleges and universities adopt affirmative consent standards, and that the American Law Institute is poised to generate a model law adding an affirmative consent law to the Model Penal Code. *Id.* at 1. The absence of organized

By requiring dissemination of criminal law definitions on campus, rather than promoting and mandating use of the “unwelcomeness” standard, CASA, if it becomes law, will deter reporting and incentivize violence by misleading students to believe that “mistaken” rapes are permissible. CASA will also require schools to enter into memoranda of understanding with civilian law enforcement agencies,<sup>85</sup> which will inhibit public awareness of sexual assaults on college campuses, and prevent effective oversight of schools’ responses, because police reports previously considered to be public records will be treated as confidential school records.

Sponsored by women Senators Claire McCaskill (D. MO.) and Kirsten Gillibrand (D. N.Y.), and promoted as a good bill for victims, CASA eventually met with opposition, after which the Safe Campus Act (“SCA”),<sup>86</sup> was introduced by Representatives Matt Salmon (R. AZ.) and Pete Sessions, (R. TX.) Likely propped up as a straw-man bill to pressure CASA’s opponents to withdraw their complaints about CASA or face enactment of a worse bill, SCA would do even more harm to Title IX as it would, *inter alia*, forbid schools to impose interim punishments on offenders, or even redress cases on campus unless the victim first files a police report. SCA would also allow schools to apply a burden of proof more onerous than mere preponderance, and would empower accused students, but not victims, to file lawsuits against schools for noncompliance with SCA.<sup>87</sup>

CASA, SCA and SaVE are all profoundly harmful to women’s safety and equality because they nowhere require “equitable” treatment for victims, and they preclude victims from seeking recourse with the OCR or the courts when their rights are violated on campus.<sup>88</sup> Most schools fail to inform students about these important issues, or even whether a particular victim is *receiving* “equitable” redress under Title IX rather than inequitable redress under a second-class misconduct policy.

Amidst all the congressional obfuscation, it remains the case that schools are mandated to comply with Title IX’s “equitable” treatment mandate, which means schools that adopt and apply less than fully “equitable” redress policies, even if they believe they have congressional permission to do so, will face lawsuits under Title IX, and under the same equal protection and

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feminist opposition to these subversive attempts to codify and legitimize men’s authority over women’s bodies is disturbing.

85. S. 590, 114<sup>th</sup> Cong. § 124 (2015).

86. Safe Campus Act, H.R. 3403, 114th Cong. (2015).

87. *Id.* at 6–16.

88. It is interesting that CASA’s lead sponsors are Democrats, while SCA was filed by Republicans. SaVE was a bipartisan initiative with leadership in both parties supporting the idea that victims should be subjected to second-class redress on campus. And while it may seem surprising to some that Democrats failed to stand up for strict enforcement of Title IX, the ugly fact remains that sexual access to women’s bodies has long been a bipartisan entitlement.

due process doctrines that I used to challenge the SaVE Act. The legal argument is simple. Because schools are mandated by federal civil rights laws to provide “equitable” redress for “sex-based” violence, they have no discretion to frame and redress such violence using second-class definitions and misconduct policies. To do so would be discriminatory under Title IX, and unconstitutional under equal protection and due process doctrines, especially if violence “based on” other protected class categories, such as race and national origin, continues to be redressed and defined equitably under civil rights laws.

Krakauer’s silence about the fact that Congress was busily proposing and passing laws related to the topic he was writing about is strange (SCA hadn’t been proposed by the time his book was finished). Equally curious is his decision to single out Harvard for criticism as a “prime example” of a school with an especially bad sexual assault policy.<sup>89</sup> This is wildly off the mark as Harvard is one of the only elite schools to reject SaVE,<sup>90</sup> adopt Title IX’s “unwelcomeness” standard,<sup>91</sup> and refuse to codify more onerous definitions, such as “non-consent” and “affirmative consent.”<sup>92</sup> Harvard’s policy also guarantees victims *equitable* treatment, on par with students who experience other types of civil rights harms based on race, color, or national origin,<sup>93</sup> although a “frequently asked questions” (FAQ) page was recently added to Harvard’s website that could be construed as weakening certain provisions of Harvard’s policy.<sup>94</sup> For example, the FAQs describe Title IX’s “unwelcomeness” standard as a subjective *and* objective test, requiring analysis of a “totality” of the circumstances. This is a troubling development as it could be interpreted as allowing offenders to assert a “mistake” defense. That the FAQ page segregates out only sex-based offenses for application of the watered-down definition of “unwelcomeness” suggests that Harvard may have bestowed upon itself discretionary authority not to treat women equitably even as students from all other protected class categories who suffer civil rights injuries will continue to receive fully equitable redress.

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89. KRAKAUER, *supra* note 1, at 343.

90. HARVARD UNIVERSITY, *Harvard University Sexual and Gender-Based Harassment Policy* (Sept. 11, 2015), available at [http://titleix.harvard.edu/files/titleix/files/harvard\\_sexual\\_harassment\\_policy.pdf?m=1461104544](http://titleix.harvard.edu/files/titleix/files/harvard_sexual_harassment_policy.pdf?m=1461104544).

91. Wendy Murphy, *Harvard Gets It Right on Sexual Assault*, THE BOSTON GLOBE (Dec. 2, 2014), <https://www.bostonglobe.com/opinion/2014/12/02/harvard-gets-right-sexual-assault/mmM8hZRndrtP9MAPXwOvtM/story.html>.

92. Halley, *supra* note 84.

93. HARVARD UNIVERSITY, *supra* note 90.

94. HARVARD UNIVERSITY, *Frequently Asked Questions Concerning Harvard University Sexual and Gender-Based Harassment Policy and Procedures for Handling Complaint Involving Students* (Apr. 12, 2016), available at [http://titleix.harvard.edu/files/sexual\\_harassment\\_policy\\_procedures\\_faqs.pdf?m=44686376](http://titleix.harvard.edu/files/sexual_harassment_policy_procedures_faqs.pdf?m=44686376).

All universities should refuse to subject women to disparate treatment, and have one unified policy in place that spells out how all forms of harassment, assault and violence that occur “on the basis of” a protected class category will be treated *exactly* the same. A single “equitable” policy sends the right message that women are not second-class citizens, and that sexist violence, like racist violence, is not only a personal offense that affects the individual victim; it is also a collective *civil rights* offense that injures the entire campus community. When all students feel injured by sexual assault, all students will become more invested in prevention, and incidence rates will decline.

Parents are increasingly aware of the importance of sending their daughters (and sons) to schools that respect women’s safety and equality, by promising and delivering fully equitable redress when sexual assault happens. Schools that subject women to second-class treatment will inevitably suffer financial losses and lower enrollment rates when they become known as less desirable and less safe educational venues for women.

Krakauer does not seem to understand this, though he does have a knack for writing impactful descriptions of the ways victims are mistreated, which will be eye-opening for parents who assume that school officials *want* to treat their daughters with respect. But brilliant writing is small solace to those who will read *Missoula* hoping to better understand women’s rights on campus. Words are no less dangerous for their artistic flare if they leave out or misstate important truths. In addition to leaving out information that could help victims, Krakauer includes information about the litigation tactics that helped offenders prevail in their cases, and in that sense, *Missoula* is a kind of guidebook that will enable more offenders to evade responsibility for their actions.

With the turn of each page, I felt increasingly duped by *Missoula*’s promise to help victims, eventually reaching a point where I was literally damaging the book by bending corners of pages and underlining whole sections in red ink to make sure I could return quickly to the bad parts, and cite them in this review. Like many book lovers, I resist marking pages and bending corners because it feels sacrilegious. But this book needed fierce page-bending and lots of red ink. Subversive books are especially dangerous because it is hard for most readers to appreciate what is wrong and what is missing, especially when a book is written by a reputable writer, and the cover declares its own integrity by claiming the book was “meticulously” reported.<sup>95</sup>

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95. Similarly subversive federal lawsuits have recently been filed on behalf of victims by attorneys who have asked the federal courts to enforce the Campus SaVE Act (“SaVE,” also known as the 2013 Clery Amendments, and the 2013 Violence Against Women Reauthorization Act) rather than, or in addition to, Title IX. Murphy, W., When Lawyers Forget Equitable, March 26, 2016, Patriot Ledger, Quincy MA, *available at*

I probably would have been satisfied to see a single paragraph explaining the differences between civil rights laws and generic student misconduct codes, and why the differences matter. But it is not there. I find this almost as shocking as the complete absence of the word “*equitable*” in a book that purports to be about injustices endured by victims whose right to “*equitable*” treatment was denied. Stranger still, Krakauer includes no key word index in the back so that a reader could easily see whether terms like “*equitable*” and “*civil rights*” appear anywhere in *Missoula*, and if so, whether they are correctly defined, etc.

Krakauer does include little-known information about how Missoula officials conspired to cause injustice for victims, such as making sure that certain people were appointed to or removed from positions of influence.<sup>96</sup> He also understands that some cops, journalists, school officials and lawyers, are biased against victims, but he does not explain how victims and their parents can figure out who is really on their side, and that they should be suspicious of even *seemingly* unbiased people, like “*independent*” advisors, and counselors at rape crisis centers, because most of the advisors and counselors to whom schools refer victims are compensated by or have signed contracts with schools to provide services.<sup>97</sup> “*Independent*” investigators

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<http://stopabusecampaign.com/when-lawyers-forget-equitable/>. This is a disturbing trend for many reasons, including that SaVE, by its terms, explicitly forbids private lawsuits, and authorizes schools to subject victims to second-class treatment on campus compared to Title IX. By contrast, Title IX is enforceable through private lawsuits and affords victims much better legal protections on campus. Which raises the question: why would a victim’s lawyer *want* a federal judge to enforce SaVE? Why wouldn’t a victim’s lawyer fiercely argue that the second-class treatment of victims under SaVE is unconstitutional, and inequitable? One possible explanation is that the victims’ lawyers are acting covertly to protect the interests of schools, while appearing to advocate for women’s rights. No doubt the victims themselves are unaware that their lawsuits, even if successful, will hurt the cause of equality for all women by legitimizing in federal court decisions the endorsement of SaVE’s second-class policies. This troubling endorsement of SaVE is also present in a recently released investigative report regarding Baylor University’s response to sexual misconduct. Baylor University Board of Regents Findings of Fact, *available at* <http://www.baylor.edu/rtsv/doc.php/266596.pdf>. The investigation was conducted by a law firm that specializes in, *inter alia*, defending schools against discrimination lawsuits. The firm was hired by Baylor to examine Baylor’s handling of sexual assaults. The firm’s lengthy final report not only nowhere uses the phrase “*women’s civil rights*,” it also shockingly recommends that Baylor incorporate and enforce the SaVE Act as part of its Title IX policy. Because the report criticizes many aspects of Baylor’s mistreatment of women, and includes numerous phrases that appear sympathetic to victims, it is difficult for the general public to understand why the report is so dangerously subversive in its refusal to frame violence against women as a civil rights issue; in its utter silence on the fact that Title IX must be enforced exactly on par with other civil rights laws, such as Title VI; and in its disturbing endorsement of the SaVE Act’s second-class treatment of victimized women.

96. KRAKAUER, *supra* note 1, at 230, 309-313.

97. NOT ALONE, *Together Against Sexual Assault, Building Partnerships with Local Rape Crisis Centers: Developing a Memorandum of Understanding*, *available at*

should also generate parental skepticism because they may not be independent at all.<sup>98</sup> Even lawyers purporting to be experts who specialize in the representation of victims in Title IX lawsuits should be carefully vetted because many lawsuits have been filed on behalf of victims that, disturbingly, ask courts to enforce SaVE's second class standards, but do *not* ask for enforcement of either Title IX's equitable treatment mandate, or women's constitutional rights to equal protection and due process.<sup>99</sup>

While *Missoula* correctly describes many ways that victims experience injustice, including through the harmful tactics of defense attorneys, it does little to teach victims how to protect themselves even as it teaches offenders and their lawyers how to use those tactics to win. For example, Krakauer writes about one victim who allowed investigators to search her phone, presumably because she had nothing to hide and felt no guilt about what was in there.<sup>100</sup> But neither did she realize that all of her text messages would be handed to the defense attorney so he could conduct a fishing expedition.<sup>101</sup>

Asking a student to reveal irrelevant personal information during an investigation is an old defense trick that works well as an intimidation tactic. Many victims provide information without hesitation because they assume they have no choice and they want to cooperate. But they do not understand the consequences of turning over a cell-phone, just as they do not understand how submitting to a rape kit exam could reveal to the defense utterly irrelevant biological proof that they had sex with other men prior to the night in question. When victims later learn that deeply personal information such as past sexual conduct, mental health issues, STIs, etc., was cavalierly handed to the defense, they become reluctant to testify for fear that information will unfairly be released to the school community and to the public at large.

Krakauer acknowledges that violations of privacy rights undermine justice for victims, as when he describes how 29,000 text messages from one victim's phone were scoured by defense attorneys, who used them to attack her credibility.<sup>102</sup> But Krakauer never tells the reader that victims can avoid privacy intrusions by not turning over cell phones and laptops for unbridled

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<https://www.notalone.gov/assets/mou-rape-crisis-centers.pdf>.

98. For example, the law firm of Kollman & Saucier, P.A. was hired by the University of Maryland to conduct an "independent" Title IX investigation in a case of mine, yet the firm's website describes the firm as specializing in the representation of businesses facing harassment and discrimination claims. *Harassment, Discrimination, and Retaliation*, Kollman & Saucier, P.A., <http://www.kollmanlaw.com/our-expertise/harassment-discrimination-and-retaliation/> (last visited May 22, 2016).

99. Wendy J. Murphy, *When Lawyers Forget Equitable*, STOP ABUSE CAMPAIGN (Mar. 26, 2016), <http://stopabusecampaign.com/when-lawyers-forget-equitable/>.

100. KRAKAUER, *supra* note 1, at 266.

101. *Id.*

102. *Id.*



inspection, and by objecting to all rape kit testing that might reveal irrelevant, constitutionally protected private information, and by not answering *any* irrelevant questions about past sexual conduct, past alcohol use, prescription drug use, etc. The defense cannot unfairly use irrelevant personal information against a victim if the information is not divulged in the first place.

Krakauer says nothing about these obvious strategies that could make a real difference for victims, but he does point out that *suspects* can protect *their* personal information by not turning over cell-phones, and deleting certain text messages so that investigators see only selective information, such as friendly text messages from the victim after a sexual assault.<sup>103</sup> Krakauer could have shown keen insight if he had pointed out the way that some offenders intentionally communicate with victims after an assault, and they use friendly and romantic language, to create a trail of evidence suggesting there was no rape. For a victim who was incapacitated and is having trouble remembering what happened, and who wants badly to believe she was not raped, a friendly text message can be a welcome sign. But as soon as the “friendly-after-the-fact” evidence is created, the pretext ends. If the victim then reports a sexual assault, those texts will be used by the perpetrator to prove there was no rape because “a real victim would not befriend her attacker the next day.” Thus, the defense argument will go, “she falsely accused the guy because he stopped showing interest.” Krakauer nowhere indicates an appreciation for the fact that some offenders are deviously tactical in their efforts to avoid punishment.

Krakauer himself seems almost tactical in the way he gratuitously violates a victim’s privacy by revealing in several pages very personal details about her past involvement in therapy after she was bullied in junior high school.<sup>104</sup> A responsible writer sincerely concerned about revictimization would not have revealed such sensitive information, even though it came out, unjustly, in a public trial. Although Krakauer used pseudonyms, many people know the identities of the victims in *Missoula*. Thus, Krakauer should have known better than to include details about the mental health treatment of a young woman who has obviously suffered a great deal of trauma in her young life.

To be fair, Krakauer also pointed out that one of the accused students had a history of bad behavior, and it is in the book even though it was deemed inadmissible and confidential under a federal educational privacy law known as FERPA.<sup>105</sup> But the bad behavior involved disorderly conduct on campus,

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103. *Id.*

104. *Id.* at 236, 244-245.

105. *Id.* at 235, *citing* The Family Educational Rights and Privacy Act, 20 U.S.C. §1232g (2012); 34 C.F.R. § 99 (2015).

while the guy was drunk and “running amok.”<sup>106</sup> The fact that the guy was punished for “running amok” can hardly be described as “private” because it happened in public, but Krakauer accepts without criticism that the behavior was confidential under FERPA. Because Krakauer writes about the victim’s therapeutic counseling only one page later, he had to know that the victim’s emotional problems, caused by bullying she experienced in *school*, were also protected by FERPA, not to mention the Constitution.<sup>107</sup> Yet Krakauer says nothing about FERPA when discussing the victim’s troubles, leaving the reader to assume, incorrectly, that FERPA grants privacy rights to public drunkenness for men, but not to confidential mental health care for women.

Krakauer could have at least pointed out that the “running amok” evidence *should* have been admitted after the guy called several witnesses to the stand to testify that he had a reputation for being a perfect gentleman. Even in the strict venue of a criminal courtroom, where Title IX does not apply and the rules do not require “equitable” treatment of victims, an accused has no right to prohibit testimony about his prior bad acts if he elects to introduce evidence of his good character. Simply put, once the good character door is opened, bad character evidence walks through.

Despite major missteps, *Missoula* will make parents of college students uncomfortable, which is a good thing. The book comes at a time when campus sexual assault is occurring at such high rates that women are significantly more likely to be victimized in college than even in the hyper-masculine environment of the military.<sup>108</sup> While this may seem shocking to some, the disparity may be tied to the fact that the military spends money on, rather than receives money from, women and men, so there’s no similar institutional financial loss when the military discharges offenders the way there is when universities expel offenders. Nor does the military face the same “liability disparity,” discussed above, that incentivizes college officials to side with offenders over victims in order to avoid lawsuits for “wrongful discipline.” In the military, neither the accused nor the victim has meaningful capacity to sue because of the *Feres* doctrine, which grants the military near total immunity against lawsuits.<sup>109</sup> Hence, military sexual assault rates are

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106. KRAKAUER, *supra* note 1, at 235.

107. Wendy Murphy, *Privacy Rights in Mental Health Counseling: Constitutional Confusion and the Voicelessness of Third Parties in Criminal Cases*, 39 J. AM. ACAD. PSYCHIATRY LAW 387 (2011).

108. Cantor, *supra* note 45, (more than 25% of female undergraduates report being sexually assaulted); U.S. COMMISSION ON CIVIL RIGHTS, *Sexual Assault in the Military* 6 (Sept. 2013), *available at* [http://www.usccr.gov/pubs/09242013\\_Statutory\\_Enforcement\\_Report\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf) (6.1% of female service members reported being the victim of unwanted sexual contact).

109. *Feres v. United States*, 340 U.S. 135 (1950).

lower, in my opinion, because there's less of a financial incentive to favor offenders.

This is not to say the cultural construct of masculinity is not causally related to how boys and men view and treat girls and women, which Krakauer plainly understands. For example, he recognizes that pornography plays a role in sexual violence when he writes about one offender who developed his understanding of female sexuality from Internet porn, and that porn "led him to believe that . . . frenetically jabbing his fingers into [a woman's] vagina and anus" would elicit the "supreme female expression of sexual pleasure."<sup>110</sup> Krakauer then writes poignantly in the same section "A rapist does not care what a woman wants. If he did, he would not rape."<sup>111</sup> I would have added that some schools do not care what women want, either. If they did, they would stop spending money on silly programs and focus on prevention by treating all violence against women as a civil rights issue under Title IX in every case, no exceptions, once and for all.

Krakauer's insight into the harmful role of pornography in boys' lives is important, but the issue deserved more than four sentences in a book like *Missoula* because most boys, hence most offenders on college campuses, learn about sex from watching pornography, and they see it for free on their phones at younger ages than ever before. Well-known Wheelock College Professor, Dr. Gail Dines,<sup>112</sup> notes that readily available violent pornography has completely changed men's understanding of how they should relate sexually to women, and has made the violent degradation of women's bodies seem normal and pleasurable.<sup>113</sup> By the time boys get to college, they are acclimated to behave like the men they see in porn, and they land at their dorm rooms ready to practice what they have learned. Unwary freshmen girls have no advance warning that seemingly nice boys are looking for ways to act out sexual "fantasies" they saw in cyber-space. Add to that powder-keg the fact that college students are free from parental oversight; alcohol is everywhere; hormones are raging; fraternities and other "male-clubs" on campus incite bad behavior and a pack mentality; and readily available rape drugs make it exceedingly easy to get away with sex offenses because drugged victims cannot reliably recall what happened.

Some rape drugs make victims' bodies behave sexually, while their minds are completely unaware of what is going on.<sup>114</sup> Women who cannot

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110. KRAKAUER, *supra* note 1, at 93.

111. *Id.*

112. *Biography*, GAIL DINES, <http://www.gaildines.com> (last visited May 22, 2016).

113. Eric W. Owens et al., *The Impact of Internet Pornography on Adolescents: Review of the Research*, 19 *SEXUAL ADDICTION & COMPULSIVITY: THE JOURNAL OF TREATMENT & PREVENTION* 99 (2012).

114. Karl L. R. Jansen & Lynn Theron, *Ecstasy (MDMA), Methamphetamine, and Date Rape (Drug-Facilitated Sexual Assault): A Consideration of the Issues*, 38 *J.*

remember what happened, or whose bodies appear to be enjoying the attack, are “perfect victims” for men hoping to escape responsibility for their actions. Drugged victims are often told that charges are impossible to prove, on campus or in the criminal justice system, because forensic tests are usually negative given that rape drugs dissipate quickly in blood and urine.<sup>115</sup> Victims are not advised that drugs *never* dissipate in hair, and that reputable labs can determine, even many weeks after an incident, that a significant dose of specific drugs entered a victim’s body at a particular moment in time.<sup>116</sup>

Even without forensic proof of drugging, schools are free to conclude that drugging occurred based on physical symptoms, behavioral evidence, and memory deficits, yet *Missoula* is awkwardly silent on this important issue despite the high prevalence of drugs as a weapon of rape on campus.<sup>117</sup> In fact, Krakauer discusses one case involving a woman named “Kelsey Belnap” who was gang-raped by four football players, and whose symptoms strongly indicate drugging,<sup>118</sup> yet Krakauer says nothing about drugs.

When Krakauer is not silent, the words he uses, linguistically speaking, are at times excellent. For example, he appropriately uses anatomical words and phrases such as, “stabbing his fingers painfully into her vagina,”<sup>119</sup> and, “withdrew his penis from Washburn’s vagina and ejaculated. . . .”<sup>120</sup> Other times his word choice is oddly erotic as he describes offenses using terms

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PSYCHOACTIVE DRUGS 1 (2006).

115. ADAM NEGRUSZ, DETECTION OF “DATE-RAPE” DRUGS IN HAIR AND URINE, FINAL REPORT (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/201894.pdf>; Denise Ryan, *Hair test portends dramatic shift in date-rape trials: toxicologist*, VANCOUVER SUN (Nov. 4, 2010), [http://endingviolence.org/wp-content/uploads/2014/03/portends\\_dramatic\\_shift\\_in\\_date-rape\\_trials.pdf](http://endingviolence.org/wp-content/uploads/2014/03/portends_dramatic_shift_in_date-rape_trials.pdf).

116. P. Kintz et al., *Testing for GHB in hair by GC/MS/MS after a single exposure. Application to document sexual assault*, 48 J. FORENSIC SCI. 195 (2003).

117. DEAN G. KILPATRICK ET AL., DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY (July 2007), *available at* <https://www.ncjrs.gov/pdffiles1/noj/grants/219181.pdf>.

118. KRAKAUER, *supra* note 1, at 38–44. The victim’s state of mind is described variously as follows: “. . . my body was like a limp noodle. I could not move;” “drifted ‘in and out of awareness;” “blacked out throughout pretty much the entire thing;” “remember bits and pieces of what happened;” “. . . began to drift up to the surface of unconsciousness,” after which, “the first thing she recalled was being ‘in the bathroom, throwing up in the bathtub. . . .” These classic signs of drugging were reported to medical and law enforcement officials only a few hours later, yet, (if Krakauer’s silence on the topic is any indication) not a single person in the medical or law enforcement community thought to test the victim’s blood or urine for the presence of rape drugs. If a victim could sue for forensic malpractice, Belnap would have a very strong case against the sexual assault nurse and the police because she arrived at the emergency room well within the window of opportunity to test her blood and urine for rape drugs. (See note 95).

119. KRAKAUER, *supra* note 1, at 104.

120. *Id.* at 153.

such as, “came in his hand,”<sup>121</sup> “thrust,”<sup>122</sup> “climax,”<sup>123</sup> and “fellatio.”<sup>124</sup> In one particularly inapt use of language, he writes that a rape kit examination is an “exceedingly humiliating experience,”<sup>125</sup> which is awkward because “humiliating” connotes that victims feel shame, and a lack of self-respect. Yet a woman’s vagina being examined by a medical professional is no more “humiliating” than when a man’s prostate is being examined for signs of cancer. It may be “re-traumatizing” for a victim when she is being examined vaginally in the aftermath of rape, and this should not be taken lightly, but Krakauer is wrong to imply that a victim should feel shame, or a loss of self-respect. It would have shown more compassion to imply that victims should feel strong and proud, not humiliated, when they submit to vaginal examinations in an effort to hold their attackers accountable.

In another part of the book, Krakauer again shows poor word choice when he cites an expert witness for the proposition that victims benefit psychologically from “retribution” against and “punishment” of the offender.<sup>126</sup> This claim, left undisputed, perpetuates the myth that women are vindictive. In fact, while punishment is certainly appropriate, some studies show that many victims want only peace and access to justice, not retribution, because being heard and being respected are more important than exacting punishment.<sup>127</sup>

As if to hammer home the myth that women have a disproportionate tendency toward malevolence, Krakauer cites several examples of false rape allegations, but not a single case where a guilty rapist’s false allegation of innocence caused a victim to suffer severe harm, such as quitting school, or committing suicide.<sup>128</sup> Krakauer actually opens *Missoula* with a line from

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121. *Id.*

122. *Id.* at 92, 94.

123. *Id.* at 257.

124. *Id.* at 105.

125. *Id.* at 18.

126. *Id.* at 237. Krakauer does include a lengthy quote from Dr. Judith Herman later in the book, in which Dr. Herman describes that victims want “acknowledgement and support,” and an “opportunity to tell their stories in their own way,” but this quote appears on page 268, nearly thirty pages later and in a context unrelated to the idea of retribution and vindictiveness, where Krakauer is discussing the distress victims endure during trial when forced to answer questions in a way that obfuscates the truth.

127. David Ford, *Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships*, 25 LAW & SOCIETY REVIEW 313 (1991); DAVID A. FORD & MARY J. REGOLI, THE INDIANAPOLIS DOMESTIC VIOLENCE PROSECUTION EXPERIMENT: FINAL REPORT (1993).

128. Petula Dvorak, *Stop blaming victims for sexual assaults on campus*, WASH. POST (Feb. 24, 2014), [https://www.washingtonpost.com/local/stop-blaming-victims-for-sexual-assaults-on-campus/2014/02/24/b88efb1e-9d8f-11e3-9ba6-800d1192d08b\\_story.html](https://www.washingtonpost.com/local/stop-blaming-victims-for-sexual-assaults-on-campus/2014/02/24/b88efb1e-9d8f-11e3-9ba6-800d1192d08b_story.html); Sophie S. Thomas, *Campus Police Chief Who Said Most Sexual Assaults ‘Aint Rape’ Is Back on Duty*, BROADLY (Nov. 13, 2015), [https://broadly.vice.com/en\\_us/article/campus-police-chief-who-said-most-sexual-](https://broadly.vice.com/en_us/article/campus-police-chief-who-said-most-sexual-)

an article on false rape accusations,<sup>129</sup> and while the article itself concludes that false claims are rare, the line he cites makes a more nuanced point, and as an opening sentence in a book on campus sexual assault, an equivocal sentence about false rape claims seems odd. If Krakauer really meant to debunk the myth that victims routinely lie about rape, he could have chosen a quote from one of the many articles that say something like: “the myth that women routinely lie about rape is itself a prolific lie.” But he did not, even though false reports of other crimes, such as auto theft, are much more common than false reports of rape,<sup>130</sup> and people who report car thefts are not subject to the same degree of public skepticism as rape victims.

Krakauer also fails to balance the length of his storytelling in the narrative accounts of the assaults he features in the heart of the book. For example, in one section where he writes about a case involving a victim named Cecilia Washburn and an accused student named Jordan Johnson, Krakauer dedicates three pages to the prosecutor’s opening statement,<sup>131</sup> and five and a half pages to the opening remarks of the defense.<sup>132</sup> At other places he seems more balanced in the number of pages used to describe the assaults, but overall, the ink scale favors the stories of accused offenders.

Maybe some of the book’s unfair biases can be blamed on the experts Krakauer relied on, who did not tell him things he needed to know. For example, Krakauer cites Rebecca Roe when explaining why the criminal justice system allows defense attorneys to make untrue statements in court with impunity, while prosecutors get in trouble for the same behavior.<sup>133</sup> Roe explains that the reason for the “double standard” is that if a prosecutor engages in misconduct and a defendant is convicted, the defense can appeal the conviction,<sup>134</sup> but when a defense attorney engages in the same misconduct, and a defendant is acquitted, the prosecution cannot appeal the acquittal because of the Fifth Amendment’s prohibition against double jeopardy. This is a correct statement in the sense that judges tolerate more misconduct from defense attorneys because they know there is little appellate court oversight to address whether a judge correctly handled such misconduct, but it is an incomplete explanation.

Prosecutors have tremendous authority to deprive individuals of liberty,

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assaults-aint-rape-is-back-on-duty.

129. David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010).

130. Donna Lyons & Anne Teigen, NATIONAL CONFERENCE OF STATE LEGISLATURES, *Auto Theft Prevention* (Dec. 2008), available at <http://www.ncsl.org/print/cj/autothftreport.pdf>.

131. KRAKAUER, *supra* note 1, at 255–58.

132. *Id.* at 259–64.

133. *Id.* at 266.

134. *Id.*

hence, their compliance with due process is essential as it ensures a proper balance between individual freedom and government power. Prosecutors who lie violate due process and face serious sanctions, as they should, including suppression of evidence and dismissal of charges. Similar sanctions are obviously not available to the prosecution when a defense attorney lies. This disparity has created for defense attorneys a kind of systemic permission to lie.<sup>135</sup> The code of professional conduct should be used to punish prosecutors *and* defense attorneys equally when they lie, but if there is to be a double standard, the code should bear down harder on defense attorneys precisely *because* they cannot face the same sanctions that prosecutors face for the same misconduct.

Krakauer does not see anything wrong with the way the criminal justice system favors offenders that cannot be chalked up to the sometimes painful realities of a process that values individual rights even at the expense of the fair treatment of victims. In a general sense, he is right. But on the issue of rape in particular, he is wrong. The criminal justice system imposes disproportionately unfair burdens on rape victims that are not mandated by the Constitution, and are not imposed on robbery victims, or victims of white-collar crime, or any other crimes.<sup>136</sup> Indeed, society fiercely protects, and makes heroes out of, people who do their civic duty and report crimes that they witness or suffer themselves, such as purse-snatching and drunk-driving. We would think it audacious and disrespectful to ask a citizen witness to a drunk driving accident to turn over their counseling files before being allowed to testify about what they saw.

Only rape victims are subjected to “special” burdens that impose needlessly on their lives, well-being and privacy, as a “price” for participating in the criminal justice system.<sup>137</sup> And while rape victims are made to bear “special” burdens, their attackers enjoy “special” benefits to which people accused of other crimes are not entitled. For example, accused rapists can force rape victims to reveal whether they have ever made a false allegation of rape<sup>138</sup> but accused robbers cannot force robbery victims to reveal whether they have ever made a false allegation of robbery. In a book that opens with a quotation about false rape allegations, you would think

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135. Krakauer appears to understand that defense lies are commonplace, as he states that “the system promotes chicanery, outright deceit, and other egregious misconduct. . .” *Id.* at 242. He’s right, but he then states, “In the adversarial system, . . . [d]ue process trumps honesty and ordinary justice.” *Id.* On this point Krakauer is wrong, and he should have emphasized not only that there is no due process right to lie, but also that defense lawyers who do so should be disbarred.

136. Wendy Murphy, *Gender Bias in the Criminal Justice System*, 20 HARVARD WOMEN’S L.J. 14 (1997).

137. MURPHY, *supra* note 7.

138. *See, e.g.*, *Commonwealth v. Bohannon*, 376 Mass. 90 (1978).

Krakauer might have pointed out this well-known injustice.<sup>139</sup>

Maybe Krakauer set out intentionally to write a fairly superficial book. If so, my critique is heavy-handed, though if he had spent just one paragraph saying something like, “all forms of targeted violence against students based on things like race, ethnicity, sex, sexual orientation, religion, disability, etc., should be addressed equitably, under the same civil rights policy,” I would have been less distraught about all the missing and misleading information in *Missoula*. But Krakauer allows the reader to remain ignorant about women’s civil rights, and to conclude, incorrectly, that violence against women on college campuses is no more a civil rights issue than the theft of a laptop.<sup>140</sup>

If there is new insight in *Missoula* it comes from the book’s focus on small town politics, and the almost creepy overvaluation of a third-tier school’s football program. Which is not to say that football does not matter—it does—even though some of us do not understand the allure, as was made embarrassingly clear to me a few years back when I gave a talk at the University of Alabama and my host glared at me when I asked the name of their mascot, and how their football team had done that year (they won the national championship). It is almost impossible for some people to believe that I did not know what a Nittany Lion was before the Penn State scandal, or that I thought Joe Paterno played for the NFL and died decades earlier. College sports is a big deal, and student athletes have significant value on campus. But the flip side of value is influence, which is why I see student athletes as having great potential to be effective leaders in sexual assault prevention, on campus and in the larger society.

I believe in the goodness of men and boys. Nobody is born a rapist, and most guys who do bad things to women are from “nice” families. Krakauer gets this point across very well when he writes about the glowing testimony of friends and teachers who support the accused students and sincerely did not believe they were capable of rape.<sup>141</sup> It is very difficult for some people to believe that a seemingly nice guy did something horrible, but, as Krakauer points out by wisely citing Dr. Judith Herman, it is much easier to disbelieve the victim.<sup>142</sup> Indeed, studies show that people subconsciously choose not to believe victims simply because it makes them feel better about the men in

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139. Brett Erin Applegate, *Prior (False?) Accusations: Reforming Rape Shields to Reflect the Dynamics of Sexual Assault*, 17 LEWIS & CLARK L. REV. 899, 907-10 (2013).

140. For example, Krakauer describes school officials as conducting “disciplinary investigations,” rather than “civil rights investigations,” and refers to the rules that prohibit violence against women as derived from the “Student Conduct Code” rather than “civil rights” laws. KRAKAUER, *supra* note 1, at 176-77.

141. *Id.* at 208-213, 219 *citing* a prosecutor’s observation that so many letters of support had been submitted on behalf of the perpetrator that, “you’d think we were talking about whether he should get the most valuable player award. . .”

142. *Id.* at 189-90.



their own lives.<sup>143</sup>

If Krakauer makes one point clear, it is that we are not reaching boys at a young enough age to interrupt whatever is making them believe, as men, that it is a good idea to impose themselves sexually on women. Talking about the issue more, with all the boys and girls we know, is a good first step. A high school football player recently knocked on my door, and asked if I would buy a discount card for local stores, as part of a fundraiser for the team. I told him I would, but only if he took a pledge to raise awareness about sexual assault and sexual harassment with his teammates, and only after he promised to tell his coach that he wanted the team to be leaders, and to be known on campus as the guys who want all relationships to be healthy and respectful. He looked at me funny, but he listened. And he said he would talk to his coach. So I bought a ticket. It is a start, especially in my town where, like most high schools, programming on dating violence, sexual assault and sexual harassment is nonexistent.

Girls also need guidance so they can better understand their rights, and they need the language to call what happens to them a “civil rights” injury so they can ask for and receive the best possible redress when sexual assault happens. Even ostensibly good ideas like anti-bullying laws are problematic because most bullying of girls is, in fact, sexual harassment.<sup>144</sup> Calling sexual harassment bullying is not only misleading, it renders invisible the very nature of sex-based offenses as civil rights problems for women and girls. It also causes victims to seek ineffective redress under toothless anti-bullying laws rather than highly enforceable, fully equitable, and serious civil rights laws, such as Title IX.

Krakauer had a chance to shine a light on many issues, but for the most part, he made things seem needlessly murky. He even clouded the truth on basic information like how widespread the problem of sexual assault really is. In one section for example, he bemoans the unreliability of data on reporting rates for sexual assault in the larger society,<sup>145</sup> but says nothing about sexual assault reporting rates on campus. And he never mentions that schools are mandated to count and report to oversight agencies all crimes and all civil rights violations, but that most schools go out of their way to mislabel and undercount the truth because they think parents are more likely to send their children to schools with low numbers.<sup>146</sup> In fact, parents these

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143. Daniel M Rempala & Frank J. Bernieri, *The Consideration of Rape: The Effect of Target Information Disparity on Judgments of Guilt*, 35 J. OF APPLIED SOCIAL PSYCHOL. 536 (2005).

144. Wendy Murphy, *Sexual Harassment and Title IX: What's Bullying Got To Do With It*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 305 (2011)

145. KRAKAUER, *supra* note 1, at xiii-xiv.

146. Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL., PUB. POL'Y & LAW 1 (2015), available at

days know that a school with low numbers could be less safe than a school with high numbers because high numbers are an indication that problems are not being swept under the rug. Of course, high numbers also mean high numbers, and notwithstanding the benefits of institutional transparency, high numbers are a problem, especially if they remain high year after year. Oddly low numbers, on the other hand, could mean a school has found a sneaky way to undercount the truth, but Krakauer does not touch the subject of strategic undercounting even though it is a pervasive problem that leads to an increase in incidence rates.<sup>147</sup>

Despite recognizing that underreporting in general is a major problem, Krakauer accepts at face value the claim that Missoula had 80 reported rapes over three years. He never says how many incidents were reported at the University of Montana during the same time period, or how many of the 80 were campus-related, but he points out that 80 is “about average” compared to similar places.<sup>148</sup> I assume he means 80 is average for “reported,” cases, rather than incidents that *actually occurred*, because 80 would be out of line with reality on the number of actual incidents. But he does not even point this out, or explain the difference between “reported” and “occurred,” and why the difference matters. Krakauer does recognize that measuring incidence rates is difficult,<sup>149</sup> but he does not explain that the primary reasons why victims do not report include fear of being blamed and shamed, and concern that it “isn’t worth it” because nothing meaningful will happen to the offender.<sup>150</sup> These fears are legitimate, but Krakauer does not connect the dots between victims’ reluctance and the millions of incidents of sexual violence perpetrated in the United States every year, from which only a small percentage are reported and prosecuted.<sup>151</sup> Krakauer instead declares, without support, that when a person is charged with rape, they “could be sent

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<http://www.apa.org/news/press/releases/2015/02/sexual-assaults.aspx>.

147. Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), [http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?\\_r=0](http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?_r=0); <https://publichealthwatch.wordpress.com/2014/04/13/crisis-response-what-are-americas-colleges-doing-to-address-sexual-assault-and-is-it-working/>; <http://www.theepochtimes.com/n3/1022107-reports-of-campus-sexual-violence-increase/>.

148. KRAKAUER, *supra* note 1, at 9.

149. KRAKAUER, *supra* note 1, at xiii.

150. Kelsey Ruane, *Sexual Violence on College Campuses: Individual Experience and Collective Silence Among Survivors*, JMU SCHOLARLY COMMONS (Mar. 2014), available at <http://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=1002&context=madrush>.

151. See, REBECCA M. BOLEN & DIANA E.H. RUSSELL, THE EPIDEMIC OF RAPE AND CHILD SEXUAL ABUSE IN THE UNITED STATES 211 (2000) (stating that 40% of adults report being sexually victimized as children, which translates into an annual incidence rate in the many millions, yet as many as 85% of victims do not report the crime).

to prison for life.”<sup>152</sup> Such hyperbole has no place in a book like *Missoula* because a minute’s worth of research would have revealed to Krakauer that only 2-3% of offenders spend even one day behind bars, a number that has not changed in decades.<sup>153</sup> Data showing the pervasive failure of America’s criminal justice system to deter sexual violence through the tertiary effect of prosecution and punishment should have been highlighted in a book about rape and injustice, as should the fact that strict enforcement of Title IX offers victims a better chance at justice because it mandates *equitable* treatment. When *equity* is done, injustice is impossible.

As discussed at length above, one of the most important ways that Title IX’s guarantee of *equity* ensures justice for victims is that it forbids schools to presume the greater credibility of one student over the other, though such presumptions *are* permissible during criminal trials because of the presumption of innocence doctrine. Under civil rights laws on campus, by contrast, a presumption that favors offenders over victims is prohibited as *inequitable*. Likewise, characterizations such as “sexual assault” and “affirmative consent” are *inequitable* because they deprive victims of 100% authority over their bodies, and impose disproportionately unfair legal burdens in the redress of sex-based violence, compared to the redress of violence when it occurs “on the basis of” other protected class categories, such as race and national origin.

Krakauer has not a clue about why *equitable* credibility presumptions, like *equitable* definitions of offenses, *matter*. Indeed, he describes, without analysis, the case of one student who was ultimately found not responsible in a campus proceeding because he said he made a mistake about a victim’s non-consent.<sup>154</sup> Krakauer could have pointed out why allowing an offender’s alleged “misunderstanding” to trump a victim’s actual non-consent is *inequitable* under Title IX, but he did not address the issue at all. This passive approval of harmful legal standards occurs in other places, too, as when Krakauer writes at the outset of a gang-rape of a woman who was “too drunk to resist.”<sup>155</sup> Krakauer implies by such language that a woman has a legal

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152. KRAKAUER, *supra* note 1, at 225.

153. MAJORITY STAFF OF THE SENATE JUDICIARY COMMITTEE, *THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE* (1993), available at <http://library.niwap.org/wp-content/uploads/2015/VAWA-Lghist-SenateJudiciary-6.93.pdf> (only 2% of rapists see even one day behind bars); see also *Reporting Rates, RAPE, ABUSE & INCEST NATIONAL NETWORK*, <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited May 23, 2016) (only 3% of rapists spend even one day behind bars and the majority of reported rapes are never prosecuted).

154. KRAKAUER, *supra* note 1, at 187, *quoting* a dean of students at the University of Montana who declared an accused student offender not responsible for an act of sexual violence, even after finding the victim credible, because it was “a case of differing perceptions and interpretations of the events in question.”

155. *Id.* at 7.

*duty* to resist, which is incorrect. There is no such duty for victims, under criminal or civil rights laws. There is only a duty on the part of all people not to rape.

Krakauer muddies the Title IX legal water even further by failing to point out that when a woman's capacity to decide whether sexual contact is "welcome" is diminished by an intoxicant, it is illegal for a person to have sexual contact with her body. This is not to say all drunk sex is a crime, though it may well be in theory, but then so is every incident of unreported underage drinking, unreported illegal possession of marijuana, etc. The important point that Krakauer misses is that when an individual lacks knowing, intelligent, and voluntary capacity to make a decision about whether sexual contact is "welcome," the one seeking to impose himself on that person's body bears a duty of restraint *and* a risk of punishment if he chooses to act. The "unwelcoming" receiver of harm has no duty to do anything and is considered vulnerable to, not liable for, the actions of another.

Although Krakauer shows some compassion for victims with diminished capacities, and an appreciation for why criminal law codes should not require proof of unconsciousness in order to prove rape of an incapacitated person,<sup>156</sup> he should have explained why Title IX's "unwelcomeness" standard is much fairer to victims with diminished capacities compared to standards of "non-consent" and even "affirmative consent." As discussed above, "unwelcomeness" asks only about the victim's subjective state of mind and capacity, while consent-based rules allow offenders' mistaken perceptions of a victim's incapacitation to override even an indisputably credible victim's report of total incapacitation.

Some argue that "unwelcomeness" is unfair to accused students because students can too easily lie about whether an act was "unwelcome." But students can just as easily lie about non-consent as "unwelcomeness," and valuing offenders' lies about "mistakes" does nothing to prevent malicious lies by victims about non-consent. Furthermore, officials have discretion to conclude that a student's report of "unwelcome" conduct is not sufficiently credible, by a preponderance of the evidence, to justify sanctions. Permitting a mistake defense adds nothing to a school's ability to conclude that unwelcomeness was not adequately established.

Policies that permit mistake defenses ignore the fact that offenders lie all the time. For this reason alone schools should preclude mistake defenses simply because they incentivize offenders to lie, while indulging the irrational view that an incapacitated victim can somehow be simultaneously incapable of self-protection, yet fully responsible for causing another person to "mistakenly" rape her body.

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156. *Id.* at 42-43.

Opponents of “unwelcomeness” object to the application of a subjective standard, yet ignore the fact that “unwelcomeness” is the established legal standard in all discrimination cases, and nobody ever complains that “unwelcomeness” is unfair when applied in the redress of racist and religious discrimination, etc. How can a legal standard be unfair only when the victim is female?

Consider this illustration: assume that a group of students is standing around making jokes about Jews, and one drunk Jewish student laughs in response, arguably indicating the joke was “welcome.” If one of the jokers then slaps the drunk Jewish student in the face while addressing him with an anti-Semitic epithet, the slapper cannot be vindicated in a campus civil rights proceeding by claiming that because the victim laughed at the joke, he mistakenly thought the Jewish victim welcomed the slap and wanted to be insulted with a religiously offensive epithet. If all the jokers say they thought the Jewish student welcomed the words and conduct, should school officials find that no civil rights violation occurred, even if the victim credibly reports that the slap and the epithet were unwelcome and offensive?

Surely some sincerely mistaken individuals in some cases should not be punished, and civil rights laws provide adequate protection against unfair punishment by requiring proof that an act was both subjectively “*unwelcome*,” and “*offensive*,” which includes an objective component.<sup>157</sup> This means that an unwelcome act might not lead to punishment at all if school officials determine that it does not rise to a level of offensiveness enough to merit a civil rights sanction. Finally, if schools wish to accord some degree of consideration to a truly sincere *mistaken* offender, they can do during the punishment phase, when assessing the degree of “offensiveness,” rather than watering down the subjective value of “unwelcomeness” itself. For incidents deemed low-level on the “offensiveness” scale because of a truly sincere mistake, a minor sanction might be appropriate, while the same type of offense, if committed by a student who lacks credible proof of having made a sincere mistake, would deserve harsher punishment.

Human behavior can be murky, sexual behavior especially so. And sometimes we do things we really do not want to do, including in sexual encounters. That is not rape, and it is not a Title IX violation either, even though one could argue about whether welcomeness can be present in the same mental space as reluctance. Ideally, welcomeness should be treated like pregnancy. You are either pregnant or you are not. You either welcomed the conduct, or you did not. An equivocal victim, by definition, is not a welcoming victim and an observer’s mistaken opinion about whether a woman is pregnant no more causes actual pregnancy than does a mistaken

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157. OFFICE FOR CIV. RTS, U.S. DEP’T OF EDUC., *Sexual Harassment: It’s Not Academic* (Sept. 2008), available at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html>.

observer's opinion about welcomeness transform a woman's reluctance to desire.

Theoretical debates aside, the focus in *Missoula* should have been on the ways that a woman's fundamental right to exclusive authority over her body is undermined by criminal laws and generic sexual misconduct policies on campus, precisely because neither regime requires the *equitable* treatment of victims. As repeatedly discussed throughout this article, only strict compliance with Title IX's equity mandate offers victims hope that justice is possible.

Krakauer does not seem to appreciate why the lack of fully equitable treatment for victims produces the very results he bemoans as unacceptable. Nor does he express much concern about institutional accountability even though institutions enjoy significant insulation from public accountability and oversight. He chalks up most of the injustices in the criminal justice system to a legitimate need to hold the government to a high burden before depriving a person of liberty. But Krakauer never points out that even in criminal cases where the rights of the accused are paramount, there is no constitutional right to cause gratuitous harm to victims. Nor does he acknowledge that in campus civil rights proceedings, the *victims'* rights predominate. Most importantly, Krakauer never says that schools cannot lawfully *choose* to treat *only* sex-based violence *inequitably*, while victimized students from other protected class categories enjoy fully *equitable* treatment. Krakauer should have stated repeatedly throughout *Missoula* that without fully equal treatment for victims, and strict enforcement of Title IX's equity mandate, women will never be safe or equal in education.

Sex discrimination in education, especially violent discrimination such as dating abuse and sexual assault, prevents women's equal access to education, promotes incivility, and destroys the integrity of the educational experience for all students. The very idea of unequal redress for the most severe expression of sex discrimination, is, itself uncivilized, and makes the following statement, crafted by me for use in this article, the most salient point by far:

Schools that address all forms of discrimination, harassment and violence under a single unified civil rights policy demonstrate the highest regard for women's equality, autonomy, and bodily integrity. Schools that segregate out violence against women for separate redress under second-class misconduct policies demonstrate profound disrespect for all women.

It is that simple, and in 350 pages, Krakauer does not see the point at all.

# REVIEW OF HANS-JOERG TIEDE'S *UNIVERSITY REFORM: THE FOUNDING OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS*

JONATHAN R. ALGER<sup>1</sup>

A century ago, our country was undergoing a period of dramatic change marked by increasing industrialization, urbanization, immigration, and new forms of specialization of labor. In what we now refer to as the “Progressive Era,” institutions of higher education were also evolving rapidly to meet the changing needs of a society in flux. In his new book, *University Reform: The Founding of the American Association of University Professors*,<sup>2</sup> Hans-Joerg Tiede discusses how faculty members were struggling at this time of rapid change to define their roles not just in teaching and research, but also in governance.

One hundred years after its founding, Tiede’s scholarly approach provides a fresh, well-documented analysis of the larger societal and higher education context in which the American Association of University Professors (“AAUP”) came into being. He brings this story to life through an in-depth review of the early cases and personalities that shaped the Association in its formative years. While the specific political and cultural disputes of the era were not identical to those of our current time, many of the issues of this period have clear parallels to the challenges in higher education and our society today. For this reason, Tiede’s work will serve as a resource not only for scholars of the history of higher education, but also for researchers and practitioners who seek to gain a long-term historical perspective and context

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2. HANS-JOERG TIEDE, *UNIVERSITY REFORM: THE FOUNDING OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS* (2015) [hereinafter *UNIVERSITY REFORM*]. Tiede is a faculty member at Illinois Wesleyan University. He is also the chair of the AAUP’s Committee on the History of the Association, a member of Committee A on Academic Freedom and Tenure, and the editor of the AAUP’s *Policy Documents and Reports*, eleventh edition.

on important topics such as shared governance, academic freedom, tenure, and due process.

As institutions of higher education (especially major research universities) grew and became more professionalized during this period, Tiede describes how the various constituencies that make up these institutions were struggling to define their positions and authority within a changing landscape. For example, Tiede reminds us that faculty members at the time were not all in tenured or tenure-track positions.<sup>3</sup> In fact, faculty members before this era were not necessarily professionalized or permanent.<sup>4</sup> The current system of faculty ranks began to develop during this time, as the concept of disciplinary specialization took firm hold in the academy.<sup>5</sup> With differences in rank came disagreements about differences in status and authority within the academic governance structure, which might sound very familiar to higher education leaders today. And at a time when white males held virtually all of the positions of power and influence, disparities of race and gender were reinforced in the academy that still haunt higher education today.<sup>6</sup>

Presidents continued to play a central role in overseeing governance, but the composition and character of external governing boards shifted with the addition of many more business leaders and lawyers—professionals who were playing an increasingly powerful role in a modern, industrialized society.<sup>7</sup> These developments foreshadowed battles among these various constituencies about priorities and decision-making that continue to play out today in our colleges and universities.

Tiede argues that the major impetus for the founding of the AAUP was to “promote the professionalization of the professoriate,” with a focus on “changing the balance of power in the American university.”<sup>8</sup> There were concerns at the time about faculty salaries and benefits, as well as retirement ages and protections. The numbers may have changed, but these issues are still very much alive and with us today. Early AAUP leaders were also deeply concerned with the nature and content of outside political influences on the academy—another debate that continues to rage a full century later. Indeed, Tiede’s realistic portrait reminds us that the quaint notion of an isolated ivory tower, untainted by outside influences, has probably never been an accurate representation of America’s colleges and universities.

*University Reform* instead suggests that the founding fathers of the AAUP were not unlike the founding fathers of the American republic, in the

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3. *Id.* at 11.

4. *Id.* at 13.

5. *Id.*

6. *Id.* at 14–15.

7. *Id.* at 11–12.

8. *Id.* at 21.



sense that they were struggling to help define a system of checks and balances to provide a governance system that would protect certain rights (in this case, of faculty members individually and collectively). They were not alone in this endeavor, however. Tiede notes how a variety of national organizations and associations were formed during this same general time period to represent varying interests within the higher education framework (such as the Association of American Universities for research institutions and their presidents in 1900,<sup>9</sup> or the Association of Governing Boards for board members in 1923<sup>10</sup>).

One of the interesting tensions of the time identified by Tiede involved the rise of the Carnegie Foundation for the Advancement of Teaching, which he characterizes as a manifestation of a Progressive Era reform movement to advocate for increased “efficiency” in higher education (efficiency being a watchword of the times as reflected in Frederick Taylor’s theory of “scientific management”).<sup>11</sup> This tension from a century ago reminds us of the ongoing 21st-Century debates about standardization of the curriculum and faculty workloads, and their relationship to efficiency in higher education.

Even within the AAUP, from the start there were tensions among faculty about the Association’s organizational structure, as well as about participation and status within it. Early AAUP meetings were dominated by faculty members from the leading research universities, some of whom sought to exclude faculty members from less “prestigious” institutions.<sup>12</sup> While many of the situations cited as evidence for the need for the AAUP involved individual faculty members and their treatment by forces in and outside of the academy, Tiede asserts that “[t]he argument for organizing an association was . . . based [on] a central Progressive article of faith of the advantages of community over individualism.”<sup>13</sup>

This movement toward a collective voice almost immediately created concerns that a national faculty association would become a narrow-minded “trade union” for professors, an argument that would continue to play out through many decades as the AAUP struggled with the issue of whether and to what extent to engage in collective bargaining with its members.<sup>14</sup> The tension between the individual academic freedom rights of faculty members on the one hand, and the collective interests of the professoriate as a whole on the other, has arguably been a defining characteristic of the AAUP throughout its history.

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9. *Id.* at 10.

10. *Id.* at 175.

11. *Id.* at 45.

12. *Id.* at 79.

13. *Id.* at 87.

14. See AAUP POLICY DOCUMENTS AND REPORTS 321 (11th ed. 2015) [hereinafter AAUP DOCUMENTS AND REPORTS].

For many people in higher education, the AAUP has long been synonymous with the protection and enhancement of the academic freedom rights of individual faculty members. Yet Tiede makes clear that the founders of the AAUP were not necessarily in agreement that academic freedom should be the primary focus of the new organization. John Dewey, for example, initially favored an emphasis on institutional governance and the faculty role within it.<sup>15</sup>

The early leaders also had sharp disagreements over the definition and extent of academic freedom, including whether grounds for dismissal should include issues such as “discourtesy.”<sup>16</sup> These are the types of issues on which the AAUP would proceed to spend many decades to define model policies, as reflected for example in the 1999 statement “On Collegiality as a Criterion for Faculty Evaluation.”<sup>17</sup>

Tiede recounts the early academic freedom cases in considerable detail, illustrating how the AAUP modified its approach over time to the investigation, analysis, and resolution of these cases that would become its hallmark in many respects. These carefully researched accounts reveal that the personalities and biases of early AAUP leaders played a central role in the cases selected and the decisions they ultimately made, just as the personalities and biases of judges on the Supreme Court have made a significant impact on the cases selected and decisions made by that body over time. These early academic freedom cases also offer other parallels to the development of legal concepts. For example, disagreements about the extent to which matters of process and procedure should take priority over substantive judgments mirrored similar arguments in the development of legal standards regarding due process.

*University Reform* also tells a cautionary tale about the protection of academic freedom, reminding us that this history is not one of unalloyed forward progress. Almost immediately after the AAUP’s founding in 1915, World War I and the Red Scare created serious threats to academic freedom in the wake of concerns about patriotism and disloyalty in the academy. The AAUP retreated from its staunch position on this issue, and even retracted some of the principles it had just enunciated in its *1915 Declaration of Principles on Academic Freedom and Academic Tenure*<sup>18</sup> in the subsequent report on “Academic Freedom in Wartime.”<sup>19</sup> Tiede does not pull his punches here; he makes clear that the Association’s leaders were pragmatic in worrying about the future influence of their organization in a society dominated by

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15. UNIVERSITY REFORM, *supra* note 2, at 103.

16. *Id.* at 117.

17. AAUP DOCUMENTS AND REPORTS, *supra* note 14, at 227–28.

18. *Id.* at 3–12.

19. UNIVERSITY REFORM, *supra* note 2, at 147.

patriotic fever. Furthermore, many professors were themselves involved in government as experts of various kinds<sup>20</sup>—a reminder once again that the wall between academe and the society at large has never been solid or impermeable.

Tiede also spells out the fascinating early history of the tensions between the AAUP and the Carnegie Foundation with regard to the development and administration of a pension program known as the Teachers Insurance and Annuity Association (“TIAA”), which would eventually become a critical source of retirement security for many faculty members.<sup>21</sup> While the details of this early history have long since been forgotten by most leaders in higher education, it’s an intriguing example of how alliances can shift over time as circumstances and expectations evolve.

By its own admission, *University Reform* takes on the founding myth of the AAUP and the centrality of academic freedom by describing the Association’s early emphasis on governance and the power dynamics in higher education at the start of the previous century. This history is important to understand, as power dynamics within higher education have been both an organizing force and a source of inherent tensions for many decades. This history does not and should not, however, detract from our understanding of the importance of academic freedom and its importance to the core mission of higher education as a marketplace of ideas. Instead, it provides clear examples of how academic freedom issues and cases have always been inextricably linked to issues of authority and power—and of how these issues and cases have reflected larger societal debates throughout our history.

The evolution of the concept of shared governance in higher education stands in sharp contrast to the governance structures of for-profit corporations and many other types of entities in our society. It reflects the messiness of an educational mission that is all about nourishing free expression, vigorous debate, and the search for truth rather than the maximization of profits or the development of products on an assembly line. Just as Progressive Era leaders searched for ways to make higher education more efficient in their time, political leaders today decry what they perceive as a lack of efficiency in colleges and universities that pride themselves on a certain level of autonomy. Through its longstanding efforts to provide a strong and cohesive faculty voice in these recurring debates, the AAUP has made an important and lasting contribution—while serving as a beacon for an educational mission that, at its best, transcends the political and social currents of any given moment in time.

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20. *Id.* at 169.

21. *Id.* at 201–09.



BETRAYING FREEDOM: A REVIEW OF  
LUKIANOFF'S *UNLEARNING LIBERTY*  
AND POWERS' *THE SILENCING*

WILLIAM E. THRO\*

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INTRODUCTION

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>1</sup>

Those words, written during an existential war, vindicated the rights of a religious minority to dissent from the prevailing orthodox patriotism of the day. Those words, which reversed a Supreme Court decision from three years before,<sup>2</sup> embody Freedom—a self-evident truth that, along with

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1. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).  
2. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

Equality, unites a People and defines the American Nation.<sup>3</sup> If our society abandons either Freedom or Equality, then one must question whether the United States “can long endure.”<sup>4</sup>

Unfortunately, in the second decade of the third millennium, American higher education is betraying Freedom. In a post-modernist era, academe no longer believes in “freedom for the thought we hate.”<sup>5</sup> Instead of creating an environment “where we are comfortable with questioning long held belief in the presence of those who seem different at first but become familiar with each passing moment, word, and deed,”<sup>6</sup> public institutions frequently restrict the speech of students.<sup>7</sup> Instead of encouraging the entire college and university community to “follow the truth wherever it may lead” while tolerating “any error so long as reason is left free to combat it,”<sup>8</sup> colleges and universities punish professors for speech.<sup>9</sup> Instead of implementing institutional policies that promote a market place of ideas, the academe denies the First Amendment rights of student organizations.<sup>10</sup> Instead of pursuing policies promoting both Freedom and Equality,<sup>11</sup> our institutions subordinate or even ignore Freedom in the name

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3. See THE DECLARATION OF INDEPENDENCE ¶ 1 (U.S. 1776) (“We hold these truths to be self-evident: All . . . are created equal; and they are endowed by their Creator with certain unalienable rights”).

4. See Abraham Lincoln, GETTYSBURG ADDRESS ¶ 2 (“Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived, and so dedicated, can long endure”).

5. *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

6. Eli I. Capilouto, Address to the Lexington Martin Luther King Day Celebration, Lexington, Kentucky (Jan. 18, 2016) (transcript available at [https://www.uky.edu/president/sites/www.uky.edu.president/files/MLK\\_Final\\_1-18-16.pdf](https://www.uky.edu/president/sites/www.uky.edu.president/files/MLK_Final_1-18-16.pdf)).

7. The examples are numerous. See Samantha Harris, Speech Code of the Month, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (2016) <https://www.thefire.org/category/speech-code-of-the-month/>.

8. Letter of Thomas Jefferson to William Roscoe (December 27, 1820) (describing Jefferson’s view of the newly created University of Virginia).

9. *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 561–62 (4th Cir. 2011) (Protected speech did not lose First Amendment protection when included in professor’s promotion application and, thus, professor could pursue retaliation claim against public university which denied him a promotion.).

10. See *Gerlich v. Leath*, 2016 WL 360673 (finding Iowa State University violated the First Amendment right of a student organization by refusing to allow the organization to use the Iowa State logo).

11. For public institutions, the Constitution requires the institution to respect both Freedom and Equality. For a discussion of the subtleties of vindicating both values in the particular contexts, see generally William E. Thro, *No Clash of Constitutional Values: Respecting Freedom & Equality in Public University Sexual Assault Cases*, REGENT UNIVERSITY LAW REVIEW (forthcoming 2016); William E. Thro, *The Heart of the Constitutional Enterprise: Affirming Equality and Freedom in Public Education*, 2011 BRIGHAM YOUNG UNIVERSITY EDUCATION AND LAW JOURNAL 571 (2011).

of Equality.<sup>12</sup>

Two recent books illustrate academe's betrayal of Freedom. First, in *Unlearning Liberty: Campus Censorship and the End of American Debate*,<sup>13</sup> Greg Lukianoff, the self-described<sup>14</sup> liberal who serves as President of the Foundation for Individual Rights in Education ("FIRE"),<sup>15</sup>

12. See *infra* notes 27-119 and accompanying text (Discussion of Lukianoff); *infra* notes 120-179 and accompanying text (Discussion of Powers).

13. GREG LUKIANOFF, *UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE* (2012).

14. As Lukianoff describes himself:

I am a lifelong Democrat and have something of a liberal pedigree. I have never voted for a Republican, nor do I plan to. I am one of only a few dozen people honored by the Playboy Foundation for a commitment to free speech; others include Bill Maher, Molly Ivins, and Michael Moore. In March 2010, I received the Ford Hall Forum Louis P. and Evelyn Smith First Amendment Award on behalf of FIRE, which has also been bestowed on Ted Turner, Maya Angelou, and Anita Hill. I have worked at the ACLU and for EnvironMentors, which is an environmental justice mentoring program for inner-city high school kids in Washington, D.C. I have worked on behalf of refugees in Eastern Europe and volunteered for a program educating incarcerated teens in California about the law. I believe passionately in gay marriage, abortion rights, legalizing marijuana, and universal health care. . .

Why is it odd that a liberal should fight for free speech rights? Isn't freedom of speech a quintessentially liberal issue? Some members of the baby boomer generation may be horrified to learn that campus administrators and the media alike often dismiss those of us who defend free speech for all on campus as members of the conservative fringe. While I was once hissed at during a libertarian student conference for being a Democrat, it is far more common that I am vilified as an evil conservative for defending free speech on campus. *Id.* at 6.

15. As Lukianoff describes the organization:

Founded by a conservative-leaning libertarian professor at the University of Pennsylvania (Kors) and a liberal-leaning civil rights attorney in Boston (Silverglate), FIRE is a unique organization in which liberals, conservatives, libertarians, atheists, Christians, Jews, Muslims have successfully worked together for the common cause of defending rights on campus. I am a Democrat and an atheist, our senior vice president is a Republican and Christian, while our legal director, a Democrat and former Green Party activist, works harmoniously alongside our other top lawyers including a Jewish libertarian and a Muslim-raised liberal. I have worked at nonprofits almost all my life and have never even heard of, let alone worked at, a cause-based organization successfully run by people with such different personal politics. But we all agree on free speech and basic rights without hesitation, and we live the benefits of having different perspectives in the office every day. True, it can get a little heated in the office around election season, but we wouldn't have it any other way. At FIRE, we see every day the tribulations of college students who get in trouble for assuming that higher education involves speaking candidly about serious topics, or that telling jokes is always permitted on campus. This book invites you to experience the confusing challenges that students face today. Each chapter opens by putting you in the shoes of a fictional modern student as you progress through high school to the last day of your first semester in college. All of the opening fact patterns are

offers “a theory of how the world of higher education today is harming American discourse and increasing polarization”<sup>16</sup> by revealing “the many ways that today’s university’s violate basic rights and betray the principles that undergird fundamental liberties.”<sup>17</sup> Second, in *The Silencing: How the Left Is Killing Free Speech*,<sup>18</sup> Kirsten Powers, a liberal<sup>19</sup> who contributes to both *USA Today* and *Fox News*, describes how “an alarming level of intolerance emanates from the left side of the political spectrum who express views that don’t hew to the ‘settled’ liberal world view.”<sup>20</sup> “It’s become clear that attempts—too often successful to silence dissent from the liberal worldview aren’t isolated outbursts.”<sup>21</sup> Lukianoff and Powers are the canaries in the coalmine. Together, they sound the alarm about higher education’s betrayal of Freedom.

This review has three parts. Part I discusses Lukianoff’s systematic exposition of how higher education denies free speech, religious liberty, and associational rights. Part II explores Power’s survey of the political left’s efforts to silence, intimidate, and diminish those who disagree with progressive orthodoxy. Part III explains why Higher Education must reverse course and reaffirm its commitment to Freedom. Freedom is essential to (1) achieving the educational benefits of diversity;<sup>22</sup> (2) ensuring “all members of the University community [have] the broadest

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based on real-life stories and will help illustrate the bad lessons that students are learning about what it means to live in a free society—even before they set foot in a classroom. *Id.* at 13-14

16. *Id.* at 12.

17. *Id.* at 12-13.

18. KIRSTEN POWERS, *THE SILENCING: HOW THE LEFT IS KILLING FREE SPEECH* (2015).

19. In her introduction, Powers describes her upbringing as the child of liberal parents in conservative Alaska, her work as a political appointee in the Clinton Administration, and working for New York Governor Cuomo and the New York Democratic Party. Powers, *supra* note 18, at xi-xii. She admits she rarely encountered political conservatives.

20. *Id.* at xiii. Powers says the effort is not limited to “conservatives and Orthodox Christians,” but extends to anyone who deviates “on liberal sacred cow issues.” *Id.* at xiii-xiv.

21. *Id.* at xiv.

22. Contrary to conventional wisdom, the compelling state interest in diversity does not mean a specific percentage of underrepresented minorities. Rather, the compelling state interest in diversity means the educational benefits that flow from having a diverse student body. As the Supreme Court explained:

A university is not permitted to define diversity as “some specified percentage of a particular group merely because of its race or ethnic origin.” “That would amount to outright racial balancing, which is patently unconstitutional.” “Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’ “

*Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013) (citations omitted).



possible latitude . . . to discuss any problem that presents itself;<sup>23</sup> and (3) promoting a “confident pluralism that conduces to civil peace and advances democratic consensus-building.”<sup>24</sup>

#### I. LUKIANOFF’S *UNLEARNING LIBERTY*

Lukianoff believes “[t]he stifling of expression on campus and the resulting consolidation of self-affirming cliques are harmful to higher education and to our country . . .”<sup>25</sup> As he elaborates:

In order for free speech to thrive, students need to experience on a regular basis how open discussion and debate and even random bits of comedy can increase tolerance and understanding more effectively than any speech code, residence hall initiative, or ideological “training” ever could. Modern universities are producing college graduates who lack that experience of uninhibited debate and casual provocation. As a result, our society is effectively unlearning liberty. This could have grave long-term consequences for all of our rights and the very cohesion of our nation. If too few citizens understand or believe in free speech, it is only a matter of time before politicians, activists, lawyers, and judges begin to curtail and restrict it, while other citizens quietly go along.<sup>26</sup>

Lukianoff offers three primary reasons for his thesis.<sup>27</sup> “First, when you surround yourself with people who agree with you and avoid debates, thought experimentation, or even provocative jokes around people you disagree with, you miss the opportunity to engage in the kind of exciting back-and-forth that sharpens your critical thinking skills.”<sup>28</sup> “Second, the deadening of debate and the fostering of self-affirming cliques also promotes a shallow and incomplete understanding of important issues and other ways of thinking.”<sup>29</sup> “Third, and perhaps most importantly, campus censorship poses both an immediate and a long term threat to all our freedoms not just because free speech is crucial to every other freedom, but

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23. University of Chicago, *Report of the Committee on Freedom of Expression* (2015).

24. *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 734 (2010) (Alito, J., joined by Roberts, C.J., Scalia, & Thomas, JJ., dissenting) (quoting Brief of Gays & Lesbians for Individual Liberty as Amicus Curiae in Support of Petitioner at 35, *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010) (No. 08-1371)). See John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587 (2015); See also JOHN D INAZU, *A CONFIDENT PLURALISM* (forthcoming 2016).

25. LUKIANOFF, *supra* note 13, at 10.

26. *Id.* at 12.

27. *Id.* at 10-13.

28. *Id.* at 10.

29. *Id.* at 11.

also because it teaches the wrong lessons about living in a free society.”<sup>30</sup>

Lukianoff proves the primary points supporting his thesis through the narrative of the “modern collegiate experience.” Over the course of eleven chapters, he takes the reader on a journey from the high school student beginning to search for a college through the admissions process, various aspects of the freshman year and ends with students being enlisted in the culture wars. Along the way, Lukianoff, relying almost exclusively on materials from FIRE’s own cases, demonstrates how higher education is betraying freedom and, more significantly, the potential long-term consequences of the betrayal.

Chapter 1, “Learning All the Wrong Lessons in High School,” explores how the betrayal of freedom actually starts in high school.<sup>31</sup> “A shameful level of civic knowledge, in combination with the miserable state of student rights in K-12, leaves students uninformed about the importance of free speech and distressingly comfortable with censorship.”<sup>32</sup> Lukianoff takes this opportunity to provide a concise overview of both the legal landscape<sup>33</sup> and the philosophical foundation for free speech.<sup>34</sup> After discussing polarization and the importance of free speech in the Internet age,<sup>35</sup> Lukianoff draws on John Stuart Mill’s *On Liberty*<sup>36</sup> to critique the culture of censorship on university campus.<sup>37</sup> He concludes the Chapter by stressing seven things that students and parents should know before going to college.<sup>38</sup>

Chapter 2, “Opening the College Brochure,” discusses how institutions impose free speech codes.<sup>39</sup> Although he acknowledges the courts invalidated public university speech codes in the late 1980’s and early 1990’s,<sup>40</sup> Lukianoff argues, “if you dig deeper into university websites and student handbooks, you are likely to find policies seriously restricting free speech.”<sup>41</sup> He focuses primarily on university’s attempts to define “harassment.”<sup>42</sup> The Supreme Court’s leading decision on sexual harassment in higher education adopted a narrow definition of

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30. *Id.* at 12.

31. LUKIANOFF, *supra* note 13, at 15-35.

32. *Id.* at 17.

33. *Id.* at 18-20.

34. *Id.* at 20-24.

35. *Id.* at 25-27.

36. John Stuart Mill, ON LIBERTY (1859).

37. LUKIANOFF, *supra* note 13, at 27-32.

38. *Id.* at 33-35.

39. *Id.* at 37-60.

40. *Id.* at 39-40.

41. *Id.* at 40.

42. *Id.* at 40-52.

harassment,<sup>43</sup> but colleges and universities have consistently adopted a far broader definition.<sup>44</sup> After briefly detailing how the U.S. Department of Education's Office for Civil Rights 2011 Dear Colleague Letter<sup>45</sup> rejected the Supreme Court's definition and adopted a far broader definition,<sup>46</sup> he explains the chilling effects of speech codes that are on the books but not enforced.<sup>47</sup>

Chapter 3, "The College Road Trip," examines how institutions regulate free speech on campus.<sup>48</sup> Although recent Supreme Court cases suggest the practice is unconstitutional,<sup>49</sup> public universities frequently attempt to confine all expressive activities to a small "free speech zone."<sup>50</sup> Lukianoff believes four factors work against free speech on campus—ignorance, ideology, liability, and bureaucracy.<sup>51</sup> He then recounts how the growth of higher education administration—particularly student affairs officers, student judicial officers, and legal counsel—has led to increased tuition costs.<sup>52</sup>

Chapter 4, "Harvard and Yale," details how our Nation's elite institutions deny free speech rights.<sup>53</sup> Although both institutions are private and, thus not subject to the U.S. Constitution, Lukianoff demonstrates how both Yale<sup>54</sup> and Harvard<sup>55</sup> have consistently pursued practices and policies contrary to the ideals of Freedom. In other words, the abuses are not confined to obscure state colleges and universities.<sup>56</sup>

Chapter 5, "Welcome to Campus!," explores how colleges and universities indoctrinate new students into a particular ideology.<sup>57</sup> Lukianoff explains how orientation programs pressure students to conform<sup>58</sup> and how residence assistants often act as morality police.<sup>59</sup> He

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43. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 644–47 (1999) (Interpreting Title IX).

44. LUKIANOFF, *supra* note 13, at 46-52.

45. See The United States Department of Education Office for Civil Rights "Dear Colleague" letter (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

46. LUKIANOFF, *supra* note 13, at 52-53.

47. *Id.* at 53-58.

48. *Id.* at 61-76.

49. See *infra* notes 236-43 and accompanying text.

50. LUKIANOFF, *supra* note 13, at 62-67.

51. *Id.* at 67-70.

52. *Id.* at 70-75.

53. *Id.* at 77-94.

54. *Id.* at 78-86.

55. *Id.* at 86-94.

56. LUKIANOFF, *supra* note 13, at 78.

57. *Id.* at 95-114.

58. *Id.* at 96-98.

59. *Id.* at 98-99.

devotes an extensive discussion to the University of Delaware's four-year orientation program, which pursues specific political and ideological goals.<sup>60</sup> He rounds out the Chapter by noting the efforts of many institutions to encourage students to "crusade against intolerance, insensitivity, and ignorance."<sup>61</sup>

Chapter 6, "Now You've Done It! The Campus Judiciary," discusses the relationship between the student disciplinary system and Freedom.<sup>62</sup> Arguing that violations of due process and free speech go hand in hand<sup>63</sup> and lamenting the student judiciary's criminalization of everything,<sup>64</sup> Lukianoff uses Michigan State University's student judicial system as an illustration of institutional overreach.<sup>65</sup> For example, Michigan State imposes mandatory accountability seminars for "slamming a door," "being rude to a dormitory receptionist," and "telling an administrator he is acting like a Nazi."<sup>66</sup> He then provides an extensive overview of the tension between a university's Title IX and constitutional obligations to take effective action in response to sexual assault and the institution's constitutional obligations to provide due process.<sup>67</sup> He concludes the Chapter by explaining that due process, like free speech and the scientific method, requires "recognition of human fallibility, and they require the establishment of processes that make it easier for the truth to come out."<sup>68</sup> Such a system, like any system run by humans, is not perfect, "but it replaced systems based on raw power, superstition, and gut instinct."<sup>69</sup>

Chapter 7, "Don't Question Authority," examines how academe frequently punishes those who dare to criticize the administration.<sup>70</sup> After noting the irony of baby boomers who questioned authority as students now suppressing criticism of their actions as administrators,<sup>71</sup> Lukianoff recounts the saga of a University of Wisconsin at Stout professor who was disciplined for posting a poster of a science fiction character that referred to killing.<sup>72</sup> He then turns to examples of professors being punished for social media posts,<sup>73</sup> sending e-mails to administrators,<sup>74</sup> and swearing.<sup>75</sup>

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60. *Id.* at 99-111.

61. *Id.* at 111-13.

62. LUKIANOFF, *supra* note 13, at 115-136.

63. *Id.* at 117-18.

64. *Id.* at 116-17.

65. *Id.* at 118-23.

66. *Id.* at 119-20.

67. *Id.* at 123-33.

68. LUKIANOFF, *supra* note 13, at 134.

69. *Id.*

70. *Id.* at 137-58.

71. *Id.* at 138.

72. *Id.* at 137-42.

73. LUKIANOFF, *supra* note 13, at 143-46.

Acknowledging state governments often promote the suppression of speech by public employees,<sup>76</sup> he concludes the Chapter by arguing the Penn State Child Rape scandal was a result, in part, of a campus valuing “conformity over principled dissent” and forgetting “the role of the dissenter and the whistleblower is as good for a college as it can be for the society as a whole.”<sup>77</sup>

Chapter 8, “Student Activities Fair,” details institution’s efforts to stifle freedom of association on campus.<sup>78</sup> After discussing an incident where Washington State University students disrupted a “politically incorrect play,”<sup>79</sup> Lukianoff details how colleges and universities treat student groups.<sup>80</sup> He notes that faculty members frequently have negative feelings toward Evangelical Christians and Mormons<sup>81</sup> and demonstrates that Christian students have frequently been treated differently from secular groups<sup>82</sup> and Muslim student groups.<sup>83</sup> He recounts the experience of the Central Michigan Young American’s for Freedom being taken over by students who were hostile to the group’s agenda,<sup>84</sup> the Supreme Court’s landmark *Christian Legal Society*<sup>85</sup> decision<sup>86</sup> and its aftermath,<sup>87</sup> the refusal to recognize a gay and lesbian student organization at a historically African-American institution,<sup>88</sup> and other controversial issues.<sup>89</sup> Ultimately, he finishes the Chapter by calling on colleges and universities to abandon efforts “to impose a preconceived notion of what good, moral people should believe.”<sup>90</sup> Instead, academe should recognize “people with radically different points of view should get to know each other” and “create greater awareness that ideological, philosophical, or religious opponents can often find common ground.”<sup>91</sup>

Chapter 9, “Finally, the Classroom!,” explores how institutions

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74. *Id.* at 146-48.

75. *Id.* at 148-54.

76. *Id.* at 154-56.

77. *Id.* at 157.

78. *Id.* at 159-84.

79. LUKIANOFF, *supra* note 13, at 160-62.

80. *Id.* at 163-83.

81. *Id.* at 163.

82. *Id.* at 163-67.

83. *Id.* at 167-69.

84. *Id.* at 169-71.

85. *Christian Legal Soc’y. v. Martinez*, 561 U.S. 661 (2010).

86. LUKIANOFF, *supra* note 13, at 171-75.

87. *Id.* at 178-81.

88. *Id.* at 175-78.

89. *Id.* at 181-83.

90. *Id.* at 183.

91. *Id.*

undermine the freedom of expression in the classroom.<sup>92</sup> Lukianoff demonstrates that many professors require their students to adopt certain assumptions,<sup>93</sup> mandate students to lobby for certain left wing causes,<sup>94</sup> are intolerant of students who disagree with their views,<sup>95</sup> evaluate students' "dispositions,"<sup>96</sup> and punish student writing that makes them uncomfortable.<sup>97</sup> Ending the Chapter with a discussion of a Northern Kentucky University professor who urged her students to exercise their free speech rights by preventing others from expressing their own views,<sup>98</sup> he urges campuses to recognize "one could learn to handle the existence of opinions one dislikes and even welcome them as a chance to learn something new."<sup>99</sup>

Chapter 10, "If Even Your Professor Can Be Punished for Saying the Wrong Thing," discusses institution's abridgement of faculty speech.<sup>100</sup> After briefly recounting the experiences of a Brandeis University professor disciplined for using the term "wetbacks,"<sup>101</sup> Lukianoff provides summaries of several professors who have been fired or disciplined for expression that is, at least arguably, constitutionally protected.<sup>102</sup> He finishes the Chapter by noting the real world consequences of academe's refusal to respect free speech rights.<sup>103</sup>

Chapter 11, "Student Draffees for the Culture War," examines how students, both individually and acting through student governments, engage in censorship.<sup>104</sup> Lukianoff recounts incidents of students destroying student newspapers,<sup>105</sup> student governments adopting "sedition acts" or speech codes,<sup>106</sup> or disrupting outside speakers,<sup>107</sup> particularly those from the right of the political spectrum.<sup>108</sup> Perhaps most alarming, Lukianoff suggests students expect to be insulated from ideas that might be offensive

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92. LUKIANOFF, *supra* note 13, at 185-201.

93. *Id.* at 186-88.

94. *Id.* at 191-93.

95. *Id.* at 193-94.

96. *Id.* at 195-98.

97. *Id.* at 198-200.

98. LUKIANOFF, *supra* note 13, at 200-01.

99. *Id.* at 201.

100. *Id.* at 203-18.

101. *Id.* at 204-06.

102. *Id.* at 206-13.

103. LUKIANOFF, *supra* note 13, at 216-18.

104. *Id.* at 219-41.

105. *Id.* at 220-25.

106. *Id.* at 225-28.

107. *Id.* at 228-29.

108. *Id.* at 229-32.

to them.<sup>109</sup> He sees indications that our Law Schools, which one would expect to be committed to constitutional values, have little respect for Free Speech.<sup>110</sup> He finishes the Chapter by discussing the free speech implications of anti-bullying laws and policies.<sup>111</sup>

Lukianoff's conclusion, "Unlearning Liberty and the Knee-Jerk Society,"<sup>112</sup> summarizes how "the threat of punishment for expressing the wrong thoughts, the omnipresence of codes warning students to be careful about what they say, and the politicized, self-serving redefinition of tolerance and civility all reinforce the social pressure" to avoid debate all together.<sup>113</sup> In his view, "too many of our educators today are ambivalent about free speech, imagining that if they really did allow all opinions to be expressed, the result would be a nightmarish landscape of non-stop bigotry and ignorance."<sup>114</sup> Instead, he calls on the higher education to practice the "intellectual habits of a free people"<sup>115</sup> and "learn to handle arguments that go against everything you wish to be true, and in the end be wiser."<sup>116</sup> The academy "must stop apologizing for believing in free speech and embrace it as the best tool we have yet devised for the growth of knowledge and understanding."<sup>117</sup>

Overall, Lukianoff presents overwhelming evidence of higher education's systematic betrayal of Freedom and a persuasive argument for why this betrayal has serious consequences. His narrative is well written, well researched, and, quite frankly, terrifying for the individual who takes the Constitution seriously. This book should be read by anyone who cares about higher education; it should be required reading for all public college and university presidents, general counsels, provosts, vice presidents for student affairs, and faculty senate leaders. Hopefully, such a required reading will begin to reverse the hostility toward Freedom on our public college and university campuses.

## II. POWERS' *THE SILENCING*

While Lukianoff focuses exclusively on higher education, Powers focuses on society as a whole with a particular emphasis on the media. Consequently, Powers' overall work is not as relevant to the academy as Lukianoff's book. Nevertheless, many elements of her societal critique are

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109. LUKIANOFF, *supra* note 13, at 232-34.

110. *Id.* at 234-37.

111. *Id.* at 237-41.

112. *Id.* at 243-46.

113. *Id.* at 243.

114. *Id.* at 245.

115. LUKIANOFF, *supra* note 13, at 245.

116. *Id.* at 245-46.

117. *Id.* at 246.

applicable to higher education, and she offers important lessons for everyone in the College and University community. Indeed, Chapters 4 and 5 focus exclusively on silencing debate on campus.<sup>118</sup> As Powers observes, “[c]ampuses across the United States have become ground zero for silencing free speech. Colleges and universities founded to encourage diversity of thought and debate have become incubators of intolerance where non-sanctioned views are silenced through bullying, speech codes, ‘free speech zones,’ and other illiberal means.”<sup>119</sup>

Chapter 1, “Repressive Tolerance,” explores the efforts of some progressives to enforce a particular worldview.<sup>120</sup> Such people believe that those “who express ideological, philosophical, or political views that don’t line up with their preferences should be completely silenced.”<sup>121</sup> Powers notes political pressure caused the withdrawal of many conservative or moderately progressive commencement speakers in 2014<sup>122</sup> and asserts this reflects Herbert Marcuse’s theory of “repressive tolerance”—advancing the progressive agenda by repressing discussion of any contrary ideas.<sup>123</sup> She observes the disconnect between the classical liberal ideas of freedom, as espoused by Montesquieu, Mill, and others, and the current attitudes of what she calls the “illiberal left.”<sup>124</sup> Powers declares that the effort to silence dissent harms “all of society by silencing important debates, denying people the right to draw their own conclusions, and derailing reporting and research that is important to our understanding of the world.”<sup>125</sup>

Chapter 2, “Delegitimizing Dissent,” discusses how some segments of the left seek to attack the character of anyone who disagrees with their worldview.<sup>126</sup> She identifies two specific tactics of character assassination. First, many liberals “will often systematically question and attack the very core of their enemies’ human identities.”<sup>127</sup> Second, the “illiberal left” will “make racist and misogynist attacks against opponents *and* accuse opponents of being racists, bigots, misogynists, rape apologists, traitors, and homophobes.”<sup>128</sup> She rounds out the Chapter by explaining how some liberals and independents are accused of being “conservatives” if they dare

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118. POWERS, *supra* note 18, at 69–106.

119. *Id.* at 70.

120. *Id.* at 1–20.

121. *Id.* at 4.

122. *Id.* at 7–8.

123. *Id.* at 8.

124. POWERS, *supra* note 18, at 12–17.

125. *Id.* at 17.

126. *Id.* at 21–47.

127. *Id.* at 25.

128. *Id.* at 32–33 (emphasis in original).



to question any aspect of the progressive orthodoxy.<sup>129</sup>

Chapter 3, “Illiberal Intolerance and Intimidation,” examines actions designed to intimidate individuals and organizations that disagree with certain ideas and beliefs.<sup>130</sup> Powers recounts the campaign against Chick-Fil-A, a fast food chain with a CEO who dared to question same-sex marriage.<sup>131</sup> Turning to higher education, she describes the experiences of Marquette University Professor John McAdams, who criticized a colleague for refusing to allow discussion of same-sex marriage,<sup>132</sup> and University of Virginia Law Professor Douglas Laycock, who dared to support a proposed religious freedom statute in Arizona.<sup>133</sup> She then discusses efforts to exclude Christian religious organizations from participating in public life because the organizations oppose same-sex marriage or regard homosexual conduct as sinful.<sup>134</sup> While noting her personal support for same-sex marriage, she observes, “most people who don’t share my opinion—which included, until recently, scores of Democrats—are not bigots but people with sincere and respectable beliefs, often based in a Christian worldview that I otherwise largely share.”<sup>135</sup>

Chapter 4, “Intolerance 101: Shutting Down Debate,” details some progressive’s actions to silence debate on college and university campus.<sup>136</sup> Using the story of a University of California at Santa Barbara professor who physically assaulted a pro-life advocate as an illustration,<sup>137</sup> Powers explains “[t]he root of nearly every free speech infringement on campuses across the country is that someone—almost always a liberal—has been offended or has sniffed out a potential offense in the making.”<sup>138</sup> Indeed, “left-leaning administrators, professors, and students are working overtime in their campaign of silencing dissent . . .”<sup>139</sup> Acknowledging the work of Lukianoff’s FIRE,<sup>140</sup> she then summarizes many incidents of colleges and universities abusing the free speech rights of students.<sup>141</sup> Powers closes the Chapter with a discussion of trigger warnings and the resulting chill on free speech and inquiry.<sup>142</sup>

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129. *Id.* at 42-47.

130. POWERS, *supra* note 18, at 49-67.

131. *Id.* at 49-53.

132. *Id.* at 53-57.

133. *Id.* at 57-58.

134. *Id.* at 59-62.

135. *Id.* at 53.

136. POWERS, *supra* note 18, at 69-88.

137. *Id.* at 69-76.

138. *Id.* at 76.

139. *Id.* at 79.

140. *Id.* at 79-80.

141. *Id.* at 79-83.

142. POWERS, *supra* note 18, at 85-88.

Chapter 5, “Intolerance 201: Free Speech for Me but Not for Thee,” discusses in more detail how colleges and universities use official policies to silence free speech on campus.<sup>143</sup> Again drawing heavily on FIRE’s work and experiences with free speech zones,<sup>144</sup> Powers observes, “if students want to exercise their right to free speech they often have to go to court against their own college or university.”<sup>145</sup> She then turns to the increasingly common practice of “disinviting” commencement speakers because students and/or faculty disapprove of the speaker’s views or actions.<sup>146</sup> Powers then focuses on several incidents where colleges and universities have denied recognition to student religious organizations<sup>147</sup> simply because the organization insists on “adhering to their core values and religious beliefs.”<sup>148</sup> She summarizes the Chapter by insisting “the illiberal left expects to be shielded from views they don’t want to encounter,” but “conservatives have to sit through classes with liberal professors in order to obtain a diploma.”<sup>149</sup>

Chapter 6, “The War on Fox News,” explores the efforts of the Obama Administration and other media to undermine and delegitimize the conservative Fox News network.<sup>150</sup> Powers recounts how the White House attempted to exclude Fox News reporters<sup>151</sup> and favored reporters from more progressive media.<sup>152</sup> She then explains how other media have attacked Fox News in general<sup>153</sup> and Fox News’ female reporters in particular.<sup>154</sup>

Chapter 7, “Muddy Media Waters,” discusses efforts to obstruct, chill, and ultimately intimidate the media.<sup>155</sup> Powers explains how the Obama Administration has reduced transparency<sup>156</sup> and harassed reporters.<sup>157</sup> She then describes “the effort by the illiberal left to politically cleanse the already liberal left of all dissent,”<sup>158</sup> with a particular focus on conservative

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143. *Id.* at 89–106.

144. *Id.* at 89–91.

145. *Id.* at 91.

146. *Id.* at 92–97.

147. *Id.* at 97–105.

148. POWERS, *supra* note 18, at 97.

149. *Id.* at 105.

150. *Id.* at 107–30.

151. *Id.* at 109–16.

152. *Id.* at 116–19.

153. POWERS, *supra* note 18, at 119–30.

154. *Id.* at 119–23.

155. *Id.* at 131–48.

156. *Id.* at 131–37.

157. *Id.* at 137–41.

158. *Id.* at 142.

Pulitzer Prize winner George Will.<sup>159</sup>

Chapter 8, “Illiberal Feminist Thought Police,” examines attempts to impose orthodoxy on issues related to feminism.<sup>160</sup> Powers describes the “effort to demonize and delegitimize anyone who doesn’t agree with the illiberal left’s absolutist position on the issue of abortion”<sup>161</sup> and to “turn simple ideological agreements, whether about the federal budget or anything else, into excuses to engage in character assignation, dismissing their opponents as sexists.”<sup>162</sup> She recounts how some Democrats have opposed fellow Democrats who are pro-life or favor any form of abortion regulation.<sup>163</sup> She wraps up the Chapter with a summary of feminist criticism of seemingly innocuous humor,<sup>164</sup> certain scientific papers,<sup>165</sup> and statistics that do not comport with the ideological narrative.<sup>166</sup>

Chapter 9, “Feminists against Facts, Fairness, and the Rule of Law,” details the supposed “rape culture.”<sup>167</sup> In her view, activists “hurl the horrific accusation of being a ‘rape apologist’ or supporting ‘rape culture’ with abandon to demonize anyone who has offended them or won’t affirm their ideological or partisan world view.”<sup>168</sup> Powers demonstrates many of the statistics regarding the frequency of rape on college and university campuses are dubious at best and flat out wrong at worst.<sup>169</sup> She recounts the media’s rush to accept the veracity of both the Rolling Stone story on the University of Virginia and the accusations against the Duke University Lacrosse players.<sup>170</sup> She rounds out the Chapter with a scathing criticism of the Obama Administration’s guidance<sup>171</sup> to higher education on the handling of sexual assaults.<sup>172</sup>

Powers concludes with a brief “Epilogue” focusing on the future.<sup>173</sup> “The first step toward change is to acknowledge the problem. I hope this book will serve as a starting place for such an acknowledgment among sincere liberals.”<sup>174</sup> Powers concludes, “we should make all efforts to

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159. POWERS, *supra* note 18, at 145-48.

160. *Id.* at 149-78.

161. *Id.* at 153.

162. *Id.* at 154.

163. *Id.* at 162-65.

164. *Id.* at 171-73.

165. POWERS, *supra* note 18, at 173-76.

166. *Id.* at 176-78.

167. *Id.* at 179-98.

168. *Id.* at 180.

169. *Id.* at 182-86.

170. *Id.* at 186-93.

171. *See* Dear Colleague Letter, *supra* note 45.

172. POWERS, *supra* note 18, at 193-98.

173. *Id.* at 199-202.

174. *Id.* at 201.

invite people who hold different views into our worlds. Contrary to popular thought, familiarity doesn't breed contempt. It breeds understanding and tolerance."<sup>175</sup>

Overall, Powers proves her thesis—the left is attempting to impose a political orthodoxy and silence any dissent. Her narrative is well written, well researched, and, in some respects, more alarming than Lukianoff's volume.<sup>176</sup> Lukianoff confines his focus to the academy and warns of potentially dangerous implications for society as a whole. Powers shows "Liberal Fascism" is already a significant, and in some instances, dominant, force in American society.<sup>177</sup> While Lukianoff should be required reading for those who work in higher education, Powers should be required reading for all thoughtful people, but particularly those on the left.

### III. WHY HIGHER EDUCATION MUST REAFFIRM FREEDOM

Lukianoff demonstrates how higher education is betraying Freedom, whether it is free speech, religious liberty, or associational rights. Powers explains how certain segments of the political left betray Freedom to silence those who dare to question progressive orthodoxy. Both suggest this betrayal of Freedom has broader implications for society, both now and in the near future. Yet, the implications for academe are even more severe. Quite simply, by betraying Freedom, higher education is abandoning its commitment to diversity, academic freedom, and its role in promoting a civil society.

#### A. The Educational Benefits of Diversity

In academe, racial and ethnic diversity is sacrosanct. Yet, institutions may not pursue "simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students,"<sup>178</sup> but must focus on "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."<sup>179</sup> The rationale for pursuing racial and ethnic diversity is not remedying societal discrimination,<sup>180</sup> it is to ensure

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175. *Id.* at 202.

176. Although Lukianoff's prose is more formal, both volumes are an easy read.

177. See JONAH GOLDBERG, *LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING* (2007).

178. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 315 (1978) (Powell, J., announcing the judgment of the court).

179. *Id.*

180. Remedying societal discrimination is not and never has been a compelling governmental interest. *Grutter v. Bollinger*, 539 U.S. 306, 323-24 (2003); *Bakke*, 438 U.S. at 306-10. As the Court explained:

"societal discrimination" does not justify a classification that imposes

increased “exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>181</sup> “[T]he classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”<sup>182</sup> “The atmosphere of ‘speculation, experiment and creation’—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.”<sup>183</sup> In other words, the Supreme Court’s rationale for pursuing racial and ethnic diversity is the free speech ideal.<sup>184</sup>

When colleges and universities betray Freedom by implicitly and explicitly limiting the exchange of ideas and enforcing ideological conformity, the institutions undermine the value of diversity. It is not enough to admit a student because of that person’s unique experiences, attitudes, and beliefs; the college and university must encourage students to sit “at the table of friendship to talk, listen, challenge and anew.”<sup>185</sup> It is not enough to welcome underrepresented populations to campus, the

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disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. *Bakke*, 438 U.S. at 310.

Similarly, the Court has rejected the notion of increasing the representation of minorities as a compelling governmental interest. *Grutter*, 539 U.S. at 323-24; *Bakke*, 438 U.S. at 306-10. “Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.” *Bakke*, 438 U.S. at 307.

181. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

182. *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603, (1967) (citations omitted).

183. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J., announcing the judgment of the Court). *See also Grutter v. Bollinger*, 539 U.S. 306, 324 (2003).

184. As the Supreme Court explained:

The Law School does not premise its need for critical mass on “any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.” To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a “critical mass” of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body. *Grutter*, 539 U.S. at 333 (citations omitted).

185. *Capilouto*, *supra* note 6.

students must recognize there is “no need to constrict who you are to measure up to who others are.”<sup>186</sup> As Lukianoff explains:

no two cultures and no two people entirely agree on what speech should and should not be allowed. Indeed, ideas about politeness and propriety differ from economic class to economic class, between genders, among cultures, between different regions of the country, and certainly from one era in history to another.

If we were to put someone in charge of policing politeness or civility, whose ideals would we choose? . . . If we tried to ban everything that offended someone’s cultural traditions, class conceptions, or personal idiosyncrasies, nobody could safely say a thing. It has been obvious to me ever since I was little that free speech must be the rule for any truly pluralistic or multicultural community. Far from requiring censorship, a true understanding of multiculturalism demands free speech.<sup>187</sup>

Moreover, when the expression of *any* minority is limited, the majority suffers because it is not exposed to those viewpoints. As Powers explains, “[t]hat is where the illiberal left’s silencing of opponents is taking us: to the end of freedom of speech, thought, and debate, to uniformity—all in the name of diversity.”<sup>188</sup> A college and university must be a place “where perspectives are put to the test” and “whether our values and beliefs align or diverge” we are united by “our common humanity.”<sup>189</sup>

## B. Individual Academic Freedom

Although there is serious debate concerning the rationale for individual academic freedom,<sup>190</sup> whether the Constitution actually protects individual academic freedom,<sup>191</sup> and how to deal with the “*Garcetti*<sup>192</sup> Paradox,”<sup>193</sup>

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186. *Id.*

187. LUKIANOFF, *supra* note 13, at 33.

188. POWERS, *supra* note 18, at 67.

189. Capilouto, *supra* note 6.

190. See STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* (2014).

191. See *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc) (“Our review of the law, however, leads us to conclude that to the extent the Constitution recognizes any right of “academic freedom” above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors, and is not violated by the terms of the Act.”). See also William E. Thro, *Academic Freedom: Constitutional Myths and Practical Realities*, 19 JOURNAL OF PERSONNEL EVALUATION IN EDUCATION 135 (2007) (endorsing the Urofsky view as a constitutional matter, but insisting institutions must respect individual academic freedom as a matter of policy).

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

193. As Peter Byrne explains:

faculty members universally assert a right to individual academic freedom.<sup>194</sup> As the “Chicago Statement”<sup>195</sup> defines the concept, individual academic freedom means “all members of the University community [have] the broadest possible latitude to speak, write, listen, challenge, and

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the Supreme Court’s decision in *Garcetti* tees up the question whether the First Amendment protects faculty from reprisals by their institutions for speech within the duties of their job. The Court there held that a county prosecutor would not be protected from adverse actions by his superiors in the office in response to a “disposition memo” prepared as part of his official duties. The Justices thus established another limitation on the right of a public employee to address matters of public concern without reprisals by their government employer. In dissent, Justice Souter expressed the “hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to . . . official duties.’” The Court in response, however, explicitly saved for future consideration whether such a limitation on the scope of employee freedom of speech should apply to academic scholarship or teaching. A few lower courts have applied the *Garcetti* rule to professors without discussing the Supreme Court’s reservation about doing so, but only in the context of governance disputes rather than in teaching or scholarship.

J. Peter Byrne, *Neo-Orthodoxy in Academic Freedom*, 88 TEX. L. REV. 143, 163-64 (2009) (Reviewing MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (2009) & STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME (2008)) (footnotes omitted).

Scott Bauries elaborates further:

Based on numerous Supreme Court pronouncements that the Court has neither disclaimed nor chosen to distance itself from, academic speech—including the academic speech of both private and public university professors—is uniquely important to the functioning of American democracy. Yet, under the Court’s First Amendment jurisprudence, the academic speech of public university professors is among the *least protected forms of speech*. In fact, it stands on the same footing as obscenity, fighting words, incitement speech, and child pornography, which are all categorically unprotected under the First Amendment due to their “low-value.” So, academic speech is indisputably high-value speech, but in the public university workplace, it qualifies for the same protection as indisputably low-value speech—no protection.

Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677, 715 (2014).

194. Bauries, *supra* note 193, at 678 (individual academic freedom is canonical); Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323, 1324 (1988) (individual academic freedom is conventional wisdom.)

195. The University of Chicago’s 2015 statement on freedom of expression arguably is the twenty-first century’s best and the most influential statement of individual academic freedom. Numerous other institutions have adopted it and FIRE is urging its adoption nationwide. See “Hard to Say: A Statement at the Heart of the Debate Over Academic Freedom,” *Economist* (Jan. 30, 2016) (available at <http://www.economist.com/news/united-states/21689603-statement-heart-debate-over-academic-freedom-hard-say>).

learn” and “to discuss any problem that presents itself.”<sup>196</sup>

When institutions betray Freedom by punishing those faculty and students who express disagreeable ideas, colleges and universities undermine the individual academic freedom.<sup>197</sup> “The basic idea of academic freedom is simple and unanswerable: knowledge cannot be advanced unless existing claims to knowledge can with freedom be criticized and analyzed.”<sup>198</sup> To illustrate in a context relevant to higher education lawyers, scholars must be able to criticize the Supreme Court’s jurisprudence as unduly *restrictive* of racial preferences;<sup>199</sup> scholars must be able to criticize the Court’s jurisprudence as overly *permissive* of racial preferences.<sup>200</sup> Researchers must be able to argue that affirmative action

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196. University of Chicago, *supra* note 23.

197. As the Supreme Court explained:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’ The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’

*Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967) (citations omitted). Similarly, ten years earlier, the Court observed:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.’

*Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

198. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 64 (2012).

199. See RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, & THE LAW* (2013). For a positive review of Kennedy’s work in this Journal, see Michael K. Olivias, *The Burden of Persuasion: Affirmative Action, Legacies and Reconstructing History*; Russell K. Nieli’s *Wounds that Will Not Heal: Affirmative Action and Our Continuing Racial Divide and Randall Kennedy’s For Discrimination: Race, Affirmative Action and the Law*, 40 J.C. & U.L. 381 (2014). For a negative review of Kennedy’s work in this Journal, see William E. Thro, *The Future Of Racial Preferences: A Review Of Kennedy’s For Discrimination And Nieli’s Wounds That Will Not Heal*, 40 J.C. & U.L. 359 (2014).

200. RUSSELL K. NIELI, *WOUNDS THAT WILL NOT HEAL: AFFIRMATIVE ACTION AND OUR CONTINUING RACIAL DIVIDE* (2012). For a position review of Nieli’s work in



actually hurts those students admitted through such programs;<sup>201</sup> researchers must be able to argue that affirmative action should be expanded to include students from high poverty backgrounds.<sup>202</sup> Although “the ideas of different members of the University community will often and quite naturally conflict,” an institution should not “attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.”<sup>203</sup> Indeed, “concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some” individuals.<sup>204</sup>

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this Journal, *see* Thro, *supra* note 199. For a negative review of Nieli’s work in this Journal, *see* Olivas, *supra* note 199.

201. RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP AND WHY UNIVERSITIES WON’T ADMIT IT* (2012).

202. SHERYLL CASHIN, *PLACE NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA* (2014). For a review of Cashin’s work in this Journal, *see* William E. Thro, *The Coal Miner’s Daughter Preference: A Review Of Cashin’s Place, Not Race: A New Vision Of Opportunity In America*, 41 J.C. & U.L. 375 (2015).

203. University of Chicago, *supra* note 23.

204. *Id.*

### C. Confident Pluralism

In 2010, the Supreme Court held that a state university could condition the recognition of a student religious organization as a student organization on the organization's willingness to admit non-believers as a means of uniting the student body.<sup>205</sup> Justice Alito, joined by three other Justices, sharply dissented and set forth an alternative vision of American life:

the Court argues that the accept-all-comers policy, by bringing together students with diverse views, encourages tolerance, cooperation, learning, and the development of conflict-resolution skills. These are obviously commendable goals, but they are not undermined by permitting a religious group to restrict membership to persons who share the group's faith. Many religious groups impose such restrictions. Such practices are not manifestations of "contempt" for members of other faiths. Nor do they thwart the objectives that [the state university] endorses. Our country as a whole, no less than the [state university] values

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205. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010). For a critique of the decision, see generally Jacob Affolter, *Fighting Discrimination with Discrimination: Public Universities and the Rights of Dissenting Students*, 26 *RATIO JURIS* 235 (2013); David Brown, *Hey! Universities! Leave Them Kids Alone!: Christian Legal Society v. Martinez and Conditioning Equal Access to A University's Student-Organization Forum*, 116 *PENN ST. L. REV.* 163 (2011); Zachary R. Cormier, *Christian Legal Society v. Martinez: The Death Knell of Associational Freedom on the College Campus*, 17 *TEX. WESLEYAN L. REV.* 287 (2011); Michael R. Denton, *The Need for Religious Groups to Be Exempt from the Diversity Policies of Universities in Light of Christian Legal Society v. Martinez*, 72 *LA. L. REV.* 1055 (2012); Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2009-10 *CATO SUP. CT. REV.* 105 (2010); Mary Ann Glendon, *The Harold J. Berman Lecture: Religious Freedom—A Second-Class Right?*, 61 *EMORY L.J.* 971 (2012); Erica Goldberg, *Amending Christian Legal Society v. Martinez: Protecting Expressive Association As an Independent Right in A Limited Public Forum*, 16 *TEX. J. C.L. & C.R.* 129 (2011); Blake Lawrence, *The First Amendment in the Multicultural Climate of Colleges and Universities: A Story Ending with Christian Legal Society v. Martinez*, 39 *HASTINGS CONST. L.Q.* 629 (2012); Timothy P. Lendino, *From Rosenberger to Martinez: Why the Rise of Hyper-Modernism Is A Bad Thing for Religious Freedom*, 33 *CAMPBELL L. REV.* 699 (2011); Michael Stokes Paulsen, *Disaster: The Worst Religious Freedom Case in Fifty Years*, 24 *REGENT U. L. REV.* 283, 284 (2012); Charles J. Russo & William E. Thro, *Another Nail in the Coffin of Religious Freedom?: Christian Legal Society v. Martinez*, 12 *EDUC. L.J.* 20 (2011); Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 *BUFF. L. REV.* 847 (2011); William E. Thro, *The Rights Of Student Religious Organizations After Christian Legal Society v. Martinez*, 39 *RELIGION & EDUC.* 147 (2012); William E. Thro & Charles J. Russo, *A Serious Setback for Freedom: The Implications of Christian Legal Society v. Martinez*, 261 *ED. L. REP.* 473 (2010); Jack Willems, *The Loss of Freedom of Association in Christian Legal Society v. Martinez*, 130 *S. Ct.* 2971 (2010), 34 *HARV. J.L. & PUB. POL'Y* 805 (2011). For analysis of how more recent decisions impact the rationale of *Christian Legal Society*, see William E. Thro, *The Limits of Christian Legal Society*, 2014 *CARDOZO L. REV. DE NOVO* 124 (2014); William E. Thro, *Undermining Christian Legal Society v. Martinez*, 295 *ED. L. REP.* 867 (2013).

tolerance, cooperation, learning, and the amicable resolution of conflicts. *But we seek to achieve those goals through “[a] confident pluralism that conduces to civil peace and advances democratic consensus-building,” not by abridging First Amendment rights.*<sup>206</sup>

Expanding upon Justice Alito’s point as well as the ideas of other scholars,<sup>207</sup> Inazu describes a “confident pluralism” as “rooted in the conviction that protecting the integrity of one’s own beliefs and normative commitments does not depend on coercively silencing opposing views.”<sup>208</sup> Emphasizing both an inherent distrust of state power<sup>209</sup> and a “commitment to letting differences coexist, unless and until persuasion eliminates those differences,”<sup>210</sup> Inazu “seeks to maximize the spaces where dialogue and persuasion can coexist alongside deep and intractable differences about beliefs, commitments, and ways of life” and to “resist coercive efforts aimed at getting people to ‘fall in line’ with the majority.”<sup>211</sup> His vision requires individuals to embrace tolerance,<sup>212</sup> humility,<sup>213</sup> and patience,<sup>214</sup>

206. *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 733-34 (2010) (Alito, J., joined by Roberts, C.J., Scalia, & Thomas, JJ., dissenting) (citations omitted) (emphasis added).

207. As Inazu explains:

The underpinnings of a confident pluralism are also advanced by a number of prominent scholars. Kenneth Karst insists that “[o]ne of the points of any freedom of association must be to let people make their own definitions of community.” William Eskridge reaches a similar conclusion: “The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others.” And David Richards reflects, “The best of American constitutional law rests . . . on the role it accords resisting voice, and the worst on the repression of such voice.”

Inazu, *supra* note 24, at 590-91 (footnotes omitted).

208. *Id.* at 592.

209. Such a distrust is implicit in our constitutional system. *See* Federalist 51 (Madison). Indeed, the Calvinist view of human nature—that everyone is totally depraved—informed and influenced the framing of our Constitution. *See generally* MARK DAVID HALL, ROGER SHERMAN AND THE CREATION OF THE AMERICAN REPUBLIC 12–40 (2012); 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. Cochran, Jr., & Angela C. Carmella, eds. 2001); William E. Thro, *A Pelagian Vision for Our Augustinian Constitution: A Review of Justice Breyer’s Active Liberty*, 32 J.C. & U.L. 491, 504 (2006).

210. Inazu, *supra* note 24, at 592.

211. *Id.* at 592.

212. *Id.* at 597-98. As Inazu explains:

Tolerance does not mean embracing all beliefs or viewpoints. That kind of tolerance is likely only possible in a society that shares a cognizable common good. It is far less plausible in a society like ours. And for this reason, tolerance admits that individuals in voluntarily chosen groups may in fact suffer moral harms, at least as perceived from the perspective of outsiders to the group. For tolerance to flourish, both the Liberal Egalitarian and the

but his paradigm also requires the government to respect associational freedom,<sup>215</sup> ensure meaningful access to public forums,<sup>216</sup> and provide funding to support pluralism.<sup>217</sup>

Inazu's Confident Pluralism paradigm encompasses the traditional roles, norms, and practices of academe. Historically, higher education has allowed individuals to question long held propositions, even those propositions regarded as objective truths. As long as a certain level of collegiality and civility was maintained, professors and students were able to express profound disagreement with each other. Through this process of questioning and respectful dialogue, individual views were refined and, in some instances, profoundly changed. Unfortunately, as Lukianoff and Powers demonstrate, the academe of the twenty-first century often wishes to silence those who challenge the prevailing view, silence any disagreement with the norm, and avoid any idea that contradicts the "politically correct" view.

To return to its traditional roles by embracing a confident pluralism, higher education must encourage the individual values of tolerance, humility, and patience, but must also act at an institutional level. Inazu's prescription for government—respect associational freedom, ensure access to public forums, and provide funding—must become institutional policy. Adopting such a policy reaffirms freedom.

Indeed, for public institutions, the Constitution requires a respect for associational freedom. There is "no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."<sup>218</sup> A public college and university may not favor those student groups that support the institution's views and it may not penalize those student groups with which it disagrees.<sup>219</sup> Similarly, the Court has ruled that

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Conservative Moralists must bear the cost of knowing that unaddressed moral harms persist within the private groups of civil society.

The aspiration of tolerance also requires the hard work of distinguishing *people* from *ideas*. Every one of us in this country holds ideas that others find unpersuasive, inconsistent, or downright loopy. More pointedly, every one of us holds ideas that others find morally reprehensible. The tolerance of a confident pluralism does not impose the fiction of assuming that all ideas are equally valid or morally benign. It does mean respecting people, aiming for fair discussion, and allowing for the right to differ about serious matters. *Id.* at 598 (citations omitted).

213. *Id.* at 599.

214. *Id.*

215. *Id.* at 604-06.

216. Inazu, *supra* note 24, at 606-08.

217. *Id.* at 608-12.

218. *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

219. Over forty years ago, the Court declared:

The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. As repugnant as these views may have been,

disagreement with a student organization's views does not justify denial of access<sup>220</sup> or funding.<sup>221</sup> Indeed, the practice of requiring students to pay mandatory fees that are then distributed to student groups is permissible only if the institution does not favor particular viewpoints.<sup>222</sup> Quite simply, the "avowed purpose" for recognizing student groups is "to provide a forum in which students can exchange ideas."<sup>223</sup> Thus, a group that holds racist, sexist, homophobic, anti-Semitic, or anti-Christian views is entitled to recognition, access to facilities, and funding.<sup>224</sup> Of course, "students and faculty are free to associate to voice their disapproval of the [student organization's] message,"<sup>225</sup> but "debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community, to be offensive, unwise, immoral, or wrong-headed."<sup>226</sup> If one finds a particular viewpoint irreprehensible, the solution is to promote an alternative viewpoint, not to suppress the irreprehensible viewpoint.<sup>227</sup>

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especially to one with President James' responsibility, the mere expression of them would not justify the denial of First Amendment rights. Whether petitioners did in fact advocate a philosophy of 'destruction' thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent. *Healy v. James*, 408 U.S. 169, 187-88 (1972).

There is no obligation for a university to recognize or fund student groups, but if a university chooses to do so, then it must treat all student groups the same. *See* 2 WILLIAM A. KAPLIN & BARBARA H. LEE, *THE LAW OF HIGHER EDUCATION* 1244-46-20 (5<sup>th</sup> ed. 2013).

220. *Widmar*, 454 U.S. at 267-70.

221. *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 831 (1995).

222. *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 233-34 (2000).

223. *Widmar*, 454 U.S. at 272 n.10. *See also Southworth*, 529 U.S. at 229 (student activity fee was designed to facilitate "the free and open exchange of ideas by, and among, its students"); *Rosenberger*, 515 U.S. at 834 (university funded student organizations to "encourage a diversity of views from private speakers").

224. However, while the institution may not refuse recognition because of the student organization's viewpoint, the institution may require the organization to (1) obey the campus rules; (2) refrain from disrupting classes; and (3) obey all applicable federal, state, and local laws. KAPLIN & LEE, *supra* note 219, at 1245-46 (interpreting *Healy*).

As a practical matter, this means that the institution can impose some neutral criteria for recognition, such as having a faculty advisor, having a constitution, and having a certain number of members. However, the institution cannot deny recognition simply because the institution or a significant part of the campus community dislikes the organization. Moreover, *Healy* also states that the institution may not deny recognition because members of the organization at other campuses or in the outside community have engaged in certain conduct. *Healy*, 408 U.S. at 185-86.

225. *Rumsfeld v. Forum for Acad. & Inst'l Rights*, 547 U.S. 47, 69-70 (2006).

226. *University of Chicago*, *supra* note 23.

227. If college and university officials are going to express disapproval in the name

Although the federal Constitution allows public colleges and universities to pressure student organizations to include individual members who disagree with the organization's objectives in some limited circumstances,<sup>228</sup> State Constitutions may command a different result.<sup>229</sup> Moreover, in those States with a state Religious Freedom Restoration Acts,<sup>230</sup> student religious groups may have an absolute right to exclude non-believers.<sup>231</sup> Even if there is no state constitutional or statutory

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of the university, they should make certain that they are authorized to speak for the institution. There likely will be situations—particularly at public institutions—where the governing board has a very different attitude toward the student organization.

228. Although nothing in the Court's opinion limits *Christian Legal Society* to a particular context, the reality is that the case arose in an unusual factual situation. Although most public institutions allow student groups to exclude those who disagree with the group's objectives or do not share the group's interests, *Christian Legal Society* involved a policy forbidding any student organization from discriminating for any reason. Under this "all-comers policy," the Young Democrats had to allow Republicans to join; the Vegetarian Society had to include carnivores; and the Chess Club had to allow members who would prefer to play checkers.

If an institution allows some student political organizations or student special interest organizations to exclude those who do not share the group's ideology, interests, or values, then it will be difficult to justify forcing other student groups to admit everyone. Moreover, given the First Amendment's "special solicitude to the rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706, (2012), it will be particularly difficult to justify such a policy with respect to religious groups.

229. Because State Constitutions often are more protective of individual liberty, a student group may have a state constitutional right to exclude those who disagree with the group's views. Indeed, since the Burger Court's decisions prompted a revival of state constitutional law in the early 1970's, A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976), "it would be most unwise these days not also to raise the state constitutional questions." William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977). Although the issue apparently is one of national first impression, it would not be surprising if a state court determined that its State Constitution prohibited the government from pressuring an organization to admit members who disagreed with the organization's objectives. See Douglas Laycock, *Theology Scholarships, The Pledge Of Allegiance, And Religious Liberty: Avoiding The Extremes*, 118 HARV. L. REV. 155, 211-12 (2004) (discussing how state court's interpreted state constitutions to provide greater protection for religious liberty in the wake of the U.S. Supreme Court's reinterpretation of the Free Exercise Clause).

230. See Ala. Const. art. I, § 3.01; Ariz. Rev. Stat. § 41-1493.01; Ark 2015 SB 975, enacted April 2, 2015; Conn. Gen. Stat. § 52-571b; Fla. Stat. §§ 767, 761.03; Idaho Code § 73-402; Ill. Rev. Stat. Ch. 775, § 35/1; Indiana 2015 SB 101, enacted March 26, 2015; 2015 SB 50, enacted April 2, 2015; Kan. Stat. §60-5301; Ky. Rev. Stat. §446.350; La. Rev. Stat. §13:5231; Miss. Code §11-61-1; Mo. Rev. Stat. §1.302; N.M. Stat. §28-22-1; Okla. Stat. tit. 51, §251; Pa. Stat. tit. 71, §§ 2403, 2401; R.I. Gen. Laws §42-80.1-1; S.C. Code §1-32-10; Tenn. Code §4-1-407; Tex. Civ. Prac. & Remedies Code §110.001; Va. Code §57-1; For a discussion of these statutes, see Christopher C. Lund, *Religious Freedom After Gonzales*, 55 S.D. L. REV. 467, 476 (2011); James W. Wright, Jr., Note, *Making State Religious Freedom Restoration Amendments Effective*, 61 ALABAMA L. REV. 425, 426 (2010).

231. State Religious Freedom Restoration Acts are state statutes that protect the

mandate, institutions—as a matter of policy—should allow student groups to exclude those who disagree with the organization’s values and objectives.<sup>232</sup> “One reason that associational freedom is the fundamental building block of a confident pluralism is that it shields groups and spaces from the reaches of state power. Without this initial sorting . . . the aspirations of a confident pluralism become functionally unworkable.”<sup>233</sup>

The Constitution also requires public institutions to permit speech in a wide variety of locations. Colleges and universities often confine expressive activities to a narrow “free speech” zone,<sup>234</sup> but recent Supreme Court decisions suggest such restrictions are unconstitutional. In *Pleasant Grove City v. Summum*,<sup>235</sup> the Court explained that “designated public fora” and “limited public fora” were not interchangeable terms for the same constitutional concept, but were in fact two separate constitutional concepts

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free exercise of religion. The statutes provide more protection for religious organizations than the Free Exercise Clause of the First Amendment as interpreted by the Supreme Court of the United States. Although there is some variance in the scope of the statutes, most acts provide “no government shall impose a substantial burden on the religious exercise” unless the burden furthers “a compelling governmental interest,” and does so by “the least restrictive means.” As a practical matter, these statutes codify the legal standard articulated by *Sherbert v. Verner*, 374 U.S. 398 (1963).

232. As Inazu explained:

The example of the all-comers policies on a number of different college campuses illustrates the importance of what some have called “institutional pluralism.” At Hastings and other public school campuses, these all-comers policies depart not only from the aspirations of a confident pluralism, but also from longstanding *constitutional* constraints. But what about private schools like Vanderbilt University and Bowdoin College? Should these private schools enforce all-comers policies as a normative matter? This is, to me, a far more complicated question than cases involving public institutions. On the one hand, Vanderbilt and Bowdoin are hindering pluralism in the same way that Hastings is in adopting an all-comers policy. Perhaps even more egregiously, their adoption of an all-comers policy cuts against the academic inquiry purportedly at the heart of institutions of higher learning. All of these failures suggest strong normative reasons to criticize Vanderbilt and Bowdoin for adopting the all-comers policy.

On the other hand, Vanderbilt and Bowdoin are themselves private actors, and they contribute to the landscape of institutional pluralism. For this reason, those who are critical of the substantive policies might nevertheless defend the ability of these institutions to implement them. Private actors like universities reinforce the First Amendment insofar as they limit the power of the state, even when they internally neglect those values. That is another reason that the state action doctrine matters—it preserves the integrity of non-state power players because of, rather than in spite of, the power that they wield.

Inazu, *supra* note 24, at 612-13.

233. *Id.* at 604 (emphasis in original).

234. LUKIANOFF *supra* note 13, at 61-76 (Chapter 3); Powers, *supra* note 18, at 89-106 (Chapter 5).

235. 555 U.S. 460 (2009).

and required different levels of scrutiny.<sup>236</sup> By doing so, the Court resolved “the confusion over terminology and scrutiny levels [noticed by lower courts] after the Supreme Court first articulated the concept of a ‘limited public forum.’”<sup>237</sup> After *Pleasant Grove*, the open spaces on a public college and university campus are properly viewed a “designated public forum.”<sup>238</sup> “Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum.”<sup>239</sup> Thus, a public institution may impose speech restrictions “only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest,”<sup>240</sup> but the college and university “may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”<sup>241</sup>

In sum, Inazu’s confident pluralism paradigm requires the development of an institutional infrastructure consistent with a commitment to Freedom; the Constitution requires public institutions to provide such an infrastructure.

## CONCLUSION

“There is no vaccination against ignorance, but there *is* us. There is

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236. *Id.* at 469. The U.S. District Court for the Southern District of Ohio explained the significance of *Pleasant Grove*:

The *Gilles* court treated the terms “limited public forum” and “designated public forum” interchangeably. But the Supreme Court has subsequently clarified that *designated public fora and limited public fora are distinct types, subject to differing standards of scrutiny.* This *Pleasant Grove* decision “resolves the confusion over terminology and scrutiny levels” created by the Sixth Circuit’s earlier decisions, and diminishes the value of *Gilles*’ holding that open campus spaces of public universities are limited public fora. Indeed, the Sixth Circuit’s most recent decision on the matter holds that such spaces are more appropriately considered designated public fora.

Univ. of Cincinnati Chapter of Young Americans for Liberty v. Williams, 2012 WL 2160969, at \*4 (S.D. Ohio 2012) (emphasis original) (citations omitted).

237. *Miller v. City of Cincinnati*, 622 F.3d 524, 535 n. 1 (6th Cir. 2010).

238. *See McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012) (holding that the open areas of Tennessee Technical University’s campus are designated public fora). *See also Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 116 (5th Cir.1992) (holding that the university campus is a designated public forum).

239. *Pleasant Grove*, 555 U.S. at 469-70.

240. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

241. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).



[higher education].”<sup>242</sup> America’s colleges and universities “still have heavy doors to open, unmet obligations to the land and its people.”<sup>243</sup> Academe must lead “this nation, and our world towards fulfilling its potential, towards meeting its lofty promises.”<sup>244</sup>

If higher education is going to fulfill its obligations to American society, it must clearly and unambiguously embrace Freedom. Freedom is essential to obtaining the educational benefits of diversity. Freedom is at the heart of the university community’s ability to “discuss any problem that presents itself.”<sup>245</sup> Freedom leads to the confident pluralism that allows society to reach a broad consensus and effective, workable solutions.

Unfortunately, as Lukianoff and Powers explain in their respective volumes, higher education is betraying Freedom. “On college campuses today, students are punished for everything from mild satire, to writing politically incorrect short stories, to having the ‘wrong’ opinion on virtually every hot button issue, and, increasingly, simply for criticizing the college administration . . .”<sup>246</sup> colleges and universities relentlessly strive to admit a diverse student body, but then insist on conformity to a particular worldview. Institutions articulate platitudes about academic freedom, but then stifle any discussion, inquiry, or research that contradicts the contemporary orthodoxy or offends a particular group. Instead of developing the institutional policies necessary to promote a confident pluralism, academe violates First Amendment rights.<sup>247</sup> This betrayal of Freedom must stop. As Justice Brandeis explained:

that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.<sup>248</sup>

Because “it is only through free debate and free exchange of ideas that

242. Frank X. Walker, *Seedtime in the Commonwealth: On the Occasion of the University of Kentucky’s Sesquicentennial*, UNIVERSITY OF KENTUCKY NEWS, (2015), <http://uknow.uky.edu/content/seedtime-commonwealth> (emphasis in original). Walker’s words, which are incorporated into the University of Kentucky’s strategic plan, influence and inform the University’s on-going efforts to keep its Promise to Kentucky.

243. *Id.*

244. *Id.*

245. University of Chicago, *supra* note 23.

246. LUKIANOFF, *supra* note 13, at 4.

247. *Christian Legal Soc’y. v. Martinez*, 561 U.S. 661, 733-34 (2010) (Alito, J., joined by Roberts, C.J., Scalia, & Thomas, JJ., dissenting).

248. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

government remains responsive to the will of the people and peaceful change is effected,"<sup>249</sup> higher education "has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it."<sup>250</sup>

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249. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)

250. *University of Chicago*, *supra* note 23.

# BOOK REVIEW OF

## *DESIGNING THE NEW AMERICAN UNIVERSITY*

WILLIAM G. DURDEN, PH.D.\*

Harvard professor Howard Gardner in *Leading Minds: An Anatomy of Leadership* identifies storytelling as the essential capacity of all eleven highly successful leaders whose successes he has studied.<sup>1</sup> Gardner identifies three components of any persuasive leadership narrative—a protagonist; a set of objectives to be accomplished often against great odds, which by virtue of the effort, draws adherents to the project; and a foil against which the protagonist and her leadership story rail.<sup>2</sup>

It is useful to consider Crow and Dabars' *Designing the New American University*<sup>3</sup> in the context of Gardner's thoughts about leadership. This book<sup>4</sup> is unquestionably an enthusiastic and compelling leadership narrative intended to disrupt significantly higher education, introduce a particular type of change through the concept of "the New American University," and persuade other educators to join in a massive effort to reinvent a critical segment of higher education—the public research university.

The protagonist in *Designing the New American University* is most difficult to pinpoint. However, there are three options – the New American University as a disruptive concept, Arizona State University as the institution that embodies the concept of the New American University, and Michael Crow, the outspoken and dynamic president of Arizona State, as the person who embodies the concept—who walks the talk. Nothing in the narrative prioritizes for those who would engage the objectives of the "New American University," whom or what they should follow—whose narrative they should embrace. The objectives of the "New American University" are

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1. HOWARD GARDNER, *LEADING MINDS: AN ANATOMY OF LEADERSHIP* 14-15(2011).

2. *Id.*

3. MICHAEL M. CROW & WILLIAM B. DABARS, *DESIGNING THE NEW AMERICAN UNIVERSITY* (2015).

4. *Id.*

clear, albeit scattered throughout the book thus adding potentially yet another frustration to those who would embrace the leadership narrative.

According to Crow and Dabars, the New American University is an institutional model predicated upon the pursuit of discovery and knowledge-production, broad demographic representation of the socioeconomic diversity of the region and nation, and breadth of functionality and societal impact. However, the New American University is also pragmatic, entrepreneurial, massive in size, and comprehensive in range of services. It represents an imperative for especially public research universities to advance new and differentiated models that more squarely address the needs of the nation in the twenty-first century. The New American University is also dedicated to sustainability—to solving shared global challenges. It is an “adaptive” knowledge enterprise in real time and at large scale. It is optimistic, pluralistic, melioristic, transdisciplinary and “use-inspired.”<sup>5</sup> It defiantly challenges the maxim that academic excellence and exclusivity are mutually dependent. For it, inclusiveness and academic excellence are a productive and societally advantageous combination exposing more and more students who otherwise would be prohibited exposure to the benefits of a research-oriented university. It extends the audience of students to whom the elites generally appeal to reach about 25% of the age cohort—all students believed to be capable of performing at a major research university. The New American University, to the extent that it is public, commits to serving all students in its respective state who are qualified. In so doing, Crow and Dabars believe it is returning to the original intentions of a state university—viz., to first and foremost educate its own students at a high academic level, at a reasonable cost and to unabashedly position them for employment upon graduation—especially for jobs that advance the state economy and quality of life.

Further, the New American University is appreciative of the role of institutional design in the advancement of discovery, creativity, and innovation. It is immune to *isomorphism*,<sup>6</sup> all colleges and universities looking the same, and *filiopietism*,<sup>7</sup> colleges and universities doing what others have always done in the past—an unconscious acceptance of “the way things are.”<sup>8</sup> It is also quite evident that none of these defining characteristics of the New American University can be selectively employed. All must be actualized for institutional reconceptualization to occur. This is no task for the uncommitted or those who would simply like to make cosmetic changes to higher education.

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5. CROW & DABARS, *supra* note 3, at 26.

6. Defined as “a constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions.” *Id.* at 122.

7. Defined as an excessive veneration of tradition. *Id.*

8. *Id.*

The foil is also quite specific, and it is in its manifold delineation that the definition of the New American University becomes most apparent. Crow and Dabars privilege what they term “the gold standard” in American higher education—fifteen major research universities—over all of the other waves of institutions of higher learning to develop in the United States over time. It is these fifteen institutions that set the bar high for research universities. There are four waves of institutions of higher learning in the United States.<sup>9</sup> The first wave are the colonial colleges dedicated exclusively to teaching and included small liberal arts colleges; the second wave are regional public colleges dedicated almost exclusively to teaching; the third wave constitute the land-grant universities that exhibited the stirrings of applied research in agriculture and in addressing the needs of local industry; the fourth wave is the roughly one hundred research-extensive and one hundred further research intensive institutions that constitute the set of American research colleges and universities that exist today. The fifteen members of “the Gold Standard” consist of five colonial colleges chartered before the American Revolution (Harvard, Yale, Pennsylvania, Princeton and Columbia); five state universities (Michigan, Wisconsin, Minnesota, Illinois, and California); and five private institutions (MIT, Cornell, Johns Hopkins, Stanford, and Chicago).<sup>10</sup> The New American University is intended to complement this set of highly successful major research colleges and universities. While the authors tolerate other institutional forms of higher education, they clearly favor research colleges and universities as they, “. . . contend that America’s research universities are the most transformative institutions on the planet—or in the course of civilization. . . .”<sup>11</sup> That said, Crow and Dabars assert that many existing research colleges and universities do not provide solutions to twenty-first century challenges. They contend that research colleges and universities are limited by entrenchment in obsolete institutional design, lack of scalability, and residual elitism. According to Crow and Dabars these institutions have run their course and a new model is necessary: The New American University.<sup>12</sup>

Crow and Dabars extol the excellent reputation and global ranking of America’s leading research colleges and universities, yet they rail against the small number of elite colleges and universities upon which that distinction rests. Reputation relying on such a small handful of institutions, they assert, “does little to ensure the broad distribution of the correlates of educational attainment, nor does it sufficiently advance the innovation that

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9. *Id.* at 13.

10. *Id.* at 84.

11. *Id.* at 7.

12. *Id.* at 10-13.

contributes to our continued national competitiveness.”<sup>13</sup> Additionally, these elite institutions have been either “unable or unwilling” to expand the size and scope of their institutions to meet the needs of the increasing numbers of gifted and talented students—25% of the college age-cohort—who could benefit from what they offer.<sup>14</sup> Provocatively and strategic to the advance of their leadership narrative, Crow and Dabars proclaim that the elites are more interested in excluding students than including them.<sup>15</sup> They gain prestige, in fact, by rejecting far more students than they accept. Additionally, their high tuition fees exclude far too many worthy students, many from first generation families.<sup>16</sup>

Crow and Dabars extend their critique of research colleges and universities by noting that their bureaucratic administrative and academic infrastructure prohibits them from responding in scale and real time to global challenges requiring discovery and innovation.<sup>17</sup> To break this logjam, Crow and Dabars call for perpetual innovation and entrepreneurship in research colleges and universities.<sup>18</sup>

Their critique does not stop with research colleges and universities. Crow and Dabars are particularly harsh when describing small liberal arts colleges. They note how few students they serve, how exclusive they are in admissions and price and how their scale and purpose depart little from the colonial era.<sup>19</sup> Such comments, I contend, discount the many innovations in curriculum, pedagogy and world-class research made by liberal arts college faculty since the colonial era. Such radical statements, however, are understandable—but not entirely forgivable—in a polemic that wishes to attract the public to a particular leadership narrative and to minimize counter-narratives. Small liberal arts colleges and universities, for example, produce twice as many students who earn a Ph.D. in science than other institutions,<sup>20</sup> and much of that is due to the hands-on, direct engagement with research-contributing faculty at the very beginning of collegiate study.<sup>21</sup> In addition, small liberal arts colleges and universities also have contributed significant pedagogical innovation to the teaching of science in

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13. *Id.* at 23.

14. *Id.*

15. *Id.*

16. *Id.* at 33-35.

17. *Id.* at 269.

18. *Id.* at 268-69.

19. *Id.* at 13.

20. *Baccalaureate Origins of S&E Doctorate Recipients*, NATIONAL SCIENCE FOUNDATION (July 2008), available at <http://www.nsf.gov/statistics/infbrief/nsf08311/nsf08311.pdf>.

21. See, e.g., Thomas R. Cech, *Science at Liberal Arts Colleges: A Better Education?* (1999), available at [https://www.grinnell.edu/sites/default/files/documents/cech\\_article\\_0.pdf](https://www.grinnell.edu/sites/default/files/documents/cech_article_0.pdf).

all types of American universities. For example, decades ago, Professor Priscilla Laws of Dickinson College—a 2400 student body liberal arts community founded in 1773—introduced the pedagogical practice of “Workshop Physics,” a discovery-based process of instruction at the undergraduate level. The results were impressive.<sup>22</sup> Numerous research colleges and universities asked Professor Laws and her team to present her methodology to them. But according to Professor Laws in private correspondence, many of these institutions have adapted her methods superficially and incompletely.<sup>23</sup> Further, they have not acknowledged the source. They have either named the program themselves to gain that element of prestige Crow and Dabars castigate, or arguably the research intensive factions of their respective physics departments have been resistant to time spent on pedagogy rather than continued research, thus privileging research over teaching.<sup>24</sup>

However, elsewhere in *Designing the New American University*, Crow and Dabars vigorously defend the virtues of a liberal arts education. They cite the importance of a liberal arts education to help students—especially prospective engineers—become “adaptive master learners.”<sup>25</sup> To underscore this assertion, they refer to James Duderstadt in, *Engineering for a Changing World: A Roadmap to the Future of Engineering Practice, Research, and Education*,<sup>26</sup> who argues that engineering should be considered as a “true liberal arts discipline, similar to the natural sciences, social sciences, and humanities. . . by imbedding it in the general education requirements of a college graduate for an increasingly technology-driven and –dependent society.”<sup>27</sup> They also cite Daniel Mark Fogel, president emeritus of the University of Vermont and a Henry James scholar, who in his article, *Challenges to Equilibrium: The Place of the Arts and Humanities in Public Research Universities*,<sup>28</sup> argues both for liberal arts as aptly suited to inculcate in students communication skills and a capacity

22. See, Priscilla W. Laws, Maxine C. Willis, and David R. Sokoloff, *Workshop Physics and Related Curricula: A 25-Year History of Collaborative Learning Enhanced by Computer Tools for Observation and Analysis*, PHYSICS TEACHER (Oct. 2015), <http://scitation.aip.org/content/aapt/journal/tpt/53/7/10.1119/1.4931006>.

23. E-mail from Priscilla Laws, Professor, Dickinson College, to Dr. William Durden, President Emeritus, Dickinson College (Aug. 21, 2015) (on file with author).

24. *Id.*

25. CROW & DABARS, *supra* note 3, at 142.

26. JAMES J. DUDERSTADT, ENGINEERING FOR A CHANGING WORLD A ROADMAP TO THE FUTURE OF ENGINEERING PRACTICE, RESEARCH AND EDUCATION iii-v (The Millennium Project, The University of Michigan eds., 2008).

27. *Id.* at iii-v.

28. DANIEL MARK FOGEL, *Challenges to Equilibrium: The Place of the Arts and Humanities in Public Research Universities*, PRECIPICE OR CROSSROADS: WHERE AMERICA’S GREAT PUBLIC UNIVERSITIES STAND AND WHERE THEY ARE GOING MIDWAY THROUGH THEIR SECOND CENTURY 241-259 (2012).

for critical thinking as prerequisites for business success and for modern languages and area studies “as handmaidens of global commerce.”<sup>29</sup> Additionally, they refer to arguments about how superbly the liberal arts prepare students for participation and leadership in a world defined by ambiguity and uncertainty.

Given this extensive and robust encomium for the liberal arts and yet the pejorative judgment of a whole genre of institutions that unequivocally embody that course of study—small liberal arts colleges and universities—one can only conclude that Crow and Dabars favor the substance and effect of the liberal arts upon students, but disfavor at least one institutional form for their delivery—the small liberal arts college and university. Not unexpectedly Crow and Dabars’ privileging of institutional models in higher education applies to their assertion of the best placement of instruction in the liberal arts—research colleges and universities.

Crow and Dabars intend the New American University to be vast in scope and to serve students at scale—large scale. Arizona State University over the last decade deliberately engaged a design process to become the prototype for a New American University. According to the vast amount of data presented by Crow and Dabars, the effort is successful. For example, over the course of the decade in which reconceptualization of the university occurred, degree-production increased more than 68 percent. Enrollment increased 38.3 percent, from 55,491 to 76,771 undergraduate, graduate, and professional students, between fall semester 2002 and fall semester 2013. Preliminary figures for fall 2014 indicated enrollment of approximately 83,145 students—roughly an 8.3 percent increase from the previous year and a 49.8 percent increase over Fall 2002. The Fall 2013 freshman class numbered 10,232, with a mean high school grade point average of 3.39 and median SAT score of 1100. Preliminary figures for Fall 2014 indicate freshman enrollment of 11,124, which represents an 8.7 percent year-over-year increase and a 63 percent increase over Fall 2002.<sup>30</sup> Increased performance and contribution locally, regionally, nationally and internationally of students and faculty are the focus of the entire Chapter Seven of *Designing the New American University*. The authors clearly wish to supply their would-be participants in their leadership narrative with the facts to justify commitment to a big idea.

Yet despite the authors’ impassioned commitment to the New American University as a much-needed model for change in higher education, they are philosophical about the distinctiveness of its emergence and the exclusivity of its application. They consider new forms of colleges and universities to have been common in the history of American higher education. Additionally, they posit that as societal and economic conditions

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29. *Id.* at 241.

30. CROW & DABARS, *supra* note 3, at 256.



change, newer models for higher education are needed, not as total replacements for what is in place but “recalibrations” of what has historically evolved. Institutions must be individually responsive, with the changes based on their evolved definition, purpose and accomplishment. The New American University cannot and should not be unthinkingly adapted; rather it should, according to Crow and Debars, serve as a model for change.

There are three topics raised by Crow and Dabars that require sustained treatment: the origins of pragmatism in American education; rankings and the New American University; and, leadership for the New American University.

Crow and Dabars assert in a chapter entitled “A Pragmatic Approach to Innovation and Sustainability” that the American pragmatic tradition is relevant to the central tenets of the New American University. The university that they envision and that is being modeled at Arizona State University holds knowledge as worthy only to the degree that it can be applied to informing and solving societal challenges. The ideal university for them seeks a “useful” education and eschews that which focuses solely on knowledge for knowledge’s sake alone. Pragmatism in education must be understood then as productive inquiry to solve a societal challenge. Such pursuit requires the ability not to be limited by inherited knowledge. Research—called by the authors “use-inspired research”—is directly connected to the production of useful knowledge—new knowledge to solve contemporary societal challenges. For Crow and Dabars, the New American University is especially concerned that knowledge should lead to action with the objective of real-world transformational impact.

Crow and Dabars trace the origins of pragmatism—understood as education for social usefulness—to a circle of Harvard academics and Cambridge intellectuals during the 1870s known as “the Metaphysical Club.”<sup>31</sup> The Club includes the logician, mathematician, and scientist Charles Sanders Pierce and the philosopher and psychologist William James.<sup>32</sup> Crow and Dabars also identify the philosopher and educational theorist John Dewey as having contributed significantly to this movement towards “usefulness” in American education.<sup>33</sup>

The authors, however, would have further strengthened their leadership narrative by locating the inclination towards pragmatism in higher education with the very founding of the nation and its colleges and universities immediately after the American Revolution. Association with additionally extensive and “noble” subjects invites public sympathy for leadership narratives. Inclusion of an earlier political narrative would have

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31. *Id.* at 215.

32. *Id.* at 215-16.

33. *Id.* at 216-18.

located the authors' criticisms of higher education with the beginnings of the nation. In fact, Crow and Dabars are best judged as part of a persistent and ambitious attempt to create a distinctive American education to serve the practical needs of the country through higher education.

Dr. Benjamin Rush, a signer of the Declaration of Independence from Pennsylvania and a friend of John Adams, Thomas Jefferson, and other founders interested in a new higher education for a new nation, said the following in a speech at the University of Pennsylvania in 1795:

I shall begin by taking notice that the same branches of learning. . .are taught in American seminaries [colleges] and in the same way, in which they were taught 200 years ago, without due allowance being made for the different obligations and interests which have been created by time, and the peculiar state of society in a new country, in which the business of the principal part of the inhabitant is to obtain first and foremost means of subsistence. . .It is equally a matter of regret, that no accommodation has been made in the system of education in our seminaries to the new form of government and the many national duties, and objects of knowledge, that have been imposed upon us by the American Revolution. Instead of instituting our sons in the Arts most essential to their existence, and in the means of acquiring that kind of knowledge which is connected with the time, the country, and the government in which they live, they are compelled to learning. . .two languages [Rush is referring to spoken and written Latin and Greek] which. . .are rarely spoken [and] have ceased to be the vehicles of Science and literature, and which contain no knowledge but that which is to be met with in a more improved and perfect state in modern languages.<sup>34</sup>

Dr. Rush unequivocally anticipated the positioning of the New American University as an institution that focuses on learning most relevant to inform and solve contemporary challenges. Dr. Rush advanced knowledge for action and transformation for the express purpose of building a new nation. This is a useful education that is proposed originally for America's colleges and universities. The foil for Rush and his fellow founders were those colleges and universities before the Revolution that adopted the English form of classical education. Dr. Rush wanted something more immediate, robust and attuned to the immediate needs of the citizens in the new nation. This was to be the distinctive American higher education—a useful education. This pragmatic definition was advocated by Dr. Rush for Dickinson College, a small liberal arts institution he founded in 1783, just five days after the signing of the Treaty

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34. HARRY G. GOOD, BENJAMIN RUSH AND HIS SERVICES TO AMERICAN EDUCATION 235–36 (Witness Press 1918).

of Paris.<sup>35</sup> And in his 1785 “A Plan of Education for Dickinson College,” Benjamin Rush reinforced a useful education in the curriculum for Dickinson by introducing instruction in chemistry, and German and French instead of Latin and Greek. He associated these new subjects in American higher education with the nation’s competitive and pragmatic advancement in commerce, war, agriculture and manufactures.<sup>36</sup> Dr. Rush also anticipated that American institutions of learning would be co-existent with their immediate surrounding communities—a key tenet of the New American University for Crow and Dabars. Dr. Rush, in a 1786 open letter to the Trustees of Dickinson College, stated that “the credit and increase” of the college depended “upon the healthiness of the town” and identified specifically “the stagnating waters” that would inhibit prosperity and increase of commerce for both.<sup>37</sup>

Dickinson College was going to be, for Rush, one of several colleges that would link into a national university for the very practical purpose of educating those who would work in the federal government of the new nation (imagine any elected official or employee of the federal government today having to obtain a specific degree to serve—to be thereby, knowledgeable). Tellingly for the history of pragmatism in American colleges and universities, the existing college leadership at the time rejected Rush’s vision as is evident in the first publishing in 1973 of Dr. Rush’s written draft of A PLAN OF EDUCATION FOR DICKINSON COLLEGE 1785.<sup>38</sup> Most of his pragmatic innovations were lined through in the text, most likely by fellow trustees and the then college president.<sup>39</sup> The United States, I contend, never had a revolution in higher education. Crow and Dabars’ provocation with the concept of the New American University thus remains relevant and timely.

Crow and Dabars are aware that commercial rankings like those of *U.S. News & World Report* are imperfect and, as such, are a threat to the adoption of an enterprise as innovative as the New American University.<sup>40</sup> They are right. For Crow and Dabars, commercial rankings, so ardently followed by the uninformed public, employ simplistic methodologies, “which pretend that the criteria for evaluation across all institutional types are consistent and immutable, [and] purport to establish precise numerical

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35. CHARLES COLEMAN SELLERS, *DICKINSON COLLEGE: A HISTORY* (Wesleyan University Press 1973).

36. Plan of a Federal University” October 29, 1788, Benjamin Rush

37. “To the Trustees of Dickinson College” in *LETTERS OF BENJAMIN RUSH*, Volume I 1761-1792, ed., L.H. Butterfield, Princeton University Press, 1951.

38. Benjamin Rush, *A Plan of Education for Dickinson College* (Working Paper, 1785).

39. Benjamin Rush, *A Plan of Education for Dickinson College* (1785), available at <http://chronicles.dickinson.edu/resources/Rush/>.

40. CROW & DABARS, *supra* note 3, at 266.

rank orders.”<sup>41</sup> Crow and Dabars contend rather that indicators of quality are often either arbitrary or subjective, and precedence in hierarchies inevitably corresponds to the variables of age and wealth.<sup>42</sup> Even when introducing the myriad of positive results of the New American University as embodied in Arizona State University this past decade, Crow and Dabars are cautious to contextualize the achievement within the parameters of a state university without immense wealth and embracing ambitions to be totally accessible. They note that their results must be evaluated within the context of their accomplishment by a large public university committed to drawing from the broader talent pool of socioeconomic diversity and advancing a culture committed to academic enterprise and improved cost-effectiveness through productivity gains and constant innovation.<sup>43</sup> This is a university re-calibrating itself and redefining its terms of engagement in higher education rather than entering into a head-to-head competition with institutions that have matured over the course of centuries. The authors know that commercial college and university ranking systems do not account positively for innovation and, in fact, will penalize it—even if it is innovation to correct what is preventing colleges and universities from educating more of the American population to a standard that will permit more comprehensive societal and economic transformation. In essence, the rankings are not working in the current and future national interest but are rather, defining the past. Implicitly Crow and Dabars call for substantial reform in ranking methodologies if educators and the American public are going to embrace the reforms necessary to establish the “New American University.” The ability to educate a broader base of our citizens cannot place high value on traditional data points used by commercial rankings to assess colleges and universities—for example, low student-faculty ratios that will never get to scale with the metrics of the New American University, high investment per student—disregarding what a university can do effectively and creatively with the money it has and a focus on incoming student metrics (SATs, class rank, etc.) rather than outgoing increases in achievement.

For Howard Gardner, a leader must embody her leadership narrative.<sup>44</sup> The aspirations that are expressed in the story must be lived openly and vigorously so that the public is inspired to join the cause to which leadership is directed.<sup>45</sup> In the case of the New American University, its objectives require behaviors that are not traditionally part of the skill set of college and university leaders. For example, the New American University

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41. *Id.* at 121.

42. *Id.*

43. *Id.* at 266-67.

44. GARDNER, *supra* note 1.

45. *Id.*

must engage in *transdisciplinarity*—defined as collaboration among universities, business, industry and government.<sup>46</sup> Most university leaders gain their experience exclusively within academia. They have little association and operative skill with other sectors of the economy. Crow and Dabars stress that in operationalizing a re-conceptualized institution, recalibrations by senior leadership are inevitable. I suggest then that a president who leads an institution through transformation to become a New American University must identify new partners, press her case to investors, seize unexpected opportunities, remain responsive to changing conditions, and deploy the university's resources in ways that empower its many parts. The president must advance her community in novel and unexpected ways. In essence, the leader of a New American University must be entrepreneurial, innovative and risk-taking—not a set of traits typically associated with academic leadership. Colleagues of the institutional leader must be attuned to these leadership traits and adjust accordingly if the concept is to be realized. For example, a university general counsel, I suggest, will have to recalibrate his understanding of risk, as traditionally exercised, because a president pursuing the New American University will stretch the parameters of risk well beyond that to which attorneys have traditionally become accustomed.

Clearly the New American University needs a particular type of leader—one who can at once uphold the values of academe and advance enterprise and entrepreneurship; one who can gain the respect of faculty and simultaneously engage successfully business, industry, military, technology and the government to create an “academic enterprise.” According to Crow and Dabars, the New American University requires academic leaders who can re-orient from exclusivity to inclusivity and from elitism to public service.

From where is the next generation leader going to come? Who will simultaneously embrace technology in new ways, become more student-centric than faculty-focused and find creative ways to raise revenue beyond the traditional tuition/state support/philanthropy model? It is precisely here that Crow and Dabars are silent. This silence permits vulnerability in the model, as a particular type of leadership is so fundamental to the success of the New American University.

*Designing the New American University* is best judged as a provocative and well-argued call in our own time for a recalibration of American higher education. It is a chapter in a long-running and completely unresolved narrative about the purpose of higher education in the United States. Some of the Founders concerned with education wanted this nation to break with higher learning as inherited from English Oxbridge. That model represented an elite undergraduate residential community that prided itself

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46. CROW & DABARS, *supra* note 3, at 204.

on its removal from daily life of the masses. The leadership in colleges at that time rejected arguments for a more useful and societally engaged college and settled back comfortably into the British model. Arguably far too many liberal arts colleges suffer today a deflated value proposition with the public because of the early decision to reject links between a liberal arts course of study and wider societal application. Crow and Dabars, in contrast, call for research universities to embrace a recalibrated liberal education accessible to larger segments of the citizenship. In so doing, universities would address the practical challenges of advancing a nation and the world to solve their shared societal challenges to which, argue Crow and Dabars, research universities are most ably suited. The New American University is the latest bold and meticulously argued model to reclaim what is distinctively American in higher education.